FLSA-371

December 24, 1984

This is in further reply to your letter requesting on behalf of your client ***, an opinion on the compensability of employee study time under the Fair Labor Standards Act (FLSA).

*** has established a "Craft and Technical Development Program," a training program maintained for compliance with regulations of the Nuclear Regulatory Commission, whereby electricians may qualify for promotional upgrades through on-the-job training and successful testing. You state that the tests cover theoretical material of general applicability, so employees usually desire study time to prepare for examinations. You wish to point out that your client has always intended to make study time available to employees during working hours so that the time spent studying would be compensated, although you indicate that it is your position that *** is not legally required to pay for employee study time.

An investigation by our Raleigh Area Office determined that the time spent studying by employees for the examinations outside working hours was required, and therefore, constituted compensable hours of work. At the time of the initial review of *** training program by Wage and Hour, study time during working hours had not been made available to the employees.

Accordingly, your client agreed to provide on-the-job employee study time. This training program revision was formalized by an agreement dated March 15, 1983, with our Raleigh Area Office staff.

Subsequent to this agreement, our Raleigh Area Office staff raised the issue of back wages owed those electricians who had studied for the tests on their own time. The Wage and Hour investigation disclosed that *** supervisors had led employees to believe that the study time was required for continuance of their employment. You do not believe that *** supervisors had improperly pressured the employees with regard to the study time. It is your position that, even if there had been improper pressure, it is not relevant to the issue of compensability of the study time since program participation was voluntary. Therefore, you believe that further negotiations regarding the compensability of employee study time are inappropriate following the March 15, 1983, agreement. However, you contend that the compensability issue can be resolved if the voluntariness of training program participation is addressed on its merits.

For that purpose, you provide the following facts. At the outset of the training program, electrician jobs were reclassified for both pay and training purposes. Employees who chose to participate in the training program and successfully passed tests were eligible for scheduled promotions. Incumbent employees who chose not to participate or who did not succeed in the testing program were "frozen at their current salary" with "adjustment increases as long as they remain in the present classification."

In any event, regardless of your position that the employees' study time outside working hours is not compensable hours of work under FLSA, you have discussed the possibility of resolving the issue of back wages with the staff of our Raleigh Area Office and with staff of the Solicitor's Office in Atlanta. You have offered to grant paid time off in lieu of cash wages owed to the employees. In this regard you are aware of the prohibition of substituting non-cash items for cash wages contained in section 531.27 of 29 CFR Part 531. However, you believe that since the prohibition is to prevent unilateral employer action, and because you believe there is no legal requirement to pay back wages for the study time, we could not prevent your client from granting paid time off to the employees for the study time.

The status of time spent in attending lectures, meetings, and training programs is discussed in section 785.27 through 785.32 of 29 CFR Part 785 (copy enclosed). As stated in section 785.27, activities need not be counted as working time if all of the following criteria are met: (a) attendance is outside the employee's regular working hours; (b) attendance is in fact voluntary; (c) the course, lecture, or meeting is not directly related to the employee's job; and (d) the employee does not perform any productive work during such attendance.

In addition, section 785.31 provides that voluntary attendance by an employee at training sessions offered by an employer under a program of instruction which corresponds to courses offered by independent bona fide institutions of learning need not be counted as compensable hours of work under FLSA even if the courses are directly related to the employee's job.

Section 2.1 of the 1982 training program manual, which has since been revised, stated that "(p) anticipation is required for existing employees in the affected classifications at the implementation of the program …" Employees were not offered the option of non-participation. Instead, the manual provided that if employees were removed from the program, they would be frozen at their current salary and would be eligible for only adjustment increases. Employees would be removed from the program for failure to pass certain competency tests. In addition to the tests for advancement, employees would be required to pass "back step" tests to prove their competency for promotion. Home study time was necessary to pass the tests. On the basis of these facts, we conclude that the training program was not voluntary, and thus did not satisfy the criterion of section 785.27(b).

Furthermore, we conclude that the training program was directly related to the employees' jobs, and thus failed to satisfy the independent requirement of section 785.27(c). The "back step" testing was clearly related to the job levels at, or below, which employees were currently performing. The training in general was directed toward ensuring that employees successfully mastered all the requirements of their current job step. Furthermore, one of the stated objectives of the program was "to improve productivity of all employees."

We cannot approve your proposed settlement offer of paid time-off in lieu of cash wages. Time-off in subsequent pay periods in lieu of cash wages owed employees is not permitted. In this regard, see Walling v. Harnischfeger Corporation, 325 U.S. 427 (1945) and Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 89 L. ED. 1296, 65 S. CT 825. However, even though your client is currently providing compensated on-the-job study time during normal working hours, we would not require *** to compensate the affected employees at their normal straight-time hourly rates of pay for the study time they performed at home. Payment of the minimum wage for each hour of study is all that is required by FLSA. However, any overtime premium owed to these employees would have to be based on the weighted average method described in section 778.115 of 29 CFR Part 778, copy enclosed.

We trust the above is responsive to your inquiry.

Sincerely,

William M. Otter
Administrator

Enclosures