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U.S. Senate Committee on Homeland Security and Governmental Affairs

“Border Security: Examining the Implications of S. 1691, the Border Patrol Pay Reform Act of 2013”

June 9, 2014, 3:30 P.M.

Chairman Carper, Ranking Member Coburn, and members of the Committee:

Thank you for inviting me to testify today on behalf of the U.S. Office of Special Counsel (OSC). I am pleased to have the opportunity to discuss OSC’s cases and our ongoing work to address widespread misuse of overtime payments at the Department of Homeland Security (DHS). We appreciate the Committee’s interest in taking a closer look at this problem.

As you know, Special Counsel Carolyn Lerner testified before Chairman Tester’s subcommittee in January. My testimony today will update the Committee on OSC’s current DHS overtime cases.

Congress has tasked OSC with providing an important oversight role in reviewing government investigations of potential misconduct. We provide a safe channel for federal employees to disclose allegations of waste, fraud, abuse, illegality, and/or threats to public health or safety. We receive approximately 1,200 whistleblower disclosures annually, and refer a relatively small number of these disclosures to the agency involved. After an OSC referral, the agency is required to investigate and submit a written report to OSC. OSC analyzes the agency’s report, receives comments from the whistleblower, and transmits our findings and recommendations to the President and Congress. Our efforts to support whistleblowers often address the identified problem and lead to reforms that prevent wasteful, inefficient, or unsafe practices from recurring.

OSC’s October 31, 2013, communication to Congress and the President prompted significant discussion and debate on the legitimacy and legality of certain overtime payments to DHS employees, particularly at Customs and Border Protection (CBP). Encouraging this type of discussion, with the goal of rooting out waste and achieving meaningful reform, is at the heart of OSC’s mission. As stated in OSC’s October 31 letter, “[A]buse of overtime pay is a violation of the public trust and a gross waste of scarce government funds. It is incumbent upon DHS to take effective steps to curb the abuse. It is up to the administration and Congress to develop a revised pay system, if warranted, that ensures fair compensation for employees who are legitimately working overtime.”

While OSC does not have a position on the Border Patrol Pay Reform Act of 2013, our update today on pending cases will provide context for the Committee as it considers the legislation. I will also highlight several issues we believe are relevant for your consideration.

Background

In September 2012, OSC received a disclosure from a CBP employee who alleged that DHS employees working in the CBP Situation Room in Washington, D.C., regularly abuse Administratively Uncontrollable Overtime (AUO). According to the employee, routine overtime payments to Situation Room employees functionally extend their daily shift by two hours, nearly every day, increasing pay by 25%, and this practice is a violation of the regulations governing AUO.

AUO may only be used when an employee's hours cannot be scheduled in advance due to a substantial amount of irregular work. For example, AUO is appropriate when an employee's work requires responding to the behavior of suspected criminals and it would "constitute negligence" for the employee to leave the job unfinished. AUO may only be used for irregular and unpredictable work beyond an employee's normal shift.

The Situation Room employees were not receiving AUO as the result of any unpredictable or compelling law enforcement need. Rather, most claimed the overtime for administrative tasks that do not qualify for AUO. And, according to the whistleblower, many of these employees spent the extra two hours not working at all; they were surfing the internet, watching sports and entertainment channels, or taking care of personal matters.

We referred these allegations to then-DHS Secretary Janet Napolitano for investigation. In April 2013, we received the agency's report, prepared by the CBP Office of Internal Affairs (OIA), which substantiated the allegations. The report concluded that previous warnings regarding proper use of AUO were disregarded, and it was "evident that the regular and consistent addition of two hours of AUO to the regularly scheduled eight-hour day implies hours of duty are controllable by management."

Recent Whistleblower Cases, Reports, and Issues for Congressional Consideration

OSC has since received nearly identical disclosures from whistleblowers throughout DHS. According to estimates provided by the whistleblowers, the total cost of AUO misuse at the locations they identified exceeds \$37 million annually.

A detailed description of four of the more recent whistleblower cases is provided below. We have highlighted significant issues from our ongoing work in these cases for your consideration.

