

**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”**

January 28, 2014, 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, Johanna Oliver, and Nadia Pluta, 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 the recently-concluded overtime case involving employees at the U.S. Customs and Border Protection (CBP), Commissioner’s Situation Room, in Washington, D.C., and 3) our findings and ongoing 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 and the whistleblower’s comments on the report, 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. 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.

In addition to providing a safe channel for disclosures of government misconduct, OSC plays a critical oversight role in government investigations and often prompts corrective actions to address the reported wrongdoing. It was within this statutory framework that we received disclosures from whistleblowers throughout DHS concerning widespread abuse of overtime pay.

Procedural Case Chronology

In September 2012, OSC received a disclosure from Jose Ducos-Bello. Mr. Ducos-Bello alleged that DHS employees working in the CBP 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. According to Mr. Ducos-Bello, 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, AUO 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 may 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 surfing the internet, watching sports and entertainment channels, or taking care of personal matters.

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, prepared by the CBP Office of Internal Affairs (OIA), which substantiated the allegations. The report concluded that previous warnings regarding proper use of AUO were disregarded, and it was "evident that the regular and consistent addition of two hours of AUO to the regularly scheduled eight-hour day implies hours of duty are controllable by management."

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

OIA's investigation confirmed most of Mr. Ducos-Bello's factual allegations and substantiated the concerns about AUO misuse. However, while CBP pledged to take corrective action in response to these findings, I remain concerned about whether the agency is ultimately willing or able to do so. As the rest of my testimony illustrates, the problem of AUO misuse is entrenched, particularly within CBP, and prior commitments to address these issues remain unfulfilled.

Over the past year, OSC has received disclosures from whistleblowers throughout DHS. In my October 31, 2013, letter to the President, which is attached to this testimony, I outlined

allegations of AUO abuse from six additional whistleblowers at five DHS offices. In addition to CBP, they include disclosures from employees at U.S. Citizenship and Immigration Services (USCIS) and Immigration and Customs Enforcement (ICE).

On Thursday, January 23, 2013, OSC received three additional reports from DHS. In these reports, CBP's Office of Internal Affairs substantiated the disclosures of AUO misuse at the CBP Office of Training and Development, CBP Laredo North Station, and CBP San Ysidro Asset Forfeiture Office. We are in the process of reviewing the details provided in these reports, and will provide the Committee with additional information on these confirmed instances of misconduct.

In addition, as public and congressional scrutiny of AUO misuse grew in response to our October letter, more whistleblowers stepped forward to report concerns. Since the fall, OSC has referred six additional AUO abuse cases to DHS for further investigation, bringing the total to 12 separate offices, and raising further concerns about the broad scope of AUO misuse, especially within CBP. These six new cases include:

- A whistleblower alleges that five Border Patrol Agents detailed to work as CrossFit instructors in El Centro, California routinely claim AUO, increasing their base pay by 15 percent every pay period.
- A whistleblower alleges that approximately 275 CBP employees in the Office of Internal Affairs (OIA) improperly claim AUO, up to two hours a day, every day, with the full knowledge and approval of the OIA leadership.¹
- A CBP employee in El Paso, Texas alleges that approximately 440 employees are improperly receiving AUO. The employee specifically alleges that Supervisory Border Patrol Agents claim AUO hours when completing administrative tasks, and Border Patrol Agents claim AUO when assigned to "light" duty due to injury and when performing routine shift change activities.
- A CBP employee alleges that approximately 95 employees at the National Targeting Centers in Herndon and Reston, Virginia, including management, improperly claim AUO, up to two hours a day, every day, increasing their base pay by 25 percent.
- A whistleblower alleges that employees working in CBP Office of Border Patrol headquarters in Washington, D.C., claim AUO on a daily basis but fail to perform duties that qualify for AUO.

¹ As noted, OIA investigated and substantiated the previous AUO abuse cases referred by OSC. Although OIA conducted thorough investigations in each of these cases, the allegations concerning misuse within OIA raise questions about its ongoing ability to review OSC referrals. Accordingly, in consultation with OSC, the DHS Office of General Counsel determined that OIA will complete the pending CBP cases previously submitted to that office. However, the DHS Office of Inspector General will receive and investigate any new OSC referrals of AUO abuse, including those listed above.

