U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

August 12, 2004 **FLSA2004-8NA**

Dear ***Name****,

This is in response to your letter requesting an opinion concerning the application of the Fair Labor Standards Act (FLSA) to the contract language as stated in the public employee/employer contract in the state of ***Name****.

According to your letter, the contract language states:

> Subd. 2. Wages; Minimum Trip: Regular drivers will be paid an hourly rate in accordance with Appendix "A", with a minimum guarantee of two (2) hours driving time pay per route/additional assignment. If a trip is less than two hours and the driver wants the minimum time, the driver will do regular maintenance in the bus garage or other work as assigned by the School District to complete the two hours. Any regular driver may complete a voucher for payment for additional time if their morning or afternoon route exceeds his/her assigned time by one half hour or more.

Your question concerns the last sentence of this subdivision, requiring a driver who works more than two hours to submit a voucher for payment of the additional time worked. You further state that the employer requires employees to work a minimum of thirty minutes or more in addition to their normal shift before they are entitled to any additional wage payment. If the employee works an additional twenty-five minutes beyond his/her normal shift, s/he would not be compensated for the extra time worked. A discussion between you and a member of my staff on February 13, 2004 revealed that employees who work more than 30 minutes beyond their shift time are paid for the actual time worked and there is no rounding to the next hour for calculating wages. For example, if a bus driver returns fifty minutes past the scheduled time, his or her stop time is not rounded up to the next hour but is paid for fifty additional minutes.

As you know, 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, $5.15 an hour, for all hours worked and overtime pay for all hours worked over 40 in a workweek.

As explained in Section 785.47, in recording working time, insubstantial or insignificant periods of time outside the scheduled working hours that cannot practically be precisely recorded may be disregarded. The courts have held that such trifles are de minimis. This rule applies only where a few seconds or minutes of work are involved and where the failure to count such time is due to considerations justified by industrial realities. An employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time. Where an employer fails to pay an employee for any part of the employee's fixed or regular working time, however small, this would be considered a violation of the FLSA.

Based on the information provided, it is our opinion that the contract language in question could be applied in a manner not consistent with the FLSA and the implementing regulations requiring that all hours worked must be recorded and paid. See 29 CFR Part 785.47.

Please note that in non-overtime workweeks or in workweeks in which the overtime provisions do not apply, an employee subject to section 6 of the FLSA is considered to be paid in compliance if wages for the workweek equal or exceed the amount due at the applicable minimum wage. In other words, if the employee's total wages for the workweek divided by compensable hours equal or exceed the applicable minimum wage, the employee has been paid in compliance with section 6 of the FLSA. These principles will also apply where an employee is not compensated for time which is compensable under the FLSA. For example, if an employee subject to the $5.15 minimum wage during a workweek is paid for 32 hours at $10.00 an hour and is paid nothing at all for 8 additional hours worked, this employee is considered to

have been paid in compliance with section 6 of the FLSA, as his hourly rate of $8 ($320 ÷ 40) is at least $5.15 per hour, the federal minimum wage.

If a covered and non-exempt employee works overtime, a different rule applies. The employer must pay the employee for all hours worked at the *agreed rate* plus the overtime premium (one-half the regular rate) for all overtime hours. Before an employee can be said to be paid statutory overtime compensation due, the employee must first be paid all straight time wages due for all hours worked under any express or implied contract or under any applicable statute (see 29 CFR Part 778.315). In the example above, if the employee works more than forty hours a week, he or she is entitled to be paid $10 an hour for all hours worked and an additional one-half the regular rate ($5.00) for all hours worked over forty in the workweek. If the employee in this example works fifty hours during the workweek, s/he would be entitled to $10 for each hour worked ($10 x 50 = $500) plus an overtime premium of $5 for each hour worked in excess of 40 ($5 x 10 = 50), for total compensation in this workweek of $550 due the employee.

Please also note that Regulations 29 CFR 516.2(a)(7) requires accurate recordkeeping of hours worked each workday and total hours worked each workweek for covered and nonexempt employees. In situations such as that described in the example above, even though there is no wage violation under the FLSA, recordkeeping violations could arise if the payroll records do not accurately record the number of hours worked in one or more of the workdays and also the correct total hours worked during the workweek (32 hours noted on the payroll records instead of the correct 40 hours of work).

If you have further questions, please contact our local Wage and Hour office in your area:

U.S. Department of Labor
Wage and Hour Division
Tri-Tech Center, Suite 920
331 Second Ave. South
Minneapolis, MN 55401
Tel. (612) 370-3371
Fax. (612) 370-3372

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 represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We trust that the above is responsive to your inquiry.

Sincerely,

Barbara R. Relerford
Fair Labor Standards Team
Office of Enforcement Policy

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