FLSA - 1175

May 18, 1988

This is in response to your letter concerning the application of the Fair Labor Standards Act (FLSA) to firefighters who are employed by a municipality. You ask if under FLSA a city must compute a firefighter's regular rate based on a maximum of 53 hours per week (212 hours per 28-day "work period") or may a city use a higher maximum of 54 hours as set forth in a collective bargaining agreement. You also ask whether FLSA mandates the city pay time and one-half for all hours worked in excess of 212 in a 28-day "work period" if the firefighter's regular salary is based on 216 hours of work in said "work period," or half-time for the hours worked in excess of 212 and time and one-half the regular rate for all hours worked over 216.

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 $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. The provisions of FLSA as they apply to employees of State and local government employees are contained in Regulations, 29 CFR Part 553, a copy of which is enclosed.

Section 7(k) of 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 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. If your client elects to utilize section 7(k), the maximum hours standard under that provision of the FLSA must be used to compute overtime.

Nonexempt, salaried firefighters who are employed by a State or local government must be paid not less than one and one-half times their regular rates of pay for all hours worked which exceed the applicable maximum hours standard for a workweek or work period. Normally, the workweek is the basic unit to which the provisions and requirements of FLSA are applied. However, as provided in section 7(k) of FLSA an employer may use a work period instead of the workweek for the purpose of determining overtime hours worked.

It follows therefore that the basic principles concerning FLSA, such as the computation of the regular rate of pay, which apply to a "workweek" also apply in the same manner to a "work period".

The Supreme Court has stated that the regular rate "is not an arbitrary level chosen by the parties; it is an actual fact. Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary `regular rate' in the wage contracts" (Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419, 424-425). It is further stated in section 778.109 of 29 CFR Part 778 (copy enclosed) that the regular hourly rate of pay is determined by dividing an employee's total remuneration (except statutory exclusions) for any workweek by the total number of hours actually worked in that workweek.

Based on information provided in your letter, it is our understanding that the annual salaries which are paid to the firefighters in question are considered to be straight-time pay for a fixed, or scheduled number of hours in each work periodic and not fixed salaries for fluctuating hours as discussed in section 778.114 of Part 778. Therefore, appropriate adjustments in the firefighters' pay must be made when they work any number of hours in a work period other than those which are regularly scheduled.

In accordance with section 778.113(b) of Part 778, the regular rate of pay for a firefighter who is

paid on this basis is computed by reducing the annual salary to its work-period equivalent and then dividing this amount by the number of hours which it is intended to compensate. Under these circumstances, the firefighter must be paid an additional one-half times the regular rate for hours worked which exceed the maximum-hours standard provided by section 7(k) of FLSA.

To illustrate, we will compute the regular rate for a firefighter who is paid an annual salary of $21,343 for a fixed number of hours. The firefighter in our example works a total of 216 <u>scheduled</u> hours during a 28-day work period which has a maximum hours standard of 212 hours worked. The work-period (28 days) equivalent of the annual salary of $21,343 in this example is

$$\frac{28}{365} = .077; \ .077 \times \$21,343 = \$1643.41$$

The regular rate of pay for the firefighter for the work period is:

1. $\frac{(equiv.)}{216 \ (hours)} = \$7.61$ (regular rate)

Since the firefighter in our example has received straight-time pay ($1643.41) for the scheduled hours in the work period, additional compensation is due at a rate of one-half times (1/2T) the regular rate of pay for the hours worked between 212 and 216. This is computed in the following manner:

$$\frac{\$7.61 \times 4 \ (overtime \ hours \ worked)}{2} - \$15.22 \ (1/2T \ due)$$

If the firefighter is called out for extra duty during a work period and, as a consequence, works more than the scheduled hours, he or she must be compensated for this additional time at a rate of not less than one and one-half times (T1/2) the regular rate of pay for the particular work period. For example, if the firefighter is called to duty for an additional 12 hours as the result of emergencies during the work period, he or she should be paid a total of $1795.61 pursuant to the requirements of FLSA. This is computed in the following manner:

Work period salary equivalent = $1643.41

1/2T for 4 scheduled overtime hours worked = 15.22

T1/2 for 12 hours of additional duty

7.61 X 1 1/2 X 12 = <u>136.98</u>

$1795.61

We trust that the above is responsive to your inquiry.

Sincerely,

Paula V. Smith
Administrator