IORANDUM

OF THE CITY ATTORNEY
800 - CITY HALL

TO: Kathleen Marquardt

FROM: Barbara Teipner Wargolet

DATE: July 24, 2002

RE: DeBraska, et al. v. City of Milwaukee
Case No. 96-C-402

The enclosed decisions are being sent to you at the request of Attorney Stuart S. Mukamal.

They include Meyer, et al v. City of Raleigh; Long Beach Police Officers Association, et al. v. Luman, et al. and Canney, et al. v. Town of Brookline, et al.

If you have any questions please contact Attorney Mukamal.

C: Stuart S. Mukamal

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

FILED
AUG 10 2001
DAVID W. DANIEL, CLERK
US DISTRICT COURT
E. DIST. N. CAROLINA

No. 5:99-CV-324-BO(3)

CHRISTOPHER C. MEYER, JOHN ERIC GRAY, DAN JONES, CHARLES L. LYNCH, JAMES NIDIFFER, and CHARLES ROSA,
Plaintiffs,

v.

THE CITY OF RALEIGH,
Defendant.

ORDER

This matter is before the Court on Plaintiffs' Motion to Add 17 Consenters pursuant to 29 U.S.C. §216(b), Motion to Exceed Page Limitation, and Motion for Partial Summary Judgment and on Defendant's Motion for Summary Judgment. The underlying complaint alleges violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §201 et seq. Plaintiffs claim that the employment practices of Defendant City of Raleigh (the "City") violated the FLSA with regards to overtime compensation, the use of compensatory time, and in its calculation of the "regular rate" of pay. Plaintiffs also claim that the City improperly classified sergeants as "exempt" employees under the FLSA when, in fact, sergeants should be classified as "non-exempt" employees.

FACTS

The City of Raleigh operates a police department, in which Plaintiffs Gray, Jones, Lynch, Nidiffer, and Rosa are currently employed as police officers. Plaintiff Meyer was also a police officer in Raleigh, but has since left the City's police department for different employment. Plaintiffs are all "non-exempt" employees, meaning that they are all subject to the employment

requirements of the FLSA.

All police officers who work for the City operate on a 28-day work cycle (the "Cycle") during which they are scheduled to work 168 hours. Plaintiffs are paid a certain salary each work cycle, which includes compensation for nine minutes of pre-roll call time for weekday platoons and 21 minutes of pre-roll call time for the weekend platoons. Officers in a weekday platoon are thus paid to work 8.4 hours per day. If any officer works more than 178 hours during a Cycle, he will be compensated at a rate of one and a half times his hourly rate. In order for a City police officer to receive overtime pay, the officer fills out a form that documents the overtime and requests payment for the overtime hours.

The City and its police officers have entered into an agreement, as provided for under FLSA, by which the officers agree to accept either compensatory time off ("comp time") or overtime pay as compensation for working overtime. See Def. Memo. in Supp. at 2. However, the City has placed a 70-hour limit on the amount of comp time that may be accrued. All employees of the City are subject to this limit. Therefore, if an officer has accrued close to 70 hours of compensatory time in one Cycle, he may be required to take time off so as to avoid exceeding the 70-hour cap.

Employees' requests to use their banked comp time are granted on a first-come, first-served basis and are made using a sign-in procedure, by which officers must record their requests in a "leave book". If the leave book is full on a particular day on which an officer seeks to use his comp time, the officer may not take leave that day. The leave book is generally deemed "full" whenever there are one or two officers from each squad, or six officers from a platoon, already taking the day off. When the leave book is full, the City will not allow a police officer to seek a replacement, if working that day would cause the replacement officer to incur

overtime payment. See Knox Depo. at 50.

ANALYSIS

1. Plaintiffs' Motion to Add 17 Consenters

The FLSA allows similarly situated employees to participate in FLSA litigation against their employer by consent. 29 U.S.C. §216(b). This consent policy promotes judicial efficiency, allowing identical FLSA cases to be heard at once if the employees so desire. All seventeen (17) consenters have indicated their desire to join the current litigation by filing consent forms with this Court.

The Court's deadline for Plaintiffs to file motions to join additional parties expired on September 1, 1999. Discovery closed on May 10, 2000. On August 11, 2000, the magistrate judge granted Defendant's Motion for Sanctions on account of Plaintiffs failure to comply with discovery deadlines. Plaintiffs filed summary judgment motions on July 24, 2000.

Given the tardiness of the instant motion, Defendant might otherwise be prejudiced by the addition of 17 consenters. The City does not oppose this motion, however, but does ask that certain conditions be imposed. This Court will therefore allow the additional consenters to join in the current action, so long as: (1) the consenters are bound by the Amended Answer and discovery served or conducted by Defendant; and (2) the consenters are subject to this Court's ruling on August 11, 2000, which was entered upon Defendant's Motion for Sanctions.

Given that Defendant does not object to the addition of the consenters, this Court will allow the additional consenters to join the suit, subject to the above limitations.

2. Motion to Exceed Page Limitation

On July 24, 2000, Plaintiffs filed a Motion to Exceed Page Limitation with respect to Plaintiffs' Motion and Memorandum in Support of Plaintiffs' Motion for Partial Summary

Judgment. Under Local Rule 5.05, the memorandum in support of a motion shall not exceed 30 pages in length. Plaintiffs' proposed memorandum, however, is 36 pages long. Given the number of issues addressed in Plaintiffs' memorandum, the complexity of those issues, and the fact that Defendant does not object to the Motion, this Court finds it proper to grant Plaintiffs' Motion to Exceed the Page Limitation.

3. Motions for Summary Judgment

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See Federal. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). A moving party is entitled to summary judgment when the record, taken as a whole, could not lead a rational trier of fact to find for the non-movant. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). In considering a motion for summary judgment, the Court must view the facts and the inferences drawn from the facts in the light most favorable to the nonmoving party. See id. at 587-88.

Both Plaintiffs and Defendant have moved for summary judgment on a number of issues, many of them overlapping. This Court will address each issue in turn.

3(A). Defendant's Motion for Summary Judgment on the Basis of the Admissions

Defendant first moves for summary judgment on the basis that all of Plaintiffs' claims are barred by Plaintiffs' first set of admissions. On December 16, 1999, Defendant served its first request for admissions on Plaintiffs. Because Plaintiffs failed to respond within 30 days after they were served by mail, and failed to withdraw their admissions thereafter, Defendant's requests were automatically admitted. See Fed. R. Civ. P. 36(a). Nonetheless, in spite of Defendant's claims to the contrary, the first set of admissions fails to establish any of Defendant's

defenses as a matter of law.