- A whistleblower alleges that employees working in the ICE Enforcement and Removal Operations Office in Chattanooga, Tennessee routinely claim AUO, up to two hours a day, every day, with the full knowledge and approval of their supervisor but fail to either work any additional hours or perform duties that qualify.

Much of the AUO claimed at the locations identified by whistleblowers involves desk duty, training assignments, or even exercise classes, where compelling law enforcement reasons for staying on duty are unlikely to arise. For example, at the November 2013 House Oversight and Government Reform Committee 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. The recently-submitted report on the Office of Training and Development also confirms that Border Patrol Agents routinely claim AUO for performing the same duties as Customs and Border Protection Officers (CBPOs). CBPOs are not eligible for AUO and therefore do not receive AUO for completing the same tasks as the agents.

At the six facilities first identified by whistleblowers in disclosures to OSC, a conservative estimate of the cost of overtime abuse is nearly \$9 million each year. The whistleblowers project that the cost nationwide is likely to reach tens of millions of dollars annually, and the more recent disclosures provide further evidence of the substantial, ongoing cost of improper AUO claims.

As I noted in my October 2013 communication to Congress and the President, identical concerns about overtime abuse were raised by a whistleblower in 2007, and CBP made similar promises about correcting them. Specifically, at that time, our agency received a disclosure that CBP 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 permitted excess overtime. Much of that overtime was controllable, and therefore it was improper to claim it as AUO.

At that time, CBP outlined a corrective plan, including the implementation of an agency-wide directive on AUO. Much of the agency's response to the 2007 complaint is mirrored in its response to the current round of allegations. Yet, to date, no directive has been issued.

In both the 2007 (Blaine, WA) and 2013 (Situation Room) 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 CBP and 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 an immediate, serious and sustained commitment to make necessary changes.

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According to DHS officials, in response to OSC's initial findings, a department-wide review of AUO practices is ongoing. AUO has reportedly been suspended at DHS Headquarters and within USCIS. These are positive steps. But, it remains unclear whether CBP – where the problem is most pervasive – has taken similar steps to control abuse. I note that in the most recent report CBP committed “to determine which of the 158 positions within CBP should continue to be eligible for AUO and which should be decertified.”

I am also pleased that Congress and this Committee in particular have shown an interest in helping CBP find ways to solve this problem, including through legislative reform.

In conclusion, I want to applaud Mr. Ducos-Bello and the courageous DHS whistleblowers who are speaking out, 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.



U.S. OFFICE OF SPECIAL COUNSEL

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The Special Counsel

October 31, 2013

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

Re: OSC File No. DI-13-0002

Dear Mr. President:

I write to express deep concerns about long-standing abuse of overtime payments by the Department of Homeland Security (DHS). The enclosed report details one of six whistleblower cases currently before the Office of Special Counsel (OSC). Each of the six cases discloses misuse of a specific pay authority known as Administratively Uncontrollable Overtime (AUO). According to information provided by the whistleblowers, abuse of AUO at these six DHS offices alone costs the taxpayers approximately \$8.7 million annually, a gross waste of government funds.

The enclosed report substantiates disclosures made by DHS employee Jose R. Ducos-Bello. The report confirms that employees in the Commissioner's Situation Room (Situation Room), an office within Customs and Border Protection (CBP) in Washington, D.C., violate the federal AUO regulation by claiming two hours of AUO pay nearly every day. The report also confirms that the Situation Room Director and Assistant Director "authorize and abet" the improper use of AUO. OSC recently referred to the Secretary of Homeland Security five additional AUO cases – a strong indication that DHS has a profound and entrenched problem.

