

(b)(6)

From: Perrini, Jo Ann
Sent: Thursday, April 11, 2013 7:37 AM
To: Draper, Vicki Lynn; Smalls, Alethea
Cc: Westray, Cindy
Subject: FW: Fwd: AUO

FYI

Jo Ann Perrini
Manager, Compensation and Benefits
Human Capital Policy and Programs
Office of the Chief Human Capital Officer

(b)(6)

From: Manlove, Marian
Sent: Wednesday, April 10, 2013 8:57 PM
To: Emerson, Catherine; Stewart, Sharon; Perrini, Jo Ann; Livoti, Carmen
Subject: Fw: Fwd: AUO

FYI, you may already have this. OPM denial of cbp request.

From: Curry, Tim. (b)(6)
Sent: Wednesday, April 10, 2013 08:09 PM Eastern Standard Time
To: Manlove, Marian
Subject: Fwd: AUO

From: Kaplan, Elaine
Sent: Wednesday, April 10, 2013 5:46 PM
To: 'Sandweg, John'
Cc: Maher, Joseph; McGowan, Sharon
Subject: RE: AUO

You have asked whether OPM would entertain a request from CBP that it approve lower AUO rates for Border Patrol Agents, based on the budgetary impact of the sequestration on CBP. It is our understanding that CBP is concerned that, without a reduction in AUO rates, it may need to furlough employees or cut back overtime hours, resulting in a significant adverse impact on its ability to perform its core mission.

I hope it goes without saying that we are very sympathetic to your dilemma. Unfortunately, however, we have concluded that OPM lacks the statutory authority to reduce AUO rates based on budgetary concerns, no matter how pressing. Further, while our regulation at 5 CFR 550.154(b) permits us to authorize deviations from the rates set forth at 5 CFR 550.154(a), in "unusual conditions" where the prescribed rates would be "unsuitable," the meaning and breadth of those terms must be interpreted in light of the statute, as well as the rest of paragraph (b). In

that light, the authority OPM has reserved to itself under paragraph (b) is inapplicable in these circumstances.

The AUO statute provides, in relevant part, that

“[a]n employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled overtime duty . . . shall receive premium pay for this duty on an annual basis . . . Premium pay under this paragraph is an appropriate percentage, not less than 10 percent nor more than 25 percent, of the rate of basic pay for the position, *as determined by taking into consideration the frequency and duration of irregular, unscheduled overtime duty required in the position*”. 5 USC 5545(c)(2)(emphasis supplied).

Under the plain language of this provision, the percentage to be used for setting premium pay is determined on the basis of the explicitly specified factors: the frequency and duration of the irregular overtime duty that the position requires. We do not believe that this language can be read to allow other completely unrelated considerations—such as budget—to affect the rate of premium pay. Indeed, it would be rather extraordinary for Congress to give OPM the discretion to cut pay rates on this basis; we assume that had Congress wanted to do so, it would have said so explicitly.

As you know, OPM has promulgated regulations that set forth the applicable AUO percentages. Those percentages, which are based on the average hours of irregular or unscheduled overtime hours worked per week are found in 5 CFR 550.154(a). This provision defines the rates that must be paid if the employee works a certain number of irregular, unscheduled overtime hours per week.

While the percentages are specified in paragraph (a), the regulations also contain a provision in which OPM reserved to itself the authority to grant agency requests that it make adjustments to AUO rates in unforeseen circumstances. Paragraph (b) of this section provides that

“If an agency proposes to pay an employee premium pay on an annual basis under § 550.151 but unusual conditions seem to make the applicable rate in paragraph (a) of this section unsuitable, the agency may propose a rate of premium pay on an annual basis for OPM approval. The proposal shall include full information bearing on the frequency and duration of the irregular or occasional overtime work required; the nature of the work which prevents hours of duty from being controlled administratively; the necessity for the employee being generally responsible for recognizing, without supervision, circumstances which require him to remain on duty; and any other pertinent conditions.” 5 CFR 550.154(b).

