

# Department of Homeland Security **Office of Inspector General**

**Evaluation of Alleged AYO Misuse at  
U.S. Border Patrol Headquarters  
(OSC File No. DI-14-1093)**





**OFFICE OF INSPECTOR GENERAL**  
Department of Homeland Security

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September 15, 2014

MEMORANDUM FOR: The Honorable Stevan E. Bunnell  
General Counsel  
Department of Homeland Security

FROM: John Roth *John Roth*  
Inspector General

SUBJECT: *Evaluation of Alleged AUO Misuse at U.S. Border Patrol  
Headquarters (OSC File No. DI-14-1093)*

The U.S. Office of Special Counsel (OSC) received a whistleblower disclosure concerning U.S. Customs and Border Protection's (CBP) U.S. Border Patrol Headquarters in Washington, DC. The whistleblower alleged that employees in U.S. Border Patrol (USBP) Headquarters claim administratively uncontrollable overtime (AUO) daily, but fail to perform duties that qualify for AUO.

On January 24, 2014, OSC referred this allegation to DHS Secretary Jeh Johnson. The Department subsequently requested our assistance with this allegation and several other AUO-related allegations from other DHS components. We assembled a taskforce of auditors, program analysts, investigators, and attorneys to review these allegations. Given time constraints and limited resources, we determined that a limited-scope review of the components' use of AUO in 2013 and 2014 would yield the most useful results.

The attached final report contains the results of our evaluation on the alleged misuse of AUO at USBP Headquarters. Your office provided technical comments on an earlier version of this report, which we incorporated in this report as appropriate. We intend to publish this report on our website within 90 days of the date of this memorandum. We will issue the results of our evaluations of the alleged misuse of AUO at other components in separate reports.

Please call me with any questions, or your staff may contact John E. McCoy II, Deputy Assistant Inspector General for Audits, at (202) 254-4100.

Attachment



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### Summary of Results

USBP Headquarters did not have sufficient AUO documentation to allow us to specifically identify a violation of law, rule, or regulation. However, many of the tasks that agents performed during AUO hours appear to have been administratively controllable.

### Background

An anonymous whistleblower alleged that USBP agents assigned to headquarters “illegally claim” AUO daily but do not perform duties justifying their AUO claims. Further, the whistleblower asserted that, “the duties and responsibilities of Border Patrol headquarters employees are regular, predictable, and controllable and that headquarters work is not sufficiently urgent to warrant the use of AUO.”

According to the whistleblower, in 2008, CBP pledged to issue a component-wide directive on the proper use of AUO and conduct annual AUO training for all employees because of acknowledged AUO abuse by border patrol agents in Lynden Station, Washington.

OSC concluded, “there is a substantial likelihood that the information the whistleblower provided to OSC discloses a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, and an abuse of authority.”

As of August 9, 2014, USBP Headquarters employed 220 Border Patrol agents in three divisions—Mission Support (26 agents); Operations (118 agents); and Strategic Planning, Policy & Analysis (52 agents); as well as the Office of the Chief of Staff (10 agents) and the External Assignment Unit (14 agents).<sup>1</sup> The Mission Support Division provides enterprise-wide oversight of USBP finance, logistics, and human resource and workforce management programs. The Operations division facilitates the security of our Nation’s borders by providing direction and support to USBP sectors nationwide. The Strategic Planning, Policy & Analysis division develops policies and standard operating procedures; conducts strategic planning; formulates budgets; develops performance measures; and reviews statistical data. According to data provided by CBP, 238 USBP Headquarters agents received approximately \$4.5 million in AUO pay in FY 2013.

In January 2014, DHS Secretary Johnson issued a memorandum suspending the use and payment of AUO for all DHS headquarters employees. Accordingly, USBP Headquarters

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<sup>1</sup> Only Border Patrol agents (job series 1896) assigned to USBP Headquarters are included; USBP Headquarters also employs staff in other job series that have never been eligible for AUO.



