FEB 26 1993

This is in response to your inquiry concerning the application of §207(k) of the Fair Labor Standards Act (FLSA) to arson investigators employed by the Fire Department.

You state that arson investigators are experienced firefighters trained in fire suppression who have been classified and assigned to the arson investigator positions in the Fire Department. Arson investigators have also been trained as peace officers and they perform law enforcement duties such as conducting investigations into the causes of fires; interviewing and interrogating witnesses and suspects; obtaining criminal complaints and warrants; arresting and detaining suspects; assisting prosecutors and testifying in the courts; and similar law enforcement activities.

Arson investigators respond to all major fire incidents of undetermined origin. They begin investigations before the fires are totally extinguished by using their firefighting knowledge and experience in evaluating and determining whether the causes were accidental or the result of arson.

As used in §207(k), any employee employed in fire protection activities "refers to any employee who is employed in an organized fire department....who performs activities which are required for, and directly concerned with the prevention, control or extinguishment of fires...." See §553.210(a) of 29 CFR Part 553. Based upon the information you have provided, we conclude that arson investigators do not perform activities that are directly concerned with the prevention, control, or extinguishment of fires. "[T]hey look for signs of arson at fires, follow up leads, compile evidence, and assist in the

MAR 10 1993

This is in response to your inquiry, addressed to former Administrator Paula V. Smith, concerning the application of the Fair Labor Standards Act (FLSA) to certain emergency medical service (EMS) employees employed by your client, which is a County in . The issue of concern is whether EMS employees employed by the County who volunteer services to EMS organizations serving portions of the County not covered by the County's EMS operations would have to be compensated by the County for such volunteer time under the FLSA. We regret the delay in responding to your inquiry.

You state that the County operated EMS service covers approximately one-third of the County. The remaining two-thirds is served by two volunteer EMS organizations. Volunteer members of the public residing in these areas operate the service and staff the ambulance and rescue vehicles. These organizations are funded by tax revenues levied on residents in two EMS taxing districts. In addition, the County provides all of the vehicles, equipment, supplies, and uniforms used by the volunteer EMS organizations. The County owns the buildings used by the volunteer group and/or pays all the expenses related to the facilities. The volunteers are covered by the County's workers compensation insurance and the County also maintains liability insurance covering the volunteers.

Volunteers receive no pay for their services unless they participate in 65% of the activities of the organizations' activities in a given month. In such cases, they are paid $100.00 as reimbursement for expenses and as a nominal fee for services rendered.

In light of these facts, you ask several questions concerning whether the County must compensate its EMS employees under the FLSA for the time that they "volunteer" hours to the EMS organization in their home communities. Your questions are addressed in the order presented.

Q.1. Is the time which an EMS employee of the County spends doing volunteer work for the volunteer EMS organization in his or her home community within the County considered to be compensable hours worked for the County under the FLSA?

A.1. Yes. Under the circumstances you describe, it is our view that all work involving like duties or services performed by career County EMS employees within the County, whether they report to the County or to the volunteer EMS organizations, is compensable and must be included by the County in determining whether the employees have worked overtime hours for purposes of the FLSA. We view the underlying purposes and rationale of §3(e)(4)(A) as requiring this result. Pursuant to §3(e)(4), an individual is not permitted to "volunteer" to perform services for a public agency if such services are the same type of services that the individual is employed to perform for the public agency. Although the volunteer EMS organizations may be corporate entities separate from the County, services performed by "volunteer" personnel, who are also County employees, are clearly performed "for" the County. Not only do the services directly benefit the County, but they are identical to the services performed by these and other County employees, at places and/or times when County personnel are unavailable.

To allow County EMS employees to "volunteer" to perform through the volunteer EMS organization, for the County, the same services for which they are paid by the County raises the potential for abuse which Congress had in mind in enacting §3(e)(4)(A). See Senate Report No. 99-159, October 17, 1985, Page 14, 2 U.S. Cong, News 1985, page 662 ("the Committee wishes to prevent any manipulation or abuse of minimum wage requirements through coercion or undue pressure upon employees to 'volunteer'").

Q.2. Would a different result obtain, if the County gave funds to the volunteer EMS organizations so that they could buy their own vehicles, equipment, uniforms, and insurance, rather than directly providing such items to the volunteer EMS organizations?

A.2. No. See A.1.

Q.3. Would the $100.00 monthly payments furnished to volunteers be considered wages for FLSA purposes?

A.3. The FLSA generally requires that all remuneration for employment be included in calculating overtime compensation, except specified types of payments excluded pursuant to §7(e). Under §7(e)(2), payments made by the employer to the employee to cover expenses incurred by the employee on his or her employer's behalf are not included in the employee's regular rate if the amount of the reimbursement reasonably approximates the expenses incurred. Such payment is not compensation for services rendered

by the employees during any hours worked in the workweek. See §§ 778.200 and 778.217 of 29 CFR 778. However, any amount in excess of the actual or reasonably approximate amount of the expense will be included in the regular rate.

We wish to make clear that EMS volunteers who serve the volunteer EMS organizations but who are not employed by the County as EMS employees are not affected. As you know, volunteer fire and EMS organizations are frequently served by individuals whose livelihood is earned principally in another vocation (mechanic, truck driver, teacher, lawyer, etc.). The FLSA excludes such individuals as employees of the public agency they serve if they receive no compensation or are paid expenses, reasonable benefits, or a nominal fee (or combination thereof) to perform the services for which they volunteered.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the questions presented. Existence of any other factual or historical background not contained in your request might require different conclusions than the ones expressed herein.

Sincerely,

Signed

Acting Administrator

MAR 10 1993

This is in response to your inquiry concerning the application of the Fair Labor Standards Act (FLSA) to a lieutenant in the County Sheriff's Department. We presume that you are concerned about the application of the exemption provided in §213(a)(1) of the FLSA.

You state that the lieutenant has been determined to be exempt from overtime pay. From time to time he works with other law enforcement agencies performing undercover narcotics investigations. Much of this work is funded under Federal grants, which provide reimbursement for the overtime expenditures of local law enforcement agencies. You wish to know whether the exempt status of the lieutenant would be jeopardized if he is paid extra compensation when he performs undercover work that is funded by Federal grants.

For purposes of our response, we assume that the lieutenant meets the salary and duties and responsibilities tests of the appropriate section of Regulations, 29 CFR Part 541. We consider criminal investigative work to be nonexempt work for purposes of exemption under §13(a)(1). Were the lieutenant to spend considerable amounts of time in such undercover work, the "primary" duty test for exemption may not be met. See §541.206 of the regulations.

As indicated in §541.118(b), additional compensation besides the salary (required by the appropriate section of the regulations) is not inconsistent with the salary basis of payment. Thus, extra compensation paid for certain undercover work would not, by itself, defeat an otherwise applicable exemption under §213(a)(1).

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances that

would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein.

We trust that the above is responsive to your inquiry.

Sincerely,

Signed

Acting Administrator

MAR 18 1993

MAR 18 1993

This is in response to your request for our views concerning the application of the Fair Labor Standards Act (FLSA) to court reporters. We regret the delay in responding to your inquiry.

The questions which you presented are: (1) whether an court reporter continues to be an employee of the trial court, or is jointly employed by the trial court and the attorney for the appealing party, when engaged exclusively in the preparation of a transcript for appeal in both indigent and non-indigent cases; (2) whether the court reporter is an employee of the trial court when the court reporter prepares transcripts for appeal during regular working hours, when free time is available, for which he or she continues to receive a regular salary, as well as a fee per page; and (3) whether the court reporter is an employee of the trial court when preparing transcripts during off duty hours at the court's offices, due to the fact that the reporter is not permitted to remove tapes of the court proceedings from the court's offices.

According to the information that you have provided, an trial judge is an elected official who is required by statute to appoint a court reporter to record the proceedings of the court. The court reporter is an employee of the governmental unit, which pays his or her salary; the salary is set by the judge, subject to approval of the governmental unit. The court reporter works a regular fixed schedule, receives overtime or compensatory time off, and fringe benefits. The court reporter is appointed for an indefinite period of time, is subject to the supervision of the judge, and may be discharged by the judge at any time. In addition to the duties relating to the court, the court reporter is also required by statute to prepare a transcript of the proceedings upon the request of any party, for purposes of appeal. The court reporter is not permitted to prepare the transcript for a party during regular working hours, except when authorized by the judge in indigent criminal cases. In that regard, the reporter receives his or her regular salary. If the court reporter chooses to prepare the transcript on his or her

own time, in the case of indigents, the governmental unit pays the reporter a per page fee, authorized by the judge. All other transcripts must be prepared during off duty hours, and under a per page fee agreement with the attorney requesting the transcript.

The hours worked in preparing a transcript are not counted for purposes of overtime pay, and the court reporter pays taxes as a self-employed person for that aspect of the work. In addition, the court reporter may hire other people to assist in preparing the transcript, but they are subject to approval by the trial judge. Usually, the reporter receives $2.50 per page for a transcript. If the reporter uses the court's equipment, the court charges a per page fee. The judge must sign the transcript, certifying its accuracy. In addition, the court reporter may be authorized to work for more than one judge, or to fill the position of a judge's clerk, while also performing the duties of court reporter.

As discussed above, an trial judge is an elected official who is required by statute "[f]or the purpose of facilitating and expediting the trial of causes," to appoint a court reporter to attend and record all court proceedings. (IC 33-15-23-1). The court reporter, who has been appointed by an elected official for the purpose of recording and transcribing the proceedings of the court, and who has sworn an oath[1] to uphold the duties of his appointed office, is required to provide a transcript when requested by a party for purposes of appeal. The court requires the court reporter to prepare the transcript outside of working hours, in most cases. The court reporter has a statutory duty to furnish and certify an accurate transcription of the court proceedings whenever a party requests it.

Under the FLSA, the definition of "employer" is not limited by the common law concept, but is to be broadly construed to effectuate the remedial purposes of the Act. Bonnette v. California Health and Welfare Agency, 704 F.2d 1465, 1469 (9th Cir. 1983). Economic reality is the test of whether an employment relationship exists. Goldberg v. Whitaker House Cooperative, Inc., 366 U.S. 28 (1961). Under the economic reality test, the employment relationship is determined by the exercise of control over the terms and conditions of employment. "[T]he determination of the relationship does not depend on . . . isolated factors, but rather upon the circumstances of the whole

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[1] IC 33-15-23-3 provides, in part:

At the time of appointment, such reporter shall take an oath . . . to faithfully perform his or her duties as such official reporter.

activity." Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947).

The following factors indicate that the court reporter is an employee of the trial court when engaged in the preparation of a transcript for purposes of appeal:

(1) The state statute requires the court reporter to prepare the transcript whenever it is requested by a party. This law creates an obligation on the part of the court reporter which is directly tied to his or her appointment. The court reporter has no choice regarding whether to prepare the transcript; the court reporter or an assistant is under a legal duty to provide the transcript. This demonstrates the court's control over the terms and conditions of employment.

(2) The government pays for a transcript prepared for an indigent party in a criminal case, upon approval by the trial judge, even if the court reporter does the work on his or her own time. The fact that the government unilaterally determines the per page fee indicates economic control. This, coupled with the trial judge's certification of the completed transcript and the statutory mandate requiring the court reporter to provide the transcript to a requesting party, points to an employment relationship between the trial court and the court reporter.

(3) The court reporter may hire assistants to help in preparing the transcript, but the trial judge must approve them. This tends to show that the government has supervisory power with regard to the court reporter's hiring of assistants, which is another indicator of control over the terms and conditions of employment.

(4) The trial judge signs the transcript, certifying its accuracy. In giving its seal of approval to the court reporter's transcription of the court proceedings, the court demonstrates supervisory control over the court reporter's final work product.

When the "economic reality" test is applied to the situation described, i.e., court reporters preparing transcripts for outside attorneys pursuant to statutory mandate, whether or not during regular working hours, we conclude that they are in a continuing employment relationship with the courts that employ them. Thus, the hours worked and compensation earned in preparing such transcripts must be combined with their regular hours and compensation for FLSA overtime purposes.

Courts have found the existence of a joint employment relationship where (1) there is an arrangement between two employers to share the services of an employee; (2) one employer was acting in the interest of the other employer by providing the employee to perform the services; or, (3) two employers shared

control over an employee.[2] Karr v. Strong Detective Agency, 787 F.2d 1205, 1206 (7th Cir. 1986)(holding detective agency and a warehouse were joint employers with respect to the employment of an undercover agent).

While it is true that the attorney who orders the transcript pays the court reporter directly on a per page basis, the attorney exercises no control over the hiring or firing of the court reporter, nor does the attorney supervise the preparation of the transcript. The court proceedings, which are recorded during the court reporter's regular work day, provide the basis for the transcript. Most importantly, state law requires the court reporter to provide the transcript upon request. Thus, the preparation of the transcript for appeal purposes is an extension of the court reporter's official duties performed for the benefit of the trial court.

We therefore conclude that the attorney is not the "employer" of the court reporter merely by virtue of ordering and paying for a transcript. In view of this conclusion, there is no reason to analyze the relationship of the attorney and the court as one of joint employment.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the questions

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[2] 29 C.F.R. 791.2(b) provides, in pertinent part, "[w]here the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as: (1) where there is an arrangement between the employers to share the employee's services, as, for example to interchange employees; or (2) where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or (3) where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer."

presented. Existence of any other factual or historical background not contained in your request might require different conclusions than the ones expressed herein.

We trust that the above is responsive to your inquiry.

Sincerely,

Signed

Acting Administrator

21 AB 206
25 CD 204

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

MAR 18 1993

This is in response to your inquiry concerning the application of the Fair Labor Standards Act (FLSA) to certain emergency medical service (EMS) employees employed by New Hanover County that volunteer services to the Ogden-New Hanover Volunteer Rescue Squad, Inc. (Ogden). The issue of concern is whether County EMS employees are precluded from volunteering their services to Ogden without compensation in accordance with the overtime requirements of the FLSA. We regret the delay in responding to your inquiry.

You state that Ogden is an autonomous private non-profit corporation that contracts with the County to provide emergency medical and rescue services on an "as needed basis." For purposes of this response, we assume that Ogden is in fact a separate and independent private entity the members of whose board of directors are not appointed or otherwise responsible to County officials. Thus, Ogden would not be a "public agency" within the meaning of the Act. (See the enclosed opinion letter of March 18, 1986, in which this issue is discussed).

As we understand the arrangement, New Hanover County has permitted its EMS employees to volunteer additional hours of service to Ogden without compensation. The County has chosen to provide emergency medical and rescue services to the public through its own career employees as well as through noncareer citizen volunteers stationed at Ogden's facilities.

The County's contract with Ogden requires that Ogden provide emergency medical and rescue services within a defined area in the County, as well as back-up assistance to the County wherever dispatched by the County Central Dispatch. In addition, Ogden is required to provide the same emergency medical response and rescue services at night and on weekends that the County furnishes to the public with its own EMS employees during the day on weekdays. According to County EMS Director (May 7, 1991 letter), Ogden also offers volunteer personnel to the County either to "ride along" as a supplement to the existing County EMS crew or as a substitute for a County EMS crew member who is sick or on personal leave. Ogden's facilities and equipment may be used by County EMS employees when necessary.

Under the circumstances presented by this case, including the integrated structure of the County's EMS services, it is our view that all work involving like duties or services performed by a career EMS employee within New Hanover County, whether the worker reports to the County or to Ogden, is compensable and must be included in determining whether he or she has worked overtime hours for purposes of the FLSA. We view the underlying purpose and rationale of section 3(e)(4)(A) as requiring this result. Pursuant to section 3(e)(4), an individual is not permitted to "volunteer" to perform services for a public agency if such services are the same type of services which the individual is employed to perform for the public agency. Although Ogden is a corporate entity separate from the County, services performed by its "volunteer" personnel, who are also County employees, are clearly performed "for" the County. Not only do the services directly benefit the County, but they are identical to the services performed by these and other County employees, at places and times when County personnel are unavailable.

To allow EMS employees to "volunteer" to perform through Ogden, for the County, the same services for which they are paid by the County raises the potential for abuse which Congress had in mind in enacting section 3(e)(4)(A). See Senate Report No. 99-159, October 17, 1985, page 14, 2 U.S. Cong. News 1985, page 662 ("the Committee wishes to prevent any manipulation or abuse of minimum wage requirements through coercion or undue pressure upon employees to 'volunteer'"). In this vein, we note that in the agreement of February 19, 1992 between the County and Ogden, at page 3, it is agreed that any employee who wishes to volunteer for Ogden must agree, in violation of the FLSA, that any wages ultimately found owing by the County to the employee as a result of this activity must be donated by the employees to Ogden. Such sums, if any, are then deducted from future contractual payments by the County to Ogden.

Furthermore, even if Ogden were a public agency, this would not be the type of situation envisioned by section 3(e)(4)(B) of the Act and 29 C.F.R. 553.105. These sections provide for mutual aid agreements between two or more public agencies, whereby employees of one agency may perform volunteer services for a second agency without thereby being considered employees of the first agency while serving as a volunteer. It should be noted, however, that these provisions contemplate cooperative relationships between separate geographic jurisdictions. They do not countenance the performance of regular volunteer duties by employees of a public agency, acting for the exclusive benefit of that same agency, as a direct supplement to the work force, but through the device of another agency, as is the case here.

We have also considered the provision in section 7(p)(1) of the Act, 29 U.S.C. 207(p)(1), separating for overtime purposes the hours worked voluntarily on a special detail by police or fire fighters for a separate and independent employer. The legislative history of this provision, which is reflected in 29 C.F.R. 553.227(a), makes clear that the second employer must be both separate and independent from the principal employer. We have concluded that, under the circumstances present here, Ogden cannot be said to be "independent" of the County. Although Ogden is not a "public agency" within the meaning of the FLSA, it has a close contractual relationship with the County. Its principal purpose is to provide the same services for the County, through the use of "volunteers," which regular employees of the County otherwise provide. It is therefore not truly "independent" of the County in the sense contemplated by section 553.227. The illustrations given in that section all concern outside employers primarily engaged in activities unrelated to the public agency's law enforcement function, which occasionally have need for law enforcement personnel to provide security functions.

We wish to make clear that EMS and rescue volunteers who are members of the Ogden Squad <u>but are not employed by New Hanover County</u> as EMS and rescue employees are not affected. As you know, volunteer fire and rescue departments are frequently served by individuals whose livelihood is earned principally in another vocation (mechanic, teacher, truck driver, lawyer, etc.). The FLSA excludes such individuals as employees of the public agency they serve if they receive no compensation or are paid expenses, reasonable benefits, or a nominal fee (or combination thereof) to perform the services for which they volunteered.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein.

Sincerely,

Acting Administrator

Enclosure

MAR 18 1993

Dear

This is in response to your inquiry concerning the application of the Fair Labor Standards Act (FLSA) to certain emergency medical service (EMS) employees employed by County that volunteer services to the Volunteer Rescue Squad, Inc. . The issue of concern is whether County EMS employees are precluded from volunteering their services to without compensation in accordance with the overtime requirements of the FLSA. We regret the delay in responding to your inquiry.

You state that is an autonomous private non-profit corporation that contracts with the County to provide emergency medical and rescue services on an "as needed basis." For purposes of this response, we assume that is in fact a separate and independent private entity the members of whose board of directors are not appointed or otherwise responsible to County officials. Thus, would not be a "public agency" within the meaning of the Act. (See the enclosed opinion letter of March 18, 1986, in which this issue is discussed).

As we understand the arrangement, County has permitted its EMS employees to volunteer additional hours of service to without compensation. The County has chosen to provide emergency medical and rescue services to the public through its own career employees as well as through noncareer citizen volunteers stationed at facilities.

The County's contract with requires that provide emergency medical and rescue services within a defined area in the County, as well as back-up assistance to the County wherever dispatched by the County Central Dispatch. In addition, is required to provide the same emergency medical response and rescue services at night and on weekends that the County furnishes to the public with its own EMS employees during the day on weekdays. According to County EMS Director (May 7, 1991 letter), also offers volunteer personnel to the County either to "ride along" as a supplement to the existing County EMS crew or as a substitute for a County EMS crew member who is sick or on personal leave. facilities and equipment may be used by County EMS employees when necessary.

Under the circumstances presented by this case, including the integrated structure of the County's EMS services, it is our view that all work involving like duties or services performed by a career EMS employee within County, whether the worker reports to the County or to is compensable and must be included in determining whether he or she has worked overtime hours for purposes of the FLSA. We view the underlying purpose and rationale of section 3(e)(4)(A) as requiring this result. Pursuant to section 3(e)(4), an individual is not permitted to "volunteer" to perform services for a public agency if such services are the same type of services which the individual is employed to perform for the public agency. Although is a corporate entity separate from the County, services performed by its "volunteer" personnel, who are also County employees, are clearly performed "for" the County. Not only do the services directly benefit the County, but they are identical to the services performed by these and other County employees, at places and times when County personnel are unavailable.

To allow EMS employees to "volunteer" to perform through for the County, the same services for which they are paid by the County raises the potential for abuse which Congress had in mind in enacting section 3(e)(4)(A). See Senate Report No. 99-159, October 17, 1985, page 14, 2 U.S. Cong. News 1985, page 662 ("the Committee wishes to prevent any manipulation or abuse of minimum wage requirements through coercion or undue pressure upon employees to 'volunteer'"). In this vein, we note that in the agreement of February 19, 1992 between the County and at page 3, it is agreed that any employee who wishes to volunteer for must agree, in violation of the FLSA, that any wages ultimately found owing by the County to the employee as a result of this activity must be donated by the employees to Such sums, if any, are then deducted from future contractual payments by the County to

Furthermore, even if were a public agency, this would not be the type of situation envisioned by section 3(e)(4)(B) of the Act and 29 C.F.R. 553.105. These sections provide for mutual aid agreements between two or more public agencies, whereby employees of one agency may perform volunteer services for a second agency without thereby being considered employees of the first agency while serving as a volunteer. It should be noted, however, that these provisions contemplate cooperative relationships between separate geographic jurisdictions. They do not countenance the performance of regular volunteer duties by employees of a public agency, acting for the exclusive benefit of that same agency, as a direct supplement to the work force, but through the device of another agency, as is the case here.

We have also considered the provision in section 7(p)(1) of the Act, 29 U.S.C. 207(p)(1), separating for overtime purposes the hours worked voluntarily on a special detail by police or fire fighters for a separate and independent employer. The legislative history of this provision, which is reflected in 29 C.F.R. 553.227(a), makes clear that the second employer must be both separate and independent from the principal employer. We have concluded that, under the circumstances present here, cannot be said to be "independent" of the County. Although is not a "public agency" within the meaning of the FLSA, it has a close contractual relationship with the County. Its principal purpose is to provide the same services for the County, through the use of "volunteers," which regular employees of the County otherwise provide. It is therefore not truly "independent" of the County in the sense contemplated by section 553.227. The illustrations given in that section all concern outside employers primarily engaged in activities unrelated to the public agency's law enforcement function, which occasionally have need for law enforcement personnel to provide security functions.

We wish to make clear that EMS and rescue volunteers who are members of the Squad <u>but are not employed by County</u> as EMS and rescue employees are not affected. As you know, volunteer fire and rescue departments are frequently served by individuals whose livelihood is earned principally in another vocation (mechanic, teacher, truck driver, lawyer, etc.). The FLSA excludes such individuals as employees of the public agency they serve if they receive no compensation or are paid expenses, reasonable benefits, or a nominal fee (or combination thereof) to perform the services for which they volunteered.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein.

Sincerely,

Signed

Acting Administrator

Enclosure

MAR 18 1993

This is in response to your inquiry concerning the application of the Fair Labor Standards Act (FLSA) to firefighters when they are "on-call," and whether the on-call hours are compensable under the FLSA.

Both the Wage and Hour Regional Office in and this office advised, in response to prior inquiries from the Fire Chief and the City Attorney, that the time spent by firefighters on-call, under the facts made available, is not compensable under the FLSA, provided that the calls are not so frequent that the employees cannot use the time effectively for their own purposes. The compensability of on-call time for the firefighters may well turn on the frequency of such emergency calls. If calls to duty are so frequent that employees cannot use their off-duty time effectively for their own benefit, the entire on-call period would be compensable. However, you have not provided any new factual information in this regard.

Whether a particular factual situation will be considered to constitute hours of work under the FLSA is not always easy to predict. 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 on-call period, and as many as 13 calls on occasion. The court stressed the "fact based nature of these cases" in distinguishing Renfro from its holdings in Norton v. Worthen Van Service Inc., 839 F.2d 653 (10th Cir. 1988) and Boehm v. Kansas City Power & Light Co., 868 F.2d 1182 (10th Cir. 1989).

You may wish to review the frequency of calls received by on-call firefighters in light of this case law. As indicated in §785.2 of 29 CFR Part 785, the ultimate decisions on interpretations of the FLSA are made by the courts.

We trust that the above is responsive to your inquiry.

Signed

Acting Administrator

MAR 19 1993

This is in response to your inquiry concerning the application of the Fair Labor Standards Act (FLSA) to certain seasonal employees of the Department of Natural Resources who also work as "volunteers" performing the same tasks for during the "off-season."

You state that employs certain employees at its park facilities on a seasonal basis. They work as full-time employees for 6 to 8 months per year. After the seasonal period is over, the employees are terminated. Many of these employees are then rehired during the next seasonal period. During the off-season, some of these employees volunteer to work (presumably without compensation) and perform the same tasks as volunteers as they had performed while employed as seasonal employees by You ask whether such volunteer work is inconsistent with the FLSA.

We conclude that such work without compensation for those hours is prohibited by §3(e)(4) of the FLSA. An individual is not permitted to "volunteer" to perform services for a public agency if such services are the same type of services which the individual is employed to perform for the public agency. See 29 CFR 553.102.

To allow employees to "volunteer" during the off-season the same services for which they are paid during the season raises the potential for abuse which Congress had in mind in enacting §3(e)(4). See Senate Report No. 99-159, October 17, 1985, page 14, 2 U.S. Cong. News 1985, page 662 ("the Committee wishes to prevent any manipulation or abuse of minimum wage requirements through coercion or undue pressure upon employees to 'volunteer'"). We do not believe it would be untoward for individuals to conclude, under the circumstances, that their chances of reemployment the next season may depend on their volunteering services to during the off-season.

We trust that the above is responsive to your inquiry.

Sincerely,

Signed

Acting Administrator

MAR 19 1993

This is in response to your inquiry, addressed to former Administrator Paula V. Smith, concerning the application of the Fair Labor Standards Act (FLSA) to emergency medical service (EMS) employees of a public employer who may respond to an accident or other medical emergency when they are off-duty. We regret the delay in responding to your inquiry.

You state that an EMS employee may on occasion, while off duty, come upon the scene of an accident or other emergency and he or she may stop to assist the victim(s). You indicate that the EMS employee is not under any compulsion or instruction from the employer to lend or render aid when off-duty, but simply acts as a "good Samaritan." You ask whether any of the time spent by the EMS employee in rendering assistance to the victims in such situations would be considered compensable under the FLSA by the employer. You present several situations for our consideration which will be discussed in turn.

The FLSA defines the term "employ" to mean "suffer or permit to work." As indicated in 29 CFR 785.7, the U.S. Supreme Court has held that employees subject to the Act must be paid for all time spent in "physical or mental exertion (whether burdensome or not) controlled or required by the employer (emphasis supplied) and pursued necessarily and primarily for the benefit of the employer or his business." Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944).

Under the situations described in questions 1 and 2 of your inquiry, we would not consider the "good Samaritan" assistance to accident victims rendered by off-duty EMS employees to be compensable by the employer under the FLSA. However, in situations where the off-duty employee remains on the scene after the on-duty EMS employees arrive (question 3), we would consider any subsequent time spent by him or her in rendering assistance to be compensable under the FLSA. At this point, the employer controls the situation and suffers or permits work by the off-duty EMS employee. Even if the time so spent is not great, but can be ascertained, it must be considered hours worked for purposes of the FLSA. See 29 CFR 785.47.

We would also like to advise you that we would question an arrangement under which EMS employees on a regular basis would "volunteer" services during their off-duty hours to their employer as "good Samaritans." In our view, such "volunteering" would be contrary to the underlying purpose and rationale of §3(e)(4)(A). In this regard, see Senate Report No. 99-159, October 17, 1985, page 14, 2 U.S. Cong. News 1985, page 662 ("the Committee wishes to prevent any manipulation or abuse of minimum wage requirements through coercion or undue pressure upon employees to 'volunteer'").

We trust that the above is responsive to your inquiry.

Sincerely,

Signed

Acting Administrator

MAR 19 1993

Dear

This is in reply to your inquiry concerning whether time spent by a police officer during off-duty hours attending an interview for a potential career development reassignment is compensable under the Fair Labor Standards Act (FLSA).

As you were previously advised, attendance at lectures, meetings, training programs and similar activities are not compensable under the FLSA if all four of the conditions described in 29 CFR 785.27 are met. Under the facts described in your letter of February 26, 1993, clearly (a) and (d) are met. Further, the program is voluntary in nature and there is nothing in your submission which indicates that the officer's failure to participate would adversely affect his present working conditions or the continuance of his employment by the City. Thus, we conclude that condition (b) is met. See 29 CFR 785.28. Since the purpose of the program is career development in another skill (i.e., traffic control and motorcycle training) rather than to enhance the officer's performance in his present job, we conclude that the condition (c) is also met. See the last sentence of 29 CFR 785.29. Consequently, we conclude that the time spent in attending the career development interview by the officer during off-duty hours is noncompensable under the FLSA.

We trust that the above is responsive to your inquiry.

Sincerely,

Signed

Daniel F. Sweeney
Deputy Assistant Administrator

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

91 MS 603.2
603.3
700 - Forestry

APR 2 1993

This is in further response to your request for guidance with respect to the application of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) regulations to forestry landowners who make raw land available to migrant agricultural workers for camping. Specifically, you question whether allowing workers to camp on forestry land creates obligations on the landowner, and whether the forestry landowner may claim the MSPA commercial housing exemption if the land is made available to members of the general public, as well as migrant workers, for camping in tents and other non-permanent shelters. We regret the delay in furnishing this information.

As you know, the MSPA does not require that migrant workers be provided with housing. However, under section 203 of MSPA, 29 U.S.C. 1823, each person who owns or controls a facility or real property which is used as housing for migrant agricultural workers shall be responsible for ensuring that the facility or real property complies with substantive Federal and State safety and health standards applicable to that housing. When migrant workers camp on a landowner's property using tents or any other type of shelter (whether supplied by the landowner, or the workers, or some third party such as the contractor), the landowner's property is being used in housing the workers and the MSPA requirements are applicable. Thus, it is the Department's position that such a landowner would be subject to the MSPA housing requirements.

A limited exemption from these requirements applies to persons who regularly provide housing on a commercial basis to the general public and who also provide housing to migrant agricultural workers on the same terms and conditions. 29 U.S.C. 1823(c); 29 CFR 500.131. It is the Department's position that this so-called "innkeeper" exemption applies only to operators of commercial lodging facilities such as motels, and not to owners of unimproved property who permit campers to use their raw land. The statute expressly speaks of "housing", and the implementing regulation speaks of "housing" and "lodging". The legislative history shows that Congress intended the exemption to be narrowly construed and to be available to businesses such as motels and

safety and health compliance for workers camping on the land, we would be pleased to respond to any further questions that you may have regarding the application of any of the specific housing safety and health standards. Again, we regret the delay in our response.

Sincerely,

Charles E. Pugh
Acting Administrator

APR - 7 1993

APR 7 1993

This is in response to your letter requesting an opinion concerning the application of the Fair Labor Standards Act (FLSA) to employees of the State of Legislative Auditor's Office. We regret the delay in responding to your inquiry.

You state that the Legislative Auditor is an elected official who is solely responsible to the legislature, serving as its fiscal advisor and auditing fiscal records of the State, its agencies, and political subdivisions. The Legislative Auditor's Office is a department within the Legislative Branch of the State of government.

The FLSA is the Federal law of most general application concerning wages and hours of work. This law requires that all covered and nonexempt employees must be paid a minimum wage of $4.25 an hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek. The provisions of the FLSA apply to all employees of State and local governments except to those who are specifically excluded under § 3(e)(2)(C) of the FLSA. Section 3(e)(2)(C) provides an exclusion from the definition of the term "employee" for all individuals who are employed by legislative branches of State governments, and who are not subject to the civil service laws of the State.

Therefore, based on the information you provided, it is our opinion that the Legislative Auditor and his/her employees appear to be excluded from the FLSA pursuant to § 3(e)(2)(C).

We trust that the above information is responsive to your inquiry.

Sincerely,

Signed

Daniel F. Sweeney
Deputy Assistant Administrator

APR - 9 1993

This is in response to your letter concerning the application of the Fair Labor Standards Act (FLSA) to exempt salaried employees who have their salaries docked for partial day absences.

You state that your client has certain salaried employees who are exempt under section 13(a)(1) of the FLSA. These employees receive sick and vacation benefits. When the employees are absent for a whole day or a number of whole days, they may use sick time or vacation time to account for the absence. If the sick time or vacation time benefits are exhausted, the employer does not pay the employees for the time missed. If one of the employees is absent for part of a day, the employee's absence is charged to his or her accrued benefits, or his or her pay is docked if benefits are inapplicable or exhausted, in the amount of the partial-day absence. You wish to know if this is in compliance with the requirements of section 541.118 of Regulations, 29 CFR Part 541.

Section 13(a)(1) of the FLSA provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in Regulations, Part 541. An employee may qualify for exemption if all of the pertinent tests relating to duties, responsibilities and salary, as discussed in the appropriate section of the Regulations, are met. One such test requires that an otherwise exempt employee be paid on a salary basis, as described in section 541.118 of the Regulations.

An employee will be considered to be paid on a salary basis within the meaning of the Regulations if under his or her employment agreement he or she regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his or her compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.

Deductions may be made, however, when the employee is absent from work for a day or more days for personal reasons, other than

sickness or accident. Thus, if an employee is absent for one or more full days to handle personal affairs, his or her salaried status will not be affected if deductions are made from his or her salary for such absences.

Deductions may also be made for absences of a day or more days occasioned by sickness or disability (including industrial accidents) if the deductions are made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability. Thus, if the employer's particular plan, policy or practice provides compensation for such absences, deductions for absences of one or more full days because of sickness or disability may be made before an employee has qualified under such plan, policy or practice and after he or she has exhausted his or her leave allowance thereunder.

Where an employer has bona fide vacation and sick time benefits, it is permissible to substitute or reduce the accrued benefits for the time an employee is absent from work, even if it is less than a full day, without affecting the salary basis of payment, if by substituting or reducing such benefits, the employee receives in payment an amount equal to his or her guaranteed salary. Where an employee has exhausted these benefits, deductions may be made in increments of full days only for absences for personal reasons or illness. Deductions from the salaries of otherwise exempt employees for partial day absences after they have exhausted their vacation or sick time benefits have never been permitted under the Regulations for either private or public employers. However, in the case of public employers, the Regulations were amended effective September 18, 1992, (57 FR 37666) to provide that an otherwise exempt public sector employee who is paid according to a pay system that requires the use of paid leave for partial day absences and, when ~~leave is not used or is exhausted, reduces the employee's pay for~~ less than one full work-day, will not be disqualified from exemption due to such a pay system. A copy of this rulemaking is enclosed for your information.

We trust that the above is responsive to your inquiry.

Sincerely,

Acting Administrator

Enclosures

APR 20 1993

This is in reference to our letter to you dated August 7, 1989, in which we expressed our view that paid firefighters employed by your client, which is a Township in
could volunteer their services to certain volunteer fire companies in the Township without being compensated in accordance with the monetary provisions of the Fair Labor Standards Act (FLSA). Upon further review of situations similar to the one described in your letter, we have determined that our letter to you expresses a view that is not in accord with the Fair Labor Standards Amendments of 1985.

Under the circumstances described in your letter, including the integrated structure of the Township's firefighting services, it is our view that all work involving like duties or services performed by paid career Township firefighters within the Township, whether the firefighter reports to the Township or to the volunteer companies, is compensable and must be included in determining whether the firefighter has worked overtime hours for the purposes of the FLSA. We view the underlying purpose and rationale of §3(e)(4)(A) as requiring this result. Pursuant to §3(e)(4), an individual is not permitted to "volunteer" to perform services for a public agency if such services are the same type of services that the individual is <u>employed</u> to perform for the public agency. Although the volunteer companies may be corporate entities separate from the Township, services performed by its "volunteer" personnel, who are also Township employees, are clearly performed "for" the Township. Not only do the services directly benefit the Township, but they are identical to the services performed by these and other Township employees, at places and times when Township personnel are unavailable.

To allow firefighters to "volunteer" to perform through the volunteer companies, for the Township, the same services for which they are paid by the Township raises the potential for abuse which Congress had in mind in enacting §3(e)(4)(A). See Senate Report No. 99-159, October 17, 1985, page 14, 2 U.S. Cong. News 1985, page 662 ("the Committee wishes to prevent any manipulation or abuse of minimum wage requirements through coercion or undue pressure upon employees to 'volunteer'").

Furthermore, even if the volunteer companies were public agencies, this would not be the type of situation envisioned by §3(e)(4)(B) of the Act and 29 CFR 553.105. These sections provide for mutual aid agreements between two or more public agencies, whereby employees of one agency may perform volunteer services for a second agency without thereby being considered employees of the first agency while serving as volunteers. It should be noted, however, that these provisions contemplate cooperative relationships between separate geographic jurisdictions. They do not countenance the performance of regular volunteer duties by employees of a public agency, acting for the exclusive benefit of that same agency, as a direct supplement to the work force, but through the device of another agency, as in the case you describe.

We have also considered the provision in §7(p)(1) of the FLSA which separates for overtime purposes the hours worked voluntarily on a special detail by police or firefighters for a separate and independent employer. The legislative history of this provision, which is reflected in 29 CFR 553.227(a), makes clear that the second employer must be both separate and independent from the principal employer. We have concluded that the volunteer companies cannot be said to be "independent" of the Township. Although they are not "public agencies" within the meaning of the FLSA, they have a close contractual relationship with the Township. Its principal purpose is to provide the same type of services for the Township, through the use of "volunteers," that regular employees of the Township otherwise provide. They are therefore not truly "independent" of the Township in the sense contemplated by §553.227. The illustrations given in that section all concern outside employers primarily engaged in activities unrelated to the public agency's law enforcement function, which occasionally have need for law enforcement personnel to provide security functions.

We wish to make clear that firefighter volunteers who are members of the volunteer companies <u>but not employed by the Township</u> as firefighters are not affected. As you know, volunteer fire departments are frequently served by individuals whose livelihood is earned principally in another vocation (e.g., mechanic, teacher, truck driver, lawyer, etc.). The FLSA excludes such individuals as employees of the public agency they serve if they receive no compensation or are paid expenses, reasonable benefits, or a nominal fee (or combination thereof) to perform the services for which they volunteered.

Accordingly, our letter to you dated August 7, 1989, is hereby withdrawn. Please let us know if you have any further questions.

Sincerely,

|S|

Acting Administrator

APR 20 1993

This is in reference to our letter to you dated December 2, 1986, in which we expressed our view that paid firefighters employed by the City of could volunteer their services to the Emergency Crew (the Crew) as emergency medical technicians (EMTs) without being compensated in accordance with the monetary provisions of the Fair Labor Standards Act (FLSA). Upon further review of situations similar to the one described in your letter, we have determined that our letter to you expresses a view that is not in accord with the Fair Labor Standards Amendments of 1985.

Under the circumstances described in your letter, including the integrated structure of the City's official safety program services, it is our view that all work involving like duties or services performed by paid career City firefighter/EMTs within the City, whether the firefighter/EMT reports to the City or to the Crew, is compensable and must be included in determining whether the firefighter/EMT has worked overtime hours for the purposes of the FLSA. We view the underlying purpose and rationale of §3(e)(4)(A) as requiring this result. Pursuant to §3(e)(4), an individual is not permitted to "volunteer" to perform services for a public agency if such services are the same type of services that the individual is <u>employed</u> to perform for the public agency. Although the Crew may be a corporate entity separate from the City, services performed by its "volunteer" personnel, who are also City employees, are clearly performed "for" the City. Not only do the services directly benefit the City, but they are identical to the services performed by these and other City employees, at places and times when City personnel are unavailable.

To allow firefighters to "volunteer" to perform through the Crew, for the City, the same services for which they are paid by the City raises the potential for abuse which Congress had in mind in enacting §3(e)(4)(A). See Senate Report No. 99-159, October 17, 1985, page 14, 2 U.S. Cong. News 1985, page 662 ("the Committee wishes to prevent any manipulation or abuse of minimum wage requirements through coercion or undue pressure upon employees to 'volunteer'").

Furthermore, even if the Crew was a public agency, this would not be the type of situation envisioned by §3(e)(4)(B) of the Act and 29 CFR 553.105. These sections provide for mutual aid agreements between two or more public agencies, whereby employees of one agency may perform volunteer services for a second agency without thereby being considered employees of the first agency while serving as volunteers. It should be noted, however, that these provisions contemplate cooperative relationships between separate geographic jurisdictions. They do not countenance the performance of regular volunteer duties by employees of a public agency, acting for the exclusive benefit of that same agency, as a direct supplement to the work force, but through the device of another agency, as in the case you describe.

We have also considered the provision in §7(p)(1) of the FLSA which separates for overtime purposes the hours worked voluntarily on a special detail by police or firefighters for a separate and independent employer. The legislative history of this provision, which is reflected in 29 CFR 553.227(a), makes clear that the second employer must be both separate and independent from the principal employer. We have concluded that the Crew cannot be said to be "independent" of the City. Although the Crew is not a "public agency" within the meaning of the FLSA, it has a close contractual relationship with the City. Its principal purpose is to provide the same type of services for the City, through the use of "volunteers," that regular employees of the City otherwise provide. They are therefore not truly "independent" of the City in the sense contemplated by §553.227. The illustrations given in that section all concern outside employers primarily engaged in activities unrelated to the public agency's law enforcement function, which occasionally have need for law enforcement personnel to provide security functions.

We wish to make clear that EMT volunteers who are members of the Crew <u>but not employed by the City</u> as firefighter/EMTs are not affected. As you know, volunteer fire and/or rescue departments are frequently served by individuals whose livelihood is earned principally in another vocation (e.g., mechanic, teacher, truck driver, lawyer, etc.). The FLSA excludes such individuals as employees of the public agency they serve if they receive no compensation or are paid expenses, reasonable benefits, or a nominal fee (or combination thereof) to perform the services for which they volunteered.

Accordingly, our letter to you dated December 2, 1986, is hereby withdrawn. Please let us know if you have any further questions.

Sincerely,

/s/

Acting Administrator

MAY 7 1993

This is in response to your inquiry on behalf of
of which was forwarded to us by the Health Care Financing Administration of the Department of Health and Human Services. is concerned about the application of the Fair Labor Standards Act (FLSA) to emergency medical service (EMS) employees.

The FLSA is the law of most general application concerning wages and hours of work. This law requires that all covered and nonexempt employees be paid not less than the minimum wage of $4.25 an hour for all hours worked and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek. The FLSA provides a number of special provisions for state and local government employees that are discussed in detail in Regulations, 29 CFR Part 553.

