G A O
Accountability * Integrity * Reliability

**United States Government Accountability Office**
**Washington, DC 20548**

B-305835

July 19, 2005

William H. Pickle
Chairman

Wilson Livingood
Member

Alan M. Hantman
Member
United States Capitol Police Board
Washington, DC 20510

Subject: United States Capitol Police—Overtime Pay and Compensatory Leave for Employees Whose Salaries Are Fixed By Statute

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. You expressed particular concern with the application of section 1009 of Public Law 108-7 to members of the USCP at the rank of lieutenant and above. Because of these concerns and concerns independently brought to our attention by the Committee on Appropriations of the House of Representatives, we expedited development of our opinion. Accordingly, this letter responds in part to your request by addressing the USCP's authority to provide overtime pay and compensatory leave to its three officials whose salaries are set by statute: the Chief of Police, the Assistant Chief of Police, and the Chief Administrative Officer.[1]

In preparing this opinion, we met with the USCP Chief, Assistant Chief, and Chief Administrative Officer and had separate discussions with the USCP General Counsel to gather information and to obtain their views on this issue.[2] The USCP General

[1] We will issue a second opinion that will address the authority to provide overtime pay and compensatory leave to the other civilian employees and members of the USCP. GAO also is reviewing the USCP policies and procedures regarding overtime pay and compensatory and annual leave.

[2] Given the time constraints, we did not obtain these views in writing.

Counsel is also counsel to the USCP Board, and asked the Board to request this opinion. The Chief, Assistant Chief, and the Chief Administrative Officer had been earning compensatory leave, but not overtime pay, until June 15, 2005, when the USCP Board issued a directive that precluded them from earning compensatory time.[3]

USCP Chief Terrance Gainer advised us that he maintained the overtime pay and compensatory leave policies that were in effect when he was sworn in as Chief in June 2002, which allowed all employees to collect overtime pay and/or compensatory leave routinely, as a result of clocking in and clocking out their daily hours. However, he stated that he expressed his concerns to some members of the USCP Board about the appropriateness of this system for salaried employees, as well as concerns regarding the high compensatory leave balances of certain USCP employees.[4] These large balances were primarily the result of the unusual emergency circumstances that occurred in the last several years, including the September 11 attacks and the anthrax and ricin incidents. He noted that in response to the USCP Board directive, he ordered his own compensatory leave balance and that of the Chief Administrative Officer eliminated. With regard to the Assistant Chief, he eliminated the compensatory leave earned while he was Assistant Chief, but not the leave earned while he was serving in other USCP positions.

As we explain below, neither the USCP Chief nor the Assistant Chief is eligible for overtime compensation or compensatory time, since their annual rates of pay exceed the statutory cap on eligibility for overtime. The USCP Chief Administrative Officer is not eligible for overtime pay, but could be eligible for compensatory leave upon a determination of special circumstances by the Chief or his designee.

**The Chief of Police and the Assistant Chief**

As noted above, the salaries of the Chief and the Assistant Chief, who are both officers of the Capitol Police, are set by statute. The annual rate of pay of the Chief is equal to $1,000 less than the lower of the annual rate of pay of the Sergeant-at-Arms of the House of Representatives or the Sergeant-at-Arms and Doorkeeper of the Senate. 2 U.S.C. § 1902. The annual rate of pay of the Assistant Chief is $1,000 less than the annual rate of pay of the Chief. Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, div. H, tit. I, § 1013(b) (Feb. 20, 2003) (Consolidated Appropriations Resolution). The current salaries of the Chief and Assistant Chief are $159,600 and $158,600, respectively.

---

[3] *See* Letter from the USCP Board to Terrance W. Gainer, Chief of Police, USCP (June 15, 2005).

[4] Despite these large balances, on several occasions, Chief Gainer and his predecessor, Chief James Varey, waived the maximum carryover amounts because of continued operations under emergency conditions, in accordance with existing regulations. Chief Gainer stated that these matters were discussed with the USCP Board prior to the decision.

Officers of the Capitol Police at the rank of lieutenant and higher are eligible for overtime pay or compensatory leave under certain circumstances. Under a provision first enacted in 1971, officers of the Capitol Police, defined as all personnel of the rank of lieutenant and higher, including inspector, were eligible for overtime pay for additional hours worked "only upon a determination of the Capitol Police Board" with respect to the additional hours of duty of such officers. 2 U.S.C. §§ 1924, 1925. In 1997, the procedures for approving overtime pay for USCP officers were modified when Congress directed the USCP Board to issue regulations to establish a unified pay and leave system for USCP civilian employees and USCP members. 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. 2 U.S.C. § 1923. The USCP Board issued such regulations, including provisions authorizing compensatory leave, and the committees approved the regulations in 1998. These regulations placed the approval authority for compensatory leave for USCP officers with the Chief.[5] Capitol Police Board Regulations Prescribing a Unified Leave System for Members and Civilian Employees of the USCP (USCP Leave Regulations), § IV(B) (May 21, 1998).

In 2003, Congress revised the process for providing additional compensation to officers at the rank of lieutenant and higher. Consolidated Appropriations Resolution, div. H, tit. I, § 1009. Section 1009 of the Consolidated Appropriations Resolution did two things. First, it authorized the Chief of Police to provide for overtime pay and compensatory leave for additional hours worked by officers. *Id.* Second, it directed the Chief to provide such compensation "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 the law of the District of Columbia. *Id.*

The District statute referenced in section 1009 dates back to 1950 and, *inter alia*, allows for overtime pay or compensatory leave for additional hours worked. D.C. Code Ann. § 5-1304 (2005). However, the statute provides that no overtime pay nor compensatory leave is authorized for any officer whose rate of basic pay, 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, or the rate of pay for level V of the Executive Schedule. D.C. Code Ann. § 5-1304(h)(3)(A) (2005).