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suspended AUO as of January 26, 2014 (pay period 02).<sup>2</sup> USBP Headquarters informed its agents that any overtime hours worked after that date would be “paid under the Federal Labor Standards Act (FLSA) or the Federal Employees Pay Act (FEPA).”

#### Relevant Regulations

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According to 5 Code of Federal Regulations (CFR) § 550.151, agencies are authorized to pay AUO annually “... to an employee in a position 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, circumstances which require the employee to remain on duty.”

Per 5 CFR § 550.153(a), a typical example of a position meeting the AUO requirement “... is that of an investigator of criminal activities whose hours of duty are governed by what criminals do and when they do it.”

Further, 5 CFR § 550.153(c) defines what it means in § 550.151 that an employee is “generally responsible for recognizing, without supervision, circumstances which require him to remain on duty:

1. The responsibility for an employee remaining on duty when required by circumstances must be a definite, official, and special requirement of his position.
2. The employee must remain on duty not merely because it is desirable, but because of compelling reasons inherently related to continuance of his duties, and of such a nature that failure to carry on would constitute negligence.
3. The requirement that the employee is responsible for recognizing circumstances does not include such clear-cut instances as for example, when an employee must continue working because a relief fails to report as scheduled.”

#### Relevant Policies

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Section 1.3.103 of the Immigration and Naturalization Service (INS) Administrative Manual of January 2000 contains examples of situations that support the payment of AUO, instructions on certifying the percentage of AUO to be paid, and standards for documenting the overtime worked by USBP employees, including those who work at Headquarters.

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<sup>2</sup> According to CBP, 17 Border Patrol agents assigned to remote or foreign locations continue to receive AUO under a waiver.



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According to INS Administrative Manual, Section 1.3.103:

- The AUO percentage rate authorized may be 10, 15, 20, or 25 percent of the employee's rate of basic pay which does not exceed the minimum rate for grade GS-10 as indicated below:
  - A position which requires an average of at least 3 but not more than 5 hours a week of irregular or occasional overtime work—10 percent.
  - A position which requires an average of over 5 but not more than 7 hours a week of irregular or occasional overtime work—15 percent.
  - A position which requires an average of over 7 but not more than 9 hours week of irregular or occasional overtime work—20 percent.
  - A position that requires an average of over 9 hours a week of irregular or occasional overtime work—25 percent.
- The weekly average of AUO hours is based upon the number of AUO hours worked by each employee during a "computation period," which is a span of time covering 12 pay periods.

The CBP Overtime Scheduling System (COSS) is used to record the number of AUO hours agents work each pay period. According to USBP guidance, employees are to use G-1012 forms to record and describe the tasks they perform during AUO duty hours; supervisors are to ensure that employees are performing AUO eligible work by reviewing the G-1012 forms every pay period. (Appendix A contains the G-1012 template.)

## Finding

USBP Headquarters did not have sufficient AUO documentation to allow us to specifically identify a violation of law, rule, or regulation. Based on our review of AUO documentation and employee interviews, many of the tasks performed during AUO hours appear to have been “regular, predictable, and controllable,” as alleged by the whistleblower. In our opinion, hours spent on predictable tasks should be administratively controllable.

## Summary of Evidence Obtained

### AUO Documentation

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None of the 86 AUO documentation forms (G-1012 forms) we obtained from USBP Headquarters contained enough detail for an independent reviewer to determine whether there were compelling reasons for AUO. In addition, some tasks appeared to be regular,



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predictable, and administrative in nature.

According to 5 CFR § 550.153(c), the “employee must remain on duty not merely because it is desirable, but because of compelling reasons inherently related to continuance of his duties, and of such a nature that failure to carry on would constitute negligence.” As shown in table 1, the G-1012 forms we reviewed often contained vague descriptions of tasks performed during AUO hours, such as “analysis” or “continuation of duties.” Based on these vague descriptions, an independent reviewer could not determine whether the agent would have been negligent if he or she had not stayed beyond regular duty hours to complete the task.

