



U.S. OFFICE OF SPECIAL COUNSEL

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November 26, 2008

The President  
The White House  
Washington, D.C. 20500

Re: OSC File No. DI-08-0663

Dear Mr. President:

The Office of Special Counsel received a whistleblower disclosure from Mr. Kenneth E. Downey, Supervisory Sector Enforcement Specialist, Department of Homeland Security (DHS), Customs and Border Protection (CBP), Border Patrol (BP), Blaine Sector, Blaine, Washington. Mr. Downey, who formerly worked at BP Lynden Station, Washington, and consented to the release of his name, alleged that employees at BP Blaine Sector and Lynden Station were improperly provided overtime pay in violation of the Federal Employees Pay Act of 1945 (45 Act), 5 C.F.R. §§ 550.153 and 550.162 (Administratively Uncontrollable Overtime (AUO) pay), and the CBP Payroll Systems Handbook (Handbook).

Mr. Downey's allegations were referred to the Honorable Michael Chertoff, Secretary, DHS, to conduct an investigation pursuant to 5 U.S.C. § 1213(c) and (d). Secretary Chertoff tasked CBP, Office of Internal Affairs (OIA), with conducting the investigation and writing the report. The Office of Special Counsel received an agency report dated August 14, 2008, which was prepared by Mr. James F. Tomsheck, Assistant Commissioner, CBP, OIA, who has the delegated authority to review and sign the report.

The agency report substantiated Mr. Downey's allegations. The report found that the payment of AUO to Blaine Sector senior managers and Lynden Station Supervisory and Patrol Agents was inconsistent with federal compensation regulations. The investigation confirmed a pattern of work assignments that were administratively controllable at both Blaine Sector Headquarters and Lynden Station and, consequently, should have made employees ineligible to receive AUO payments. The agency report revealed deficiencies in control over the authorization, eligibility, and justification of AUO payments.

As part of the agency's corrective action plan, BP Chief David Aguilar issued a reminder notice dated January 14, 2008, to all Sector Chief Patrol Agents, educating the agents about AUO. A unified BP policy on AUO administration has been approved by BP leadership through a new policy directive which outlines guidance on the proper application of AUO and provides administrative processes, including electronic forms, to be used by BP employees who are requesting and approving AUO payments. Training modules for the implementation of the new policy directive for supervisors also have been approved. In addition, a draft "user's guide" for employees who earned AUO has been developed. The agency also plans to counsel all Blaine Sector and Lynden Station supervisory employees

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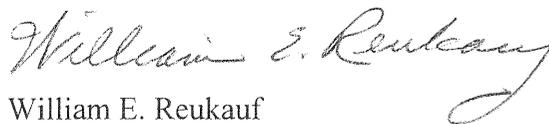
regarding the documentation deficiencies that they did not detect or correct while previously approving AUO payments for staff. Additionally, counseling will include specific guidance to supervisors regarding when AUO is appropriate and when other overtime payments should be approved to address the need for overtime as it arises in the sector.

Mr. Downey provided comments on the agency report. He stated that he was generally pleased that the report validated his concerns about mismanagement. However, Mr. Downey asserted that senior BP managers have no intention of actually limiting or properly tracking AUO because to do so would result in a decrease in annual income for the BP agents, including themselves. Mr. Downey stated that BP managers would continue to see AUO as an entitlement in concept rather than an overtime provision for administratively uncontrollable tasks, as the law intended. Pursuant to 5 U.S.C. § 1213(e)(3), I am now transmitting the agency's report along with Mr. Downey's comments to you.

I have reviewed the original disclosure, the agency report, and Mr. Downey's comments. Based on that review, I have determined that the agency report contains all of the information required by statute. The statute also requires that I make a determination whether or not the findings of the agency head appear reasonable. In this case, I conclude that the findings set forth in the report appear to be reasonable.

As required by law, 5 U.S.C. § 1213(e)(3), I have sent a copy of the agency report and Mr. Downey's comments to the Chairmen of the Senate Committee on Homeland Security and Governmental Affairs and the House Committee on Homeland Security, and the respective Committees' Ranking Members. I have also filed copies of the agency's redacted report and Mr. Downey's comments in our public file and closed the matter.

Respectfully,



William E. Reukauf  
Acting Special Counsel

Enclosures