

**Testimony of the Honorable Carolyn N. Lerner, Special Counsel
U.S. Office of Special Counsel**

**U.S. Senate Committee on Homeland Security and Governmental Affairs
Subcommittee on the Efficiency and Effectiveness
of Federal Programs and the Federal Workforce**

**“Examining the Use and Abuse of Administratively Uncontrollable Overtime at the
Department of Homeland Security”**

December 10, 2013, 2:30 P.M.

Chairman Tester, Ranking Member Portman, and members of the Subcommittee:

Thank you for inviting me to testify today on behalf of the U.S. Office of Special Counsel (OSC). I am pleased to have the opportunity to discuss the long-standing abuse of overtime payments brought to light by whistleblowers at the Department of Homeland Security (DHS). I appreciate the Committee’s interest in taking a closer look at this problem. I’d like to introduce Lynn Alexander and Johanna Oliver, attorneys in our Disclosure Unit, who had primary responsibility for these matters.

My statement today will focus on three areas: 1) the role of the Office of Special Counsel in whistleblower disclosures, 2) the specific procedures followed in this matter, and 3) our findings and areas of concern.

OSC’s Role and Process

As an independent agency within the Executive Branch, the Office of Special Counsel provides a safe channel for federal employees to disclose allegations of waste, fraud, abuse; violations of law, rule, or regulation; and health or safety concerns. We evaluate disclosures to determine if there is a “substantial likelihood” that wrongdoing has been disclosed. If this substantial likelihood standard is met, I am required to send the information to the head of the appropriate agency. After a referral, the agency is required to conduct an investigation and to submit a written report to my office. OSC received approximately 1,150 disclosures from federal employees in Fiscal Year 2012, and just over three percent of the disclosures were referred for investigation.

After reviewing the agency’s report of investigation, I make two determinations. First, I determine whether the report contains the information required by the statute and second, whether the findings of the agency appear reasonable. In addition, the whistleblower is given an opportunity to comment on the agency report. My office then transmits the report, whistleblowers’s comments, and my findings and recommendations to the President and congressional committees with oversight responsibility for the agency involved.

It was within this statutory framework that we received disclosures from seven whistleblowers at six separate offices at the Department of Homeland Security over the past two years.

Procedural Case Chronology

In September 2012, the Office of Special Counsel received a disclosure from Jose Ducos-Bello. Mr. Ducos-Bello alleged that DHS employees working in the U.S. Customs and Border Protection (CBP) Commissioner's Situation Room, in Washington, D.C., regularly abuse Administratively Uncontrollable Overtime (AUO), and that the Director and Assistant Director authorize and abet this improper use. These routine overtime payments to Situation Room employees functionally extend their daily shift by two hours, nearly every day, increasing pay by 25%. This practice is a violation of the regulations governing AUO.

According to regulations, this type of overtime may only be used when an employee's hours cannot be scheduled in advance due to a substantial amount of irregular work. For example, AUO is appropriate when an employee's work requires responding to the behavior of suspected criminals and it would "constitute negligence" for the employee to leave the job unfinished. AUO should only be used for irregular and unpredictable work beyond an employee's normal shift. 5 C.F.R. Sec. 550.151-154.

The Situation Room employees in Mr. Ducos-Bello's disclosure were not receiving AUO as the result of any unpredictable or compelling law enforcement need. Rather, most claimed the overtime for administrative tasks that do not qualify for AUO. And, according to Mr. Ducos-Bello, many of these employees spent the extra two hours not working at all; they were relaxing, surfing the internet, watching sports and entertainment channels, or taking care of personal matters.

The abuse of this type of overtime at the Commissioner's Situation Room was not an isolated occurrence. Over the past year, we received disclosures from six more whistleblowers at five other offices throughout DHS. These allegations are outlined in my October 31, 2013, letter to the President, which is attached to this testimony.

Much of the AUO at these locations involved desk jobs or training assignments, where compelling law enforcement reasons for staying on duty are highly unlikely to arise. For example, last month at a House hearing on AUO abuse, DHS whistleblower John Florence testified about his specific concerns at the CBP training facility in Glynco, GA. According to Mr. Florence, classroom instructors and as many as 50 headquarters managers in the Office of Training and Development routinely claim AUO at a significant cost to the taxpayers.