In addition, some tasks recorded during AUO hours appear to have been regularly schedulable. For example, according to the descriptions, some agents used AUO hours to complete time and attendance records (described as “COSS” and “T&A”), annual activity reports, spending plans, and performance appraisals. We believe predictable tasks such as these can be controlled through normal administrative means such as planning, delegating authority, rearranging schedules, and establishing additional shifts.

### **Examples of AUO Tasks Recorded on G-1012 Forms in 2013 (Facsimiles)**

- Continuation of duties
- Field Support (phone/email)
- Support of Pacific Corridor Operations
- AMOSS Surveillance/ Liaison OPS
- Protocols
- Analysis
- Processing cases
- Liaison
- "Strategic" estimate/ supervisory duties
- Dissemination of information to the field
- Performance Appraisal Report editing
- Range Clean up - Weapon Maintenance
- Mapping coordinates
- COSS-T&A, JPATT
- SIP for floor safe
- Skymaster-inventory
- Weekly-week ahead
- Document Review
- Oceanus-coastal quarterly
- Budget/quarterly spend plan
- AMOC Annual Activity Reports
- Equipment purchase research
- Training Module Creation
- 5-year staffing plan, relocation funding
- CBP transportation reduction
- PPT revise and send
- Pay reform-union issues
- Classified intel



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We did not find a pattern in the number of AUO hours headquarters agents recorded each day. Although 2 hours of AUO was recorded most frequently in COSS (33 percent), the number of hours recorded on sequential days during the pay period generally varied. Appendix B shows the percentage of time recorded for each potential AUO increment (e.g., 1 hour, 1.5 hours, and 2 hours) in COSS.

### **Employee Interviews**

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As of March 28, 2014, USBP Headquarters employed 41 supervisory agents and 171 nonsupervisory agents. In April 2014, we interviewed 10 supervisory agents and 16 nonsupervisory agents to gain a better understanding of the tasks typically performed during AUO hours. We also asked questions to determine agents' understanding of AUO, documentation of AUO tasks, and approval of AUO hours. Based on these interviews, we concluded that agents:

- Generally did not receive consistent training or guidance on AUO requirements;
- Did not always follow the requirements for documenting and reviewing tasks performed during AUO hours; and
- Sometimes used AUO hours to complete their tasks in a timely manner.

### **Training and Guidance**

When asked about AUO guidance, some agents said they never received any guidance or took any training; others recalled receiving a memo about AUO from Chief Fisher. (In December 2012, U.S. Border Patrol Chief Michael J. Fisher issued a memo summarizing existing guidance on the administration and management of AUO to all chief patrol agents and division chiefs.) A supervisory agent said he acquired a broad understanding of AUO from years of working at USBP and knew guidance existed, but could not recall any specific guidance. Some agents thought that AUO was simply for unscheduled and irregular work; others believed that any time worked beyond their regular 8-hour workdays was AUO.

### **Documenting and Reviewing AUO Hours**

We asked agents to describe their process for documenting AUO prior to the suspension. Although USBP AUO policy requires that agents complete the G-1012 form at the end of each pay period and have their supervisor approve it, two agents completed G-1012 forms for their own records, but did not turn them in to their supervisors; three other agents usually did not complete G-1012 forms at all. Two



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agents told us that although they submitted G-1012 forms, they were not sure whether their supervisors reviewed them.

One supervisory agent confirmed that he does not collect or review any of his employees' G-1012 forms. Another said neither he nor his supervisor consistently review the AUO forms. Two supervisory agents told us that although they review the forms, they trust the agents to report their activities accurately and do not attempt to verify the AUO tasks listed. Two other supervisors indicated that they properly review their employees' G-1012 forms.

