



**U.S. Customs and  
Border Protection**

Commissioner

Carolyn N. Lerner  
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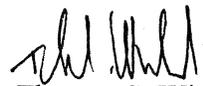
Re: OSC File No. DI-13-4124

Dear Ms. Lerner:

The enclosed report is in response to your referral of allegations that employees of the Department of Homeland Security (DHS) U.S. Customs and Border Protection (CBP), Office of Training and Development (OTD), U.S. Border Patrol Academy and Field Operations Academy (FOA) engaged in conduct that may constitute violations of law, rule, or regulation, gross mismanagement, a gross waste of funds, and an abuse of authority. The Office of Special Counsel (OSC) received the allegations from CBP employee Customs and Border Protection Officer John Florence, the Branch Chief of the Tactics Branch in FOA's Use of Force Section, who consented to the release of his name. On September 12, 2013, OSC referred these allegations and a request for an investigation to DHS Acting Secretary Rand Beers. On September 18, 2013, the matter was referred to the CBP Office of Internal Affairs for investigation. Through investigation, the initial field work was expanded to include additional OTD training facilities in the report of investigation. I was designated as the official responsible for providing your office with the Department's report pursuant to 5 U.S.C. § 1213. The findings are included in the enclosed report.

If you require further information regarding this matter, please contact Philip Carpio in the Office of Chief Counsel at 202-344-2940.

Sincerely,

  
Thomas S. Winkowski  
Acting Commissioner

Enclosure

cc: Secretary, Department of Homeland Security  
Deputy Secretary, Department of Homeland Security  
Chief Human Capital Officer, Department of Homeland Security  
General Counsel, Department of Homeland Security

## **1. SUMMARY OF THE INFORMATION WHICH FORMED THE BASIS FOR THE INVESTIGATION**

A whistleblower alleged to the Office of Special Counsel (OSC) that employees of the Department of Homeland Security (DHS), U.S. Customs and Border Protection (CBP), Office of Training and Development (OTD), U.S. Border Patrol Academy (BP Academy) and Field Operations Academy (FOA), engaged in conduct that may constitute violations of law, rule, or regulation, gross mismanagement, and a gross waste of funds. The whistleblower, John Florence, has consented to the release of his name. Mr. Florence, Customs and Border Protection Officer (CBPO) is the Branch Chief of the Tactics Branch in FOA's Use of Force Section. However, at the time relevant to this disclosure, Mr. Florence was the Acting Assistant Director for the Use of Force Section.

On September 12, 2013, the OSC referred these allegations and a request for investigation to DHS Acting Secretary Rand Beers. On September 18, 2013, the matter was assigned to CBP, Office of Internal Affairs (IA) for investigation. On September 26, 2013, Mr. Florence was interviewed. Field investigative work began on November 18, 2013 by the CBP-IA Washington Field Office (WFO) and was expanded to include additional OTD training facilities.

In brief, Mr. Florence alleged the following:

- Border Patrol Agents (BPA) employed by OTD as instructors and managers routinely claim Administratively Uncontrollable Overtime (AUO) on a daily basis but fail to perform duties which qualify for AUO.

## **2. DESCRIPTION OF THE CONDUCT OF THE INVESTIGATION**

CBP-IA Special Agents (SA) from the WFO, conducted investigative interviews of supervisors of BPAs and CBPOs assigned to five OTD locations:

- Border Patrol Academy, Artesia, NM
- Canine Center El Paso (CCEP)
- Field Operations Academy, Glynco, GA
- Canine Center Front Royal (CCFR), Front Royal, VA
- Advance Training Center (ATC), Harper's Ferry, WV

The interviews were conducted between December 2, 2013, and December 18, 2013. Position Descriptions (PD), AUO Training Certificates and local time and attendance records (CBP Form 203, Administratively Uncontrollable Overtime Reports) for the past twelve months were obtained and reviewed for the approximately 146 BPAs assigned to OTD as supervisors or instructors.

According to their Position Descriptions, BPA Instructors assigned to OTD perform the following duties: course planning and development, evaluating and updating curriculum,

professional and technical expert duties, and supervisory duties/session coordination. CBPO Instructors assigned to OTD perform similar duties in their Position Descriptions. Both the BPA Instructors and the CBPO Instructors are grade GS-13 and are Fair Labor Standards Act non-exempt.