First, Defendant requested that Plaintiff admit that "[s]ince March 15, 1996, the City has properly compensated [Plaintiffs] under the FLSA." However, this request requires that the Plaintiffs make a conclusion of law. It is well-settled that requests for admissions cannot be used to compel an admission of a conclusion of law. See Reliance Ins. Co. v. Marathon LeTourneau Co., 152 F.R.D. 524, 525 (S.D.W.Va.1994). Therefore, this admission request is invalid under Rule 36(a) and may not be applied against Plaintiffs.

The second admission at issue, that "[Plaintiffs] are credited for time worked prior to the start of roll call" also fails to refute Plaintiffs' claim. Consistent with the admission, Plaintiffs agree that they were credited for nine minutes of time worked prior to the start of roll call. Nonetheless, Plaintiffs claim that, although they were credited with some work prior to roll call, they are nonetheless entitled to more compensation than they have been receiving. Therefore, Plaintiffs' claim of compensation for additional pre-roll call time is not barred by the admission that they have been credited with some pre-roll call hours.

Similarly, admissions two, three, and five, which state that Plaintiffs work on a 28-day cycle, executed a compensatory time agreement with the City and have accumulated no more than 480 hours in the comp time bank, fail to refute any of Plaintiffs claims. None of Plaintiffs' claims is based on any allegations that are inconsistent with these admissions.

Lastly, although Plaintiffs admitted that the City's "Standard Operating Procedure" concerning overtime complies with the FLSA, this admission does not refute Plaintiffs' claim. As an initial matter, this admission requires a conclusion of law and is therefore invalid. Moreover, even if it is accepted, the admission fails to refute Plaintiffs' claim regarding overtime compensation. Rather than claiming that the City's "Standard Operating Procedure" fails to

comply with the requirements of the FLSA, Plaintiffs claim that the Procedure, as it is applied by Defendant in practice, is non-compliant. Therefore, their claim is not barred by the admission that the "Standard Operating Procedure" is compliant with FLSA. In any event, the admission is invalid and need not be applied against Plaintiffs.

For these reasons, Plaintiffs' admissions do not refute any of Plaintiffs' claims as a matter of law. Accordingly, Defendant is not entitled to summary judgment on the basis of Plaintiffs' first set of admissions and its Motion for Summary Judgment on that basis must be denied.

3(B). Plaintiffs' and Defendant's Motion for Summary Judgment on the issue of Compensation for Pre-Shift Work

Plaintiffs' first claim is that Defendant failed to compensate its officers for pre-roll call work. Although the City compensates officers for nine minutes of pre-roll call time during the week and 21 minutes of pre-roll call time on the weekends, Plaintiffs claim that they perform more than nine or 21 minutes of work prior to roll call.

Officers Jones, Liptak, Lunch, Nidiffer, and Rosa stated in deposition testimony that they arrived anywhere from fifteen to forty minutes prior to roll call. See Jones Dep. at 18 (an average of 30 minutes early); Liptak Dep. at 4 (from 20 to 30 minutes early); Lynch Dep. at 28 (from 25 to 40 minutes prior to roll-call); Nidiffer Dep. at 74 ; Rosa Dep. at 38. Plaintiffs stated that they had to arrive early in order to perform various tasks, including: (1) putting gas in their law enforcement vehicle; "restocking" their vehicle with flares and other safety devices; (2) obtaining reports to be used during the day; (3) viewing the bulletin board; (4) signing out warrant folders; and (5) getting bags together. See id.

Plaintiffs claim that the police department had an "unwritten rule" that required them to come in more than nine (or 21) minutes prior to roll call. Officer Nidiffer states that "they'll tell

you, '[y]ou need to be here, because sometimes we start roll call at six-forty.' . . . So you need to be there at least by six-thirty. And some guys get there early–earlier than that and get their cars and go through their warrants or whatever." See Nidiffer Dep. at 20. According to Officer Lynch, "you are pretty much required to be in far ahead of [roll call] to . . . take care of . . . getting your work packet . . .looking at the bulletin board, getting any information off [the board], getting your bags . . . because they want you as soon as roll call is over to be on the street instead of doing things like that." See Lynch Dep. at 27-28. Another officer claimed that one would be "looked upon as not being prompt" if he did not show up more than 15 minutes early.[1] See Rosa Dep. at 38. Another stated that it was an "unwritten rule" that officers come in at least fifteen minutes early. See Rosa Dep. at 45-46.

Defendant claims that it sufficiently compensates its officers for their pre-roll call "work" by paying them for nine minutes of pre-roll call time on the weekdays and 21 minutes on the weekends. Defendant argues that, although Plaintiffs may do some work-related activities prior to roll call, Plaintiffs also engage in socializing and car-parking, which are not compensable activities. See Jones Dep. at 20 (stating that he does use some of his pre-roll call time to socialize with other officers); Lynch Dep. at 60 (stating that he socializes during the ten minutes before the shift); Nidiffer Dep. at 78-79 ("Yeah, sure [I talk with other officers prior to roll call]. I mean, you don't just go into the station and not say hi to anybody. I mean, this is really about the only time you get to . . . talk about cases that are going on . . . or what's happening.").

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[1] At least one officer was commended, in his annual evaluation, "[for] repor[ing] for duty well in advance of his assigned shift and utiliz[ing] this time to prepare himself for duty by obtaining needed equipment from his locker, signing out his warrant packet and reviewing informational bulletin boards/shift assignment rosters." See July 14, 1999 Evaluation of Officer Jones ¶ 5.

Defendant claims that the pre-roll call work takes less than nine (or 21) minutes and that Plaintiffs have therefore been adequately compensated therefor.

Defendant also argues that there is no rule, unwritten or otherwise, that requires that Plaintiffs come to work early. See Def. Memo. in Supp. at 13 (stating that "[t]he City does not require the Plaintiffs to come in before roll call" and that "[t]here are no duties that an officer is required to perform prior to roll call."). Defendant does not agree that Plaintiffs and other officers are "suffered" to work any amount of time prior to 6:45 a.m., when they are, in fact, required to report for the day.

Whether the officers' pre-roll call, work-related activities should be compensated is an issue of law for the court. Under FLSA, employers must pay overtime for "employment in excess of [forty hours] at a rate not less than one and one- half times the regular rate at which [the employee] is employed." 29 U.S.C. § 207(a)(1). By not providing a definition of "work" or "employment" in the FLSA, Congress left it to the courts to determine which employment-related activities are "work" and, therefore, compensable under the Act. Courts generally construe "work" to include those activities that are "controlled or required by the employer and pursued necessarily and primarily for the benefit of his employer and his business." Tennessee Coal, Iron & R. Co. v. Muscoda, 321 U.S. 591, 598, 64 S.Ct. 698, 703.

Under applicable regulations, "compensable hours of work" include time during which the "employee is suffered or permitted to work for the employer." See 29 C.F.R. § 553.221(b). The regulations further states that "[s]uch time includes all pre-shift and post-shift activities which are an integral part of the employee's principal activity or which are closely related to the performance of the principal activity, such as attending roll call, writing up and completing tickets or reports, and washing and re-racking fire hoses." Id.