#### **Use of AUO to Complete Tasks in a Timely Manner**

Although a few agents described work that may have qualified for AUO, others implied that they used AUO hours to finish tasks that they simply were not able to finish by the end of their regular 8-hour shifts. For example, agents described preparing briefings for the Secretary, responding to Congressional inquiries, preparing procurement paperwork, and waiting for responses from the field. Two agents used AUO for meetings scheduled to run longer than their normal shifts. Four agents admitted that some of the tasks they performed during AUO hours could have been scheduled in advance.

#### **CBP Actions Resulting From Lynden Station Disclosure**

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According to the whistleblower, in 2008, CBP pledged to issue a component-wide directive on the proper use of AUO and conduct annual AUO training for all employees as a result of acknowledged AUO abuse by border patrol agents at the Lynden Station in Washington.

CBP's Office of Internal Affairs conducted an investigation of alleged improper use of AUO at the Lynden Border Patrol Station and issued a report on its findings to OSC on August 14, 2008.

According to the report, CBP's leadership had approved a new CBP AUO policy and planned to implement it throughout the agency at the conclusion of bargaining with CBP's unions. On December 10, 2012, U.S. Border Patrol Chief Fisher issued a memorandum that summarized and emphasized existing guidance on the administration and management of AUO. However, we did not find evidence of a "new CBP AUO policy" issued after 2008.

In its 2008 report, the Office of Internal Affairs also indicated that CBP said it had created "comprehensive roll-out guidance and education to include onsite training as well as a web based learning center..." CBP also acknowledged that negotiations with



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the unions would affect the timing of the training. However, the report did not mention any CBP plans to conduct AUO training annually, as alleged by the whistleblower.

### **Actions Taken and Planned**

Effective January 26, 2014, USBP headquarters' use of AUO was permanently suspended. At the time of our review, USBP Headquarters was permitting the use of other types of overtime pay for work conducted outside of agents' regular 8-hour workdays.

On August 20, 2014, CBP Commissioner R. Gil Kerlikowske sent a memorandum on "Use of Administratively Uncontrollable Overtime" to Deputy Secretary Alejandro Mayorkas. The memorandum presented CBP's Office of Human Resources Management's (HRM) Report of Review and Findings on CBP's use of AUO, which was completed in June 2014. HRM determined, "the nature of the duties and overtime work performed by just over 1,900 CBP employees in positions designated as eligible to receive AUO do not meet the qualifying requirements for AUO." This includes positions located in USBP Headquarters. According to Commissioner Kerlikowske's memorandum, "CBP is pursuing a series of actions to ensure the appropriate use and payment of AUO. These include de-authorizing AUO for those positions it has been determined that AUO is not the appropriate means of overtime compensation."



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**Appendix A**  
**CBP Form G-1012 Template**

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

**Record of AUO Hours Worked**

<b>NAME</b>		<b>SSN</b>	<b>PP#</b>	<b>FOR PERIOD FROM:</b>	<b>TO:</b>
<b>POSITION TITLE</b>		<b>% AUO</b> 25	<b>REGION</b>	<b>SECTOR/DISTRICT</b>	<b>STATION/DEPT/PROGRAM</b>
<b>Date</b>	<b>DAILY TOUR DUTY HRS</b>	<b>AUO HRS WORKED</b>	<b>EXCLUDABLE DAYS</b>	<b>REASON FOR AUO HRS WORKED OR ABSENCE</b>	
<b>Sunday</b>					
<b>Monday</b>					
1/1					
<b>Tuesday</b>					
1/2					
<b>Wednesday</b>					
1/3					
<b>Thursday</b>					
1/4					
<b>Friday</b>					
1/5					
<b>Saturday</b>					
1/6					
<b>Sunday</b>					
1/7					
<b>Monday</b>					
1/8					
<b>Tuesday</b>					
1/9					
<b>Wednesday</b>					
1/10					
<b>Thursday</b>					
1/11					
<b>Friday</b>					
1/12					
<b>Saturday</b>					
1/13					
<b>TOTAL</b>					
<b>Certified True and Correct:</b>			<b>Examined and Approved:</b>		
_____			_____		
<b>Employee Signature</b>			<b>Supervisor Signature</b>		

