FLSA - 1195

October 9, 1987

This is in further response to your letter, with enclosures, addressed to Assistant Area Director *** concerning the application of the Fair Labor Standards Act (FLSA) to emergency medical service employees, also referred to as EMTs (emergency medical technicians), of the City of ***(the City). We regret the delay in responding to your inquiry.

The FLSA is the Federal law of this 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 $3.35 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. This applies to all employees of State and local governments except to those who are specifically excluded in section 3(e)(2)(C) of FLSA or who may qualify for exemption from the minimum wage and/or overtime pay provisions of the Federal law.

On January 16, the Department of Labor (the Department) published final regulations which implement the Fair Labor Standards Amendments of 1985. These regulations contain rules concerning certain statutory exclusions and exemptions, recordkeeping requirements, and compensatory time provisions which apply to State and local government workers in general, in addition to specific rules for volunteers and for fire protection and law enforcement employees. A copy of the regulations is enclosed for your information.

You wish to know if the EMTs are primarily engaged in law enforcement or fire protection activities for the purpose of applying the provisions of section 7(k) of FLSA. Section 7(k) 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 of 7 to 28 consecutive days for the purpose of paying overtime compensation to employees employed in fire protection or law enforcement 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.

In an opinion (copy enclosed) issued by this office in 1985, we set forth two tests for determining if the activities of EMTs are "substantially related" to fire protection or law enforcement as described in section 553.215 of Regulations, 29 CFR Part 553. The first test requires that EMTs be trained to rescue individuals who have been injured or who are in danger of being injured. Under these circumstances, the term "rescue" refers to actions taken to free a victim from imminent danger or harm by the most expeditious means. In many cases, this may require an EMT to take action beyond merely applying emergency

medical treatment such as bandaging, administering oxygen, or transporting an individual to a hospital. For instance there may be situations where the EMTs, as the first responders at the scene of an automobile accident, must extricate an injured person from a vehicle in order to begin treatment and preparation for movement as soon as possible. As stated in the material enclosed with your inquiry, "the EMT will have to use whatever means are available to gain access to the patient and disentangle him from the wreckage …. " This means that an EMT must be properly trained to operate special types of equipment such as hydraulic "spreaders" or chemical foam extinguishers in case they are available for their use at the accident scene. Therefore, we interpret the requirement that an EMT be "trained to rescue" as meaning that the individual has knowledge of basic life-saving procedures and life-support procedures (i.e. CPR, administering oxygen, and extrication techniques). However, it is not necessary for an EMT to routinely perform any or all of these procedures in order to meet the requirements of the first test referred to above.

You have indicated that the EMTs who are the subject of your inquiry are not trained to rescue fire victims by removing them from burning buildings or other structures. This would require (1) extensive training in fire-suppression and evacuation techniques and (2) special equipment and protective clothing which could not be carried or transported by EMT crews. Under these circumstances, the obligation of an EMT to "rescue" a victim is limited by the nature of the event (fire) and the ability of the EMT to safely and efficiently provide assistance. Therefore, it is our opinion that an EMT need not be trained in fire-suppression or evacuation procedures in order to be engaged in activities which are "substantially related" to firefighting or law enforcement.

The second test to determine if activities are "substantially related" to fire protection or law enforcement is that EMTs must be "regularly dispatched" to such things as fires or accidents. (See section 553.215 of Part 553.) There is no specific frequency of occurrence which establishes "regularity"; it must be determined on the basis of the facts in each case.

You also indicate that the City is conducting a survey of the emergency medical service response logs to see if the majority of call-outs during a certain period were in conjunction with either the fire department or the police department. As stated in the opinion letter of October 11, 1985, if more than 50 percent of the fire protection/law enforcement call-outs during the applicable work period are calls related to fires, the EMTs who are properly trained and regularly dispatched would qualify as "fire protection" employees for the purposes of section 7(k) of FLSA. The same applies to police call-outs as a means of determining if an EMT may qualify as a "law enforcement" employee.

Finally, you wish to know if a written opinion from the Wage and Hour Division in this matter would provide the City with a "good faith defense." Sections 9 and 10 of the Portal-to-Portal Act of 1947 (Portal Act), 29 U.S.C. 259, and sections 790.13 through 790.19 of Interpretative Bulletin, 29 CFR Part 790 set forth the conditions which support good faith reliance on an administrative regulation, order, ruling, approval, or interpretation.

Section 10(a) of the Portal Act provides that:

....no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938 . . . if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy at such agency with respect to the class of employers to which he belonged. Such a defense, if established shall be a bar to the act or proceeding. . . .

Subsection (b)(1) of this section states that, in the case of FLSA, the Agency referred to in subsection (a) shall be the Administrator of the Wage and Hour Division. However, it is our opinion that written rulings and opinions prepared for the signature of Wage and Hour staff below the level of the Administrator, when this position is not vacant, may not be relied on for purposes of good faith reliance under the Portal Act. This is so since neither the Portal Act Reorganization Plan No. 6 of 1950 (15 F.R. 3174) nor delegations of authority issued pursuant to the latter make reference to Department staff below that level.

We trust that the above is responsive to your inquiry.

Sincerely,

Paula V. Smith
Administrator