In addition, the following references were consulted for guidance:

- U.S. Customs Service (USCS) Payroll System Handbook (June 1993)
- Title 5, Code of Federal Regulations
- U.S. Immigration and Naturalization Service (INS) Policy Statement 1.3.103, Administratively Uncontrollable Overtime Pay (January 2000)
- INS Administrative Manual Procedures (AM) 1.3.103, Administratively Uncontrollable Overtime Pay (January 2000)
- INS Administratively Uncontrollable Overtime Training Guide (September 22, 1997)
- USCS Directive No. 51550-004A, Administrative Uncontrollable Overtime (June 29, 2000)
- CBP Payroll Time and Attendance Manual (2006)
- Border Patrol Memorandum, Use of Administratively Uncontrollable Overtime Guidance (December 10, 2012)

The following employees were interviewed and each provided a sworn statement:

- Kevin J. Strong (BP Academy)
- Todd C. Bryant (BP Academy)
- James B. Cox (BP Academy)
- Ignacio Luevano (BP Academy)
- Jennie Marquez (BP Academy)
- Brian Yarges (BP Academy)
- Thomas Mick (BP Academy)
- Jesus Azua (BP Academy)
- Mark Bazill (BP Academy)
- Roberto Garcia (BP Academy)
- Martin Cosio (BP Academy)
- Dwayne Miller (BP Academy)
- Aaron Villegas (CCEP)
- Dan Ramos (CCEP)
- Jason Landrum (CCEP)
- Robert Lukason (CCEP)
- Michael K. Brown (FOA)
- Dawn Stefanello (FOA)
- Paul Kleine (FOA)
- Kevin LaVan (FOA)
- Timothy Spittler (CCFR)
- Jeffery Gabel (CCFR)
- Laren Shaw (CCFR)

- James Cobb (ATC)
- Allison Hanley (ATC)
- Michael (Sean) Godsey (ATC)
- Wilda Housden (ATC)
- David Corolis (ATC)
- John Mansell (ATC)
- Gordon Harmon (ATC)
- Wesley Windle (ATC)

### **3. SUMMARY OF EVIDENCE OBTAINED FROM THE INVESTIGATION**

The investigation confirmed the following allegations made by the whistleblower:

- Numerous BPAs assigned to OTD improperly claim AUO and receive AUO pay for performing duties that do not qualify for AUO according to the relevant policies and regulations.

### **4. INVESTIGATIVE FINDINGS**

#### **A. Background**

OTD is responsible for centralized leadership and direction of all CBP training programs. OTD staffs training facilities across the nation with instructors who are BPAs from the Office of Border Patrol (OBP) and CBPOs from the Office of Field Operations. BPAs and CBPOs are covered under different Collective Bargaining Agreements.

Highlights of OTD:

- Custom and Border Protection Basic Training promotes an integrated structure to centralize and manage all BP Academy and FOA training resources and functions. They deliver mission-focused and standardized CBP basic training programs equipped to meet the challenges of the mission of CBP.
- The BP Academy is located in Artesia, NM and has the mission to educate, train, and develop BPAs.
- The FOA, located in Glynco, GA, is committed to developing, coordinating, and delivering training programs, both basic and advanced, to satisfy the needs of CBPOs, Air and Marine Officers, Regulatory Auditors, Agricultural Specialists, Import Specialists, Entry Specialists, Fines Penalties and Forfeiture Officers, Seized Property Specialists, and all other field operations personnel.
- The CBP Advanced Training Center campus located in Harpers Ferry, WV, was designed to serve law enforcement training needs in surroundings that emulate CBP's common operating environments. The ATC provides firearms, intermediate force, incident management, intelligence, and leadership training programs. The ATC trains and develops national and international officers, agents, and government leaders through the delivery of specialized training programs designed to meet tactical and strategic challenges.

- The CCEP, located in El Paso, TX and the CCFR, located in Front Royal, VA develop, execute and oversee the allocation, training, and support of canine resources capable of responding to CBP operations. Disciplines include Concealed Humans and Narcotic Detection, Search and Rescue, Human Remains Detection/Cadaver, Tracking and Trailing, Special Response (Patrol), Currency/Firearms Detection and Canine Instructor.

**B. Relevant Regulations**

5 C.F.R. § 550.151 authorizes agencies to pay AUO annually "...to an employee 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, circumstances which require the employee to remain on duty."

5 C.F.R. § 550.153 (a) provides, in pertinent part, that for AUO to be authorized the "...position must be one in which the hours of duty cannot be controlled administratively ... [The employee's] hours on duty and place of work depend on the behavior of the criminals or suspected criminals and cannot be controlled administratively. In such a situation, the hours of duty cannot be controlled by such administrative devices as hiring additional personnel; rescheduling the hours of duty (which can be done when, for example; a type of work occurs primarily at certain times of the day); or granting compensatory time off duty to offset overtime hours required."

5 C.F.R. § 550.153(c) further provides that:

"The words in § 550.151 that an employee is generally responsible for recognizing, without supervision, circumstances which require him to remain on duty"- mean that:

- (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."