This Court finds that the officers' pre-roll call duties, including the signing out of warrant packets, the re-fueling and re-stocking of law enforcement vehicles, and obtaining information off of the station's bulletin board, qualify as "integral" to the principal activity of law enforcement, in that they must be done prior to the commencement of daily law enforcement duties.[2] At the same time, activities such as socializing and car-parking are not compensable "work" under the FLSA.

Therefore, issues of fact remain which preclude summary judgment. First, an issue of fact remains as to whether, when all of the non-compensable activities are removed from the calculation, including socializing and car-parking, the officers perform more than nine minutes (on weekdays) or 21 minutes (on weekends) of work prior to roll call. If such duties do require more than nine (or 21) minutes of activity, Plaintiffs have worked time for which they have gone uncompensated. However, if the majority of the time is spent socializing, and only nine minutes of work is actually performed prior to roll call, the City's practice of compensating for nine minutes of pre-roll call time would be sufficient.

Second, an issue of fact remains as to whether there exists an "unwritten rule" by which officers are required to report at least fifteen minutes prior to their official "report" or "roll call" time. If there exists such a rule, then Plaintiffs could be said to have "suffered" work for the benefit of the City for which they have gone uncompensated. These are both issues of fact that must be left to the fact-finder and, therefore, preclude summary judgment.

3(C). Compensation for Post-Shift Work

Plaintiffs also claim that they were not compensated for post-shift work. The City's

[2] Moreover, because the officers must be "on the street" subsequent to the roll call, time spent prior to roll call engaging in such integral activities is compensable time.

overtime work compensation scheme required officers to submit overtime forms in order to request compensation for the amount of overtime that they had done. In practice, however, Plaintiffs claim they were discouraged from submitting overtime compensation forms. As a result, they argue that they have not been credited with all of the overtime work that they have performed. Specifically, the officers state that, if they worked overtime that amounted to less than 30 minutes, they were discouraged from or explicitly told not to submit overtime compensation forms for those minutes. See Liptak Dep. at 6-7; Jones Dep. at 22; Rosa Dep. at 53 (stating that he was told by supervisors not to submit an overtime form over ten times).

Defendant claims that officers have been fully compensated for all post-shift work done by them. See Williams Aff. ¶ 11; Newman Aff. ¶ 13 (stating that he "never had a problem with either Officer Rosa or Nidiffer failing to submit a[n overtime] slip when they were supposed to"). Moreover, to the extent that Plaintiffs have failed to turn in their overtime slips, Defendant claims that Plaintiffs themselves are at fault for any work for which they have not been compensated. See Lynch Dep. at 48 (stating that "I never thought about" submitting time for certain overtime spent helping a recruit).

Because Plaintiffs claim that the City has a practice of failing to compensate officers for overtime work, and Defendant claims that all overtime work has been properly compensated, there remains a material issue of fact that precludes judgment at this stage. Moreover, whether Plaintiffs were actually "discouraged", and thereby prevented, from submitting slips for overtime work performed by them is an issue of fact. Therefore, Plaintiffs' Motion for Summary Judgment must be denied as to their post-work overtime compensation claim claim.

3(D). Compensation for Off-Duty Training

Plaintiffs claim that City police officers are not always compensated for training for

which they should be compensated. Officer Nidiffer claims that he attended a DUI class, a drug interdiction identification class, and a computer forensic class for which he was not compensated. Although the computer forensic class did not "directly relate" to Nidiffer's job, as the department did not have computers capable of doing such work, he claims that the drug interdiction identification class and the DUI class did pertain directly to his job. Officer Jones states that, if an officer requests to take a shooting class, for example, the police department may refuse to "send" him to the class and, if so, he will not be compensated for time spent at the class.

As previously discussed, Congress did not provide a definition of "work" under the FLSA, but rather left it to the courts to determine which employment-related activities are compensable "work" under the Act. Courts have construed "work" to mean all activities "controlled or required by the employer and pursued necessarily and primarily for the benefit of his employer and his business." Muscoda, 321 U.S. at 598, 64 S.Ct. at 703 (holding that underground travel to iron ore mines was compensable work). Under applicable regulations, "compensable hours of work" generally include time during which an employee is on duty, "as well as all other time during which the employee is suffered or permitted to work for the employer." See 29 C.F.R. § 553.221(b) (emphasis added).

In this case, the police officers claim that they should be compensated for voluntary, off-duty training that is has been disapproved by the City. However, using the generally accepted definition of "work", duties must be "controlled or required" by the employer in order to constitute "work." Therefore, where, as here, the employer has explicitly rejected or disapproved of its employee taking a particular class or training program, but the employee nonetheless chooses to participate in the course of his own volition and on his own time, that

training cannot be said to be "controlled or required" by the employer. Nor could it be considered to be time during which the employee is "suffered" or even "permitted" to work for the employer.

Because voluntary training, which is disapproved by the City, is not controlled, required, or even permitted by the City to be done on its behalf, such training is not compensable "work" under the FLSA. Plaintiffs' Motion for Summary Judgment will be denied on this issue, and Defendant's Motion will be granted.

3(E). Compensation for Canine Care

Plaintiffs further claim that officers have been under-compensated for time spent doing off-duty care of law enforcement canines. Defendant presently compensates officers who work with canines for one hour of home canine care per day, i.e., 28 hours of canine care per each 28-day cycle. Defendant claims that it arrived at the one-hour number by doing research on the issue and states that one hour is "generous" based on studies that it has done. See Mathias Aff. ¶¶ 5-6. Plaintiffs counter that one hour is not enough, when time spent running and feeding the dog, as well as vacuuming the officer's automobile, is taken into account.

In Reich v. New York City Transit Authority, 45 F.3d 646, 650 (2d Cir. 1995), the Second Circuit Court of Appeals held that "feeding, training, and walking are work and are indispensable to the dogs' well-being and to the employer's use of the dogs in its business." Indeed, such work is clearly "suffered" for and permitted by the City, which requires officers with canines to train such dogs for use in performing law enforcement activities. Given that the City requires its canine officers to use dogs in the line of duty, "feeding, training and walking" the canines are activities that are clearly integral to the officers' law enforcement duties. Defendant apparently agrees that such activities should be compensated by the City, and claims

that it took such activities into account in calculating the one-hour per day canine compensation figure.

However, if the feeding, training and walking were the only activities that required compensation, the evidence on the record indicates that canine officers would spend only 25 to 40 minutes doing canine-related work each day and the one-hour compensation scheme would be sufficient. See Gray dep. at 30, 34 (stating that he does 15 to 20 minutes of canine care in the morning and 10 to 20 minutes of canine care in the evening). However, Plaintiffs argue that 20-minutes per day of automobile vacuuming should also be considered compensable canine care. If vacuuming were included, the record supports that canine officers would spend more than one hour a day on canine-related duties.