AUO is intended to be used only when an employee's hours cannot be scheduled in advance due to a substantial amount of irregular work. For example, under the governing regulation, AUO is appropriate if an employee's work hours depend on responding to the behavior of suspected criminals and it would "constitute negligence" for the employee to leave the job unfinished. CBP and other DHS components have the authority to use AUO to effectively secure the borders, which may require irregular and unpredictable work beyond an employee's normal shift. See 5 C.F.R. § 150.151–154. Despite this definition, thousands of DHS employees routinely file for AUO, claiming up to two hours a day, nearly every day, even in headquarters and training assignments where no qualifying circumstances are likely to exist.

The attached report confirms that Situation Room employees in Washington, D.C., claim to have worked two hours of AUO following their assigned shift 89 percent of the time. These routine AUO payments to Situation Room employees "functionally [extend] their daily shift by two hours each day," but are not the result of any unpredictable or compelling law enforcement need. Most of the claimed overtime work is "administrative in nature, often consisting of Headquarters or local taskings" that do not qualify for AUO. Mr. Ducos-Bello alleged that the

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employees who “work” overtime frequently watch sports and entertainment channels during their claimed AUO periods, or spend the two additional hours at their duty station relaxing, joking, surfing the internet, and taking care of personal matters.

This case is not an isolated occurrence. Rather, it is part of a persistent pattern of AUO allegations raised by DHS employees. Some of these whistleblowers are authorized to receive AUO. They are disclosing information against their own financial self-interest due to concerns about the ethics of the practice and the resulting impact on the federal budget. While DHS officials have acknowledged AUO abuse when confronted with specific allegations, they have taken insufficient steps to correct the problem.

For example, on February 20, 2008, OSC referred a whistleblower’s allegations of AUO abuse at the Office of Border Patrol in Lynden, WA (OSC File No. DI-08-0663). The DHS report in response to those disclosures confirmed that employees in Lynden routinely abused AUO and that senior managers also benefited from improperly approved AUO. At the time, CBP promised to implement “an Agency-wide AUO policy directive [to] bring conformity to the policies and practices” – a step that would cease the practices in Lynden and prevent misuse throughout the agency.¹

That commitment was made more than five years ago. In the current report on AUO abuse in the Situation Room, CBP repeats its desire “to work towards a unified and simplified agency-wide directive on AUO.” The report adds an additional, minor commitment by CBP to show a video to all employees to reinforce rules on proper AUO use and administration.

Much of the language regarding the Situation Room AUO abuse and proposals for corrective action is taken directly from the 2008 Lynden report. Roughly one-quarter of the 2013 report is identical to the concerns cited in the 2008 report. The lack of progress in implementing plans first outlined five years ago raises questions about the agency’s willingness or ability to confront this important problem.

CBP cites an array of obstacles to full implementation of an agency-wide AUO directive, including collective bargaining obligations and the need for updated regulations from the Office of Personnel Management. DHS and CBP must overcome these challenges and move quickly to reform AUO practices. OSC is currently processing five additional AUO cases, each of which met the high “substantial likelihood” standard for investigative referral by OSC to DHS. These cases include:

- A whistleblower at the CBP Office of Training and Development in Glynco, GA, alleged that agents routinely abuse AUO by claiming two hours of AUO daily while failing to perform any qualifying duties. The fact that AUO is claimed at a training facility – where compelling law enforcement reasons for staying on duty are unlikely to arise – raises concerns about the propriety of its use by these employees. According to the

¹ In 2012, OSC resolved a whistleblower case brought by another employee in Washington, who alleged retaliation for disclosing evidence of AUO abuse to his superiors.

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whistleblower, CBP pays out nearly \$5 million annually to employees in the Office of Training and Development, including to 50 managers at Headquarters. DHS is required to submit a report to OSC in response to these allegations by January 2, 2014.

