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Subject: *United States Capitol Police—Overtime Pay and Compensatory Leave for Members and Civilian Employees*

On July 7, 2005, you requested our opinion on the authority of the United States Capitol Police (USCP) to provide overtime pay and compensatory and annual leave to its members and civilian employees. On July 19, 2005, we issued an opinion regarding overtime pay and compensatory leave for the three USCP employees whose salaries are fixed by statute: the Chief of Police, the Assistant Chief, and the Chief Administrative Officer.¹ This opinion addresses these same issues for the remaining USCP members and civilian employees.² This opinion also addresses the application of Section 1007 of the Legislative Branch Appropriations Act, 2006,³ which waives the repayment of unauthorized overtime compensation for certain USCP officers.

¹B-305835, July 19, 2005. In the first opinion, we concluded that the USCP Chief and Assistant Chief were ineligible for compensatory leave or overtime pay because their annual rates of pay exceed the statutory cap on eligibility for overtime. The Chief Administrative Officer is not eligible for overtime pay, but could be eligible for compensatory leave under special circumstances as determined by the Chief.

²To gather information for this opinion, we met with the USCP Chief Administrative Officer and the Director of Human Resources and had separate discussions with the USCP General Counsel, who provided us with his written views on section 1007 of the Legislative Branch Appropriations Act, 2006.

³Pub. L. No. 109-55, § 1007 (Aug. 2, 2005).

As we explain below, USCP civilian employees covered by the Fair Labor Standards Act (FLSA) are eligible for overtime pay, but may not receive aggregate compensation (base salary plus overtime pay) in excess of \$156,848 annually (under 2005 USCP pay schedules). USCP civilian employees who are FLSA-exempt may not receive overtime pay, but may receive compensatory leave, upon a determination of special circumstances by the Chief of Police. Compensatory leave for both civilian and uniformed employees is not subject to annual aggregate compensation limits, but under USCP regulations, is subject to an annual carryover maximum of 240 hours. Since 2001, the USCP Chief has invoked his authority under the USCP Leave Regulations to waive this maximum because of continuing emergency circumstances.

Members of the Capitol Police below the rank of lieutenant are covered by the FLSA and are eligible for overtime pay (up to an annual aggregate compensation limit of \$156,848 under 2005 USCP pay schedules) or compensatory leave. Lieutenants and above are FLSA-exempt and are eligible for overtime pay (up to an annual aggregate compensation limit of \$131,400 under 2005 pay schedules) or compensatory leave, provided their basic rate of pay does not exceed \$131,400.

Section 1007 waives the repayment of unauthorized overtime pay that was earned and compensatory leave that was earned and used by USCP officers at the rank of lieutenant and above prior to June 15, 2005. Section 1007 explicitly excludes the Chief, Assistant Chief, and Chief Administrative Officer from this waiver.

Analysis

Civilian Employees Covered by FLSA

The Congressional Accountability Act and USCP regulations control overtime compensation for USCP civilian employees. The Congressional Accountability Act, enacted in 1995, made certain provisions of the FLSA applicable to covered employees in the legislative branch, including the Capitol Police. Pub. L. No. 104-1, § 203 (Jan. 23, 1995) (2 U.S.C. § 1313). The FLSA requires that certain employees receive additional compensation for hours worked beyond a 40-hour work week. 29 U.S.C. § 207. Generally, the Congressional Accountability Act requires that employees covered by the FLSA receive overtime pay, not compensatory leave, for additional hours worked. 2 U.S.C. § 1313(a)(3). These requirements apply to most employees who are not “employed in a bona fide executive, administrative, or professional capacity.” 29 U.S.C. § 213(a)(1).

In 1997, Congress directed the USCP Board to issue regulations to establish a unified pay and leave system for USCP civilian employees and USCP members. 2 U.S.C. § 1923. By statute, these regulations have the force and effect of law once approved by the Committee on House Administration of the House of Representatives and the Committee on Rules and Administration of the Senate. *Id.* The USCP Board issued such regulations, including provisions authorizing overtime pay and compensatory leave, and the committees approved the regulations in 1998. Capitol Police Board

Regulations Prescribing a Unified Leave System for Members and Civilian Employees of the USCP (USCP Leave Regulations) (May 21, 1998).

Section IV of these regulations deals with compensatory leave for civilian employees of the USCP and distinguishes between employees who are covered by, and those who are exempt from, the FLSA. *Id.* § IV(B)-(C). As required by the Congressional Accountability Act, employees who are covered by the FLSA generally must receive overtime pay, not compensatory leave, for additional hours worked.⁴ 2 U.S.C. §§ 1313(a)(1), (3); USCP Leave Regulations, § IV(C).

