

## FLSA-765

December 19, 1988

This is in further response to your letter concerning the application of the overtime compensation provisions of the Fair Labor Standards Act (FLSA) to firefighters employed by \*\*\*. You wish to know whether \*\*\* may pay overtime compensation to its firefighters based upon the "two-tier" overtime payment system described below and comply with the overtime compensation requirements of FLSA. We regret the delay in responding to your inquiry.

You state that the firefighters are covered by the provisions of a collective bargaining agreement (CBA) between \*\*\* and the Fireman's Mutual Benevolent Association. The CBA provides that overtime pay will be paid for the hours worked in excess of 56 hours per week at one and one-half times the hourly rate obtained by dividing a week's pay by 40 hours (or annual pay by 2080 hours). For FLSA purposes, the parties intend that overtime pay be computed at a rate that is one and one-half times the hourly rate of pay obtained by dividing a week's pay by 56 hours (or annual compensation by 2912 hours), and the provisions of section 7 (k) will be adopted. This rate will be paid for the hours in excess of 53 but less than 56 (the maximum hours standard under section 7(k) is 53 hours in a 7-day work period or 182 hours in a 24-day work period). The parties wish, however, to continue to use the CBA overtime pay provisions for overtime hours worked in excess of 56 in a 7-day work period (or 192 hours in a 24-day work period).

The following examples illustrate what we understand to be the intent of the parties. The hourly pay rates calculated below are based upon the annual wage provision for a first year firefighter specified in the CBA.

### CBA hourly rate

\$16,676

$2080 (40 \text{ hours} \times 52 \text{ weeks}) = \$8.02$

### "FLSA" hourly rate

\$16,676

$2912 (56 \text{ hours} \times 52 \text{ weeks}) = \$5.73$

We presume that firefighters will be considered hourly paid employees and the hourly rates as obtained above, when applied to hours worked in each work period, will govern compensation.

Using the hourly rates as calculated above, overtime pay for a firefighter who works 53, 55, and 58 hours in three consecutive 7-day work periods would be calculated as follows:

Hours Straight Total Gross

Worked Hourly Rate time Overtime Wage

$$53 \times \$5.73 = \underline{\$303.69} \quad \$303.69$$

Total 53 303.69

$$53 \times \$5.73 = 303.69$$

$$\text{Total } \underline{2} \times 5.73 \times 1.5 = \underline{17.19}$$

$$55 \quad 303.69 \quad 17.19 \quad 320.88$$

$$53 \times 5.73 = 303.69$$

$$3 \times 5.73 \times 1.5 = 25.79$$

$$\underline{2} \times 8.02 \times 1.5 = \underline{24.06}$$

$$\text{Total } 58 \quad 303.69 \quad 49.85 \quad 353.54$$

The same principles would be applied if the parties adopt a 24-day work period under section 7(k).

As indicated in section 778.202 of Interpretative Bulletin, 29 CFR Part 778 (copy enclosed), section 7(e)(5) of FLSA permits the payment of a premium rate to an employee for work in excess of normal working hours or regular working hours, as the case may be. The extra compensation provided by such premium rate paid for excessive hours is a true overtime premium to be excluded from the regular rate and, pursuant to section 7(h), the extra compensation may be credited toward overtime compensation due under FLSA. Section 553.233 of Regulations, 29 CFR Part 553 (copy enclosed) provides that the rules set forth in 29 CFR Part 778 are applicable to employees for whom section 7(k) exemption is claimed when overtime compensation is provided in cash wages.

Therefore, if firefighters are compensated as discussed above, it is our opinion that the parties proposed overtime pay system meets the requirements of FLSA.

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

Sincerely,

Paula V. Smith  
Administrator