

**FLSA - 1166**

July 15, 1988

This is in further response to your letters concerning the application of the Fair Labor Standards Act (FLSA) to members of the City \*\*\* (the City) Volunteer Fire Department. 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 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 this law apply to all employees of State and Local governments except 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.

Regulations, 29 CFR Part 553, 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.

In your letter you state that the Fire Department receives approximately 500 fire calls per year. The average fire call is slightly less than two hours in length. The City currently has two full-time employees of the Fire Department and an additional 60 volunteer firefighters who receive on-call compensation when they respond to fire calls or are involved in training. Currently, firefighters are required to maintain a 30% response to fire calls and are required to attend 75% of the monthly training sessions in a year's time (two training sessions each month lasting approximately two hours each). The volunteer firefighters are paid \$7.00 per hour for responding to fire calls and training. The volunteer officers, Lieutenant Captain and Assistant Chief receive an additional \$50, \$84 and \$210 respectively each month. Volunteer firefighters who serve 20 years with the \*\*\* Fire Department will be eligible for a \$420 per month pension upon reaching 50 years of age.

You wish to know if the persons "volunteering" to serve as firefighters must be paid at a rate of one and one-half times their highest rate of pay when they work more than 40 hours in a week. You are also concerned whether or not Community Service Officers can volunteer within the same agency to be volunteer firefighters. Finally you ask at what rate would you compute overtime compensation for an employee being paid two different rates when they work more than 40 hours per week.

Section 3(e) of FLSA provides that individuals performing volunteer services for units of State and local governments should not be regarded as "employees" under the statute. Congress did not intend to discourage or impede volunteer activities undertaken for civic, charitable, or humanitarian purposes. Examples of services which might be performed on a volunteer basis include firefighting. See sections 553.100 through 553.104 of the Regulations.

Whether individuals who perform volunteer work for State and local governments are employees under FLSA will depend on the facts present in each situation. Section 3(g) of FLSA defines the term "employ" as including "to suffer or permit to work," and defines "employee" as "any individual employed by an employer." However, the U.S. Supreme Court has made it clear that this definition of "employ" did not "stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another." (See Walling v. Portland Terminal Company, 330 U.S. 148.)

We recognize the fact that the responsibility for public fire protection is often undertaken by volunteers in their communities. However, an employee of a public agency employer such as the District cannot be both a paid employee and an unpaid "volunteer" while performing the same type of service which the individual is employed to perform for his or her employer. This means that the

employees to whom you referred cannot perform services which are similar or identical with their paid duties when they respond to emergencies during their off-duty time as uncompensated "volunteers."

As indicated in section 553.106, volunteers may be paid expenses, reasonable benefits, a nominal fee, or any combination thereof, for their service without losing their status as volunteers. Whether such payments to volunteers are nominal must be considered in context of the economic realities of the total situation.

You state that the volunteers receive \$7.00 per hour for each hour worked while responding to fire calls or attending the training sessions. A payment of this type by the City to these individuals will affect their status as volunteer firefighters. Generally, payments of nominal amounts, which reasonably approximate any expenses incurred by the volunteers are acceptable as a means of reimbursing individuals who perform firefighting duty on a voluntary basis. An hourly rate paid for actual hours worked would in this instance, establish an employer-employee relationship because of section 3(e)(4)(a)(i) of FLSA. Therefore, nonexempt employees working full-time for the City would be due overtime compensation for all hours worked over 40 in a workweek.

Where an employee in a single workweek works at two or more different types of work for which different non-overtime rates of pay (of not less than the applicable minimum wage) have been established, the regular rate for that week is the weighted average of such rates as described in Interpretative Bulletin 778.115, 29 CFR Part 778 (copy enclosed). The total earnings (except statutory exclusions) are computed to include the total compensation during the workweek from all such rates, and are then divided by the total number of hours worked at all jobs. Certain statutory exceptions permitting alternative methods of computing overtime pay in such cases are discussed in 778.400 and 778.415 through 778.421.

We trust that the above information is responsive to your inquiry.

Sincerely,

Paula V. Smith  
Administrator

Enclosure