posed upon both parties, can it be said that there is a voluntary "agreement" to use comp time?

An administrative law judge for New York's Public Employment Relations Board (PERB) recently answered the question "no." The case involved police officers working for the Village of Muttontown. In 2013, the officers began to be represented by the Muttontown Police Benevolent Association (PBA).

The City and the PBA met in 2013 and 2014 to negotiate an initial collective bargaining agreement. In January 2015, the PBA declared impasse and sought binding arbitration. As the parties headed to arbitration, PERB was required to decide whether the Village's proposal for comp time was mandatorily negotiable.

The Village's somewhat complicated proposal read: "For hours actually worked beyond those scheduled for a given '7(k)' work cycle (the Village may unilaterally set and from time to time change the '7(k)' schedule), the Village may elect to compensate the employee with compensatory time on a time and one half basis, to be used (the scheduling of which shall not unduly disrupt the operations of the Department as determined by the Chief) within one calendar year of earning same."

PERB's Administrative Law Judge found that "although the subject matter of the payment of overtime by means of compensatory time off is generally mandatorily negotiable, the Village's proposal is not because it would give the Village the right to elect whether to compensate unit employees for overtime worked with compensatory time off in lieu of payment in a manner that is contrary to that required by the FLSA. Section 7(o) allows an employer to use compensatory time off to pay represented law enforcement personnel for overtime worked in lieu of payment 'only' pursuant to 'applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees.' Since there is no agreement between the parties that allows the Village to compensate officers with time off for overtime worked, the demand contravenes the provisions of the FLSA. The foregoing is consistent with PERB's prior decision holding that an agreement must be reached in order for the employer to be able to make that type of election and that neither the filing for interest arbitration nor the issuance of an interest arbitration award satisfy that statutory requirement."

Muttontown Police Benevolent Association, 49 PERB ¶ 4520 (N.Y. PERB ALJ 2016).

Q & A

From Washington

Question: Are you familiar with cases where IA investigator pre-interviews complainant for two hours before going on tape but makes no reference to the pre-interview or provides any notes on the pre-interview in the IA file?

Answer: This is a practice that used to be fairly common, but by now has largely disappeared in the name of transparency of the IA process. We wouldn't recommend it.

From Montana

Question: A grievance is being considered. Is it allowable to request discovery to prepare for the filing of a grievance?

Answer: Typically, the obligation to bargain in good faith carries with it the obligation to share information relevant to the bargaining process. In turn, that means that there's an obligation to exchange information about grievances. It's not a formal discovery process like in court, and usually involves each side sending a letter to the other saying simply, "Please provide us with all documents in your possession that are relevant to the Grievance."

From New Mexico

Question: I understand that if the employer conducts a search of an employee's personal phone that the employee is using for work, the employer should get a search warrant and search only for the issues under investigation and not use that to search all the digital data on the phone. Is that premised on *Riley v. California*? The reason for my asking is that I'm rewriting policy for my department.

Answer: You're correct – my opinion is based on *Riley v. California*. The way I'm reading things – and you should definitely check with your own lawyer on this – *Riley* will demand a warrant absent exigent circumstances, which will rarely exist. It's less clear to me whether the warrant will have to be supported by probable cause or reasonable suspicion (my money's on the latter). I also think that a department that wants to examine an employee's cell phone should be prepared to have the examination done by an independent forensics firm, with instructions to limit the examination to the type of cell phone content that forms the basis for the reasonable suspicion or probable cause.

My two "rules" are simply cautions to employees and employers. Because of the combination of *Riley*, public records laws, and criminal and civil legal proceedings demanding access to officer phones, I suggest that (1) personal phones never be used for employer purposes; and (2) employer phones never be used for personal purposes.

From Pennsylvania

Question: Are there any restrictions on placing GPS devices on fleet vehicles to monitor vehicle positions and movements? In addition, can these GPS units be used for disciplinary action if it is found that an officer is violating Department policy?

Answer: Thus far, we know of only one case that has addressed this issue, *City of Springfield*, MUP-12-2466 (Mass. DLR ALJ 2014). The ruling in the case was that the installation of GPS tracking devices was a mandatory topic for collective bargaining, with the rationale centering on the potential disciplinary implications of such devices.