5 C.F.R. § 551.501 Overtime pay.

- (a) An agency shall compensate an employee who is not exempt under subpart B of this part for all hours of work in excess of 8 in a day or 40 in a workweek at a rate equal to one and one-half times the employee's hourly regular rate of pay, except that an employee shall not receive overtime compensation under this part—

- (1) On the basis of periods of duty in excess of 8 hours in a day when the employee receives compensation for that duty under 5 U.S.C. 5545(c)(1) or (2) or 5545b;
- (2) On the basis of hours of work in excess of 8 hours in a day that are not overtime hours of work under §410.402 of this chapter, part 532 of this chapter and 5 U.S.C. 5544, or part 550 of this chapter;
- (3) On the basis of hours of work in excess of 8 hours in a day for an employee covered by 5 U.S.C. 5544 for any hours in a standby or on-call status or while sleeping or eating;
- (4) On the basis of hours of work in excess of 8 hours in a day for an individual who is not an employee, as defined in 5 U.S.C. 5541(2), for purposes of 5 U.S.C. 5542, 5543, and 5544;
- (5) On the basis of hours of work in excess of 40 hours in a workweek for an employee engaged in fire protection or law enforcement activities when the employee is receiving compensation under 5 U.S.C. 5545(c)(1) or (2) or 5545b, or is not an employee (as defined in 5 U.S.C. 5541(2)) for the purposes of 5 U.S.C. 5542, 5543, and 5544;
- (6) For hours of work that are not “overtime hours,” as defined in 5 U.S.C. 6121, for employees under flexible or compressed work schedules;
- (7) For hours of work compensated by compensatory time off under §551.531 of this part; and
- (8) For fractional hours of work, except as provided in §551.521 of this part.

(b) An employee’s “workweek” is a fixed and recurring period of 168 hours—seven consecutive 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of a day. For employees subject to part 610 of this chapter, the workweek shall be the same as the administrative workweek defined in §610.102 of this chapter.

(c) In this subpart, “irregular or occasional overtime work” is overtime work that is not scheduled in advance of the employee’s workweek.

(d) The maximum earnings limitations described in §§550.105, 550.106, and 550.107 of this chapter do not apply to overtime pay due the employee under this subpart.

5 C.F.R. § 550.111 Authorization of overtime pay.

(a) Except as provided in paragraphs (d), (f), and (g) of this section, overtime work means work in excess of 8 hours in a day or in excess of 40 hours in an administrative workweek that is—

(1) Officially ordered or approved; and

(2) Performed by an employee. Hours of work in excess of 8 in a day are not included in computing hours of work in excess of 40 hours in an administrative workweek.

(b) Except as otherwise provided in this subpart, a department shall pay for overtime work at the rates provided in §550.113.

(c) Overtime work in excess of any included in a regularly scheduled administrative workweek may be ordered or approved only in writing by an officer or employee to whom this authority has been specifically delegated.

(d) For an employee for whom the first 40 hours of duty in an administrative workweek is his basic workweek under §610.111(b) of this chapter, overtime work means work in excess of 40 hours in an administrative workweek that is:

(1) Officially ordered or approved, and

(2) Performed by an employee, when the employee's basic pay exceeds the minimum rate for GS-10 (including any applicable special rate of pay for law enforcement officers or special pay adjustment for law enforcement officers under section 403 or 404 of the Federal Employees Pay Comparability Act of 1990 (Pub. L. 101-509), respectively; a locality-based comparability payment under 5 U.S.C. 5304; and any applicable special rate of pay under 5 U.S.C. 5305 or similar provision of law) or when the employee is engaged in professional or technical, engineering or scientific activities. For purposes of this section and section 5542(a) of title 5, United States Code, an employee is engaged in professional or technical engineering or scientific activities when he or she is assigned to perform the duties of a professional or support technician position in the physical, mathematical, natural, medical, or social sciences or engineering or architecture.

(e) Notwithstanding paragraphs (a) and (d) of this section, when an employee's basic workweek includes a daily tour of duty of more than 8 hours and his hourly rate of basic pay exceeds the hourly rate of overtime pay provided by §550.113, the department shall pay him at his basic rate of pay for each hour of his daily tour of duty within his basic workweek.

(f)(1) Except as provided in paragraph (f)(2) of this section, for any criminal investigator receiving availability pay under §550.181, overtime work means actual work that is scheduled in advance of the administrative workweek—

(i) In excess of 10 hours on a day containing hours that are part of such investigator's basic 40-hour workweek; or

(ii) On a day not containing hours that are part of such investigator's basic 40-hour workweek.