Unfortunately for Plaintiffs, however, Defendant has presented uncontroverted evidence that the City had no knowledge that its canine officers were spending 20 minutes per day vacuuming their automobiles. The record shows that then-Sergeant Kenneth Mathias informed the canine officers that they would receive one hour per day for home animal care, and that no officer told Mathias that he took more than one hour doing such duties. Moreover, Plaintiffs present no evidence that any other supervisor had knowledge that the canine officers were doing 20 minutes of vacuuming per day. Because the City had no knowledge of the vacuuming, it was clearly not "controlled or required" by the employer. In fact, when the City did become aware of the 20-minute vacuuming practices, subsequent to Gray's deposition testimony, the City instructed its officers to perform any required vacuuming on-duty, so that off-duty vacuuming was no longer permitted or required.

The Court agrees that canine care, including feeding, walking, and other requisite duties, should be compensated as "work." However, the Court does not agree that the ancillary task of

automobile vacuuming should be compensable, where the employer was unaware of the task or the fact that it was being performed in such a way that it required 20 minutes of the officers' daily canine-related activities. Absent the 20-minute vacuuming routine, Plaintiffs' canine activities were adequately compensated under the City's policy of granting each canine officer one hour of "off-duty" compensation for canine-related activities. Accordingly, Plaintiffs fail to support that canine officers have been improperly compensated for their work. Accordingly, Plaintiffs' Motion for Summary Judgment is denied and Defendant's Motion for Summary Judgment is granted as to this claim.

3(F). Designation of Sergeants as "Exempt" Employees

Plaintiffs further claim, on behalf of certain members of the consenting group, that the City has misclassified its police sergeants as "exempt" employees. Under 29 U.S.C. § 213(a)(1), bona fide executive, administrative, and professional employees are exempt from the requirements of the FLSA. Whether a person qualifies for the exemption is based on: (1) whether the employee's duties are primarily managerial in nature; (2) whether the employee's salary meets a particular level; and (3) whether the employee meets the "salary basis" test. See 29 C.F.R. §§§ 541.1, 541.1(f); 541.118; see also 29 C.F.R. §§ 541.2, 541.3. In all cases, the burden of employer bears the burden of demonstrating that its employees are exempt. See Reich v. Newspapers of New England, Inc., 44 F.3d 1060, 1070 (1st Cir.1995).

First, this Court must consider whether the duties of the City's sergeants are primarily managerial. Whether management duties constitute a "primary" job duty is determined on a case-by-case basis. See 29 C.F.R. § 541.103. Generally speaking, an employee meets the "duties" test if "the employee's 'primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision

thereof, and includes the customary and regular direction of the work of two or more other employees therein.'" Shockley v. City of Newport News, 997 F.2d 18, 25 (4th Cir. 1993) (citing 29 C.F.R. § 541.1(f)) (emphasis in the original). As a "rule of thumb", this means that an employee must devote over fifty percent of his time to managerial duties in order to meet the threshold. See id. at 26.

In this case, the record supports that each sergeant is in charge of a police squad, for which his "primary duty [is] . . . to supervise the officers assigned to [that] squad." See Brown Aff. ¶ 21. Moreover, the record is clear that sergeants "devote more than fifty percent of their time to management responsibilities" and that they always supervise at least two other employees. Id. ¶¶ 21, 22. For all of these reasons, the sergeants' "duties" are primarily managerial.

They City's sergeants also meet both the "salary level" and "salary basis" tests. The sergeants meet the requisite level of salary because their starting pay exceeds $250 per week. See 29 C.F.R. § 541.1. They similarly pass the "salary basis" test because they are, in fact, paid on the basis of a "salary."

"According to the regulations, '[a]n employee will be considered to be paid "on a salary basis" . . . if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.'" Auer v. Robbins, 519 U.S. 452, 455, 117 S. Ct. 905, 908 (1997). The method of salary payment notwithstanding, employees who are covered by a "policy that permits disciplinary or other deductions in pay 'as a practical matter'" are deemed not to be paid on a salary basis and, therefore, not exempt from the FLSA. See Auer, 519 U.S. at 461.

In this case, the City's police sergeants receive their pay in the form of a salary, paid out in a certain amount each pay period. However, Plaintiffs argue that sergeants are not on a "salary basis" because they are subject to disciplinary deductions from their pay. However, the record does not support such a finding. Under Auer, the Supreme Court has held that there must be a "clear and particularized policy [of deductions based on disciplinary action]--one which "effectively communicates" that deductions will be made in specified circumstances." Auer, 519 U.S. at 462. In this case, Plaintiffs present no evidence of any such policy, nor of any case in which a sergeant has been subject to such disciplinary deductions. Accordingly, Plaintiffs' Motion for Summary Judgment is denied and Defendant's Motion is granted on this issue.

3(G). Inclusion of Periodical Bonuses in "Regular Rate"

During each of the past two years, employees of the City have been given a bonus as a result of increases in the City's revenue during those years.[3] In 1998, City employees received $500 in such bonuses and in 1999, City employees received $250. Plaintiffs claim that the City has incorrectly failed to include periodical bonuses in their "regular rate" of pay. The "regular rate" is calculated by dividing the annual salary by the number of hours worked during the year. The amount of overtime pay that is paid to the City's officers is calculated based on the regular rate.

The "regular rate" of pay "include[s] all remuneration for employment paid to, or on behalf of, the employee". However, Title 29 U.S.C. § 207(e) expressly excludes from the "regular rate" all "sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service." See 29 U.S.C. § 207(e)(1). Such gifts

[3] Specifically, the bonuses were paid to all full-time employees on the City's payroll from January to mid-February after the bonuses were authorized by the City. See Benton Aff. ¶ 11.

should be excluded from the "regular rate" so long as the amounts of the gifts "are not measured by or dependent on hours worked, production, or efficiency." Id.

In this case, the annual bonuses were given to all employees of the City and were not measured by or dependent on the hours worked by City employees. See Benton Aff. ¶ 4. Nor were the bonuses measured by the employees' levels of production or efficiency. Id. Because the bonuses, therefore, were in the nature of gifts, they were properly excluded from calculation of the "regular rate" of pay.

Alternatively, the bonuses are excludable under 29 U.S.C. § 207(e)(3)(a). Title 29 U.S.C. § 207(e)(3)(a) excludes from the "regular rate" any sums paid in recognition of services performed during a given period if: (1) the fact that payment is to be made at the sole discretion of the employer near the end of the time period and (2) the amount of the payment are determined at the sole discretion of the employer and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly. Because the City's bonuses are excludable on these bases, they should not be included in the calculation of the "regular rate".