1. San Ysidro, CA, Asset Forfeiture Office, CBP

Allegations

Two whistleblowers at the CBP Asset Forfeiture Office (AFO) in San Ysidro, CA, alleged that Border Patrol Agents (BPAs) routinely claim two hours of AUO each day, but fail to perform duties that qualify for AUO payments. The whistleblowers further alleged that employees work on routine administrative matters during the claimed AUO periods or are not even present for the AUO time they claim.

Report

OSC referred the case to DHS, and received a report on January 23, 2014. The investigation, conducted by CBP's Office of Internal Affairs, confirmed that "Overtime work at the San Diego Sector AFO was improperly paid as AUO." Specifically, the report states, "A majority of the time, San Diego Sector AFO BPAs and [Supervisory Border Patrol Agents] claimed two hours of daily AUO work." Additionally, "The AUO work hours documented and claimed were not irregular or occasional and basically were just an extension of their regularly scheduled eight-hour shift, i.e., employees just continued performing the same work duties as they had been performing during the regular shift hours."

Additional Issues for Congressional Consideration

In addition to confirming AUO misuse throughout the AFO, the report illustrates how broadly AUO misuse extends within CBP. For example, the report confirms that BPAs in the AFO paralegal section worked a scheduled 10-hour shift and claimed 2 hours of AUO daily. The report notes that BPAs in the paralegal section have the same duties as non-BPAs in the section. The non-BPAs are not eligible for AUO and do not work 10-hour shifts. The report confirms, "[T]he duties in the paralegal section could have been accomplished the next day, and it was not necessary to extend the work day an additional two hours, which is what happened. The additional two hours of AUO worked and claimed each day should not have been paid as AUO."

Congress may want to consider whether and to what extent pay reform should cover BPAs assigned to paralegal or other similar administrative duties.

2. Glynco, GA, Office of Training and Development, CBP

Allegations

A whistleblower at the CBP Office of Training and Development (OTD) in Glynco, GA, alleged that agents routinely abuse AUO by claiming two hours of AUO daily while failing to perform any qualifying duties. According to the whistleblower, CBP pays out nearly \$5 million annually to employees in OTD, including to 50 managers at Headquarters.

Report

OSC referred the case to DHS, and received a report on January 23, 2014. OIA conducted the investigation for CBP and concluded that "the payment of AUO to OTD employees is inconsistent with the relevant regulations and policies." The report adds, "[I]t 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," and improperly claimed as AUO.

Additional Issues for Congressional Consideration

The OIA report on OTD also confirms that BPAs routinely claim AUO for performing the same duties as Customs and Border Protection Officers (CBPOs). CBPOs are not eligible for AUO and therefore do not receive AUO for completing the same tasks as the agents. For example,

within OTD, the position of instructor is occupied by both BPAs and CBPOs. The BPA instructors who teach classes claim they frequently do not have enough time to complete all of their duties within an 8-hour day, and therefore claim AUO for the additional hours worked. In contrast, CBPO instructors who teach classes state that they generally have enough time to complete their other duties. When it is not possible to complete all additional instructor duties within an 8-hour day, CBPO instructors generally complete these types of duties without compensation because AUO is not available to them.

Congress may want to consider whether and to what extent pay reform should cover BPAs assigned to positions with the same duties as CBPOs or other employees who are not currently eligible for AUO.

3. Houston, TX, Enforcement and Removal Operations, Immigration and Customs Enforcement

Allegations

A whistleblower at the Immigration and Customs Enforcement (ICE) facility in Houston, TX, alleged that ICE supervisors authorize and abet the improper use of AUO. The whistleblower disclosed that employees are directed to stay beyond their normal duty hours to complete routine administrative tasks that are not time-sensitive or investigative in nature. These employees are instructed to certify the time as AUO.

