FLSA 1211

January 23, 1987

This is in further response to your letter of October 21 1986, concerning the application of the Fair Labor Standards Act (FLSA) to firefighters who are employed by the City of (the City). You wish to know if the City may pay its firefighters "for an <u>average</u> 112 hours of work per pay period regardless of the number of actual hours worked...."

Section 7(k) of FLSA provides a partial overtime pay exemption for public agency employees employed in fire protection or law enforcement activities (including security personnel in correctional institutions). Under this provision, an employer may establish a work period of 7 to 28 consecutive days for the purpose of paying overtime compensation to employees employed in fire protection or law enforcement activities. The maximum hours standard for fire protection personnel ranges from 53 hours worked in a 7-day work period to 212 hours worked in a 28-day work period. You indicate that the City has established a 27-day work period, which has a maximum hours standard of 204 hours worked, for the purpose of applying the provisions of section 7(k).

As an example of the method of payment which is proposed for our consideration, you refer to a firefighter who is paid for 112 hours, presumably at a straight-time rate of pay, at the end of each of two pay periods in the 27-day work period, during which time this individual actually works 216 hours. This method of paying employees on the basis of an "average" number of hours would not comply with the requirements of FLSA. Since the firefighter in your example actually works a total of 216 hours during the work period, the premium compensation for 12 overtime hours (216 - 204) must be based on the employee's <u>regular rate of pay</u> which is described below.

Nonexempt, salaried firefighters who are employed by a State or local government must be paid not less than one and one-half times their regular rates of pay for all hours worked which exceed the applicable maximum hours standard for a workweek or work period. Normally, the <u>workweek</u> is the basic unit to which the provisions and requirements of FLSA are applied. However, as provided in section 7(k) of FLSA, an employer may use a <u>work period</u> instead of the workweek for the purpose of determining overtime hours worked. It follows, therefore, that the basic principles concerning FLSA, such as the computation of the regular rate of pay, which apply to a "workweek" also apply in the same manner to a "work period".

The Supreme Court has stated that the regular rate "is not an arbitrary level chosen by the parties; it is an actual fact. Once the parties have decided upon the amount of wages and the mode of payment, the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary, 'regular rate' in the wage contracts" (<u>Walling</u> v. <u>Youngerman-Reynolds Hardwood Co.,Inc.</u>, 325 U.S. 419, 424-425). It is further stated in section 778.109 of 29 CFR Part 778 (copy enclosed) that the regular hourly rate of pay is determined by

dividing an employee's total remuneration (except statutory exclusions) for any workweek by the total number of hours actually worked in that workweek.

Based on information provided by the City's Personnel Director, *** in a telephone conversation on December 10 with a member of my staff, it is our understanding that the annual salaries which are paid to the firefighters in question are considered to be straight-time pay for a fixed, or scheduled number of hours in each work period, and not fixed salaries for fluctuating hours as discussed in section 778.114 of Part 778. Therefore, appropriate adjustments in the firefighters' pay must be made when they work any number of hours in a work period other than those which are regularly scheduled.

In accordance with section 778.113(b) of Part 778, the regular rate of pay for a firefighter who is paid on this basis is computed by reducing the annual salary to its work-period equivalent and then dividing this amount by the number of hours which it is intended to compensate. Under these circumstances, the firefighter must be paid an additional one-half times the regular rate for hours worked which exceed the maximum hours standard provided by section 7(k) of FLSA.

To illustrate, we will compute the regular rate for a firefighter who is paid an annual salary of $21,840 for a fixed number of hours. The firefighter in our example works a total of 216 <u>scheduled</u> hours during a 27-day work period which has a maximum hours standard of 204 hours worked. The work-period (27 days) equivalent of the annual salary of $21,840 in this example is $1616.16:

<u>27</u> = .074; .074 X $21,840 = $1616.16

365

The regular rate of pay for the firefighter for the work period is:

<u>$1616.16</u> (equiv.) = $7.48 (regular rate)
2l6 (hours)

Since the firefighter in our example has received straight-time pay ($1616.16) for the scheduled hours in the work period, additional compensation is due at a rate of one-half times (1/2T) the regular rate of pay for the hours worked between 204 and 216. This is computed in the following manner:

<u>$7.48</u> X 12 (overtime hours worked) = $44.88 (1/2T due)

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If the firefighter is called out for extra duty during a work period and, as a consequence works more than the scheduled hours, he or she must be compensated for this additional time at a rate of not less than one and one-half times (T1/2) the regular rate of pay for the particular work period. For example, if the firefighter is called to duty for an additional

12 hours as the result of emergencies during the work period, he or she should be paid a total of $1795.68 pursuant to the requirements of FLSA. This is computed in the following manner:

Work period salary equivalent = $1616.16

1/2T for 12 scheduled overtime hours worked = $ 44.88

T1/2 for 12 hours of additional duty

$7.48 X 1 1/2 X 12 = $ 134.64

$l795.68

We trust that the above is responsive to your inquiry.

Sincerely,

Paula V. Smith
Administrator

Enclosure