At the six facilities identified by whistleblowers, a conservative estimate of the overtime abuse is nearly \$9 million each year. The whistleblowers estimate that the cost nationwide is likely to reach tens of millions of dollars annually.

In the Situation Room case, after we determined that there was a substantial likelihood of a violation of law, rule, or regulation and gross waste of government funds, we referred these allegations to then-DHS Secretary Janet Napolitano for investigation. In April 2013, we received the agency's report, which substantiated the allegations. The report concluded that previous warnings regarding proper use of AUO were disregarded, and it was "evident that the

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regular and consistent addition of two hours of AUO to the regularly scheduled eight-hour day implies hours of duty are controllable by management.”

As to the other five investigations of overtime abuse, DHS’s reports to my agency are expected back within the next several weeks and months, and we will keep the Subcommittee informed of further developments.

OSC Comments and Areas of Concern Regarding Custom and Border Protection’s Findings

I credit the Customs and Border Protection (CBP) Office of Internal Affairs for conducting a thorough investigation into Mr. Ducos-Bello’s allegations. And, as noted, the CBP investigation confirmed most of the whistleblower’s factual allegations. However, while the agency has pledged to take corrective action, I remain concerned about whether the agency is ultimately willing or able to do so.

As I noted in my communication to Congress and the President, in 2007 the identical concerns about overtime abuse were raised and the agency made similar promises about correcting them. Specifically, at that time, our agency received a disclosure that Customs and Border Protection employees in Blaine, Washington were improperly claiming AUO. In response, the agency confirmed the allegations, finding that employees were given blanket authorization to work overtime and managers improperly provided excess overtime. Much of that overtime was controllable, and therefore it should not have been classified as AUO.

At that time, CBP outlined a corrective plan, requiring training in AUO and the implementation of an agency-wide directive on AUO. Much of the agency’s response to the 2007 complaint mirrored its response to the current round of allegations.

In both reports, CBP cites a number of obstacles that will make it difficult to implement a directive to correct this problem, including collective bargaining obligations and the need for updated regulations from the Office of Personnel Management.

While I am hopeful that the Department will overcome these obstacles and take definitive action to correct this overtime abuse, I am also realistic. Based both on the magnitude of the problem and the history of ineffective solutions, it will require a serious commitment to make necessary changes. I am pleased that Congress and this Committee have shown an interest in helping the Department find ways to solve this problem, including through legislative reform.

As Senator Portman mentioned last month, OSC would also benefit from greater statutory authority to ensure that agencies follow through on commitments made in response to whistleblower disclosures. Since taking office, I have modified our practice in certain cases by requesting that agencies report back to OSC on steps taken to remedy misconduct. For the most part, agencies have consented to providing this information to OSC. However, OSC’s oversight role would certainly be strengthened if we could require agencies to respond to our requests for follow-up reporting.

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In conclusion, I want to applaud Mr. Ducos-Bello and the courageous DHS whistleblowers who have spoken out, and continue to come forward, often against their own financial self-interest. Had they not stepped forward, these problems would not have come to light, and the taxpayers would continue to foot the bill for these improper payments.

I would be pleased to answer any questions that the Committee may have.

Special Counsel Carolyn N. Lerner

The Honorable Carolyn N. Lerner heads the United States Office of Special Counsel. Her five-year term began in June 2011. Prior to her appointment as Special Counsel, Ms. Lerner was a partner in the Washington, D.C., civil rights and employment law firm Heller, Huron, Chertkof, Lerner, Simon & Salzman, where she represented individuals in discrimination and employment matters, as well as non-profit organizations on a wide variety of issues. She previously served as the federal court appointed monitor of the consent decree in *Neal v. D.C. Department of Corrections*, a sexual harassment and retaliation class action.

Prior to becoming Special Counsel, Ms. Lerner taught mediation as an adjunct professor at George Washington University School of Law, and was mediator for the United States District Court for the District of Columbia and the D.C. Office of Human Rights.

Ms. Lerner earned her undergraduate degree from the University of Michigan, where she was selected to be a Truman Scholar, and her law degree from New York University (NYU) School of Law, where she was a Root-Tilden-Snow public interest scholar. After law school, she served two years as a law clerk to the Honorable Julian Abele Cook, Jr., Chief U.S. District Court Judge for the Eastern District of Michigan.