

Senate Homeland Security and Governmental Affairs Committee
Subcommittee on Efficiency and Effectiveness of Federal Programs and the Federal Workforce
Hearing: Examining the Use and Abuse of Administratively Uncontrollable Overtime at the
Department of Homeland Security

Testimony of

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Chairman Tester, Ranking Member Portman, Members of the Subcommittee, thank you for the opportunity to appear before you today to address the Department of Homeland Security's (DHS's) use of Administratively Uncontrollable Overtime (AUO). This is a matter of concern to DHS and we welcome the opportunity to work with you on finding solutions at an affordable cost. Properly paying our border and homeland security personnel, and properly managing that pay system are essential to the Department's missions. DHS takes its responsibility to ensure proper use of taxpayer funds seriously. Some of our components' AUO practices stretch back many years. We are examining those practices because we are concerned by allegations that AUO has not always been employed appropriately under the law. Our leadership has directed interim measures to limit DHS's use of AUO where the available evidence suggests that its use is impermissible and where interim action can be quickly implemented. DHS is studying additional measures that may be warranted as our review continues. We will continue to keep this Subcommittee closely apprised.

Mr. Chairman, the Department welcomes your interest in addressing the challenges posed by AUO. As you know, the Department has sought legislative changes for several years that would enable U.S. Customs and Border Protection (CBP) to reform and rationalize its compensation structure. Existing AUO authorities no longer meet the needs of a 21st century law enforcement environment.

The Department has been working to institute pay reform, including of AUO, since at least 2009. CBP developed a plan to replace AUO with Law Enforcement Availability Pay (LEAP), as part of its effort to upgrade the journeyman Border Patrol Agent position from GS-11 to GS-12. That transition began in 2010, and the President's fiscal year 2011 Budget Request submitted in April

2010 would have significantly offset the long-term costs associated with that grade increase. The replacement of AUO with LEAP required statutory changes, and a legislative pay reform proposal was submitted as part of the President's fiscal year 2012 Budget Request, and formally submitted to Congress in September 2011.

The Department again restated the proposal in the President's Fiscal Year 2013 Budget Request submitted to Congress in February 2012. The Department's proposal would have provided pay parity for all of CBP's overtime-eligible law enforcement agents and officers.

In many areas of human capital policy at DHS, we strive to create consistent policies. However, premium pay, or overtime, poses challenges to achieving uniformity. These differences can be attributed to several factors, including the disparate missions of our workforce; the number of unions that represent our employees and the range of concerns of those they represent; the budgetary impacts of various types of pay reform that have been considered; the difficulty in managing various types of pay systems and their impact on current mission operations; and the need for legislation to implement most pay reforms.

Administratively Uncontrollable Overtime

AUO was established by Congress in 1966 (Public Law 89-554), and is a payment mechanism that allows the compensation of certain employees for irregular, unscheduled, but necessary overtime. 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. Currently, approximately 77% of AUO paid at DHS goes to employees of CBP. Once an employee is certified for AUO, AUO pay is the exclusive mechanism for irregular overtime performed and is determined 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.¹ Under Office of Personnel Management's (OPM's) 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.²

Current Activities

The Department takes its responsibility to be a good steward of taxpayer dollars very seriously. Within DHS Components, allegations of misconduct that are raised by employees are typically provided to and addressed by Component internal affairs offices and/or the DHS Office of the

¹ See P.L. 101-509, Section 404; 5 U.S.G. 5304; 5 CFR part 531, subpart G; CFR 550.151

² See 5 CFR 550.154

Inspector General in conjunction with the Component's human resources office. If merited, employees found to have engaged in misconduct are subject to disciplinary action.

In disclosure cases, the Office of Special Counsel (OSC) evaluates whether there is a "substantial likelihood" that an employee has alleged a violation of law, rule, regulation, gross mismanagement or other similar conduct. Upon making a finding of "substantial likelihood," OSC refers the matter to the affected agency for investigation. Within DHS, OSC referral letters are forwarded to the Office of the General Counsel (OGC). OGC first checks with the DHS Office of Inspector General (OIG) to determine if OIG wishes to pursue an investigation or to defer the matter. Should OIG defer, the OGC subsequently forwards the disclosure or allegation to the investigative office or internal affairs division of the Component at which the allegations are based. Counsel at the involved Component liaises with the OSC during the pendency of the investigation. Going forward, the Office of the Chief Human Capital Officer (OCHCO) will also be 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.

Prior to OSC's most recent referral, CBP initiated a comprehensive review of all positions currently eligible to earn AUO. The purpose of this review is to document and validate previous eligibility determinations of more than 150 positions, and to identify those that no longer meet the requirements so that appropriate action may be taken. The Border Patrol has also issued official guidance on AUO to all Chief Patrol Agents and Division chiefs, most recently via a December 2012 memorandum.

In its referral letter, OSC suggested that a Department-wide review into the use of AUO be conducted. On October 31, 2013, then-Acting Secretary of Homeland Security Rand Beers directed OGC to conduct such a review. CBP, OCHCO, and all other relevant components of DHS are working closely with OGC on this review, and will be integral in implementing any decisions that result from OGC's findings and recommendations to the Secretary. In addition, OGC will refer all specific allegations regarding the misuse of AUO to OIG.

Prior to the conclusion of this review, however, the Department has taken, and will continue to take, interim steps to suspend the use of AUO in certain categories or areas in order to fully align with the regulatory requirements for the use of AUO. These interim measures do not prevent the Department from authorizing overtime work and payment under other overtime rules available to Department management and the workforce.

A number of internal investigations are being conducted in addition to the OGC and OIG reviews. This includes investigations into AUO use at CBP, ICE, and USCIS. Pending the conclusion of each investigation, DHS will consider appropriate remedial measures, including disciplinary action and AUO decertification.

Thank you for allowing us the opportunity to testify before you today. I look forward to answering your questions.