FLSA-1168

July 6, 1988

This is in further response to your letter concerning the application of the Fair Labor Standards Act (FLSA) to firefighters employed by the City *** (the "City"). We regret the delay in responding to your inquiry.

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 $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 apply 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 requirements of the statute.

On January 16, 1987, the Department of Labor published final Regulations, 29 CFR Part 553, which implement the Fair Labor Standards Amendments of 1985 (the Amendments). These regulations contain rules concerning 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.

It is our understanding that the City wishes to increase the tour of duty for each firefighter from 24 hours to 24.5 hours. Pursuant to section 553.222(c) of the regulations, the City further purposes to exclude 8 hours from the firefighters' compensable hours worked during each of these extended tours of duty.

Section 553.222 of the regulations sets forth the criteria which a public agency employer must adhere to in order to exclude the time which firefighters spend sleeping from their hours worked under FLSA. One of the criteria is that there must be an expressed or implied agreement between the employer and employees concerning the exclusion of time spent sleeping. In this regard you wish to know if the City were to give written notice to affected employees that deductions for sleep time would begin as of a certain time and there were no objection from those employees, would this constitute an implied agreement. Further, you wish to know if the employees objected to the sleep time deduction but continued to work, would this constitute an implied agreement.

As a general principle, an implied agreement or contract must contain the same elements as an express agreement. (See Dr. Franklin Perkins School v. Freeman, 741 P. 2d 1502 (7th Cir. 1984).) Furthermore, every contract requires some form of mutuality of obligation. (See Boggs v. Blue Diamond Coal Co., 590 F. 2d 655 (6th Cir. 1979), cert. denied, 444 U.S. 836 (1979).) A contract cannot be implied in fact when one party has expressly disavowed all intention to contract. (See Vantage Point, Inc., v. Parker Bros., Inc., 529 F. Supp. 1204 (E.D.N.Y. 1981, affirmed, 679 F.2d 301 (2nd Cir. 1982).) If the City were to exclude time spent sleeping in this case and pay the firefighters accordingly, mere acceptance by these employees of the reduced paychecks would not constitute an implied agreement to or acceptance of the exclusion. (See Beebe v. United States, 640 F.2d 1283 (Cl Ct. 1981).) In Beebe, the court stated that for an implied agreement to exist there needed to be a "statement, act or deed on the part of ..." the employees or their union representative which could be construed as consent to the exclusion of certain time from compensable hours worked.

The City would also need to identify a statement, act, or deed by its firefighters beyond acceptance of a reduced paycheck, to establish the necessary implied agreement for the proposed exclusion of time spent sleeping. In the absence of such an agreement, an employer may not make deductions for sleep from compensable hours of work under FLSA.

We trust that the above is responsive to your inquiry.

Sincerely

Paula V. Smith
Administrator