



**U.S. Immigration
and Customs
Enforcement**

Ms. Carolyn N. Lerner
Special Counsel
U.S. Office of Special Counsel
1730 M Street, NW, Suite 300
Washington, D.C. 20036

Re: OSC File No. DI-14-1100

Dear Ms. Lerner:

In accordance with Title 5, United States Code (U.S.C.) section 1213(c) and (d), the enclosed report is submitted in response to your referral of allegations that employees of the Department of Homeland Security (DHS), U.S. Immigration and Customs Enforcement (ICE), Office of Enforcement and Removal Operations (ERO), Chattanooga, Tennessee, sub-office engaged in conduct that may constitute violations of law, rule, or regulation; gross mismanagement; a gross waste of funds; or an abuse of authority. Specifically, the Office of Special Counsel (OSC) received allegations from an individual who requested anonymity that employees claim Administratively Uncontrollable Overtime (AUO) but fail to work any additional hours or fail to perform duties that qualify for AUO. At the OSC's request, the DHS Office of Inspector General (OIG) and ICE's Office of Professional Responsibility (OPR) conducted investigations into the allegations. I have been delegated the authority to review and sign this report.

ICE has enclosed two versions of its report along with a plan of action as a result of the investigatory findings. The first version of the report contains the names and positions of ICE law enforcement officers and is For Official Use Only (FOUO), as specified by Title 5, U.S.C. Section 1213(e). Each page of the report has been marked accordingly. We understand that, as required by law, you will provide a copy of the unredacted version of the report to the President of the United States and the appropriate oversight committees in the Senate and House of Representatives for their review. In these legally required re-disclosures of the unredacted report, ICE respectfully requests that OSC retain ICE's FOUO markings and convey the sensitivities of the identifiable information contained in the report.

The second version of the report has been redacted to eliminate references to privacy-protected information and is suitable for release in accordance with the Freedom of Information Act (FOIA), 5 U.S.C. Section 552. ICE has redacted the names and positions of law enforcement officers pursuant to FOIA exemptions (b)(6) and (b)(7)(C) because the release of this information would constitute a clearly unwarranted invasion of the law enforcement officers' personal privacy. Accordingly, these exemptions are specifically asserted to protect ICE's law enforcement officers from possible acts of threat, coercion, and bribery. ICE requests that only the redacted version of the report be made available on your website, in your public library, or in any other forum in which it will be accessible to persons not expressly entitled by law to a copy of the unredacted report.

Please do not hesitate to contact my office at (202) 732-3000, should you require any further information regarding these matters.

Sincerely,

A handwritten signature in black ink, appearing to read "Dan Ragsdale", written over a faint, illegible background.

Daniel H. Ragsdale
Deputy Director

Enclosure

Cc: Chief Human Capital Officer
Principal Deputy General Counsel

I. Summary of Information with Respect to Which the OPR Investigation was Initiated

On an unknown date, an individual who requested anonymity made the following allegations to the Office of Special Counsel (OSC) regarding employees in the U.S. Immigration and Customs Enforcement (ICE), Office of Enforcement and Removal Operations (ERO) sub-office in Chattanooga, Tennessee:¹

Allegation: Employees in the ERO office claim Administratively Uncontrollable Overtime (AUO) but fail to work any additional hours or fail to perform duties that qualify for AUO.

On January 24, 2014, the OSC provided a letter to Jeh Johnson, the Secretary of the Department of Homeland Security (DHS), referring the allegations to ICE for an investigation and requesting a report of findings within 60 days.

According to the information referred by the OSC, the whistleblower alleged that Deportation Officer (DO) [REDACTED] continually falsifies his time and attendance sheets by claiming he works 1.5 to 2.5 hours of AUO daily while rarely working more than an 8-hour shift. In addition, the whistleblower alleged that ERO employees have reported Mr. [REDACTED]'s actions to Supervisory Detention and Deportation Officer (SDDO) [REDACTED]; however, SDDO [REDACTED] continues to certify DO [REDACTED]'s AUO and attendance documents. The whistleblower also alleged that SDDO [REDACTED] falsifies his time and attendance sheets by claiming he works two or three hours of AUO daily but fails to work any additional hours or fails to perform duties that qualify for AUO. Additionally, the whistleblower alleged that all employees in the ERO office are instructed to work 9.5- to 10-hour days, and to claim AUO rather than "45 Act" overtime pay. According to the whistleblower, AUO is claimed when performing either controllable or administrative work such as training, surveillance, and paperwork.