Section 7(k) of the FLSA provides a partial overtime pay exemption for public agency employees employed in fire protection or law enforcement activities (including security personnel in correctional institutions). Under this provision, an employer may establish a work period ranging from 7 to 28 consecutive days for the purpose of paying overtime compensation to employees employed in such activities. The maximum hours standard for fire protection personnel ranges from 53 hours worked in a 7-day work period to 212 hours worked in a 28-day work period. The maximum hours standard for law enforcement personnel ranges from 43 hours worked in a 7-day work period to 171 hours worked in a 28-day work period. See §§ 553.201 and 553.230 of the regulations.

EMS employees who are employed by a public fire protection or law enforcement agency, and whose work is an integral part of that agency's fire protection or law enforcement activities, may be paid overtime compensation pursuant to the provisions of §7(k). This is explained in §§ 553.210(a) and 553.211(b).

EMS employees who are not employed by a fire protection or law enforcement agency, but who are stationed at a fire station or police station in order to respond to calls, may be paid pursuant to the 7(k) exemption where they are an integral part of fire

protection or law enforcement activities. EMS employees who are not employed by a fire protection or law enforcement agency, and are not stationed at a fire station or a police station, may also be paid pursuant to the 7(k) exemption under certain conditions. As explained in §553.215, EMS employees of a public ("third service") agency, other than a fire protection or law enforcement agency, may be treated as employees engaged in fire protection or law enforcement activities if their services are substantially related to fire protection or law enforcement. However, this section of the regulations also refers to the fact that the provisions of §7(k) do not apply to EMS employees of a public agency, such as a hospital, that was subject to the FLSA prior to the Fair Labor Standards Amendments of 1974. Additionally, the exemption is not applicable to personnel employed by private EMS organizations.

Section 553.215 of the regulations contains two tests for determining if public EMS (third service) agency employees are providing services that are substantially related to fire protection or law enforcement:

1. The first test requires that individuals, in order to qualify as fire protection employees, must be trained to rescue fire victims, accident victims, or firefighters who are injured in the performance of their firefighting duties. Similarly, in order for individuals to qualify as law enforcement employees, they must be trained to rescue crime victims or law enforcement personnel who are injured in the performance of their law enforcement duties.

2. The second test requires that such individuals be regularly dispatched to fires, riots, natural disasters, or accidents in order for them to qualify as fire protection employees. Similarly, in order for them to qualify as law enforcement employees, they must be regularly dispatched to crime scenes, riots, natural disasters, or accidents.

As indicated in §553.215, where EMS employees perform both fire protection and law enforcement activities, the applicable overtime standard is the one in which the EMS employees spend the majority of work time during the work period.

Most EMS employees respond to a variety of emergency calls. Some calls are related to law enforcement emergencies, some are related to fire protection emergencies, and some are related to medical emergencies not attributable to either law enforcement or fire protection. Thus, the application of §7(k) to EMS

employees of public agencies that are not an integral part of fire protection or law enforcement agencies must be made on a case-by-case basis in accordance with the criteria discussed above. The results will necessarily vary depending on the nature of the EMS calls serviced.

With regard to changing the regulations to allow EMS organizations to claim the partial overtime exemption under §7(k) for fire protection employees, the Department of Labor gave full consideration to such proposed regulatory modifications during the 1987 rulemaking (52 FR 2012, 2023) for the regulations implementing the Fair Labor Standards Amendments of 1985. The position stated in the regulations is consistent with the legislative history of the Fair Labor Standards Amendments of 1974. We appreciate the concerns raised by but do not believe (absent congressional action) that there is an adequate basis to presently change the regulations.

With respect to your constituent's comment as to whether the Secretary of Labor may appoint an "industry committee" on this issue, please note that the FLSA currently provides for such a process only to recommend minimum wages to be paid under §6 to employees in American Samoa. See §5 of the FLSA.

If you have any further questions, please do not hesitate to contact this office.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

MAY 14 1993

This is in response to the joint inquiry submitted by you and Representative, United Firefighters Union of The issue of concern is whether time spent by firefighters in hazardous materials handling training is compensable under the Fair Labor Standards Act (FLSA).

You state that the City and the Union jointly agreed to establish a Hazardous Materials Handling (Haz-Mat) Team. State law does not require a fire department to have a Haz-Mat Team, but does require that firefighters possess a Hazardous Materials Specialist Certificate, if the fire department has such a team.

The Haz-Mat Team is composed of firefighters who have volunteered for the assignment and who are in training for, or have completed, the training required by the State. Training for the State required certificate is only available outside of the City and outside a firefighter's regularly scheduled work hours.

As indicated in §553.226(b)(2) of 29 CFR Part 553, attendance outside of regular working hours at specialized training or follow-up training, which is required for certification of employees of a governmental jurisdiction by law of a higher level of government, does not constitute compensable hours of work. Since law imposes the training requirement in question, the Haz-Mat training time is not compensable under the FLSA.

We have also considered the Haz-Mat training under the general rules set forth in 29 CFR 785.27 through 785.32. Attendance at training programs is not compensable if all four conditions described in 29 CFR 785.27 are met. Under the facts described in your letter, clearly (a) and (d) are met. Further, the program is voluntary in nature and there is nothing in your joint submission which indicates that a firefighter's failure to participate would adversely affect his present working conditions or the continuance of his or her employment by the City. Thus, we conclude that condition (b) is met. See 29 CFR 785.28.

Since the purpose of the training is development of another skill, we conclude that condition (c) is also met. See 29 CFR 785.29. Thus, under the general rules, the Haz-Mat training is not compensable under the FLSA.

We trust that the above is responsive to your inquiry.

Sincerely,

/s/

Daniel F. Sweeney
Deputy Assistant Administrator

MAY 18 1993

Dear

This is in response to your inquiry on behalf of County officials concerning the Fair Labor Standards Act (FLSA). They are concerned about the application of the FLSA to deputy sheriffs, jailers and dispatchers, who have not been paid in compliance with the monetary provisions of FLSA.

As you were advised by Regional Administrator Jennings, it is our position that the employees at issue are not excluded from the FLSA by virtue of §3(e)(2)(C) as the personal staff of the Sheriff notwithstanding Nichols v. Hurley, 921 F.2d 1101 (10th Cir. 1990). It is our view that this case was incorrectly decided and is contrary to congressional intent and rulings in other circuits, as well as prior 10th Circuit precedence. Id. at 1114, 1115.

For this reason, we do not believe the holding in Nichols (involving deputies and undersheriffs) should change our enforcement position or be considered controlling in , or any other State outside the 10th Circuit. Since County officials have not accepted our position or agreed to comply with the FLSA, the Kansas City Regional Office is reviewing the matter to determine what further action may be appropriate.

If you have any further questions, please do not hesitate to contact this office.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

June 7, 1993

This is in response to your letter requesting an opinion concerning the application of the seamen's exemption (section 13(b)(6)) under the Fair Labor Standards Act (FLSA) to employees employed as "cooks" and "stewards" aboard passenger cruise vessels.

You state that you represent an employer who operates several passenger cruise vessels, and the employer is concerned about two job classifications, "cooks" and "stewards". You state that those employees who are classified as cooks normally cook food for both crew members and passengers; and those employed as stewards assist passengers by cleaning their rooms (as well as crew quarters), assisting with luggage, serving meals and clearing tables, and working in the kitchen on a rotating basis assisting in food preparation.

As you know, section 13(b)(6) of the FLSA provides an exemption from the overtime pay provisions for any employee employed as a seaman. As defined in 29 CFR Part 783, "Application of the Fair Labor Standards Act to Employees Employed as Seamen", the term "seaman" includes cooks and stewards if such employees are subject to the authority, direction, and control of the master aboard a vessel, and whose services are rendered primarily as an aid in the operation of a vessel as a means of transportation.

Based on the information you provided, it is our opinion that the "cooks" and "stewards" employed by your client appear to meet the criteria outlined specifically in sections 783.31 and 783.32 of 29 CFR Part 783. Therefore, the seamen's exemption (section 13(b)(6)) would apply to the "cooks" and "stewards" employed by your client during the times they are performing their normal duties aboard the vessel, provided the employees do not spend more than 20 percent of the time worked in a workweek performing work of a nature other than that which characterizes the services of a seaman. Time spent in work such as preparing food for/or servicing noncrew members of the vessel would be included in this 20 percent tolerance on nonexempt work. See Martin v. Bedell, 955 F. 2d 1029 (5th Cir, 1992).

We trust that the above information is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

JUN 22 1993

Dear

This is in response to your inquiry concerning the application of the Fair Labor Standards Act (FLSA) to individuals employed as jailers who wish to volunteer as reserve police officers without compensation.

As indicated in the enclosed opinion letter of February 18, 1992, jailers who work as reserve police officers for the same employer must be compensated for all hours worked in both capacities in accordance with the minimum wage and/or overtime compensation requirements of the FLSA.

We trust that the above is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosure

JUN 29 1993

This is in response to your inquiry as to whether the is a public agency for purposes of the compensatory time off provisions of the Fair Labor Standards Act (FLSA).

The information you have provided indicates that the Council was created by an act of the County Commissioners in accordance with the Code. The Commissioners have the power to appoint and remove members of the Council. It appears that the Internal Revenue Service considers the Council a government instrumentality under the provisions of the Internal Revenue Code.

Since the Council was created by the County and is administered by individuals who are responsible to public officials, we would consider it to be a public agency as defined in §3(x) of the FLSA. Consequently, provided the prerequisites are met, compensatory time off (at time and one-half) may be furnished to employees working in excess of 40 hours in a workweek in lieu of immediate cash payment for overtime.

The provisions of §7(o) of the FLSA (compensatory time and compensatory time off) are discussed in §§553.20 through 553.28 of Regulations, 29 CFR Part 553. With respect to §3(x), the criteria are discussed in detail in the enclosed opinion letter of October 9, 1990.

We trust that the above is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosure

JUN 2 9 1993

This is in response to your inquiry concerning the application of the overtime compensation requirements of the Fair Labor Standards Act (FLSA). The issue of concern is whether the FLSA prevents from paying its police officers overtime premiums for hours worked in excess of their regularly scheduled hours, that are not statutory overtime hours under the FLSA.

You state that the City has elected, pursuant to §7(k), a 14-day work period for police officers for which the maximum standard is 86 hours under the FLSA. The officers are assigned to work either schedules of 76 hours (8 days @ 9.5 hours), or 85.5 hours (9 days @ 9.5 hours) in every 14-day work period. Instead of paying straight-time for hours between 76 and 86 (or 85.5 and 86), the City proposes to pay an overtime premium rate for the hours worked in excess of scheduled hours that are not in excess of 86 hours.

As a general rule, the FLSA does not prevent an employer from paying compensation in excess of its standards. We have concluded that overtime premiums paid as you propose may be treated as both excludable from the FLSA "regular rate" and creditable toward any FLSA overtime that may be due.

We trust that the above is responsive to your inquiry.

Sincerely,

Charles E. Pugh
Acting Administrator

JUN 29 1993

Dear

This is in response to your inquiry on behalf of the Town of concerning the application of the Fair Labor Standards Act (FLSA). The issue is whether a full-time employee of the Public Works Department may "volunteer" his services to the Fire Commission as a dispatcher trainee.

You state that an employee of the Public Works Department wishes to take training to be a dispatcher for the Fire Commission, and work as a part-time dispatcher on a volunteer basis without compensation. This individual hopes to qualify as a dispatcher and then be selected for a full-time paid dispatcher position with the Town. Presumably he would continue to work as a "public works" employee and "volunteer" as a dispatcher until selected to be a full-time paid dispatcher by the Town.

Under the FLSA, an individual cannot be both a paid employee and an unpaid "volunteer" while performing the same type of services that the individual is employed to perform for his or her employer. The phrase "same type of services" means similar or identical services. However, an individual employed by a public agency can volunteer services to that agency in some other capacity. See 29 CFR 553.103.

You do not state what type of job this individual holds with the Public Works Department. If, for example, he were employed as a laborer, truck driver, or equipment operator, or some similar capacity, he would not be considered to be furnishing the same type of services to the Town when volunteering as a dispatcher for the Fire Commission. Thus, he could volunteer as proposed. Conversely, he could not volunteer as fire dispatcher if he is employed as a public works dispatcher, or some similar job.

We would not, however, consider the Public Works Department and the Fire Commission of the Town of to be separate public agencies for purposes of §3(e)(4)(A)(ii) of the FLSA, unless it can be shown that they are treated separately for statistical purposes in the Census of Governments. See 29 CFR 553.102.

We trust that the above is responsive to your inquiry.

Sincerely,

Charles E. Pugh
Acting Administrator

JUN 29 1993

Dear

This is in further response to your inquiry concerning the application of the Fair Labor Standards Act (FLSA) to certain state-mandated college credits required for law enforcement officers.

You state that law now requires that law enforcement officers possess either a 2-year associate degree from an accredited college or a minimum of 60 fully accredited college level credits. No particular course work is prescribed and the credits may be in any area of study. The question presented is whether the time spent by police officers in obtaining the credits is compensable under the FLSA.

The compensability of education/training programs and related issues is discussed in 29 CFR 785.27 through 785.32. Attendance at training programs is not compensable if all four conditions described in 29 CFR 785.27 are met. Under the facts described in your letter, we conclude that (c) and (d) are met. Presumably, officers not having the required credits would obtain them during off-duty hours, thus meeting requirement (a).

As indicated in the opinion letter of October 30, 1980, to which you refer, the reason why attendance by an employee is not voluntary [criterion (b)] must be examined. We have concluded that in situations where the State has mandated training that is of general applicability, the FISA does not require compensation by the employer for time spent in such training. Clearly, 60 college credits or an AA degree in any field is not training tailored to meet the needs of individual employers.

We trust that the above is responsive to your inquiry.

Sincerely,

Charles E. Pugh
Acting Administrator

DEC 29 1993

This is in response to your inquiry concerning the overtime compensation provisions of the Fair Labor Standards Act (FLSA). The issue of concern in whether certain supplemental salary payments to employees under the salary guarantee provisions of the employer's Comprehensive Disability Plan must be included in the regular rate of pay for FLSA overtime compensation purposes.

You state that the employer has a Comprehensive Disability Plan (Plan) which has the purpose of compensating eligible employees, in whole or in part, for salary loss when they are unable to perform their regular and customary work because of illness or injury. Section 3(e) of the Plan provides for salary supplements for employees who cannot perform their regular work and are reassigned to a lower classification that provides lower wages.

Under the Plan, an employee reassigned to a lower classification receives, in addition to the wages earned at the lower classification rate, a supplemental payment based upon the differential between the lower classification rate and the employee's "regular weekly wage." This supplemental payment is made out of the employer's general funds and is treated as earned income for payroll tax purposes. The supplemental payment is not, however, included in calculating the employee's regular rate of pay for FLSA overtime compensation purposes.

As you point out, §207(e) of the FLSA requires inclusion in the regular rate of <u>all</u> remuneration for employment paid to, or on behalf of, an employee except for payments specifically excluded in subsections (1) through (7) of §207(e). We agree with your analysis and conclusion that the employer's supplemental salary payments are not excludable under §207(e)(4) and, therefore, must be included in the regular rate of pay for FLSA overtime compensation purposes. See 29 CFR 778.214 and 778.215.

With respect to the opinion letters provided by the employer's counsel (No. 163, June 4, 1963; CCH ¶30,741; No. 412, November 24, 1965, CCH ¶30,996.42; and No. 1221, July 13, 1972, CCH ¶30,803), it is unclear what the legal basis is for the positions asserted in these letters. Moreover, the letter

dated July 13, 1972, has insufficient facts to draw any legal conclusions from it. Consequently, we do not consider them to provide a sufficient basis to alter the views expressed above.

We trust that the above is responsive to your inquiry.

Sincerely,

Charles E. Pugh
Acting Administrator

JUL - 1 1993

This is in response to your inquiry concerning §13(a)(1) of the Fair Labor Standards Act (FLSA) and the salary basis requirement contained in §541.118 of 29 CFR Part 541.

In the light of recent litigation, you ask whether it is a violation of §541.118 to require employees such as fire battalion chiefs and similar employees to work specific hours; to record their time worked and compensated absences; and to obtain permission for absence from duty. This section of the regulations defines the term "salary basis," which is one of the tests for exemption under §13(a)(1).

Section 541.118 does not specifically forbid a requirement that an employee work specified hours, or record his or her time worked including compensated absences. Nor does this section specifically forbid a requirement that an employee obtain permission to be absent from duty. In our opinion, the requirements described would not themselves affect an otherwise valid salary basis of payment.

We trust that the above is responsive to your inquiry.

Sincerely

Charles E. Pugh
Acting Administrator

JUL - 1 1993

This is in response to your inquiry concerning the application of 29 U.S.C. §207(p)(1) of the Fair Labor Standards Act (FLSA) to police officers employed by County who wish to perform "special detail work" at a County vocational and technical school.

You state that the School receives 55 percent of its annual budget funding from the State of and the remainder is furnished by the County. You further assert that the County and School are: (1) treated as separate employers for payroll purposes; (2) deal with other governmental agencies at arms-length concerning the employment of any individual; (3) participate in separate employee retirement systems; (4) are independent entities with full authority to perform all of the acts necessary for their functions; and (5) can sue and be sued in their own names.

You indicate that the School has recently requested the services of County police officers to provide special detail security work at its facilities. County police officers would perform such work on their own time and on a purely voluntary basis. The County would facilitate the employment of the special detail officers as provided in 29 CFR 553.227(d). In light of this background, you ask whether the County and the School are separate and independent employers for the purpose of 29 U.S.C. §207(p)(2).

According to the 1987 Census of Governments[1], "...[i]n some [New Jersey] first-, second-, third-, and fifth-class counties, the vocation school board is appointed by the chief elected executive officer of the county, or by the director of the board of chosen freeholders, or by a judge of the Superior Court (in

[1]Government Organization, Vol. 1 No. 1, U.S. Department of Commerce, September 1988, Appendix page A-145.

all other counties). The county superintendent of schools serves as an ex officio member. The fiscal needs of county vocational school systems are determined and provided for by the county governments." The Census of Governments classifies county vocational schools as dependent agencies of the county government and they are not counted as separate governments.

If in fact County has such control over the County vocational school, the two employers would not be considered to be separate and independent for the purposes of 29 U.S.C. §207(p)(1). Consequently, the hours worked by County police officers for both employers would have to be combined for FLSA overtime compensation purposes.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein.

We trust that the above is responsive to your inquiry.

Sincerely,

Charles E. Pugh
Acting Administrator

AUG - 4 1993

This is in response to your letter in which you request an opinion as to whether your client, a telemarketing establishment, qualifies as a retail establishment for purposes of the application of section 7(i) of the Fair Labor Standards Act (FLSA).

The Wage and Hour Division of the Department of Labor administers and enforces the FLSA, the Federal law of most general application concerning wages and hours of work. This law requires that all covered and nonexempt employees be paid a minimum wage of $4.25 an hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek.

In your letter, you state that your client's business is engaged in the sale of weight loss programs and employs weight loss advisors who deal directly with, and sell to, the firm's customers by telephone throughout the United States. The company offices, support and clerical staff, accounting and recordkeeping departments, advertising department, telephone sales department and shipping department are located at the single establishment. The manufacturing of the diet products which are sold by the company is done by an independent company at another location.

You also state that members of the general public throughout the United States call an in-WATS number in a state different from that in which the establishment is located. These orders are recorded and transmitted by computer to the firm's establishment. The advisors call the customer to confirm the order, attempt to upgrade the order by selling additional products, determine if the individual has any health problems which would result in a change in the order, or cancellation of the order. If there is no change in the original order or if the order is changed or canceled, this is tape recorded and the customer is provided with an order number and the establishment's services telephone number for any further contact about the final order. The purchased products are then shipped to the customer from the establishment.

As you indicated, on occasion the customers visit the establishment to place orders, but most transactions are handled by telephone.

Section 7(i) of the FLSA provides an exemption from the overtime pay requirement of the FLSA for any employee of a retail or service establishment, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum wage (currently $4.25 an hour) and (2) more than half of the employee's compensation for a representative period (not less than one month) represents commissions on goods or services. A "retail service establishment" is defined to mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry. Since the sales of your client's telemarketing establishment, as described in your letter, may be considered retail sales in the particular industry, and since you indicate that these sales are not for resale because the sales are made to the individual customer or consumer, it is our opinion that your client's establishment may qualify as a retail or service establishment for the purpose of applying section 7(i) of the FLSA. We assume, for the purposes of making this determination, that these sales constitute at least 75 per centum of the company's annual dollar volume of sales. In addition, it should be noted that this response expresses no opinion on whether or not the remaining requirements of section 7(i) are met.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of the FLSA.

Sincerely,

Maria Echaveste
Administrator

AUG 11 1993

This is in response to your inquiry concerning the application of the Fair Labor Standards Act (FLSA) to a canine patrol officer employed by Township. The issue of concern is whether certain time spent by the officer at home in caring for the dog is compensable under the FLSA.

You state that your client was approached by the officer about establishing a canine unit in 1991. The Township subsequently entered into an agreement with the officer for use of his dog and for the officer's services for canine patrol purposes. You believe that the Township is not liable to the officer for additional FLSA compensation for taking care of the dog because the officer initiated the arrangement, and because the officer owns the dog. We do not agree.

The FLSA defines the term "employ" to mean "suffer or permit to work." As indicated in 29 CFR 785.7, the U.S. Supreme Court has held that employees subject to the Act must be paid for all time spent in "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer or his business." Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944).

Certain training and "care" of a police dog at home by a canine officer is considered a part of the officer's principal activities and not preliminary or postliminary activities within the meaning of §4 of the Portal-to-Portal Act of 1947, 29 U.S.C. 251 et seq. See Truslow v. Spotsylvania County Sheriff, 783 F.Supp. 274 (E.D. Va. 1992); Nichols v. City of Chicago, 789 F.Supp. 1438 (N.D. Ill. 1992).

We consider the term "care" to mean bathing, brushing, exercising, feeding, grooming, related cleaning of the dog's kennel or transport vehicle, and similar activities performed by the canine officer at home on workdays as well as on days off duty or during vacation periods. Such work is considered to be compensable under the FLSA. Care also includes time spent in administering drugs or medicine for illness and/or transporting the dog to and from an animal hospital or veterinarian.

Likewise, time spent in training the dog at home is compensable. All of the foregoing activities are, of course, illustrative but not all inclusive. However, ownership of the police dog is not a factor in determining the compensability of the time spent in such activities under the FLSA.

We take the position that dog care activities of the type illustrated do not have to be compensated at the same rate of pay as paid for law enforcement activities. If different pay rates are used, the employer may, pursuant to an agreement or understanding arrived at with the employee before performance of the work, pay for overtime hours engaged in such work at time and one-half the special rate pursuant to §7(g)(2) of the FLSA.

Further, the employer and the employee may work out a reasonable agreement as to compensable hours worked at home in canine care in addition to law enforcement work at the job site. See 29 CFR 785.23. Such agreements should provide that <u>additional</u> hours spent in <u>extraordinary</u> care (e.g., time spent in trips for veterinary care) should also be captured and reported.

We trust that the above is responsive to your inquiry.

Sincerely,

Maria Echaveste
Administrator

AUG 16 1993

Dear [redacted]:

This is in response to your inquiry on behalf of [redacted] is concerned about the application of the Fair Labor Standards Act (FLSA) to emergency medical service (EMS) employees.

The FLSA is the law of most general application concerning wages and hours of work. This law requires that all covered and nonexempt employees be paid not less than the minimum wage of $4.25 an hour for all hours worked and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek. The FLSA provides a number of special provisions for state and local government employees that are discussed in detail in Regulations, 29 CFR Part 553.

Section 7(k) of the FLSA provides a partial overtime pay exemption for public agency employees employed in fire protection or law enforcement activities (including security personnel in correctional institutions). Under this provision, an employer may establish a work period ranging from 7 to 28 consecutive days for the purpose of paying overtime compensation to employees employed in such activities. The maximum hours standard for fire protection personnel ranges from 53 hours worked in a 7-day work period to 212 hours worked in a 28-day work period. The maximum hours standard for law enforcement personnel ranges from 43 hours worked in a 7-day work period to 171 hours worked in a 28-day work period. See §§553.201 and 553.230 of the regulations.

EMS employees who are employed by a public fire protection or law enforcement agency, and whose work is an integral part of that agency's fire protection or law enforcement activities, may be paid overtime compensation pursuant to the provisions of §7(k). This is explained in §§553.210(a) and 553.211(b).

EMS employees who are not employed by a fire protection or law enforcement agency, but who are stationed at a fire station or police station in order to respond to calls, may be paid pursuant to the §7(k) exemption where they are an integral part of fire protection or law enforcement activities. EMS employees who are not employed by a fire protection or law enforcement agency, and

are not stationed at a fire station or a police station, may also be paid pursuant to the §7(k) exemption under certain conditions. As explained in §553.215, EMS employees of a public ("third service") agency, other than a fire protection or law enforcement agency, may be treated as employees engaged in fire protection or law enforcement activities if their services are substantially related to fire protection or law enforcement. However, this section of the regulations also refers to the fact that the provisions of §7(k) do not apply to EMS employees of a public agency, such as a hospital, that was subject to the FLSA prior to the Fair Labor Standards Amendments of 1974. Additionally, the exemption is not applicable to personnel employed by private EMS organizations.

Section 553.215 of the regulations contains two tests for determining if public EMS (third service) agency employees are providing services that are substantially related to fire protection or law enforcement:

1. The first test requires that individuals, in order to qualify as fire protection employees, must be trained to rescue fire victims, accident victims, or firefighters who are injured in the performance of their firefighting duties. Similarly, in order for individuals to qualify as law enforcement employees, they must be trained to rescue crime victims or law enforcement personnel who are injured in the performance of their law enforcement duties.

2. The second test requires that such individuals be regularly dispatched to fires, riots, natural disasters or accidents in order for them to qualify as fire protection employees. Similarly, in order for them to qualify as law enforcement employees, they must be regularly dispatched to crime scenes, riots, natural disasters, or accidents.

As indicated in §553.215, where EMS employees perform both fire protection and law enforcement activities, the applicable overtime standard is the one in which the EMS employees spend the majority of work time during the work period.

Most EMS employees respond to a variety of emergency calls. Some calls are related to law enforcement emergencies, some are related to fire protection emergencies, and some are related to medical emergencies not attributable to either law enforcement or fire protection. Thus, the application of §7(k) to EMS

employees of public agencies that are not an integral part of fire protection or law enforcement agencies must be made on a case-by-case basis in accordance with the criteria discussed above. The results will necessarily vary depending on the nature of the EMS calls serviced.

With regard to changing the regulations to allow EMS organizations to claim the partial overtime exemption under §7(k) for fire protection employees, the Department of Labor gave full consideration to such proposed regulatory modifications during the 1987 rulemaking (52 FR 2012, 2023) for the regulations implementing the Fair Labor Standards Amendments of 1985. The position stated in the regulations is consistent with the legislative history of the Fair Labor Standards Amendments of 1974. We appreciate the concerns raised by Ms. but do not believe (absent congressional action) that there is an adequate basis to presently change the regulations.

With respect to your constituent's comment as to whether the Secretary of Labor may appoint an "industry committee" on this issue, please note that the FLSA currently provided for such a process only to recommend minimum wages to be paid under §6 to employees in American Samoa. See §5 of the FLSA.

If you have any further questions, please do not hesitate to contact this office.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

AUG 27 1993

This is in response to your letters concerning the application of the Fair Labor Standards Act (FLSA) to police officers. You ask whether the FLSA requires an employer to provide lunch periods to police officers. You also ask whether an employer may reschedule days off in order to avoid overtime compensation.

As indicated in the enclosed Handy Reference Guide, the FLSA does not require an employer to provide meal or rest periods, or other types of employment benefits as described on page 2 of the Guide. These and similar matters are for agreement between the employer and the employees or their authorized representatives. The FLSA simply requires that all covered and nonexempt employees be paid in accordance with its minimum wage and overtime requirements for all hours actually worked.

Likewise, there is nothing in the FLSA which prohibits an employer from rescheduling days off within a work period (or workweek) even if such rescheduling would avoid overtime compensation. Section 29 CFR 553.224 does not prevent an employer from rescheduling days off within the applicable work period. In this regard, see the example of "balancing" hours for an entire work period described in 29 CFR 553.231(b). In other words, the FLSA does not confer to employees the right to be scheduled to work overtime.

We trust that the above is responsive to your inquiries.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosure

OCT 15 1993

This is in response to your inquiry concerning the application of the Fair Labor Standards Act (FLSA) to individuals in a company operated preemployment training program for school bus drivers. The issue of concern is whether the trainee bus drivers are employees for FLSA purposes during the training period.

You state that your client provides school transportation services at several locations in the U.S. and employs a substantial number of school bus drivers. Each state in which the employer operates has training and licensing requirements for school bus drivers. In order to meet these requirements as well as overall safety concerns, the employer has developed an in-house training program.

Before training the applicants, the employer screens them extensively. The screening process consists of an application, interview, reference check, motor vehicle record check, and a criminal record check. Applicants must then acquire a commercial driver's license which may require a drug test and a physical exam. The employer pays for the drug test and allows the applicant to use the employer's physician for the physical exam, if the applicant so chooses, at no cost. If these steps are successfully completed, the applicant is eligible for training.

Training consists of several components including those required by state law (e.g., first aid/CPR) as well as training in the employer's operating procedures. Training includes procedures for accidents/emergencies, loading/unloading of students, "management" of students, defensive driving, and etc. During the training period, applicants do not transport students or substitute for existing drivers. The training provided is free of charge.

Failure in any portion of the training program disqualifies an applicant for consideration for employment. While the employer seeks to immediately employ an applicant who has successfully completed the training program, there is no guarantee of employment. Applicants are not paid for the time spent in the training program. They are requested to sign an "acknowledgement" that describes the foregoing conditions.

In light of Walling v. Portland Terminal Co., 330 U.S. 148 (1947); Donovan v. American Airlines, Inc., 686 F.2d 267 (5th Cir. 1982); and Reich v. Parker Fire Protection District, 992 F.2d 1023 (10th Cir. 1993) you ask whether the persons in the training program are employees for FLSA purposes.

Whether "trainees" are employees of an employer under the FLSA will depend on all of the circumstances surrounding their activities with respect to the employer while in "training" status. We have taken the position that if all six of the following criteria apply, the "trainees" are not employees within the meaning of the FLSA:

(1) the training, even though it may include actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;

(2) the training is for the benefit of the trainees;

(3) the trainees do not displace regular employees, but may work under their close observation;

(4) the employer derives no immediate advantages from the activities of the trainees, and sometimes the employer's operations may actually be impeded;

(5) the trainees are not necessarily entitled to a job upon completion of the training period; and

(6) the employer and the trainees have an understanding that the trainees are not entitled to wages for the time spent in training.

The information that you have provided is not, in our opinion, sufficient to determine whether the individuals in question are excluded from the FLSA as "trainees" under the criteria above and the cases cited. First, you indicate that the employer has operations at several locations in different states under which different training criteria may apply. Thus, we cannot easily evaluate all of the overall circumstances surrounding the various training operations.

Further, specific information as to the above factors, also discussed in the cases cited, is lacking. For example, what benefits flow to the employer under the arrangement? Why does the employer not derive immediate advantages from the training programs? How many "trainees" have been hired as compared to all trainees? These and similar facts with respect to the criteria are necessary in order to analyze their employment status.

While the information you have provided seems to suggest that the individuals at issue are not employees during the training program, we do not feel it is appropriate to take an unequivocal position absent more facts, or a formal record as in the cases cited.

We trust that the above is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

OCT 20 1993

This is in response to your inquiry concerning the application of the Fair Labor Standards Act (FLSA) to corrections officers who volunteer their services as reserve police officers.

We must reiterate the advice given in the letter to Congressman on this issue. Correction officers who also work as reserve police officers must be compensated for all hours worked in both capacities in accordance with the minimum wage and/or overtime compensation requirements of the FLSA.

The term "public safety employees" means those employees who are subject to §7(k) of the FLSA. See the discussion of this and related terms at 52 FR 2015 (copy enclosed). Section 7((k) provides a limited overtime exception for police officers, firefighters, and also, by express reference, "security personnel in correctional institutions." Correctional institutions include jails. See 29 CFR §553.211(f) (copy enclosed).

We trust that the above is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosures

OCT 28 1993

This is in response to your inquiry concerning the application of the Fair Labor Standards Act (FLSA) to certain volunteer firefighters under a proposed retention and incentive program. The issue of concern is whether adoption of the proposed plan's benefits would affect the status of the volunteers under the FLSA and 29 CFR §553.106.

You state that fire and rescue services are currently provided through a duel system consisting of a paid professional Department of Fire and Rescue and 12 separate volunteer fire and/or rescue companies, which have been created and established by volunteers pursuant to law. The various volunteer companies are independent corporations and currently have rosters totaling approximately 1,159 members. You also indicate that the County's Department of Fire and Rescue provides daytime services while the volunteer companies provide service at night and on weekends. Dispatching is provided by the Department of Fire and Rescue 24 hours per day.

The Board of County Supervisors is considering the adoption of a retention and incentive program to assist in the recruitment and retention of volunteers, who save the citizens millions of tax dollars that would otherwise have to be spent on full-time professional fire and rescue employees. Two alternative plans with similar benefits are being considered. The proposed benefits are:

1) A monthly "pension" plan based upon a $10.00 per year credit for each year of credited service with a cap of 20 years service credit for a maximum benefit of $200 per month at age 55; and

2) a pre-retirement "life insurance" death benefit of $10,000.

The County would operate the plan under one proposal. An independent insurance company would operate the plan under the other alternative.

Currently, individual volunteer firefighters receive tax relief with respect to County vehicle licenses and personal property taxes assessed against vehicles used in responding to fire or rescue emergencies. They are also covered by life and disability insurance provided by the fire companies, which are funded through a separately stated "fire levy" tax. In addition, there are also both Federal and State provided death benefits ($100,000 and $10,000 respectively) applicable to volunteers killed in the line of duty.

As indicated in 29 CFR §553.106(d), individuals do not lose their volunteer status if they are provided reasonable benefits which may involve inclusion in group insurance (such as liability, health, life, disability, workers' compensation) or pension plans. In our opinion, the proposed benefits appear reasonable and individuals who receive such benefits under the proposed plans would not lose their volunteer status under the FLSA.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein.

We trust that the above is responsive to your inquiry.

Sincerely,

Maria Echaveste
Administrator

NOV 12 1993

This is in response to your inquiry concerning the application of §3(e) of the Fair Labor Standards Act (FLSA) and 29 CFR §§ 553.100-106 to certain "volunteers" who would serve a municipal fire and rescue department. The issue of concern is whether a monthly payment of $100 to these individuals would affect their status under the FLSA.

You state that the municipality anticipates creating a program under which 15 volunteers would contribute their time to the service of its Fire and Rescue Department, which is currently staffed with 16 full-time firefighters. The volunteers in question are not employed in any capacity with the public agency.

Volunteers must meet four conditions to retain active membership in the fire rescue and firefighter program. They must: (1) reside within 15 miles of the municipality; (2) attend at least three training sessions a month; (3) provide 24 hours of shift work per month; and (4) respond to at least 30 percent of "all calls." If members do not maintain these requirements, they are removed from the volunteer program. The program is limited to 15 volunteers who may withdraw from the program at any time for any reason.

Volunteers will receive no payments for responding to calls, but will be paid $100 per month as a nominal fee and to help cover personal expenses. Personal expenses include the purchase of shoes and belts, travel, meals, and books and paper for training purposes. All other equipment, uniforms, and tuition will be furnished by the municipality. Those volunteers who wish to obtain certification as emergency medical technicians will be responsible for paying their own fee ($75 bi-annually) for such certification.

As indicated in 29 CFR §553.106, volunteers may be paid expenses, reasonable benefits, a nominal fee, or any combination thereof, for their services without losing their status as volunteers. In

our opinion, a payment of $100 per month to an individual as a fee and to cover expenses under the above described conditions would not cause the individual to lose his or her volunteer status under the FLSA.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client that is under investigation by the Wage and Hour Division, or that is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of the FLSA.

We trust that the above is responsive to your inquiry.

Sincerely,

Maria Echaveste
Administrator

DEC 13 1993

This is in response to your letter of May 21, 1992, regarding the application of §207(p)(3) of the Fair Labor Standards Act (FLSA) to certain firefighters involved in substitution situations. We regret the delay in responding to your inquiry.

You state that members of the force substitute for each other during scheduled working hours pursuant to a Memorandum of Understanding between the City and the employees' collective bargaining unit, of Firefighters. You state that all the conditions of substitution are in conformance with 29 CFR §553.31.

You state that a practice has developed in where some City firefighters do not trade shifts pursuant to §207(p)(3) of the FLSA but instead one firefighter pays another to work all or part of his/her shift. You offer as an example:

> "Assume that Firefighter A is scheduled for two 24-hour shifts in a particular week. The shifts would begin at 7:00 a.m. Monday and 7:00 a.m. Wednesday. Firefighter B is scheduled for two 24-hour shifts the same week starting at 7:00 a.m. Tuesday and 7:00 a.m. Thursday. Firefighter A requests Firefighter B to substitute for him on his Monday shift. In exchange for this substitution, Firefighter A pays Firefighter B instead of working one of Firefighter B's shifts."

You ask whether this arrangement is consistent with §207(p)(3).

Section 207(p)(3) simply relieves the employer from the responsibility of compensating Firefighter B for any overtime worked in voluntarily substituting for Firefighter A. There is

no FLSA requirement that Firefighter A substitute in turn in order to "payback" Firefighter B. The "payback" is a matter left to the parties to resolve. Therefore, it is our opinion that the practice of paying Firefighter B in cash instead of working one of his or her shifts is not inconsistent with the provisions of §207(p)(3) of the FLSA.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

JAN -5 1995

This is in reply to your letter requesting an opinion on the application of the overtime pay exemption contained in section 13(b)(1) of the Fair Labor Standards Act (FLSA) to truck drivers employed by one of your clients,

You state that operates a distribution center in California under a contractual relationship with The drivers are compensated pursuant to a labor agreement with the union based on activity and mileage. The pay plan does not include overtime premium pay for hours worked in excess of 40 in a workweek. has received an opinion from the U.S. Department of Transportation's Federal Highway Administration (FHA) stating that the drivers are engaged in interstate commerce and are subject to the jurisdiction of the FHA.

The distribution center is a large complex of adjoining warehouses. Products of a wide variety of types and brands from various locations arrive and are stored at the warehouse. Every evening , retail stores in its northern division place orders to the northern division office. In turn, each day transmits those orders to employees fill the orders from the distribution center and load trucks. The truck drivers deliver the orders to the various stores in the northern division. These deliveries are made to stores in California, Oregon, Nevada and to the Port of Oakland where the goods are shipped to Hawaii. All routes are assigned interchangeably and may be assigned to any of the drivers.

Section 13(b)(1) of the FLSA provides an exemption from the Act's overtime pay requirements for any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act (MCA) of 1935. This has been interpreted as applying to any driver, driver's helper, loader, or mechanic employed by a carrier whose activities directly affect the safety of operation of motor vehicles engaged in the transportation on the public highways of

passengers or property in interstate or foreign commerce within the meaning of the MCA. The terms and conditions of this exemption are further explained in Regulations, 29 CFR Part 782 (copy enclosed).

It is clear that the drivers you have in mind are engaged in interstate commerce and subject to the overtime exemption contained in section 13(b)(1) when they deliver goods outside the State of California and to the Port of Oakland. With regard to your client's drivers who may not make an interstate trip, it should be noted that the Department of Transportation has held that drivers, driver's helpers, loaders, or mechanics would be subject to the Secretary of Transportation's jurisdiction under section 204 of the MCA for a 4-month period beginning with the date they could have been called upon to, or actually did, engage in activities directly affecting the safety of operation of motor vehicles on the public highways in interstate commerce. Since you state that the routes are assigned interchangeably and may be assigned to any of the drivers, it would appear that during any 4-month period, the overtime pay exemption contained in section 13(b)(1) of the FLSA would apply to all your client's truck drivers. If at the end of any 4-month period the employees are no longer engaged in interstate commerce, or in the regular course of their employment are no longer subject to making one of the interstate trips, jurisdiction under MCA would cease and the employees would no longer be exempt from overtime pay under the FLSA.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought because of an investigation by the Wage and Hour Division, or because of litigation with respect to, or requiring compliance with, the provisions of the FLSA.

We trust that the above is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosure

(b) (7)(E)

(b) (7)(E)

JAN 17 1995

This is in response to your request for an opinion letter concerning the provisions in 29 CFR §553.222(c) relating to the exclusion of sleep time from compensable hours of work of police officers and firefighters subject to the overtime provisions of the Fair Labor Standards Act, 29 USC 201 et seq. (FLSA). We regret the delay in responding to your inquiry.

The question concerns the existence of an express or implied agreement between employer and employee to exclude sleep time from compensable hours of work in light of recent cases construing that provision. As a general matter, an employee's statutory rights under the FLSA cannot be waived by an agreement between the employee and his or her employer, but the Supreme Court has held that an agreement between the parties is a factor to be considered in determining if sleep time is compensable worktime. Skidmore v. Swift & Co., 323 U.S. 134, 137 (1944). Generally, when an individual accepts employment he becomes subject to the conditions proposed by the employer and the employee may be subject to termination for not abiding by those conditions.

More specifically, you have inquired about the situation of employees, not previously subject to a policy of excluding sleep time from hours worked, who have their shifts unilaterally expanded to 24 hours and 15 minutes (without any additional pay for the 15 minutes), and are told that from that time forward their sleep time will be excluded from hours worked. They continue in their employment, with or without protest, depending on their fear of possible coercion.

As you point out, the question arises in part as a result of the decision in Bodie v. City of Columbia, S.C., 934 F.2d 561 (4th Cir. 1991), in which an employee who said nothing and continued to receive a paycheck when told by his employer that he had to agree to a sleep time exclusion or be fired was held to have agreed to the exclusion. As you also point out, the Department filed an amicus brief in that case supporting the employee's

position, and the Department continues to take the position that no agreement came into existence in that case as a result of the employer's use of overweening bargaining power.

However, Bodie, and the case of Johnson v. City of Columbia, S.C., 949 F.2d 127 (4th Cir. 1991), establish that where the employee actively and affirmatively protests the employer's actions and makes known his objections to the new policy of sleep time being treated as noncompensable work time, the employer cannot show that an agreement exists. Bodie, 934 F.2d at 567; Johnson, 949 F.2d at 130, 131. Thus, we agree with your conclusion that an employee is not deemed to have agreed for all time to the exclusion of sleep time merely by continuing to work under a new system instituted by the employer. And the employer cannot rely on agreements signed by the employee "under duress." Johnson, supra, 949 F.2d at 130.

We trust that the above is responsive to your inquiry.