Report

OSC referred the case to DHS, and received an initial report on September 11, 2013, and a supplemental report on January 27, 2014. The subsequent ICE Office of Professional Responsibility (OPR) investigation, after conducting a random sampling of timesheets for 28 employees, determined that 54% of the AUO justifications were noncompliant with AUO rules, and another 33% were found to be “undetermined,” because they were vague and it was unclear whether the justifications supported the AUO claim. OPR further noted that the lack of ICE policy and guidance on AUO contributed, at least in part, to employees providing justifications for overtime that are inconsistent with the purpose of AUO.

Additional Issues for Congressional Consideration

While misuse of AUO is most widespread within CBP, substantiated misuse in other DHS components may indicate a need for congressional action if DHS reforms are not sufficient to correct these identified problems. OSC currently has five pending cases alleging misuse of AUO at ICE and one pending case alleging AUO misuse at U.S. Citizenship and Immigration Services (USCIS).

4. Laredo, TX, Laredo North Station, CBP

Allegations

A whistleblower at the CBP facility in Laredo, TX, alleged that BPAs at the Laredo North Station improperly claim AUO for routine shift-change activities. The whistleblower also alleged that supervisors told agents they could exercise during the last half-hour of the two-hour period claimed as AUO.

Report

OSC referred the case to DHS and received an initial report on November 26, 2012, and a supplemental report on January 23, 2014. The supplemental report and investigation, conducted by CBP-OIA, confirmed that “BPAs are regularly remaining at their duty stations two hours beyond the end of their shift in order to earn AUO pay.” The report concludes, “The evidence supports the allegation that BPAs are not performing duties that justify the receipt of AUO pay.” CPB noted, “[I]t is clear that AUO is being inadequately documented and/or utilized improperly for work that is not compensable under AUO.”

The report did not substantiate the allegation that supervisors told BPAs that they could exercise during the last half-hour of the two-hour period claimed as AUO. According to the report, there is a current program that allows BPAs to exercise on duty, but BPAs all know that AUO cannot be claimed for working out.

Additional Issues for Congressional Consideration

The investigation substantiated the allegation that BPAs are not performing duties that justify the receipt of AUO pay, but noted that the majority of the duties performed by agents claiming AUO are routine post-shift activities. The agents interviewed indicate that the work cannot be completed in an eight-hour shift. The report contains an extensive discussion of the cost and benefits of continued misuse of AUO versus the alternative of transitioning to four shifts per day without AUO. According to senior BPA managers, a deliberate choice was made to continue with three, ten-hour shifts per day utilizing AUO to facilitate the shift changes. The managers insist that employing three, ten-hour shifts is a more cost-effective approach to securing the border, even if AUO may not properly be used for routine activities.

Summary of all OSC Whistleblower Cases Involving AUO

Since 2007, OSC has referred allegations of AUO abuse at 10 CBP locations. To date, CBP/OIA has substantiated the allegations at 5 of these locations. This includes a 2007 case in Blaine, WA, which was discussed at length in OSC’s prior testimony. The other substantiated cases include those discussed above at the Commissioner’s Situation Room in Washington, D.C.; San Ysidro, CA; Glynco, GA (OTD); and Laredo, TX. The DHS Office of Inspector General is currently investigating 5 other cases, including allegations of AUO misuse at the Office of Internal Affairs; at the Office of Border Patrol Headquarters; in El Centro, CA; at the National Targeting Centers; and in El Paso, TX. Summaries of these cases were provided in OSC’s January 2014 testimony. The current due date for the OIG investigations is June 13, 2014.

AUO abuse allegations are not limited to CBP. OSC referred allegations of AUO abuse at five ICE locations and one USCIS location. To date, one allegation of AUO abuse has been

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substantiated at an ICE office in Houston, Texas (discussed above). ICE OPR is currently investigating four additional allegations of AUO abuse at facilities in Chattanooga, TN; Salem, VA; Bakersfield, CA; and Columbus, OH. DHS OIG has nearly completed an investigation of AUO abuse at the USCIS Office of Security and Integrity in Washington, D.C. The reports in these cases are currently due in June and July 2014.

I thank you for the opportunity to provide this update and summary of OSC's work, and would be pleased to answer your questions.