On April 9, 2014, the OIG completed a Report of Investigation relating to the ICE allegation. The ICE Office of Professional Responsibility (OPR) conducted a supplemental investigation of AUO practices at ERO Chattanooga in an effort to provide all of the necessary information requested by OSC and required by statute. The Agency received extensions through October 10, 2014, to provide the report to the OSC.

II. Description of Conduct of OPR's Investigation

OPR reviewed the information sent to the OSC and conducted interviews of the SDDO, DO, and the Immigration Enforcement Agents (IEAs) at ERO Chattanooga and the Deputy Field Office Director (DFOD) located in Oakdale, LA. The interviews focused on the employee's understanding of AUO, the training they received on AUO, and the specific mission-related duties they accomplish while claiming AUO. Employees were also questioned about the allegations disclosed by the whistleblower.

¹ The individual, who requested anonymity, will be referred to in this document as the "whistleblower."

The following employees were interviewed during the OPR investigation:

- DFOD [REDACTED]
- IEA [REDACTED]
- IEA [REDACTED]
- IEA [REDACTED]
- DO [REDACTED]
- SDDO [REDACTED]

In addition to the interviews, OPR reviewed certified Time and Attendance (referred to as “WebTA”) records and the associated G-1012, Records of AUO Hours Worked (referred to as “AUO forms”) for all of the employees covering a 6-month period from January 12, 2014, to June 28, 2014 (a total of 12 pay periods). While ICE employees validate their hours worked in WebTA, including AUO hours, WebTA does not allow employees to electronically document their justifications for AUO. Instead, these justifications are only documented on the AUO forms. In addition, OPR compared AUO hours approved on the AUO forms with the hours claimed in WebTA to verify the consistency of the AUO hours claimed by the employees. OPR also reviewed the justifications on the AUO forms to determine if those justifications were sufficient to support AUO.

OPR reviewed employee justifications on the AUO forms to determine if they were “compelling and inherently related” to the continuance of their duties such that a failure to carry on would “constitute negligence” as mandated in 5 C.F.R. § 550.153(c).² Justifications were also reviewed to determine if the claims constituted a situation that could not be controlled administratively, particularly by the use of such administrative instruments 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, as outlined in 5 C.F.R. § 550.153(a).

Justifications that clearly met the criteria were considered “sufficient” by OPR. Justifications that included duties considered administrative or regular, or which lacked adequate detail, were considered “insufficient” by OPR. If there were multiple justifications, so long as one justification was considered “sufficient,” OPR deemed the entire justification to be “sufficient.”

III. Summary of Evidence Obtained from the OPR Investigation

A. Background Regarding ICE ERO and the Chattanooga Sub-office

The ERO Chattanooga office is a sub-office of ERO New Orleans and is managed by a SDDO. The office has one DO, three IEAs, and one Enforcement and Removal Assistant (ERA). Five of the six positions are currently authorized for AUO. ERO Chattanooga covers a large geographic

² A justification on an AUO form is not sufficient evidence to prove if the hours were actually worked or if the duties reported were actually performed. The determinations of “sufficient” versus “insufficient” were made by OPR to identify which justifications should be followed up on during the subject or employee and supervisor interviews.

area in south central Tennessee. This area of responsibility (AOR) consists of 18 counties with 21 correctional institutions. The AOR for the ERO Chattanooga office consists of approximately 12,000 square miles.

The ERO Chattanooga office is responsible for the daily operations of the following:

- CAP – The Criminal Alien Program (CAP) provides ICE-wide direction and support in the biometric and biographic identification, arrest, and removal of priority aliens who are incarcerated within federal, state, and local prisons and jails, as well as at-large criminal aliens who have circumvented identification. The identification and processing of incarcerated criminal aliens, before release from jails and prisons, decreases or eliminates their time spent in ICE custody and reduces the overall cost to the federal government.
- Docket Management – Docket Management involves conducting legal research and records checks to support the apprehension, detention, and deportation of detainees. It includes preparing documentation for Warrants of Arrest and Warrants of Deportation for detainees in ICE custody. It also involves reviewing and evaluating case histories in order to properly adjudicate requests for discretionary relief. Additionally, employees will establish and maintain liaison with other federal, state, and local law enforcement officials in order to monitor the upcoming release of aliens from criminal detention facilities.
- FOW – A Field Operations Worksheet (FOW) is required for an operation involving an alien that is not in ICE custody, such as field surveillance or an arrest, and must be signed prior to the operation’s occurrence. A FOW allows the officer to document an individual’s residence, vehicles, and work location, and allows the officer to maintain notes during surveillance or based on other information garnered during their investigation of an individual. Processing a FOW involves physically checking the address location to ensure validity.