Accordingly, Plaintiffs' Motion for Summary Judgment on this issue is denied, and Defendant's Motion is granted.

3(H). Inclusion of Longevity Pay in "Regular Rate"

Plaintiffs also argue that their longevity pay should be included in the calculation of the "regular rate." In Raleigh, a longevity payment may be made to a City police officer, so long as: (1) the officer has given five years of service to the City; and (2) he has not received an annual performance evaluation rating of "Needs Improvement" or "Unsatisfactory". The amount of an officer's longevity payment is calculated as a percentage of the officer's income. While Plaintiffs

claim that longevity payments should be included in calculating the "regular rate", Defendant argues that longevity pay is a "sum paid as a gift as a reward for service," see 29 U.S.C. § 207(e)(1), and that the longevity pay is therefore excludable.

As discussed above, gifts should be excluded from the calculation of "regular rate" so long as the amounts of the gifts "are not measured by or dependent on hours worked, production, or efficiency." See 29 U.S.C. § 207(e)(1). In this case, even if an employee were to work more than five years for the City, he would not receive a longevity payment if his performance rating (based on his performance) had fallen below a certain threshold. Therefore, although the longevity payments are not directly proportional to employees' efficiency or productivity, they are certainly "dependent" thereupon.

Because the longevity payments may be withheld at the discretion of the City, on the basis of the police officer's performance rating or efficiency, the officers' longevity pay is not excludable under 29 U.S.C. § 207(e)(1). Moreover, the longevity payments are not excludable on any other basis, so they must be included in calculating the "regular rate". Accordingly, Plaintiffs' Motion for Summary Judgment on this point must be granted and Defendant's corresponding Motion for Summary Judgment be denied.

3(I). Compensatory Time

Plaintiffs also claim that Defendant has violated FLSA's requirements with regards to its policy governing the use of compensation time. Title 29 U.S.C. § 207(o) provides that employees of public agencies may be compensated for overtime work with compensatory time off in lieu of cash payment. Title 29 U.S.C. § 207(o)(5) further requires that use of such compensatory time shall be given to such employee "within a reasonable period after [the employee] mak[es] the request [for the use of the time] if the use of the compensatory time does

not unduly disrupt the operations of the public agency."

In 29 C.F.R. § 553.25(c)(1), the Department of Labor ("DOL") states that what qualifies as a "reasonable period" of time is based upon the customary work practices, including but not limited to the following: "(a) the normal schedule of work, (b) anticipated peak workloads based on past experience, (c) emergency requirements for staff and services, and (d) the availability of qualified substitute staff." The DOL also clarifies the "undue disruption" standard, by stating that "mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time off." The DOL noted that, for an employee's request to be "unduly disruptive", the employer must "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." See 29 C.F.R. § 553.25(d).

In this case, the City's stated policy is that a request for "comp time . . . should be given to the employee . . . within a reasonable time as long as it does not unduly disrupt the[] operations [of the police department]." See Dominick Dep. at 39. In practice, the Platoon Captain is "allow[ed] to make the decision on how many people [will] be [allowed] off [on a particular day], depending on the work load, the shift, the events that are happening." See Knox Dep. at 46. Knox states that the Platoon Captain has arrived at that number by determining "what it t[akes] to cover the City safely, period." See id. at 49. When the "log book" is filled for a particular day, no other officer may take that day off.[4]

[4] Generally speaking, a squad's log book will be filled on a particular day as soon as one or two officers are taking the day off. As officer Liptak stated, "A lot of times if there is already somebody off on my squad, then we don't get a chance to take off, so it's disapproved."

Plaintiffs claim that the City has violated the "undue disruption" standard in that it has a practice of denying comp time requests on occasions when, to grant such requests would not be "unduly disruptive." Plaintiffs claim that, in practice, "[r]equests to use comp time are denied . . . absent conformance with an 'unduly disruption' standard." See Plaintiffs' Memo. in Supp. at 30. Specifically, they complain that Defendant denies comp time requests without regard for available substitute officers who are willing and able to substitute for the requesting officer.

The stated policy of the City is to grant such requests if they are made in a reasonable time and do not "unduly disrupt" the operations of the police department. The City's formal policy is obviously complaint with 29 U.S.C. § 207(o)(5), as it merely restates the requirements of the Statute. However, in practice, the City implements this stated policy by allowing its Platoon Sergeants to set certain "minimum employment levels". Furthermore, when these minimum employment levels are reached (i.e., the log books "are full"), any officer seeking to use his comp time on that particular day will be denied.

This Court agrees that maintaining minimum employment levels is crucial to ensuring safety and order in the City of Raleigh. However, to comply with the "undue disruption" standard, the City must turn down comp time requests, only when granting them would impose an unreasonable burden "during the time requested". See 29 C.F.R. § 553.25(d). Although the applicable regulation is ambiguous as to what constitutes an unreasonable or undue disruption, the Secretary's preamble to the interpreting regulations clarifies its meaning. The preamble clearly states that:

> "situations may arise in which overtime may be required of one employee to permit another employee to use compensatory time off. However, such a situation, in and of itself, would not be sufficient for an employer to claim that it is unduly disruptive."

52 Fed. Reg. 2012, 2017 (1987). Moreover, although this interpretation is not entitled to

Chevron deference, it is entitled to "respect" if it has the "'power to persuade'". See Christensen v. Harris County, 529 U.S. 576, 587, 120 S.Ct. 1655, 1663 (2000) (citing Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)).

This Court finds the Secretary's interpretation persuasive and holds that, because Defendant is unwilling to substitute officers who may need to be paid overtime to grant an officer's comp time request, it thereby denies requests when doing so would not impose undue hardship. It is therefore possible for the City to grant comp time requests, even when the log book is "full", without causing staffing levels to fall below the critical level. To do this, the City need find replacements for the requesting officers and may, in some cases, be required to pay "overtime" to such replacement officers. However, to so accommodate its officers would not impose "undue hardship" on the City.

For these reasons, the Court will grant Plaintiffs' Motion for Partial Summary Judgment on this issue and will deny Defendant's Motion for Summary Judgment.

3(J). Statute of Limitations

Lastly, Defendant has moved for summary judgment as to all claims based on violations allegedly done prior to May 17, 1997. Plaintiffs seek recovery for claims that accrued more than three years prior to the filing of the instant suit on May 17, 1999. However, under 29 U.S.C. § 255(a), absent a willful violation, an FLSA claim must be commenced within two years after the claim accrues. If an employee can show that his employer acted willfully, the statute of limitations is extended to three years.

In McLaughlin v. Richland Shoe Co., 486 U.S. 128 (1988), the Supreme Court held that an employer "willfully" violates the FLSA if: (1) the employer actually knows its conduct is in violation of the law; or (2) the employer acts in reckless disregard for whether the conduct

violates the law. Id. at 133, 135. Therefore, "[i]f an employer acts unreasonably, but not recklessly, in determining its legal obligation, then . . . it should not be . . . considered [wilful] under . . . the . . . standard we approve today." Id. at n. 13.