Sincerely,

Maria Echaveste
Administrator

JAN 23 1995

This is in response to your letter concerning the method used by one of your clients to make deductions from the salaries of employees who are exempt under section 13(a)(1) of the Fair Labor Standards Act (FLSA).

You state that the client until recently utilized a traditional 5-day 40-hour workweek. If an exempt employee was absent from work for a day or more for personal reasons or sickness, the employee was subject to a pay reduction as permitted by Regulations, 29 CFR Part 541.118. The client has now made a change in this method by implementing an alternative workweek schedule that gives employees every other Friday off. You state that the employees' workweek now begins on Friday at 11 a.m. and ends the following Friday at 11 a.m. The employees are now scheduled to work the following hours in the workweek.

Friday	Saturday	Sunday	Monday	Tuesday	Wednesday	Thursday	Friday
4	0	0	9	9	9	9	0
0	0	0	9	9	9	9	4

Under this work schedule, if one of your client's exempt employees is absent from work, for example, on Tuesday and the employee elects to have his or her pay reduced, nine hours of pay is deducted from the employee's salary. For the following reasons it is our opinion that this method of reducing the amount of an exempt employees salary is not in compliance with the "salary basis" of payment, as discussed in section 541.118 of the Regulations.

The salary requirement in the case of an exempt executive, administrative, or professional employee contemplates payment for certain duties and responsibilities whose worth cannot be measured by the time spent in their performance. Consequently, it has been our longstanding position that we do not take a

particular number of hours as constituting a day for salary deduction purposes, as permitted in section 541.118 of the Regulations.

In considering your client's situation, where the employer and the bona fide executive, administrative and professional employees have agreed to a five-day work schedule within a workweek, the amount which may be deducted from the employee's weekly salary must be calculated on the basis of one-fifth of the employee's guaranteed salary. The daily amount thus computed is applicable regardless of the number of hours the employee is scheduled to work.

We trust that this satisfactorily responds to your inquiry.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

1-25-95

This is in response to your letter on behalf of the You specifically request an opinion regarding the application of the Fair Labor Standards Act (FLSA) to an alternative work schedule proposed by the

As you know, the Wage and Hour Division of the Department of Labor administers and enforces the Fair Labor Standards Act (FLSA). The FLSA is the Federal law of most general application concerning wages and hours of work. This law requires that all covered and non-exempt employees must be paid a minimum wage of $4.25 an hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek.

Our responses to your questions are as follows:

Q.1. With respect to <u>non-exempt</u> employees, is there any problem with allowing employees to choose to work ten-hours per day, 4 days per week (10/4)?

A.1. No. The FLSA does not set a minimum or a maximum number of hours in a day or in a week that an adult employee may be required or may choose to work, nor does it regulate work schedules or employers' utilization of their workforce.

Q.2. With respect to <u>exempt</u> employees, is there any problem with a 10/4 work schedule?

A.2. Same as in A.1. above.

Q.3. With respect to <u>non-exempt</u> employees, is there any problem with allowing employees to choose an alternative work schedule that calls for a two-week schedule as follows:

nine hours per day for five days (week 1)
nine hours per day for three days (week 2)

eight hours per day for one day (week 2)
one day off (week 2)
for a total of 80 hours in two weeks?

A non-exempt employee must be paid overtime premium pay for all hours worked over 40 in a workweek.

A.3. An employee's workweek is a fixed and regularly recurring period of 168 hours - seven 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of the day. For this reason, it may be possible for an employer to establish a workweek that will accommodate a flexible work schedule such as that described above. Such a workweek would have to begin at a point somewhere during a workday so that no more than 40 hours are worked in each workweek.

Q.4. With respect to exempt employees, is there any problem with the 9/5/4 work schedule outlined in item 3 above?

A.4. No.

We trust that the above is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

JAN 25 1995

This is in further response to your inquiry concerning collectively bargained bonuses under the Fair Labor Standards Act (FLSA). We previously furnished you existing opinions and citations on this issue by facsimile (fax).

Your questions are answered in the order presented:

Q.1. Do collectively bargained performance or incentive bonus payments have to be included in the "regular rate" for FLSA overtime compensation purposes?

A.1. Yes. See 29 CFR §778.211(c). Methods used in including such payments are found at 29 CFR §§778.208 - .210. Also, see the opinion dated 8/26/94 previously sent by fax.

Q.2. Do collectively bargained "signing" bonuses have to be included in the "regular rate" for FLSA overtime purposes?

A.2. Whether "signing" bonuses have to be included in the regular rate depends upon certain conditions related to how employees may "qualify" for such payments. The issue is discussed in greater detail in the opinions of 10/15/81 and 4/21/86 previously sent to you by fax. Also, see Minizza v. Stone Container Corp., 842 F.2d 1456 (3rd Cir. 1988).

Q.3. Do negotiated bonuses paid for attendance (reducing absenteeism) or reducing or eliminating safety violations or injuries have to be included in the "regular rate" for FLSA overtime purposes?

A.3. Yes. See 29 CFR §778.211(c).

Q.4. May a company and the union negotiate "shift differentials" and specifically provide in the CBA that the differentials will not be included in the "regular rate" for the purpose of FLSA overtime compensation?

A.4. No. The FLSA requires that such payments must be included in the "regular rate." See 29 CFR §778.207. Employees or their union may not waive their rights under the FLSA. See Brooklyn Savings Bank v. O'Neil, 328 U.S. 697 (1945); Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981).

We trust that the above is responsive to your inquiry.

Sincerely,

Ethel P. Miller
Chief, Branch of Fair Labor
Standards Act Enforcement

JAN 25 1995

This is in response to your letter requesting an opinion as to the application of the Fair Labor Standards Act (FLSA) to employees who are allowed to leave their workplace to smoke. Specifically, you wish to know whether smoke breaks may be deducted from "hours worked" under the FLSA.

You state that your client is a resort property which prohibits smoking on the job. While it does provide uncompensated lunch breaks, it does not provide work breaks. You state that employees who are compelled to take breaks to smoke are allowed to do so by the employer provided they remove themselves from their workstation and punch out when doing so. The length of these non-work periods range from 10 to 25 minutes, and is primarily at the discretion of those employees who choose to smoke.

As indicated in 29 CFR §785.18, rest periods (or "coffee breaks") of short duration, running from 5 to 20 minutes are common in industry. They promote the efficiency of employees and are customarily paid for as working time. It is our long-standing position that such breaks must be counted as hours worked. The fact that certain employees may choose to smoke during such breaks contrary to their employer's policy would not, in our opinion, affect the compensability of such breaks. Furthermore, if the employer allows affected employees to work beyond their shifts to make up the time, the employer is incurring additional liability for such makeup time under the FLSA.

While there may be valid health reasons for prohibiting "smoking breaks", it does not follow that employee efficiency is not enhanced by such breaks as is the case with respect to "coffee breaks." In other words, we think it is immaterial with respect to compensability of such breaks whether the employee drinks coffee, smokes, goes to the restroom, etc. Moreover, we think that the underlying rationale is equally valid for employees working in an office environment, or for employees working in physically demanding jobs in factories, mines or on farms.

As the court pointed out in Mitchell v. Greinetz, 235 F.2d 621, 13 WH Cases (BNA) at 7, (10th Cir. 1956), these cases must be decided in light of the particular facts and circumstances involved. Of primary consideration is whether the time involved under the conditions of employment is such that it cannot be effectively used by the employees for purposes not connected with their employment. We do not believe that the facts given indicate that the time in question is unconnected with the employees' employment. For this reason, we believe that the breaks are in fact for the benefit of the employer and fully compensable under the FLSA.

Our views should not, however, be construed to prevent an employer from adopting a policy that prohibits smoking in the workplace, or devising appropriate disciplinary procedures for violations of such policy. But an employer may not arbitrarily fail to count time spent in breaks during the workday because the employee was smoking at his or her workplace or outside thereof.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of the FLSA.

We trust that the above is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

FEB -2 1995

This is in response to your inquiry concerning the application of §7(k), 29 U.S.C. 207(k), of the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 et seq., to firefighters who are cross-trained as emergency medical technicians (EMTs). We regret the delay in responding to your inquiry.

Section 7(k) of the FLSA provides a partial overtime exemption for fire protection and law enforcement personnel (including security personnel in correctional institutions) who are employed by public agencies on a work period basis. 29 CFR §553.201. The term "any employee .... in fire protection activities" refers to any employee (1) who is employed by an organized fire department or fire protection district; (2) who has been trained to the extent required by state statute or local ordinance; (3) who has the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type; and (4) who performs activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires, including such incidental nonfirefighting functions as housekeeping, equipment maintenance, etc. The term also includes rescue and ambulance personnel that form an integral part of the public agency's fire protection activities. 29 CFR §553.210(a).

We have concluded that firefighters who are cross-trained as EMTs qualify for exemption under §7(k) as fire protection employees where they are principally engaged as firefighters meeting the four tests outlined in 29 CFR §553.210(a), as set forth above, and where the EMT functions they perform meet the tests described in 29 CFR §553.215 for ambulance and rescue employees. Under these circumstances, we would consider that ambulance and rescue activities are incidental to the employees' fire protection duties within the meaning of the fourth test in 29 CFR §553.210(a), including any ambulance and rescue activities related to medical emergencies, rather than fires, crime scenes, riots, natural disasters, and accidents.

In these circumstances, the time engaged in ambulance and rescue activities would be considered to be work performed as an incident to or in conjunction with the employees' fire protection activities within the meaning of 29 CFR §553.212(a), and would not count in the 20 percent limitation on nonexempt work.

We trust that the above is responsive to your inquiry.

Sincerely,

Maria Echaveste
Administrator

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

FEB 13 1995

This is in response to your inquiry on behalf of Mayor of . Mayor is concerned about the application of §7(k), 29 U.S.C. 207(k), of the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 et seq., to firefighters who are cross-trained as emergency medical service (EMS) employees.

Section 7(k) of the FLSA provides a partial overtime exemption for fire protection and law enforcement personnel (including security personnel in correctional institutions) who are employed by public agencies on a work period basis. 29 CFR §553.201. The term "any employee .... in fire protection activities" refers to any employee (1) who is employed by an organized fire department or fire protection district; (2) who has been trained to the extent required by state statute or local ordinance; (3) who has the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type; and (4) who performs activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires, including such incidental nonfirefighting functions as housekeeping, equipment maintenance, etc. The term also includes rescue and ambulance personnel that form an integral part of the public agency's fire protection activities. 29 CFR §553.210(a) and .215.

We have concluded that firefighters who are cross-trained as EMS employees qualify for exemption under §7(k) as fire protection employees where they are principally engaged as firefighters meeting the four tests outlined in 29 CFR §553.210(a), as set forth above, and where the EMS functions they perform meet the tests described in 29 CFR §553.215 for ambulance and rescue employees. Under these circumstances, we would consider that ambulance and rescue activities are incidental to the employees' fire protection duties within the meaning of the fourth test in 29 CFR §553.210(a), including any ambulance and rescue activities related to medical emergencies, rather than fires, crime scenes, riots, natural disasters, and accidents.

In these circumstances, the time engaged in ambulance and rescue activities would be considered to be work performed as in incident to or in conjunction with the employees' fire protection activities within the meaning of 29 CFR §553.212(a), and would not count in the 20 percent limitation on nonexempt work.

Nevertheless, as the City's labor counsel advised, caution may be in order. The statutory language of §7(k) does not clearly indicate that it applies to EMS employees or activities. The applicable regulations were promulgated based upon the legislative history of the 1974 FLSA Amendments (See Congressional Record-House, March 28, 1974, Conference Report on S.2747, pages 2380-81).

If we can be of further assistance, please do not hesitate to contact this office.

Sincerely,

Daniel F. Sweeney

Daniel F. Sweeney
Deputy Assistant Administrator

FEB 16 1995

This is in response to your letter requesting an opinion concerning the application of the overtime pay exemption contained in section 7(i) of the Fair Labor Standards Act (FLSA) to a new compensation system your client, a retail employer, is considering to implement for its sales employees.

Your specific question is as follows:

> Where an employee is paid on a straight commission basis, can the section 7(i) overtime exemption apply if the employee's compensation is calculated as a percentage of all retail sales by all sales employees in a given store, as opposed to being based on only the retail sales of that particular employee?

You state that your client operates several retail stores which sell "big ticket items." The stores vary in size with approximately 5 to 30 full-time sales persons at any given store. Your client believes that a "team approach" to assisting the customers gives all sales persons an incentive to do their best to serve all store customers, as opposed to having little incentive to assist customers if each employee receives commissions based only on his or her own individual sales. Furthermore, your client believes that such a compensation system would eliminate administrative problems relating to determining which sales person should properly be credited with a sale and whether commissions should be split between more than one sales person. The actual percentage commission rates may vary among the sales persons based upon their experience, tenure with the company, job performance and other factors.

As you know, under section 7(i) of the FLSA an employee of a retail or service establishment who is paid in full or in part on a commission basis may be exempt from the overtime pay requirements of the FLSA if (1) the regular rate of pay of such employee in a workweek is in excess of one and one-half times the minimum

wage (currently $4.25 an hour), and (2) more than half of the employee's compensation for a representative period (not less than one month) represents commissions on goods or services.

Where an employee is paid on a straight commission basis, it is our opinion that the section 7(i) overtime exemption can apply if the employee's compensation is calculated as a percentage of all retail sales by all sales employees in a given store, as opposed to being based on only the retail sales of that particular employee. Based on the information provided, we have no objections to the implementation of your client's proposed compensation system.

We trust that the above is responsive to your inquiry.

Sincerely,

Maria Echaveste
Administrator

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

FEB 2 1 1995

This is in further response to your inquiry on behalf of the City of . The City is concerned about the application of the Fair Labor Standards Act (FLSA) to the simultaneous employment of certain City firefighters by the City's school department as athletic coaches.

As your know, a recent investigation of the City disclosed that certain City firefighters, while simultaneously employed as coaches by the City's school department, were not paid proper overtime compensation. The City paid all back wages due these employees and agreed to full future compliance with the FLSA. Subsequently, City Solicitor requested that the Secretary of Labor exempt these employees so that they could work, as before, without FLSA overtime compensation while so employed. Mr. and one of the affected employees, who had made a similar inquiry, was advised on December 9, 1994, by the Wage and Hour Boston Regional Office that the Secretary of Labor has no such authority (copies enclosed).

We must reiterate that there is no provision in the FLSA or its implementing regulations that allows the Secretary of Labor to waive its provisions with respect to any employee. The FLSA in general is remedial in purpose and Congress, in enacting the FLSA was concerned with the objective of establishing certain minimum labor standards.

As your constituents were advised, the Supreme Court has held that an employee or his or her union may not waive the employee's rights under the FLSA. Brooklyn Savings Bank v. O'Neil, 328 U.S. 697 (1945); Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981). In O'Neil, supra. the Court observed that "while in individual cases hardship may result, the restriction will enure to the benefit of the general class of employees in whose

interest the law is passed as to that of the community involved (citations and internal quotations omitted)."

If we can be of further assistance, please do not hesitate to contact this office.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosures

cc: Washington, D.C. Office

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

FEB 24 1995

This is in response to your letter to Senator Hatfield concerning the application of the Fair Labor Standards Act (FLSA) to students participating in training programs such as those which will be sponsored under the School-To-Work Opportunities Act (STW). You are concerned that business participation in STW programs may be at risk due to the perception that provisions of the FLSA present barriers. Your letter and other inquiries demonstrate that there is considerable misunderstanding as to when a STW participant must be considered an employee under the FLSA.

The minimum wage provisions of the FLSA do not apply to students in training programs unless there is an employment relationship and the employer meets the coverage tests of the FLSA. Although these criteria do not differ based on the age of the employee or whether the employee is working under the auspices of a STW program, we believe that many of the STW training programs will not result in an employment relationship. If the program is carefully structured and provides a bona fide training experience, the FLSA should not be an impediment to the participation of employers in STW programs.

The Office of School-to-Work of the Departments of Labor and Education has advised us that a learning experience at an employer's work site that includes all of the following elements is consistent with a learning experience under the STW:

> (1) a planned program of job training and work experience for the student, appropriate to the student's abilities, which includes training related to preemployment and employment skills to be mastered at progressively higher levels that are coordinated with learning in the school-based learning component and lead to the awarding of a skill certificate;

(2) the learning experience encompasses a sequence of activities that build upon one another, increasing in complexity and promoting mastery of basic skills;

(3) the learning experience has been structured to expose the student to all aspects of an industry and promotes the development of broad, transferable skills; and,

(4) the learning experience provides for real or simulated tasks or assignments which push students to develop higher-order critical thinking and problem-solving skills.

A student enrolled in a STW learning experience would not be considered an employee within the meaning of the FLSA, if the following additional criteria were met:

(1) the student receives on-going instruction at the employer's worksite and receives close on-site supervision throughout the learning experience, with the result that any productive work that the student would perform would be offset by the burden to the employer from the training and supervision provided;

(2) the placement of the student at a worksite during the learning experience does not result in the displacement of any regular employee -- i.e., the presence of the student at the worksite cannot result in an employee being laid off, cannot result in the employer not hiring an employee it would otherwise hire, and cannot result in an employee working fewer hours than he or she would otherwise work;

(3) the student is not entitled to a job at the completion of the learning experience -- but this does not mean that employers are to be discouraged from offering employment to students who successfully complete the training; and

(4) the employer, student, and parent or guardian understand that the student is not entitled to wages or other compensation for the time spent in the learning experience -- although the student may be paid a stipend for expenses such as books or tools.

If all of the foregoing criteria were met, an employer would not be required to pay wages to a student enrolled in a STW learning experience. If, however, some of the above criteria were not met, it is still possible that a STW participant would not be an employee under the FLSA; however, all of the facts and circumstances would have to be considered.

We assure you that the proper administration of STW programs is important to the Department of Labor. The Wage and Hour Division will assist the State offices administering STW programs in any issues which may arise under the FLSA, and will contact them in an attempt to resolve any matters which come to our attention involving the administration of STW programs in accordance with the requirements of the FLSA.

Sincerely,

María Echaveste
Administrator

FEB 27 1995

[redacted]

This is in response to your letter requesting an opinion concerning the application of section 778.114 of CFR Part 778 to deductions for vacation and sick leave when employees have worked some in the weeks that they take this time off.

You state that an employer gives each of his employees one day vacation and one day sick pay for each four-week period that the employee works. An employee who is paid on the fluctuating workweek salary basis takes two days off during a workweek for personal reasons. The employer pays the employee his full salary for that workweek, and deducts two days vacation pay from his accrued vacation time. Such deductions occurred several times when the employee took off for personal reasons until he had exhausted all of his vacation time. We note that the employee was paid his full salary during these workweeks.

You further state that the employer closed down all operations for one week for its annual vacation, but did not pay the employee who is paid on a fluctuating workweek basis any vacation pay because he had previously used up his vacation time. The employee does not believe that the fluctuating workweek salary basis was met because of the deductions made.

Generally, an employee paid under the fluctuating workweek method must receive his/her full salary in any workweek in which he/she performs work. As explained in section 778.114, one of the primary requirements is that the employee receives his/her guaranteed salary regardless of the number of hours or days worked in the workweek, whether they be few or many. Therefore, in your situation the requirements of section 778.114 are met where the employee is paid his/her full salary in any workweek when he/she performs any work. The fact that deductions are made from vacation or sick leave banks because of absences for personal reasons or illness would not change this opinion. While the principles set forth in section 541.118 of 29 CFR Part 541 are not applicable with regard to the principles set forth in

section 778.114, it is our opinion that an employee who is compensated under the fluctuating workweek method of paying overtime need not be paid his/her full salary in any workweek when he/she performs no work. The fact that deductions are made from vacation or sick leave banks because of absences for personal reasons or illness would not change this opinion, as long as no deductions are made from an employee's salary, if his or her leave bank has been exhausted.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of the FLSA.

We trust that the above is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

FEB 27 1995

This is in response to your inquiry on behalf of II, State Director, National Volunteer Fire Council. Mr. is concerned about the application of the Fair Labor Standards Act (FLSA) to firefighters who wish to volunteer services to their employer in the same capacity.

The FLSA is the law of most general application concerning wages and hours of work. This law requires that all covered and nonexempt employees be paid not less than the minimum wage of $4.25 an hour for all hours worked and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek.

Under the FLSA, an individual cannot be both a paid employee and an unpaid "volunteer" while performing the same type of services that the individual is employed to perform for his or her employer. The phrase "same type of services" means similar or identical services. Thus, firefighters employed by a local government may not volunteer additional services to their employer in the same capacity without compensation in accordance with the provisions of the FLSA.

In amending the FLSA in 1985, the Congress made it clear that it did not intend to discourage or impede volunteer activities undertaken for civic, charitable, or humanitarian purposes, but also expressed its wish to prevent any manipulation or abuse of minimum wage or overtime requirements through coercion or undue pressure upon individuals to "volunteer" their services. Therefore, §(3)(e)(4) of the FLSA forbids an individual from volunteering the same type of services to his or her employer that the individual is employed to perform by the employer without compensation in accordance with the provisions of the FLSA.

To allow firefighters (or any employees) to "volunteer" the same services for which they are paid raises the potential for abuse which Congress had in mind in enacting §3(e)(4). See Senate Report No. 99-159, October 17, 1985, page 14, 2 U.S. Cong. News 1985, page 662 ("the Committee wishes to prevent any manipulation or abuse of minimum wage requirements through coercion or undue pressure upon employees to 'volunteer'").

We wish to note that §3(e)(4) would not prevent firefighters from volunteering services to another local government jurisdiction. Nor does §3(e)(4) prevent volunteer firefighters who serve a local government but who are not employed by such government from continuing to serve that body. As you know, fire and rescue departments are frequently served by individuals whose livelihood is earned principally in another vocation (mechanic, teacher, truck driver, lawyer, etc.). The FLSA excludes such individuals as employees of the public agency they serve if they receive no compensation or are paid expenses, reasonable benefits, or a nominal fee (or combination thereof) to perform the services for which they volunteered.

If you have any further questions, please do not hesitate to contact this office.

Sincerely,

Daniel F. Sweeney

Daniel F. Sweeney
Deputy Assistant Administrator

FEB 28 1995

This is in response to your letter requesting an opinion concerning the application of section 541.118 of Regulations, 29 CFR Part 541 to your client's proposed bonus time plan for its exempt employees.

You state that your client wishes to establish a bonus plan to compensate its exempt, salaried employees for inordinate hours worked during seasonal business peaks. The plan would award exempt employees who work more than an average number of hours per week with additional time off (bonus time) or pay during the non-peak season. These employees are normally expected to work a set hourly schedule in order to fulfill the requirements of their jobs, and since they are occasionally called upon to work beyond their scheduled hours, this bonus time system was proposed for tracking and rewarding the employees.

Specifically, you state that if an exempt employee works more hours than expected in a given week, his/her accumulated bonus time will be increased in direct proportion to the extra hours worked that week. If an exempt employee works fewer hours than expected, his/her accumulated bonus time will be reduced in direct proportion to the hours below the expected hours for that week. If the employee works the exact same hours as expected, his/her accumulated bonus time will not change. If the employee should ever work fewer hours than expected in any given week and not have enough accumulated bonus time to offset the shortage, the accumulated bonus time will be reduced as a negative quantity.

You further state that an exempt employee's salary will not be adjusted downward for a reduction in time worked due to scheduling or business reasons. Exempt employees' salaries will never be adjusted downward for absences of less than a full day. In the event than such employee misses time from work due to an illness, injury, or other reason covered under the company's sick leave policy, his/her bonus time will not be reduced for those

hours paid as sick leave. However, if the employee's sick leave has been exhausted, bonus time hours may be used in order for the employee to continue to be paid for days away from the job. The exempt employee's wages may be adjusted downward if he/she misses one or more complete days due to illness, injury or other personal reason and has depleted all of his/her accrued sick leave, bonus time and other applicable paid benefits. We also note that these employees may elect, at his/her own discretion, to take a lump sum payment of his/her bonus time's cash value once a year.

As you know, section 13(a)(1) of the Fair Labor Standards Act (FLSA) provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in Regulations, Part 541. An employee may qualify for exemption if all of the pertinent tests relating to duties, responsibilities, and salary, as discussed in the appropriate section of the Regulations, are met. One such test requires that an otherwise exempt employee be paid on a salary basis, as described in section 541.118 of the Regulations.

An employee will be considered to be on a salary basis within the meaning of the Regulations if under his or her employment agreement he or she regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his/her compensation, which amount is not subject to reduction because of variations in quality or quantity of the work performed.

Deductions may be made, however, when the employee is absent from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for one or more full days to handle personal affairs, his/her salaried status will not be affected if deductions are made from his/her salary for such absences.

Deductions may also be made for absences of a day or more occasioned by sickness or disability (including industrial accidents) if the deductions are made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability. Thus, if the employer's particular plan, policy or practice provides compensation for such absences, deductions for absences of one or more full days because of sickness or disability may be made before an employee has qualified under such plan, policy or practice and after he/she has exhausted his/her leave allowance thereunder.

Where an employer has proposed a bona fide bonus time benefits plan such as the one described in your letter, it is permissible to substitute or reduce the accrued leave in the plan for the

time an employee is absent from work even if it is less than a full day without affecting the salary basis of payment, if by substituting or reducing such leave the employee receives in payment an amount equal to his/her guaranteed salary. Payment of an amount equal to the employee's guaranteed salary must be made even if an employee has no accrued benefits in his/her bonus time plan account, and the account has a negative balance, where the employee's absence is for less than a full day.

Based on the information contained in your letter and provided all the other requirements of section 541.118 are met, it is our opinion that your client's proposed bonus time plan for its exempt employees appears to meet the requirements outlined in the Regulations.

A recent series of court cases has held that employer policies allowing partial-day deductions defeat the exemption for employees to whom the policies apply, even if such policies never resulted in any actual deductions from pay. A number of courts have expanded upon this interpretation and have denied the exemption based on a variety of employer practices that relate the employee's pay to the employee's hours worked. Practices with hourly attributes, such as payment of additional compensation for time worked over 40 in a week, requiring use of personal or sick leave by the hour, and others have been declared inconsistent with the "salary basis" requirement in the regulations.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question 3presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought because of an investigation by the Wage and Hour Division, or because of litigation with respect to, or requiring compliance with, the provisions of the FLSA.

We trust that the above is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

MAR - 2 1995

This is in reply to your letter concerning the application of the Fair Labor Standards Act (FLSA) to individuals working as striptease dancers at your client's business establishment that sells liquor to the public and provides live entertainment. You seek an opinion as to whether these dancers are employees or independent contractors under the FLSA.

You state that the individuals in question are professional striptease dancers who enter into lease agreements with your client. Under the lease agreement your client has no authority to control any aspect of the striptease business each dancer conducts on the leased premises or at such other nightclubs unrelated to your client at which a dancer may choose to perform. The dancers determine their own work schedule, prices, customers, dance routines, musical accompaniment, assistants, and advertising.

The lease agreement specifically provides for the following:

1. your client does not determine the dancer's work schedule;

2. your client does not determine the amounts the dancer's customers pay to the dancer;

3. your client does not determine the prices to be charged by the dancer;

4. your client does not approve the clothing worn by the dancer;

5. your client does not approve the dance routine of the dancer;

6. your client does not require (or allow) the dancer to wait on tables;

7. your client does not require the dancer to pay fees to employees who work for your client;

8. your client does not have the right to terminate the agreement because of a dancer's unlawful acts for which the client is not subject to criminal and/or civil penalties;

9. your client does not have policies for which the dancer could be fined for breakage;

10. your client does not have the right to terminate the agreement without cause; and

11. your client does not limit the times the dancer may perform at other clubs or work at other jobs.

You state that your client is essentially renting a stage and related facilities for a fixed rental fee of $15 per dancer per dance night.

In the application of the FLSA an employee, as distinguished from a person who is engaged in a business of his or her own, is one who as a matter of economic reality follows the usual path of an employee and is dependent on the business which he or she serves. The employer-employee relationship under the FLSA is tested by "economic reality" rather than "technical concepts." It is not determined by the common law standards relating to master and servant. Rutherford Food Corp. v. McComb, 331 U.S. 722; Goldberg v. Whitaker House Cooperatives, Inc., 336 U.S. 28; Walling v. Portland Terminal Co., 330 U.S. 148; Walling v. American Needlecrafts, Inc., 139 F. 2d 60.

The Supreme Court has on a number of occasions indicated that there is no single rule or test for determining whether an individual is an independent contractor or employee for purposes of the FLSA. The Court has held that it is the total activity or situation which controls. Among the factors which the Supreme Court considered significant were: (1) the extent to which the services rendered are an integral part of the principal's business; (2) the permanency of the relationship; (3) the amount of individual investment in facilities and equipment; (4) the opportunities for profit and loss; (5) the degree of independent business organization and operation; (6) the nature and degree of control by the principal; and (7) the degree of independent initiative, judgment or foresight exercised by the one who performs the services. See Rutherford Food Corp. v. McComb, 331 U.S. 722; and see also United States v. Silk, 331 U.S. 704; Bartels v. Birmingham, 332 U.S. 126; NLRB v. Hearst Publications, 322 U.S. 111.

For the following reasons, it is our opinion that the individuals in question are employees of your client and not independent contractors. It is clear that the services rendered are an integral part of your client's business; there does not appear to be any significant investment on the part of the individuals in

facilities and equipment; and it is our opinion that the individuals in question are not engaged in the operation of independent business organizations. We feel that these factors, rather than the degree of control by your client, are the significant ones in determining whether or not an employment relationship exists between your client and the individuals you describe.

We trust that this satisfactorily responds to your inquiry.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

MAR - 2 1995

This is in reply to your letter concerning our reply of March 18, 1992, to [redacted] on the pay practices of one of his clients as it relates to wages paid to "professional" employees. In that letter we determined that the employees in question were not paid on "a salary basis" as required by section 541.118 of 29 CFR Part 541, for purposes of the minimum wage and overtime pay exemption contained in section 13(a)(1) of the Fair Labor Standards Act (FLSA), since the employees were not guaranteed a salary free and clear.

You now state that you are recommending that the client revise its pay practices. Specifically, the revision will provide that the professional employees employed by your client will be offered the option of either receiving a guaranteed fixed base salary, well in excess of $250 per week, with benefits, or they can choose to be paid a guaranteed fixed weekly salary of $250 with no benefits. A professional employee choosing to accept the fixed weekly salary of $250 will not have that salary subject to any reduction, except as permitted under section 541.118(a)(2) of the regulations. In addition to the fixed weekly salary of $250, such employees will receive a bonus or commission based on revenues received by your client from customers for whom the employee has performed services. The bonus or commission will be calculated as a percentage of the revenues received by your client from its customers less the amount of the guaranteed fixed weekly salary received during the period for which the commission is calculated. In no event will this result in a reduction of the amount of the guaranteed fixed weekly salary of $250. You request an opinion as to whether this method of compensation satisfies the requirements of section 541.118 of the regulations.

As indicated in section 541.118(b), additional compensation besides the salary paid to an employee is not inconsistent with the salary basis of payment. Thus, where an employee is guaranteed a fixed salary free and clear within the meaning of

section 541.118, an employer may pay a "bonus" in addition to the employee's salary without affecting the employee's salary basis of payment or otherwise affecting the employee's exempt status under section 13(a)(1). However, you should be advised that genuine guarantees must be obtained clearly demonstrating that the salary is not simply part of the bonus or commission, and that no circumstances exist which would reduce it or divide it. This could be achieved by having the employer issue separate checks, one for the unvarying $250 amount and another for the varying commission or bonus amount. Or there may be a clearly stated contractual agreement between the employer and the employee ensuring the payment of the $250 amount for any work week in which the employee performs any work regardless of whether there are additional earnings. Under these conditions, it is our opinion that the revised pay practices that you are recommending to the client may satisfy the "salary basis" requirement contained in section 541.118 of the regulations.

We trust that the above information is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

MAR - 6 1995

This is in response to your letter requesting an opinion on the application of sections 3(r) and 3(s) of the Fair Labor Standards Act (FLSA) to employees employed by one of your clients.

You indicate that the client operates a private nonprofit residential facility that provides counseling and a home to families and their small children where the parents have a history of abusing their children. Its mission is to break the cycle of child abuse and neglect. The typical parent is a single mother who by court order has lost custody of her child or children due to neglect and abuse. When this occurs the Florida Department of Health and Rehabilitative Services (HRS) becomes the custodian of the child and provides information to the parent regarding your client's program. If the parent decides to enroll in the program, the client is notified by the HRS which becomes the legal guardian of the child. The parent and child then become full-time residents at the client's facility. The program averages six months in duration and provides the parents with intensive training in child care.

While children of school age attend the local county school, parents take high school or pre-G.E.D. courses taught by teachers at the facility. The teachers are employees of a local high school and are paid by the county school board. The client has not contracted with the county school system and has no involvement in the educational program, its contents or the method of instruction. The client does not believe that a school is operated on the premises of the facility.

You further state that there is no charge for the program or services provided. The client relies on private donations, contributions from charities such as the United Way, and funding from county government, HRS, and Federal sources. Your client has 23 employees and acknowledges that one employee who periodically prepares mailers requesting contributions from previous donors, some of whom are located out-of-State, is

individually covered under the FLSA and, as such, is paid in accordance with its monetary provisions.

Sections 3(s) and 3(r) of the FLSA extend coverage under the law to, among others, employees of an enterprise which is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education.

Employees are covered under the FLSA if they are individually engaged in interstate commerce or if they are employed by a covered enterprise. Since you indicate that your client has recognized one employee who is individually covered under the FLSA, we will assume that your client has correctly identified those employees who are individually covered. With regard to enterprise coverage under the FLSA, a private nonprofit institution such as the one operated by your client would not be a covered enterprise under the FLSA, unless the home operates on its premises an elementary or secondary school (as determined by State law), or other institution named above. From the information in your letter we cannot tell if such a secondary school is operated on the premises of your client's facility. However, even if such a school is operated on the facility's premises, only those employees of your client who are engaged in its operation would come within the enterprise provisions of the FLSA.

You state that your client is also concerned about an employee who serves as an evening and nighttime child care worker. This employee's duties include playtime activities that enhance child development during the evening hours and supervision of parents and children sleeping during the night. The employee also regularly directs the activities of two other child care workers. From the information you provide it does not appear that this employee is individually covered under the FLSA nor does it appear that the employee is covered on the enterprise basis of coverage under the FLSA.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client or firm which is under investigation by the Wage and Hour

Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of the FLSA.

We trust that the above is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

MAR 10 1995

This is in response to your letter requesting an opinion concerning the application of the Fair Labor Standards Act (FLSA) to your client's proposed paperless time recording system.

You state that under the proposed system, employee time cards would be eliminated and employees would instead sign in and out by punching in number codes through the employer's telephone system. The dates and times of sign in and sign out would automatically be recorded on computers, and three times during each pay period the employer would post a printout listing by assigned employee number the recorded hours by date for each employee. Those postings would be placed in a central location and remain posted for four days so that employees could review and raise any discrepancies. The employer would then recycle the paper printouts and rely solely on the records stored in the computer database.

Please note that the FLSA places no restrictions on the system or method -- providing it is accurate -- by which employers may record time worked by employees. In this regard and based on the information provided, it is our opinion that your client's proposed paperless time recording system would not violate the requirements of the FLSA as long as it is an accurate representation of time worked and provided the employer is able to convert the data, or any part of it, into a form which is suitable for inspection.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client or firm which is under investigation by the Wage and Hour

Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of the FLSA.

We trust that the above information is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

MAR 13 1995

This is in further response to your inquiry concerning the application of §7(k), 29 USC §207(k), of the Fair Labor Standards Act (FLSA) to firefighters covered by the provisions of a collective bargaining agreement (CBA). You ask whether a certain part of the overtime compensation section of the CBA will satisfy the overtime compensation requirements of the FLSA.

Section 21.02(a) of the CBA provides for a work cycle or work period of 15 days during which firefighters are normally scheduled to work five 24-hour shifts - 120 hours. Under §7(k) and 29 CFR §553.230(c), the FLSA overtime threshold is 114 hours. Consequently, during each work period firefighters are normally scheduled to work six FLSA overtime hours.

Section 21.02(a) of the CBA provides in part that:

> To compensate for those hours actually worked in excess of one hundred and fourteen (114) hours during each fifteen (15) day cycle, employees working their schedule of five (5) shift days per cycle shall receive one (1) twenty-for (24) hour ("Kelly") day off duty during each period of 90 days. (For purposes of this provision, hours actually worked shall include scheduled vacation days utilized by employees in addition to days actually worked.) Such compensatory day off shall be scheduled off duty by the employees by agreement with the Fire Chief.

You state that the "Kelly Day" referred to in this section is a scheduled 24-hour shift off duty <u>without</u> pay. An employee opting for overtime compensation in accordance with this provision would receive one 24-hour shift off duty (in our experience, a "Kelly Day" is intended to be a day off <u>with</u> pay) as the only compensation for having worked 30 FLSA overtime hours (six overtime hours in five consecutive 15 day work periods). The "Kelly Day" compensation provided by in this section (whether or not it is with pay) does not satisfy, <u>per se</u>, the overtime compensation requirements of the FLSA.

For each work period an employee would be entitled to six hours of FLSA overtime compensation in cash (based upon the employee's "regular rate" of pay), or nine hours of compensatory time off, pursuant to §7(o), for use at some future date. While it is permissible to count scheduled vacation time in determining whether the FLSA overtime threshold has been reached (or exceeded), only hours worked need be counted under the FLSA. Consequently, employees paid pursuant to this CBA provision may not be employed in violation of the FLSA overtime requirements in work periods in which they have used sufficient vacation time so that they have not actually worked in excess of the 114-hour threshold.

We note that, in lieu of the above provision, employees may opt to receive overtime compensation (section 21.03) in accordance with the provisions of §7(o) of the FLSA. Nevertheless we suggest that the provisions of section 21.02(a) discussed above be modified or deleted. See Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981) in which the Supreme Court held that a union may not negotiate a provision that waives employees' statutory rights under the FLSA.

We trust that the above is responsive to your inquiry.

Sincerely,

Maria Echaveste
Administrator

MAR 16 1995

[redacted]

This is in response to your letter requesting an opinion concerning the application of section 13(a)(15) of the Fair Labor Standards Act (FLSA) to your client's business of providing companionship services for individuals in their homes.

You state that your client's employees, while working as sitters or companions, in compliance with 29 CFR §552.6, do perform household work related to the personal care of the home-bound individual such as preparing meals, making beds, washing clothes or other similar services. You raise several questions/examples as to what other activities would be classified as non-routine care related to the patient's physical and psychological personal care.

As you know, section 552.6 of 29 CFR Part 552 defines "companionship services" as those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. Section 552.6 also includes the performance of "general household work" provided that such work is incidental, i.e., does not exceed 20 percent of the total weekly hours worked.

Based on the information provided, it is our opinion that such activities as cleaning the patient's bedroom, bathroom or kitchen, picking up groceries, medicine, and dry cleaning would be related to personal care of the patient and would be the type of household work that would be exempt work for purpose of section 13(a)(15) of the FLSA. However, activities involving heavy cleaning such as cleaning refrigerators, ovens, trash or garbage removal and cleaning the rest of a "trashy" house would be general household work or nonexempt work that is subject to the 20 percent time limitation.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of the FLSA.

We trust that the above is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

MAR 24 1995

Dear

This in reply to your letter of February 24, 1995, on behalf of requesting an opinion on the application of the minimum wage and overtime pay provisions of the Fair Labor Standards Act (FLSA) to employees of the Park). Your constituent states that the Park is a seasonal operation that is open for less than seven months a year, and operates amusement rides within the boundaries of the Recreation Area under a license with the Department of Agriculture.

The FLSA is the Federal law of most general application concerning wages and hours of work. All employees covered under this law and not otherwise exempt must be paid a minimum wage of not less than $4.25 an hour and overtime premium pay of not less than one and one-half times their regular rates of pay for all hours worked in excess of 40 in a workweek.

Section 13(a)(3) of the FLSA provides a complete minimum wage and overtime pay exemption for any employee employed by an establishment which is an amusement or recreational establishment if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33 1/3 per centum of the average receipts for the other six months of such year. This exemption, however, does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from the FLSA's minimum wage provisions, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture. Your constituent's license with the Department of Agriculture to operate amusement rides at the Recreation Area is a contract for purposes of section 13(a)(3) of the FLSA. Thus, the complete minimum wage and overtime pay exemption contained in section 13(a)(3) is not applicable to employees of the Park.

Section 13(b)(29) of the FLSA provides a partial overtime exemption for any employee of an amusement or recreational establishment that meets one of the seasonality tests contained in section 13(a)(3), if the establishment is located in a national park or national forest or on land in the National Wildlife Refuge System and if the employee (A) is an employee of a private entity engaged in providing services or facilities in a national park or national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture, and (B) the employee receives compensation for employment in excess of fifty-six hours in any workweek at a rate of not less than one and one-half times the regular rate at which he or she is employed. Consequently, employees of the Park must be paid a minimum wage of not less than $4.25 an hour and overtime premium pay for hours worked in excess of fifty-six in a workweek.

We trust that this is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

cc: Washington, D.C., Office

MAR 28 1995

This is in response to your request pursuant to the regulations at 29 CFR Part 549, seeking approval of a proposed profit-sharing plan covering certain employees employed by your client, Attached to your letter, you include what appears to be an outline of your client's proposed profit-sharing plan. Our review of the plan outline raises several concerns about potentially disqualifying provisions that should be clarified.

The plan outline provides that all employees employed in are eligible to participate in the plan except for those individuals who are covered under a collective bargaining agreement or who participate in a management incentive plan. The outline also provides that depending upon the target profit level attained, eligible employees may receive up to 3% of their base salary.

Section 7(e)(3)(b) of the Fair Labor Standards Act permits exclusion from the regular rate of pay, upon which overtime compensation is calculated, sums paid to employees pursuant to a bona fide profit-sharing plan or trust meeting the requirements of the Department's regulations at 29 CFR Part 549. Section 549.1(d)(1) of the regulations provides that eligibility must extend to all employees subject to the minimum wage and overtime provisions of the FLSA. However, participation in an employer's profit-sharing plan may be limited to particular classifications of employees if specific approval is obtained from the Administrator. This approval may be granted to exclude certain employees from the profit-sharing plan after such employees, including their representatives, have been given notice and an opportunity to present their views on the issue. See 29 CFR §549.1(d)(2).

To assist you in meeting these requirements for approval, a draft notice to affected employees is enclosed together with a copy of the regulations. Once a finalized profit-sharing plan is completed, your client should prepare sufficient copies thereof and post them together with copies of the profit-sharing plan. The notices should be posted for not less than 15 workdays. At the conclusion of the posting period, should attest that these requirements have been met by providing a

listing of the places and dates of posting including notification given to bargaining representatives, and submit such attestation to this office.