B. Relevant Regulations

The federal regulations most pertinent to the OPR investigation are as follows:

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) provides, “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 the 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. § 550.163(b) provides that an “employee receiving premium pay on an annual basis under § 550.151 may not receive premium pay for irregular or occasional overtime work under any other section of this subpart. An agency shall pay the employee in accordance with other sections of this subpart for regular overtime work, and work at night, on Sundays, and on holidays.”

C. Relevant Policies and Guidance

As with some other DHS components, ICE continues to reference guidance and policies from prior agencies who administered AUO (i.e., the Immigration and Naturalization Service (INS) and/or the U.S. Customs Service (USCS)).

The INS Administrative Manual (AM), Section 1.3.103 contains the following information regarding AUO:

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 INS AM also provides examples of incorrect applications of AUO. Examples of potential misuses include:

- (1) Payment of AUO 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;

The ICE Office of Human Capital has posted criteria for the applicability of AUO on the ICE employee website, which in part states:

The requirement that an employee must be required to perform “substantial amounts of irregular or occasional overtime work” involves the following elements:

- A substantial amount of irregular or occasional overtime work means an average of at least 3 hours a week of that overtime work;
- The irregular or occasional overtime work is a continual requirement, generally averaging more than once a week; and
- There must be a definite basis for anticipating that the irregular or occasional overtime work will continue over an appropriate period with a duration and frequency sufficient to meet the requirements of this Section.

The requirement that an employee is generally “responsible for recognizing, without supervision, circumstances which require him or her to remain on duty” means that:

- The responsibility for an employee to remain on duty when required by circumstances must be a definite, official, and special requirement of his or her position;
- The employee must remain on duty not merely because it is desirable but because of compelling reasons inherently related to continuance of his or her duties, and of such a nature that failure to carry on would constitute negligence; and
- 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.

The words “require the employee to remain on duty” mean that:

- The employee is required to continue on duty in continuation of a full daily tour of duty or, that after the end of the regular workday, the employee resumes duty in accordance with a prearranged plan or an awaited event (performance of only callback overtime work does not meet this requirement); and
- The employee has no choice as to when or where he or she may perform the work when he or she remains on duty in continuation of a full daily tour of duty. (This differs from a situation in which an employee has the option of taking work home or doing it at the office; or doing it in continuation of his or her regular hours of duty or later in the evening. It also differs from a situation in which an employee has such latitude in working hours, as when in a travel status, that he or she may decide to begin work later in the morning and continue working later at night to better accomplish a given objective.)

In June 2007, the ICE ERO Assistant Director for Management sent a memorandum to all Field Office Directors requesting review of the general statutory and regulatory requirements pertaining to AUO to ensure its proper administration via supervisors.

Additionally, the Office of Personnel Management (OPM) has issued guidance regarding AUO.³ The OPM Fact Sheet entitled “Guidance on Applying FLSA Overtime Provisions to Law Enforcement Employees Receiving Administratively Uncontrollable Overtime Pay,” found at <http://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/guidance-on-applying-flsa-overtime-provisions-to-law-enforcement-employees-receiving-administratively-uncontrollable-overtime-pay/> (last visited Dec. 20, 2013), provides,

While an employee must have a substantial amount of irregular overtime with certain characteristics to qualify for AUO pay, once AUO pay becomes applicable it becomes the sole compensation under title 5 for ALL irregular overtime or occasional hours. (See 5 CFR 550.163(b). Note also that all irregular or occasional overtime hours are used in determining the AUO percentage under 5 CFR 550.154(a).) The type of hours needed to qualify for AUO pay (i.e., qualifying conditions in 5 CFR 550.153) are narrower than the type of hours compensated by AUO pay.

