



U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

FLSA2009-19

January 16, 2009

Dear **Name***:

This is in response to your request for an opinion whether the Transportation Authority's (TA) employees are firefighters employed by a public agency, thereby falling within the partial overtime exemption under section 7(k) of the Fair Labor Standards Act (FLSA).^{*} You further inquire whether the regular rate of pay excludes payments made for vacation buy-backs or stipends for nonuse of sick leave. It is our opinion that the TA is a public agency whose firefighters meet the requirements of sections 3(y) and 7(k) of the FLSA. Further, we opine that the TA may exclude payments for vacation buy-backs from the regular rate of pay, but must include stipends for nonuse of sick leave in that regular rate.

Section 7(k) of the FLSA provides a partial overtime pay exemption for public employees in fire protection or law enforcement activities. Under section 7(k), when a public employer establishes a work period between 7 and 28 consecutive days, overtime compensation is not required until the employee satisfies the maximum hours standard under the regulations. See 29 C.F.R. § 555.230(c). The maximum hour standard for fire protection personnel ranges from 53 hours worked in a 7-day period to 212 hours worked in a 28-day period. See *id.*

Public Agency

The TA provides regional transportation, including railroad, omnibus, marine, and air services. The TA is a public benefit corporation created by, and organized under, state law. The TA is considered a "state agency," and you represent that its declared purpose, according to state statute, is "in all respects for the benefit of the people of the state . . . and the authority shall be regarded as performing an essential governmental function in carrying out its purposes." The TA has the power to establish, levy, and collect fares, tolls, or fees, and acquire real property pursuant to eminent domain. The TA's property is exempt from taxation.

Under section 3(x) of the FLSA, a public agency includes "a political subdivision of a State." In applying the term "political subdivision," the Department of Labor relies on *NLRB v. Natural Gas Util. Dist. of Hawkins County, TN*, 402 U.S. 600, 604-05 (1971), where the Supreme Court accepted the National Labor Relations Board's definition of political subdivisions as entities that are "(1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by

^{*} Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at www.wagehour.dol.gov.

individuals who are responsible to public officials or to the general electorate.” *See also Skills Dev. Servs. v. Donovan*, 728 F.2d 294, 299-300 (6th Cir. 1984); Wage and Hour Opinion Letter [FLSA2004-14](#) (Oct. 8, 2004); Wage and Hour Opinion Letter March 18, 1986 (copy enclosed).

You indicate that the state legislature created the TA as a state agency to provide “essential governmental function[s],” including regional transportation and related services. The TA’s board and chairperson are appointed by the governor with the advice and consent of the state senate, and the governor may remove any board member for inefficiency, neglect of duty, or misconduct in office. Because the TA is created by the state and is administered by “individuals who are responsible to public officials,” it is a political subdivision under the *Natural Gas* analysis, and thus a “public agency” under section 3(x) of the FLSA.

Firefighters Under Sections 3(y) and 7(k)

The TA employs individuals in its Aircraft, Rescue, and Firefighting Department stationed at the local international airport. These employees provide services, including fire protection and prevention, dispatching, fire inspection, fire equipment inspection, rescue at an airplane crash scene or fire, and assistance to individuals in the airport needing medical attention. They are trained firefighters with the authority and responsibility to engage in fire suppression. Further, the employees receive training consistent with state regulations, including training in aircraft rescue, firefighting essentials, initial fire attack, and ongoing emergency training as required by applicable regulations, including training related to aircraft firefighting. Over the past 25 years, they have responded to emergencies to prevent, control, or extinguish fires, and to protect life, property, and the environment.

You ask whether the individuals described qualify as “employee[s] in fire protection activities” under section 3(y) of the FLSA.

Section 3(y) states:

“Employee in fire protection activities” means an employee, including a firefighter, . . . rescue worker, [or] ambulance personnel, . . . who –

- (1) is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or State; and
- (2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

Based on the information provided, the employees in question are trained in and have the legal authority and responsibility to engage in fire suppression. Moreover, they engage in fire prevention and control, and respond to emergencies where life, property, or the environment is at risk.

You note, however, that “public agencies” that are political subdivisions of a state under section 3(x) are not mentioned in section 3(y). You ask whether firefighters employed by the TA, a “public agency,” are within the purview of section 3(y).

According to legislative history, section 3(y) “preserv[es] the intended flexibility afforded to cities and fire departments under the *original* Fair Labor Standards Act.” 145 Cong. Rec. H11499-02 (1999) (statement of Rep. Ehrlich) (emphasis added) (copy enclosed). It is clear that Congress did not intend to preclude public agencies that are political subdivisions of a state from utilizing the partial exemption in section 7(k). Therefore, we believe section 3(y) includes firefighters employed by a “public agency” that is a political subdivision of a state under section 3(x). It is our opinion that the TA’s employees are “employee[s] in fire protection activities” under section 3(y) and, therefore, qualify for the partial overtime exemption under section 7(k).

Work Period Under Section 7(k)

The firefighters are represented by two unions -- the Airport Firefighters Association (FA) and the Superior Officers Association (OA). The collective bargaining agreements (CBA) between the TA and these firefighters’ unions state:

The standard work week shall be four (4) days on and four (4) days off which shall be two (2) work days from 7:00 a.m. to 5:00 p.m. and the other two (2) work days from 5:00 p.m. to 7:00 a.m. The foregoing work schedule shall not be changed unless the changes are mutually agreed upon.

