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This is in further response to your inquiry and our meeting on May 12 concerning the application of the overtime compensation provisions of the Fair Labor Standards Act (FLSA) to correctional officers employed by _____ County. You are primarily concerned about the calculation of overtime pay under the FLSA.

The rules for computing an employee's "regular rate" for the purposes of the overtime pay requirements of the FLSA are set forth in 29 CFR Part 778. These rules are applicable whether overtime compensation is paid pursuant to § 7(a), or whether the § 7(k) partial overtime exemption is claimed for fire protection or law enforcement personnel (including security personnel in correctional institutions). However, wherever the word "workweek" is used in Part 778, the words "work period" should be substituted if § 7(k) is claimed. 29 CFR § 553.233.

As indicated in 29 CFR § 778.109, the "regular rate" is a rate per hour although employers are not required to compensate employees on an hourly rate basis. Where employees are compensated on other than an hourly rate basis, the regular rate must be derived from such basis by dividing total remuneration for employment (except statutory exclusions) in any workweek (work period) by the total hours worked in the workweek (work period).

The regular rate of pay cannot be left to a declaration by the parties; it must be drawn from what happens under the employment contract. Once the parties have decided on the amount of wages and the mode of pay, the "regular rate" becomes a matter of mathematical computation which is unaffected by any contrary designation of regular rate in the wage contracts. See 29 CFR § 778.108. In light of these basic FLSA principles, we will address your questions. In certain cases, we have edited your questions to reflect our understanding of the issue.

Q.1. When the County advertises a job vacancy and the applicable salary, should the advertisement indicate a minimum or maximum number of hours that the salary is intended to compensate? Should the "regular rate" of pay be advertised?

A.1. No. There is no requirement in the FLSA that the employer advertise the FLSA regular rate upon which statutory overtime compensation will be computed, or indicate the minimum or maximum number of hours that the salary is intended to compensate.

Q.2. The County Correction Officers Salary Schedule (July 1, 1996) contains pay rates stated in terms of weekly (37½ hour), biweekly, and annual amounts for four levels of correction officers; such rates reflect paid meal and lineup time at "time and one-half" as well as provide "rotating shift" rates. Additionally, the schedule provides pay "steps" but does not include longevity pay, shift differential, holiday pay, and uniform allowance. Would an officer, who is entitled to the latter payments under the collective bargaining agreement and who works FLSA overtime, be properly paid for FLSA overtime if his or her overtime premium pay is computed based entirely on the schedule rates?

A.2. No. It does not appear that the "schedule" provides for the inclusion of night differential payments that must be included in the regular rate (see 29 CFR §778.207). It is unclear whether the "steps" in the schedule reflect longevity pay, which is includable in the regular rate. However, neither uniform allowance nor holiday pay are includable in the FLSA regular rate (see 29 CFR §§778.217 - .218).

Q.3. Does the method used by the County in calculating the negotiated pay increase under the bargaining agreement meet FLSA requirements?

A.3. The FLSA does not require pay increases. The issue of how a negotiated increase is to be applied under the contract is an issue for the parties to resolve.

Q.4. Would the compensation provided in section 6.7 of our bargaining agreement affect the FLSA regular rate of pay for the classifications specified (correction officer IV, deputy warden, warden, chief of staff)?

A.4. It appears that the classifications may be supervisors or have management duties. Assuming that employees in such classifications meet the duties, responsibilities, and salary tests contained in 29 CFR Part 541, they would be exempt from the overtime requirements of the FLSA. Thus, the additional "stipends" would have no effect. Such payments would, however, affect the FLSA regular rate for any such employee who does not meet the tests for exemption in Part 541.

Q.5. Are the compensatory time off ("comp time") provisions in the bargaining agreement in compliance with the provisions of the FLSA?

A.5. It is not clear on what basis comp time is accrued under the contract. The FLSA requires one and one-half hours of comp time for each FLSA overtime hour

worked. Law enforcement employees may accrue up to 480 hours of FLSA comp time, which may be carried indefinitely until either used by the employee or cashed out. FLSA comp time may be cashed out at any time, or at termination of employment. However, the 10-day per year accrual "cap" (assuming this means 80 hours) would be permissible. As to comp time for "managerial" employees see A.4.

Q.6. Should the cleaning and clothing allowance specified in our contract be included in calculating the FLSA regular rate?

A.6. No. See A.2.

Q.7. Does the pay we receive for not working on a designated holiday have to be included in the regular rate? What about the premium pay that would be paid for working on a holiday?

A.7. Pay for not working on a designated holiday is excludable from the regular rate. See A.2. Premium pay (not less than time and one-half) paid for working on a holiday may be treated as an overtime premium pursuant to section 7(e)(6) of the FLSA and is creditable towards any FLSA overtime compensation due. See 29 CFR §§ 778.200 - .203.

Q.8. Should the "investigator stipend" specified in our contract be included in the regular rate? The stipend represents additional biweekly salary payments.

A.8. Yes.

Q.9. Is there a statute of limitations applicable to claims under the FLSA?

A.9. Yes. A 2-year statute of limitations applies to the recovery of back pay, except in the case of willful violation, in which case a 3-year statute of limitations applies.

In summary, the FLSA regular rate of pay is computed as stated below:

Base weekly pay + rotating shift pay + longevity pay + night shift pay + investigator pay + FLSA hours worked = FLSA regular rate.

All payments must be reduced to their workweek (work period) equivalent if paid on an other than a workweek (work period) basis. For example, the workweek equivalent for investigator I pay is \$31.50 ($\$63.00 \times 26 \div 52 = \31.50). If a 14 day-work period is applicable pursuant to FLSA § 7(k), no equivalent computation is necessary.

We trust that the above is responsive to your inquiry.

Sincerely,

**Daniel F. Sweeney
Office of Enforcement Policy
Fair Labor Standards Team**

Enclosures