Additionally, the OPM Compensation Policy Memorandum 97-5A states, “[W]hile the conditions for AUO pay... ‘generally’ require that an employee’s hours of duty may not be subject to administrative control, that does not mean that overtime work must be compensated on an hourly basis as if it were regularly scheduled overtime work when circumstances occasionally require supervisors or managers to direct overtime work for short periods of time.” OPM Compensation Policy Memorandum 97-5A, *Guidance on Administratively Uncontrollable Overtime (AUO) Pay* § III (June 13, 1997).

D. Analysis of AUO Documentation for ERO Chattanooga Employees

OPR reviewed WebTA records and the AUO forms for the five employees covering 6 months beginning January 12, 2014, through June 28, 2014 (a total of 12 pay periods). The analysis revealed the following:

- OPR found that during the 6-month review period, 58 percent of the AUO justifications reviewed were insufficient and 42 percent were sufficient.
- Sufficient descriptions include: “after hours juvenile placement A#,” “FOW surveillance,” “served arrest warrant with Agent Martin,” “assist with HSI with meth delivery surveillance,” “Interview and detain locally incarcerated subjects,” “Alien transport,” “Alien Smuggling Load,” and “visit County Jails.”

³ The OPM guidance was not specifically referenced during OPR’s underlying investigation. However, ICE is including it within this report given its relevance to the subject matter.

- Insufficient descriptions include: “CAP,” “record checks,” “Docket Management,” “sign & review Afiles/NFTS/TECS entry/await transport,” “Alien Processing,” “processing duties,” “email from EOPF,” “prepared for travel to FITP,” “prepared monthly vehicle report, T and A, and Travel Voucher for FL,” “TB shot, hearing test,” “Range Prep,” and “ammo vault coordination.”
- Justifications that clearly met the criteria were considered “sufficient” by OPR. Justifications that included duties considered administrative, regular, or that lacked adequate detail were considered “insufficient” by OPR. If there were multiple justifications, so long as one justification was considered “sufficient,” OPR deemed the entire justification to be “sufficient.” As a result, OPR found that a majority of the AUO justifications reviewed were insufficient. A number of justifications referencing operational activities, such as alien processing, docket management, CAP, FOW, etc., were determined to be insufficient by OPR because the justifications were vague and lacked adequate detail. These duties could possibly qualify for AUO; however, more information was needed to be certain. Therefore, the justifications were included in the insufficient category.
- OPR found that the AUO justifications provided by some ERO Chattanooga employees were often repetitive in nature. For example, one employee used the phrase “CAP, Record Checks, Alien Processing...” and a variation of other duties 77 times out of 92 instances (84 percent) of total AUO claimed by the employee. Another employee used the justification “Sign & review A-files/NFTS/TECS entry/await transport, Review of A-file...” 54 times out of 91 instances (59 percent) of total AUO claimed.
- The average AUO hours worked for each of the ERO Chattanooga employees was over 146.55 hours for the 6 months examined. The least amount of AUO worked by any individual subject during this period was 73.50 hours, while the greatest was 191.25 hours. The employee who earned the least amount stopped claiming AUO half-way through the review period.
- OPR found that four of the five employees were certified at the maximum 25 percent AUO allowance throughout the entire review period.
- OPR found that claims of two hours occurred most frequently (119 times out of 390 total claims) on the AUO forms of the five employees in the ERO Chattanooga sub-office.
- OPR identified seven instances where the AUO hours claimed in WebTA did not match what was claimed and approved on the AUO forms. This resulted in a total of 4.25 more hours being claimed in WebTA, compared to what was claimed on the AUO form.

E. Information Obtained from Employee Interviews

OPR conducted interviews of all employees assigned to ERO Chattanooga who receive AUO, including the SDDO and the DFOD responsible for the ERO Chattanooga office. During the

interviews, all of the employees stated that they had never received formal training about AUO, with the exception of the SDDO who stated that he completed a PowerPoint block of training in Virtual University in July 2014 entitled, “Premium Pay Administration, Focusing Primarily on Administratively Uncontrollable Overtime.”

Interviews of the ERO Chattanooga employees revealed that their standard duty hours began at 7:00 a.m. and concluded at 3:00 p.m. All employees stated that their understanding of AUO was that it was any unscheduled work that they completed after 3:00 p.m. All employees stated that their understanding of AUO was derived from other employees and accepted past practices.

