

AUG 12 1997

This is in response to your inquiry concerning the application of the Fair Labor Standards Act (FLSA) to civilian police dispatchers employed by the Police Department. The issue of concern is whether certain "on-call" time is "hours worked" for FLSA purposes and, if compensable, whether such time must be paid at overtime rates of pay.

You state that the Department unilaterally changed the on-call policy with respect to dispatchers subsequent to its unionization. Under the new policy, dispatchers were issued pagers and required to answer all pages within 15 minutes without exception. A pager's range is about 20 minutes (sic) from the 911 Center. If they fail to respond to a page they must submit a memo explaining the failure to answer. Further, they are subject to disciplinary action that may include suspension from duty (or even termination) for failing to abide by the on-call policy.

You indicate that one dispatcher received a verbal warning for failure to respond to a page while attending a funeral of a family member outside of pager range. Further, you state that your client received a verbal warning for failing to respond to a page on her scheduled day off while she was with her ill father at a hospital outside of pager range.

Based upon the Police Department's on-call policy and these anecdotes, you have concluded that the time involved in responding to pages (including time to travel to a phone if the situation requires it) and writing the memo explaining failure to respond should, at a minimum, be paid at overtime rates of pay. Further, it is your view that the on-call policy is unduly restrictive and you ask whether the on-call time should be compensated.

In general, we agree that time spent in responding to a pager call may be compensable if the time spent is more than

de minimis. That is, the time is compensable if more than insubstantial or insignificant periods of time of a few seconds or minutes duration are involved (e.g. seeking a phone when away from home) to carry out the strictures of the Police Department's on-call policy. 29 CFR § 785.47. Further, we agree that that writing the "failure to respond" memo required by the policy may be similarly compensable. Note that we take no position as to compensability of travel time back to the Police Department to respond to an emergency callback to duty. 29 CFR § 785.36. Of course, the time spent dispatching during the emergency callback would be compensable.

However, such time, if any, would have to be compensated at overtime rates of pay under the FLSA only if it occurred after the employee in question had already worked not less than 40 hours in the workweek. In workweeks in which no statutory overtime has been worked because, for example, the dispatcher has been on "leave" (holiday, vacation, personal day off, etc.), no additional compensation would be due under the FLSA if the wages paid for the workweek when divided by the "hours worked" (including any on-call related time) yields not less than the applicable minimum wage under § 6(a). U.S. v. Klinghoffer Bros. Realty Corp., 14 WH Cases 765 (BNA) (2nd Cir. 1960), rehearing denied, 14 WH Cases 913 (2nd Cir. 1961).

As to the larger issue of on-call time being compensable, we offer the following for consideration. Whether waiting time is to be treated as hours worked under the FLSA depends on whether the time is spent predominately for the employer's benefit or for the employee's benefit. With respect to on-call time, it is our position that an employee who is not required to remain on the employer's premises but must carry a pager or be otherwise reachable when off-duty, is not working while on call unless the employee is unable to use the time effectively for his or her own purposes. 29 CFR § 785.17.

In Bright v. Houston Northwest Medical Center Survivor, Inc., 934 F.2d 671, 30 WH Cases 609 (5th Cir. en banc 1991), cert. denied, 112 S. Ct. 882 (1992), the Fifth Circuit concluded that on-call time which a hospital's biomedical equipment repair technician spent at home or in locations he chose was not working time, even though he was required to be reachable by beeper, to remain sober, and to arrive at the hospital within about 20 minutes after being called. Moreover, the lone employee in that case was required to respond to calls around the clock seven days a week, 365 days a year. It would appear that the employer's

requirements in that case are at least as restrictive as those you describe.

However, in Renfro v. Emporia, 948 F.2d 1529, 30 WH Cases 1017 (10th Cir. 1991), cert. dismissed, 112 S. Ct. 1310 (1992), the court found on-call time spent by firefighters compensable where they responded to an average of three to five calls in a 24-hour period, and as many as 13 calls on occasion. The court stressed the "fact based nature" of on-call cases in distinguishing Renfro from its holdings in other cases.

Thus, it is not always easy to predict whether a particular factual situation involving on-call time is "hours worked" under the FLSA. However, in our view, the requirements imposed by the Police Department on its dispatchers are not sufficient by themselves to convert the on-call periods into "hours worked" for FLSA purposes. Other factors such as frequent calls as in the Renfro case would be necessary. In this regard, also see Martin v. Ohio Turnpike Commission, 968 F.2d 606 (6th Cir. 1992); Birdwell v. City of Gadsden, 970 F.2d 802 (11th Cir. 1992).

Another factor examined by some courts is whether employees actually are able to use the on-call time for their own purposes. See Spires v. Ben Hill County, 745 F. Supp. 690 (M.D. Ga. 1990). Nothing you have presented suggests that dispatchers are unable to use the on-call periods to engage in personal pursuits, business activities, hobbies, sports, etc.

In summary, we are unable to conclude based upon the information presented that the on-call periods are so restrictive that they constitute "hours worked" under the FLSA.

Some employers compensate employees for the inconvenience of being on-call whether or not such on-call periods are "hours worked." While the FLSA does not require such payments, they will, if made, affect the computation of any overtime payment due an employee. See 29 CFR § 778.223. Since the dispatchers are represented by a union, it would seem that the on-call policy and compensation could be addressed through the collective bargaining process.

We trust that the above is responsive to your inquiry.

Sincerely,

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