(2) Notwithstanding paragraph (f)(1) of this section, all overtime work scheduled in advance of the administrative workweek on a day containing part of a criminal investigator's basic 40-hour workweek must be compensated under this section if both of the following conditions are met:

(i) The overtime work involves protective duties authorized by section 3056(a) of title 18, United States Code, or section 2709(a)(3) of title 22, United States Code; and

(ii) The investigator performs on that same day at least 2 consecutive hours of overtime work that are not scheduled in advance of the administrative workweek and are compensated by availability pay.

(3) Any work that would be overtime work under this section but for paragraphs (f)(1) and (f)(2) of this section will be compensated by availability pay under §550.181.

(g) For firefighters compensated under subpart M of this part, overtime work means officially ordered or approved work in excess of 106 hours in a biweekly pay period, or, if the agency establishes a weekly basis for overtime pay computations, in excess of 53 hours in an administrative workweek.

(h) Availability hours, as described in §550.182(c), are not hours of work for the purpose of determining overtime pay under this section.

(i) An employee is not entitled to overtime pay under this subpart for time spent in training, except as provided in §410.402 of this chapter.

### **C. Relevant Policies**

The current CBP workforce has continued to reference guidance and policies from its legacy agencies, Immigration and Naturalization Service (INS) and the United States Customs Service (USCS) which administered AUO. Reference will be made to both the INS and USCS policies and guidelines. As this report makes eminently clear, the existence of multiple instructions and the lack of one central AUO policy for CBP have contributed to the problems with documentation, and the monitoring of AUO administration. With certain exceptions, the guidance on the use of AUO issued by USCS and INS is generally consistent with the law on AUO.

The findings in this report demonstrate that OBP personnel, as legacy-INS employees, would not necessarily have sought the legacy USCS Payroll System Handbook as a source of guidance with regard to use of AUO and instead would have referred to the INS Administrative Manual (AM). Because both the USCS Payroll System Handbook and the INS AM mirror the requirements in the law and regulations for the proper payment of AUO, the investigation refers to both documents.

**i. *The USCS Payroll System Handbook***

The USCS Payroll System Handbook, Chapter 8, Premium Pay, restates the requirements of the law governing the administration of AUO. Although still titled as a USCS document, the USCS Payroll System Handbook is now used by CBP's Office of Administration, Payroll Branch, as the policy governing the administration of payroll for all CBP employees.

Chapter 8 of the USCS Payroll System Handbook states that the requirements for authorizing AUO for a position are as follows:

A position must meet the following four requirements in order to have AUO payments approved. All four requirements must be met; a substantial amount of irregular overtime by itself is not sufficient.

(1) The hours of duty cannot be controlled administratively. That is, the hours of duty and place of work cannot be controlled through normal administrative action such as hiring additional personnel or rescheduling hours of duty. The element of uncontrollability must be an inherent part of the assigned duties, for example, a criminal investigator whose hours of duty and place of work depend on the behavior of criminals or suspected criminals.

(2) Substantial amounts of irregular overtime are required. This means the irregular overtime is a continuing requirement usually averaging more than once a week and averaging at least 3 hours a week.

(3) The employee is generally responsible for recognizing, without supervision, when to remain on or return to duty. The responsibility to remain on duty must be an official and special requirement of the position. The requirement to remain on duty must be inherently related to the purpose of the position and of such a nature as to constitute negligence if not fulfilled.

(4) There must be a sound basis for anticipating that such requirement will be ongoing. Both the experience in the previous four calendar quarters and the nature of the assigned duties must point to an ongoing need to perform substantial amounts of irregular overtime.

**ii. *The INS Administrative Manual Procedures***

The INS AM Procedures remains in effect, unless superseded, due to the savings provision contained in the Homeland Security Act of 2002.

The INS AM, Section 1.3.103, contains the following relevant information:

AUO is defined as a premium pay, paid on an annual basis, to an employee 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, circumstances which require the employee to remain on duty.

The "Record of AUO Hours Worked" (Form G-1012) was the official record of AUO hours worked by every employee who earned AUO. The INS AM procedure required that it be signed every pay period by the employee and by the immediate supervisor. A copy of the form was to be filed for a minimum of six years in the T&A Folder of each employee on AUO, and available for review by interested parties.

For an employee to be approved to receive AUO, a determination must be made by the immediate supervisor, or by a higher level supervisor or manager, that an employee has work assignments that frequently require unscheduled overtime work that cannot be controlled, that the AUO hours reported by the employee are actually worked, and that therefore the employee may earn a specified percentage of AUO annual premium pay. This determination is to be documented on a certification form.