In this case, Plaintiffs offer no evidence that Defendant had actual knowledge that it was violating the FLSA. Neither have they demonstrated a reckless violation of the FLSA by Defendant. Accordingly, Plaintiffs' action will be subject to a two-year statute of limitations.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion to Add 17 Consenters and Motion to Exceed Page Limitation are hereby GRANTED. Both Plaintiffs' Motion for Partial Summary Judgment and Defendant's Motion for Summary Judgment are hereby GRANTED in part and DENIED in part.

SO ORDERED.

This 8TH day of August, 2001.

Terrence W. Boyle
TERRENCE W. BOYLE
CHIEF UNITED STATES DISTRICT JUDGE

I certify the foregoing to be a true and correct copy of the original.
David W. Daniel, Clerk
United States District Court
Eastern District of North Carolina
By [signature]
Deputy Clerk

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CLERK, U.S. DISTRICT COURT
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MAY 11 2001
CENTRAL DISTRICT OF CALIFORNIA
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CENTRAL DISTRICT OF CALIFORNIA
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LONG BEACH POLICE OFFICERS' ASSOCIATION, et al., **Plaintiffs,** vs. **ROBERT M. LUMAN, et al.,** **Defendants.**	**CV 99-13090 FMC (JWJx)** **ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S PARTIAL MOTION FOR SUMMARY JUDGMENT; ORDER DISMISSING PLAINTIFF LONG BEACH POLICE OFFICERS' ASSOCIATION**

This matter is before the Court on Plaintiff's Motion for Partial Summary Judgment filed on November 2, 2000. For the reasons stated herein, Plaintiff's Partial Motion for Summary Judgment is hereby **GRANTED IN PART AND DENIED IN PART.**

I. Background

This action arises out of the City of Long Beach Police Department's ("the Department's) policy of compensating officers for overtime with compensatory time off in lieu of cash payment as permitted by the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 et seq. Specifically, a dispute has arisen between individual police

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officers and the Department regarding under what circumstances a police officer's request to take compensatory time off will be granted.

The Long Beach Police Officer's Association ("the Association"), the police officers' employee representative, and Michael Schaich, the original Plaintiffs in this action, have been joined by 334 other Long Beach police officers ("the 334 officers"). These police officers have filed consents to participate in the litigation pursuant to 29 U.S.C. § 206(b).

A. The Policy — Compensatory Time in Lieu of Cash Payment

The City of Long Beach personnel ordinances authorize the Department to provide an employee with compensatory time off in lieu of cash payment for overtime worked. Compensatory time accrues at the rate of one and one-half hours for each hour of overtime worked.

It is the policy of the Department to grant a police officer's request for use of compensatory time off unless the use of compensatory time by the officer would cause the staffing levels to fall below established minimum standards.[1] (King Decl. ¶ 4). This policy was incorporated into the memorandum of understanding ("MOU") between the Association and the Department.[2]

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[1] Jerome Lance, Chief of Police, explained the rationale for the minimum staffing levels in his declaration. These levels ensure that the City of Long Beach has a sufficient number of police officers on duty at all times and ensures that the Department will be able to respond to calls for service within a specified time period based on the priority of the call (*e.g.*, five minute response time for felony spouse beating in progress). (Lance Decl. ¶ 2).

[2] The MOU provides:

> It is agreed that there exists within the Police Department personnel policies and procedures, general orders, departmental policies and rules and regulations. Except as specifically modified by this MOU, these rules and regulations, and policies and subsequent amendments thereto shall be in force and effect during the term of this MOU. Before any new or subsequent amendments to these policies or departmental rules and regulations directly affecting wages, hours,

Beginning in April 1999, the Department adopted a policy of attempting to grant requests to take compensatory time off by finding another officer to cover the requesting officer's shift.[3] (Lacey Depo. at 30-31). This attempt was made by the scheduling sergeant independently or by the scheduling sergeant with the assistance of the requesting officer. (Lacey Depo. at 30-31). Prior to April 1999 time, there was no such policy. (Lacey Depo. at 31, 37).

B. The Denied Requests — Police Officers Schaich and Bacon

1. Officer Schaich

On or about March 11, 1999, Officer Schaich requested four days of compensatory time off for the days March 29, 30, 31, and April 1, 1999. (Schaich Decl. ¶ 3).[4] Kevin King, Scheduling Sergeant assigned to Watch I of the East Patrol Division of the Department at the time of the request, reviewed Officer Schaich's request to use compensatory time and determined that granting Officer Schaich all four days requested would cause the staffing levels fall below the Department's minimum standards. (King Decl. ¶¶ 2,4,5). Sergeant King informed Officer Schaich that he could grant his request with respect to three of the four days, but not all of

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terms and conditions of employment are implemented, the City, through the Police Chief, shall meet in accordance with Government Code Section 3500, et seq., with the Association regarding such changes.

[3] The Department argues that Commander Lacey's testimony regarding this issue should not be considered because it is an answer to a hypothetical question. To the contrary, Commander Lacey's testimony merely explains a possible application of a departmental policy that is at the heart of the present controversy.

[4] The Department has objected to paragraphs three and four of Officer Schaich's declaration on the bases of relevancy, lack of foundation, and because the declaration sets forth a legal conclusion. The Court sustains the Department's objection to the fourth paragraph of Officer Schaich's declaration, which indeed sets forth a legal conclusion. Conversely, the third paragraph of Officer Schaich's declaration regarding his request to take compensatory leave is relevant, does not lack foundation, and is not a legal conclusion; therefore, the Court overrules the Department's objection to the third paragraph of the Declaration.

the days requested. (King Decl. ¶ 5). Officer Schaich informed Sergeant King, however, that if he could not have off all four days, he did not want to take any days off; therefore, Sergeant King denied the request in its entirety. (King Decl. ¶ 5).

Officer Schaich claims that he provided Sergeant King with the names of four officers who could work his scheduled shifts on the four days in question. (Schaich Decl. ¶ 3). Sergeant King disagrees with this statement and denies that names were ever offered or provided. (King Decl. ¶ 7).

2. Officer Bacon

On March 19, 2001, Officer Bacon requested to take a day of compensatory time off to be used on April 8, 2001. (Bacon Decl. ¶ 3). This request was denied. (Bacon Decl. ¶ 3). The following day, Officer Bacon resubmitted the request along with the name of another officer would work the shift in his place. (Bacon Decl. ¶ 4). The request was again denied, but Officer Bacon was given the option of trading scheduled days off with another officer. (Bacon Decl. ¶ 5). Officer Bacon worked his shift on April 8, 2001. (Bacon Decl. ¶ 7).

