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COMPENSATORY TIME OFF RULES REVISED

By: Alison Berry Wilkinson

New rules have emerged on granting compensatory time off pursuant to the Fair Labor Standards Act. Although my original article on this subject was published over two years ago, the topic of comp-time requests remains a hot issue, and many reprints of that article have been published. But, recent changes in the compensatory time off rules require an update.

The basic question that is constantly posed is: when can a public agency employer deny an employee's request to take earned comp-time off? The old rule that an employer could not deny a comp-time off request due to inconvenience or because the employer will have to replace the employee on an overtime basis is not so clear any longer.

The source of all the comp-time controversy is the language contained in the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, which provides that, "[a]n employee of a public agency . . . who has requested [comp-time off] 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)(B) (Deering's 2003). The courts originally interpreted § 207(o)(5) to "specifically [give] the employee the right of access to and control of the use of [comp-time] subject only to the employer's right to deny requested uses by the employee that would unduly disrupt the employer's operation." *Heaton v. Moore*, 43 F.3d 1176, 1180 (8th Cir. 1994).

The Downfall of the *Heaton* Rule

The *Heaton* rule was met with resistance from other courts. One big blow to the *Heaton* rule came from the U.S. Court of Appeals in *Collins v. Lobdell*, 188 F.3d 1124 (9th Cir. 1999). *Collins* stated that, "[a]lthough employees have a right to use comp-time when it would not unduly disrupt the public employer's business, the FLSA does not give employees the right of absolute control over the use of comp-time." *Id.* at 1130. A few months after *Collins* was decided, *Heaton* was abrogated by the United States Supreme Court in *Christenson v. Harris County*, 529 U.S. 576 (2000).

Christenson stated that, “§ 207(o)(5) is more properly read as a minimal guarantee that an employee will be able to make some use of compensatory time when he requests to use it.” *Id.* at 583. Furthermore, “§ 207(o)(5) is better read not as setting forth the exclusive method by which compensatory time can be used, but as setting up a safeguard to ensure that an employee will receive timely compensation for working overtime.” *Id.* at 583-584. “Section 207(o)(5) guarantees that, at the very minimum, an employee will get to use his compensatory time . . . unless doing so would disrupt the employee’s operations.” *Id.* at 584. “At bottom, we think the better reading of § 207(o)(5) is that it imposes a restriction upon an employer’s effort to *prohibit* the use of compensatory time when employees request to do so.” *Id.* at 585.

What Exactly Does This Mean?

This question is best answered by examining a recent decision from the U.S. Court of Appeals, 5th Circuit, who directly addressed this issue in *Houston Police Officers’ Union v. City of Houston*¹ (*Houston*).

In *Houston*, the Police Department administered comp-time usage by referring to a “Red Book.” Each unit was assigned a specific Red Book that listed all the officers in the unit who were scheduled to be off-duty on any given day. Each unit had a predetermined limit on the number of officers who could be off on a particular day. An officer wishing to use his accrued comp-time had to sign his name in his unit’s Red Book for the day(s) he wished to take off. If the Red Book’s limit for

the requested day had not been reached, the officer received his requested comp-time. This system sometimes frustrated an officer’s attempt to choose the dates on which he would use comp-time by essentially forcing officers to use their comp-time earned based on the department’s convenience rather than the convenience of the officer. The court ruled in favor of the City of Houston and upheld the Red Book system.

The Houston Police Officers’ Union contended, consistent with the old rule, that “when an employee makes a reasonably timely request for a specific period of comp-time leave, the employer must grant it unless doing so would unduly disrupt the agency’s operation for each such request.”

In analyzing and applying § 207(o)(5), the 5th Circuit rejected the old rule and stated that:

“The ‘reasonable period’ clause imposes upon the employer the obligation to facilitate the employee’s timely usage of his accrued compensatory time. The ‘unduly disrupt’ clause suggests conditions, however, that would release the public employer from the previously imposed condition. The statute, thus construed, reflects a balance between obligation and exemption.” . . . “[W]e conclude that [§ 207(o)(5)] does not require a public employer to authorize comp-time use as specifically requested by an employee (subject to the undue disruption clause), but instead requires that the comp time be permitted within a reasonable period after the employee requests its use.”

¹ *Houston Police Officers’ Union v. City of Houston* was filed on April 29, 2003 and has not yet been assigned a regular citation. However, the case may be found on Westlaw, cited as *Houston Police Officers’ Union v. City of Houston*, 2003 WL 1964189 (5th Cir. (Tex.)). Or on Lexis as *Houston Police Officers’ Union v. City of Houston*, 2003 U.S. App. Lexis 8096.

The court further held:

“The FLSA requires, generally, that officers be allowed to take comp-time within reasonable periods after making their requests. The burden that this statute places upon public employers is waived, however, in those circumstances where compliance would ‘unduly disrupt the operations of the public agency.’ This balance represents the statutory compromise between the interests of public agencies and their employees.”

Prudence and Preparation Rules

If an officer requests comp-time off, and the employer denies the request even though the department is fully staffed during the comp-time that has been requested by the officer, or denies the request despite the fact that there are officers that are readily available to fill the empty spot on overtime, then the rule apparently still stands that the employer cannot deny the request.

However, given the current court trend of expanding an employer’s right to deny comp-time off requests, public safety labor organizations should negotiate well-defined policies and procedures regarding comp-time usage. Included in these negotiations should be the criteria the employer is to use in deciding whether to deny or grant the officer’s request. The employees should be given some definite guidelines they can rely on when making their requests to take comp-time off.

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