Interviews of the ERO Chattanooga employees revealed consistent patterns in the documentation and justifications that employees used to document AUO hours. The ERO Chattanooga employees stated that they worked AUO to accomplish tasks that could not be completed during the course of the normal workday. Specifically, the ERO Chattanooga employees stated that these tasks are mission critical as they involve the movement of ICE detainees through the system. Examples of these tasks provided by the employees included the transportation of ICE detainees, the processing of detainees (to include fingerprinting, photographs, document completion, document review, review of Alien Files (A-files), and emails related to the detaining and/or prosecution of criminal aliens). Many of the aforementioned examples are encompassed within the term CAP or Criminal Alien Program—terms frequently utilized by many of the ERO Chattanooga employees to justify their AUO hours. During interviews, several employees that used “CAP,” “record checks,” and “alien processing” as justifications for AUO explained that these duties included tasks related to the processing of an alien, such as: surveillance of addresses associated with a criminal alien; photographs and fingerprints of an arrested criminal alien; completing forms associated with the apprehension of a criminal alien, such as a Fugitive Operations Worksheet (FOW); and completion of associated bond and detainer documents.

During the interviews, ERO Chattanooga employees stated that they do not claim AUO for hours that they do not work. The ERO Chattanooga employees stated that they have never received any formal training describing the types of duties that qualify for AUO (with the exception of the SDDO, as noted above). The ERO Chattanooga employees stated that they have relied on other employees and accepted past practices for their understanding of AUO. The interviews revealed that many of the justifications claimed by ERO Chattanooga employees may fail to meet the regulatory criteria for AUO. However, the employees explained that their work during the regular work day—as well as some of the activities conducted after regular hours and subsequently documented as AUO—are time sensitive, inter-related, and ultimately critical to the movement of ICE detainees through the system. One example provided by employees was the review of A-files for accuracy by an IEA, which may not have been accomplished during the regular work day as a result of other mission critical activities, but still needs to be completed and forwarded to the SDDO by the end of each day. The SDDO must then review the files, sign them, and have them forwarded to the appropriate location to ensure the timely movement and transfer of ICE detainees.

Additionally, SDDO ██████ stated that ERO employees have a very limited timeframe (48 hours) to determine whether the suspected alien is legally present in the United States, once notified.

Within the 48-hour timeframe, the employees are required to travel to the facility to interview the individual, take biometrics, travel back to the office, conduct records checks on the individual and, if determined to be illegally present in the United States, prepare the proper paperwork, have this paperwork approved immediately by the supervisor and authorized by a judge (if applicable), and travel back to the jail to serve the individual with the paperwork. Although some of the duties required to fulfill these responsibilities were administrative in nature, if employees failed to properly or adequately complete their responsibilities, an individual could be released from custody, which would constitute negligence on their part.

SDDO [REDACTED] further stated that he was responsible for reviewing all of the AUO sheets for his four employees and with the exception of one report from an employee, has had no reason to question the validity of his employees' claims of AUO. The SDDO referenced one instance in which an employee reported to him that another employee (DO [REDACTED]) was not working the AUO hours claimed. The SDDO stated that he asked the employee making the allegation whether he had any proof, to which the employee stated no. The SDDO stated that he encouraged the employee to report the allegation to the ICE Joint Intake Center.

DFOD [REDACTED] stated that he is not aware of any of the ERO Chattanooga employees being ordered or otherwise directed to work AUO or specific amounts of AUO by the SDDO or anyone else. The DFOD further stated that AUO is based on the employees' individual work load for a particular work day. The DFOD provided examples of work that could qualify for AUO: arrests, detainee processing, fugitive operations work, and work involving juvenile detainees. The DFOD stated that when detainees depart from the ERO Chattanooga facility, additional administrative work involving the detainees file must still be completed. According to the DFOD, this type of work is mission critical due to deadlines and future arriving detainees and the attention that they will require.

The whistleblower alleged that ERO Chattanooga employees claim AUO but fail to work any additional hours. Interviews conducted by OPR did not substantiate this allegation as all of the employees asserted that they had claimed AUO for the actual hours worked. As documented above, the interviews indicated that mission critical work of ERO was being completed both during the regular work day and after regular hours.

