

TESTIMONY OF

RONALD VITIELLO  
Deputy Chief  
Office of the Border Patrol

and

PAUL L. HAMRICK  
Deputy Assistant Commissioner  
Office of Internal Affairs

U.S. Customs and Border Protection  
Department of Homeland Security

BEFORE

Senate Committee on Homeland Security and Governmental Affairs

ON

“S.1691, Border Patrol Agent Pay Reform Act (BPAPRA)”

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Washington, DC

Chairman Carper, Ranking Member Coburn, distinguished Members of the Committee, thank you for the opportunity to appear before you today to address the need for pay reform within the Border Patrol. We welcome the opportunity to work with you on finding solutions at an affordable cost.

Properly paying our personnel and appropriately managing our pay system are essential to the Department of Homeland Security (DHS) mission. U.S. Customs and Border Protection's (CBP) application of overtime, specifically Administratively Uncontrollable Overtime (AUO), goes back many years, yet the CBP mission has substantially evolved since that time, and so too should our compensation authorities.

#### *Administratively Uncontrollable Overtime*

AUO was established by Congress more than 40 years ago, and is a payment mechanism that allows the compensation of certain employees for irregular, unscheduled, but necessary overtime. Approximately 77% of AUO paid at DHS goes to employees of CBP, including more than 20,000 Border Patrol agents. In order to be eligible for AUO, an employee must be in a position in which the hours of duty cannot be controlled administratively and which requires substantial amounts of irregular or occasional overtime work, with the employee generally being responsible for recognizing, without supervision, the circumstances which require the employee to remain on duty. Once an employee is certified for AUO, AUO pay is the exclusive mechanism for irregular overtime performed. AUO is paid as a percentage—not less than 10 percent nor more than 25 percent—of an employee's rate of basic pay fixed by law or administrative action for the position held by the employee.<sup>1</sup> Under Office of Personnel Management (OPM) government-wide regulations, the rate of AUO pay that is authorized for a position is based on the average number of hours of irregular or occasional overtime work performed per week. For example, a 25 percent rate is authorized for a position that requires an average of over 9 hours per week of irregular or occasional overtime work.<sup>2</sup>

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<sup>1</sup> For this purpose, the rate of basic pay includes locality payments. See 5 U.S.C. 5304(c)(2), 5 C.F.R. 531.610(c), 5 C.F.R. 550.103, and 550.151.

<sup>2</sup> See 5 C.F.R. 550.154

Mr. Chairman, the Department and its law enforcement components welcome your interest in addressing the challenges posed by AUO. As you know, the Department has sought legislative changes for several years that would enable it to reform and rationalize its compensation structure.

*Border Patrol Agent Pay Reform Act (BPAPRA)*

AUO is ill suited to serve the overtime requirements of a modern day Border Patrol. S. 1691, the *Border Patrol Agent Pay Reform Act* (BPAPRA), would replace AUO for the Border Patrol with a flexible system. The bill would compensate eligible employees for necessary overtime while maximizing agent availability for critical law enforcement and border security responsibilities.

Border Patrol frontline agents work in locations that are desolate, at times dangerous, and subject to extremes in temperature. In addition, today's Border Patrol relies increasingly on technology, intelligence, and analytic support to the frontline. While agents responsible for these elements have similar overtime demands as frontline agents, they may not be eligible for AUO.

If enacted, BPAPRA would provide the necessary tools to ensure that a Border Patrol agent is available to continue work and meet mission requirements beyond the eighth hour of his or her shift, while providing predictable rotations around the clock. Agents would be eligible to receive a regular overtime supplement for extended shifts of 9 or 10 hours and could receive additional overtime pay or compensatory time off when required to respond to emergencies or other mission requirements.

BPAPRA would eliminate Fair Labor Standards Act (FLSA) compensation and would likely reduce overall costs. It would increase the work hour capacity for the Border Patrol by over 2.5 million hours annually. It also has the support of the National Border Patrol Council, which represents 17,000 agents.

### *Current AUO Management and Allegation Investigations*

As you are aware, a number of Department employees have made disclosures to the Office of Special Counsel (OSC) concerning alleged abuses of the AUO system. CBP takes seriously its responsibility to ensure proper use of taxpayer funds. While many frontline officers and agents across the department require work hour flexibility, often through the use of AUO, misuse of these funds is not tolerated. Within DHS Components, allegations of misconduct that are raised by employees are typically provided to and handled by Component internal affairs offices and/or the DHS Office of the Inspector General in conjunction with the Component's human resources office. The Office of the Chief Human Capital Officer (OCHCO) is also provided a copy of the OSC referral letter, allowing OCHCO to identify significant issues and trends that require immediate attention even before investigations are complete. If merited, employees found to have engaged in misconduct are subject to disciplinary action.

CBP's Office of Internal Affairs (IA) conducted a series of investigative inquiries regarding the alleged improper use of AUO by specific entities within CBP. IA Field Offices in Washington, DC, Houston, TX, San Diego, CA, and Seattle, WA, conducted AUO-related investigations at specific Border Patrol Sector headquarters, stations, training entities, and the CBP Commissioner's Situation Room.

Although the OSC received complaints that overtime hours compensated under AUO were not being worked – allegations that, if proven, could constitute criminal or administrative violations – the investigations conducted by CBP Office of Internal Affairs did not substantiate any OSC allegations that employees had received AUO compensation for hours that were not worked. The investigations did, however, substantiate aspects of the allegations that questioned whether AUO was the appropriate mechanism for specific overtime compensation. The investigations did not involve the fiscal analysis necessary to determine short and long term budgetary impact of the improper use of AUO. Importantly, even where AUO was not the proper overtime mechanism, CBP had an obligation, and employees had an entitlement, to be appropriately compensated for overtime hours worked. The results of these investigative inquiries were supplied to the OSC.

CBP recognizes that it needs to continue to improve its management of AUO. DHS and CBP have taken actions to address the situation. On January 27, 2014, Secretary Johnson issued a memorandum directing the DHS component leadership to take immediate action to suspend AUO for certain categories of employees on an interim basis. As a result, approximately 900 (600 at CBP) component headquarters personnel, full-time trainers, and employees found to have misused AUO in completed investigations were suspended from receiving AUO. After additional review, on May 23, 2014, DHS Deputy Secretary Alejandro N. Mayorkas issued a memorandum to CBP's Commissioner and the heads of several other DHS components, outlining the areas in which the Department must improve its AUO administration. The Deputy Secretary mandated that all components develop a comprehensive plan within 30 days to address AUO compliance issues. The components will also work with the Management Directorate to develop a DHS wide Directive formalizing these efforts and new reforms. The directive will include requirements for independent audits of AUO records and mandate disciplinary measures for those who violate AUO policies in the future, including supervisors and managers who permit employees to misuse AUO.

The Department and CBP take the responsibility to be good stewards of taxpayer dollars very seriously. Until such time that CBP can address all of its AUO compliance issues, CBP leadership has directed interim measures, such as a comprehensive position review of AUO eligibility, to eliminate CBP's use of AUO where the available evidence suggests that its use is impermissible.

### *Conclusion*

We thank the Committee for its commitment to improving the overtime pay system for Border Patrol agents and for developing legislation to address CBP's needs for a cost-efficient and equitable overtime compensation system that would meet the needs of a 21<sup>st</sup> century border security environment and workforce. The Department looks forward to continuing to work with Congress on this endeavor to ensure that the Border Patrol and other impacted DHS law enforcement components have an effective overtime pay system.

Chairman Carper, Ranking Member Coburn, and distinguished Members of the Committee, thank you for this opportunity to testify today. I look forward to answering your questions.