In 2005, 150 percent of the minimum rate payable for grade GS-15 ($103,947) in the metropolitan Washington area is $155,920. Salary Table 2005-DCB, *at* http://www.opm.gov/oca/05tables/html/dcb.asp. In 2005, level V of the Executive Schedule is $131,400. 2005 Pay Tables for Executive and Senior Level Employees, *at* http://www.opm.gov/oca/05tables/indexSES.asp. Therefore, according to the "terms

[5] The regulations authorized compensatory leave, but not overtime pay, for USCP members that are exempt from the Fair Labor Standards Act, which includes all USCP officers, only upon a determination of special circumstances by the Chief.

and conditions" of District law, incorporated by reference in section 1009, no officers of the Capitol Police may be given overtime pay or compensatory leave if their basic rate of pay exceeds $131,400.[6] D.C. Code Ann. § 5-1304(h)(3)(A) (2005).

Because the rates of basic pay of the Chief and the Assistant Chief exceed $131,400, neither official is eligible to collect overtime pay or compensatory leave, and the USCP must eliminate compensatory leave earned subsequent to the passage of section 1009.[7] Chief Gainer reported that he complied with the USCP Board's directive to eliminate his own compensatory leave balance and the compensatory leave earned by the Assistant Chief while he was serving in that position. In addition, the USCP should recover any unauthorized compensatory leave taken by the Chief and Assistant Chief, by making appropriate adjustments to their annual and sick leave balances.[8]

**The Chief Administrative Officer**

The salary of the USCP Chief Administrative Officer, a civilian employee responsible for the budgeting, financial management, information technology, and human resources of the USCP, also is set by statute at a rate of $1,000 less than the annual rate of pay of the Chief of Police. 2 U.S.C. § 1903. The current salary of this position is $158,600.

The Congressional Accountability Act and USCP regulations control overtime compensation for civilian employees. The Congressional Accountability Act, enacted in 1995, made certain provisions of the Fair Labor Standards Act (FLSA) applicable to covered employees in the legislative branch including the Capitol Police, and authorized the Office of Compliance to issue implementing regulations. Pub. L. No. 104-1, § 203 (Jan. 23, 1995) (codified at 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. However, under the FLSA, individuals "employed in a bona fide executive, administrative, or professional capacity" are exempt from the requirement and therefore are not "covered employees." 29 U.S.C. § 213.

The USCP unified pay and leave regulations authorized by Congress in 1997 and approved by USCP's oversight committees in 1998 also regulate compensatory leave. 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. USCP Leave Regulations, § IV(B)-(C). Employees

---

[6] In 2004, this cap was $128,200, and in 2003, it was $125,400.

[7] To the extent that the Assistant Chief earned compensatory time prior to the enactment of section 1009, the unified pay and leave regulations govern such time. In addition, if the Assistant Chief earned compensatory time in a prior position for which compensatory time was authorized, those balances also may be maintained.

[8] Since Congress did not include the USCP in the statute that authorizes agencies to waive overpayments to federal employees, USCP lacks the authority to waive any compensatory leave that was erroneously taken. 5 U.S.C. § 5584.

who are covered by the FLSA generally must receive overtime pay, not compensatory leave, for additional hours worked.[9] *Id.* However, employees who are exempt from the FLSA may not receive overtime pay, but may receive compensatory leave "for special circumstances as determined by the Chief of Police or his/her designee." *Id.*

The regulations issued by the Office of Compliance make evident that the USCP Chief Administrative Officer is an exempt employee under the FLSA. The Chief Administrative Officer meets every definitional requirement for an individual employed in an "administrative" capacity. He is an employee "whose primary duty consists of office or nonmanual work directly related to management policies or general operations of his employer;" he "customarily and regularly exercises discretion and independent judgment;" he "regularly and directly assists the head of an employing office;" he "does not devote more than 20 percent" of his time to other duties; and he "is compensated for his services on a salary or fee basis at a rate of not less than $155 per week." Office of Compliance Final Regulations, § H541.2 (Jan. 22, 1996). As the senior official responsible for budgeting, financial management, information technology, and human resources, who is compensated well in excess of $155 per week, the Chief Administrative Officer clearly meets the definition of an employee engaged in a *bona fide* administrative capacity. *See* 2 U.S.C. § 1903. Furthermore, the Chief Administrative Officer also appears to fall under the definitions of individuals employed in executive and professional capacities. Office of Compliance Final Regulations, §§ H541.1, H541.3 (Jan. 22, 1996).

As a FLSA-exempt employee, the Chief Administrative Officer is entitled to compensatory leave only "for special circumstances as determined by the Chief of Police." USCP Leave Regulations, §IV(B). Therefore, unless the Chief of Police or his designee makes a determination that "special circumstances" exist, the Chief Administrative Officer is not entitled to compensatory leave, nor should he accumulate compensatory leave as a matter of routine. Therefore, we recommend that the USCP review the compensatory leave earned by the Chief Administrative Officer, and recover any leave that was not earned pursuant to a determination of special circumstances.

**Conclusion**

After the passage of section 1009 of the Consolidated Appropriations Resolution, neither the USCP Chief nor the Assistant Chief is eligible for overtime pay or compensatory leave, since their annual rates of pay exceed the statutory cap on eligibility for overtime. The USCP Chief Administrative Officer is ineligible for overtime pay, but could be eligible for compensatory leave upon a determination by the Chief or his designee that "special circumstances" exist. The USCP must also

[9] 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).

recover any unauthorized compensatory leave taken by these individuals by making appropriate adjustments to their annual and sick leave balances.

/signed/

Anthony H. Gamboa
General Counsel