The whistleblower also alleged that DO [REDACTED] falsified his AUO by claiming to work 1.5 to 2.5 hours of AUO daily while rarely working more than an 8-hour shift. Interviews of ERO Chattanooga employees conducted by OPR did establish that DO [REDACTED], as well as all other employees of the ERO Chattanooga office, claimed duties that may not qualify as AUO under the regulatory definition. Additionally, two employees alleged that DO [REDACTED] was not working the AUO he was claiming; however, OPR was unable to substantiate the allegation that DO [REDACTED] was not working the hours claimed.

During his interview with OPR, DO [REDACTED] stated the following:

- DO [REDACTED]'s understanding of AUO until early 2014 was that basically anything after his eight-hour workday was considered AUO.

- DO ██████ acknowledged that based on guidance received in 2014, some of the work that he claimed as AUO prior to 2014 is not appropriate for AUO (i.e., docket work that can be performed the next day).
- DO ██████ stated that AUO justifications provided on his AUO form described the work done during his regular shift and not necessarily the work performed during the actual AUO hours.
- DO ██████ had on occasion performed AUO from his residence.
- DO ██████ stated that he was authorized to take FOW folders home, as were all other officers.
- DO ██████ had the capability to access and perform record checks via his government-issued iPhone.
- DO ██████ no longer works AUO from his residence based on his perception that there was an issue as a result of the DHS OIG interviews regarding the subject.
- DO ██████ stated that prior to early 2014, he did not fill out the AUO worksheet on a daily basis and instead usually filled it out at the end of the two-week pay period.

The whistleblower further alleged that SDDO ██████ continued to approve DO Denniston's AUO after being advised by other employees that DO ██████ falsified his AUO by rarely working more than an eight hour shift. Interviews conducted by OPR revealed that SDDO ██████ continued to approve DO ██████'s AUO after being advised by one employee that DO Denniston was not working the hours of AUO that he claimed. The investigation did not substantiate the allegation that DO ██████ was not working the hours claimed. SDDO ██████ stated that he continued to approve DO ██████'s AUO subsequent to receiving the above referenced allegation because the employee making the allegation provided no substantial proof that DO ██████ was falsifying his AUO. DO ██████ denied falsifying his AUO to OPR.

Additionally, SDDO ██████ stated that ERO Chattanooga employees are authorized to take FOW temporary files/work folders home and that he is not aware of an ERO policy prohibiting the removal of FOW files from the office. As background, a FOW is used to allow an IEA or DO to update and maintain information on individuals that are not in ICE custody. A FOW allows the officer to document an individual's residence, vehicles, and work location, and allows the officer to maintain notes during surveillance or based on other information garnered during their investigation of an individual. The FOW contains copies of documents that are contained within an individual's A-file, which cannot be removed from the office.

SDDO ██████ indicated that he believes that the purpose of the AUO form was to document AUO hours worked. SDDO ██████ stated that he was unaware that DO ██████ was occasionally describing the work done during his regular shift on his AUO form and not necessarily the work performed during his AUO hours. Additionally, SDDO ██████ was unaware that DO ██████ was working AUO from home other than while handling juvenile or regular duty calls, which could have been worked from home. SDDO ██████ believes that DO ██████'s AUO claim for "completing an official passport" is justified since it was related to the travel associated with moving illegal aliens.

The whistleblower alleged that SDDO [REDACTED] falsified his AUO by claiming to work two to three hours of AUO daily, but fails to work any additional hours or fails to perform duties that qualify for AUO. OPR asked SDDO [REDACTED] to elaborate regarding the specific duties conducted for his commonly-used justification of “sign & review A-files/NFTS/TECS entry/await transport, Review of A-file.” The SDDO stated that he is required to review and approve every form in an A-file to ensure accuracy in relation to legal sufficiency and bond information. He stated that due to associated time sensitivities, he at times needed to complete these reviews during AUO hours. SDDO [REDACTED] stated that the acronym NFTS stands for the National Files Transfer System and that he is typically the individual who is required to update and/or transfer the A-files. The SDDO stated that he is also responsible for approving all TECS⁴ documents entered by the employees.

During his interview with OPR, SDDO [REDACTED] stated that his understanding of AUO is that if any work is associated with the movement of illegal aliens through the system, it can be authorized as AUO. SDDO [REDACTED] asserted that he has never falsified his time and attendance by claiming to work two to three hours of AUO daily and failing to work any additional hours or failing to perform the duties that qualify for AUO.