C. The Present Motion

Plaintiffs argue that the undisputed facts establish that summary judgment should be granted in their favor as to the issue of whether the Department's policy on the use of compensatory time violates § 207(o)(5). The Department argues that the Association is not a proper party to this action, and that the 334 officers are not proper parties to this action because Plaintiff's counsel has not brought a motion to include them. Therefore, the Department argues, the only issue presented by the present action is whether the Department violated § 207(o)(5) when it denied Plaintiff Michael Schaich's request to use compensatory time.

II. The Association's and the 334 Officers' Status as Parties to This Action

The Department argues that the Association is not a proper party to this action. The Department relies on *State Nevada Employees' Association, Inc. v. Bryan*, 916 F.2d 1384, 1391 (9th Cir. 1990), which indeed held that an employee's

representative is not a proper party in an action alleging a violation of 29 U.S.C. § 207(o). Accordingly, the Court hereby **dismisses** the Association from this action.

The Department next argues that the 334 officers are not proper parties to this action because Plaintiff's counsel has not filed a motion pursuant to 29 U.S.C. § 216(b) to include them. However, the 334 officers filed their consents on June 30, 2000, and the Court acknowledged the filing of these consents on July 11, 2000.[5] Defendants' counsel indicated that he had anticipated filing objections to the joining of the 334 officers to this action; however, all a prospective plaintiff need do to "opt in" to FLSA suit for damages is to file a consent pursuant to 29 U.S.C. § 216(b). *See, e.g., Does I Through XXIII v. Advanced Textile Corp.*, 214 F.3d 1058 (9th Cir. 2000); *Bonilla v. Las Vegas Cigar Co.*, 61 F. Supp.2d 1129 (D. Nev. 1999). Accordingly, the 334 officers are proper plaintiffs in this action.

III. Summary Judgment Standard

Summary judgment is proper only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. Rule Civ. Pro. 56(c); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Whether a fact is material is determined by looking to the governing substantive law; if the fact may affect the outcome, it is material. *Id.* at 248, 106 S.Ct. 2505.

[5] Apparently, neither party received a copy of this filing. A copy was provided to counsel at the hearing on the present Motion on May 7, 2001.

If the moving party meets its initial burden, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). Mere disagreement or the bald assertion that a genuine issue of material fact exists does not preclude the use of summary judgment. *Harper v. Wallingford*, 877 F.2d 728 (9th Cir. 1989).

The Court construes all evidence and reasonable inferences drawn therefrom in favor of the non-moving party. *Anderson*, 477 U .S. at 255; *Brookside Assocs. v. Rifkin*, 49 F.3d 490, 492-93 (9th Cir.1995).

IV. Compensatory Time Off Under the FLSA

A. Authorization for Compensatory Time Off in Lieu of Cash Payment for Overtime

Generally, the FLSA requires that employees who work more than forty hours in a week be compensated at a rate of one and one-half times their hourly rate of pay for each hour worked over forty hours in that week. 29 U.S.C. § 207(a)(1). However, the FLSA permits governmental agencies to provide employees with compensatory time off in lieu of cash payment for overtime:

> (o) Compensatory time
>
> (1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

29 U.S.C. § 207(o)(1). The governmental agency may provide employees with compensatory time off only pursuant to a collective bargaining agreement or memorandum of understanding. 29 U.S.C. § 207(o)(2)(A)(i).

B. Employees' Requests to Use Overtime

The FLSA also addresses an employee's request to use compensatory time. Generally, an employee's request must be honored unless the use of the compensatory time unduly disrupts the operations of the public agency:

> (5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency--(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and (B) who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not ***unduly disrupt*** the operations of the public agency.

29 U.S.C. § 207(o)(5) (emphasis added). The term "unduly disrupt" is defined by Department of Labor Regulations:[6]

> When an employer receives a request for compensatory time off, it shall be honored unless to do so would be "unduly disruptive" to the agency's operations. Mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time off. . . . For an agency to turn down a request from an employee for compensatory time off requires that 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.

29 C.F.R. § 553.23(d). The Department of Labor, in an August 19, 1994, Letter Ruling, provides more guidance as to when granting a request for compensatory time off would be "unduly disruptive," would be an "unreasonable burden," and would be more than a "mere inconvenience":[7]

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[6] This Court is required to give deference to an agency's regulation containing a reasonable interpretation of an ambiguous statute. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44, 104 S. Ct. 2778 (1984); *Christensen v. Harris County*, 529 U.S. 576, 586-87, 120 S. Ct. 1655 (2000).

[7] An agency's interpretation of a regulation should be given deference if the language of the regulation is ambiguous and the interpretation is consistent with the statute. *Auer v. Robbins*, 519 U.S. 452, 117 S. Ct. 905 (1997); *Christensen v. Harris County*, 529 U.S. 576, 120 S. Ct. 1655 (2000). The terms "unduly disruptive," "unreasonable burden," and "mere inconvenience" are ambiguous and therefore the

> It is our position 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 services 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.***

Department of Labor, Letter Ruling, August 19, 1994 (emphasis added).

V. Analysis

The Department has a policy that provides compensatory time off to its employees in lieu of cash payment, and that policy is incorporated into its MOU with the Association. *See* 29 U.S.C. § 207(o)(1)-(2). Accordingly, the Department is subject to the requirement that employee's requests for use of accrued compensatory time be granted unless such request is unduly disruptive. *See* 29 U.S.C. § 207(o)(5). This Court is required to give deference to the Department of Labor's regulations that define the term "unduly disruptive." *See Chevron*, 467 U.S. at 842-44. Those regulations state that a mere inconvenience to the employer is not to be considered "unduly disruptive" and that requests for compensatory time off should be granted unless the employee's absence would impose an unreasonable burden on the agency's ability to provide services of an acceptable quality and quantity to the public. 29 C.F.R. § 553.23(d). The Department of Labor ("DOL") has interpreted this regulation to require employers to attempt to meet their staffing needs through other means, in order to grant a request for compensatory time off. (08/14/94 Letter Ruling). Specifically, the DOL has interpreted this provision to mean that 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. *Id.*

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agency's interpretation as set forth in its August 19, 1994, Letter Ruling must be given deference.

Under this standard, the Court agrees with the Department that granting an employee's request for compensatory time off is not required when that employee's absence would cause staffing to fall below the Department's established minimum level. Plaintiffs have presented no evidence that questions the legitimacy or necessity of maintaining these levels,[8] and the Court has no difficulty concluding that the Department need grant no request for compensatory time off when that action would endanger the safety of the public it is charged with protecting. Such a result would surely be "unduly disruptive" within the meaning of § 207(o)(5).