We are also concerned that the "target" feature of the plan, without further explanation, may run afoul of 29 CFR §549.2(b) of the regulations. This section provides that a plan is not a bona fide profit-sharing plan "[i]f the amount to be paid periodically by the employer into the fund ... to be distributed to the employees is a fixed sum." It appears that under your client's plan, distributions to eligible employees will be made based on the attainment of a specific percentage of the profit amount targeted. In theory the company could designate an arbitrary "target" amount which bears little or no relation to profits, and pay a predetermined percentage to employees. There is nothing in the plan outline which explains the method that the company uses to reach its determinations of the allocation amount, i.e., how the profit pool is determined. Stated another way, the company has complete discretion with regard to the amount of money that it allocates as its profit target amount. It may or may not be a fixed sum. Nevertheless, without more information, we cannot conclude that this section or provision of the plan does not implicitly contain the disqualifying provision set forth in 29 CFR §549.2(b).

Additionally, we are concerned that the "Payment Determination" section of your client's proposed plan may be disqualified by 29 CFR §549.2(d) of the regulations. This regulation provides that a plan will not be deemed to meet the requirements of a bona fide profit-sharing plan "[if] any individual employee's share ... is set at a predetermined fixed sum or is so limited as to provide in effect for the payment of a fixed sum." The plan outline calls for a percentage of the employee's base salary to be paid out as the employee's share of the profits. For example, under the plan, if 100% of the target amount is attained, the employee will receive 2% of his base salary. Arguably, this payment could be viewed as a predetermined rate or fixed sum prohibited by the regulation.

Finally, we note that there is no provision in the plan outline for distributions to employees who may separate or are terminated from their employment. Pursuant to 29 CFR §549.1(g) of the regulations all profit-sharing plans must provide for the right of an employee to receive his or her share of distributed profits which must not be based on the employee's continued employment with the employer after the period for which the determination of profits has been made.

The concerns raised herein should be addressed before your client's profit-sharing plan is made final. We trust that the foregoing is responsive to your request.

Sincerely,

Maria Echaveste
Administrator

APR - 3 1995

This is in response to your letter requesting an opinion concerning whether certain practices by your client would defeat the salaried status of exempt employees as defined under section 541.118 of Regulations, Part 541.

You state that your client performs contract work for a Federal agency. The agency requires the employer and others bidding on contracts to complete a "Contract Pricing Proposal" known as an "Optional Form 60." This form requires the employer to estimate the hours each employee is expected to work on the contract in addition to each employee's hourly rate. Optional Form 60 does not allow contractors to submit bids showing exempt employees' salaries. Once contracts are awarded, the Federal agency requires that (1) each employee's time be billed to that agency on an hourly basis, (2) all hours billed to the agency be actually worked and paid to the employee (i.e., all labor billed must equal all labor paid).

Your client uses the Accounting System and is required to list all hours worked by both nonexempt and exempt employees. This system is set up to handle two types of overtime: one for nonexempt employees at the rate of one and one-half times the employee's regular hourly rate and another for exempt employees at the employee's regular hourly rate. Government contract auditors audit the contractor's accounting records to determine that all hours billed to the Federal agency for direct labor are actually worked and paid to the employee at straight time.

You further state that the exempt employee regularly works 40 or more hours per workweek under a Federal contract. This employee generally receives a salary for all hours worked in the workweek. His/her annual salary is based on the hourly rate quoted to the Federal agency times 2080 hours divided by the 24 pay periods in each year, which results in the employee receiving a paycheck in that amount. Should the employee work less than 40 hours per week, he/she is required to take vacation, sick leave, or some

other type of paid leave, and continues to receive his/her regular salary based on a 40-hour workweek. In the event that the exempt employee works more than 40 hours in one workweek, he/she accrues compensatory time at the straight time rate for each hour over 40. The employer requires the employee to take compensatory time off at any time during the fiscal year in lieu of receiving the straight time overtime pay.

In light of the above, you client seeks an opinion on the following two issues: (1) whether its present practice of providing compensatory time to its professional employees at the straight time rate for all hours worked over 40 per workweek, defeats the employee's salaried basis status and therefore renders the employee nonexempt; and (2) whether implementing a practice of paying overtime to its professional employees at the straight time rate for all hours worked over 40 per workweek would defeat the employee's salaried basis status and render the employee nonexempt.

Section 13(a)(1) of the Fair Labor Standards Act (FLSA) provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in Regulations, Part 541. An employee may qualify for exemption if all of the pertinent tests relating to duties, responsibilities, and salary, as discussed in the appropriate section of the Regulations, are met. One such test requires that an otherwise exempt employee be paid on a salary basis, as described in section 541.118 of the Regulations.

An employee will be considered to be on a salary basis within the meaning of the Regulations if under his/her employment agreement he/she regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his or her compensation, which amount is not subject to reduction because of variations in quality or quantity of the work performed. Deductions may be made, however, when the employee is absent from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for one or more full days to handle personal affairs, his/her salaried status will not be affected if deductions are made from his/her salary for such absences.

It has been our longstanding position that additional compensation, as defined in section 541.118(b), besides an exempt employee's guaranteed salary is not inconsistent with the salary basis of payment. It continues to be our opinion that extra compensation by the hour, in addition to an exempt employee's guaranteed salary, for hours worked in excess of 40 in a workweek would not defeat the exempt status of an otherwise exempt employee.

Based on the information contained in your letter and provided all the other requirements of section 541.118 are met, it is our opinion that both practices addressed by your client in compensating its exempt employees would not defeat the salaried status within the meaning of the Regulations.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought because of an investigation by the Wage and Hour Division, or because of litigation with respect to, or requiring compliance with, the provisions of the FLSA.

We trust that the above discussion is responsive to your inquiry. If we can be of further assistance, please do not hesitate to contact us.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

25 BD 202.4
25 BD 202.21

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

APR 3 1995

This is in further regard to the Department of Labor's interpretation under the Fair Labor Standards Act (FLSA) of the compensability of time spent by employees voluntarily driving their employers' vehicles between home and customers' work sites each day, transporting parts, tools, equipment, etc., needed to perform their jobs. Our interpretation was set forth in an opinion letter dated August 5, 1994.

We have continued to review this matter since issuance of the August 5 opinion letter. We note that driving between work sites is a necessary component of the job which is performed throughout the day and is a principal activity of the employees. Furthermore, the employee may not leave the employer's vehicle at the site of the last service call, but must drive it to a location satisfactory to the employer for security -- the employer's establishment, a garage, or the employee's home.

We are also aware, however, that driving from home to work is an activity which is not ordinarily compensable, and that the employees in question have chosen to drive the employer's vehicle home rather than to the employer's yard for their own personal convenience and benefit.

We have, therefore, concluded that a balancing of the interests of employers and employees is appropriate. Accordingly, where the following circumstances exist, time spent traveling between the employee's home and the first work site of the day and between the last work site of the day and the employee's home need not be compensated: (1) driving the employer's vehicle between the employee's home and customers' work sites at the beginning and end of the workday is strictly voluntary and not a

condition of employment; (2) the vehicle involved is the type of vehicle that would normally be used for commuting; (3) the employee incurs no costs for driving the employer's vehicle or parking it at the employee's home or elsewhere; and (4) the work sites are within the normal commuting area of the employer's establishment.

Our opinion letter of August 5, 1994, is hereby withdrawn.

Sincerely,

Maria Echaveste
Administrator

APR - 6 1995

This is in reply to your letter requesting clarification regarding the payment of additional compensation to employees who are exempt under section 13(a)(1) of the Fair Labor Standards Act (FLSA).

Your specific question and our response are as follows:

Q. Does the payment of additional compensation to employees who meet both the duties test and salary basis for exemption under Part 541 defeat an otherwise valid exemption?

A. No. As discussed in section 541.118(b) of Regulations, Part 541 (copy enclosed), additional compensation besides the required minimum weekly salary guarantee may be paid to exempt employees for hours worked beyond their standard workweek without affecting the salary basis of pay. Thus, extra compensation may be paid for overtime to an exempt employee on any basis. The overtime payment need not be at time and one-half, but may be at straight time, or at one-half time, or flat sum, or on any other basis.

If after reading the enclosed publication you have questions concerning the FLSA, you may wish to contact the New Orleans Wage and Hour District Office at 701 Loyola Avenue, Room 13028, New Orleans, Louisiana 70113, telephone: (504) 589-6171. That office is responsible for the enforcement of the FLSA in your area, and will be pleased to offer every possible assistance.

We trust that the above information is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosure

APR - 6 1995

This is in response to your letter concerning an opinion you received from our Regional Administrator in San Francisco concerning the "salary basis" requirement under the white collar exemptions. At issue is whether an employer may make deductions from an exempt employee's leave bank for days when the employee is instructed by the employer not to report to work because of budgetary constraints. You state that under no circumstances will an exempt employee's weekly salary be reduced because of such deductions from his or her leave bank.

It is our opinion that the requirement that an exempt white collar employee be paid on a "salary basis" will be met under the circumstances described above. We trust that this satisfactorily responds to your inquiry.

Sincerely,

Maria Echaveste
Administrator

APR - 6 1995

This is in response to your letter of March 29, 1995, requesting an opinion concerning whether a salaried exempt employee can be paid additional compensation for services rendered in excess of 40 hours in a workweek.

In reference to your letter of February 9, 1995, it is our understanding that you asked whether any opinions had been rendered, and did not specifically request a new response to your question. Nevertheless, as discussed in section 541.118(b) of Regulations, Part 541 (copy enclosed), additional compensation besides the required minimum weekly salary guarantee may be paid to exempt employees for hours worked beyond their standard workweek without affecting the salary basis of pay. Thus, extra compensation may be paid for overtime to an exempt employee on any basis. The overtime payment need not be at time and one-half, but may be at straight time, or at one-half time, or flat sum, or on any other basis.

With regard to the above, please note that there has been no change in this agency's position on this subject since prior to the letters (beginning with 1974) that were provided to you.

We trust that the above information is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosure

APR 7 1995

This is in further response to your inquiry relating to the exclusion of sleep time from compensable hours of work under the provisions of the Fair Labor Standards Act (FLSA) and pursuant to 29 CFR §553.222(c).

We previously advised you that under that regulation, where an employer and employee had agreed that sleep time was to be compensable, an employer could not make unilateral changes in the agreement to exclude sleep time from compensable hours of work and then consider the employee's continued employment to be acceptance of such change. Some form of uncoerced mutual assent is necessary to consider the parties' agreement validly changed.

While the regulation does not address the converse, i.e., the procedure for rendering sleep time compensable, where there was previously an express or implied agreement to exclude sleep time from compensable hours of work, the following is our analysis. An employee could unilaterally withdraw his or her consent, and the employer would then be required to compensate the employee for any future sleep time that may occur. However, the employer would not be required to agree to a continuation of the same terms and conditions of employment. The employer and employee are free to establish new conditions of employment such as rate of pay, hours of work, or reassignment.

For those employees represented by the International Association of Fire Fighters, such changes in conditions or terms of employment could be addressed within the collective bargaining process by the parties. Non-represented employees regrettably do not have this option.

We trust that the above is responsive to your inquiry.

Sincerely,

Maria Echaveste
Administrator

APR 13 1995

This is in reply to your request for an opinion concerning the application of the Fair Labor Standards Act (FLSA) to the paralegal profession. Specifically, you would like to know if a paralegal qualifies as a non-exempt employee and would, therefore, be eligible for overtime pay.

You state that the paralegal in question earns a salary of $30,000 a year, holds a certificate approved by the American Bar Association, and performs the following duties:

1. Drafts federal complaints using the forms provided by various publications.

2. Drafts discovery requests (interrogatories and requests for productions) using various publications and, after reviewing the facts, creating appropriate questions and requests.

3. Responds to opposing party's discovery requests using documentation provided by clients and through discussions with clients.

4. Interviews witnesses and prepares affidavits.

5. Creates and maintains files.

6. Interacts on a regular basis with clients.

7. Prepares subpoenas (witnesses, depositions, records).

8. Reviews Federal, State and Local Rules concerning procedure.

9. Prepares disposition, trial and hearing summaries.

10. Prepares medical releases and medical summaries.

11. Prepares correspondence to clients, opposing counsel and courts.

12. Trial preparation (List of exhibits / witnesses / voir dire / jury instructions).

The above duties are assigned to the paralegal by one of the attorneys, and he performs these tasks fairly independently. At no time does the employee provide advice to any of the firm's clients, and has been told to make no decisions concerning the priority of projects or as to which assignments can be set aside in order to handle other matters. He has also received overtime pay on a previous occasion.

Section 13(a)(1) of the FLSA provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in Regulations, 29 CFR Part 541, a copy enclosed. An employee will qualify for exemption as a bona fide administrative employee if all the pertinent tests relating to duties, responsibilities and salary, as described in section 541.2 of the regulations, are met.

The definition of "administrative" exempts only employees who are primarily engaged in the responsible work which is characteristic of employment in a bona fide administrative capacity. Thus, the employee must have as his primary duty office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers. In determining whether an employee's exempt work meets the primary duty requirement, the amount of time spent in the performance of administrative duties is a useful guide in determining the primary duty of an employee. In the ordinary case, it may be taken as a good rule of thumb that primary duty means the major part or over 50 percent of the employee's time.

Activities contemplated by the regulations as being "directly related to management policies or general business operations" of an employer are those related to the administrative operations of the business, as distinguished from the basic tasks of the employer's business, i.e., the "production" work. Based on the information provided, it is our opinion that the paralegal in question is engaged in the "production work" of his or her employer, and does not qualify for exemption as a bona fide administrative employee, as discussed in section 541.2 of the regulations.

In addition, it continues to be our opinion that the duties of paralegal employees do not involve the exercise of discretion and independent judgment of the type required by section 541.2(b) of the regulations. The outline of the duties of the paralegal employees submitted with your letter describes the use of skills

rather than discretion and independent judgment. The paralegal employee appears to fit more appropriately into that category of employees who apply particular skills and knowledge in preparing assignments. Employees who apply such skills and knowledge are not deemed to be exercising independent judgment, even if they have some leeway in reaching a conclusion.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of the FLSA.

We trust that the above is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosure

APR 19 1995

This is in response to your letter of December 7, 1994, concerning the application of the minimum wage and overtime pay exemption contained in section 13(a)(1) of the Fair Labor Standards Act (FLSA) to Registered Nurses (Rns) employed by a home care agency. You specifically ask if the method by which plans to pay its Rns would satisfy the "salary basis" requirement for exemption, as discussed in section 541.118 of Regulations, 29 CFR Part 541.

You state that for purposes of this request we may assume that the Rns meet all the duties and responsibilities tests for exemption as bona fide professional employees, as described in section 541.3 of the Regulations. The Rns would be paid a predetermined amount of compensation on a weekly, or less frequent basis. This amount would be in excess of the amount specified in the Regulations, and would not be subject to reduction because of variations in the quality or quantity of the work performed. Subject to the deductions permitted by section 541.118 of the Regulations, the employees would receive their full salaries for any workweek in which they perform work without regard to the number of days or hours worked.

You further state that also desires to pay a productivity bonus to each of the Rns in question in addition to their salaries. The productivity bonus would be calculated based on the number of patient visits completed by the Rns during an established period of time that are in excess of a stated minimum number of visits during that same period of time. In other words, the Rns, in addition to their salaries, would earn a lump sum amount for each patient visit completed over "x" number of visits in a workweek, in a pay period, in a fiscal quarter, or in some other established time period.

It is our opinion that where the Rns in question are guaranteed a salary of at least $250 per week, which amount constitutes all or part of their compensation and which amount is not subject to reduction because of variations in the quality or quantity of the

work performed, they would qualify for exemption as bona fide professional employees under the upset salary proviso of section 541.3(e) of the Regulations. Such employees may be paid additional compensation in the form of a productivity bonus, as you describe, without affecting their exempt status.

We trust that this satisfactorily responds to your inquiry.

Sincerely,

Maria Echaveste
Administrator

Enclosure

APR 19 199

This is in response to your inquiry concerning the application of the Fair Labor Standards Act (FLSA) to certain employees of the City of that volunteer as firefighters, but who are employed in other capacities by the City. We regret the delay in responding to your inquiry.

You state that the City employs two individuals in its public works department and one employee in its public safety department (in duties not related to firefighting) who, in addition to their regular duties, volunteer as firefighters during their normal working hours and while off-duty from their regular jobs. The City relies on such volunteers to supplement its one firefighter stationed in the fire station, and the police/firefighter (cross trained) employees whom it specifically employs for public safety purposes. The City proposes to give the volunteer firefighters paid administrative leave from their regular jobs when called out to firefighting duties during their normal working hours. You ask if this practice would jeopardize their status as volunteers with respect to off-duty firefighting.

We have long taken the position that time spent by employees in work for public or charitable purposes requested, directed or controlled by their employer during normal working hours (on-duty time) is compensable under the FLSA. Thus, where the employees in question perform firefighting during their normal working hours for the City on their regular jobs, they must be compensated (and will be under the proposal) for such time in accordance with the FLSA. See 29 CFR §785.44.

On the other hand, time spent voluntarily in firefighting activities by such employees outside of their normal working hours is not considered to be hours worked for FLSA purposes. Id. Thus, the fact that they will be compensated (based on their normal pay for their regular jobs) for firefighting while on-duty will not effect their status as volunteers with respect to off-duty firefighting.

We trust that the above is responsive to your inquiry.

Sincerely,

Maria Echaveste
Administrator

APR 21 1995

This is in response to your inquiry on behalf of Your constituents are concerned about the application of the Fair Labor Standards Act (FLSA) to their employment when they "volunteer" as reserve deputies for the Sheriff's Department. They indicate that they are employed as corrections officers by the Department.

Before addressing your constituents' specific concerns, it might be helpful to consider the matter of volunteering in general. Under the FLSA, individuals may not volunteer services to private sector employers. On the other hand, in the vast majority of circumstances, individuals can volunteer services to public sector employers. When Congress amended the FLSA in 1985, it made clear that people are allowed to volunteer their services to public agencies and their community with but one exception -- public sector employers may not allow their employees to volunteer, without compensation, additional time to do the same work for which they are employed.

Public sector employees may volunteer to do different kinds of work in the jurisdiction in which they are employed, or volunteer to do similar work in different jurisdictions. For example, police officers can volunteer different work (non-law enforcement related) in city parks or schools, or can volunteer to perform law enforcement for a different jurisdiction than where they are employed. Additionally, there is no prohibition on anyone employed in the private sector from volunteering in any capacity or line of work in the public sector.

Section 3(e)(4)(A) of the FLSA makes clear that individuals are not "employees" entitled to compensation for hours of work if the volunteer services they provide to a public agency are not the same type of services which they are employed to perform by that agency. To allow public employees to volunteer to perform for their public agency employer the same type of services for which they are paid raises the potential for abuse which Congress clearly had in mind in enacting this section of the law. See Senate Report No. 99-159, October 17, 1985, page 14, 2 U.S. Cong. News 1985, page 662 ("the Committee wishes to prevent any manipulation or abuse of minimum wage requirements through coercion or undue pressure upon employees to 'volunteer'").

In this regard, we have found situations involving coercion or pressure to "volunteer" in a number of FLSA investigations. For example, an Ohio police department required auxiliary officers to "volunteer" unpaid hours in order to be eligible for paid assignments. Similarly, an Indiana police department required part-time paid officers who wanted to continue to be scheduled for part-time paid employment to fill-in and work night shifts as "volunteers" without pay. Such situations are considered to be violations of the FLSA.

Even where there is no evidence of coercion, allowing paid employees to provide the same type of services for their employer on an uncompensated "volunteer" basis if they chose to do so would in effect allow employees to waive their rights to compensation due under the FLSA. The Supreme Court has held that an employee may not waive his or her rights to compensation due under the FLSA. Brooklyn Savings Bank v. O'Neil, 328 U.S. 697 (1945). The Court observed that "while in individual cases hardship may result, the restriction will enure to the benefits of the general class of employees in whose interest the law is passed and so to that of the community at large (internal citations and quotations omitted)." Id. Similarly, in Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981), the Court held that a labor organization may not negotiate a contract provision that waives employees' statutory rights under the FLSA.

The Department's regulations, at 29 CFR §553.103, define "same type of services" to mean similar or identical services, and refers to the duties and other factors contained in the definitions of the three-digit categories of occupations in the Dictionary of Occupational Titles. Equally important are all the facts and circumstances in a particular case including whether the volunteer service is closely related to the actual duties performed by or responsibilities assigned to the employee who "volunteers."

We have taken the position that law enforcement duties such as transferring or taking custody of prisoners, booking, fingerprinting, restraining, etc., with respect to suspects or prisoners, are the same type of services whether performed by police officers, detectives, bailiffs, jailers, deputies, etc. Similarly, law enforcement duties such as patrolling streets, directing traffic, taking reports on stolen or recovered property, missing persons, collecting evidence and taking photos at crime scenes, performing matron duties with female prisoners, etc., whether performed by police cadets, community service officers, reserve deputies, auxiliary or regular police officers, are the same type of services for purposes of §3(e)(4)(A).

Consequently, it is our position that corrections officers employed by the Sheriff's Department who, for example, work in the jail to take custody, book, fingerprint, and secure suspects or prisoners, may not volunteer as reserve deputies without compensation in accordance with the FLSA. However, "civilian" employees such as dispatchers, clerks, secretaries, mechanics, etc. employed by the Sheriff's Department could volunteer as reserve or auxiliary deputies.

It is important to again make clear that individuals who are reserve deputy volunteers but who are not employed in any capacity by a public agency are not affected. As you know, sheriffs' departments or volunteer fire/rescue organizations are frequently served by individuals whose livelihood is earned principally in another vocation (mechanic, teacher, sales clerk, truck driver, construction worker, lawyer, etc.). Under FLSA, such individuals are not "employees" if they receive no compensation or are paid no more than expenses, reasonable benefits, or a nominal fee (or combination thereof) to perform the services for which they volunteer.

We trust that the above is responsive to your inquiry. If you have further questions, please do not hesitate to contact this office.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

MAY 30 1995

Dear

This is in response to your letter requesting an opinion concerning the application of section 13(b)(11) of the Fair Labor Standards Act (FLSA) to a proposed payment plan for local delivery drivers employed by a wholesale beer distributor in

You state that the company, during the period of January 24, 1994 to January 20, 1995, regularly employed five full-time drivers who delivered beer to retail outlets such as bars, liquor stores, and grocery stores within the State of The drivers leave the company's warehouse in the morning, make an average of 13 stops for deliveries, and return to the warehouse upon completing their delivery route. The drivers are members of which is affiliated with the ---s, and are paid pursuant to a collective bargaining agreement (CBA) between Local 133 and your client.

The drivers have been paid $114.50 for delivering up to 310 cases of beer per day. For each case delivered in excess of 310, up to a maximum of 410, the drivers have been paid another $.30. The company's contract with the union has recently been renegotiated but the only significant difference in the payment plan is that the additional $.30 per case is applicable up to a maximum of 500 cases.

You further state that the payment plan provides an incentive to the drivers to complete their deliveries quickly and efficiently. It has had the effect of reducing the number of hours worked by the drivers to 40 hours or less per week. The 5 full-time regular drivers worked a total of 226 weeks during the representative period for an average workweek of 38.37 hours.

Section 13(b)(11) of the FLSA provides an exemption for "any employee employed as a driver or driver's helper making local deliveries, who is compensated for such employment on the basis

of trip rates, or other delivery payment plan, if the Secretary shall find that such plan has the general purpose and effect of reducing hours worked by such employees to, or below, the maximum workweek applicable to them under section 7(a)." The Wage and Hour Division has previously approved trip rates under §13(b)(11) based upon similar CBAs between and wholesale beer distributors in the

Based on the information provided, it is our opinion that your client's proposed payment plan for its local delivery drivers in the i meets the requirements for the exemption described in section 13(b)(11) of the FLSA.

We trust that the above is responsive to your inquiry.

Sincerely

Daniel F. Sweeney
Deputy Assistant Administrator

JUN 5 1995

Dear

This is in response to your letter on behalf of concerning the definition of employee as distinguished from independent contractor. In addition, is also concerned about what legal options a company can use to fill a work vacancy.

The Wage and Hour Division of the Department of Labor administers and enforces the Fair Labor Standards Act (FLSA), the Federal law of most general application concerning wages and hours of work. This law requires that all covered and nonexempt employees be paid a minimum wage of $4.25 an hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek. The FLSA is discussed in more detail in the enclosed "Handy Reference Guide to the Fair Labor Standards Act."

The Supreme Court has, on a number of occasions, indicated that there is no single factor rule or test for determining whether an individual is an independent contractor or an employee for purposes of FLSA. It is the total activity or situation which is controlling. Among the factors which the Supreme Court has considered significant are: (1) the extent to which the services rendered are an integral part of the principal's business; (2) the permanency of the relationship; (3) the amount of individual investment in facilities and equipment; (4) the opportunities for profit or loss; (5) the degree of independent business organization and operation; (6) the nature and degree of control by the principal; and (7) the degree of independent initiative, judgment, or foresight exercised by the one who performs the services. These are explained in the enclosed "Employment Relationship Under the Fair Labor Standards Act" pamphlet.

Under FLSA, an employee, as distinguished from a person who is engaged in a business of his/her own, is one who as a matter of economic reality follows the usual path of an employee and is dependent on the business (s)he serves. The employer-employee relationship is tested by "economic reality" rather than "technical concepts"; it is not determined by the common law standards relating to master and servant.

With regard to your constituent's concern about job vacancies, the FLSA does not address the hiring practices of companies. Such matters are, usually, for private agreement between employers and employees or their authorized representatives.

If after reading the enclosed material has any questions concerning the application of the FLSA, you may wish to suggest that she contact the Columbus Wage and Hour District Office located at 646 Federal Office Building, 200 North High Street, Columbus, Ohio 43215-2475, telephone (614) 469-5677.

We also wish to point out that the tests establishing employer-employee relationships for purposes of FLSA application and the Internal Revenue Service's tax code application are different. Therefore, may wish to contact the Internal Revenue Service for its position on this matter.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosures

cc: Washington, D.C., Office

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

JUN 15 1995

Dear

This is in response to your letter requesting an opinion concerning the application of the Fair Labor Standards Act (FLSA) to correctional officers who also wish to volunteer their services as law enforcement officers for the County Sheriff's Office.

You state that correctional officers are employed by a regional jail that is advised by a separate jail board and under the supervision of a jail administrator. This board consists of individuals from three member jurisdictions. The sheriff of each jurisdiction is, by law, a jail board member but does not have input into the day to day operational decisions pertaining to the regional jail. Jail employees fall under the personnel policies of the same jurisdiction of the sheriff's office in which they want to volunteer. In addition, the county in which they want to volunteer as deputies is the fiscal agent for the regional jail.

Under the FLSA, an individual cannot be both a paid employee and an unpaid "volunteer" while performing the same type of services which the individual is employed to perform for his or her employer. The phrase "same type of services" means similar or identical services. Based on the information provided, the jail and the sheriff's office do not appear to be separate independent employers.[1] Thus, correctional officers employed by the jail may not volunteer additional services to the sheriff's office in the same capacity without compensation in accordance with the provisions of the FLSA, as indicated in the letter of October 20, 1993, to which you refer.

In amending the FLSA in 1985, the Congress made it clear that it did not intend to discourage or impede volunteer activities undertaken for civic, charitable, or humanitarian purposes, but

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[1]In accordance with 29 CFR §553,102, two agencies of the same State or local government are considered to be separate public agencies where they are so treated by the Census of Governments issued by the Bureau of Census, U.S. Department of Commerce.

also expressed its wish to prevent any manipulation or abuse of minimum wage or overtime requirements through coercion or undue pressure upon individuals to "volunteer" their services. Therefore, §3(e)(4) of the FLSA forbids an individual from volunteering the same type of services to his or her employer that the individual is employed to perform by the employer without compensation in accordance with the provisions of the FLSA.

To allow correctional officers (or any employees) to "volunteer" the same services for which they are paid, raises the potential for abuse which Congress had in mind in enacting §3(e)(4). See Senate Report No. 99-159, October 17, 1985, page 14, 2 U.S. Cong. News 1985, page 662 ("the Committee wishes to prevent any manipulation or abuse of minimum wage requirements through coercion or undue pressure upon employees to 'volunteer'").

We trust that the above information is responsive to your inquiry. If we can be of further assistance, please do not hesitate to contact us.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

JUN 21 1995

P9506053/E10659/95-502

Dear

This is in response to your letter to Secretary of Labor Robert B. Reich concerning the application of the Fair Labor Standards Act (FLSA) to the City of training program. The copy of the program was not received with your inquiry. We trust that the following discussion regarding time spent by employees in attending meetings, lectures or training will be of assistance.

The Wage and Hour Division of the Department of Labor administers and enforces the FLSA, the Federal law of most general application concerning wages and hours of work. This law requires that all covered and nonexempt employees be paid a minimum wage of $4.25 an hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek. The FLSA is discussed in more detail in the enclosed "Handy Reference Guide to the Fair Labor Standards Act."

Time spent by employees in attending meetings, lectures or training courses may be excluded from the hours of work which are compensable under the FLSA, provided all four of the following criteria are met; (1) attendance is outside the employees' regular working hours; (2) attendance is in fact voluntary; (3) the meeting, lecture or course is not directly related to the employees' job; (4) The employees do not perform any productive work during such attendance. These criteria are more fully explained in sections 785.27 through 785.31 of the enclosed Interpretative Bulletin, Part 785, on Hours Worked.

You will note that under section 785.31 voluntary attendance by employees at certain lectures, training sessions and courses of instruction may not be regarded as hours worked even if such courses are directly related to their jobs or paid for by their employers, provided that attendance at these courses is outside the employees' working hours.

If after reading the enclosed material you have additional questions concerning the application of the FLSA, you may wish to contact the Richmond Wage and Hour District Office located in the 700 Center, 700 East Franklin Street, Suite 560, Richmond, Virginia 23219, telephone (804) 771-2995.

We trust that the above information is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosure

JUL 11 1995

Dear Mr.

This is in response to your letter in which you request an opinion regarding full workweek absences of overtime-exempt employees for jury duty, witness attendance, and temporary military leave.

Section 13(a)(1) of the FLSA provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in Regulations, Part 541. An employee may qualify for exemption if all of the pertinent tests relating to duties, responsibilities and salary, as discussed in the appropriate section of the Regulations, are met. One such test requires that an otherwise exempt employee be paid on a salary basis, as described in section 541.118 of the Regulations.

An employee will be considered to be paid on a salary basis within the meaning of the Regulations if under his or her employment agreement he or she regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his or her compensation, which amount is not subject to reduction because of variation in the quality or quantity of the work performed.

You ask under section 541.118(a)(4) of Part 541, does the salary basis requirement for overtime exemption require an employer to pay an overtime-exempt employee his or her salary for a workweek in which he or she performs no work for the employer because of absence from work due to jury duty service, witness attendance, or temporary military duty for that entire workweek.

Under the Regulations an otherwise exempt employee need not be paid for any workweek in which he or she performs no work. The employer therefore would not have to compensate the employee for the weeks he or she performed no work for the employer due to jury duty, serving as a witness, or temporary military duty.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein.

We trust that the above information is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

JUL 11 1995

Dear

This is in response to your inquiry on behalf of of . Mr. is concerned about whether his employer may prevent him from leaving work to act as a volunteer firefighter with the Volunteer Fire Department.

It appears that your constituent is employed by a local employer who does not want to allow Mr. to respond to fire calls during his working hours, even if he "punches out" (i.e., he is not paid for such time). The Department of Labor does not administer any statutes that would require your constituent's employer to release him during working hours to perform volunteer firefighting duties with the Fire Department. This is a matter to be resolved by the parties directly, or through the collective bargaining process if a union is involved.

There may be some provision in state law that governs volunteer firefighting, and you may wish to suggest that your constituent contact the State of in this regard, if he has not already done so.

We trust that the above is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

cc: Washington, D.C., Office

JUL 11 1995

Dear

This is in response to your inquiry on behalf of of Mr. is concerned about the application of the Fair Labor Standards Act (FLSA) to nonexempt school employees such as bus drivers, custodians, maintenance workers, etc., when they "volunteer" to coach extra-curricular activities for which they will be paid a "stipend" by their employer.

Your constituent asks:

> May a school district utilize the services of a classified employee (bus driver, maintenance worker, etc.) as a volunteer who separately coaches an extra-curricular activity for which a fixed stipend is paid, as separate and distinct from his regular duty for pay purposes, or must he be paid at an overtime rate for the extra-curricular coaching duty if his regular duty (bus driver, etc.) hours and coaching duties exceed 40 hours per week?

The application of the FLSA to "volunteers" is discussed in 29 CFR §§553.100 - .106 of the enclosed copy of the regulations. For purposes of this response we assume that the employees involved offer their services freely and without pressure, directly or implied, from their employer to perform the coaching services. In this regard, see 29 CFR §553.101.

Employees may volunteer hours of service to their public employer or agency provided such services are not the same type of services for which the individual is employed to perform for such public agency. Employees may volunteer their services in one capacity or another <u>without contemplation of pay for services rendered</u>. See 29 CFR §553.103.

Where a stipend, i.e. a fixed sum of money paid periodically for services, is involved, such payment must be nominal. See 29 CFR §553.106. Since neither the dollar value of the stipend, nor its terms and conditions have been provided, we are unable to provide a more precise answer. However, if the stipend, when divided by the hours spent in coaching activity would yield the equivalent of $4.25 an hour (current minimum wage) or greater to the employee, such payment would be considered more than nominal.

Consequently, both the hours spent in coaching and the compensation earned from such activity would have to be combined with the employee's hours and earnings in his or her regular job for FLSA overtime purposes.

We trust that the above is responsive to your inquiry. If we can be of further assistance, please do not hesitate to contact this office.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

JUL 11 1995

Dear _____

This is in response to your letter concerning the application of the Fair Labor Standards Act (FLSA) to an internship program operated by your health and fitness center.

You state that college students, who are in academic programs to become physical fitness instructors or exercise physiologists, are required to complete an internship program in a health/fitness setting, such as those provided by the YMCA, hospital based health and fitness centers, corporate fitness centers, and cardiac rehabilitation programs. The students must participate in the internship programs to complete their degree requirements, and they receive academic credit for their participation.

The Wage and Hour Division of the Department of Labor administers and enforces the FLSA, the Federal law of most general application concerning wages and hours of work. An employee who is covered under this law must be paid a minimum wage of not less than $4.25 an hour and overtime premium pay of not less than one and one-half times his or her regular rate of pay unless specifically exempt. The FLSA is discussed in more detail in the enclosed "Handy Reference Guide to the Fair Labor Standards Act", and "Employment Relationship Under the Fair Labor Standards Act."

The Supreme Court has held that the words "to suffer or permit to work" as used in the FLSA to define "employ", do not make all persons employees who, without any express or implied compensation agreement, may work for their own advantage on the premises of another. Whether trainees are employees of an employer under the FLSA will depend upon all the circumstances surrounding their activities on the premises of the employer. If all of the following criteria are met, the trainees are not employees within the meaning of the FLSA:

1. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school.

2. The training is for the benefit of the trainees or students.

3. The trainees or students do not displace regular employees, but work under their close observation.

4. The employer that provides the training derives no immediate advantage from the activities of the trainees or students, and on occasion his/her operations may actually be impeded.

5. The trainees or students are not necessarily entitled to a job at the conclusion of the training period.

6. The employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.

Where educational or training programs are designed to provide students with professional experience in the furtherance of their education and the training is academically oriented for the benefit of the students, it is our position that the students will not be considered employees of the institution to which they are assigned, provided the six criteria referred to above are met. For example, where certain work activities are performed by students that are but an extension of their academic programs, we would not assert that an employer-employee relationship exists for the purposes of the FLSA. In situations where students receive college credits applicable toward graduation when they volunteer to perform internships under a college program, and the program involves the students in real life situations and provides the students with educational experiences unobtainable in a classroom setting, we do not believe that an employment relationship exists between the students and the facility providing the instruction. Where there is no employment relationship under the FLSA, the minimum wage and overtime pay provisions of the FLSA have no application. It should be noted that the payment of a stipend to the interns does not create an employment relationship under the FLSA as long as it does not exceed the reasonable approximation of the expenses incurred by the interns involved in the program.

Although we have reviewed the information in your letter, we do not feel that there is enough detail for us to make a definite determination on the question you raise. However, the above discussion should be of assistance to you in determining whether or not the internship programs you have in mind would result in an

employment relationship between the students participating in the program and the companies providing the training.

We trust that the above is of assistance to you.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosures

JUL 17 1995

Dear :

This is in reply to your letter of May 24, 1995, concerning the application of the Fair Labor Standards Act (FLSA) to the placement by your organization of interns at the . You state that the interns are high school juniors and seniors who come to , to observe, interact, and work with role models who hold public policy leadership positions. The interns work four days a week, seven hours a day for approximately four weeks. The interns receive a stipend of $150 per week to cover their exepenses.

The FLSA is the Federal law of most general application concerning wages and hours of work. An employee who is covered under this law most be paid a minimum wage of not less than $4.25 an hour and overtime premium pay of not less than one and one-half times his or her regular rate of pay for all hours worked in excess of 40 in a workweek, unless otherwise exempt. The FLSA is discussed in more detail in the enclosed "Handy Reference Guide to the Fair Labor Standards Act."

The Supreme Court has held that the words "to suffer or permit to work" as used in the FLSA to define "employ", do not make all persons employees who, without any express or implied compensation agreement, may work for their own advantage on the premises of another. Whether trainees or students are employees of an employer under the FLSA will depend upon all the circumstances surrounding their activities on the premises of the employer. If all six criteria discussed on pages 4 and 5 of WH Publication 1297, "Employment Relationship Under the Fair Labor Standards Act" are met, the trainees or students are not employees within the meaning of the FLSA, and would not have to be paid in accordance with its monetary provisions.

It should be noted that in your case, since the interns are to be paid a stipend of $150 per week and are to participate in the internship program for 28 hours per week, even if it were determined that the interns were employees under the FLSA, the interns will have been paid in excess of the minimum wage provisions of the FLSA.

We trust that this satisfactorily responds to your inquiry.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosures

JUL 17 1995

Dear

This is in response to your letter requesting an opinion concerning the use of compensatory time under the Fair Labor Standards Act (FLSA) by nonexempt employees at Community College.

Based on a conversation with of my office, you state that you could allow your nonexempt employees to use compensatory time in lieu of pay at the rate of one and one-half times for each hour worked. Since Community College is a public institution, it falls under the amendment to the FLSA that allows public employees to receive compensatory time off for working FLSA overtime.

As you know, the Wage and Hour Division of the Department of Labor administers and enforces the FLSA, the Federal law of most general application concerning wages and hours of work. This law requires that all covered and nonexempt employees must be paid a minimum wage of $4.25 an hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek.

With regard to the application of the FLSA to State and local government employees, please note that as a condition for use of compensatory time in lieu of overtime payment in cash, section 207(o)(2)(A) of the FLSA requires an agreement or understanding be reached prior to the performance of work. This can be accomplished pursuant to a collective bargaining agreement, a memorandum of understanding or any other agreement between the public agency and representatives of the employees. The application of the FLSA to public employees is fully explained in

Regulations, 29 CFR Part 553 (copy enclosed). The compensatory time off provisions are found at sections 553.20 - .28.

We trust that the above information is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosure

JUL 27 1995

Dear

This is in response to your letter to Secretary Reich concerning the hours medical interns are required to work.

The Wage and Hour Division of the Department of Labor administers and enforces the Fair Labor Standards Act (FLSA), which is the Federal law of most general application concerning wages and hours of work. This law requires that all covered and nonexempt employees must be paid a minimum wage of $4.25 an hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek. The FLSA is discussed in more detail in the enclosed "Handy Reference Guide to the Fair Labor Standards Act."

Although the FLSA provides many beneficial labor standards, it does not set a minimum or a maximum number of hours in a day or in a week that an adult employee may be required to work, nor does it regulate work schedules or employers' utilization of their workforce.

Section 13(a)(1) of the FLSA provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, professional, or outside sales capacity. In order to qualify for exemption under this section, an employee must meet all of the tests relating to duties, responsibilities, and salary that are contained in the appropriate section of Regulations, 29 CFR Part 541 (copy enclosed). Physicians, generally, qualify for exemption as bona fide professional employees.

Please note that section 541.314 of the Regulations provides that physicians and other practitioners, whether or not licensed to practice prior to commencement, are excepted from the salary or fee requirement during their internship or resident program, where such a training program is entered upon after the earning of the appropriate degree required for the general practice of their profession. This means that the compensation received by a physician during his or her internship is a matter between the physician and the hospital where he or she is in internship. We are not aware of any legislation that would address the matter of your concern.

We trust that the above information is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosures

AUG 3 1995

Secretary Reich has asked me to respond to your inquiry concerning the application of the Fair Labor Standards (FLSA) to parent volunteers who are also public school employees. You ask several follow-up questions in light of the enforcement policy statement on this issue by Secretary Reich and Secretary of Education Riley. I regret the delay in responding to your inquiry.

As you know, the Wage and Hour Division will not assert FLSA violations for time spent by a public school employee, who is also the parent of the child in that school system, volunteering in their own child's classroom or in activities directly involving their own child's education without expectation of compensation so long as there is no coercion or pressure on the employee by the employer to do so.

This policy is intended to be applicable only for the time spent by a public school employee, who is also the parent (or who stands in loco parentis) of a child in that school system, volunteering in their own child's classroom or in activities directly related to their own child's education without expectation of compensation.

For example, this means that the employee/parent can volunteer time with respect to their own child's class field trip, athletic contest, band concert, debate or speech club event, etc. On the other hand, the enforcement policy is not considered applicable in situations where the employee/parent volunteers in a school activity in which their child does not participate.

Enclosed is a copy of the enforcement policy from the Field Operations Handbook. It should be noted that the enforcement policy was adopted notwithstanding the provisions of §3(e)(4) of the FLSA. The policy does not waive or otherwise have any effect on an individual employee's right under §16(b) of the FLSA to, at some future date, maintain a claim for appropriate FLSA compensation for "volunteer" hours. Thus, your inference with respect to the enforcement policy and the provisions of the FLSA is correct.

When an enforcement policy is changed, it is our policy to announce such change through all appropriate means, including the media, so that the interested and affected parties have sufficient notice of its effect and have time to adjust their operations accordingly.

I trust that the above is responsive to your inquiry. If we may be of further assistance, please do not hesitate to contact this office.

Sincerely,

Maria Echaveste
Administrator

Enclosure

AUG 7 1995

This is in further response to your letter on behalf of concerning whether railroads are required to pay their employees overtime.

The Wage and Hour Division of the Department of Labor administers and enforces the Fair Labor Standards Act (FLSA). The FLSA is the Federal law of most general application concerning wages and hours of work. This law requires that all covered and nonexempt employees must be paid a minimum wage of $4.25 an hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek. The FLSA is discussed in more detail in the enclosed "Handy Reference Guide to the Fair Labor Standards Act", which you may wish to send to your constituent.

Please note that section 13(b)(2) of the FLSA provides an overtime pay exemption for any employee of an employer engaged in the operation of a railroad subject to the provisions of Part 1 of the Interstate Commerce Act. This exemption would apply to your constituent's employer and, thus, would not have to be paid any additional compensation for working overtime in excess of 40 hours per week. Since the provisions of the FLSA are statutory, any change to address concern would require legislative action by the Congress.