The whistleblower also alleged that ERO Chattanooga employees are instructed to work 9.5 to 10 hour days and to claim AUO rather than “45 Act⁵” overtime pay. OPR was unable to substantiate this allegation, as interviews of the ERO Chattanooga employees revealed that no employee, nor the SDDO, were instructed to work 9.5 to 10 hour days and to claim AUO. Interviews revealed that employees lacked knowledge about when 45 Act overtime was appropriate and indicated that it was rarely used. However, employees did not indicate that they were ordered to work 9.5 to 10 hours a day and claim AUO.

IV. Listing of any Violation or Apparent Violation of Law, Rule, or Regulation

The OPR investigation substantiated the following allegation made by the whistleblower:

- ERO Chattanooga employees claim AUO but fail to perform duties that qualify for AUO

The OPR investigation revealed that ERO Chattanooga employees did claim AUO hours for work that may not meet the regulatory definition of AUO. However, interviews of these employees further revealed that in an effort to facilitate the primary mission of ERO (the enforcement and removal of individuals illegally present in the United States), they spent their regular working hours (7:00 a.m. to 3:00 p.m.) completing tasks specifically associated with this mission. As a result, the administrative requirements of the ERO mission, which may not meet the regulatory criteria for AUO, were completed after the conclusion of the regular work day and claimed as AUO. The interviews further revealed that some time-sensitive administrative duties, while possibly failing to meet the regulatory requirements of AUO, are inter-related and inter-

⁴ TECS is an official government computerized information system permitting message transmittal between DHS law enforcement offices and other national, state, and local law enforcement agencies.

⁵ Overtime under the Federal Employees Pay Act (FEPA) of 1945 is commonly referred to as “45 Act” overtime.

dependent on the mission critical activities being conducted primarily during the regular work day.

In addition, the investigation demonstrated that ICE has not provided ERO Chattanooga employees with formal AUO training, which has resulted in employees following accepted past practices regarding AUO. The OPR investigation revealed that minimal updated agency guidance and lack of training regarding the use of AUO contributed to ERO Chattanooga employees providing justifications, in most circumstances, that were either vague in nature or that did not qualify for AUO premium pay. Although some of the “insufficient” justifications listed on the AUO forms may have been administratively uncontrollable given the situation, OPR was not able to make a determination based solely on the justifications provided, because they were too vague.

The OPR investigation failed to substantiate the following allegation made by the whistleblower:

- ERO employees claim AUO but fail to work any additional hours.

During the interviews, two employees alleged that DO ██████ submitted AUO for hours that he does not work; however, OPR was unable to substantiate this allegation due to a lack of evidence. Additionally, OPR did not substantiate the allegation that SDDO ██████ falsified his AUO by claiming to work two to three hours of AUO daily, but failing to work any additional hours. During his interview, SDDO ██████ denied claiming AUO for work that he does not perform. However, the interviews revealed ambiguities and misunderstandings between management and employees regarding the scope of AUO work that can be performed at home, as well as how to justify AUO on the AUO form.

V. Description of Action Taken or Planned as a Result of Investigation

ICE is committed to administering overtime pay in a manner that is consistent with law, regulation, and policy. As initially provided for in its January 27, 2014, report to the OSC, ICE has initiated a variety of measures to ensure that AUO is properly administered across the agency. Specifically, ICE has issued guidance and training that explain proper AUO practices, is finalizing an updated form for recording AUO hours, and has conducted and is finalizing a thorough review of all positions currently authorized for AUO to confirm that they meet the regulatory criteria. Additionally, the agency will continue to promptly investigate all claims of AUO abuse and will take appropriate remedial action.

A. Guidance Memoranda on Proper AUO Administration

On July 21 and 22, 2014, ICE issued two guidance memoranda—one for all ICE supervisors and one for all ICE employees receiving AUO. The July 21, 2014, guidance memorandum for supervisors explains the supervisor’s role and responsibilities with respect to proper AUO administration, and reminds them that they must comply with and understand the laws governing AUO. The memorandum instructs supervisors to determine whether their subordinate employees’ AUO justifications are consistent with AUO law and policy, and to work with the

Office of Human Capital to decertify those individuals whose duties are not consistent with the regulatory criteria for AUO. The guidance memorandum for supervisors also includes an Acknowledgment of Receipt, which supervisors were required to sign and return to the Office of Human Capital.