The issue, then, centers whether the Department, when considering an employee's request to take compensatory time off, is required to determine whether its staffing needs could be met in some other fashion. Plaintiffs have suggested that where an employee has provided the names of officers who are both able and willing to work the requesting officer's shift, then the request must be granted. The uncontroverted facts establish that prior to April, 1999, the Department had no policy of either attempting to find another officer to fill the requesting officer's shift or of allowing the requesting officer to find another officer to fill the shift.

Therefore, the uncontroverted facts establish that the Department's failure to adopt a policy to implement the requirements of the FLSA prior to April 1999 was in violation of § 207(o)(5).[9]

The Department's post-April 1999 policy is articulated by Commander Lacey in his deposition. Commander Lacey explained that beginning in April 1999, the

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[8] Indeed, Plaintiffs do not suggest that compensatory time off should be granted if this action causes the staffing levels to fall below the minimum standard.

[9] Whether Officer Schaich submitted the names of four officers who were willing to cover his shifts on March 29, 30, 31, and April 1, 1999, is disputed by the parties. This dispute is immaterial, however, because the uncontroverted facts establish that, under the Department's established policy, these officers would not have been considered as possible substitutes for Officer Schaich's shifts. (Lacey Depo. at 37).

Department adopted a policy of attempting to grant requests to take compensatory time off by finding another officer to cover the requesting officer's shift. This policy, as articulated, would not violate § 207(o)(5).

However, other evidence offered by Plaintiff supports an inference that this policy was not in every instance followed. Officer Bacon's declaration indicates that he requested a day of compensatory time off and provided the name of another officer who could work his shift for him. Under the Department's policy as articulated by Commander Lacey, this request should have been granted. However, the request was denied, and the notation that Officer Bacon could instead trade days off with another officer supports an inference that the policy articulated by Commander Lacey was not followed in this instance.

Accordingly, material issues of fact exist that preclude summary judgment regarding whether the post-April 1999 policy, as applied, violates § 207(o)(5).

VI. Effect of United States Supreme Court Decision in *Christensen*

Defendants correctly note that the United States Supreme Court has stated that the use of compensatory time is not under the exclusive control of the employee and that an employer has significant control over the use of accrued compensatory time. *See Christensen v. Harris County*, 529 U.S. 576, 586 n.5, 120 S. Ct. 1655 (2000) (rejecting, in dicta, a notion that compensatory time should be treated like employee "cash in the bank" under the exclusive control of the employee). However, this acknowledgment by the Supreme Court does not alter the requirement under 29 U.S.C. § 207(o)(5) that an employee's request must be honored unless it would unduly disrupt the employer's operations. *See id.* (noting that examples of the employer's control were the ability to "buy out" accrued compensatory time and the ability to deny use of accrued compensatory time when such use would unduly disrupt the employer's operations). Therefore, *Christensen* does not compel a result contrary to that reached by this Court in resolving the present Motion.

VII. Conclusion

For the reasons stated herein, the Court hereby **GRANTS** Plaintiff's Motion for Summary Judgment with respect to claims that arose prior to the April 1999 implementation of a policy regarding substitution of officers to facilitate use of compensatory time. The Court hereby **DENIES** Plaintiff's Motion for Summary Judgment with respect to claims that arose after the April 1999 implementation of the substitution policy.

DATED this 9th day of May, 2001.

FLORENCE-MARIE COOPER, Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JOHN J. CANNEY, et al. Plaintiffs, v. TOWN OF BROOKLINE and BROOKLINE POLICE DEPARTMENT, Defendants.	Civil Action No. 98-11955-MEL

LASKER, D.J.

John Canney and 125 other Brookline Police Officers (the "police officers" or "officers") allege that payment practices of their employer, the Town of Brookline and its Police Department (collectively, the "town") violate the Fair Labor Standards Act ("FLSA").[1] Pursuant to a settlement agreement, the parties have resolved most of the issues in this case. There remains the question whether the town may refuse to grant an officer's request to use "compensatory time" because to do so the town would have to pay another officer overtime. Both parties move for summary judgment on this issue. The town's motion is denied. The police officers' motion is granted in part and denied in part.

[1] Fair Labor Standards Act of 1938, (codified as amended in 29 U.S.C. §§ 201-219).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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[1] Fair Labor Standards Act of 1938, (codified as amended in 29 U.S.C. §§ 201-219).

The FLSA requires an employer to pay its workers who are covered under the statute in cash, at the rate of time and one-half, for overtime work. Section 207(o) of the FLSA, with some restrictions, permits a public employer to compensate its employees in paid time off (compensatory time) instead of cash overtime.

The precise question for decision is whether the need to pay one officer overtime to allow another officer to use compensatory time constitutes an "undue disruption" as this term is used in 29 U.S.C. § 207(o)(5) and is interpreted in 29 C.F.R. § 553.25(d). Section 207(o)(5) provides that an employee who asks to use accrued compensatory time:

> shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of compensatory time does not <u>unduly disrupt</u> the operations of the public agency.

29 U.S.C. § 207(o)(5) (emphasis added).

In 29 C.F.R. § 553.25(d), the DOL has clarified the meaning of "undue disruption" contained in § 207(o). It provides:

> (d) <u>Unduly disrupt</u>. When an employer receives a a request fo compensatory time off, it shall be honored unless to do so would be "unduly disruptive" to the agency's operations. Mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time off. (See H.Rep. 99-331, p. 23.) For an agency to turn down a request from an employee for compensatory time off requires that 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 payment of one officer overtime to allow another officer to use compensatory time does not constitute an "undue disruption." On the present record nothing indicates that having to pay one or more officers overtime in cash, to permit another officer to take compensatory time would effect the police department's "ability to provide services of acceptable quality and quantity."

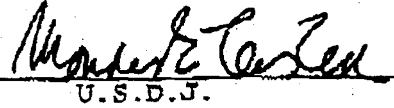
The DOL concurs in this reading of the statute and applicable regulation. See 52 Fed. Reg. 2012, 2017 (1987); April 21, 2000, Amicus Brief of the DOL in Debraska v. Milwaukee; DOL FLSA opinion letter, 1994 WL 1004861. The DOL's interpretation is entitled to deference. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) (court's must give effect to an agency's regulation containing a reasonable interpretation of a statute); Auer v. Robbins, 519 U.S. 452, 461-62, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) (agency's interpretation of its own regulation is entitled to deference). Despite the town's argument to the contrary, nothing in Christensen v. Harris County, 529 U.S. __, 120 S.Ct. 1655, __ L.Ed.2d __ (2000) changes this result.

The affidavits submitted by the parties do not establish whether the town, in fact, prohibited any officers from using compensatory time because it would result in hiring other officers at overtime rates. Whether the town engaged in this practice, and on how many occasions, remains an open question of fact.

The defendants' motion for summary judgment is denied. The plaintiffs' motion for summary judgment is granted in part and denied in part.

It is so ordered.

Dated: October 9, 2000
Boston, Massachusetts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