June 16, 2009

Re: Standards for use of comp time
Overtime thresholds under §207(k)

Dear Madam Secretary:

We write to you about two issues concerning the applicability of the Fair Labor Standards Act to public safety employees. The first issue concerns the standards for the use of compensatory time off. The second issue concerns the overtime thresholds under 29 U.S.C. §207(k). As it is our understanding that formal promulgation of rules proposed during the previous administration is on hold pending review, we offer these thoughts as general observations for your consideration.

IDENTITY AND INTEREST OF COMMENTATORS

The National Association of Police Organizations (NAPO) is a coalition of police unions and associations from across the United States that serves to advance the interests of America's law enforcement officers through legislative and legal advocacy, political action and education. Founded in 1978, NAPO is the strongest unified voice supporting law enforcement officers in the United States. NAPO represents more than 2,000 police units and associations, 241,000 sworn law enforcement officers, 11,000 retired officers and more than 100,000 citizens who share a common dedication to fair and effective crime control and law enforcement.

Will Aitchison, the primary author of this letter, is an attorney in Portland, Oregon, who has litigated claims under the FLSA for law enforcement officers and fire protection employees across the country. Aitchison is the author of the book, *The Fair Labor Standards Act – A User's Manual* (Labor Relations Information System, 2004).

THE STANDARDS FOR THE USE OF COMPENSATORY TIME OFF

Statutory and Regulatory Background. When Congress enacted Section 207(o) of the FLSA in 1985, it set the following standards for the use of compensatory time off: "an employee of a public agency . . . who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time [1] within a reasonable period after making the request [2] if the use of the compensatory time does not unduly disrupt the operation of the public agency." 29 U.S.C. §207(o)(5)(b). The following year, the Secretary defined "unduly disrupt" in 29 C.F.R. §553.25(d), and noted in the regulation that "for an agency to turn down a request from an employee for

compensatory time off, . . . it should reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services."

The Secretary's preamble to 29 C.F.R. §553.25(d) states: "The Department recognizes that situations may arise in which overtime may be required of one employee to permit another employee to use compensatory time. However, such a situation, in and of itself, would not be sufficient for the employer to claim that it is unduly disruptive." 52 Fed.Reg.2012, 2017 (1987). In an August 19, 1994, opinion letter, the Wage and Hour Administrator similarly stated:

> It is our position, notwithstanding [a collective bargaining agreement to the contrary], that an agency may not turn down a request from an employee for compensatory time off unless it would impose an unreasonable burden on the agency's ability to provide service of acceptable quality and quantity for the public during the time requested without the use of the employee's services. The fact that overtime may be required of one employee to permit another employee to use compensatory time off would not be a sufficient reason for an employer to claim that the compensatory time off request is unduly disruptive.

1994 WL 1004861. These views were again expressed by the Secretary in an *amicus* brief in *DeBraska v. City of Milwaukee*, 131 f.Supp.2d 1032 (E.D. Wis. 2000)

Litigation Over The Use Of Compensatory Time Off.

Litigation over the use of compensatory time off has produced inconsistent results. Most courts have accepted the Secretary's position; other courts, however, have not. The result is an inconsistent application of the law throughout the country. Arrayed in the order in which they were decided, the relevant cases include:

> *Aiken v. City of Memphis*, 190 F.3d 753 (6th Cir. 1999). A divided court allowed an employer to reject compensatory time off requests when available compensatory time off "slots" were full and employer would be required to fill vacancies with employees on an overtime basis.
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> *DeBraska v. City of Milwaukee*, 131 F. Supp. 2d 1032 (E.D. Wis. 2000). The court rejected *Aiken*, and held that an employer may not deny compensatory time off requests on the grounds that no compensatory time "slots" remain open, even if it offered the requesting employee another compensatory time off option within one week of the requested date. The Court reasoned: "There may be no alternative to requiring an officer to work overtime hours so that another officer may utilize accrued comp time, but the Secretary reasonably has determined consistent with legislative intent, that having to work overtime does not, by itself, amount to such a disruption. Indeed, this is particularly true where the City could pay the replacement officers in comp time and not cash overtime wages. Congress

recognized that only operational disruption, not payroll expense to the employer, could be a basis for denying an employee the use of accrued comp time."

Canney v. Town of Brookline, 2000 WL 1612703, 142 Lab.Cas. ¶34,169 (D. Mass. 2000). The court accepted the Secretary's position, and held that the payment of one officer overtime to allow another officer to use compensatory time does not constitute an "undue disruption" justifying denial of the compensatory time off request.