The INS AM also provides examples of incorrect applications of administratively uncontrollable overtime pay authority. Examples of potential misuses of the AUO pay authority which should be identified and corrected are the following:

- (1) payment of AUO pay to an employee who almost always works in a supervised office environment and does not perform independent investigative or other administratively uncontrollable work;
- (2) crediting of hours of work for AUO pay that are clerical or administrative in nature, can be easily scheduled in advance, and do not involve independent investigative or other administratively uncontrollable work;

**D. Summary of CBP-IA's Investigation: Witness Testimony; Review of COSS; Previous Warnings.**

The results of CBP-IA's investigation at each of the five training facilities as well as at OTD as a whole are described below.

**i. *Office of Training and Development***

The BPA supervisors interviewed in OTD consistently described AUO as any work that carries over past the end of the shift and must be completed prior to departing. They explained that the work must be completed prior to departing because failure to do so would have a negative impact on the training mission. Failure to complete training in a timely manner could lead to a student's failure to complete the course resulting in the termination of the employee and the loss of expenses incurred by CBP related to the employee, e.g., background investigation, polygraph, payroll and benefits. Examples include remedial training, resolving trainee issues, terminations, injured students, Spanish language lab, accident investigations, grading tests, test reviews, boat maintenance, storing of equipment, taking canines to veterinarians, canine deaths, vehicle accidents, prepare materials and canines for the next day, assist other law enforcement entities,

prepare course curriculum, equipment maintenance, and administrative Headquarters or local taskings. They describe their work on AUO as unpredictable because they don't know what is going to happen from day to day as described above.

BPA supervisors estimate that 75% of the time each week the BPA instructors are teaching a class and they do not have enough time to complete all of their other duties within their eight hour day. The supervisors stated that besides AUO, there is not another mechanism in place to pay the BPA instructors after their normal eight hours tour of duty has ended. The supervisors stated that all overtime, other than AUO, must be scheduled and approved in advance via email. The BPA supervisors interviewed by CBP-IA explained that there are duties performed that are unpredictable in nature, such as remedial training, student injuries and taking canines to veterinarians. Other duties they perform are predictable such as vessel maintenance or class or room preparation which could be covered under Federal Employees Pay Act (FEPA).

The CBPO supervisors interviewed in OTD also estimate that 75% of the time each week, CBPO instructors are teaching a class, but generally have enough time to complete their other duties. CBPO supervisors cited the same examples of work that needs to be done when instructors are not teaching a class or interacting with students. The only examples CBPO supervisors feel are uncontrollable are remedial training, resolving trainee issues, terminations, injured students, Spanish language lab, and accident investigations. They explained that these types of duties are uncontrollable because of the unpredictable nature of the training environment. The CBPO supervisors interviewed explained that the CBPO Instructors at the training facilities generally complete these types duties without compensation because they believe overtime funds are not authorized when not performing their primary law enforcement duties at a port of entry. For example, if a canine is injured, both the BPAs and CBPOs would ensure the medical attention is obtained no matter how long it took. The CBPO supervisors interviewed explained that in that example, the BPA would continue to work on AUO after their eight hour shift had ended but the CBPO would not be compensated. The CBPO supervisors claim that instructors currently rarely work overtime at the FOA or the CCFR and they do not understand why the BPAs need AUO to complete their work. They claim the CBPOs and the BPAs perform the same work and the BPAs should generally, except emergencies, have enough time to complete their work in a normal work day just like the CBPOs do. They feel AUO could be mitigated by more appropriate scheduling.

During the interviews, all but one supervisor said they always had a supervisor on duty. Their answers varied when asked if they felt they worked in an office environment. Some felt they worked in an office environment because they felt they were a support unit performing non law enforcement duties. Some felt they were in an office environment because they were furloughed and operational personnel were not. They choose when to start and end training and in an operational environment they can't dictate what happens. Some felt they worked as an operational unit because they are not sitting a desk throughout the day and the training academy component has a strong nexus to the operational environment. Finally, others felt they worked in an academic environment in which they teach operational functions or a combination of all three.

ii. *Border Patrol Academy*

All of the instructors at the BP Academy are BPAs. The interviews of the BPA supervisors revealed that as a general matter, instructors work a 7:00 a.m. to 3:00 p.m. shift, with the option of taking unpaid lunch for either an hour or half hour, or taking no lunch. If an individual took a one hour lunch, that BPA's working shift would be 7:00 a.m. to 4:00 p.m. hours. The students' hours at the BP Academy are 7:30 a.m. to 4:30 p.m. with one hour of unpaid lunch. Almost all of the time, the instructors worked until at least 4:30 p.m., thus they were on AUO for one hour or one half hour, depending on their lunch period.