Civilian employees who receive overtime pay are subject to the USCP's annual aggregate compensation cap, which is set in the annual pay schedule approved by the USCP's oversight committees.⁵ *See* Capitol Police Board Resolution For Unified Schedules of Rates of Basic Pay for Members and Civilian Employees of the USCP (USCP Pay Regulations), § b(3) (Jan. 15, 1998). For 2005, the maximum amount of compensation for civilian employees is \$156,848. Schedule of Rates of Basic Pay for Civilian Employees of the USCP (Jan. 9, 2005). This limit is applied on an annual basis, rather than on a pay period basis.⁶ USCP Pay Regulations, § d.

Civilian Employees Exempt from FLSA

Under the USCP Leave Regulations, FLSA-exempt civilian employees, which include executive, administrative, and professional employees, may not receive overtime pay, but may receive compensatory leave “for special circumstances as determined by the Chief of Police or his/her designee.”⁷ USCP Leave Regulations, § IV(B).

⁴FLSA-covered employees may receive compensatory time for additional duty that is not eligible for FLSA overtime payment. USCP Leave Regulations, § IV(C).

⁵Although the USCP pay schedules refer to this cap as “a maximum annual payable rate,” the pay regulations refer to this amount as “an annual pay limitation.” USCP Pay Regulations § d. Thus, the maximum annual payable rate is a cap on base salary, plus any overtime pay and other cash payments.

⁶Applying the cap on an annual basis, rather than on a pay period basis, allows more flexibility in dealing with unforeseeable events or emergencies.

⁷On July 22, 2005, the USCP Board forwarded proposed amendments to the USCP leave regulations to its oversight committees for their review and approval. Under these amendments, FLSA-exempt civilian employees may earn compensatory leave for “any special event or special assignment” provided their basic salary is less than the lesser of 150 percent of the minimum rate payable for grade GS-15 of the General Schedule for the relevant locality (\$155,920, in 2005), or the rate of pay for level V of the Executive Schedule (\$131,400, in 2005). However, employees may not exceed a balance of 80 hours of compensatory leave at any time, nor may their aggregate compensation (presumably using the dollar value of compensatory leave) exceed the lesser of the 150 percent of GS-15 or Executive Schedule Level V.

In the course of this opinion, the question arose whether the USCP annual aggregate compensation limits apply to compensatory leave. While the USCP regulations do not specifically answer this question, the limitation on aggregate compensation is located in the pay regulations that deal strictly with rates of pay and other cash payments, rather than the leave regulations which authorize compensatory leave. Unlike annual leave, USCP employees are not entitled to a lump sum payment for accumulated compensatory time upon separation. USCP Leave Regulations, § XVI. Although not completely free of doubt, we would read the annual pay limitation as applicable only to overtime pay, not compensatory leave.⁸ Thus, FLSA-exempt civilian employees may earn compensatory leave, subject only to the maximum annual carryover balance of 240 hours.⁹ USCP Leave Regulations, §§ III(B), IV(d). To avoid any future doubt on this matter, we recommend that the USCP Board fully consider whether compensatory leave should be subject to annual aggregate pay limitations and amend its regulations accordingly.

USCP Members

USCP officers and members are eligible for overtime pay or compensatory leave under certain circumstances, but their eligibility and the limit on their overtime compensation is dependent on their rank and salary.

The Congressional Accountability Act and USCP Pay and Leave Regulations govern overtime compensation for members below the rank of lieutenant. The Congressional Accountability Act authorizes law enforcement personnel to elect compensatory time in lieu of overtime compensation. 2 U.S.C. § 1313(c)(4). The USCP Leave Regulations reflect this provision and state that “members who have been determined to be non-exempt under the FLSA, as applied by the Congressional Accountability Act, are eligible to elect to receive hours of compensatory time off in lieu of overtime compensation for additional duty.” USCP Leave Regulations, § IV(A).

The USCP reported to us that they have determined that members below the rank of lieutenant are subject to the FLSA and thus are non-exempt employees. Therefore,

⁸In contrast, under Title 5, as interpreted by the Office of Personnel Management (OPM), executive branch employees are subject to a pay period cap on both overtime pay and compensatory leave. 5 U.S.C. § 5547. In 2005, employees in the Washington, D.C., region may not receive more than \$135,136 in base salary and overtime pay or compensatory leave. This cap is calculated as the greater of the maximum rate of basic pay for GS-15 for the relevant locality (\$135,136, in 2005 for the Washington, D.C., locality) or level V of the Executive Schedule (\$131,400, in 2005). *Id.* OPM includes “the dollar value of earned hours of compensatory time off” within the definition of premium pay for purposes of this cap. 5 C.F.R. § 550.105.