Long Beach Police Assn. v. Luman, 8 Wage & Hour Cas.2d (BNA) 1395, 2001 WL 1729693 (C.D.Cal.2001). The Court accepted the Secretary's interpretation of Section 207(o)(5)(b), concluding "if the only disruption in the employer's ability to meet its staffing levels consists of the fact that the substitute officer would be working on overtime, the employer may not deny the request for compensatory time off."

Houston Police Officers' Association v. City of Houston, 330 F.3d 298 (5th Cir. 2003). The Court rejected the Secretary's interpretation of the statute, and held that an employer need not grant an employee's request to use compensatory time off on the particular day the employee requests so long as it does so within a reasonable period after the employee requests its use.

Mortensen v. County of Sacramento, 368 F.3d 1062 (9th Cir. 2004). The Court rejected the Secretary's interpretation, and finds that "the text of §207 (o)(5) unambiguously states that once an employee requests the use of [compensatory time off], the employer has a reasonable period of time to allow the employee to use accrued time. Because the statutory language is unambiguous, we need not defer to the regulations and opinion letter." The court allowed an employer up to *one year* after the employee requested to use compensatory time off to select a day (at the employer's discretion) for use of the time.

Scott v. City of New York, 340 F.Supp.2d 371 (S.D.N.Y. 2004). Rejects the Secretary's position, and finds "the 'reasonable period' referenced in section 207 (o)(5) refers to the time period between the date for which the employee applies for leave and the date on which that leave is actually granted." Other cases following *Scott* in the same District include *Saunders v. City of New York*, 594 F.Supp.2d 346 (S.D.N.Y. 2008) and *Parker v. City of N.Y.,* 2008 WL 2066443 (S.D.N.Y. May 13, 2008).

Beck v. City of Cleveland, 390 F.3d 912 (6th Cir. 2004). Payment of overtime to a substitute officer in order to honor an officer's request for compensatory time did not alone qualify as unduly disruptive under the FLSA. The court concluded: "Moreover, the legislative history of Section 207(o)(5) reflects that the phrase "unduly disrupt" did not apply to financial impact on public employers' payrolls. . . . The Secretary's opinions on the "unduly disruptive" provision in Section 207(o)(5) are consistent with the legislative reports that compensatory time should not be used to avoid overtime pay and that "unduly disrupt" applies to governmental operations, not finances. Thus, the Secretary's opinion that the mere payment of overtime to honor a request for compensatory leave does not qualify

as “unduly disruptive” is wholly consistent with Section 207(o)(5) and its legislative history.”

Heitmann v. City of Chicago, 2007 WL 2739559 (N.D. Ill. 2007). Rejects *Mortensen*, *Houston*, and *Aiken*, sides with *Beck*, and concludes that “undue disruption” does not allow an employer to take into account potential overtime costs.

Heitmann v. City of Chicago, 2009 WL 764155 (7th Cir. 2009). In an opinion by Judge Easterbrook, the court upheld the Secretary’s interpretation, finding: “On Chicago's view, the employee cannot ask for a particular date or time, but only for *some* leave; and if any time off within a reasonable time after the request would cause undue disruption, then the employee must wait longer -- must wait, by definition, for an *un* reasonable time. That can't be right. Chicago's view produces an implausible relation between the “reasonable time” and “undue disruption” clauses. The regulation makes sense when specifying that the employer must ask whether leave on the date and time requested would produce undue disruption, and only if the answer is yes may the employer defer the leave-and then only for a reasonable time.”

The Pending Draft Regulation

On July 28, 2008, the Secretary issued a proposed rule on the use of compensatory time off. The Secretary stated the following to be the purpose behind the rule:

> The appellate decisions uniformly read the statutory language unambiguously to state that once an employee requests compensatory time off, the employer has a reasonable period of time to allow the employee to use the time, unless doing so would be unduly disruptive. The Department proposes to revise the current rule to adhere to the appellate court rulings cited above. Proposed Sec. 553.25(c) adds a sentence that states that section 7(o)(5)(B) does not require a public agency to allow the use of compensatory time on the day specifically requested, but only requires that the agency permit the use of the time within a reasonable period after the employee makes the request, unless the use would unduly disrupt the agency's operations. Additionally, the phrase ``within a reasonable period after the request'' has been added to the final sentence of proposed Sec. 553.25(d) and the phrase ``during the time requested'' has been replaced with ``during the time off'' to clarify the employer's obligation.