We trust that the above information is responsive to your inquiry. If you have any further questions, please do not hesitate to contact us.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosure

AUG 24 1995

This is in response to your letter requesting an opinion on the application of section 7(i) of the Fair Labor Standards Act (FLSA) to sales technicians engaged in the selling and installing of mobile home additions, such as awnings, carports, room additions and porches. You state that the sales technicians are paid on a commission basis which is a percentage of their sales.

Section 7(i) provides an exemption from the overtime pay provisions of the FLSA for any employee of a retail or service establishment if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum wage of $4.25 an hour, and (2) more than half of his or her compensation for a representative period (not less than one month) represents commissions on goods or services. A retail or service establishment means an establishment 75 per centum of whose annual dollar volume of sales of goods or service (or of both) is not for resale and is recognized as retail sales or services in the particular industry. There is not enough information in your letter for us to determine whether or not your client's business meets the definition of a retail or service establishment for purposes of section 7(i). However, the following should be of assistance to you in making your own determination.

Mobile homes that are intended to be a permanent structure on a fixed site would allow for the construction of awnings, carports, room additions and porches. The sale and installation of such items that involve substantial structural changes, such as, cutting away from the existing structure to enlarge doors or windows, or other construction work, such as digging foundations, pouring cement footings, grading and related work, are construction activities to which the retail concept does not apply. Where more than 25 per centum of an establishment's annual dollar volume is derived from such activities, the

establishment would not qualify as a retail or service establishment for purposes of section 7(i). On the other hand, some installation activities which are incidental to a retail sale are considered exempt activities. An example of such an exempt activity would include the installation of an aluminum awning that requires little more than boring holes and inserting screws. For a more detailed discussion of what constitutes retail sales of goods and services under the FLSA see sections 779.314 to 779.321 of Interpretative Bulletin, 29 CFR Part 779, a copy of which is enclosed.

We trust that the above is responsive to your inquiry. However, if you have any further questions please do not hesitate to let us know.

Sincerely,

el F. Sweeney
ty Assistant Administrator

Enclosure

SEP 11 1995

This is in response to your inquires concerning the application of the Fair Labor Standards Act (FLSA) to "volunteering" by employees of a for-profit employer. We regret the delay in responding to your inquiry.

As you know, we have a longstanding policy of limiting volunteer status to those individuals performing charitable activities for not-for-profit organizations. On a rare occasion, we have considered as volunteers, and not employees, individuals who perform activities of a charitable nature for a for-profit hospital, where the hospital does not derive any immediate economic advantage from the activities of the volunteers and there is no expectation of compensation. However, we have never opined that employees of for-profit hospitals may perform activities for their employers, and we decline to do so here.

You also ask about volunteers with respect to organizations that provide hospice services to the terminally ill. You state that there is an apparent conflict between FLSA and the medicare provisions of the Social Security Act (SSA) (42 U.S.C. 1302 et seq.). The latter [specifically, 42 U.S.C. 1395x(dd)(2)(E)(i)] defines a "hospice program," in part, as an organization that "utilizes volunteers in its provision of care and services."

We do not believe that the SSA repeals the FLSA by implication with respect to volunteers. Nor do we believe that the SSA necessarily creates a conflict with our policy on volunteers under the FLSA. We see no reason to treat hospice volunteers differently than volunteers in a hospital situation. Therefore, the Wage and Hour Division will not assert an employment relationship between a for-profit hospice and individuals who volunteer their services to perform activities of a charitable nature, such as running errands, sitting with patients so that a family may have a break, and going to funerals. We consider these types of activities to have humanitarian and, for some, religious implications, and are what the Supreme Court was referring to when it mentioned "ordinary volunteerism" in Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985).

On the other hand, individuals may not donate their services to hospices to do activities such as general office or administrative work that are not charitable in nature. Moreover, with respect to those individuals already employed by a hospice, they may not "volunteer" their services to the hospice.

You have also asked a general question about whether employees of a for-profit organization may donate their service without compensation for activities such as staffing a booth at a function where the employer displays its goods or services, or working as a guide during an employer's "open house." The answer to this question is no. Employees may not donate their services to their for-profit employers.

We trust that the above is responsive to your inquiry.

Sincerely,

Maria Echaveste
Administer

SEP 18 1995

This is in response to your letter requesting an opinion concerning the application of the Fair Labor Standards Act (FLSA) to your employees who are ambulance drivers. You are specifically concerned about the application of sections 13(b)(1) of the FLSA and 785.22 of Regulations, 29 CFR Part 785, to these employees.

The Wage and Hour Division of the Department of Labor administers and enforces the FLSA, the Federal law of most general application concerning wages and hours of work. This law requires that all covered and nonexempt employees must be paid a minimum wage of $4.25 an hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek.

Section 13(b)(1) of the FLSA provides an overtime pay exemption for any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to section 204 of the Motor Carrier Act (MCA) of 1935 (now codified at 49 U.S.C. 3102). This exemption applies to any driver, driver's helper, loader, or mechanic employed by a carrier, and whose duties affect the safety of operation of motor vehicles on the public highways in interstate or foreign commerce. The application of the exemption is discussed in 29 CFR Part 782.

In the cases of Spires v. Ben Hill County, 980 F.2d 683 (11th Cir. 1993) and Jones v. Giles, 741 F.2d 245 (9th Cir. 1984), two courts of appeals have held that ambulance drivers are not subject to the FLSA's section 13(b)(1) motor carrier exemption. Both holdings are unconditional, without regard to the frequency of interstate operations, and in both cases the courts noted that the Interstate Commerce Commission (ICC) (predecessor of the Department of Transportation (DOT)) had determined that the unique operation of ambulances compared to other forms of motor transportation put them outside the ICC's jurisdiction. In

Lonnie W. Dennis, common Carrier Application, 63 M.C.C. 66 (1954), the ICC held that the Motor Carrier Act did not confer jurisdiction over ambulance services upon the Commission. The DOT adopted the reasoning of the Commission in Dennis when it published notice that ambulance services were not subject to the requirements of the Federal Motor Carrier Safety Regulations. (42 Fed. Reg. 60078, 60080 (November 23, 1977).)

On the basis of Spires and Jones, the Department does not consider the section 13(b)(1) exemption applicable to ambulance service employees. We have advised our investigative personnel that overtime for ambulance service employees is to be computed without regard to that exemption. We recognize that the case of Benson v. Universal Ambulance Service, 675 F.2d 783 (6th Cir. 1982), has a contrary result, but that decision did not deal with the ICC's interpretation of its own jurisdiction, which the ICC had explained in Dennis, and both the Ninth and Eleventh Circuits specifically declined to follow Benson.

With regard to your concern about the 24-hour duty/sleep time under section 785.22 of Regulations, Part 785, you are correct in your understanding that where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. If the sleeping period is of more than 8 hours, only 8 hours may be credited. Where no expressed or implied agreement to the contrary is present, the 8 hours of sleeping time and meal periods constitute hours worked. Thus, an employer can only exclude from computation of hours worked a maximum of 11 hours in any 24-hour period when an employee is on duty for an uninterrupted, continuous period of 24 hours or more. The actual amount excludable (up to the 11 hour maximum) will, of course, depend on the actual time the employee is on meal break or is sleeping.

We trust that the above information is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

OCT 12 1995

This is in response to your inquiry concerning the application of §13(a)(15) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 213(a)(15), to employees of rehabilitation agencies that provide personal care services to individuals who are unable to care for themselves. We regret the delay in responding to your inquiry.

As you know, Regulations, 29 CFR 552, are concerned with the application of the FLSA to "domestic" employees. The Department has published a notice of proposed rulemaking in the Federal Register on December 30, 1993 (58 FR 69310), which invited public comments until February 28, 1994, on a number of technical modifications to 29 CFR 552. In addition, public comments were invited on a proposal to revise §552.109 to clarify that, in order for the exemptions is FLSA §§13(a)(15) and 13(b)(21) to apply, employees engaged in providing companionship services and live-in domestic service employees who are employed by a third-party employer or agency must be "jointly" employed by the family or household using their services.

After reviewing the public comments, the Department has adopted the technical changes originally proposed, including a revision necessitated by recently-enacted amendments to Title II of the Social Security Act, which were enacted October 22, 1994, as Public Law 103-387 (Social Security Domestic Employment Reform Act), and has reopened and extended the period for filing written comments on the proposed revision to 29 CFR §552.109. Copies of these Federal Register documents are enclosed for your information, and you are encouraged to participate in this rulemaking process.

An employer who in good faith operates in conformity with a regulation of the Wage and Hour Division which is subsequently modified or rescinded is protected by §10 of the Portal-To-Portal

Act, 29 U.S.C. 252 et seq., from liability or punishment for failure to pay minimum wages or overtime compensation under the FLSA.

We trust that the above is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosures

OCT 17 1995

This is in response to your inquiry concerning the application of the Fair Labor Standards Act (FLSA) to a "pay equalization plan" proposed by . The issue of concern is whether the plan meets the overtime compensation requirements of the FLSA. We regret the delay in responding to your inquiry.

firefighters are covered by the terms of a collective bargaining agreement (CBA) between the union and the County. Firefighters are paid by the hour and scheduled to work 24 hours on and 48 hours off-duty, and the County has adopted a 14-day work period pursuant to §7(k) of the FLSA. Under such scheduling, firefighters work 96 hours in one work period and 120 hours in the following two work periods before the cycle repeats. FLSA overtime compensation is required after 106 hours worked in the 14-day work period. Consequently, no overtime is worked in the "short" work period but 14 hours (120 - 106) of overtime are worked in the following two "long" work periods. Further, you advised that the firefighters are paid bi-weekly rather than semi-monthly as described in the brief filed on behalf of the County before the Special Master on the collective bargaining "pay equalization" impasse.

We agree with the County's conclusion that the proposed IAFF "pay equalization plan" under which the County would pay its firefighters for an average 116.7 hours worked each pay period regardless of the actual hours worked each work period would not comply with the overtime requirements of the FLSA. We also agree with the County that the union's pay averaging proposal is not a valid "Belo" plan contract pursuant to §7(f) of the FLSA.

It is possible, however, to establish a valid "prepayment plan" under the FLSA that would meet the pay equalization objective that the IAFF seeks.[1] For purposes of this response, we assume

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[1]It has been our experience that because of misunderstandings and the technical requirements of such plans, violations of the FLSA overtime requirements frequently resulted from use of such plans. Consequently, the overtime interpretations contained in 29 CFR Part 778 no longer contain information on prepayment plans.

that State or local law allows public employers to advance pay to employees for hours that have not yet been worked.

The principles of such a plan are as follows:

Though cash overtime compensation due an employee must normally be paid on the pay day for the employee's regular work period or workweek, there is no objection if the employers pay in advance the anticipated overtime compensation to become due to an employee for working overtime in some subsequent work period or workweek. This is the basic principle of the prepayment plan. Thus some employers, in an attempt to keep employees' wages as constant as possible from pay period to pay period, have resorted to paying their employees a sum in excess of what they earn or are entitled to in a particular work period or workweek, which sum is considered to be a "prepayment" or advance payment of compensation for overtime to be subsequently worked. In other words, the employer and the employee (or union on the employees' behalf) agree that in any work period or workweek in which the employee works less than the applicable statutory overtime threshold, the employer will advance to the employee the difference in pay for the overtime work period or workweek and the amount that the employee would earn if paid only for the hours actually worked.

Plans of this type require the use of a record system under which the employer can maintain a running balance account for each employee of the amount owed by the employee to the employer's credit. At no time may the employer owe the employee overtime compensation. In any work period or workweek for which the prepayment credits due the employer are not sufficient to equal the additional overtime compensation due the employee, the difference must be paid to the employee in cash on the pay day for such work period or workweek.

A prepayment plan cannot be applied to an employee who is paid a salary under an agreement that the employee will receive the salary even when he or she works less than the regular number of hours in some weeks. Also, it cannot be applied to an employee paid a salary for a fluctuating number of hours worked from week to week. Since the nature of such employees' employment is that they will receive the fixed basic salary regardless of the number of hours worked, it cannot be said that they are paid in excess of what they earn, or to what they are entitled in any period in which

they receive the fixed salary, even though such work periods or workweeks may have been "short."

Under a valid prepayment plan any excess payment made for short work periods or workweeks must be regarded and clearly understood by both the employer and employees as a loan or cash advance to be repaid either by offset against future overtime earnings or by refund in cases where employment is terminated.

The following illustrates a prepayment plan for hourly paid firefighters working scheduled hours as described above. For ease of illustration we have used a regular rate of $10.00 an hour:

Work Period 1

Scheduled hours	96		
Hours worked	96		
Hours paid	96 ST	@ $10.00	= $960.00
	14 OT	@ 15.00	= 210.00
Gross earnings			= 1170.00
OT owed employer	14 hrs.	@ 15.00	= $210.00

Work Period 2

Scheduled hours	120		
Hours worked	120		
Hours paid	106 ST	@ $10.00	= $1060.00
	7 OT	@ 15.00	= 105.00
Gross earnings			= 1165.00
OT owed employer	7 hrs.	@15.00	= 105.00

Work Period 3

Scheduled hours	120		
Hours worked	120		
Hours paid	106 ST	@ $10.00	= $1060.00
	7 OT	@ 15.00	= 105.00
Gross earnings			= 1165.00
OT owed employer	0		

Work Period 4

Scheduled hours	96		
Hours worked	96		
Hours paid	96 ST	@ $10.00	= $960.00
	14 OT	@ 15.00	= 210.00
Gross earnings			= 1170.00
OT owed employer	14	@ 15.00	= 210.00

Work Period 5

Scheduled hours	120		
Hours worked	96	(24 vacation/leave)	
Hours paid	96	ST @ $10.00 =	$960.00
	24	vac.@ 10.00 =	240.00
Gross earnings		=	1200.00
OT owed employer	14 @ 15.00	=	210.00

Work Period 6

Scheduled hours	120		
Hours worked	120		
Hours paid	106	ST @ $10.00 =	$1060.00
	7	OT @ 15.00 =	105.00
Gross earnings		=	1165.00
OT owed employer	7 @ 15.00	=	105.00

Work Period 7

Scheduled hours	96		
Hours worked	96		
Hours paid	96	ST @ $10.00 =	$960.00
	14	OT @ 15.00 =	210.00
Gross earnings		=	1170.00
OT owed employer	21 @ 15.00	=	315.00

and so forth.

We trust that the above is responsive to your inquiry.

Sincerely,

Maria Echaveste
Administrator

OCT 25 1995

This is in response to your communication on behalf of Personnel/Safety Director for the City of Jasper, Indiana. is concerned about the exempt status under section 13(a)(1) of the Fair Labor Standards Act (FLSA) of an employee employed as assistant auditor/ deputy clerk-treasurer.

The information provided by your constituent states that the assistant auditor/deputy clerk-treasurer assists the clerk/treasurer and the city auditor, performs payroll duties, maintains attendance records, records new employee payroll information, prepares fire department work schedules, files and types, and performs day-to-day duties as directed by the clerk/treasure and the city auditor.

Section 13(a)(1) of the FLSA provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in Regulations, 29 CFR, Part 541, a copy of which is enclosed. In this regard, an employee of a central agency that provides personnel, procurement, budget, and/or auditing services related to the management policies or general business operations of a local government such as a city or of other departments within a city government could qualify as an exempt administrative employee if all of the other requirements of this exemption are met.

The criteria for exemption as an administrative employee are contained in section 541.2, and in the interpretative section (Subpart B) under sections 541.201 through 215. When compensated on a salary or fee basis of at least $250 per week, an employee may qualify for the administrative exemption if the employee's primary duty consists of office or nonmanual work directly related to management policies or the employer's general business operations, and this work involves the exercise of discretion and independent judgment. With respect to the assistant auditor/deputy clerk-treasurer position, the duties described in the position description provided by the City of are generally clerical in nature that appear to involve well-established techniques, procedures, and standards. It also appears that the skills involved can be acquired after a relatively short-period of training and on-the-job experience.

While the employee may have some leeway in the way the work is performed, the extent of discretion and independent judgment that may be required of the position appears to be within closely prescribed limits, and not at the level contemplated by the regulations. The term "discretion and independent judgment" requires the making of real decisions in significant matters, and does not apply to the kinds of decisions normally made by clerical and similar type employees. (See 29 CFR 541. 207.)

Based on the information provided, it is our opinion that an employee performing the work of the assistant auditor/deputy clerk-treasurer position would not qualify for exemption from the minimum wage and overtime provisions of the FLSA. We trust this information will assist the City in the classification of their employees. Should the city have any further questions, assistance may be obtained from Mr. Nelson Kielt of this office at (202) 219-4907.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

cc: Washington, D.C., Office

NOV - 2 1995

This is in response to your memorandum requesting an opinion concerning the application of the Fair Labor Standards Act (FLSA) to the proposed mechanical training program for employees of the at the at College Park.

You propose to establish a training program whereby employees of the company can update their skills in the mechanical and technical area. You state that the main thrust of the program is to upgrade employees to a higher skill, especially in areas of electronics and energy management. The training program would be strictly voluntary, and the employees' participation or non-participation will in no way affect their present working conditions or their employment status.

As you know, the Wage and Hour Division of the Department of Labor administers and enforces the FLSA, which is the Federal law of most general application concerning wages and hours of work. This law requires that all covered and nonexempt employees must be paid a minimum wage of $4.25 an hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek.

As explained in 785.27 of Regulations 29 CFR Part 785 (copy enclosed), time spent by employees in training programs need not be counted as compensable hours of work under the FLSA, if all four criteria are met: (a) attendance is outside of 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.

Based on the information provided, it is not possible to tell if criteron (c) has been met. However, as you know, there are "special situations" as discussed in section 785.31 which state that even if the training is clearly related to an employee's job, or paid for by the employer, voluntary attendance by an employee outside of his/her working hours need not be compensated if the course corresponds to courses offered by independent bona fide institutions of learning. Therefore, if the training you

have in mind corresponds to courses offered by independent bona fide institutions of learning, it is our opinion that time spent by employees in your proposed training program need not be counted as hours worked under the provisions of the FLSA.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of the FLSA.

We trust that the above information is responsive to your inquiry.

Sincerely

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

Enclosure

NOV - 6 1995

P9510399/E18994/96-45

President Clinton has asked us to respond to your inquiry concerning the application of the Fair Labor Standards Act (FLSA) to your employment when you "volunteer" as a reserve deputy for the . You indicate that you are employed as a jail officer by the .

Before addressing your specific concerns, it might helpful to consider the matter of volunteering in general. Under the FLSA, individuals may not volunteer services to private sector employers. On the other hand, in the vast majority of circumstances, individuals can volunteer services to public sector employers. When Congress amended the FLSA in 1985, it made clear that people are allowed to volunteer their services to public agencies and their community with but one exception -- public sector employers may not allow their employees to volunteer, without compensation, additional time to do the same work for which they are employed.

Public sector employees may volunteer to do different kinds of work in the jurisdiction in which they are employed, or volunteer to do similar work in different jurisdictions. For example, police officers can volunteer different work (non-law enforcement related) in city parks or schools, or can volunteer to perform law enforcement for a different jurisdiction than where they are employed. Additionally, there is no prohibition on anyone employed in the private sector from volunteering in any capacity or line of work in the public sector.

Section 3(e)(4)(A) of the FLSA makes clear that individuals are not "employees" entitled to compensation for hours of work if the volunteer services they provide to a public agency are not the same type of services which they are employed to perform by that agency. To allow public employees to volunteer to perform for their public agency employer the same type of services for which they are paid raises the potential for abuse which Congress clearly had in mind in enacting this section of the law. See Senate Report No. 99-159, October 17, 1985, page 14, 2 U.S. Cong.

News 1985, page 662 ("the Committee wishes to prevent any manipulation or abuse of minimum wage requirements through coercion or undue pressure upon employees to 'volunteer'").

In this regard, we have found situations involving coercion or pressure to "volunteer" in a number of FLSA investigations. For example, an Ohio police department required auxiliary officers to "volunteer" unpaid hours in order to be eligible for paid assignments. Similarly, an Indiana police department required part-time paid officers who wanted to continue to be scheduled for part-time paid employment to fill-in and work night shifts as "volunteers" without pay. Such situations are considered to be violations of the FLSA.

Even where there is no evidence of coercion, allowing paid employees to provide the same type of services for their employer on an uncompensated "volunteer" basis if they chose to do so would in effect allow employees to waive their rights to compensation due under the FLSA. The Supreme Court has held that an employee may not waive his or her rights to compensation due under the FLSA. Brooklyn Savings Bank v. O'Neil, 328 U.S. 697 (1945). The Court observed that "while in individual cases hardship may result, the restriction will enure to the benefits of the general class of employees in whose interest the law is passed and so to that of the community at large (internal citations and quotations omitted)." Id. Similarly, in Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981), the Court held that a labor organization may not negotiate a contract provision that waives employees' statutory rights under the FLSA.

The Department's regulations, at 29 CFR §553.103, define "same type of services" to mean similar or identical services, and refers to the duties and other factors contained in the definitions of the three-digit categories of occupations in the Dictionary of Occupational Titles. Equally important are all the facts and circumstances in a particular case including whether the volunteer service is closely related to the actual duties performed by or responsibilities assigned to the employee who "volunteers."

We have taken the position that law enforcement duties such as transferring or taking custody of prisoners, booking, fingerprinting, restraining, etc., with respect to suspects or prisoners, are the same type of services whether performed by police officers, detectives, bailiffs, jailers, deputies, etc. Similarly, law enforcement duties such as patrolling streets, directing traffic, taking reports on stolen or recovered property, missing persons, collecting evidence and taking photos

at crime scenes, performing matron duties with female prisoners, etc., whether performed by police cadets, community service officers, reserve deputies, auxiliary or regular police officers, are the same type of services for purposes of §3(e)(4)(A).

Consequently, it is our position that jail officers employed by the who, for example, work in the jail to take custody, book, fingerprint, and secure suspects or prisoners, may not volunteer as reserve deputies without compensation in accordance with the FLSA. However, "civilian" employees such as dispatchers, clerks, secretaries, mechanics, etc. employed by the could volunteer as reserve or auxiliary deputies.

It is important to again make clear that individuals who are reserve deputy volunteers but who are not employed in <u>any</u> capacity by a public agency are not affected. As you know, sheriffs' departments or volunteer fire/rescue organizations are frequently served by individuals whose livelihood is earned principally in another vocation (mechanic, teacher, sales clerk, truck driver, construction worker, lawyer, etc.). Under FLSA, such individuals are <u>not</u> "employees" if they receive no compensation or are paid no more than expenses, reasonable benefits, or a nominal fee (or combination thereof) to perform the services for which they volunteer.

We trust that the above is responsive to your inquiry. If you have further questions, please do not hesitate to contact this office.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

NOV 20 1995

This is in response to your letter in which you request an opinion under the Fair Labor Standards Act (FLSA), concerning the compensability of time spent by employees voluntarily driving their employers' vehicles between home and customers' work sites, transporting parts, tools and equipment needed to perform their jobs.

You describe two work situations in detail and we see no need to repeat all the facts here. In one situation, employees drive their personal vehicles to one of several "operating bases" where they pick up company vans and proceed to the first work site of the day. At day's end, the route is reversed. Travel time from home to the "operating bases" and back home in the evening is not compensated. All other travel time is compensated. In the other situation, employees voluntarily drive company vans to and from their homes. In this situation, travel time from home to the first work site and from the last work site home is not compensated. All other travel time is compensated.

As these two work situations are described in your letter, your client's travel time pay practices are in compliance with the FLSA. The facts in the second situation appear to be clearly within the discussion in the Administrator's April 3, 1995, opinion letter, to which you refer in your letter.

You ask if our response would be the same if, in the second situation, employees were required to drive company vans to and from home. We think not. One of the criteria in the April 3 letter is that driving the employer's vehicle to and from home must be "strictly voluntary." Once this standard is not met, the position stated in the letter would not apply and all the travel time would be compensable. We regret any confusion on this point that may have resulted from a telephone conversation with a member of my staff who indicated otherwise.

We trust this is responsive to your inquiry. If you have any further questions on this matter, please do not hesitate to contact us again.

Sincerely,

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

NOV 20 1995

Branch Copy

This is in response to your letter requesting an opinion as to the exempt status of certain employees under section 13(a)(1) of the Fair Labor Standards Act (FLSA). You specifically request an opinion as to whether these employees would be paid on a "salary basis" if paid under two methods of compensation described in your letter. You state that we are to assume that all the other requirements for exemption contained in Regulations, 29 CFR Part 541, are met.

With respect to Method 1, you indicate that an employee receives five-days of sick leave, no vacation pay, and no holiday pay. A paid "holiday" is provided to the employee for full day absences occasioned by the employer or the operating requirements of the business. In addition, no deductions from pay are made for partial day absences, and extra compensation is provided to the employee for billable hours worked in excess of 80 in a two week period. The floating "holiday" concept is apparently intended to address periods when no work is available to the employee due to the operating requirements of the business. It is assumed that such "holiday" pay is provided to the employee in whatever increments are necessary to prevent deductions from salary that may be attributed to the lack of available work, i.e., an unspecified number of days ranging from none to multiple days dependent upon available work. The pay practices outlined under this method would technically meet the criteria contained in § 541.118 of the regulations for payment on a "salary basis." We note, however, that such practices have the effect of forcing an employee into a leave-without-pay status for any absence of a full day, including sickness when the five-days of sick leave are exhausted, that is taken when work is available. These austere pay practices are somewhat unusual as more and more employers seek to establish high-performance, family-friendly workplaces.

Under Method 2, employees are provided unlimited sick leave, vacation pay, and holiday pay. Absences for full and partial days are deducted from accrued vacation balances, and deductions

from pay are only made for full-days after available leave balances are exhausted (no deductions from pay are made for partial day absences). As in Method 1, extra compensation is provided to the employee for billable hours worked in excess of 80 in a two week period. We must take issue, however, with the practice that mandates the use of vacation days when the customer requests a slowdown in work. It has been the Department's longstanding position that where an employer has a bona fide vacation pay benefit plan, it is permissible to substitute or reduce the accrued leave in the plans for the time an employee is absent from work even if it is less than a full day without affecting the salary basis of payment, if by substituting or reducing such leave the employee receives in payment an amount equal to his or her guaranteed salary. Inherent in this approved pay practice is the element that the absence from work was occasioned voluntarily by the employee. It is our position, therefore, that the practice of requiring an employee to use accrued vacation time to accommodate the operating requirements of a business would be inconsistent with the requirement to pay the employee on a "salary basis." While the salary of the employee is technically not reduced by this approach, it imposes a condition that is not unlike a direct deduction from pay, which is prohibited by § 541.118(a)(2) of the regulations.

We also note that both methods provide for extra compensation for hours billed in excess of 40 per week. In this regard, it is the Department's longstanding position that the furnishing of extra compensation over the guaranteed salary is not inconsistent with payment on a salary basis. With respect to the requirement that an employee must record all billable hours worked, we wish to point out that several recent court cases have denied the exemption based on a variety of employer practices that relate the employee's pay to the employee's hours worked. Practices with hourly attributes, such as payment of additional compensation for time worked over 40 hours in a week, requiring use of personal or sick leave by the hour, and the recording of hours worked, among others, have been declared inconsistent with the "salary basis" requirement in the regulations.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration and of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion that the one expressed herein. You have also represented that this opinion is not sought because of an

investigation by the Wage and Hour Division, or because of litigation with respect to, or requiring compliance with, the provisions of the FLSA.

We trust that the above is responsive to your inquiry.

Sincerely,

Maria Echaveste
Administrator

Enclosure

NOV 30 1995 30 1995

This is in response to your letters requesting an opinion as to the application of section 541.118 of Regulations, 29 CFR, Part 541, to the vacation and sick leave policies one of your clients wishes to implement for salaried exempt employees.

You state that your client wishes to implement the following policy language with regard to vacation and sick leave for salaried exempt employees.

> Vacation: Vacation may, at the employee's option, be used in not less than one hour increments to permit an employee to take a partial day vacation. Under no circumstance will an employee's weekly salary be reduced as a result of taking time off under this policy.
>
> Sick Leave: Exempt employees may use sick leave in one hour increments, provided that under no circumstances will an exempt employee's weekly salary be reduced for an absence of less than a full day.

ou ask if the above procedures for partial day vacation and sick eave meet the salary requirements for salaried exempt employees, as discussed in section 541.118 of the regulations.

It is our opinion that an otherwise salaried exempt employee will be paid on a "salary basis" as discussed in section 541.118 of the regulations under the circumstances described above. This opinion is in accord with the position set forth in my letter dated March 30, 1994 to of your corporate office in Lexington, Massachusetts, and is consistent with our interpretation of accrued leave plans under Section 541.118, notwithstanding the dicta in the 1990 Abshire decision. It would be appropriate to regard this letter as a modification to your 1993 settlement agreement with the Department.

Sincerely,

Maria Echaveste
Administrator

DEC -5 1995

Dear

This is in response to your inquiry on behalf of Your constituent is concerned about the application of the Fair Labor Standards Act (FLSA) to his employment as a school bus driver for the School District.

The FLSA is the Federal law of most general application concerning wages and hours of work. This law requires that all covered and nonexempt employees be paid not less than the minimum wage of $4.25 an hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in the workweek. The major provisions of the FLSA are briefly described in the enclosed Handy Reference Guide.

apparently feels that the overtime requirements of the FLSA discourage his employer from letting him work overtime during the school year in order to earn "extra" compensation. Consequently, he will have no funds to tide him over during the summer months when he receives no compensation because school is not in session.

It has been our experience that many school districts avoid summer months without pay for their employees by prorating the salary earned during the duty months and paying in equal monthly installments throughout the entire year. This is done for the convenience of the employees. For example, assume a school bus driver is paid $12,000 annually for 10 months (or $1,200 per month). For the employee's convenience, the employee is paid $1,000 per month for 12 months.[1]

---

[1] The regular rate for overtime purposes (should any be worked) would be determined by using the higher $1,200 per month rate:

$1,200.00/mo. x 12 mo. ÷ 52 wks. = $276.92 (weekly equiv.);
276.92 ÷ hrs. worked = regular rate (rr);
rr x ½ x overtime (OT) hrs. = additional OT premium due ($).

In addition, we should note that the FLSA, as the result of the 1985 Amendments, provides that public employees such as your constituent, can receive compensatory (comp) time off in lieu of immediate cash payment for FLSA overtime hours worked. Comp time is earned at the rate of one and one-half hours for each hour of FLSA overtime worked. Employees such as can accrue up to 240 hours of comp time off with pay that can be used at some future date, such as during summer months when school is not in session. FLSA comp time is more fully explained in Regulations, 29 CFR 553 (copy enclosed). See §§553.20 - 553.28 (pp. 2033 - 2037).

In light of the above, concerns could be addressed within the FLSA as presently amended. However, his employer would have to make appropriate changes in compensation practices.

With regard to litigation concerning the application of FLSA to public employees, major U.S. Supreme Court cases are discussed in the "background" section of the Final Rule of January 16, 1987, which implemented the Fair Labor Standards Amendments of 1985 (Pub. L. 99-150). See page 2012.

If we can be of further assistance, please do not hesitate to contact this office.

Sincerely,

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

Enclosures

cc: Washington, D.C., Office

($276.92/wk. is the straight-time equivalent of $1,200.00/mo.).

1/21/97

This is in response to your letter in which you raise a number of questions concerning the application of the Fair Labor Standards Act (FLSA) to member volunteers of a cooperative grocery store.

Under section 3(g) of the FLSA, "employ" is defined as "to suffer or permit to work." However, the Supreme Court has made it clear that the FLSA was not intended "to stamp all persons as employees who without any express or implied compensation agreement might work for their own advantage on the premises of another." In administering the FLSA, the Department follows this judicial guidance in the case of individuals serving as unpaid volunteers in various community services. Individuals who volunteer or donate their services, usually on a part-time basis, for public service, religious or humanitarian objectives, not as employees and without contemplation of pay, are not considered as employees of the religious, charitable and similar nonprofit corporations that receive their service. Please note examples of volunteer services in the enclosed "Employment Relationship Under the Fair Labor Standards Act."

With regard to questions 1, 2, and 3, you indicate that cooperative members volunteer to stock shelves, sweep floors, slice meat, and operate cash registers in the store in exchange for discounts on purchases. The discounts may be used by the members at anytime during the two week period after they are earned. You ask if this practice violates the minimum wage provisions of the FLSA.

In this case, the cooperative members do not appear to be "volunteers" within the meaning of the FLSA. This is so because the services volunteered are not for public service, religious, or humanitarian objectives as required by the FLSA; rather, the services are being donated for commercial business purposes. It is, therefore, our opinion that the cooperative members would be considered "employees" within the meaning of the FLSA, and would be subject to the minimum wage and overtime provisions of the Act. This determination would not change even if member employees were not given discounts, or if they performed tasks of their own choosing and worked anytime they chose.

JAN 21, 1997

This is in further response to your inquiry concerning the application of the Fair Labor Standards Act (FLSA) to police officers while attending administrative disciplinary proceedings.

The specific question you present is whether the time spent giving testimony by a police officer at an administrative proceeding would be compensable hours worked under the FLSA. In particular, when the police officer giving testimony has been subpoenaed to testify on behalf of a fellow officer during a disciplinary proceeding, would the time so spent be "hours worked" for FLSA purposes.

As you know, we have held that time spent in testifying in court or other proceedings is compensable hours of work under the FLSA if:

1. the time spent is controlled or required by the State or local government; or

2. if attendance is intended to benefit the State or local government; or

3. if attendance is a direct result of official police duties.

We agree with your conclusion that the time spent testifying on behalf of a fellow officer is the result of official police duties and, therefore, is compensable under the FLSA.

We trust that the above is responsive to your inquiry.
Sincerely,
Daniel F. Sweeney
Office of Enforcement Policy
Fair Labor Standards Team

As the Supreme Court recognized in Goldberg v. Whitaker House Cooperative, Inc., 366 U.S. 28 (1961), part ownership or any proprietary interest of a member in a cooperative does not preclude the existence of an employer-employee relationship. As the Court stated in that case, "[w]e fail to see why a member of a cooperative may not also be an employee of the cooperative." Id. at 32. Moreover, the fact that the company is not operated for profit also is immaterial. See Farmers Irrigation Co. v. McComb, 337 U.S. 755, 768 (1949).

With respect to questions 4-7, there is not enough information in your letter for us to make a determination. Whether or not the professionals, board members, and committee members would be considered "employees" pursuant to the FLSA would depend upon all of the facts in the particular situation.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided full and fair description of all the facts and circumstances that would be pertinent to our consideration and the questions presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein.

We trust that the above information is responsive to your inquiry.

Sincerely,

Maria Echaveste
Administrator

Enclosure

JAN 21 1997

This is in response to your letter of October 21, 1996, requesting a formal opinion as to the adequacy of the information your client gives its tipped employees regarding Section 3(m) of the Fair Labor Standards Act, 29 U.S.C. 203(m). Section 3(m) provides in pertinent part that the tip credit provision "shall not apply with respect to any tipped employee . . . unless (1) such employee has been informed by the employer of the provisions of this section. . . ."

You state that your client displays the FLSA poster furnished by the Wage and Hour Division, explains its tip pooling arrangement to employees when first hired, and includes the explanation in the employee handbook which is provided to each employee and posted on the employee bulletin board. In addition, the employees' paycheck stubs explain the amount of the tip credit taken by the employer.

The FLSA poster alone is not sufficient notice to employees of the provisions of Section 3(m). Even if the poster were prominently displayed, an employee might not take notice of the tip credit provision unless specifically directed to it by the employer. However, the combination of verbal notification, written notification in the employment handbook, and notification by paycheck stub would be sufficient to meet the notice requirement in Section 3(m).

I trust that the above is responsive to your inquiry.

Sincerely,

Maria Echaveste
Administrator

JAN 21 1997

Dear

This is in response to your request for an opinion concerning the legality of a proposed pay policy under the Fair Labor Standards Act, 29 U.S.C. 201 et seq. Specifically, you have asked whether, under section 3(m), your client may include, as part of the compensation for the first two weeks of employment, the reasonable cost of the meals it customarily provides, deduct, during those two weeks, the reasonable cost of the meals from the compensation as an offset against its expense of purchasing uniforms and safety equipment, and exclude the reasonable cost of the meals from the calculation of the employee's regular rate, pursuant to section 7(e)(2). The employees have the option of purchasing the uniforms and safety equipment, rather than having deductions taken from their pay for these items. Also, under the policy, the contract wage will be the statutory minimum.

Section 3(m) allows an employer to consider as part of wages the reasonable cost of providing "board, lodging or other facilities" that are customarily furnished for the benefit of employees, except to the extent that such costs are excluded by the terms of a bona fide collective bargaining agreement. An employer may credit the reasonable cost or the fair value of furnishing section 3(m) facilities toward payment of the minimum wage, or deduct the amount from the compensation, even though the deduction reduces the pay below the statutory minimum. Thus, your client may legally include as part of compensation the reasonable cost of furnishing meals, or deduct this cost from the wages paid.

Section 3(m), however, does not apply to the costs of uniforms and safety equipment furnished. In nonovertime workweeks, an employer may take bona fide deductions for such non-section 3(m) costs to the extent that they do not result in the employees receiving less than the minimum wage in cash free and clear for their hours worked. 29 C.F.R. 531.36(b). In addition, in accordance with an agreement or understanding with the employees, the employer may also take these deductions in overtime workweeks, provided that all straight time hours are paid at not

less than the minimum wage in cash free and clear, and that the regular rate is calculated before any deductions are made. 29 C.F.R. 531.37.

Under the pay policy proposed by your client, since the employees' cash wage is the statutory minimum, the deductions to recover the costs of the uniforms and safety equipment will reduce the cash compensation below the minimum wage. Consequently, such deductions are in violation of the Act. Moreover, it is our longstanding position that the cost of uniforms and safety equipment required by the employer is a business expense of the employer. Thus, even if the employees purchase these items, this cost may not reduce their wages below the minimum wage, nor decrease their overtime compensation.

Additionally, your client cannot exclude the reasonable cost or fair value of furnishing meals which it counts as part of compensation from the calculation of the regular rate. Section 7(e)(2), in pertinent part, excludes from the employee's regular rate, "reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours worked." The reasonable cost or fair value of furnishing board, lodging and other facilities to employees is regarded as compensation under section 3(m) and it does not come within section 7(e)(2). 29 C.F.R. 778.216(d). Where the employer makes payments to employees in the form of facilities which are considered as part of wages, the reasonable cost to the employer or the fair value of furnishing such facilities must be included in the regular rate. 29 C.F.R. 778.116.

Finally, your assertion that the employer's expense of providing transportation to and from pick up points to the job site falls within the section 7(e)(2) exclusion is incorrect. Section 7(e)(2) has no application to these transportation expenses since that provision applies to payments made to an employee as reimbursement for expenses he or she incurs on his employer's behalf, or where the employee is required to expend sums solely by reason of action taken for the employer's convenience. 29 C.F.R. 778.217. It does not apply to expenses incurred by the employer. Also, these transportation expenses are not "facilities" which may be included as compensation under section 3(m). See 29 C.F.R. 531.33(c).

We trust that this satisfactorily responds to your inquiry. If you have further questions on this matter, do not hesitate to contact us.

Sincerely,

Maria Echaveste
Administrator

JAN 22 1997

This is in response to your inquiry concerning the application of the Fair Labor Standards Act (FLSA) to certain employees of Sea Isle City. The employees at issue work in various City departments and also serve as emergency medical technicians (EMTs) with the Sea Isle Volunteer Ambulance Corps, or serve as firefighters in the Sea Isle City Volunteer Fire Department.

You state that police officers employed by the City who have obtained EMT certification are paid $500 in addition to their regular pay. They use their EMT skills while doing their police work. You indicate that the additional $500 (as a result of a wage-hour audit) is now incorporated in the officers' "regular rate" of pay for FLSA overtime compensation purposes.

Some employees of the Public Works Construction Office and City Hall also serve as EMTs for which they receive a similar payment pursuant to the applicable union contract. However, unlike police officers, these employees serve the Sea Isle Volunteer Ambulance Corps, which is a separate nonprofit corporation that, presumably, serves the citizens of the community.

Finally, the Sea Isle Volunteer Fire Department (a City Department) is served by City employees who "volunteer" their services. The City does not employ any paid firefighters or EMTs.

City employees who volunteer as firefighters leave their regular jobs to respond to fire calls and return to their regular city jobs when finished. They are paid $115 annually to reimburse them for mileage and use of their personal vehicles to respond to fire calls.

We understand that the City pays its employees their regular wages for the time spent in volunteer activities that occur

during their normal workday to insure that employees do not lose income as a result of volunteering.

In light of this background, you ask several questions that will be addressed in the order presented. For sake of clarity, we have edited your questions.

Q.1. Must the $500 EMT payment paid to public works and other City employees pursuant to applicable union bargaining agreements be included in calculating overtime under the FLSA? Does it make any difference that the employees at issue perform the EMT services after leaving their City jobs by volunteering their services to the Volunteer Ambulance Corps (a separate nonprofit corporation) and then returning to their city jobs?

A.1. Yes. The $500 EMT payment must be included in calculating the employees' regular rates of pay for the purpose of FLSA overtime compensation. Unless otherwise specifically excluded pursuant to §7(e) of the FLSA, all remuneration paid to employees as compensation pursuant to their employment contract must be included in determining the FLSA "regular rate" for overtime compensation purposes. In other words, the EMT compensation must be treated in the same fashion for other City employees as it is treated in the case of police officers.

It does not matter that the employees are members of the Volunteer Ambulance Corps and that the employees at issue leave their City jobs when performing EMT services.

Q.2. What about the mileage payment of $115 per year paid to City employees who "volunteer" as firefighters?

A.2. Individuals do not lose their status as "volunteers" because they are reimbursed for transportation costs. Volunteers are discussed in 29 CFR Part 553 (copy enclosed). See 29 CFR §§ 553.100 - .106. Payments to reimburse an employee for expenses of the type described may be excluded in calculating the employees' regular rates of pay. This is discussed in the general overtime regulation, 29 CFR Part 778 (copy enclosed). See 29 CFR §778.217.

Q.3. When a City employee who is trained as an EMT leaves his or her regular city job to respond to an EMT call with the Corps, is the employee considered to be working in two types of jobs for the City?

A.3. No. An employee may "volunteer" services to their public agency employer provided such services are not the same type of services which the individual is employed to perform for their employer. For example, a worker in public works who performs refuse collection or street and lighting maintenance/repairs could volunteer as an EMT to the City, or to a separate and independent organization. The hours of service rendered in such situations would not be subject to the minimum wage, overtime, or recordkeeping provisions of the FLSA.

Q.4. Are there any other exemptions/exceptions that would affect the workers described above?

A.4. No.

Q.5. Can police officers who are qualified EMTs volunteer to the Volunteer Ambulance Corps during off-duty hours?