You assert that this contract language creates an eight-day work period sufficient for purposes of section 7(k). You ask whether the TA must “perform a formalistic declaration” of section 7(k) for it to apply.

Under 29 C.F.R. § 553.230, firefighters qualifying under section 7(k) with a work period of eight days must receive overtime for more than 61 hours worked during that period. Under 29 C.F.R. § 553.224(a), the term “work period” means:

any established and regularly recurring period of work which . . . cannot be less than 7 consecutive days nor more than 28 consecutive days. Except for this limitation, the work period can be of any length, and it need not coincide with the duty cycle or pay period or with a particular day of the week or hour of the day. Once the beginning and ending time of an employee’s work period is established, however, it remains fixed regardless of how many hours are worked within the period.

The “four days on/four days off” work schedule establishes a “regularly recurring period of work which [is not] less than 7 consecutive days nor more than 28 consecutive days.” [29 C.F.R. § 553.224\(a\)](#). See *Birdwell v. City of Gadsden*, 970 F.2d 802, 806 (11th Cir. 1992) (“The evidence was uncontradicted that the officers worked in seven day cycles -- an officer worked five days with two days off.”). Further, the TA has affirmatively claimed the 7(k) exemption by the CBAs, which objectively establish an eight-day work

period. Therefore, the TA's established eight-day work period allows it to pay its firefighters overtime after 61 hours worked, in accordance with section 7(k).

Vacation Buy-Back and Stipend for Nonuse of Sick Leave

Under the TA's CBA with the FA, "[o]fficers have the option to convert vacation time into cash value four times during the fiscal year." The CBA with the OA provides that "[o]fficers have the option to convert vacation time into cash value twice during the fiscal year."

As regards to the nonuse of sick leave, the CBA with the FA provides a stipend of 12.5 hours for each perfect attendance quarter. The CBA with the OA states:

[a]ll employees will be eligible for a stipend for perfect attendance as follows:
for the first quarter of perfect attendance – 11.0 hours, for the second quarter . . .
– 12.0 hours, for the third quarter . . . – 13.0 hours, and for the fourth quarter . . .
– 14.0 hours. The hourly rate shall be that to which the employee is entitled on the last day of the quarter which applies.

You ask whether the regular rate may exclude these payments.

Under section 7(e)(2) of the FLSA, the regular rate may exclude payments not made as compensation for hours worked. These include payments made for occasional periods when no work is performed due to vacation. 29 U.S.C. § 207(e)(2). The regulations clarify that the exclusion applies when the employee foregoes a vacation but still receives the vacation pay in addition to customary pay for all hours worked. [29 C.F.R. § 778.219\(a\)](#). Therefore, it is our opinion that the regular rate of pay may exclude vacation buy-back payments. See Wage and Hour Opinion Letter [FLSA2006-18NA](#) (July 24, 2006); Wage and Hour Opinion Letter [FLSA2004-2NA](#) (Apr. 5, 2004).

Although FLSA section 7(e)(2) also excludes payments made for occasional periods where no work is performed due to illness, the stipend for nonuse of sick leave must be included in the regular rate, because the stipends are attendance bonuses. Under [29 C.F.R. § 778.211\(c\)](#), "[b]onuses which are announced to employees to induce them to work more steadily or more rapidly or more efficiently or to remain with the firm are regarded as part of the regular rate of pay. Attendance bonuses . . . are in this category." See 29 U.S.C. § 207(e)(3)(a); Wage and Hour Opinion Letter November 5, 1999 (copy enclosed); Wage and Hour Opinion Letter February 24, 1986 (copy enclosed); Wage and Hour Opinion Letter July 15, 1980 (copy enclosed); see also *Landaas v. Canister Co.*, 188 F.2d 768, 771-72 (3d Cir. 1951) ("We conclude that the provision for attendance bonus was clearly a part of the regular rate."); *Bibb Mfg. Co. v. Walling*, 164 F.2d 179 (5th Cir. 1947) (attendance incentive must be included in regular rate), *cert. denied*, 333 U.S. 836 (1948); *Chao v. Port City Group*, No. 1:04-CV-609, 2005 WL 3019779, at *4 (W.D. Mich. Nov. 10, 2005) (attendance bonus paid to employees who had perfect attendance during an entire quarter should have been included in the regular rate).

We believe that perfect attendance stipends encourage employees not to use or abuse sick leave, resulting in reduced absenteeism. Regular attendance benefits the employer by not

requiring replacement salaries including possible overtime, limiting administrative costs related to rescheduling, and improving workplace morale. Stipends for nonuse of sick leave are considered attendance bonuses. *See* Wage and Hour Opinion Letter February 24, 1986.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issues addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We trust that this letter is responsive to your inquiry.

Sincerely,

Alexander J. Passantino
Acting Administrator

*** Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. § 552(b)(7).**

*Quoted in Balestrieri v. Menlo Park Fire Protection Dist.
No. 12-15975 archived on September 30, 2015*