

## **FLSA-109**

February 27, 1990

This is in response to your letters concerning the application of the Fair Labor Standards Act (FLSA) to certain employees of the \*\*\* Street Department who also work for the Fire Department. We regret the delay in responding to your inquiry.

You state that the employees at issue work 40 hours per week for the street department. On occasion during the winter when snow removal is necessary, they will work in excess of 40 hours per week for which they are paid time and one-half their regular rates of pay. These employees also voluntarily work for \*\*\* the Fire Department as firefighters and respond to fire calls on a "first-come basis." If they actually go on the fire call, they are paid \$16.00 per hour for the first hour and \$8.00 per hour for all subsequent hours on the fire call.

In response to our request, you advised us that one of the employees at issue responded to 46 fire calls in 1986, 77 fire calls in 1987, and 92 fire calls in 1988; the other employee responded to 39 calls in 1986, 70 calls in 1987, and 42 calls in 1988. In addition, these employees regularly attended two firefighter training sessions each month (generally of 1 to 2 hours duration) for which they were paid. In light of these facts, you rendered an opinion to the City which concluded that the employees in question did not work for the City as firefighters on an "occasional or sporadic basis" and, therefore, their hours of work for the City as firefighters must be combined with their hours worked for the street department in computing proper FLSA overtime compensation. We agree.

Section 7(p)(2) of FLSA provides that State and local government employees may, solely at their option, work occasionally or sporadically on a part-time basis for the same public agency in a different capacity from their regular employment, and the hours worked in the different jobs need not be combined for the purpose of determining overtime liability under FLSA. The term "occasional or sporadic" means infrequent, irregular, or occurring in scattered instances. See section 553.30 of Regulations, 29 CFR Part 553.

The street department employees would be considered to be employed in a different capacity when working for the City as firefighters. However, as indicated above, it is essential that such extra employment be infrequent, irregular, or occurring in scattered instances. Under the circumstances you described, it is our opinion that the employees in question were not employed as firefighters on an infrequent or irregular basis within the meaning of section 7(p)(2) of FLSA. Consequently, the hours worked by these employees as firefighters would be combined with the hours worked in their primary jobs for the purpose of computing proper overtime compensation due them under FLSA.

We would like to point out alternative methods of computing overtime pay for nonexempt employees whose part-time employment is not occasional or sporadic. Where such an employee works at two or more different types of work for which different nonovertime rates of pay have been established, the employee's regular rate for that week

is the weighted average of such rates. See section 778.115 of 29 CFR Part 778. An alternative method of overtime compensation provided under section 7(g)(2) of FLSA is discussed in sections 778.415 through 778.421 of Part 778. In addition, State and local government employees may be furnished compensatory time off in lieu of overtime payment in cash for hours worked in excess of statutory standards. See sections 553.20 through 553.28 of Regulations Part 553.

We trust that the above is responsive to your inquiry.

Sincerely,

Nancy M. Flynn  
Acting Administrator