A.5. We cannot give you a definite answer without more information as to the relationship between and the Ambulance Corps, especially the Corps governing board and how its members are appointed and removed. We would also need more information regarding the arrangement between the City and the Corps with respect to the services furnished and territory covered. However, we have enclosed for your guidance opinion letters dated August 19, 1994, and March 18, 1993, that discuss in considerable detail volunteering that is permissible and impermissible under the FLSA. With regard to Q.4., please note paragraph 4 on page 3 of the August 19, 1994 letter.

We trust that the above is responsive to your inquiry. If you have further questions, please contact Walt Steinmann of this office at 202-219-4907.

Sincerely,

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

Enclosures

JAN 22 1997

The Honorable Charles W. Stenholm
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Stenholm:

This is in response to your inquiry on behalf of Jerry L. Hill, CPA, of Stamford, Texas. Mr. Hill is concerned about the application of the Fair Labor Standards Act (FLSA) to a client's business and whether the client's employees are subject of the minimum wage and overtime requirements of the FLSA.

The FLSA is the Federal law of most general application concerning wages and hours of work. Covered and nonexempt employees must be paid not less than $4.75 an hour (increasing to $5.15 an hour effective September 1, 1997) and overtime pay of not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek. The major provisions of the FLSA are described in the enclosed Handy Reference Guide to the Fair Labor Standards Act. Who is covered under the FLSA is discussed on pages 2 - 4 of the Handy Reference Guide.

Your constituent's questions are addressed in the order presented:

> Q.1. Can an employee who "engages" in interstate commerce in performing his or her job but is employed by an "enterprise" whose annual dollar volume of sales or business done is less than $500,000 be subject to minimum wage and overtime pay under the FLSA?
>
> A.1. Yes. As explained on page 3 of the Guide, employees of firms which are not covered enterprises under the FLSA still may be subject to its provisions if they are individually engaged in interstate commerce or in the production of goods for interstate commerce, or in any closely related process or occupation directly essential to such production. We should also point out that there are no sales or dollar volume tests for certain other enterprises named on page 3 (e.g., schools, hospitals, residential care institutions, and public agencies).

Q.2. Assume an employer operates four business establishments. Three of the establishments are operated as 50%/50% partnerships by two individuals; the fourth establishment is operated by the same two partners who own 37.5%/37.5% respectively and a third partner who owns 25%. Are the sales or business done of all four establishments aggregated to determine if the $500,000 FLSA enterprise test is met?

A.2. Yes. For example, the revenues of four fast food restaurants operated as you describe would be aggregated to determine if the FLSA $500,000 annual dollar volume test for "enterprise" coverage has been met.

Q.3. Would a fast food retailer be considered "engaged in commerce" even if 100% of the products purchased are bought within the State?

A.3. Under the enterprise provisions of the FLSA an employer does not have to have employees "engaged in commerce" directly provided that the enterprise "has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person. This literally means that any products, supplies or equipment used by employees of the enterprise that were produced or shipped from outside the State (even though purchased by the enterprise from suppliers within that State) would cause the employees to be covered. For example, the coffee served, cleaning supplies utilized, cooking equipment (ranges fryers, grills) operated, etc., that have been produced outside of or shipped by any person from outside the State, would trigger this provision.

If we can be of further assistance, please do not hesitate to contact this office.

Sincerely,

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

Enclosure

JAN 23 1997

Dear

This is in response to your request for an opinion under the Fair Labor Standards Act, 29 U.S.C. 201, et seq. ("FLSA") as to the treatment of two types of bonus payments pursuant to a plan proposed to your clients, a number of labor organizations. You wish to know if payments under these plans must be included in the employees' compensation for purposes of calculating their regular rate of pay in overtime weeks.

The first question arises from a plan to pay employees lump sum bonuses on a quarterly basis based on operational improvements measured monthly in such things as plant safety, reduction of quality complaints, and production efficiency as measured by a reduction in downtime. Under the plan, improvements resulting in the payment of the bonuses will be determined by measuring the performance for a month against the performance for that month in the previous year.

As a general matter, all remuneration paid to employees except that expressly excluded by the FLSA is included in their total compensation when computing their regular rate for overtime purposes. See 29 C.F.R. 778.108. At 29 C.F.R. 778.211(c) it is provided that bonuses such as those described above fit none of the statutory exclusions from the regular rate and are included in an employee's total compensation when computing the regular rate:

> Bonuses which are announced to employees to induce them to work more steadily or more rapidly or more efficiently or to remain with the firm are regarded as part of the regular rate of pay. Attendance bonuses, individual or group production bonuses, bonuses for quality and accuracy of work, bonuses contingent upon the employee's continuing in employment until the time the payment is to be made and the like are in this category. They must be included in the regular rate of pay. (emphasis added).

When including these bonuses in the regular rate of pay, they must be apportioned back over the workweeks of the period during which they may said to have been earned. See 29 C.F.R. 778.209 for the methods of inclusion of bonuses in the regular rate.

The other question arises from a proposal to pay the employees a lump sum computed by multiplying the employees' pay for an unspecified period by a fixed percentage. You indicate that the payments would include the same percentage of both the employees' straight time earnings and any overtime compensation paid to the employees for the period in question. We believe that such a payment would constitute a percentage of total earnings bonus excluded from computation of the employees' regular rate of pay for overtime purposes pursuant to 29 C.F.R. 778.210. Payment of a bonus and simultaneous payment of the overtime compensation due on the bonus satisfies the overtime requirements of the FLSA and no recomputation is required.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your might require a different conclusion than the one expressed herein. This opinion is also provided on the basis that it is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with the provisions of the FLSA.

I trust that the above is responsive to your inquiry.

Sincerely,

Maria Echaveste
Administrator

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

JAN 23 1997

This is in response to your July 19, 1996 letter to the Secretary of Labor asking a number of questions concerning the application of the Fair Labor Standards Act (FLSA) to the training time spent by public safety trainees attending the Department of Correction's training academy. We understand that you have already received a partial response from the Bureau of Apprenticeship and Training (BAT). This letter will address questions you raised which are within the purview of the Wage and Hour Division (Division).

Question 1: What has been the historic application of 29 C.F.R. 785.32 to the compensablity of time spent in apprenticeship training?

Section 785.32 represents a narrow exception to the general FLSA rule for determining the compensable nature of training time. The general rule, found at 29 C.F.R. 785.27, indicates that training time will be compensable hours of work if, the training is:

1. During regular working hours; **or**
2. Required by the employer; **or**
3. Directly related to the employee's job; **or**
4. Involves the performance of any productive work.

The Division has always judged that the first three of these criteria are satisfied for training time at bona fide fire or police academies, making such time compensable hours of work. 29 C.F.R. 553.214, 553.226(c).

In questioning the application of Section 785.32, you have incorrectly described it as an overtime exemption to the FLSA. It actually provides a narrow exception to the general Section 785.27 test discussed above.

As an enforcement policy, the Division has historically interpreted the Section 785.32 exception to allow employers to treat time spent in bona fide apprenticeship programs as noncompensable **only** when each of the following criteria are met:

1. The time is spent in an organized program of related **supplemental instruction;**

2. The apprentices are employed under a written apprenticeship agreement or program which substantially meets the fundamental BAT standards; and

3. The program does not involve productive work or the performance of the apprentice's **regular duties.**

The time spent at academies such as that operated by the constitutes the primary and regular duty of the apprentices so engaged. It thus does not meet the supplemental instruction and other-than-regular duty criteria necessary for the application of the Section 785.32 exception.

Question 2: Is the application of Section 785.32 limited only to certain types of bona fide apprentices?

No.

Question 3: What is the Department's interpretation of "related, supplemental instruction?"

For purposes of Section 785.32 only, the Wage and Hour Division has interpreted "related supplemental instruction" to be theoretical instruction designed to give apprentices a better understanding of the mechanical activities which they will be called upon to perform in their trades. It should be noted, however, that it does **not** include time spent by apprentices in performing their regular duties or in any active work.

The enclosed Memorandum Opinion in the case of James O'Neil, et al. v. State of Washington By and Through the Washington State Patrol, No. 88-2-00852-1 (April 10, 1992), also provides an interpretation of the meaning of "related supplemental instruction" as used in Section 785.32.

Question 4: Is full time attendance at a training academy considered compensable as regular work hours for FLSA overtime purposes?

Yes, however, see the special provisions applicable to employees of state and local governments found in Section 553.226.

Question 5: Are any of the preceding answers dependent upon the mixture of employer(s) and union(s) who compose a bona fide apprenticeship program?

No.

You indicate that the State and appropriate unions have agreed that overtime will not be paid to trainees while at the academies. We note that the courts are reluctant to recognize the validity of such agreements on the basis that employees subject to the

Act may not choose to "decline" the protections of the Act. Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 302 (1985).

Please note that the FLSA only requires the payment of minimum wage, currently $4.75 an hour, for the academy training time. Further, trainees may be covered by the partial FLSA Section 7(k) overtime exemption (see Section 553.214). The FLSA does not require payments in excess of these requirements.

We trust this satisfactorily responds to your inquiry. If you have further questions on this matter, please contact Michael Ginley of my staff at (202) 219-8412.

Sincerely,

Maria Echaveste
Administrator

Enclosure

JAN 27 1997

This is in response to your request for an opinion as to the impact under the Fair Labor Standards Act, 29 U.S.C. 201 et seq., ("FLSA") of a plan proposed by a company you represent relating to income tax withholding from the wages of its tipped employees. Under a procedure authorized by the Internal Revenue Service (known as the Tip Reporting Alternative Commitment (TRAC)), there are two components to your client's plan. The employer will require employees customarily and regularly receiving tip income to provide a written report (by use of a form prepared by the employer) of the amount of tips received by the employee each pay period. You advise that there is no requirement under the Internal Revenue Code that employers require employees to provide such information to their employers. The Code places the reporting burden directly on employees.

On the basis of the information provided to the employer by its employees as to the amount of their tips, the employer will withhold from the wages and pay to the Internal Revenue Service the amount of taxes appropriate for such amount of employee income. You indicate that the employer benefits from instituting such a plan by gaining protection from IRS audit. You also indicate that there is no particular benefit of the plan to the employees except for the withholding of taxes otherwise owed by the employees, based on tips which the IRS considers income to the employees. You have asked if the reporting requirements and withholding procedure proposed for its tipped employees by your client would result in your client losing the ability to take the tip credit for employees who otherwise meet the requirements for application of this portion of Section 3(m) of the Act, or would otherwise result in violation of the FLSA.

With respect to the tip reporting requirements imposed on the employees pursuant to TRAC, we see no impact on the compensation requirements of the FLSA. The fact that the employer requires the employees to report their tips to the employer does not entitle the employer to exercise dominion over those tips. This requirement instituted by the employer, as with many aspects of employment not governed by the Act, does not affect the minimum wage and overtime requirements of the Act. It is subject to whatever agreement is arrived at between an employer and its employees, either individually or through the collective bargaining process.

You also inquired whether deducting from an employee's wages for tax withholding applicable to TRAC-reported tips violates the FLSA or causes an employer to lose the ability to take the Section 3(m) tip credit. The regulations clarify that taxes assessed against an employee that the employer collects and forwards to the appropriate governmental agency may be included as "wages" under Section 3(m). 29 C.F.R. 531.38. Thus, an employer may deduct from an employee's wages for taxes the employee owes on tip income, such as the employee's share of social security and Federal and State income tax. The fact that the employee reported the tip income to the employer pursuant to the TRAC program is irrelevant to the validity of the deduction from wages.

However, your letter also stated that an employee might not retain all tips received where tips become a source from which deductions are made (such as tips paid out through payroll). We view this circumstance differently. The general principle is that tips are the property of the employee to whom they are given. Barcellona v. Tiffany English Pub, Inc., 597 F 2d 464, 466-67 (5th Cir. 1979). Only tips which an employee receives "free of any control by the employer" may be counted in applying the tip credit. 29 C.F.R. 531.52. Where an employer makes an invalid deduction from tips, the employee has not received the minimum wage "free and clear" as required by 29 C.F.R. 531.35. See Tavern Talent and Placements, Inc. 104 LC 34,773 (CCH) (D. Colo, 1988). Thus, we do not believe that an employer may make deductions for tax withholding directly from an employee's tips, as opposed to withholding from the other wages paid by the employer. See also 26 U.S.C. §§ 3102(c) and 6053(b).

We trust that the above information is responsive to your inquiry.

Sincerely,

Maria Echaveste
Administrator

JAN 27 1997

This is in response to your inquiries concerning the application of the Fair Labor Standards Act to Putnam County Emergency Medical Service (EMS) employees who volunteer as firefighters for the Putnam County Volunteer Fire Service. The question presented is whether the EMS employees are providing "the same type of services" for purposes of §3(e)(4), 29 U.S.C. 203(e) (4), when so engaged. We regret the delay in responding to your inquiry.

You state that the Fire Service was established by the County and is controlled, and funded in part, by the County Commissioners. In addition, some of the municipalities within the County provide funds, equipment and/or facilities for the Service. The County fire department serves those areas of the County that have no municipal services.

Since 1992 Putnam County has operated a free-standing EMS Division that provides county-wide EMS services. To staff this assumed function, the County hired a number of firefighters who were cross trained as emergency medical technicians (EMT)/paramedics and who were formerly employed by the City of Palatka to perform EMS services county wide, which was that jurisdiction's responsibility prior to 1992.

Former City employees that became County EMS employees continue to serve as volunteer firefighters with the County and they perform the exact same firefighter and "first responder" EMS services for the County's Volunteer Fire Service as they previously performed when employed by the City of Palatka.

Approximately 300 volunteer firefighters serve the County's Fire Department. Some are municipal firefighters, others are employees of fire departments or EMS

departments in surrounding cities and counties, and 17 are full-time employees of the County's EMS. In addition, nine temporary on-call EMS employees of the County volunteer in the Fire Service. To reiterate, it is the latter 26 Putnam County EMS employees that are the focal point of your inquiry.

When the EMS employees are serving the County as volunteer "firefighters," they provide "first responder" services at fire or emergency scenes, i.e., primary medical assistance to victims until the on-duty paid County EMS personnel arrive on the scene. Presumably, they also engage in fighting fires and related duties. Of the 300 volunteer firefighters, 131 have first responder training (40 hours of training/certification in EMS assistance), 67 have EMT training (180 hours of training/certification), and 21 have paramedic training (requiring even more advanced life support training/certification).

Section 3(e)(4)(A)(ii) of the FLSA provides that individuals are not "employees" entitled to compensation for hours of service if the volunteer services they provide to a public agency are not "the same type of services" which they are employed to perform by that agency. In the case you describe, the public agency is Putnam County. The term "same type of services" is defined at 29 CFR §553.103 to mean similar or identical services, and refers to the duties and other factors contained in the definitions of the three-digit categories of occupations in the Dictionary of Occupational Titles. Equally important are all the facts and circumstances in a particular case, including whether the volunteer service is closely related to the actual duties performed by or responsibilities assigned to the employee who "volunteers."

In many communities firefighters must have EMS training and skills and they are regularly dispatched to incidents resulting from fires, accidents, natural disasters, crimes, and medical emergencies. In fact, they are regularly dispatched to such incidents and may be the "first responder," even though EMS employees of the same employer may also be dispatched to the scene to provide ambulance services or to provide advanced life support services. Under such circumstances, a firefighter volunteering as an EMS employee (or vice versa) would be considered to be providing the "same type of services" that he or she is employed to perform by the employer.

In light of the facts you have provided, we conclude that Putnam County EMS employees are providing the same type of services when they serve the Putnam County Volunteer Fire Service. Consequently, they may not volunteer without compensation in accordance with the requirements of the FLSA. The separate

employment of firefighters and EMS employees by the two different jurisdictions, the City and County, prior to 1992 presented less of a likelihood of coerced services in the form of volunteering. But since that time the employment by the County of firefighters and EMS employees performing the same duties for a single employer, the County, creates the possibility that an employee could be pressured or feel pressured to provide "volunteer" services to the County. It was concern about the possibility of such a situation that led Congress to provide narrow circumstances under which individuals could provide volunteer services to the same public agencies that also employed them as employees. This concern was explained in the legislative history of the 1985 Amendments: "[T]he Committee wishes to prevent any manipulation or abuse of the minimum wage requirements through coercion or undue pressure upon employees to 'volunteer.'" Senate Report No. 99-159, page 14, 2 U.S. Cong. News, page 662.

We note, however, that EMTs employed by other jurisdictions are not so affected, and may continue to volunteer to the Putnam County Volunteer Fire Service, even if "mutual aid" agreements exist between their employing jurisdictions and Putnam County. In this regard, see 29 CFR §553.105.

Whether the EMT/firefighter reports to the scene in an EMS vehicle or with a fire truck is not relevant in our view. This would appear to be more governed by chance then design. The basic duties performed at the scene are the same or closely related services required for public safety.

We trust that the above is responsive to your inquiry.

Sincerely,

Maria Echaveste
Administrator

FEB - 7 1997

Dear

This is in response to your request for an opinion as to the application of the professional exemption from minimum wages and overtime provided by Section 13(a)(1) of the Fair Labor Standards Act, 29 U.S.C. 201, 213(a)(1) ("FLSA") to a group of employees of one of your clients. Your client produces scientific products such as fetal bovine serum, cell culture media, enzymes, chemical "markers and ladders'" for working with DNA, reagents, and other biological supplies. You state that these products are used by scientists to analyze and map DNA structure for various organisms, up to and including human beings.

The employees in question are sales representatives who sell primarily by telephone the products produced by your client. You state that the sales work requires a sophisticated understanding of the science involved in working with the materials produced by your client. The employees in question also provide technical advice to customers based on the nature of the customer's scientific research as it relates to the nature of the products produced by your client. You indicate that the employer requires all of these employees to have obtained at least a bachelor degree in biology or related knowledge of cell culture and molecular biology, and you indicate that approximately 40% of these employees have advanced degrees. Finally, you indicate that the employee are paid a salary in excess of $250 dollars a week. On the basis of the preceding, you believe that the employees are subject to the Section 13(a)(1) exemption for the learned professions.

Section 13(a)(1) of the FLSA provides a minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in Regulations, 29 C.F.R. Part 541. The regulatory requirements for the professional exemption are provided at 29 C.F.R. 541.3. Included in the conditions for the learned professions exemption is the requirement that the employee for whom the exemption is sought perform work requiring the consistent exercise of discretion and judgment in its performance. 29 C.F.R. 541.3(b).

The employees in question would seem to require knowledge and understanding of scientific principles and processes in order to understand the nature of their employer's product so as to be able to sell it. With that information they have the ability to

sell their employer's products. But we do not view this knowledge and understanding necessary for a sales position as being equivalent to the consistent exercise of discretion and judgment in the performance of day-to-day duties, as required by the regulations.

There very well may be other employees of the company who make decisions concerning the processes, tests and procedures necessary to produce the employer's products on a consistently successful basis. And in making these decisions these employees may exercise discretion and judgment on a day-to-day basis. But we view the making of these decisions, and the exercise of discretion and judgment which such decision making might require, as distinct from the knowledge and use of the results of these decisions by the sales employees in selling the employer's product. There is no indication that the employees in question participate in any processes which require the exercise of discretion and judgment. It is possible for the sales personnel about whom you have inquired to have obtained a great deal of knowledge about their employer's products without consistently exercising the type of discretion and judgment contemplated by the professional exemption.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a different conclusion than the one expressed herein. This opinion is also provided on the basis that it is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with the provisions of the FLSA.

I trust that the above information is responsive to your inquiry.

Sincerely,

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

FEB 12 1997

This is in response to your letter requesting an opinion as to whether your client's meal period policy would comply with section 785.19 of 29 CFR Part 785.

You state that the employees who are subject to the meal period policy are called store associates whose duties consist of sales, customer service, merchandising, security, administration, and general store maintenance. The store associates who work at least 5.5 hours are entitled to a 30 minute meal period that is unpaid, unless they are interrupted and not able to take the entire 30 minute break. These employees will be paid for the entire 30 minute meal period if they must return to the sales floor on two or more occasions. If they must return to the sales floor one time during the meal period, the meal period will be extended for the amount of time that they spend on the sales floor, so that the employees receive an entire 30 minutes of uninterrupted meal period time. You state that the store associates must spend their meal period in a store break room off the selling floor if only one store associate is on duty during the meal period. These employees may leave the store only if at least two other store associates remain in the store. The meal period of the employees who spend it in the break room is unpaid, unless they are interrupted and must return to the sales floor on two or more occasions.

As you are aware, section 785.19 of 29 CFR Part 785, states that bona fide meal periods that occur during the scheduled workday are not hours worked if the employee is completely relieved from duty for the purposes of eating regular meals. It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period.

On the other hand, section 785.17 of 29 CFR Part 785, states that an employee who is required to remain "on call" on the employer's premises or so close thereto that he cannot use

the time effectively for his own purposes is working while "on call." If, however, the employee is actually relieved of all duties for the meal period, except for rare and infrequent emergency calls, the meal period can be excluded from hours worked except when the period is actually interrupted. It should be noted that it is probable that employees eating lunch on the premises would always be subject to call in serious emergencies, but this alone would not make the meal period working time. However, if the meal period is frequently interrupted by calls to duty, the employee would not be considered relieved of all duties and the meal period would have to be counted as hours worked.

Based on the information contained in your letter, it is our opinion that the store associates who take a full 30 minute meal period without interruption would not have to be compensated for that meal period. However, the store associates who are required to remain "on call" in the company break room would have to be compensated for the meal period, unless their meal period is totally uninterrupted or is only interrupted for rare and infrequent emergency calls to duty.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein.

We trust that the above information is responsive to your inquiry.

Sincerely,

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

FEB 25 1997

This responds to your letter of October 16, 1996, concerning the application of the Fair Labor Standards Act (FLSA) to a salaried exempt employee. This executive, administrative, or professional employee works a full workweek in his exempt position and then works up to eight additional hours on rare occasions in a nonexempt position for the same employer.

The FLSA is the Federal law of most general application concerning wages and hours of work. An employee who is covered under this law and not otherwise exempt must be paid a minimum wage of not less than $4.75 an hour for all hours worked and not less than one and one-half times his regular rate of pay for all hours worked in excess of 40 in a workweek.

Section 13(a)(1) of the FLSA provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in the Regulations at 29 C.F.R. Part 541. An employee may qualify for exemption if all the pertinent tests relating to duties, responsibilities and salary, as discussed in the appropriate section of the regulations, are met. One such test requires that an otherwise exempt employee devote no more than 20% (40% for a retail or service establishment employee) of his hours worked in the workweek to nonexempt work.

An exempt employee must be paid on a salary basis, as described in section 541.118 of the regulations. As stated in section 541.118, an employee will be considered to be paid "on a salary basis" if under his or her employment agreement he or she regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his or her compensation, which amount is not subject to reduction because of the quality or quantity of the work performed.

There is no requirement that the exempt employee be paid for extra work in a nonexempt position. However, it should be noted that if the employee devotes more than 20% (40% for a retail or service establishment employee) of his time in the workweek to the extra work, he will not be classified as an exempt employee for that workweek and must be paid the full

minimum wage and overtime compensation during that workweek at a regular rate determined by dividing his full salary for that week by 40 hours. If the employee loses the exemption on a regular and recurring basis, we would question whether the employee is actually an exempt employee, and the exemption may be denied in all workweeks in which it is claimed, including those weeks when no work in the nonexempt position was performed.

It has been our longstanding position that additional compensation besides an exempt employee's guaranteed salary is not inconsistent with the salary basis of payment. Thus, extra compensation by the hour for hours worked in excess of 40 in a workweek would not defeat the exempt status of an otherwise exempt employee.

I trust that this satisfactorily responds to your inquiry.

Sincerely,

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

FEB 27 1997

This responds to your letter of July 1, 1996, requesting an opinion on whether it is permissible under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, for your nonprofit ambulance service to give some type of credit or consideration to volunteers, which the volunteers would exchange for merchandise to be used to carry out the work of the ambulance service. Your letter does not present sufficient information for us to provide a definitive response. However, we do offer some thoughts regarding the issue.

Under each of the three proposals that you mention in your letter, the ambulance service would give the volunteers some type of credit, e.g., tokens, points, stamps, based on the number of hours the volunteers donate to the company. The volunteers would then exchange the credit for such merchandise as uniforms, stethoscopes, radios, etc. You suggest that the merchandise would be used on the ambulance and remain the property of the ambulance service. You also indicate that you are considering the proposals in order to encourage volunteerism, and to prevent individuals from losing money through their volunteer work.

The Department has consistently maintained that where an individual donates his services "without contemplation of pay," to a religious, charitable, or similar nonprofit organization, (s)he may be a volunteer not covered by the Act. See Opinion Letter No. 626 [Wage-Hours] Lab. L. Rep. (CCH) ¶30,616 (June 28, 1967); Opinion Letter No. 687 [Wage-Hours] Lab. L. Rep. (CCH) ¶30,681 (November 7, 1967); Opinion Letter No. 598 [Wage-Hours] Lab. L. Rep. (CCH) ¶30,587 (May 1, 1967). However, if the parties agree that the individual will perform services for even nominal wages, (s)he is not a volunteer and must be compensated in accordance with the FLSA. Opinion Letter No. 687 supra.

We are unable to discern from your letter how the proposals would work in practice. As examples, it is unclear whether the volunteer would select an item to be purchased, and the ambulance service would actually buy and place it into operation where needed or give it to the individual for his or her personal use

while volunteering, or whether the ambulance service would convert the credits to cash or some other negotiable instrument which it gives to the volunteer to purchase an item. If the ambulance provides cash or some other negotiable instrument, such as a gift certificate, the more control and discretion the volunteer has in spending the money, the more it may appear that the ambulance service is compensating the volunteers for the work. Considering that your proposals are tied to the number of hours that volunteers contribute services, the exchange of credit for a negotiable instrument would increase the appearance that the exchange is intended to be compensation.

Further, it is unclear how your proposals would encourage individuals to volunteer or prevent them from losing money as a result of donating their time. In this respect, it appears from your letter that the volunteers would use the credit which the ambulance service gives them to purchase for the company items that the company would normally buy to operate effectively. Also, except for the uniforms, the items that you listed as examples of the types of merchandise that the volunteers would purchase with the credit seem unrelated to the amount of time a volunteer works. Additionally, it is unclear how the proposals would benefit the ambulance service, since it appears that the company would still be providing the money to purchase the items in question.

If you have further questions, please let us know.

Sincerely,

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

FEB 27 1997

This is in response to your request for an opinion as to the salary requirements for exempt, part-time employees. You would like to know whether the specific salary requirements for executive, administrative, and professional employees are reduced for part-time employees.

As you know, section 13(a)(1) of the FLSA provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, professional, or outside sales capacity. In order to qualify for exemption under this section, an employee must meet all of the tests relating to duties, responsibilities, and salary that are contained in the appropriate section of the Regulations, 29 CFR Part 541 (copy enclosed).

Section 541.118(a) of the regulations states that an employee will be considered to be paid "on a salary basis" within the meaning of the regulations if, under the employee's employment agreement, the employee regularly receives each pay period, on a weekly or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. The employee must receive his or her full salary for any week in which he or she performs any work without regard to the number of days or hours worked.

Therefore, it is our opinion that the specific salary requirements for executive, administrative, and professional employees may not be reduced for part-time employees.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your

request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of the FLSA.

We trust that the above is responsive to your inquiry.

Sincerely,

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

Enclosure

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

February 28, 1997

This is in reply to your letter asking whether an *au pair* employer may take credit against the minimum wage for the employer's payment of tuition on behalf of the *au pair*. You forwarded a legal memorandum with your letter -- prepared by [redacted] -- that concludes that such credit may be taken for tuition costs, and you requested our review of the issue. Mr. [redacted] memorandum also raises the issue of whether an *au pair* employer may take credit against the minimum wage for medical insurance, so we have considered and opine on that matter as well. For the reasons discussed below, it is our opinion that an *au pair* employer may not take credit in meeting its minimum wage obligations for either tuition costs or medical insurance under the circumstances addressed in the memorandum.

TUITION

The Department has opined in several opinion letters -- including the April 3, 1967, Wage and Hour Administrator's Opinion cited in the memorandum -- that tuition may be credited against the minimum wage under certain circumstances. Such advice is based on the Department's regulations at 29 CFR §531.32, which discuss "facilities," other than board and lodging, for which an employer may take credit against the minimum wage. Tuition furnished by a college to its student employees is among the facilities listed in §531.32(a) for which an employer may take credit.

Credit for facilities under §531.32 is conditioned by 29 CFR §531.30, which requires that the employee's acceptance of such facilities be voluntary and uncoerced. Section §531.32 was thus not intended to address the present situation where an employee must take courses as a condition of participation in the *au pair* program, and an employer is required to pay for the employee's tuition. Instead, it generally applies to colleges which employ students who voluntarily take courses. In none of the situations addressed by the aforementioned opinions was the employee obligated to accept the "facility" or the employer required by law or regulation to provide such tuition costs.

Consistent with the "cultural exchange" purpose of the *au pair* program administered by your agency, USIA regulations at 22 CFR 514.31(k) require the host family to pay the cost of an *au pair*'s academic course work in an amount not to exceed $500. This situation is thus clearly distinguishable from one where an employee voluntarily accepts tuition credit as part of his/her wages and the employer is under no obligation to provide such tuition. An *au pair* employer must pay tuition costs up to $500 and the *au pair* must take courses as an element of participation in the program. Thus, the payment is not voluntary and uncoerced as required by §531.30.

We also note that in quoting §30c03(a)(5) of the FOH, the memorandum omitted the conditional clause at the end of the sentence. The full text of this provision states:

> Tuition furnished to an employee for courses or training for the individual's own personal benefit is a bona fide "facility" for which a wage credit may be taken, unless the training is related to employment or is required to retain employment. (Emphasis in original.)

In this case, the training is required to retain employment since the regulations require the *au pair* to be enrolled in an accredited post-secondary institution and the host family to provide tuition. Thus, a host family employer may not take credit for tuition costs under such circumstances.

INSURANCE

Section 531.32(c), which discusses "facilities" other than board and lodging for which an employer may take credit against the minimum wage, provides that medical services and hospitalization which the employer is bound to furnish under workmers' compensation acts, or similar Federal, State, or local law, are not "facilities" within the meaning of that section. In addition, the Department has issued several opinions on this issue, holding that payments for insurance premiums are not "facilities." These opinions flow from Section 7(e) of the FLSA, which excludes payments for such health insurance and other benefit plans from the computation of the regular rate of pay. Therefore, an employer may not take credit for such payments.

The question also arises whether an employer may make a deduction from an employee's wage to pay an employee's medical insurance premium to a third party, and thereby reduce the wage below the statutory minimum wage. Such a deduction is permissible only if: (a) the employer is not required to provide the insurance; (b) the employer derives no direct or indirect benefit or profit; and (c) the deduction is made upon a voluntary assignment to a third party by the employee, which would be

revocable at any time (see §531.40). It is our view that these conditions are not satisfied under the *au pair* program.

Although USIA regulations at 22 CFR §514.14 provide that "Sponsors shall require each exchange visitor to have insurance . . . ", the legal memorandum which you submitted suggests that a host family is required to provide such insurance. Furthermore, a USIA document, entitled "Guidelines Governing the Designation and Administration of Au Pair Programs" states that "[o]rganizations must maintain health/accident insurance [and] shall provide the minimum currently in effect, which is . . . medical and accident coverage."

If the host family is required by law, regulation or some other legal instrument to provide such insurance, a deduction from wages to recoup the cost is not permissible. In such a situation, the provision of insurance is a normal operating expense of the employer. Moreover, we believe that the employer derives a benefit from providing insurance to the *au pair*, thereby making such deduction impermissible. Without insurance the *au pair* cannot participate in the program and cannot provide child care to the host family. It is irrelevant that the medical insurance also benefits the *au pair* (which would likely be the case in any employment situation); if the employer derives <u>any</u> benefit, such deduction may not be made. Even assuming that the host family were not required to provide such insurance, it could not reduce an *au pair*'s wage below the statutory minimum wage for an insurance premium without the *au pair*'s voluntary authorization, which the employee must be free to revoke at any time.

I apologize for the delay in responding, and hope that the foregoing is responsive to your request.

Sincerely,

John R. Fraser
Acting Administrator

MAR - 4 1997

This is in response to your letter of July 2, 1996, concerning your client's proposal to reduce the workweek of certain exempt employees from 40 hours to 32 hours with a commensurate reduction in pay. You ask whether such a reduction will affect the exempt status of these employees.

Section 13(a)(1) of the Fair Labor Standards Act provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in the Regulations at 29 C.F.R. Part 541. An employee may qualify for exemption if all the pertinent tests relating to duties, responsibilities and salary, as discussed in the appropriate section of the regulations, are met.

An exempt employee must be paid on a salary basis, as described in section 541.118 of the regulations. Section 541.118 provides that an employee will be considered to be paid "on a salary basis" if under his or her employment agreement he or she regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his or her compensation, which amount is not subject to reduction because of the quality or quantity of the work performed.

Your client is an employer in the mental health field. Because of a reduction in spending by the state on programs administered by this employer, it must reduce operating costs. The employer has the option of either reducing the workweek for certain exempt employees or laying off employees. It proposes to reduce the workweek of the exempt employees from 40 to 32 hours with a commensurate reduction in pay. None of the employees affected will be paid less than $250 per week after the reduction.

As stated in the Administrator's opinion letter of November 13, 1970 (WH-93), Section 541.118 does not preclude a bona fide reduction in an employee's salary which is not designed to circumvent the salary basis requirement. A reduction in salary

resulting from a reduction in the workweek under the circumstances you describe will not defeat an otherwise valid exemption. However, if the amount of the deduction reduces the salary of an employee below the amount required by the regulations, the exemption will be lost for that employee.

I trust that this information has been responsive to your inquiry.

Sincerely,

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

MAR 11 1997

This is in response to your inquiry concerning the application of the Fair Labor Standards Act (FLSA) to your employment as a police canine officer. Your inquiry concerns whether on-call duty periods that you are assigned by your employer are compensable under the FLSA.

You state that a canine officer is on-call two out of every six weeks on a 24-hour standby basis. While on-call an officer works his or her regular shift and may not take leave of any kind. He or she carries a pager and must respond to a call within ten minutes, and is restricted from drinking alcoholic beverages. In light of these facts, you ask whether the FLSA requires any compensation for such restrictions.

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 employees. 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. See 29 CFR §785.17 (copy enclosed).

In Bright v. Houston Northwest Medical Center Survivor, Inc., 934 F.2d 671, 30 WH Cases 609 (5th Cir. en banc 1991), cert. denied, 30 WH Cases 1176 (US Sup Ct 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.

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 on-call period, and as many as 13 calls on occasion. The court stressed the "fact based nature" of these 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.

In our view, the requirements imposed by your employer 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.

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. This is discussed in 29 CFR §778.223 (copy enclosed).

We trust that the above is responsive to your inquiry.

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

Enclosures

MAR 12 1997

This is in response to your letter of December 6, 1996, inquiring about whether an employee working as a security guard/driver on an armored car would be covered by the Fair Labor Standards Act (FLSA), 29 U.S.C. 201.

The FLSA is the Federal law of most general application concerning wages and hours of work. An employee who is covered under this law and not otherwise exempt must be paid a minimum wage of not less than $4.75 an hour for all hours worked and not less than one and one-half times his or her regular rate of pay for all hours worked in excess of 40 in a workweek.

Section 13(b)(1) of the FLSA, 29 V.S.C. 213(b)(1) provides a complete overtime pay exemption for any employee whose hours of work are subject to regulation by the U.S. Department of Transportation. In construing the extent of the Section 13(b)(1) exemption, the courts have ruled that employees do not have to cross a state line to be subject to the exemption if they are transporting property destined for another state. Such property may consist of checks drawn on out-of-state banks transported by employees of an armored car company who do not drive across a state line. Baez v. Wells Fargo Armored Service, 938 F.2d 180 (11th Cir. 1991). In that case the armored car employees were subject to Section 13(b)(1) even though all the transportation of out-of-state checks took place within 35 miles of Miami, Florida.

It is also not necessary that the employer hold a permit from the Interstate Commerce Commission for the overtime exemption to be applicable to its drivers and drivers' helpers. The exemption turns on the power of the Department of Transportation to regulate the employer, not the actual exercise of that power.

I trust that this information has been responsive to your inquiry.

Sincerely,

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

MAR 17 1997

Thank you for your letter concerning the application of the Fair Labor Standards Act (FLSA) to salaried professional employees who are paid additional compensation for hours worked in excess of 40 per week.

We carefully reviewed your letter and concluded that your concerns involving

relate to actions taken by the State of Department of Labor under State law, which apparently is similar to the FLSA. We understand that the administration of the Federal law is not an issue and the U.S. Department of Labor is not involved in the case. As you may be aware, compliance with the FLSA does not relieve employers from having to comply with State laws setting standards higher than the FLSA. Under these principles, States may set their own labor standards which can vary from Federal requirements.

With respect to your questions on the proper interpretation of the requirements for exemption from the FLSA as a "professional" employee, we do not interpret our regulations to require time-and-a-half compensation for hours worked over 40 in a week by *bona fide,* salaried professional employees who are otherwise exempt, merely because the employer provides additional compensation for the additional hours. The Department has consistently held that, standing alone, extra hourly compensation for working more than 40 hours in a week does not defeat an otherwise applicable FLSA exemption for a professional employee, provided the employee meets all of the regulatory tests relating to duties, responsibilities, and compensation including the requirement for payment of a *bona fide* guaranteed salary as defined in the Department's regulations on "salary basis" of pay in 29 CFR § 541.118.

The Federal regulations explain that a salary may consist of a predetermined amount constituting all or part of the employee's compensation. In other words, under U.S. Department of Labor regulations, additional compensation besides the guaranteed salary, such as discussed in your letter, is not inconsistent with the salary basis of payment and does not invalidate an otherwise applicable exemption (29 CFR § 541.118(b)). The Department considers several factors when determining if employees in fact are paid a guaranteed salary or on an hourly basis, including whether the employer reduces employees' pay by the hour for each hour absent from work and whether additional compensation is paid on an hourly basis, among others. Where all the pertinent facts indicate that an employee is paid on an hourly basis rather than on a guaranteed salary basis, the exemption does not apply.

In Brock v. The Claridge Hotel and Casino, 846 F.2d 180 (3d Cir.), cert. denied, 488 U.S. 925 (1988), to which your letter refers, you should be aware that the employees in that case were strictly hourly-paid workers, not salaried workers. Their pay always varied in direct relation to their actual hours of work and there was no evidence that the employer ever paid them so as to conform to a "guarantee." The court thus found that the employees were not salaried and, therefore, correctly held that they could not qualify for exemption. See, also, Klein v. Rush Presbyterian St. Luke's Medical Center, 990 F.2d 279 (7th Cir. 1993); Michigan Ass'n of Gov't Employees v. Michigan Department of Corrections, 992 F.2d 82 (6th Cir. 1993). We believe that those decisions correctly denied exempt status to employees where the facts demonstrated that the employees had not actually been paid on a "salary basis."

Again, thank you for letting me know of your concerns about this important issue. If I may be of further assistance, please do not hesitate to contact me at 219-8305.

Sincerely,

John R. Fraser
Acting Administrator

4-29-97

This is in response to your inquiry on behalf of of is concerned about the mandatory charges that her employer, deducts from her pay for cafeteria food services at work whether she chooses to eat at the facility or not.

We have considered your constituent's comments under the provisions of the Fair Labor Standards Act (FLSA), which is the Federal law of most general application concerning wages and hours of work. This law requires that all covered and nonexempt employees be paid not less than the minimum wage of $4.75 an hour (increasing to $5.15 an hour effective September 1, 1997) and overtime pay of not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek. The major provisions of the FLSA are described in the Handy Reference Guide to the Fair Labor Standards Act.

Under the FLSA, wages may take the form of cash or "facilities" as defined in 29 CFR Part 531. Section 3(m) of the FLSA permits an employer to count towards its minimum wage obligation the reasonable cost or fair value of board, lodging, or other facilities furnished to employees. As indicated in §531.29, §3(m) applies to situations where board, lodging or other facilities are furnished in addition to a stipulated wage or where such charges are deducted from a stipulated wage.

Meals furnished to employees are regarded as primarily for the benefit and convenience of the employee. See §531.32. Thus, deductions for meals would not violate the minimum wage and/or overtime requirements of the FLSA. (Or violate the salary basis requirements for certain "exempt" employees). Although §531.30 of the regulations provides that an employee's acceptance of facilities must be "voluntary and uncoerced," such provisions have been rejected by several appellate as well as district courts with respect to meals provided to employees. Wage and Hour

no longer enforces the "voluntary" provision with respect to meal credits or deductions.

Thus, where an employee is required to accept a meal provided by the employer as a condition of employment, Wage and Hour will take no enforcement action, provided that the employer takes credit (or makes deductions) for no more than the actual cost incurred.

If we can be of further assistance, please do not hesitate to contact this office.

Sincerely,

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

Enclosures

MAY 20 1997

This is in response to your inquiry on behalf of Pastor of the Pastor is concerned about the application of the Fair Labor Standards Act (FLSA) to church employees and to individuals who volunteer in church activities.

The FLSA applies to employees individually engaged in interstate commerce or in the production of goods for interstate commerce and to all employees in certain enterprises which are so engaged. The FLSA contains no per se exemption or exception from its requirements for church employees. The major provisions of the FLSA are explained in the enclosed Handy Reference Guide to the Fair Labor Standards Act.

Employees of a church, synagogue, or mosque are individually covered under the FLSA where they regularly and recurrently use a computer, telephone, telegraph, or the mail for interstate communication; or receive, prepare, or send written material across State lines. Individual coverage will not be asserted, however, for office and clerical employees who only occasionally or sporadically devote negligible amounts of time to writing interstate communications or otherwise handle interstate communications or make bookkeeping entries relating to interstate transactions.

Whether or not enterprise coverage applies to the operations of a nonprofit religious organization depends on several factors. Generally enterprise coverage is not applicable to employees engaged exclusively in the operation of the church, etc., since their activities are not performed for a "business purpose" within the meaning of the FLSA. However, where a nonprofit religious organization employs employees in connection with the operation of the type of institutions described in sections 3(r) and 3(s) of the FLSA (hospitals, elementary or secondary schools, preschools, residential care institutions, and institutions of higher education), they will be covered on an enterprise basis, since such

activities have, by statute, been declared to be performed for a business purpose.

Additionally, activities of religious organization may be performed for a "business purpose" where, for example, they engage in ordinary commercial activities such as operating a printing and publishing plant. In this regard, see Mitchell v. Pilgrim Holiness Church Corp., 210 F.2d 879 (7th Cir.), cert. denied, 347 U.S. 1013 (1954); Tony and Susan Alamo Foundation et al. v. Secretary of Labor, 471 U.S. 290 (1985). However, contributions, pledges, donations, tithes and other funds raised through activities such as raffles and games that are used in the furtherance of the educational, eleemosynary and religious activities of a nonprofit organization are not included in computing the annual dollar volume of business done by an enterprise.