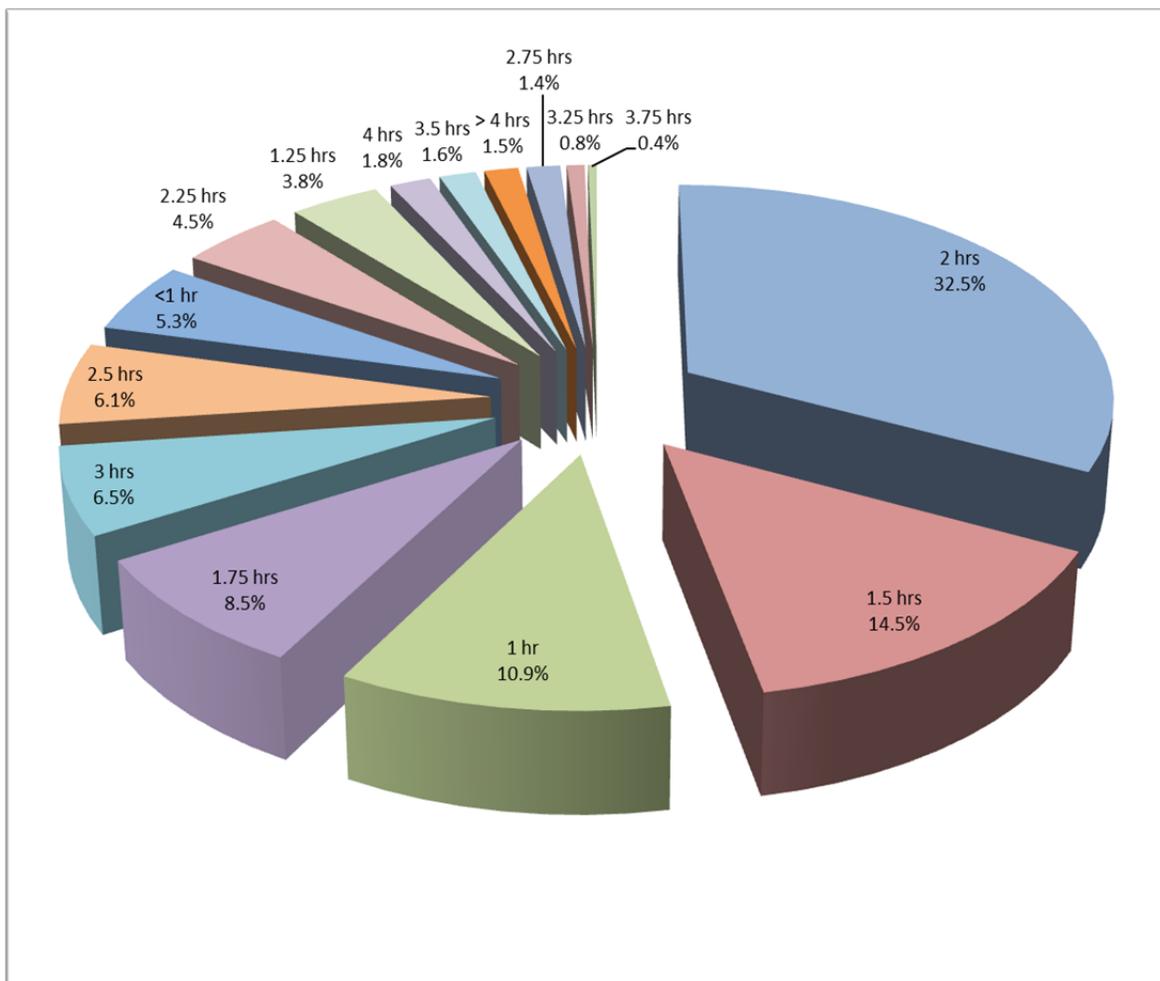
Form G-1012 (2/09/99)



## Appendix B Frequency of AUO Time Increments Recorded

USBP employees record AUO hours in 15-minute increments. The chart below depicts the percentage of time each AUO increment was recorded in COSS. For example, agents recorded 2 hours of AUO about 33 percent of the time.