The Director of the BP Academy stated he would need 27 to 35 additional staff members to eliminate the usage of AUO at the BP Academy if AUO was decertified. As an explanation for this claim, the Director of the BP Academy said,

“BP Academy staffing models are based on student throughput, class overlap, departmental staffing formulas, curriculum delivery responsibilities and fluctuating other than student contact hours. AUO has allowed the BP Academy to manage these unpredictable, irregular and uncontrollable tasks outside the normal 8-hour training day. Currently the BP Academy is operating under a 1783 yearly hours availability after a 12% (225 hrs.) adjustment for leave and training.

If the BP Academy had to adjust to incorporate into an 8-hour workday those tasks that are irregular, uncontrollable, and unpredictable and based on a current BP Academy aggregate 20% AUO level (7-9 AUO hrs./week) would account for an additional 364-468 hours of CDI (Course Developer/Instructor) availability a week.”

The Director of the BP Academy also explained that an 18% to 23% staffing adjustment would be applied to compensate for the decertification of AUO. Since CBP is already at the maximum staffing level of Border Patrol Agents at 21,370, these additional instructors would not be hired by CBP but rather would be transferred from OBP in the field, thereby reducing the amount of agents carrying out the primary mission of OBP. Therefore, there would be no additional salary expense since those agents are already employed by CBP. There would, however, be additional costs associated with their permanent change of station relocation to OTD and then back out to OBP at the end of their 3-5 year “Not To Exceed” appointment. It is unknown how many more CDIs would be needed in the other three training centers but a safe estimate is that another 35 would be needed, totaling 70 additional instructors. The estimated costs for 70 relocations both into and out of OTD would be \$910,000.

CBP-IA's investigation concludes that the Director of the BP Academy's explanation that AUO is necessary because eliminating it would require the hiring of additional staff contradicts the relevant regulations. Specifically, 5 C.F.R. § 550.153(a) provides, in pertinent part, that for AUO to be authorized the “position must be one in which the hours of duty cannot be controlled administratively. . . . [and] the hours of duty cannot be controlled by such administrative devices as hiring additional personnel; rescheduling the hours of duty (which can be done when, for example; a type of work occurs primarily at certain times of the day); or granting compensatory

time off duty to offset overtime hours required.” By definition, if the hours of duty can be controlled administratively by “hiring additional personnel, rescheduling the hours of duty, or granting compensatory time to offset overtime hours required,” then the employees do not qualify for AUO.

**iii. *Field Operations Academy***

Some of the instructors at the FOA are BPAs and some of them are CBPOs. CBPOs work a 7:30 a.m. to 4:30 p.m. shift, with a one hour lunch period. The CBPO instructors work the same shift as the students. CBP-IA’s investigation revealed that the CBPOs rarely, if ever, receive any type of overtime pay and they do not qualify for AUO because of their job series (GS-1895). They routinely start work before their shift begins and stay after their shift had ended to complete their duties and responsibilities without compensation. The BPAs work a 7:00 a.m. to 4:00 p.m. shift, with a one hour lunch period and claim AUO almost every day. According to the supervisors interviewed by CBP-IA, duties such as remedial training, resolving trainee issues, terminations, transporting/accompanying injured students to health care facilities, and physical injury investigations would qualify for AUO. Other duties such as grading tests, test reviews, storing of equipment, preparing materials for the next day, preparing course curriculum, equipment maintenance, and administrative Headquarters or local taskings would not qualify for AUO. Currently, BPA Instructors are compensated with AUO for performing all of the duties listed above.

**iv. *Advanced Training Center***

Some instructors at the ATC are BPAs and some are CBPOs. The BPA instructors work a 7:30 a.m. to 4:00 p.m. shift or a 7:30 a.m. to 4:30 p.m. shift, depending on the course they are teaching. The student’s normal working hours are 8:00 a.m. to 4:30 p.m. or 8:00 a.m. to 5:00 p.m. shift, depending on their half to one hour lunch period. The CBPO instructors work on an Alternate Work Schedule, 8 days with 9 hours a day, 1 day with 8 hours and off one day during the pay period. Almost every day, the BPAs work after their shift has ended and receive AUO for performing duties such as remedial training, resolving trainee issues, terminations, transporting/accompanying injured students to health care facilities, physical injury investigations, grading tests, test reviews, storing of equipment, preparing materials for the next day, preparing course curriculum, equipment maintenance, and administrative Headquarters or local taskings.

**v. *Canine Center El Paso***

All of the instructors at CCEP are BPAs. Both the instructors and the students work a 6:00 a.m. to 2:00 p.m. shift. During these core hours, the instructors spend all of their time with the students teaching and do not take any time for lunch. Almost every day, the BPAs work after their shift has ended and receive AUO for performing duties such as remedial training, resolving trainee issues, terminations, transporting/accompanying injured students to health care facilities, physical injury investigations, grading tests, test reviews, storing of equipment, preparing materials for the next day, preparing course curriculum, equipment maintenance, and administrative Headquarters or local taskings.