Individuals not employed by the church but who volunteer their services without contemplation of pay to serve as lectors, cantors, ushers, choir members, religious education or "Sunday School" teachers, etc., would not be considered employees. On the other hand, a secretary or bookkeeper employed by the church could not "volunteer" additional services to provide secretarial or bookkeeping services without compensation in accordance with the provisions of the FLSA, but could be an usher, sing in the choir or teach Sunday School. In this regard, we are also enclosing a copy of the publication Employment Relationship Under the Fair Labor Standards Act.

We hope that his discussion of the FLSA and its application to religious institutions will be helpful to Pastor . If we may be of further assistance, please do not hesitate to contact this office.

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

Enclosures

JUN 11 1997

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 contact 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 x 26 ÷ 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

JUN 19 1997

This is in response to your letter requesting an opinion on the application of Section 13(a)(1) of the Fair Labor Standards Act (FLSA) to the position of program specialist.

You state that the responsibilities of the program specialist are coordinating, scheduling, and attending test planning and other meetings; preparing various reports (e.g. trip, weekly status, meeting summary, and review summary status) and briefing material; participating in the review and comment of program documents in support of product life cycle management; participating in the review and development of test plans, test procedures, problem trouble reports, and test reports; and establishing review cycle and tracking mechanism for all documents produced and reviewed by ACT-320.

Section 13(a)(1) of the FLSA provides a minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, professional or outside sales capacity, as those terms are defined in the enclosed Regulations, 29 CFR Part 541.

An employee may qualify for exemption as a bona fide administrative employee if all of the pertinent tests relating to duties, responsibilities and salary, as discussed in section 541.2, are met. Under the "short" test of section 541.2(e)(2), an employee who is paid on a salary or fee basis of at least $250 per week may qualify for exemption if the employee has as his or her primary duty office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customers, which includes work requiring the exercise of discretion and independent judgment.

It appears that the performance of the duties that you have outlined depends primarily upon the use of skills and experience in applying techniques and procedures, rather than the exercising of discretion and independent judgment, within the meaning of section 541.207 of Regulations, Part 541. In addition, these activities are in the nature of "production" work, as distinguished from duties directly related to management policies or general business operations, within the meaning of section 541.206 of the Regulations. It is our opinion that the program specialist, as described, does not qualify for the administrative exemption. The employee(s) must, therefore, be paid in accordance with the minimum wage and overtime requirements of the FLSA.

We trust that the above information is responsive to your request.

Sincerely,

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

Enclosure

JUN 30 1997

This is in reply to your letter of January 13 requesting an opinion as to whether licensed veterinary technicians (LVTs) are exempt professional employees under section 13(a)(1) of the Fair Labor Standards Act (FLSA).

You indicate that you employ licensed veterinary technicians who attend a minimum of two years college and are licensed by the State of New York to perform various medical procedures.

Section 13(a)(1) of the FLSA provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, professional, or outside sales capacity. In order to qualify for exemption under section 13(a)(1), an employee must meet all the pertinent tests relating to duties, responsibilities, and salary as contained in Regulations, 29 CFR Part 541. One of the tests for professional status under section 541.3(a)(1) requires that the employee perform work which requires knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study. For example, the professions of law, medicine, nursing, and theology have been traditionally recognized as professional within the meaning of section 541.3, since such professions require a prolonged course of specialized intellectual instruction. See section 541.301 and 541.302. Further examples of professions meeting the requirement for a prolonged course of specialized intellectual instruction and study are given in section 541.301(e)(1).

A "prolonged course of ... study" has generally been held to include only those employees who have acquired at least a baccalaureate degree or its equivalent which includes an intellectual discipline in a particular course of study as opposed to a general academic course otherwise required for a baccalaureate degree. Work which can be performed by employees with education and training which is less than

that required for a bachelor's degree would not be work of a bona fide professional level within the meaning of the regulations.

It is clear that veterinary technician work involves primarily the use of skills and procedures which do not require four years of college or university training to obtain a degree in a professional discipline. The information provided suggests that the LVTs are best characterized as skilled nonexempt technicians. Therefore, it is our opinion that the LVTs do not meet the requirements in Regulation 541.3 for exemption as a professional employee. As a result these employees would be subject to both the minimum wage and overtime requirements of the FLSA and should be paid accordingly.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein.

We trust that this satisfactorily responds to your inquiry.

Sincerely,

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

JUL 21 1997

This is in response to your letter requesting an opinion as to the application of the Fair Labor Standards Act (FLSA) to the proposed flexible work schedule of

You represent 19,000 employees throughout the U.S. and locations around the world. In an effort to retain and attract the most qualified workers, the company has embraced the flexible and alternate workweek program that would allow employees to work 4 ten-hour days or 9-hour days over a two-week period with one extra day off.

You are specifically concerned about the 9-hour work days over a two-week period in which the employee would work four 9-hour days and one 8-hour day for a total of 44 hours in the first workweek. Instead of being paid for all 44 hours, the employee would only be paid for 40 hours and the additional 4 hours would be put into a "bank." In the second workweek, the employee would work four 9-hour days for a total of 36 hours, and he/she would take off one 8-hour day (either Monday or Friday). At the end of the second workweek, the four banked hours would be added to the 36 hours for a total of 40 hours. All hours above the base hours in either week would be paid as overtime.

You asked the following question about employees working 9-hour days over a two-week pay period:

Q. Are there any Federal regulations that would prohibit such work practices with regard to hourly and non-exempt employees?

A. Yes. The regulations implementing the FLSA, 29 CFR Part 778 (copy enclosed), prohibit the proposed work practices regarding hourly, non-exempt employees. Section 778.104 does not permit the averaging of hours over a two-week pay period as indicated in your proposal to "bank" four hours in the first workweek to be added to the hours worked in the second workweek. A non-exempt employee must be paid an overtime premium pay for all hours worked in excess of 40 in a workweek. However, if you use Friday at noon as the beginning of the workweek, an employee may work the hours you suggest in consecutive workweeks with no overtime pay due to the employee. Thus, the 8 hours worked on Friday is split (4/4) to indicate the end of workweek 1 and the beginning of workweek 2. This is illustrated as follows:

Workweek 1:

F(PM)	S	S	M	T	W	T	F(AM)
0	-	-	9	9	9	9	4

Workweek 2:

F(PM)	S	S	M	T	W	T	F(AM)
4	-	-	9	9	9	9	0

Although an employee's workweek may begin on any day and at any hour of the day, the workweek once selected must be a fixed and regularly recurring period of seven consecutive 24-hour periods. The beginning of the workweek may be changed if the change is intended to be permanent, but not where the change is designed to evade the overtime requirements of the FLSA. (29 CFR 778.105).

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this

opinion is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of the FLSA.

We trust that the above information is responsive to your inquiry. If we can be of further assistance to you, please do not hesitate to contact us.

Sincerely,

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

Enclosure

OPINION LETTER

JUL 21 1997

Dear

This is in response to your request for an opinion as to whether your client's proposed plan for deducting wages from salaried exempt employees after the employees have exhausted their available sick leave is in compliance with section 541.118 of Regulations, 29 CFR Part 541.

The plan provides that an employee would accrue one sick day every two months (a newly hired employee would accrue the first sick day two months after commencing work). Deductions from the salary would only be made when the employee does not have any sick days accumulated for use, or when the employee has exhausted all of his or her sick days. The plan further provides that such deductions would be made when an employee is absent for one entire day, and the amount of salary deducted per day would be determined by dividing the employee's weekly salary by the average number of days worked per week by the employee over the past three months.

As you know, section 541.118(a) indicates that an employee will be considered to be paid on a salary basis within the meaning of the regulations if under his or her salary agreement he or she regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his/her compensation, which amount is not subject to reduction because of variations in quality or quantity of work performed. The employee must receive his or her full salary for any week in which the employee performs any work without regard to the number of days or hours worked.

Section 541.118(a)(3), however, indicates that deductions may be made from the salary for absences of a day or more occasioned by sickness or disability (including industrial accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability. Thus, if the employee's particular plan, policy or practice provides compensation for such absences, deductions for absences of one or more full days because of sickness or disability may be made before an employee has qualified under such plan, policy or practice, and after he/she has exhausted his/her leave allowance thereunder.

Your client's plan appears to comply with the above requirements of the regulations in part; however, we take issue with the plan's method for determining the amount of salary deducted for the sick day absences. It is the Department's long standing position that where there is an understanding that a normal workweek consists of five or six workdays, the deduction permissible for a day of absence under section 541.118 must be calculated on the basis of one-fifth of a five-day workweek, or one-sixth of a six-day workweek, whatever the case may be.

Additionally, you ask if an employer may legally deduct the salary of an employee in a situation where the employee works at home about one-half hour reviewing files on a day in which the employee calls in sick. It is our position that a deduction cannot be made from the salary of a salaried exempt employee in such a situation, even when the employee spends only one-half hour reviewing files at home. The regulation provides that a deduction may occur only if the absence is for "a day or more." 29 CFR 541.118(a)(3).

Your second question, as far as we can determine, deals with a policy whereby your client's salaried exempt employees may "make-up" a sick day rather than having their salary deducted as specified in the Regulations. We call your attention to the fact that the scheduling of work hours of salaried exempt employees is the responsibility of the employer. Such an employee may be required to work any number of hours or days for his or her agreed upon salary. The responsibility for establishing a workable policy for "making up a sick day" (if the employer so chooses) rather than making a legal deduction from the salary of the employee is an obligation of the employer. The Regulations do not prohibit such a policy or provide guidelines for establishing one.

We trust that the above information is responsive to your inquiry.

Sincerely,

Michael F. Ginley
Director, Office of Enforcement Policy

JUL 21 1997

Dear

This is in response to your inquiry concerning the application of the overtime pay requirements under § 7(k) of the Fair Labor Standards Act (FLSA) to officers of the Police Department.

We have edited your questions to reflect our understanding of the issues presented:

Q.1. If a 28-day work period has been adopted under § 7(k) for police officers, how many hours may be worked in the 28-day work period before overtime compensation is due under the FLSA?

A.1. 171 hours. Overtime compensation is due for all hours worked in excess of 171 hours in a 28-day work period that has been designated by the employer at time and one-half the employees' regular rates of pay. When one 28-day work period ends, the next 28-day period commences.

Q.2. If a 14-day work period has been adopted, what is the corresponding FLSA threshold?

A.2. 86 hours. Overtime compensation is due for all hours worked in excess of 86 hours in a 14-day work period.

Q.3. During a period between June 1990 and October 1991 police officers were paid overtime after 80 hours worked. What is the implication of this practice?

A.3. While such overtime payment was not required under the FLSA, the law does not prohibit an employer from applying a more beneficial overtime standard to its employees.

Q.4. The City chose to pay employees for a 30-minute meal period, but did not count the meal period as "hours worked" for overtime purposes. Is this practice proper under the FLSA?

A.4. If the employees at issue were completely relieved from duty during the meal period, the meal periods would not have to be counted in determining "hours worked" for FLSA minimum wage and/or overtime compensation purposes, and the pay for such time may be excluded in calculating the employees' regular rates of pay.

If you have any further questions, please do not hesitate to contact this office.

Sincerely,

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

JUL 23 1997

This responds to your letters of October 26, 1994, and August 19, 1996, concerning the criteria a wholesale salesman must meet in order to qualify for the minimum wage and overtime exemption contained in section 13(a)(1) of the Fair Labor Standards Act (FLSA).

Section 13(a)(1) of the FLSA provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in the Regulations at 29 C.F.R. Part 541. An employee may qualify for exemption if all the pertinent tests relating to duties, responsibilities and salary, as discussed in the appropriate section of the regulations, are met. It has long been our position that job titles by themselves are insufficient yardsticks to determine the exempt or nonexempt status of any group of employees under section 13(a)(1) of the FLSA. It is the actual duties, responsibilities, and salary, of the employee, not the job title, that determine the exempt or nonexempt status of any individual employee under section 13(a)(1). However, we can offer the following general comments in answer to your question.

We assume that the wholesale salesman in question is paid a salary of at least $250 per week. Pursuant to section 541.2(e)(2), an employee who is paid on a salary basis of at least $250 per week may qualify for exemption as a bona fide administrative employee if the employee's primary duty consists of the performance of office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customers, which includes work requiring the exercise of discretion and independent judgment.

The duties contemplated by the regulations as being "directly related to management policies or general business operations" are those "relating to the administrative operations of a business as distinguished from production" work. 29 C.F.R. 541.205(a). The exemption is limited to "persons who perform work of substantial importance to the management or operation of the business of his employer or his employer's customers." Id.

An administrative employee need not "participate in the formulation of management policies or the operation of the business as a whole." 29 C.F.R. 541.205(c). The exemption includes an employee who plans or directs the implementation of such policy. It encompasses persons who either carry out major assignments in conducting the operations of the business, or whose work substantially affects business operations. 29 C.F.R. 541.205. The primary focus of the administrative/production dichotomy is to distinguish between "employees who administer the business's affairs and those who are engaged in its production activities." Dalheim v. KDFW-TV, 918 F.2d 1220, 1230 (5th Cir. 1990).

The Third Circuit case Martin v. Cooper Electric Supply Co., 940 F.2d 896 (3rd Cir. 1991), holding that a group of wholesale salespersons were not entitled to the administrative exemption, may offer you some guidance. The court rejected the employer's arguments that its salespersons "serviced" the business because they engaged in negotiations and represented their employer in their sales efforts. The court explained that "servicing" within the meaning of section 541.205(b) means "activity ancillary to an employer's principal production activity." 940 F.2d at 904. Thus, the court reasoned that the salespersons did not "service Cooper's business by making wholesale sales -- wholesale sales is Cooper's business. Any negotiation and representational duties undertaken . . . in the course of ordinary selling do not constitute administrative-type servicing . . . . These activities are only routine aspects of sales production[.]" Id. at 904-905.

In addition, the court interpreted the term "promoting sales" in section 541.205(b) to mean "something more than routine selling efforts focused simply on particular sales transactions. Sales promotion . . . consists of marketing activity aimed at promoting (i.e., increasing, developing, facilitating and/or maintaining) customer sales generally. Promoting sales does not encompass activities necessarily included in the process of closing specific sales." 940 F.2d at 905.

An employee whose primary duty is sales promotion within the meaning of section 541.205(b) engages in marketing activity geared to furthering the company's overall sales effort, and is not engaged in the ordinary day-in-day-out selling activity directed at making specific sales. Examples of employees engaged in administrative sales promotion work would include those performing public relations or advertising, those who design and/or organize a company's overall sales campaign, or those who advise management on general sales policy, or formulate such policy.

Section 541.205(a), in addition to construing the phrase "directly related to management policies or general business operations," also provides that the phrase "limits the exemption

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to persons who perform work of substantial importance to the management or operation of the business of his employer or his employer's customers." 29 C.F.R. 541.205(a). The regulations make it clear that the fact that the employer may suffer serious financial loss due to the employee's failure to adequately perform his duties does not make the employee's work substantially important for purposes of the exemption. 29 C.F.R. 541.205(c)(2).

The regulations also require that an administrative employee perform work requiring the exercise of discretion and independent judgment. The regulations describe the requisite exercise of discretion and independent judgment as "involv[ing] the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered." 29 C.F.R. 541.207(a). The interpretation also states that the term "implies that the person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance." Id. The term must be distinguished from the use of skills or techniques, or the application of known standards or established procedures beyond which the employee is not authorized to deviate. A high level of discretion and independent judgment is necessary to qualify for the exemption.

A wholesale salesperson who has some leeway in negotiating, but is guided by the company's procedures and standards would not be exempt. The job may require a significant level of skill and proficiency, but that is not the same thing as discretion. The regulation makes it clear that "[t]he mere fact that the employee uses his knowledge and experience does not change his decision . . . into a real decision in a significant matter." 29 C.F.R. 541.207(c)(3).

The decisions of wholesale salesmen typically do not involve matters of policy or significant importance, but are limited to routine day-to-day operational matters. The regulation states that the requisite discretion and independent judgment "may include the kind of discretion and judgment exercised by buyers, certain wholesale salesmen, representatives, and other contact persons who are given reasonable latitude in carrying on negotiations on behalf of their employers." 29 C.F.R. 541.207(d)(2) (emphasis added). The regulation also states that it is impossible "to state a general rule which will distinguish in each of the many thousands of possible factual situations between the making of real decisions in significant matters and the making of choices involving matters of little or no consequence." Id. Thus, whether a wholesale salesman is exempt or nonexempt depends on a thorough evaluation of all the facts

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and circumstances pertaining to the individual employee's actual duties, responsibilities and salary.

I trust that this satisfactorily responds to your inquiry.

Sincerely,

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

7/23/97

JUL 23 1997

Dear

This is in response to your letter requesting clarification of language within the definition of sections 541.118(a) and 541.118(4). We must presume that you mean 541.118(a)(4).

Your specific question and our response are as follows:

Q. If an exempt employee is out on jury duty for a full week, and performs no work during that week, do they have to be paid their salary during that week (to meet the salary test requirement)?

A. No. While section 541.118(a)(4) of Regulations, Part 541 states that deductions may not be made for absences of an employee caused by jury duty, attendance as a witness, or temporary military leave, section 541.118(a) states that in any workweek in which the employee performs no work for the employer, the employer need not pay the employee any part of his or her salary. In other words, subsection (a) takes precedence over subsection (a)(4) of section 541.118 in cases where the employee performs no work in the workweek.

To be of further assistance to you, we are enclosing an opinion letter (December 2, 1993) that also discusses your concern.

We trust that the above information is responsive to your inquiry. If we can be of further assistance, please do not hesitate to contact us.

Sincerely,

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

JUL 23 1997

This responds to your letter of May 1, 1997, concerning Wage and Hour's present enforcement position on the issue of whether the substitution of paid vacation, personal or sick leave for partial-day absences will defeat the exempt status under section 13(a)(1) of the Fair Labor Standards Act.

Wage and Hour's current enforcement position remains as stated in the enclosed letters dated April 14, 1992, and July 17, 1987. Where an employer has bona fide benefit plans for vacation, personal or sick leave, it is permissible to substitute or reduce the accrued leave in the plans for the time an employee is absent from work, even if it is less than a full day, without affecting the salary basis of payment, if by substituting or reducing such leave the employee receives in payment an amount equal to his or her guaranteed salary. Where the employee's absence is for less than a full day, payment of an amount equal to the employee's guaranteed salary must be made even if an employee has no accrued benefits in the leave bank account, or if the leave account has a negative balance.

I trust that the above is responsive to your inquiry.

Sincerely,

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

Enclosures

JUL 28 1997

Dear

This is in response to your inquiry concerning the application of the Fair Labor Standards Act (FLSA) to certain travel time by police officers in patrol cars outside of normal duty hours. We regret the delay in responding to your inquiry.

You ask whether the time spent by a police officer commuting to and from work in a marked police car outside his or her normal duty hours must be treated as hours worked under the FLSA. Generally, subject to certain conditions (e.g. the travel must be within the normal commuting area), the answer is no. You ask a number of follow-up questions that will be addressed in the order presented:

Q.1. Does it matter if use of the vehicle is mandatory?

A.1. Yes. The Employee Commuting Flexibility Act of 1996 (Section 2102 of PL 104-188) that amends the Portal-to-Portal Act of 1947 provides, among other matters, in order for the travel time to be considered noncompensable, the use of the vehicle by the employee must be pursuant to an agreement between the employer and employee or the employee's representative. This requirement may be satisfied by a written agreement but a written agreement is not required. A collective bargaining agreement may also serve this purpose, or an understanding based on established industry or employer practices. See House Report 104-585 (May 20, 1996) at page 4.

Q.2. Does it matter if the officer is required to monitor the police radio channel while commuting?

A.2. No. Monitoring the police radio channel while commuting would not, per se, change an otherwise

noncompensable home to work (or vice versa) trip into hours worked. See 29 CFR §553.221(f).

Q.3. Does it matter if the officer is required to respond to emergency calls while commuting to work.

A.3. Yes. The officer would be considered to be "on-duty" from the moment that he or she responds to the emergency. See 29 CFR §553.221(f).

Q.4. Does it matter if the officer is required to carry specialized police gear in the vehicle?

A.4. No. Merely transporting tools or supplies of the type described (riot gear, specialized weapons, crime scene material, or first aid materials) would not change the noncompensable nature of the commute in the police vehicle. House Report 104-585 at page 5.

Q.5. Would transporting a police dog in the vehicle make the commute compensable?

A.5. No. We think that transporting the police dog is akin to transporting tools and supplies as discussed in A.4.

We trust that the above is responsive to your inquiry.

Sincerely,

/s/

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

JUL 29 1997

This is in response to your inquiry concerning the compensability of certain time spent by police officers in training classes. We regret the delay in responding to your inquiry.

Your questions will be addressed in the order presented. Our answers assume that the training occurs outside of duty hours, i.e., on the employee's own time. The fact that the employer may allow officers to attend some of the training during duty hours, i.e., "on the clock" does not, per se, control whether the training time during off-duty hours is compensable under the FLSA. The general rules applicable to training and related matters are found at 29 CFR §§ 785.27 - .32. Please note particularly the exceptions to the compensability of training time discussed in §§ 785.30 - .31. If the training at issue meets these latter criteria it is not necessary to further consider the issue.

Q.1. A patrol officer wants to attend a class in homicide investigation techniques. In this officer's police department, patrol officers do not investigate homicides; such investigations are handled by investigators assigned to the homicide unit. While the officer feels that the homicide training will be helpful with regard to job performance, the police department believes such training is not necessary to performance as a patrol officer. Accordingly, the police department will not pay for the course, but will give the officer some time off to attend class. Is the homicide investigation training taken during off-duty hours compensable under the FLSA?

A.1. No. As you know, all the criteria in §785.27 must be met in order to exclude the training time from "hours worked." Assuming that tests (a), (b) and (d) are met, only test (c) remains. Homicide investigation training is not necessary for patrol officers since

they do not investigate homicides; such function is the responsibility of investigators from the homicide unit. Thus, under the rule in §785.28, homicide training would appear to be for the purpose of advancement through upgrading the employee to a higher skill. (Presumably homicide investigators are in a higher ranked job commanding more pay than patrol officers). Although it may incidentally improve the officer's skill in investigating non-homicide cases, such training would not be considered directly related to the employee's job under test (c).

Q.2. Consider the same facts and assumptions as in Q.1. except (in another department) the patrol officer has the responsibility to perform the homicide investigation. Would the homicide training be compensable for the patrol officer?

A.2. Yes. The test in (c) would not be met because the training is directly related to the patrol officer's job responsibility. Therefore, homicide training for this patrol officer would be compensable.

Q.3. A police officer wants to attend a stress reduction class specifically designed for law enforcement personnel. The employing department is not willing to pay for the class or to have the officer attend while on duty, but will allow the officer some limited time off to travel to the class.

A.3. You have not provided sufficient information about the nature and purpose of the course for us to conclusively opine. However, if the stress training were to focus directly on police situations involving pursuit or apprehension of suspects, riot control, and similar highly charged intervention situations, the training would appear to be directly related to the patrol officer's job. On the other hand, stress training focusing strictly on maintaining personal health and fitness by focusing on preventative health care, diet, exercise, recreation, etc., would appear to be only indirectly related to employment situations encountered by police officers.

We trust that the above is responsive to your inquiry.

Sincerely,

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

AUG 11 1997

This is in response to your letter of March 18, 1997, concerning a sick leave plan for employees exempt under section 13(a)(1) of the Fair Labor Standards Act (FLSA). You wish to know whether the sick leave plan would affect the salary basis of payment as discussed in section 541.118 of the Regulations, 29 C.F.R. Part 541.

As described in your letter, the sick leave plan of your client provides:

> [A]n employee will be paid his or her normal salary for the employee's first occurrence of absence in a calendar year. The employee will not be paid for the first two days of each and every subsequent occurrence of absence in a calendar year; rather, employees will be paid beginning on the third day of absence for each subsequent occurrence. Under no circumstances will salary deductions occur for partial day absences.

You ask whether the sick leave plan is considered to be a bona fide plan under section 541.118(a)3). The plan you describe would meet the criteria set forth in section 541.118(a)(3) of 29 C.F.R. Part 541 for a bona fide plan, policy, or practice of providing compensation for loss of salary occasioned by sickness and disability. Thus, the salary basis of payment is not affected for otherwise exempt employees subject to the plan. The fact that employees are not paid for the first two days of every occurrence of absence after the initial occurrence of absence in a calendar year does not affect the bona fides of the plan as long as deductions are not made for absences of less than an entire day

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein.

We trust that the above is responsive to your inquiry.

Sincerely,

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

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

AUG 19 1997

This is in further response to your inquiry concerning the application of the minimum wage requirements of the Fair Labor Standards Act (FLSA) to the employment of an *au pair* child care worker. An *au pair* is subject to the Exchange Visitor Program regulations, 22 CFR §514, of the U.S. Information Agency (USIA).

You have petitioned the Wage and Hour Division pursuant to 29 CFR §531.4 and seek credit against the FLSA minimum wage requirement for the cost of educational expenses, two weeks paid vacation, and credit for the "personal" use of the family automobile by the *au pair*. For the reasons discussed below, it is our opinion that an *au pair* employer may not take credit in meeting its minimum wage obligations for any of the three items.

EDUCATIONAL EXPENSES

Although the Department has previously ruled that the cost of tuition may be credited against the minimum wage under certain circumstances, the Department has specifically ruled in a February 28, 1997 opinion that an *au pair* employer may not take credit for educational expenses. Credit for facilities under 29 CFR §531.32 is conditioned by 29 CFR §531.30, which requires that the employee's acceptance of such facilities be voluntary and uncoerced. Section 531.32 was thus not intended to address situations where an employer is required, as a condition of participation in a federal program, to provide the employee the facility for which the employer wants to take credit. In the present situation, an *au pair* employer is required by USIA regulations at 22 CFR §514.31(k) to pay for an employee's tuition. Therefore, an *au pair* employer may not take credit for tuition payments. A copy of the February 28, 1997 ruling with a more detailed discussion is enclosed for your information.

PAID VACATION

As stated in 29 CFR §531.29, the legislative history of section 3(m) of the FLSA, which permits an employer to take credit against the minimum wage for board, lodging or other facilities customarily furnished to the employee, "clearly indicate[s] that [it] was intended to apply to all facilities furnished by the employer as compensation to the employee . . ." emphasis added. Consistent with section 7(e)(2) of the FLSA, the Department's regulations at 29 CFR §778.216 and §778.218 provide that payments made for occasional periods when no work is performed, such as those for vacation, cannot be considered compensation. Since such payments for hours not worked are not compensation, they cannot be "other facilities" for purposes of the FLSA. Thus, an *au pair* employer may not take credit against the minimum wage for two weeks paid vacation. We note that, in any event, a cash payment is not a "facility." Even if a paid vacation were considered "other facilities," as discussed above, an employer may not take credit for

facilities which the employer is required by law or regulation to provide. Since a two-week paid vacation is specifically required by USIA regulations at 22 CFR §514.31(j)(4), no deduction or credit against the minimum wage would be permissible.

USE OF AUTOMOBILE

The Department has consistently ruled that an employer may not take credit for the personal use of an automobile where such automobile is incident of and necessary to the employment. This view was clearly approved by the court in Brennan v. Modern Chevrolet Co., 363 F. Supp. 327 (N.D. Tex. 1973), affd. 491 F.2d 1271 (5th Cir. 1975), in which a company automobile used by a car salesman was found not to be a facility, and therefore credit for its cost could not be taken to meet the minimum wage, despite the fact that 90% of the car's use by the salesman was personal. In the present case, the *au pair* employer is required by 22 CFR §531.4(k) to "facilitate the enrollment and attendance of the *au pair*" in an accredited post-secondary institution. If the *au pair* uses the automobile, even occasionally, to attend such institution or to transport the child being provided care for any reason, credit for the automobile's use, whether personal or work-related, is inappropriate. A copy of the Modern Chevrolet decision with a more detailed discussion is enclosed for your information.

HOURS PER WEEK

You also inquire about the amount of the stipend an *au pair* employer must pay in situations where the *au pair* works less than the maximum 45 hours per week. The FLSA only requires payment of the minimum wage for hours worked. However, the Department has no authority to lower the amount of the minimum stipend where the *au pair* works less than the maximum. USIA regulations assume that, without a specified maximum limit, an *au pair* would work more than 45 hours per week. This assumption is reflected in USIA regulations at 22 CFR §514.31(b)(2) and §514.31(j)(1), which require, respectively, that an *au pair* work no more than 45 hours per week and that an *au pair* be provided a stipend of not less than $115.00 per week (which reflects the minimum wage times 45 hours, minus deductions). You should direct your inquiry regarding this 45-hour issue to the USIA, as the Department of Labor has no involvement with these regulatory provisions.

We trust that the above is responsive to your inquiry.

Sincerely,

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

Enclosures

AUG 29 1997

Dear

This is in response to your letter concerning application of the Fair Labor Standards Act (FLSA) to employees of a semi-private club facility that includes a dining room and banquet facilities. You seek an opinion on the proper calculation of a server's overtime pay.

With respect to dining room service, a 15% "discretionary" gratuity is added to each sale. The customer's register receipt informs the customer of this charge, but the customer is not otherwise informed that this charge is added or that the customer may reduce the charge if there is a problem with the service. All gratuities are paid to servers, buspersons and bartenders in the weekly paycheck Where tips are not shared, the gratuity paid to the server is based on the server's sales for the day. With respect to banquet service, there is an 18% mandatory gratuity added to every sale. Tips for banquets, buffets, and brunches are shared with buspersons and bartenders. Tips are shared equally for banquets and are shared up to a maximum of 15% for buffets and brunches. The employer does not retain any portion of the service charges.

Where an employer imposes a service charge on each sale, such charges do not have the character of tips, which are always purely discretionary with the customer. 29 CFR 531.55(a). While you characterize the dining room service charge as discretionary, it is in effect mandatory since the customer is not aware that he may reduce or eliminate the charge. Under such circumstances, it is our position that payments to employees from the service charges collected by the employer are direct compensation under the direct control of the employer and must be included in the regular rate of all recipients for overtime purposes. Moreover, the tip credit rules do not apply under the circumstances described in your letter.

You also inquire concerning the applicability of the exemption under section 7(i) of the FLSA to servers, particularly bartenders and bussers who share in the service charges. Under section 7(i) of the FLSA, an employee of a retail or service establishment who is paid in full or in part on a commission basis may qualify for exemption from the overtime pay requirements of section 7(a) in a workweek

if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum wage (currently $4.75 an hour), and (2) more than half of the employee's compensation for a representative period (not less than one month) represents commissions on goods or services. A service charge levied on a customer by an establishment such as a hotel or restaurant for services by waiters or waitresses may qualify as a commission under section 7(i) since such charge bears a direct relationship to the sale of goods or services by the establishment. Tips received by such employees from the customers are not commissions for the purposes of section 7(i).

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein.

We trust that this satisfactorily responds to your inquiry.

Sincerely,

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

AUG 29 1997

This is in response to your inquiry concerning the application of the Fair Labor Standards Act (FLSA) to certain training that will mandate for its deputy sheriffs and correctional officers. The issue of concern is whether the training is compensable under the FLSA.

As a result of labor negotiations with the Deputy Sheriffs Benevolent Association (DSBA or "union"), the County has proposed that deputy sheriffs and correctional officers receive certified first responder (CFR) training[1] in exchange for enhanced pension benefits sought by the union. Such training would be performed on the employees' own time without additional monetary compensation. The parties agreed that CFR certification will be mandatory for all employees, and that it will conform to New York State requirements. The County will provide 48 hours of classroom training based on the curriculum mandated by the State, and will use State certified instructors.

In light of this background you ask two questions:

> Q.1. Is the CFR classroom training time compensable under the FLSA?
>
> A.1. Yes. Where an employer (or someone acting in the employer's behalf or interest) either directly or indirectly requires employees to undergo training, the time so spent is clearly compensable. The employer has usurped and controlled employees' time and must pay for it. 29 CFR §§785.27 -.28. While the State may prescribe standards and certification for emergency medical training, the requirement that all law enforcement employees of the County take such training is a requirement imposed by the County. Nothing you have provided suggests that the State, per se, imposes

[1] CFR training is designed to provide care before the arrival of an ambulance at the scene of a medical emergency.

such training on all law enforcement employees. Or, that in order to be employed in a law enforcement capacity in , CFR training is mandatory.

Because of the foregoing, we consider the general rule in 29 CFR §785.27(b) as controlling rather than 29 CFR §553.226(b)(1).

Q.2. If the parties increased the workweek to 43 hours for law enforcement employees, could the extra three hours be designated for CFR training purposes?

A.2. Yes. The parties may adopt the overtime compensation provisions of §7(k) in lieu of collectively bargained contract standards more beneficial to employees by agreement. The parties may not, however, negotiate a contract provision that waives employees' statutory rights under the FLSA. Brooklyn Savings Bank v. O'Neil, 328 U.S. 697 (1945); Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981). Further, the parties may agree as to when training hours may be scheduled during workweeks or work periods.

We trust that the above is responsive to your inquiry.

Sincerely,

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

AUG 29 1997

Dear

This responds to your letter of February 28, 1997, concerning the costs that can properly be included in the reasonable costs of meals customarily furnished employees under section 3(m) of the Fair Labor Standards Act (FLSA). Specifically, you ask whether meal credit amounts established by the Industrial Welfare Commission in 1989 may be considered to be the "reasonable costs" of such meals furnished by the Hotel to its employees during their shifts.

Section 3(m) of the FLSA permits an employer to consider as part of the wages paid an employee the reasonable cost or fair value of facilities furnished an employee. The furnishing of meals to employees is discussed in section 531.32 of 29 C.F.R. Part 531. However, an employer may not claim as part of wages facilities not used by an employee. For example, an employer may not claim as part of wages the reasonable cost or fair value of meals not eaten by an employee.

In determining the reasonable cost of meals furnished to employees, we would generally include only the actual cost to the employer of the food and the cost of its preparation. We would not include any cost which the employer incurs whether or not the employees were furnished meals. In an establishment which sells meals to the public, items such as management salaries, employee insurance, payroll taxes, menus, holiday and vacation pay, operating supplies, laundry, telephone, maintenance services, advertising, licenses and taxes, insurance and depreciation, franchise cost, travel cost, cash over or short, building and equipment rental, promotion and general administrative costs are a part of the general cost of the operation of the employer's business establishment, which may not be charged to the reasonable cost of the employees' meals.

Furthermore, in the typical restaurant the employees obtain their own meals from the kitchen and return their own empty plates so that only the proportional cost per meal for the kitchen personnel who are engaged in food preparation would be attributable to the reasonable cost of employees' meals rather than the entire labor cost associated with serving a meal to a customer. Wage costs attributable to the food preparation employees may not be claimed if they would be paid at the same rate even if meals were not provided to employees. Other numerous small cost items would be treated in accordance with the above principles.

As stated in your letter, the meal credit amounts established by the Industrial Commission are as follows: Breakfast -

$1.50, Lunch - $2.10, and Dinner - $2.80. There is not enough information in your letter for us to determine whether these amounts reflect the actual cost to the employer of furnishing meals to employees. If after reviewing your situation in light of the above principles, you still believe that the cost of the meals furnished by the is in excess of the meal credit amounts determined by the Commission, please furnish additional information indicating the exact impact of each particular item to show the additional cost the employer bears in furnishing meals to the employees so that we may give you a definitive answer as to the amount which may be claimed as a meal credit.

I trust that this satisfactorily responds to your inquiry.

Sincerely,

Daniel F. Sweeney
Office of Enforcement
Fair Labor Standards

SEP - 5 1997

This is in response to your letter in which you request an opinion under the Fair Labor Standards Act (FLSA) concerning a client's proposed pay plan whereby it would pay overtime premium compensation to employees who work 2 different jobs, for which different rates are paid, based on the rate paid for the secondary job.

Under your client's plan employees would work 7 hours a day, Monday through Friday, on their regular jobs. In addition they may work additional hours during the week or on weekends on "secondary" jobs, which are distinctly different from their regular jobs, and for which different rates of pay have been established. The employees would be paid their normal rates of pay when performing their regular jobs and the rate established for the secondary jobs when performing them during hours in excess of 7 in a day and on weekends. Your client would pay overtime premium pay at a rate of one and one-half times the rate established for the secondary job for all hours over 40 in a workweek, regardless of when in the workweek the secondary job was performed. For example, if an employee were to work 35 hours at his/her regular job and two 7-hour shifts at a secondary job, overtime pay would be computed for 9 hours (35 + 14 - 40 = 9) at one and one-half times the rate paid for the secondary job regardless of whether the work was performed early in the week or later, i.e., even if work during hours 41 through 49 were not performed on the secondary job, but on the primary job.

Section 7(g)(2) of the FLSA provides an exception from the general regular rate requirement of section 7(a) and allows, under specified conditions, the computation of overtime pay on the basis of the bona fide hourly rate in effect when the overtime work is performed. Where the provisions of section 7(g)(2) are met, as discussed in 29 CFR 778.415 through 778.421, the required overtime compensation may be paid at a rate of not less than one and one-half times the hourly nonovertime rate established for the type of work performed during such overtime hours. The recordkeeping requirements for employers who pay employees under section 7(g)(2) agreements are contained in section 516.25 of 29 CFR Part 516.

As stated in section 778.419(a)(2), the overtime hours for which the overtime rate is paid must qualify as overtime hours under section 7(e)(5) [hours in excess of 8 in a day or 40 in a week or in excess of the employee's normal working hours]; 7(e)(6) [hours on Saturdays, Sundays, and other "special days"]; or 7(e)(7) [hours outside of the hours established by agreement or contract as the basic workday or workweek]. In addition, the number of overtime hours for which the overtime rate is paid must equal or exceed the number of hours worked in excess of the applicable hours standard.

In our view, the time worked on the "secondary" job would not qualify under section 7(e)(5), (6), or (7) because your client does not pay premium pay for overtime hours on other than a 40-hour-workweek basis and the hours on the "secondary" job are not necessarily "overtime" hours. In most weeks, some of the hours worked by an employee on his/her regular job would occur beyond the 40th hour. Your client would have to pay for overtime hours either at one and one-half times a weighted average rate (see 29 CFR 778.115) or, under section 7(g)(2), on the rate -- regular or secondary -- at which an employee actually works during each hour over 40 in a workweek.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client that has been under investigation by the Wage and Hour Division, or that has been in litigation with respect to, or subject to the terms of, any agreement or order applying or requiring compliance with the provisions of the FLSA.

Sincerely,

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

SEP -8 1997

This responds to your letter of February 7, 1997, in reply to the Administrator's letter of January 21, 1997, concerning the legality of a proposed employment agreement under section 3(m) of the Fair Labor Standards Act (FLSA). Specifically, you ask whether an employer may credit $.87 per hour against the minimum wage of $4.75 as the reasonable cost of furnishing meals, beverages, and snacks to employees employed for extended periods at offshore or remote locations.

Section 3(m) of the FLSA permits an employer to consider as part of the wages paid an employee the reasonable cost or fair value of facilities furnished an employee. The furnishing of meals to employees is discussed in section 531.32 of 29 C.F.R.

In determining the reasonable cost of meals furnished to employees, we would generally include only the actual cost to the employer of the food and the cost of its preparation. We would not include any cost which the employer incurs whether or not the employees were furnished meals. In an establishment which sells meals to the public, items such as management salaries, employee insurance, payroll taxes, menus, holiday and vacation pay, operating supplies, laundry, telephone, maintenance services, advertising, licenses and taxes, insurance and depreciation, franchise cost, travel cost, cash over or short, building and equipment rental, promotion and general administrative costs are a part of the general cost of the operation of the employer's business establishment, may not be charged to the reasonable cost of the employees' meals.

Furthermore, in the typical restaurant the employees obtain their own meals from the kitchen and return their own empty plate, and food preparation employees might be paid at the same rate even if meals were not provided to employees. Only any extra costs that are directly attributable to the cost of providing employees' meals, rather than the entire labor cost associated with serving a meal to a customer, may be charged as a reasonable cost. Other numerous small cost items would be treated in accordance with the above principles.

You state in your letter that the employer's cost of furnishing meals to employees is $10.43 per day or about $.87 per hour for a 12-hour day. Assuming, with the above principles in mind, that $10.43 is the actual daily cost of furnishing meals to each

employee, the employer may claim $.87 per hour as a meal credit against the minimum wage.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein.

I trust that this satisfactorily responds to your inquiry.

Sincerely,

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

SEP 10 1997

This is in response to your inquiry on behalf of
is concerned about the application of the Fair Labor Standards Act (FLSA) to his employment by the

As you know, Mr. is employed as a full-time custodian by the School District, and has been seeking to be employed as a substitute teacher by his employer. There is nothing in the FLSA that prevents an employer from employing an individual in two or more jobs or capacities. As a general rule, however, all hours worked from the employer must be combined for the purpose of determining proper minimum wage and/or overtime compensation.

An exception to this general rule is provided by § 7(p)(2) of the FLSA. If the terms of this exception are met, the School District would not be obligated to combine the hours worked in both jobs for FLSA overtime pay purposes. The issue of concern is whether this provision can be applied in Mr. case.

Section 7(p)(2) provides that where State or local government employees, solely at their option work occasionally or sporadically on a part-time basis for the same public employer in a different capacity from their regular employment, the hours worked in the different jobs shall not be combined for the purposes of determining overtime compensation under the FLSA. The part-time employment must meet both tests. This is explained in 29 CFR § 553.30, which was previously furnished to your constituent.

Clearly, the "different capacity" test would be met in the employment situation described. However, the occasional or sporadic employment test is problematic. This is because the need for "substitute" teachers is difficult to predict. Thus, the School District (upon the advice of its counsel) has been reluctant to use this exception. We have been advised that the District's budget cannot sustain overtime compensation for combined employment should the 7(p)(2) exception not apply.

On May 15, 1997, a conference call was initiated by the School District and its labor counsel with this office on Mr. behalf. He was advised that it is not possible for us to conclude that the occasional and sporadic test would be met without specific facts concerning the frequency of the substitute teaching assignments. In response to our questions, we were advised that in all likelihood, . would be substituting at least one day per week should the School District employ him in such capacity.

As indicated in 29 CFR § 553.30, the Department has determined that where an employee, in addition to his or her regular job, works additional hours on a part-time basis every week or every other week, the additional work does not constitute intermittent and irregular employment within the meaning of § 7(p)(2). Absent any facts to the contrary, we conclude that this exception could not apply, if the substitute teaching occurred with the frequency discussed above.

We thought that your constituent understood our position after the conference call, and that we did not agree with his view that substitute teaching qualified, per se, as occasional or sporadic employment within the meaning of § 7(p)(2). We regret any misunderstanding that may have occurred. Ultimately, whether will be employed as a substitute teacher in addition to his regular employment by the School District is a management decision that has to be made by the District.

If you have any further questions, please do not hesitate to contact this office.

Sincerely,

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

cc: Washington, D.C., Office

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

SEP 12 1997

This is in response to your request for an opinion as to possible application to employees of your client, of the exemption from minimum wage and overtime requirements in Section 13(a)(1) of the Fair Labor Standards Act, 29 U.S.C. 201, 213(a)(1) ("FLSA"). In particular, you ask about the application of the administrative exemption, as defined in the Secretary of Labor's regulations at 29 C.F.R. 541.2.

