



FLSA2018-24

November 8, 2018

Dear **Name\***:

This letter responds to your request for an opinion concerning whether nonprofit, private volunteer fire departments that contract with state municipalities and counties to provide fire protection services to the general public are “public agencies” entitled to the partial overtime exemption in Section 7(k) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 207(k)—and if not, whether they would become public agencies if the state enacted legislation that defined them as “political subdivisions.” This opinion is based exclusively on the facts you have presented. You represent that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating or for use in any litigation that commenced prior to your request.

## **BACKGROUND**

Your letter represents that your client, a nonprofit firefighters’ association, consists partly of nonprofit, privately owned volunteer fire departments that contract with North Carolina municipalities and counties to provide fire protection services to the general public. These fire departments do not consider themselves political subdivisions and do not avail themselves of the partial exemption in Section 7(k). They provide fire protection services as independent contractors, purchase most of their own equipment, and independently elect their board of directors, which appoints their officers. Their bylaws give them independent judgment and discretion over their operations.

These fire departments receive public funds from the North Carolina Department of Insurance and their local government clients. Additionally, the North Carolina legislature has authorized local governments to collect a “fire fee” from taxpayers, which helps to fund the fire departments. The local governments also provide oversight; for example, they may review and audit the fire departments’ financials and budgets, make suggestions or provide input concerning their funding, and appoint several nonvoting seats to their board of directors. Upon dissolution, the fire departments’ bylaws require the distribution of their assets to the government for a public purpose.

## **GENERAL LEGAL PRINCIPLES**

The FLSA provides a partial exemption to the overtime pay requirements of Section 7(a) for employees of public agencies engaged in fire protection activities. *See* 29 U.S.C. § 207(k). FLSA Section 3(x) defines a “public agency” as, among other things, “any agency of ... a State, or a political subdivision of a State.” 29 U.S.C. § 203(x); *see* 29 C.F.R. § 553.1(c). “The key factors in determining whether a private party should be considered a public agency are whether the entity is directly responsible to public officials or to the general public and whether the

parties' contracts designate them as state agencies rather than independent contractors." *Wilcox v. Terrytown Fifth Dist. Volunteer Fire Dep't, Inc.*, 897 F.2d 765, 767 (5th Cir. 1990) (holding that a nonprofit firefighting corporation that is required to provide its annual budget to the local government, is funded almost exclusively by local taxes, is subject to local government audit, and whose contract gives the local government "governing authority" over its operations is a public agency); *Powell v. Tucson Air Museum*, 771 F.2d 1309, 1311–12 (9th Cir. 1985) (applying the same two-part test) (citing *Skills Dev. Servs., Inc. v. Donovan*, 728 F.2d 294, 300 (6th Cir. 1984) (holding that a "political subdivision" is an entity "created by the State to constitute a department or administrative arm of the government or administered by individuals who are responsible to public officials or the general public")). State law declarations and interpretations identifying an entity as a public agency or political subdivision are not dispositive. *Cf. NLRB v. Nat. Gas Util. Dist. of Hawkins Cty., Tenn.*, 402 U.S. 600, 602–03 (1971) (holding that, under the National Labor Relations Act, federal law determines whether an entity created under state law is a "political subdivision").

In determining whether an entity is "directly responsible" to the public, the "single most determinative factor" is whether public officials select and control the entity's board of directors. WHD Opinion Letter FLSA 1226, 1986 WL 383425, at \*4 (Mar. 18, 1986); *see* WHD Opinion Letter FLSA 730 (Oct. 9, 1990) (describing appointment and removal of board members as "the key factor"); *see also Powell*, 771 F.2d at 1312 (focusing on appointment and removal of board members); *Williams v. Eastside Mental Health Ctr., Inc.*, 669 F.2d 671, 679 (11th Cir. 1982) (same). Another important factor is whether public officials hire and fire the entity's employees. *Powell*, 771 F.2d at 1312; *see also Skills Dev. Servs.*, 728 F.2d at 300 (identifying "internal control"—the "ability to discipline or fire administrators"—as indicative of a political subdivision). "[S]ubstantial state regulation" alone does not establish public control. *Powell*, 771 F.2d at 1312; *Williams*, 669 F.2d at 679.

## OPINION

Based on the facts you have provided, the nonprofit, privately owned fire departments that you describe are not public agencies within the meaning of Section 7(k) and are therefore not entitled to its partial overtime exemption. To begin with, the fire departments do not satisfy the first *Wilcox* factor because they are not "directly responsible" to public officials or to the general public. *See Wilcox*, 897 F.2d at 767. They purchase most of their own equipment, exercise independent judgment and discretion over their operations, and—most importantly— independently elect their board of directors. *See, e.g.*, WHD Opinion Letter FLSA2008-14, 2008 WL 5483053, at \*1–2 (Dec. 18, 2008) (finding that a private volunteer fire department that contracts with municipal governments to provide fire protection services, receives funding through public taxes and fees, independently elects its directors, and independently hires and fires its employees is not a public agency); WHD Opinion Letter FLSA 1226, 1986 WL 383425, at \*4 (describing appointment and removal of board members as the "single most determinative factor" of public control). The fact that local governments provide some of their funding; may review and audit their financials, budgets, and funding; and appoint nonvoting seats to their board of directors does not alone establish the requisite public control to make the fire departments directly responsible to the public. Moreover, the fire departments do not satisfy the second *Wilcox* factor because their contracts designate them as independent contractors, not as state agencies. *See Wilcox*, 897 F.2d at 767.

The potential state legislation described in your letter would not make the fire departments public agencies entitled to the partial exemption in Section 7(k) because it would not limit the fire departments' operational independence or otherwise alter the analysis discussed above. The definition of "political subdivision" is a question of federal law, and declarations under state law "are not necessarily controlling." *Nat. Gas*, 402 U.S. at 602-03 (looking past formal labels to the entity's "actual operations and characteristics"). To transform a fire department into a public agency under Section 7(k), the state government must functionally establish "internal control" over the fire department's operations. *See Skills Dev. Servs.*, 728 F.2d at 300. This primarily involves the power to appoint or remove board members or officers, or to hire or fire employees. *See, e.g.*, WHD Opinion Letter FLSA 1226, 1986 WL 383425, at \*4 (describing the ability to appoint or remove board members as the "single most determinative factor" of public control); *Powell*, 771 F.2d at 1312 (describing the ability to hire or fire employees as indicative of public control); *Skills Dev. Servs.*, 728 F.2d at 300 (describing the ability to discipline or fire administrators as indicative of public control).

We trust that this letter is responsive to your inquiry.

Sincerely,



Bryan L. Jarrett  
Acting Administrator

**\*Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b)(7).**