- A whistleblower at the U.S. Citizenship and Immigration Services headquarters facility in Washington, D.C., alleged abuses of AUO in 2010 while the whistleblower worked in the Office of Security and Integrity (OSI). The whistleblower alleged that everyone in OSI claimed 10 hours of AUO every week, even though no employee performed work that qualified. This whistleblower requested that her position be made ineligible for AUO and also advised supervisors that AUO was being routinely misused. The whistleblower was initially told she could not be decertified from AUO because it would draw unwanted attention to the office. While the whistleblower was eventually decertified, the AUO abuse by others has not stopped. DHS is required to submit a report in response to these allegations by November 13, 2013.
- A whistleblower at the Immigration and Customs Enforcement (ICE) facility in Houston, TX, alleged that ICE supervisors authorize and abet the improper use of AUO. The whistleblower disclosed that employees are directed to stay beyond their normal duty hours to complete routine administrative tasks that are not time-sensitive or investigative in nature. These employees are instructed to certify the time as AUO. OSC received an inadequate report from ICE on September 11, 2013, and will seek a supplemental report.
- Two whistleblowers at the CBP facility in San Ysidro, CA, allege that Border Patrol Agents at the Asset Forfeiture Office routinely claim two hours of AUO each day, but fail to perform duties that qualify for AUO payments. The whistleblowers further alleged that employees work on routine administrative matters during the claimed AUO periods or are not even present for the AUO time they claim. DHS is required to submit a report to OSC in response to these allegations by November 6, 2013.
- Finally, a report issued by CBP in response to a whistleblower's disclosures at the CPB facility in Laredo, TX, confirms that AUO is being used for routine shift change activities in violation of rules and regulations. OSC requested additional information from CBP on the Laredo activities.

These additional cases indicate that AUO problems are ongoing and pervasive throughout DHS. Indeed, according to CBP's own data, during one three-month period in 2013 agents at Border Patrol Headquarters in Washington, D.C., averaged 1.99 AUO hours per day, or 20 hours per pay period. This is one of the highest AUO rates of any CBP duty station, including many duty stations in border areas. One whistleblower noted to OSC that if all AUO claims by agents in the field were excluded, and only AUO claims by agents in office jobs were examined, "the dollar amount of AUO abuse would be in the tens of millions per year."

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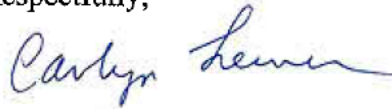
Such abuse of overtime pay is a violation of the public trust and a gross waste of scarce government funds. It is incumbent upon DHS to take effective steps to curb the abuse. It is up to the administration and Congress to develop a revised pay system, if warranted, that ensures fair compensation for employees who are legitimately working overtime.

The allegations regarding AUO abuse at the CSR were referred to former DHS Secretary Janet Napolitano on January 2, 2013, for an investigation and report.² On April 17, 2013, James F. Tomshek, Assistant Commissioner, Office of Internal Affairs (IA), submitted a report based on the results of an investigation conducted by CBP's IA. On May 3, 2013, a copy of the report was forwarded to Mr. Ducos-Bello, who provided comments in response to the report on May 5, 2013.

The report contains all of the information required by statute. However, there remain serious questions about the agency's ability or willingness to adequately address the AUO abuse issue. Therefore, I find the report unreasonable.

As required by 5 U.S.C. § 1213(e)(3), I have sent copies of the agency report and Mr. Ducos-Bello's comments to the Chairman and Ranking Member of the Senate Committee on Homeland Security and Governmental Affairs and the Chairman and Ranking Member of the House Committee on Homeland Security. I have also filed a copy of the report and the whistleblower's comments in our public file, which is now available online at www.osc.gov, and closed the matter.

Respectfully,



Carolyn N. Lerner

Enclosures

² The Office of Special Counsel (OSC) is authorized by law to receive disclosures of information from federal employees alleging violations of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. 5 U.S.C. § 1213(a) and (b). If the Special Counsel determines that there is a substantial likelihood that the disclosures are accurate, she is required to advise the appropriate agency head and the agency head is required to conduct an investigation of the allegations and submit a written report. 5 U.S.C. § 1213(c). Upon receipt, the Special Counsel solicits comments from the whistleblower and reviews the agency's report to determine whether it contains all of the information required by statute and that the findings of the head of the agency appear to be reasonable. 5 U.S.C. § 1213(e)(2).

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.