The employees in question are classified as "investigator", and their duties generally involve background investigations of various types of employees such as executives, contract employees, law enforcement employees, astronauts, and others. The investigators conduct interviews and obtain information from various other sources in order to develop the pertinent facts concerning the character, habits, fitness, suitability, qualifications and other matters which may affect the subject's fitness for employment. Upon the completion of an investigation, an investigator compiles the information which was gathered in a written report.[1]

Section 13(a)(1) of the FLSA provides a minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, professional, or outside sales capacity as those terms are defined in the Regulations at 29 C.F.R. Part 541. In order to qualify for exemption under Section 13(a)(1), an employee must meet all of the pertinent tests relating to duties, responsibilities, and salary as discussed in appropriate sections of the regulations. A determination of the exempt or nonexempt status of an employee must be made on an individual basis

[1] This opinion is based upon the facts as set forth in your request.

that takes into account all of the pertinent facts relating to the actual work performed by the employee in question. An employer claiming that an employee is exempt from the FLSA under Section 13(a)(1) bears the burden of proving that all of the requirements for exemption are met in a particular case.

An employee may qualify for exemption as a bona fide administrative employee if all of the pertinent tests relating to duties, responsibilities, and salary, as discussed in section 541.2 of the regulations, are met. Pursuant to section 541.2(e)(2), an employee who is paid on a salary or fee basis of at least $250 per week may qualify for exemption as a bona fide administrative employee if the employee's primary duty consists of the performance of office or nonmanual work "directly related to management policies or general business operations" of the employer or the employer's customers, and the employee's work requires the exercise of discretion and independent judgment.

In determining whether activities are "directly related to management policies or general business operations" of the employer, two factors must be assessed. First, it is important to distinguish between those types of activities related to the administrative or staff operations of a business and "production" or line activities. Second, in addition to describing the types of activities, this phrase limits the exemption to "persons who perform work of substantial importance to the management or operation of the business" of the employer or of the employer's customers. 29 C.F.R. 541.205(a).

With regard to these inquiries, there is a distinction between "those employees whose primary duty is administering the business affairs of the enterprise from those whose primary duty is producing the commodity or commodities, whether goods or services, that the enterprise exists to produce and market." Dalheim v. KDFW-TV, 918 F.2d 1220, 1230 (5th Cir. 1990); Reich v. Chicago Title Ins. Co., 853 F. Supp. 1325, 1330 (D. Kan. 1994). In other words, the test is whether the employees are engaged in carrying out the employer's day-to-day affairs rather than running the business itself or determining its overall course and policies. Bratt v. County of L.A., 912 F.2d 1066, 1070 (9th Cir. 1990). For example, employees "servicing" the business itself by advising management officials, planning, negotiating, representing the company or doing business research may be exempt administrative employees where their work is of substantial importance to the management or operation of the business. 29 C.F.R. 541.205(b). While the regulations provide that "servicing" a business may be

administrative, "advising the management" as used in the regulations is directed at advice on matters that involve policy determinations, i.e., how a business should be run or run more efficiently, not merely providing information in the course of the customer's daily business operation. Bratt, 912 F.2d at 1070. In general, then, "administrative employee" refers to a person who is engaged in important staff functions of the employer or the employer's clients or customers as opposed to the production functions.

In applying these general principles, the courts frequently have concluded that the primary function of investigators is to conduct or produce investigations for their investigative agencies or customers and, therefore, the administrative exemption does not apply. For example, in Reich v. State of New York, 3 F.3d 581 (2d Cir. 1993), cert. denied, 114 S. Ct. 1187 (1994), the court examined whether criminal investigators were subject to the exemption. The court concluded that they were not exempt because the Bureau of Criminal Investigation is in the law enforcement "business" and the investigators' primary duty was to conduct or produce criminal investigations. Similarly, in Gusdanovich v. Business Information Company, 705 F. Supp. 262 (W.D. Pa. 1985), the company was in the business of investigating and collecting information for insurance companies, businesses and individuals. The court concluded that an investigator for the company had as his primary duty the gathering of that information or product, and thus he was engaged in production activities. See also Harris v. District of Columbia, 741 F. Supp. 254, 262-63 (D.D.C. 1990) (housing inspectors not exempt); Roney v. United States, 790 F. Supp. 23 (D.D.C. 1992) (Deputy U.S. Marshal (i.e., "Criminal Investigator") not exempt). Cf. Adams v. United States, 27 Fed. Cl. 5 (1992) (applying OPM regulations, court states that the exempt status of criminal investigators employed by various Federal agencies depends on duties of particular jobs).

In addition, the Administrator has concluded that police officers of a municipality who had "primary responsibility for all aspects of the investigation of major crimes" are production workers of the agency and therefore cannot qualify for the administrative exemption. Op. Ltr. No. WH-529 (Feb. 1, 1988). See also Opinion Letter of Dec. 6, 1988 (state criminal investigators); June 9, 1988 (assistant sheriff, D.A. investigator); and July 8, 1988 (state criminal investigators). Because the inquiry is, by its nature, fact-intensive, the Department's application of the test does not always lead to classifying law enforcement personnel as "production" workers. See Op. Ltr. No. WH-292 (Oct. 8, 1974) (concluding on unspecified facts that certain

public defender investigators and deputy probation officers were administrative employees, but noting "questionable" status of similar but more junior employees).

Inasmuch as the firm that you have asked about has the conduct of investigations as its business function - the product it exists to produce - the specific investigation activities performed by the employees would appear to be more related to the ongoing day-to-day production operations of the firm than to management policies or general business operations of the firm.

Even if the investigators were viewed as performing staff operations of the firm's customers, they must perform work of "substantial importance to the management or operation of the business" of the customer in order to qualify for the exemption. For example, tax consultants ordinarily perform work at a responsible level and their work is of substantial importance to an employer's overall management policies or general business operations. However, a bank teller, bookkeeper, or accounting clerk typically does not perform work at such a level. 29 C.F.R. 541.205(c). Even where an employee's job is "indispensable," that is not sufficient to satisfy the substantial importance requirement. Dalheim, 912 F.2d at 1231; Clark v. J.M. Benson Co., Inc., 789 F.2d 282, 287 (4th Cir. 1986). It is the nature of the work performed by an individual that is critical to this test, and that work must "substantially affect[] the structure of an employer's [or its customer's] business operations and management policies." Martin v. Cooper Electric Supply Co., 940 F.2d 896, 906 (3d Cir. 1991) (emphasis in original). See Bratt 912 F.2d at 1070. Based upon the information you have provided, we believe that the work of the investigators is not of substantial importance to the overall management or operation of the firm's customers, because their work does not help shape or define the policies or operations of those agencies or affect their operations to a substantial degree.

Finally, it is our view that most of the work of investigators typically involves the use of skills and the application of known standards or established procedures, as distinguished from work requiring the exercise of discretion and independent judgment as required by section 541.207 of the regulations. The materials you provided do not demonstrate that the investigators evaluate alternative courses of conduct and have the authority to make independent choices, free from immediate direction or supervision, with respect to matters of significance and consequence. 29 C.F.R. 541.207(a), (d)(1). It is not sufficient that an employee makes decisions regarding "when

and where to do different tasks, as well as the manner in which to perform them." Clark, 789 F.2d at 287-88. Nor is it sufficient that an employee may make limited decisions, within clearly "prescribed parameters." Dalheim v. KDFW-TV, 706 F. Supp. 493, 509 (N.D. Tex. 1988), aff'd, 918 F.2d 1220 (5th Cir. 1990). Rather, there must be true discretion and independent judgment on matters of significance or consequence. Therefore, based upon the information that you have provided, it is our opinion that the employees employed as investigators cannot qualify as bona fide administrative employees under 29 C.F.R. 541.2.

In a letter supplementing your opinion request you have provided a ruling by the Office of Personnel Management and Department of the Navy that found that Federal investigators qualified for the administrative exemption. Since we are not aware of all the facts upon which that ruling was based, we do not find it dispositive.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a different conclusion than the one expressed herein.

We trust that the above information is responsive to your inquiry.

Sincerely,

John R. Fraser
Acting Administrator

SEP 12 1997

This responds to your letter of November 25, 1996, concerning whether the minimum wage and overtime exemption contained in section 13(a)(1) of the Fair Labor Standards Act (FLSA) is applicable to five classifications of employees employed by the

The FLSA is the Federal law of most general application concerning wages and hours of work. An employee who is covered under this law and not otherwise exempt must be paid a minimum wage of not less than $5.15 an hour for all hours worked and not less than one and one-half times his regular rate of pay for all hours worked in excess of 40 in a workweek.

Section 13(a)(1) of the FLSA provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in the Regulations at 29 C.F.R. Part 541. An employee may qualify for exemption if all the pertinent tests relating to duties, responsibilities and salary, as discussed in the appropriate section of the regulations, are met. One such test provides that an employee who is paid on a salary or fee basis at a rate of at least $250 a week exclusive of board, lodging or other facilities is exempt if regularly directing the work of two or more full time employees, or the equivalent, and if the employee's primary duty consists of management of the enterprise or a recognized subdivision thereof. This test is also termed the "upset salary" or "short test" (29 C.F.R. 541.1(f)).

Although you do not state the salary of the employees involved, we assume it to be more than $250. Therefore, we must determine whether the employees regularly direct the work of at least two employees and whether their primary duties consist of management. A determination of whether an employee has management as their primary duty must be based on all the facts in a particular case. In the ordinary case, it may be taken as a rule of thumb that primary duty means the major part, or over 50 percent of the employee's time. Time alone, however, is not the sole test, and in situations where the employee does not spend over 50 percent of his time in management duties, the employee nevertheless might have management as the primary duty if the other pertinent

factors support such a conclusion.

Lead Court Clerk

The Lead Court Clerk regularly directs the work of five to seven employees and therefore meets the first criterion of the short test. With respect to the second or "primary duty" criterion, you indicate that there is an even 50-50 split on the amount of time spent in performing management and the amount of time spent performing duties similar to those of the employees supervised.

According to your letter and the attached job description, the Lead Court Clerk performs the following duties which are managerial in nature: direct supervision of five to seven employees, providing training, assigning and reviewing work, writing performance evaluations, approving leave requests, recommending disciplinary actions and coordinating with other departments. See 29 C.F.R. 541.102(b). This employee also regularly exercises discretion and independent judgment in the performance of job duties and is under minimal supervision. Assuming the facts as stated in your letter and the attached job specification, we would consider this employee to be an exempt executive employee.

Supervising Deputy Clerk

The Supervising Deputy Clerk regularly directs the work of ten employees and therefore meets the first criterion of the short test. With respect to the second or "primary duty" criterion, you indicate that there is an even 50-50 split on the amount of time spent in performing management and the amount of time spent performing duties similar to those of the employees supervised.

According to your letter and the attached job description, the Supervising Deputy Clerk performs the following duties which are managerial in nature: direct supervision of ten employees, interviewing, selecting and training employees, assigning and reviewing work, writing performance evaluations, approving of leave requests, and recommending promotions and disciplinary actions. See 29 C.F.R. 541.102(b). This employee also regularly exercises discretion and independent judgment in the performance of job duties and is under minimal supervision. Assuming the facts as stated in your letter and the attached job specification, we would consider this employee to be an exempt executive employee.

Jury Commissioner and Probate Commissioner

The Jury Commissioner and the Probate Commissioner do not qualify for the executive exemption because they do not supervise two or more full time employees, or the equivalent. There remains the question whether they can qualify for exemption as "administrative employees". Pursuant to Section 541.2(e)(2), an employee who is paid on a salary or fee basis of at least $250 per week may qualify for exemption as a bona fide administrative employee if the employee's primary duty consists of the performance of office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customers, and the employee's work requires the exercise of discretion and independent judgment. Thus, the exemption applies to employees engaged in administrative operations as opposed to "production", but only where the employees perform work of substantial importance to the management or operation of the business. See 29 C.F.R. 541.205(a).

The Jury Commissioner coordinates the organization, staffing and operational activities of the Jury Office, participates in the development of policy for the Jury Office, participates in the development of the budget, and coordinates with other divisions and outside agencies. In addition, the Jury Commissioner supervises one employee, including training, writing performance evaluations, directing and reviewing the employee's work, recommending promotional and disciplinary actions, and approving leave requests. The Jury Commissioner regularly exercises discretion and independent judgment.

The Probate Commissioner participates in the development and implementation of goals and policies for the Probate Division, forecasts additional funds needed by the office, identifies opportunities for improving service delivery methods and procedures, and coordinates assigned services with those of other divisions. In addition, the Probate Commissioner supervises one employee, including training, writing performance evaluations, directing and reviewing the employee's work, recommending promotional and disciplinary actions, and approving leave requests. The Probate Commissioner regularly exercises discretion and independent judgment in the performance of job duties and is under minimal supervision.

Assuming the facts as stated in your letter and the attached job specification, we would consider both the Jury Commissioner and the Probate Commissioner to be exempt administrative employees because their work appears to be of substantial importance to the operation of the district court itself, and they are directly involved in developing goals and policies for their divisions.

Judge's Administrative Assistant

Section 3(e)(2)(C) excludes from the coverage of the FLSA an individual who is not subject to the civil service laws of the State, political subdivision, or agency which employs him or her, and who holds a public elective office of that State, subdivision, or agency, (2) is selected by the holder of such an office to be a member of his or her personal staff, (3) is appointed by such an office holder to serve on a policy making level, or (4) is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his or her office.

As indicated in Section 553.11 of the Regulations, 29 C.F.R. Part 553, the term "member of personal staff" generally includes only persons who are under the direct supervision of a selecting elected official and have regular contact with such official. According to your letter, the Judge's Administrative Assistant works directly for the elected judge and is an at-will employee. Therefore, this employee is excluded from coverage by the FLSA pursuant to the personal staff exception.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein.

I trust that this satisfactorily responds to your inquiry.

Sincerely,

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

SEP 15 1997

This is in response to your letter of April 23, 1997, requesting an opinion regarding the application of the Fair Labor Standards Act (FLSA) to time spent in classroom training and testing to obtain and maintain State-mandated agent licenses. We have no record of receipt of your letter dated December 9, 1996.

You represent an insurance company which would like to know whether or not it is required to compensate its non-exempt employees for time spent in classroom training and testing to obtain and maintain agent licenses required by State-mandated continuing education requirements.

The relevant facts you present include the following:

(1) The States in which your client operates require persons involved in solicitation or negotiation of insurance to obtain and maintain agent licenses. The requirements include not only a passing grade on the licensing exam, but also extensive classroom time. In some cases 90 hours per person are required by State licensing procedures to obtain and annually maintain licenses.

(2) Attendance at all licensing classes and continuing education courses are scheduled outside of regular working hours.

(3) Employees who do not meet the State licensing requirements may continue employment with the company in other positions.

(4) The employee does not perform productive work during his or her attendance at the classes.

(5) The licensing training and continuing education components are general in nature, and the license can

be used by the employee if he or she goes to work for another insurance company.

(6) The licensing training and continuing education courses are sponsored by and mandated by the State (not the company), and is not training tailored to meet the needs of either an individual employer or the company in particular.

As you know, sections 785.27 through 785.32 of Regulations 29 CFR Part 785 discuss the subject of training programs as hours worked under the FLSA. Attendance at training programs need not be counted as working time if the following four criteria are met: (a) Attendance is outside of 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.

Based on the information provided, it appears that criteria (a) and (d) are met. As for criterion (c), although the training is clearly related to the employee's job, sections 785.30 and 785.31 provide that even such training need not be compensated if it is secured at or it corresponds to courses offered by independent bona fide institutions of learning and is voluntarily attended by an employee outside normal working hours. The information you provided to a member of my staff indicates that the courses to be taken by the employee would be general/basic courses (e.g., property damage insurance, casualty insurance) offered by independent institutions that provide general instruction which enables the employee to gain or continue employment with any employer in the insurance business. We would regard this training as primarily for the benefit of the employee and not the employer. In training of this type, where the employee is the primary beneficiary, section 785.31 indicates that criterion (c) does not have to be met.

With regard to criterion (b), where the State has imposed the licensing training requirement on the individual and not on the employer, and the training is of general applicability and not tailored to meet the particular needs of individual employers, it is our opinion that non-exempt employees would not have to be compensated for time spent in such training.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you

have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of, any agreement or order applying, or requiring compliance with, the provisions of the FLSA.

We trust that the above information is responsive to your inquiry. If we can be of further assistance, please do not hesitate to contact us.

Sincerely,

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

SEP 15 1997

This is in response to your letter on behalf of several clients in the trucking industry who are subject to the Department of Transportation's mandatory random and post-accident drug testing regulations. You inquire whether time spent in drug testing and in physical examinations required by the Department of Transportation for commercial licensing purposes may be considered compensable hours of work under the Fair Labor Standards Act (FLSA).

The FLSA is the Federal law of most general application concerning wages and hours of work. This law requires that all covered and nonexempt employees be paid not less than the minimum wage of $5.15 an hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek.

We agree with the comment in your letter that the regulation at 29 C.F.R. 785.43, pertaining to the receipt of medical attention, is inapplicable to this case. However, attendance by an employee at a meeting during or outside of working hours for the purpose of submitting to a mandatory drug test imposed by the employer would constitute hours worked for FLSA purposes, as would attendance at a licensing physical examination during or outside of normal working hours.

Generally, whenever an employer imposes special requirements or conditions that an employee must meet before commencing or continuing productive work, the time spent in fulfilling such special conditions is regarded as indispensable to the performance of the principal activity the employee is hired to perform. Included in this general category are required physical examinations and drug testing. Where the Federal government requires employees to submit to physical examinations and drug testing as a condition of the employer's license to operate its business, both the drug tests and physical examinations are for the benefit of the employer.

Time spent in these activities is time during which the employee's freedom of movement is restricted for the purpose of serving the employer and time during which the employee is subject to the employer's discretion and control. It is immaterial whether the time spent in undergoing the required physical examination and drug testing is during the employee's normal working hours or during nonworking hours.

The physical examination and the drug testing are essential requirements of the job and thus primarily for the benefit of the employer. Therefore, it is our opinion that the time so spent must be counted as hours worked under the FLSA.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein.

I trust that this satisfactorily responds to your inquiry.

Sincerely,

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

SEP 15 1997

This responds to your letter of October 30, 1996, concerning the application of the Fair Labor Standards (FLSA) to a proposed Guaranteed Pay Agreement applicable to the nonexempt employees of your client, a home health care agency.

The employees in question are licensed vocational nurses (LVN's) who are not exempt from minimum wage and overtime compensation pursuant to 29 C.F.R. 541.3. The LVN's workload fluctuates from week to week depending on the number of persons needing care and the seriousness of the patients' conditions. Variations in travel time and on-call time also cause fluctuations in hours worked. Currently, the LVN's hours worked vary from 32 to 64 hours each work week.

Your client proposes to offer to LVN's a Guaranteed Wage Agreement, under which employees would be paid a guaranteed weekly salary based on 60 hours worked. Employees will be guaranteed wages for 40 hours at their regular rates of pay and 20 hours at one and one-half times their regular rates with additional compensation at one and one-half their regular rates for any hours in excess of sixty hours in a work week.

The FLSA is the Federal law of most general application concerning wages and hours of work. It requires that all covered and nonexempt employees be paid not less than the minimum wage of $5.15 an hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek.

Section 7(f) of the FLSA provides an exemption from the overtime pay requirement of the FLSA for certain employees who are paid a weekly guarantee for not more than 60 hours based on a contract or agreement which specifies a regular rate of pay not less than the applicable minimum wage and one and one-half times the regular rate for each hour worked in excess of the applicable maximum hours standard. This method of compensation is often referred as a "Belo" plan (see Walling v. A.H. Belo Corporation, 316 U.S. 624.

At the outset, it should be noted that there is no requirement that a contract, to qualify under Section 7(f), must be approved by the Secretary of Labor or the Administrator. Upon knowledge of sufficient facts, however, the Administrator may issue an

advisory opinion as to whether a particular pay arrangement accords with Section 7(f). See 29 C.F.R. 778.414.

The requirements of FLSA Section 7(f) are explained in Sections 778.402 through 778.414 of Regulations, 29 C.F.R. Part 778. (Copy attached.) This method of payment may be implemented only for employees whose duties require irregular hours of work which the employer cannot reasonably control or anticipate. As stated in Section 778.405, the irregularity of hours worked must result in significant variations below as well as above the maximum hours standard provided by Section 7(a) of the FLSA. There is no valid irregularity as required by FLSA Section 7(f) where the variation in hours worked occurs only in the hours over 40; there must also be irregularity in the hours worked under 40. Irregularity caused by absences for personal reasons, illness, vacations, holidays, or scheduled days off will not meet the requirements in Section 7(f).

It is important to note that an employer's employees must agree to any pay plan which is established under the provisions of Section 7(f). Section 516.4 of the Regulations, 29 C.F.R. Part 516, requires employers to maintain a copy of any written agreement concerning the implementation of a plan pursuant to Section 7(f) of the FLSA or, in the case of a verbal understanding, a written memorandum summarizing the terms of such agreement.

It is my opinion that the Guaranteed Wage Agreement, attached to your October 30 letter, complies with the applicable provisions of the Section 7(f) and 29 C.F.R. 778.402 through 778.414 discussed above. It should be noted that the determination of the applicability of Section 7(f) in all cases depends not merely on the wording of the contract, but upon the actual practice of the parties and whether the number of hours for which pay is guaranteed is reasonably related to the number of hours the employee may be expected to work (See 29 C.F.R. 778.412).

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein.

I trust that this information is responsive to your inquiry.

Sincerely,

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

Enclosure

SEP 22 1997

This is in response to your inquiry concerning a letter ruling dated July 11, 1995, issued pursuant to the Fair Labor Standards Act (FLSA) by this office.

You ask whether this ruling would apply to teacher assistants who volunteer as activity coaches for a "nominal" stipend. The assistants would be working in excess of 40 hours per week. The short answer is no.

We think that teacher assistants engaged in coaching of sports or other extracurricular activities after school would be providing the "same type of services" that they are employed to perform. The phrase "same type of services" means similar or identical services.

Teachers (although exempted from the minimum wage and overtime requirements of the FLSA) traditionally engage in extracurricular activities such as coaching athletic teams or acting as moderators or advisers in areas such as drama, forensics, journalism, etc., as part of their jobs. Likewise, when teaching assistants perform such activities, they would be engaging in similar or identical services to those that they are employed to perform.

In contrast, school employees such as bus drivers, custodians, building maintenance, or food service workers are not providing the same type of services when they engage in coaching activity. Their primary jobs involve activities such as driving vehicles, cleaning buildings, repairing equipment or fixtures, or preparing and serving food.

If we can be of further assistance, please do not hesitate to contact this office.

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

OCT - 7 1997

Dear

This is in response to your letter inquiring whether time spent by fire and police personnel in undergoing physical examinations required by the City of ? must be considered compensable hours of work under the Fair Labor Standards Act (FLSA) when the examinations are conducted outside of regular working hours.

The FLSA is the Federal law of most general application concerning wages and hours of work. This law requires that all covered and nonexempt employees be paid not less than the minimum wage of $5.15 an hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek.

Generally, whenever an employer imposes special requirements or conditions that an employee must meet before commencing or continuing productive work, the time spent in fulfilling such special conditions is regarded as indispensable to the performance of the principal activity the employee is hired to perform. Included in this general category are required physical examinations.

Time spent undergoing a physical examination is time during which the employee's freedom of movement is restricted for the purpose of serving the employer and time during which the employee is subject to the employer's discretion and control. It is immaterial whether the time spent in undergoing the required physical examination is during the employee's normal working hours or during nonworking hours. The physical examination is an essential requirement of the job and thus primarily for the benefit of the employer. Therefore, it is our opinion that the time so spent must be counted as hours worked under the FLSA.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein.

I trust that this satisfactorily responds to your inquiry.

Sincerely,

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

OCT 15 1997

This is in response to your inquiry on behalf of Mr. of is concerned about the application of the Fair Labor Standards Act (FLSA) to public safety dispatchers.

As you know, the FLSA is the law of most general application concerning wages and hours of work. Covered and nonexempt employees must be paid not less than the minimum wage of $5.15 an hour for all hours worked and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek.

It might be helpful to review application of the FLSA to employees of State and local governments. In 1966, Congress amended the FLSA to cover employees of certain publicly operated institutions, principally schools and hospitals. The Education Amendments of 1972 further extended FLSA coverage to employees of preschools (both public and private). Virtually all remaining State and local government employees who were not covered as the result of the 1966 and 1972 FLSA Amendments were brought under coverage of the Act by the 1974 FLSA Amendments.

These Amendments were then challenged as unconstitutional and in National League of Cities v. Usery, 426 U.S. 833 (1976) the Supreme Court ruled that the minimum wage and overtime provisions of the FLSA could not be applied constitutionally to State and local government employees who are engaged in traditional governmental activities such as fire protection and law enforcement activities. However, in a subsequent case, Garcia v. San Antonio Metropolitan Transit Authority et al., 469 U.S. 528 (1985), the Supreme Court reversed its prior ruling in National League and held that the FLSA could be applied to State and local government employees.

The 1985 FLSA Amendments were enacted following the Garcia decision to respond to the many concerns expressed by State

and local government employer and employee organizations, who identified areas in which they believed that the application of the FLSA would have adverse effects. These Amendments provide special provisions applicable to State and local government agencies and their employees. The amended Act permits compensatory time off with pay in lieu of cash overtime wages under certain conditions, permits the exclusion of certain hours of work in calculating overtime compensation for employees who work for two separate employers or in two separate capacities for the same employer, and provides special standards for volunteering. These provision are in addition to the more lenient overtime standards for law enforcement and fire protection personnel provided by the 1974 FLSA Amendments. All these provisions are contained in 29 CFR Part 553 (copy enclosed).

It appears that your constituent believes that civilian public safety dispatchers should be considered as fire protection or law enforcement employees so that they may qualify for the more lenient overtime provisions in § 7(k) of the FLSA, instead of the overtime requirements in § 7(a) (i.e. after 40 hours worked in a workweek).

Section 7(k) provides a partial overtime pay exemption for public employees employed in fire protection or law enforcement activities (including security personnel in correctional institutions). Under this provision, an employer may establish a work period of at least 7 but not more than 28 consecutive days for the purpose of paying overtime compensation. The maximum hours standard for fire protection employees ranges from 53 hours worked in a 7-day work period to 212 hours worked in a 28-day work period. For law enforcement employees, the maximum hours standard ranges from 43 hours worked in a 7-day work period to 171 hours worked in a 28-day work period.

When a firefighter or police officer works in excess of the maximum hours standard for the particular work period that has been adopted, he or she must be paid overtime compensation at one and one-half times the employees regular rate of pay in cash, or furnished compensatory time off (within certain statutory limits) at the rate of not less than one and one-half hours of compensatory time for each hour of overtime work. Sections 553.230 - .233 of the regulations explain the overtime compensation rules for employees under § 7(k).

As indicated in §§ 553.210(c) and 553.211(g), "civilian" employees of public safety agencies are not considered to be employed in fire protection or law enforcement activities

for purposes of the § 7(k) exemption. In promulgating the regulations, the Department of Labor gave full consideration to proposals that would have allowed civilian dispatchers to be treated as persons engaged in fire protection or law enforcement activities for purposes of qualifying for the § 7(k) exemption. See pages 2022 - 2033 of the enclosed publication.

Neither the statute nor the legislative history of the 1974 and 1985 Amendments provides for the application of this exemption to support staff of fire, police or public safety departments. Thus, congressional action would be required to address your constituent's concerns.

As to specific comments about "four on four off twelve [hour] shift" scheduling, there is nothing in the FLSA that presently prevents such scheduling. However, FLSA overtime compensation would be required in each workweek in which dispatchers work in excess of 40 hours.

If we can be of further assistance, please do not hesitate to contact this office.

Sincerely,

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

Enclosure

OCT 20 1997

This is in response to your inquiry concerning certain pay docking practices that may affect vocational instructors at the You ask whether the policy violates the Fair Labor Standards Act (FLSA).

It appears that you are concerned about the salary basis requirements under 29 CFR Part 541. These regulations provide the tests for exemption for executive, administrative, professional and outside sales workers under § 13(a)(1) of the FLSA. Employees whose duties, responsibilities, and salary meet the tests in the regulations are exempt from the minimum wage and overtime pay requirements of the FLSA.

As indicated in 29 CFR § 541.301, vocational teachers who meet the duties and responsibilities tests can qualify for exemption as professional employees under § 13(a)(1). However, the regulations provide an exception to the salary or fee basis test for certain professionals including teachers. See 29 CFR § 541.314. Moreover, 29 CFR § 541.5d specifically provides that, under certain conditions, the pay of public employees may be docked because the employee has not accrued sufficient leave, or whose accrued leave has been exhausted.

Thus, docking of such employees' pay (because they do not have leave credits to supplement eight hours of holiday pay earned to cover the scheduled 10-hour shift on a holiday not worked) would not violate the FLSA.

I trust that the above is responsive to your inquiry. Please let me know if you have any further questions.

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

OCT 20 1997

This is in response to your letter concerning the application of the Fair Labor Standards Act (FLSA) to your employment as administrative assistant for the

You state that you are responsible for assisting and greeting members and guests; maintaining the master calendar of community events, the accounts receivable and accounts payable systems, the office equipment and supplies and the filing system; coordinating weekly and monthly schedules of officials; assisting the Board of Directors and the Executive Director in preparing the monthly newsletter and performing special projects; overseeing volunteers, and the Hospitality Assistant in managing various records and reports; and performing other duties as requested by the Executive Director.

The FLSA (minimum wage law) is the Federal law of most general application concerning wages and hours of work. This law requires that all covered and nonexempt employees be paid not less than the minimum wage, $5.15 an hour effective September 1, 1997, for all hours worked. Overtime pay of not less than one and one-half times the regular rate of pay is required for all hours worked over 40 in a workweek. Prior to September 1, the minimum wage was $4.75 an hour. The major provisions of the law are outlined in the enclosed "Handy Reference Guide to the Fair Labor Standards Act."

Section 13(a)(1) of the FLSA provides a minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, professional, or outside sales capacity, as those terms are defined in Regulations, 29 CFR Part 541 (copy enclosed). In order to qualify for exemption under section 13(a)(1), an employee must meet all of the pertinent tests relating to duties, responsibilities, and salary, as discussed in the appropriate sections of the Regulations.

An employee who is paid on a salary or fee basis of at least $250 per week may qualify for exemption as a bona fide administrative employee if the employee's primary duty is office or nonmanual work directly related to management policies or general business operations of his or her employer or his or her employer's customers, which includes work requiring the exercise of discretion and independent judgment. (See section 541.2 of the Regulations.)

The term "discretion and independent judgment", as used in the Regulations, implies that the person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance. The term applies to the kinds of decisions normally made by persons who formulate or participate in the formulation of policy within their spheres of responsibility or who exercise authority within a wide range to commit their employer in substantial respects financially or otherwise.

It appears that your responsibilities, as administrative assistant, require the use of skills acquired by training or experience in applying techniques, procedures, or specified standards. An employee is not exercising "discretion and independent judgment" within the meaning of section 541.2 if he or she merely applies his or her knowledge in following prescribed procedures, or determining which procedure to follow, or determining whether specified standards are met.

Therefore, it is our opinion that your position, as described above, does not quality for the administrative exemption. Accordingly, you must be paid in accordance with the minimum wage and overtime pay provisions of the FLSA.

We trust that this information is responsive to your inquiry.

Sincerely,

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

Enclosures

OCT 31 1997

This is in response to your letter to the Administrator of the Wage and Hour Division. In you letter, you ask "does the "Fixed Salary for Fluctuating Hours" method of paying an employee have to qualify under Section 7(f) of the Act?"

The short answer to your question is no. The fixed salary for fluctuating hours and Section 7(f) of the Fair Labor Standards Act (FLSA) are two separate methods of paying overtime.

Under section 778.114 of Interpretative Bulletin, 29 C.F.R. Part 778, an employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid pursuant to an understanding with the employer that the employee will receive such fixed amount as straight time pay for whatever hours the employee is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than working for 40 hours or for some other fixed weekly work period, such a salary agreement is permitted by the FLSA if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours the employee works is greatest, and if the employee receives extra compensation, in addition to such salary, for all overtime hours worked at a rate of not less than one-half the employee's regular rate of pay. This is often referred to as the fixed salary for fluctuating hours or the "fluctuating workweek".

Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week, and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary agreement.

Section 7(f) of the FLSA provides an exemption from the overtime pay requirement of the FLSA for certain employees who are paid a weekly guarantee for not more than 60 hours based on a contract or agreement which specifies a regular rate of pay not less than the applicable minimum wage and one and one-half times the regular rate for each hour worked in excess of the applicable hours standard. This method of compensation is often referred to as a "Belo" plan (see Walling v. A.H. Belo Corporation, 316 U.S. 624).

The requirements of FLSA Section 7(f) are explained in Sections 778.402 through 778.414 of Regulations, 29 C.F.R. Part 778. (Copy enclosed.) This method of payment may be implemented only for employees whose duties require irregular hours of work which the employer cannot reasonably control or anticipate. As stated in Section 778.405, the irregularity of hours worked must result in significant variations below as well as above the maximum hours standard provided by Section 7(a) of the FLSA. There is no valid irregularity as required by FLSA Section 7(f) where the variation in hours worked occurs only in the hours over 40; there must also be irregularity in the hours worked under 40. Irregularity caused by absences for personal reasons, illness, vacations, holidays, or scheduled days off will not meet the requirements in Section 7(f).

It is important to note that an employer's employees must agree to any pay plan which is established under the provisions of Section 7(f). Section 516.4 of the Regulations, 29 C.F.R. Part 516, requires employers to maintain a copy of any written agreement concerning the implementation of a plan pursuant to Section 7(f) of the FLSA or, in the case of a verbal understanding, a written memorandum summarizing the terms of such agreement.

We trust that this is responsive to your inquiry.

Sincerely,

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

Enclosure

OCT 31 1997

MEMORANDUM FOR RUTH BAUMAN
DISTRICT DIRECTOR
SALT LAKE CITY, UTAH DISTRICT OFFICE

FROM: DANIEL F. SWEENEY
FAIR LABOR STANDARDS TEAM LEADER
OFFICE OF ENFORCEMENT POLICY

SUBJECT: DAY CARE

This is in response to you inquiry regarding opinion letters on day care for children older than pre-school age. There are facilities in your area which offer day care services to school age children from after school until their parents pick them up after work. There are other facilities in your area which offer day care services to older citizens (I assume geriatric care) while the primary care giver takes a break.

We have researched our opinion letter files and those of the SOL and find nothing on these specific topics. Our focus on child care has been for children younger than school age or living in a residential care facility.

It is our opinion that coverage would have to be established either through individual coverage or through 3(s)(1)(A) of the FLSA. An establishment offering such services would not be a named enterprise under Section 3(s)(1)(B) of the FLSA.

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

DEC 3 1997

Dear

This responds to your respective requests for an opinion concerning the application of section 3(o) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 203(o), to employees in the meat packing industry. According to your letter, the employees in question perform the following preliminary and postliminary activities: sharpening knives, waiting in line at wash stations, cleaning equipment, and putting on and taking off required safety gear. You specifically ask whether section 3(o) allows for the exclusion of any of these activities from hours worked pursuant to the express terms or by custom or practice under a collective bargaining agreement.

Section 3(o) of the FLSA states as follows:

> Hours worked. -- In determining for the purposes of sections 6 and 7 the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

29 U.S.C. 203(o) (emphasis added). Since section 3(o) provides an exemption from the broad, remedial provisions of the FLSA, it must be read narrowly. See Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960).

The putting on, taking off, and washing of protective safety equipment are compensable activities under the FLSA if they are integral to an employee's principal activities, regardless of the fact that they may be performed either before or after the employee's regular work shift. See Reich v. IBP, Inc., 38 F.3d 1123 (10th Cir. 1994) (where court concluded that the time spent by employees in putting on, taking off, and washing protective safety equipment that is unique to the meat packing industry -- e.g., a mesh apron, a plastic belly guard, mesh sleeves or plastic arm guards, wrist wraps, mesh gloves, rubber gloves, polar sleeves, rubber boots, a chain belt, a weight belt, a scabbard, and shin guards -- was compensable). See generally 29 C.F.R. 790.8(b) and (c). It is our view that by its very terms section 3(o) does not apply to the putting on, taking off, and washing of protective safety equipment, and, therefore, time spent on these otherwise compensable activities cannot be excluded from hours worked pursuant to the express terms or the custom or practice under a collective bargaining agreement.

The plain meaning of "clothes" in section 3(o) does not encompass protective safety equipment; common usage dictates that "clothes" refer to apparel, not to protective safety equipment which is generally worn over such apparel and may be cumbersome in nature. In regard to the meaning of "washing," the legislative history specifically states that the term refers only to washing oneself. The conference agreement limited the section 3(o) exemption "to time spent by the employee in changing clothes and cleaning his person at the beginning or at the end of each workday." See H.R. Conf. Rep. No. 1453 (1949), reprinted in 1949 U.S.C.C.A.N. 2251, 2255 (emphasis added). See also 95 Cong. Rec. 14,875 (1949) (speaking of the conference agreement as limiting the application of section 3(o) "to time spent in changing clothes or washing (including bathing) at the beginning or end of each workday") (emphasis added); 29 C.F.R. 790.7(g) (discussing preliminary and postliminary activities such as "washing up or showering," which, under the Portal-to-Portal Act, would not generally be considered to be compensable unless deemed to be an integral part of an employee's principal activity) (emphasis added). Thus, section 3(o) cannot be read so broadly as to include the cleaning of protective safety equipment.

Therefore, the phrase "changing clothes or washing" in section 3(o) does not include the putting on, taking off, or washing of that protective safety equipment utilized in the meat packing industry which is integral to the performance of an employee's principal activity. Moreover, the phrase clearly does not encompass the sharpening of knives.

We trust that the above is responsive to your individual inquiries.

Sincerely,

John R. Fraser
Acting Administrator

DEC -5 1997

Dear

This is in reply to your letter of April 3, 1997, concerning the salary basis of payment contained in the Regulations, 29 C.F.R. Part 541. You ask whether a mining company's requirement that employees wear a seat belt while driving on mine property in extra-hazardous conditions constitues a safety rule of major significance as that term is defined in section 541.118(a)(5), 29 C.F.R. Part 541.

You state that your client is a mining company which conducts mining operations year-round 24 hours a day, often under hazardous weather conditions. The company's Accident Prevention Manual contains a policy requiring that seat belts be worn by all occupants while operating company equipment.

Section 13(a)(1) of the FLSA provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative or professional capacity, as those terms are defined in the Regulations 29 C.F.R. Part 541. An employee may qualify for exemption if all the pertinent tests relating to duties, responsibilities and salary, as described in the appropriate section of the Regulations, are met. One such test contained in section 541.118 of the Regulations requires that an otherwise exempt employee be paid on a salary basis.

Deductions which may be made from an employee's compensation without affecting his or her exempt "salary" status are found in sections 541.118(a)(2),(3), and (5) of the regulations. The only disciplinary type of deduction permissible is one imposed as a penalty "in good faith for infractions of safety rules of major significance." Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines. From the information you provide, it appears that the disciplinary deduction you have in mind is not the kind of deduction

permitted by the Regulations and would defeat the exemption for an otherwise exempt employee. It would be permissible, however to suspend such an employee for an entire week without pay and not defeat the exemption, since section 541.118(a) states, in part, that an employee need not be paid for any workweek in which he or she performs no work.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein.

We trust that this satisfactorily responds in your inquiry.

Sincerely,

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

DEC 24 1997

This is in response to your letter to Secretary Herman regarding overtime compensation under the Fair Labor Standards Act (FLSA). You ask four specific questions, which will be answered in the order asked.

Question 1: If an employee paid a fixed salary for fluctuating hours (fluctuating workweek method) needs sick/personal or vacation time, can they be required to use vacation/sick for days missed and also can they be docked under this program for partial or full days once they use all available benefits?

Answer 1: Generally, an employee paid under the fluctuating workweek method must receive his/her full salary in any workweek in which he/she performs work. As explained in section 778.114 of C.F.R. Part 778 (copy enclosed), one of the primary requirements is that the employee receives his/her guaranteed salary regardless of the number of hours or days worked in the workweek, whether they be few or many. The fact that deductions are made from vacation or sick leave banks because of absences for personal reasons or illness would not change this opinion, as long as no deductions are made from an employee's salary, if his or her leave bank has been exhausted. However, it is our opinion that an employee who is compensated under the fluctuating workweek method of paying overtime need not be paid his/her full salary in any workweek when he/she performs no work.

Question 2: If a showroom sales staff is hourly + commission, and they earn a monthly commission must you take that commission and compute the amount allocable to each week of that month and pay additional overtime, even if you've already paid overtime based on their hourly wage?

Answer 2: Commissions (whether based on a percentage of total sales or of sales in excess of a specified amount, or on some other formula) are payments for hours worked and must be included in the regular rate. Where it is not possible or practicable to allocate the commission among the workweeks of the period in proportion to the amount

of commission actually earned or reasonably presumed to be earned each week, some other method must be adapted. Two methods commonly used are allocating equal amounts of the commission to each workweek during the commission period or allocating equal amounts of the commission to each hour worked during the commission period. These methods of allocating commissions are discussed in section 778.120.

Question 3: If we establish a salary for a regular 45 hour workweek and pay overtime according to a salary for a workweek exceeding 40 hours, can you dock for partial days or full days for sick/personal and or vacation?

Answer 3: If an employee is paid a fixed salary for a fixed workweek and if this salary is reduced by the amount of the average hourly earnings for each hour lost by the employee in a short workweek, the employee is, for practical purposes employed at an hourly rate of pay.

For example:
If an employee is paid a fixed salary of $300 for a fixed workweek of 45 hours, the employee's regular rate of pay is $6.67 ($300/45hours). During a workweek when the employee works 45 hours, he/she will receive $300 salary plus $16.68 in overtime compensation (1/2 x $6.67 x 5 hours) or a total of $316.68.

During a workweek when the employee works 48 hours, he/she will receive $300 salary plus $16.68 in overtime compensation for the hours between 40 and 45 plus $30.02 for the hours worked between 45 and 48 ($6.67 x 1 ½ x 3 hours) or a total of $346.70.

In a workweek where the employee works only 38 hours, he/she will receive $253.45 (38 hours x $6.67).

Question 4: Can you pay a showroom sales associate on a salary basis and consider him or her exempt from overtime if the associate does not handle outside sales 80% or more of the time?

Answer 4: The criteria for the executive, administrative, professional and outside sales exemptions are contained in 29 C.F.R. Part 541 (copy enclosed). There is not enough information in your letter for a determination on the exempt status of a showroom sales associate to be made.

If you have further questions regarding the application of the Fair Labor Standards Act you may find it more convenient to contact the Richmond, Virginia Wage and Hour District Office located at The 700 Center, 700 East Franklin Street, Suite 560, Richmond, Virginia, 23219, telephone: 804-771-2995.

We trust this is responsive to your inquiry.

Sincerely,

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

Enclosures