While we acknowledge that the language used in the regulation referring to “unusual conditions” or rates that are “unsuitable” is imprecise when read in isolation, we do not believe that it would be permissible to read the regulation as allowing OPM to find a rate “unsuitable” based on budgetary considerations; nor do we believe the text of the regulation supports such a reading. First, as described above, we do not think that the statute can be read that way, and OPM obviously cannot promulgate regulations that conflict with the statute. In addition, the regulation’s description of the information agencies must supply to justify a different overtime rate, supports this conclusion. The enumerated categories of information agencies are asked to supply relates back to the statutory requirement that rates be set based on “the frequency and duration “ of the irregular, unscheduled, overtime duty require by the position. While the

regulations do contain catchall language that allows agencies to provide information about “any other pertinent conditions,” this catchall language should be read in light of the character of the previously enumerated conditions as well as the underlying statute.

Please let me know if you would like to discuss further and I am sorry that we could not be more helpful.

From: Sandweg, John (b)(6)
Sent: Wednesday, April 10, 2013 1:59 PM
To: Kaplan, Elaine
Cc: Maher, Joseph; McGowan, Sharon
Subject: RE: AUO

Completely understandable.

Thanks-

JS

From: Kaplan, Elaine (b)(6)
Sent: Wednesday, April 10, 2013 1:58 PM
To: Sandweg, John
Cc: Maher, Joseph; McGowan, Sharon
Subject: RE: AUO

As always, got caught up in assorted crises. Will provide a response by c.o.b.

From: Sandweg, John (b)(6)
Sent: Tuesday, April 09, 2013 3:42 PM
To: Kaplan, Elaine
Cc: Maher, Joseph; McGowan, Sharon
Subject: Re: AUO

Thanks Elaine - much appreciated.

JS

From: Kaplan, Elaine [(b)(6)]
Sent: Tuesday, April 09, 2013 03:16 PM Eastern Standard Time
To: Sandweg, John
Cc: Maher, Joseph; McGowan, Sharon [(b)(6)]
Subject: RE: AUO

John—I am having staff look at this right now.

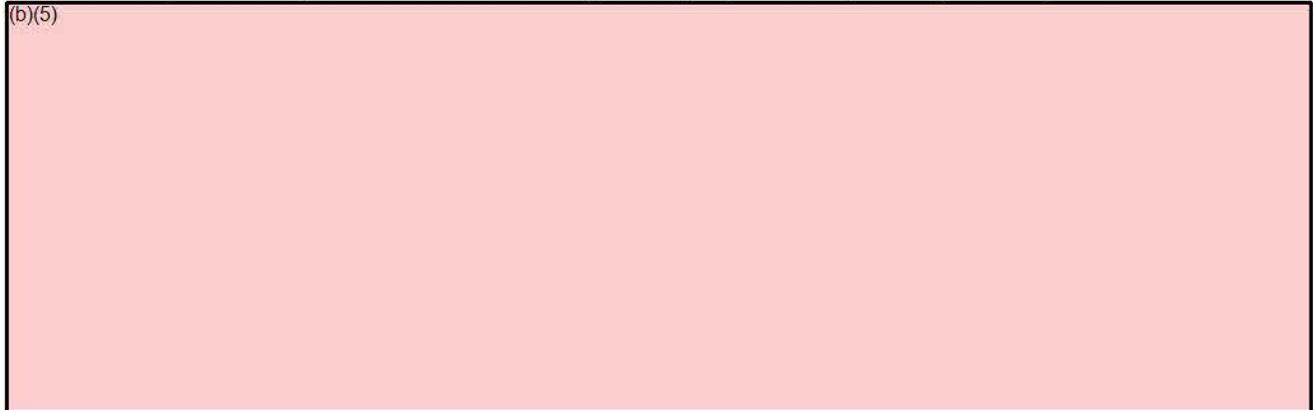
Will try to get back to you by noon tomorrow, if not sooner.

From: Sandweg, John [(b)(6)]
Sent: Tuesday, April 09, 2013 3:00 PM
To: Kaplan, Elaine
Cc: Maher, Joseph
Subject: AUO

Elaine-

Thank you for your help on the AUO issue. Joe Maher, my Principal Deputy GC, and I are available to provide any assistance in working through questions you may. As a point of

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Thanks again-

JS

John Sandweg

Acting General Counsel

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