**vi. Canine Center Front Royal**

Some instructors at the CCFR are BPAs and some are CBPOs. They all work 7:00 a.m. to 3:00 p.m. shifts, as well as the students. Almost every day, the BPAs work after their shift has ended and receive AUO for performing duties such as remedial training, resolving trainee issues, terminations, transporting/accompanying injured students to health care facilities, physical injury investigations, grading tests, test reviews, storing of equipment, preparing materials for the next day, preparing course curriculum, equipment maintenance, and administrative Headquarters or local taskings.

**vii. CBP Overtime Scheduling System (COSS) Data Review of the OTD**

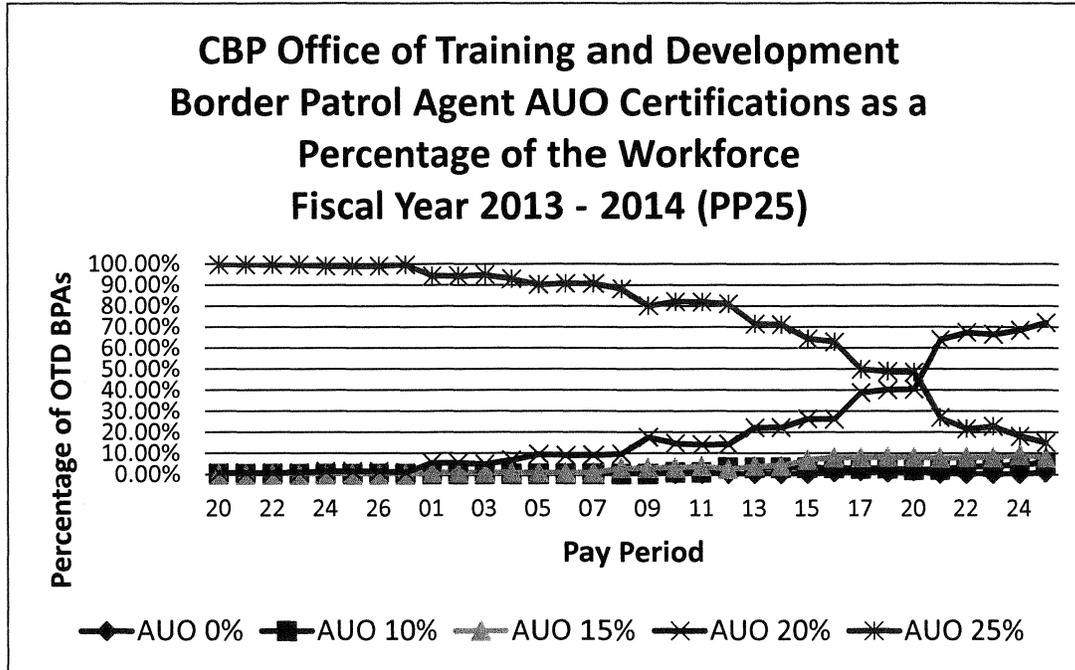
CBP-IA conducted a data query through COSS of the daily shift schedules of all BPA personnel assigned to OTD who are eligible to receive AUO for the time period November 2012 through November 2013. A review of these work schedules revealed that at the end of each employee’s normal eight hour work shift, additional hours of AUO were claimed a majority of the time, giving the appearance that these hours are controllable. Specifically, the review of the COSS data for OTD BPAs for the time period November 2012 through November 2013 shows that two hours or less of AUO were reportedly worked immediately following the assigned shift 88% of the time.

In the spring of 2013, CBP management was directed to decrease costs Agency-wide, including AUO. As shown in the chart and graph below, the number of BPAs in OTD receiving 25% in AUO was dramatically reduced. The chart and graph show that the amount of AUO worked at OTD may be controllable.

**Comparison of AUO Certification of Border Patrol Agent Assigned to CBP Office of Training and Development in Fiscal Year 2012 and 2014\***

<b>AUO/ Fiscal Year</b>	<b>2012</b>	<b>2012 Distribution</b>	<b>2014</b>	<b>2014 Distribution</b>
0%		0.0%	0	0.0%
10%		0.0%	8	5.6%
15%		0.0%	11	7.6%
20%	1	0.5%	104	72.2%
25%	204	99.5%	21	14.6%
<b>Total</b>	<b>205</b>	<b>100%</b>	<b>144</b>	<b>100%</b>

\* Compares certifications in calendar year pay period 24 for both fiscal years.



**viii. Previous Warnings Regarding Proper Use of AUO**

CBP-IA SAs could find no policy or guidance from OTD governing the payment of AUO to BPAs assigned to OTD. During interviews of BPA supervisors, it was clear that all were familiar with the following memorandums from the Chief OBP providing guidance on the proper application of AUO.