⁹Since 2001, the USCP Chief has invoked his authority to waive the maximum carryover for both uniformed and civilian employees because of continuing emergency circumstances. USCP Leave Regulations, §§ III(B)(2), IV(D).

all USCP members below the rank of lieutenant may elect to receive either overtime pay or compensatory leave. Those members who elect overtime pay are subject to the USCP annual pay limitation of \$156,848. Schedule of Rates of Basic Pay for Members of the USCP (Jan. 9, 2005). This pay limitation is applied on an annual basis. 2 U.S.C. § 1932; USCP Pay Regulations, § d.

USCP Officers

The USCP considers officers at the rank of lieutenant and higher exempt from the FLSA, and section 1009 of the Consolidated Appropriations Resolution of 2003 governs their overtime compensation. Pub. L. No. 108-7, div. H, tit. I, § 1009 (Feb. 20, 2003) (Consolidated Appropriations Resolution). Section 1009, which applies only to officers at the rank of lieutenant and higher, authorizes the USCP Chief to provide for the compensation of overtime work with either overtime pay or compensatory leave. *Id.* However, such compensation must be provided “in the same manner and subject to the same terms and conditions which are applicable to the compensation of overtime work of officers and members of the United States Secret Service Uniformed Division and the United States Park Police who serve at the rank of lieutenant and higher” in accordance with section 5-1304 of the District of Columbia Code. *Id.*

Under the terms and conditions of District of Columbia law, officers may elect to receive either overtime pay or compensatory leave. However, the statute provides that no overtime pay nor compensatory leave is authorized for any officer whose rate of basic compensation,¹⁰ combined with any applicable locality-based comparability payment, equals or exceeds the lesser of 150 percent of the minimum rate payable for grade GS-15 of the General Schedule for the relevant locality (\$155,920, in 2005), or the rate of pay for level V of the Executive Schedule (\$131,400, in 2005). D.C. Code Ann. § 5-1304(h)(3)(A) (2005). Thus, for 2005, no officer at the rank of lieutenant and above whose salary exceeds \$131,400 may receive overtime pay or compensatory leave.

In addition, for USCP officers whose rate of basic pay is below this amount, “premium pay may be paid only to the extent that such payment would not cause such officer or member’s aggregate rate of compensation to exceed” the lesser of 150 percent of the minimum rate payable for grade GS-15 of the General Schedule or the rate of pay for level V of the Executive Schedule, which in 2005, is \$131,400. D.C. Code Ann. § 5-1304(h)(3)(B) (2005). In several provisions, the District of Columbia statute distinguishes between “premium pay” and “compensatory time off.” *See, e.g.,*

¹⁰ The District of Columbia statute defines rate of basic compensation as the rate of compensation fixed by law for the position exclusive of any deductions or additional compensation of any kind. D.C. Code Ann. § 5-1304(a)(7). For the USCP, we would read this as the rate of pay for an officer that is derived from the Schedule of Rates of Basic Pay for Members of the USCP. Thus, it would not include specialty or proficiency pay, awards, bonuses, student loan repayments, or other similar compensation.

D.C. Code Ann. §§ 5-1304(f)(1)(B), (h)(1), (h)(3)(A) (2005). For example, officers who are denied the use of “compensatory time off” may apply for “premium pay” instead. D.C. Code Ann. § 5-1304(f)(1)(B). Because the statute distinguishes between “premium pay” and “compensatory time off,” and the cap for officers earning less than \$131,400 refers only to “premium pay,” in our opinion, this cap applies only to those officers who elect overtime pay, not compensatory leave.

While the District of Columbia statute applies the premium pay cap on a pay period basis, a separate provision that was enacted in the same statute as section 1009 directs that limits on premium pay for USCP officers and members are to be applied on an annual basis. Consolidated Appropriations Resolution, § 1012 (2 U.S.C. § 1932). Thus, in 2005, officers at the rank of lieutenant and higher may receive overtime pay, but only to the extent that their basic rate of pay, plus any overtime pay received, does not exceed \$131,400 on an annual basis. Such officers may also elect compensatory time.¹¹

Waiver of Erroneous Payments of Overtime Compensation

The Legislative Branch Appropriations Act, 2006, waives the collection of overtime compensation to certain USCP officers erroneously paid in violation of the restrictions of section 1009 of the Consolidated Appropriations Resolution. Pub. L. No. 109-55, § 1007 (Aug. 2, 2005). Section 1007 states that “any individual to whom overtime compensation was paid under section 1009 [of the Consolidated Appropriations Resolution], in violation of the restrictions applicable to the payment of such compensation under section 1009(b) of such Act[,] shall not be required to repay the compensation, but only to the extent the compensation was paid for services provided prior to June 15, 2005.”¹² *Id.*

The USCP General Counsel asserted that this provision waives the collection of unauthorized payments of overtime pay, as well as unauthorized compensatory leave

¹¹Under the amendments to the USCP Leave Regulations proposed by the USCP Board on July 22, 2005, two additional restrictions were added to officers’ collection of compensatory leave: officers may not exceed a balance of 80 hours of compensatory leave at any time, nor may their aggregate compensation (presumably using the dollar value of compensatory leave) exceed the lesser of the 150 percent of GS-15 or Executive Schedule Level V.

