

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 employed 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 but not employed by the Township 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.

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Accordingly, our letter to you dated August 7, 1989, is hereby withdrawn.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

Sincerely,

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Acting Administrator