On January 14, 2008, the Chief, OBP, issued a memorandum to all Sector Chief Patrol Agents on the use of AUO at checkpoints. This document states,

“The AUO policy and prior reviews of AUO premium pay clearly indicate that AUO premium pay is NOT appropriate for compensating employees for covering shift changes. Managers should adjust the shift scheduling by administrative means such as overlapping shifts, four-shift rotations, or other arrangements to eliminate the need to cover shift changes with overtime work and thus better manage regularly scheduled overtime and its costs.”

This memorandum also provides the four criteria for justifying approval of AUO premium pay as found in the USCS Payroll System Handbook. These requirements must be met for those certified AUO positions and is not limited to checkpoint operations. Criteria number three concludes with the statement, “However, if such continuation of infrequent work becomes more than irregular and there is a discernible pattern of work assignments then the Sector Chief Patrol Agent should review the hours to determine if they are administratively controllable by scheduling.”

The memorandum also states, “In order to insure that our employees are properly compensated for performing the work of the Border Patrol while accurately monitoring

costs and minimizing questions about premium and overtime pay, Sector Chief Patrol Agents are directed to immediately review the method of compensation used for payment for work in excess of eight hours in a day, particularly at checkpoints.”

**E. Factual Findings and Conclusions**

The CBP-IA investigation revealed the following factual findings and conclusions.

- Factual findings:
  - OTD utilizes CBP Form 203 to document the description of their duties performed while on AUO. The investigation revealed that the locally-kept CBP Form 203s maintained for BPAs assigned to the OTD do not contain an adequate description of overtime duties performed.
  - During the interviews, OTD personnel were asked to review CBP Form 203 to determine, in their opinion, which Duty Codes were administrative in nature and could be easily scheduled in advance. Responses varied from all to none of the codes.
  - The investigation revealed that the certification process as described in the relevant policies and guidance documents above is not fully utilized by OTD managers.
  - 44% of all of the interviewees opined that the AUO pay received by the BPAs in OTD was controllable.
  - 70% of all of the interviewees opined that the AUO pay received by BPAs in OTD is because of compelling reasons inherently related to continuance of his duties, and of such a nature that failure to carry on would constitute negligence. For example, if a student was injured and needed medical attention, the instructor would be negligent if they did not take the student to a medical facility.
  - 38% of all of the interviewees opined that the work the BPAs performed while on AUO, such as lesson preparation, grading tests, paperwork, classroom preparation and taskings from headquarters was administrative.
  - The investigation revealed that, if a BPA instructor had to return to work after the completion of his shift, he rarely claimed AUO for those hours.
- Conclusions:
  - CBP-IA SAs determined that the payment of AUO to OTD employees is inconsistent with the relevant regulations and policies because the AUO documented and claimed by BPAs assigned to OTD is often controllable,

sometimes administrative in nature, and functionally extends their daily shift each day.

- In contrast to the policies outlined in the January 14, 2008 memorandum, this investigation and review of the Time & Attendance records from COSS and the U.S. Department of Agriculture National Finance Center (NFC) payroll records for BPAs assigned to OTD confirm a pattern of work assignments that are controllable by scheduling.
- Based upon the documentary evidence and witness testimony, it is evident that the regular and consistent addition of up to two hours of AUO to the regularly scheduled eight hour day implies hours of duty are controllable by management.
- Based on the information collected, some of the AUO at OTD appears to comply with AUO requirements. However, most AUO appears to be comprised of routine duties controllable by the hiring of additional personnel or rescheduling hours of duty.
- Although the investigation identified instances where AUO was improperly claimed, no information was developed that BPAs did not work the hours they claimed.
- CBP has not conducted an analysis related to the cost of assigning additional instructors to OTD facilities.

## **5. DESCRIPTION OF ACTION TAKEN OR PLANNED**

CBP intends to take the following actions:

- The function of instructor at all of the CBP training academies will be expeditiously deauthorized from AUO. Employees performing this function will have their overtime compensated via the applicable and appropriate overtime statute for that employee (i.e. FLSA or FEPA) going forward.
- CBP will act upon the findings of the internal eligibility review currently being conducted by the CBP Office of Human Resources Management (HRM) to determine which of the 158 positions within CBP should continue to be eligible for AUO and which should be decertified. The HRM review will be completed by February 15, 2014.
- Issue a revised AUO directive after the department-wide AUO review and in concert with Immigration and Customs Enforcement's own directive.
- CBP is cooperating fully with a recently initiated department-wide audit of AUO use at DHS being conducted by the Government Accountability Office.

- CBP is continuing to explore the possibility, through legislation, of comprehensive pay reform for Border Patrol Agents and other job categories earning AUO.