¹²Section 1007(b) states that this provision does “not apply with respect to any officer or employee of the [USCP] whose annual rate of pay is specified in statute.” Pub. L. No. 109-55 (Aug. 2, 2005). Therefore, the USCP cannot waive unauthorized payments of overtime compensation to the Chief, Assistant Chief, or Chief Administrative Officer. Section 1007 only waives repayment of overtime compensation paid under section 1009 of the Consolidated Appropriations Resolution, which applies to uniformed officers at the rank of lieutenant and above. Therefore, the section 1007 waiver does not apply to USCP civilian employees.

used prior to June 15, 2005. Memorandum from John T. Caulfield, General Counsel, USCP, to Tony Gamboa, General Counsel, GAO (Aug. 2, 2005). The USCP General Counsel, however, stated that section 1007 would not waive unauthorized compensatory leave that was earned, but not used. *Id.* He emphasized that the intention of section 1007 was to ensure that USCP officers did not have to repay funds that were erroneously paid because of “flawed management controls.” H. Rpt. 109-189, at 33 (July 26, 2005). We agree.

Section 1007 uses the term “overtime compensation,” which is the same term used in section 1009 of the Consolidated Appropriations Resolution. As noted above, section 1009 authorized the payment of overtime compensation in the same manner as compensation is paid to members of the Secret Service Uniformed Division and the United States Park Police under District of Columbia law. The referenced District of Columbia statute authorizes the payment of either premium pay or compensatory time off. D.C. Code Ann. §§ 5-1304(d)(1)-(2) (2005). Therefore, we would read “overtime compensation” as used in section 1007 to include both overtime pay and compensatory leave.

Section 1007 also states that officers shall not be required to “repay” any unauthorized compensation. Pub. L. No. 109-55, § 1007 (Aug. 2, 2005). Likewise the conference report accompanying the legislation emphasizes that the provision “waives the repayment of certain overtime compensation *paid* incorrectly.” H. Rpt. 109-189, at 33 (July 26, 2005) (emphasis added). Generally, leave is understood to be “paid” when it is used, rather than when it is earned.¹³ Therefore, we agree with the USCP General Counsel that section 1007 waives the collection of unauthorized overtime pay that was earned and paid or any compensatory leave that was earned and used prior to June 15, 2005. This provision would apply to officers whose base salary exceeds the statutory cap referenced in District of Columbia law and who collected either overtime pay or compensatory leave, and to officers whose base salary is under the statutory cap, but who collected overtime pay such that their annual aggregate compensation exceeded the cap.

Conclusion

Civilian employees and members of the USCP may be eligible for either compensatory leave or overtime pay, depending on their FLSA coverage, salary, and rank. Civilian employees covered by the FLSA are generally entitled to overtime pay, up to a certain amount as determined by USCP pay schedules. FLSA-exempt civilian employees may receive compensatory time only upon a determination of special circumstances by the Chief.

Members of the USCP at a rank below lieutenant are entitled to elect either overtime pay (up to \$156,848, in annual aggregate compensation in 2005, as determined by USCP pay schedules) or compensatory leave. USCP officers at a rank of lieutenant

¹³ See, e.g., USCP Leave Regulations, § XVI(A) (separating employees are “paid” for their accumulated annual leave).

and above are entitled to overtime pay or compensatory leave, provided their base salary does not exceed \$131,400 (in 2005, as determined by section 1009 of the Consolidated Appropriations Resolution). In addition, officers who elect to receive overtime pay are subject to this same cap on annual aggregate compensation.

Section 1007 of the Legislative Branch Appropriations Act, 2006, waives the repayment of unauthorized overtime pay paid to, or compensatory leave used by, USCP officers whose base salary exceeds the cap applied by section 1009 (\$131,400, in 2005), except for those officers whose annual rate of pay is set by statute (the Chief, Assistant Chief, and Chief Administrative Officer). Section 1007 also waives collection of overtime pay paid to other officers in excess of the aggregate compensation limit applied by section 1009.

This opinion, and our July 19, 2005, opinion, provide guidance to the USCP regarding implementation of overtime regulations and statutes. Given the recent focus on USCP's implementation of its overtime statutes and regulations, we think now would be an appropriate time for the USCP to consult with its oversight committees to address concerns over its overtime compensation system and to consider how to clarify and update the USCP pay and leave authorities. In light of the multiple, and sometime conflicting, statutes and regulations that apply to the pay and leave of USCP employees, the USCP Board should consider whether to develop, in consultation with its oversight committees, a legislative package that includes complete, comprehensive, and integrated pay and leave authorities.

/signed/

Anthony H. Gamboa
General Counsel