



February 14, 2005

FLSA2005-1NA

Dear **Name***,

This is in response to your letter concerning the application of the Fair Labor Standards Act (FLSA) to a contract negotiated between the City of **Name*** and its firefighters. We regret the delay in responding to your inquiry.

You requested an opinion regarding three contemplated "special assignment" positions. Two of the new positions would be in fire investigation and one in the fire department's training division. Current firefighters would be reassigned to fill the three positions. The City plans to pay these three nonexempt individuals at a "special assignment" pay rate that is higher than the pay rate for work in fire suppression. The employees would be paid time and one-half this higher straight time pay rate when they work more than eight hours a day performing the special assignment duties.

There may also be times when these three employees may work overtime in their former positions as firefighters. You state that when an employee works overtime performing the duties of a firefighter, the City wishes to pay overtime at a rate that is time and one-half the lower straight time base rate which is paid for fire suppression.

You ask whether an employee who performs two different jobs during overtime hours may be paid at time and one-half the regular rate in effect when the respective jobs are performed in non-overtime hours. You refer to Regulations 29 CFR Part 778, *Interpretive Bulletin on Overtime Compensation*, and quote sections 778.415 and 778.419. You assure us that your proposal is not a device for avoiding the payment of minimum wage and that its use is not intended to avoid the payment of proper overtime compensation due on other sums paid to employees, such as bonuses which are part of the regular rate. You also have asked us to assume that the two hourly rates are bona fide and that all overtime hours worked would be compensated at an overtime rate.

As the regulations you quote make clear, nothing in the FLSA prohibits an employer from paying an employee at different rates for various types of work as long as no rate is less than the statutory minimum wage. Ordinarily when an employee in a single workweek works at two or more different types of work for which different hourly rates of pay have been established, his or her regular rate for that week is the weighted average of those rates. However, if the employer meets certain conditions, Section 7(g)(2) permits an employer to pay an employee overtime compensation at one and one-half times a different hourly rate than the employee's regular hourly rate. If an employer wishes to use the Section 7(g)(2) alternative compensation calculation, the employer must satisfy the following four requirements.

- (1) the employee must perform two or more kinds of work;
- (2) the employer must establish a bona fide different hourly rate for those different kinds of work;
- (3) the compensation must be paid pursuant to an agreement or understanding arrived at between the employer and the employee in advance of the performance of the work; and
- (4) the compensation must be computed at rates not less than one and one-half times such rates applicable to the same work when performed during non-overtime hours.

Accordingly, the Wage and Hour Division would agree that Section 7(g)(2) may apply in the situation you describe so that the employees are compensated at the overtime rate that corresponds to the job performed during their overtime hours. 29 U.S.C. § 207(g)(2); 29 CFR § 778.419. See also Opinion Letters of December 16, 1980, July 1, 1986, and November 10, 1986 (enclosed).

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a



different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to pending litigation concerning the issue 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 the above information is responsive to your inquiry.

Sincerely,

Barbara R. Relford
Office of Enforcement Policy
Fair Labor Standards Team

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