The July 22, 2014, guidance memorandum for all employees receiving AUO reminded employees of their obligation to submit accurate time and attendance records, and to be especially attentive when claiming AUO. It includes a description of the types of “administratively uncontrollable” duties that generally warrant irregular and occasional overtime justifying AUO. The guidance also differentiated those duties that can be controlled administratively. Specifically, the guidance explains that where a duty can be readily scheduled in advance of the administrative workweek or performed during an employee’s next tour of duty, it does not warrant AUO.

B. Premium Pay Guide

On July 22, 2014, the ICE Office of Human Capital issued a detailed premium pay guide explaining the statutory and regulatory requirements governing the different forms of premium pay, as well as examples and scenarios to provide context. The guide contains a detailed section on AUO that explains the criteria for certifying an employee for AUO, the computation of AUO, and the criteria for discontinuing AUO. The guide also includes an explanation of the various other forms of premium pay that may be available to ICE employees when relevant criteria are met, to include the Fair Labor Standards Act, Federal Employees Pay Act, and Law Enforcement Availability Pay. Additionally, the premium pay guide includes appendices setting forth the responsibilities of management and employees for requesting and/or approving premium pay, including specific guidance regarding the proper use and documentation of AUO.

C. Premium Pay Training

ICE’s Office of Human Capital has developed premium pay training for supervisors and employees, based on the premium pay guide. The training provides detailed guidance on the different forms of premium pay, to include AUO. The first round of training was given to senior headquarters and field office management on July 15, 2014, both in person and through Sonexis. Additionally, on March 27, 2014, AUO training slides for managers were made available on Virtual University, ICE’s electronic database for training opportunities. This online training course is now an annual requirement for managers of employees certified for AUO. As of October 8, 2014, there were 2,444 employees who had completed the training. Furthermore, the Office of Human Capital is in the process of contracting the service of a federal pay subject matter expert to travel to field offices across the country to provide guidance to employees on premium pay, to include AUO. This training is expected to take place in fiscal year 2015. The slides from this training will be made available to all employees on Virtual University and will be supplemented by additional web-based training, which will cover portions of the premium pay guide that were not addressed in the in-person training program.

The Office of Human Capital has solicited questions and will be issuing a set of answers to Frequently Asked Questions regarding premium pay, to include AUO. The set of answers will be disseminated and posted for employees, as well as supplemented by teleconferences with managers to resolve any additional concerns.

D. New AUO Form with Duty Codes and Justifications

To ensure the proper administration of AUO, the agency has developed and is finalizing an updated form for recording AUO that includes a list of duty codes from which to select when recording AUO hours. The duty codes correspond to a detailed justification document, which explains those duties that generally warrant AUO and provides employees with detailed instructions for properly justifying AUO on their timesheets. The new form also requires employees to explain the situation justifying the irregular and occasional overtime, such as unforeseen delays, emergency circumstances, or supervisory orders. Once issued, the agency plans to conduct training on proper use of the form.

E. Position-by-Position Review

ICE's Office of Human Capital is finalizing a position-by-position review of each position that is currently authorized for AUO and plans to implement its findings early in fiscal year 2015. The position review encompasses approximately 6000 employees in 64 positions ICE-wide. The review was designed to ensure compliance with the statutory, regulatory, and policy requirements for AUO. This review is not intended to serve as a definitive decision point on whether any individual employee(s) should be certified for AUO premium pay, but rather will address whether specific positions should be authorized for AUO coverage.

F. Third Party Audits

In an effort to monitor ICE's ongoing efforts to promote and maintain a culture of compliance with regard to the use of AUO, ICE intends to expand its existing review of AUO practices in its OMB Circular A-123 audit. In order for the audit to appropriately evaluate the success of the other corrective actions put in place, this expanded audit will likely begin in fiscal year 2016.

G. Table of Offenses and Penalties

ICE's Office of Human Capital is revising the Table of Offenses and Penalties to include an offense relating to violation of law, rules, and policies governing AUO. The Office of Human Capital plans to provide the updated Table for ICE-wide review during the first quarter of FY15.