### Increments of AUO Hours Recorded in COSS between October 2012 and February 2014



Source: DHS OIG analysis of CBP data



## **Appendix C**

### **Conduct of the Review**

Objective and Scope: The objective of this evaluation was to assess, to the extent possible given limited resources, the validity of the whistleblower's allegation that USBP headquarters agents did not perform duties justifying their AUO claims. Our objectives included: determining the amount of AUO paid to USBP Headquarters agents, the justifications for receiving AUO pay, and whether USBP Headquarters' use of AUO was consistent with Federal regulations. The scope of this evaluation was FYs 2013 and 2014. A determination of the cause or effect of improper use of AUO was not included in the scope.

Regulations and Policies Governing AUO: We reviewed the CFR, specifically 5 CFR § 550.151 and 5 CFR § 550.153(c), as well as

- Customs Directive No. 51550-004A, Administratively Uncontrollable Overtime (AUO) Pay;
- Immigration and Naturalization Service Administrative Manual (dated January 2000);
- Chapter 8 of the Payroll System Handbook, Customs Issuance System (CIS) Handbook (HB) 5300-09; and
- December 10, 2012 memorandum from Michael J. Fisher, Chief, U.S. Border Patrol, on "Administratively Uncontrollable Overtime Guidance."

Judgmental Sample of Record of AUO Hours Worked forms (G-1012 forms): As of March 28, 2014, USBP Headquarters employed 212 agents. Of the 212 agents, 41 were supervisory and 171 were nonsupervisory.

We selected a judgmental sample of 134 G-1012 forms for 67 agents (14 supervisory and 53 nonsupervisory) who received AUO between October 1, 2012, and February 28, 2014. The sample included two random pay periods from 2013 for each agent.

Review of G-1012 Forms: We requested 134 G-1012 forms from USBP Headquarters and obtained 86. We reviewed the 86 G-1012 forms to determine the tasks agents performed while claiming AUO.

Interviews of USBP Headquarters Agents: From the list of 67 agents whose AUO forms we requested, we selected 10 supervisory agents and 16 nonsupervisory agents for interviews. We interviewed these 26 agents in April 2014 to gain a better understanding of the tasks they typically performed during AUO hours. We also asked the 26 agents questions to determine their understanding of AUO; whether they thought AUO tasks



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could have been scheduled in advance; as well as how they tracked their AUO hours and completed G-1012 forms. We asked supervisors additional opened-ended questions to determine how they reviewed their employees' G-1012 forms, as well as how they validated the AUO hours and tasks claimed. Not every interviewee answered every question on our prepared list of questions.

Review of Payroll Records: We determined the total amount of AUO paid to USBP Headquarters agents in FY 2013.

Observation Regarding Possible Causes of Improper AUO Use: We did not design this evaluation to address the root causes of improper use of AUO. However, based on our interviews, as well as our review of congressional testimony and Federal AUO regulations, we believe there are at least three reasons Federal AUO regulations may have been improperly applied. First, employees had a sense they were entitled to AUO because it was "the way it has always been done" and AUO was part of the culture of the Border Patrol. Second, there was a lack of understanding of Federal AUO regulations, which are complex and outdated. Finally, employees maintained an attitude of doing "whatever it takes to complete the mission," without concern as to whether AUO was the correct type of premium pay for the tasks.

Evaluation Standards: We conducted this review under the authority of the *Inspector General Act of 1978*, and according to the Quality Standards for Inspection and Evaluation issued by the Council of the Inspectors General on Integrity and Efficiency, dated January 2012.

## ADDITIONAL INFORMATION

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