The notice of proposed rulemaking did not cite the holdings of or discuss *DeBraska, Canney, Long Beach Police Association, Beck,* or the District Court’s decision in *Heitmann* (the Seventh Circuit’s decision in *Heitmann* had not yet been released); instead, the notice focused on *Aiken*, *Houston Police Officers’ Association*, and *Mortensen.* The proposed rule, which received a number of critical comments, has not been acted upon by the Secretary.

The Appropriate Standards For The Use Of Compensatory Time Off

We believe the standards for the use of compensatory time off articulated in the proposed rule would completely undercut any value compensatory time off might have for employees, and would effectively write the "unduly disrupt" standard out of the statute. A simple hypothetical is illustrative. Assume a police officer tells his employer on January 15 that he would like to use compensatory time off on April 17 to get married. The employer has no particular reason to deny the request, but nonetheless tells the employee "No, you can't have April 17 off," and says no more. Under the proposed rule, which embraced *Mortensen*, so long as the employer allowed (or forced) the use of another compensatory time off day within a year of the original request on January 15, the employer would not violate Section 207(o)(5).

This cannot be the law. Congress granted public employers a limited exception to the rule that overtime must be compensated in cash. While that exception made some accommodation for the financial concerns expressed by public employers, it did not erect a compensatory time off system that gave *carte blanche* to employers to determine when and if employees would take compensatory time off. Instead, the system was meant to establish compensatory time off as the functional equivalent of cash, usable by the employee at any time the *employee* requests subject to the requirement that the use not unduly disrupt the employer's operations.

We urge you not to adopt the proposed rule, and instead to restart the rulemaking process on the issue. We believe the final rule should explicitly incorporate the standards found in the Preamble to 29 C.F.R. §553.25(d) and the Secretary's subsequent consistent statements on the issue.

THE SECTION 207(k) EXEMPTION

Background of the Section 207(k) Exemption

When Congress applied the FLSA to state and local governments in 1974, it enacted a partial overtime exception for public safety employees as 29 U.S.C. §207(k). As written, the Section 207(k) exemption set an overtime threshold of 216 hours in a 28-day period. However, Section 207(k) also authorized the Secretary to conduct a study of the average number of hours worked by fire protection and law enforcement personnel, and to establish by rule different overtime thresholds depending upon the result of that study.

Before the Secretary's study was complete, the Supreme Court had held in *National League of Cities v. Usery* 426 U.S. 833 (1976), that the FLSA could not constitutionally be applied to state and local governments. In response, the Secretary's study reviewed the work hours of only Federal employees. When a court found the failure to include state and local firefighter and law enforcement hours in the study was erroneous, the Secretary redid the study, and published the final results at 48 F.R. 50,518 (September 8, 1983). After the Supreme Court reversed *National League of Cities* in

Garcia v. San Antonio Metropolitan Transit Authority, the Secretary issued the overtime standards as 29 C.F.R. §553.230. Those standards set the maximum hours for law enforcement personnel at 171 hours in a 28-day work period, with lower maximum standards if work periods of less than 28 days are chosen.

The Need To Revise The Maximum Hours Threshold.

Much has changed in the more than 25 years since the Secretary's work hours study was concluded. It is clear that the average work hours for law enforcement personnel are much less than 171 hours in a 28-day period. In most of the country, law enforcement officers work the equivalent 40-hour weeks. In some parts of the country, the prevailing hours are even less than 40 hours a week owing to the particular shift schedules used by employers. Based upon its experience with law enforcement agencies in all states in the country, NAPO is confident that an average work hour study conducted today would produce the result that the average work hours for law enforcement officers is at or near 160 hours in a 28-day period.

It is hard to overstate the impact of the inappropriately high maximum work thresholds of 29 C.F.R. §553.230. Under 29 U.S.C. §207(h), an employer is allowed credits against its overtime liability under the FLSA if it makes premium payments described in 29 U.S.C. §207(e)(5)-(7). Since most law enforcement employees have schedules that approximate 40-hour weeks, their employers make premium payments for work outside normal shift schedules. The result is that Section 207(h) credits allow law enforcement employers to avoid compliance with a wide variety of the FLSA's provisions. It is difficult to imagine, for example, how credits would not completely erode any liability for non-compliance with the FLSA's regular rate and time-of-payment provisions.

Beyond this, the thresholds in 29 C.F.R. §553.230 are simply wrong. They do not reflect the reality of law enforcement work in the country, and have not for many years. Those thresholds should be updated.

CONCLUSION

Thank you for the opportunity to offer these thoughts for your consideration and review as you address these important issues. If we may be of any assistance to you or the Department, please do not hesitate to call upon us.

Sincerely,

THE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS
Will Aitchison, Esq.

By: _____

William J. Johnson, Esq.
Executive Director