*** FLSA-990 ***

May 9, 1990

This is in further response to your letter concerning the application of the overtime provisions of theFair Labor Standards Act (FLSA) to law enforcement officers represented by your clients who are labor organizations in the State of Wisconsin. We regret the delay in responding to your inquiry.

You ask whether a public employer must pay overtime compensation for hours worked in excess ofFLSA maximum hours standard to an employee who "voluntarily" works an additional day in the current workweek (or work period) in order to "trade" this day worked for a day off in a future workweek (or work period). In this regard, you refer to "trading time" as described in section 553.18 of Regulations, 29 CPR Part 553 (1986 Edition). However, the section to which you refer is no longer current since Regulations, Part 553 have been revised (copy enclosed), effective February 17, 1987, to implement the changes in FLSA resulting from the 1985 Fair Labor Standards Amendments (Public Law 99-150) enacted November 13, 1985.

As indicated in section 553.31 of the revised Regulations, section 7(p)(3) of FLSA, as amended, provides that two individuals employed in any occupation by the same public agency may agree, solely at their option and with the approval of the public agency, to substitute for one another during scheduled work hours in performance of work in the same capacity. The hours worked shall be excluded by the employer in the calculation of the hours for which the substituting employee would otherwise be entitled to overtime compensation under FLSA. Where one employee substitutes for another, each employee will be credited as if he or she had worked his or her normal schedule for that shift. This provision makes if clear that "trading time" is intended for situations in which one employee substitutes for another employee.

An employee trading time with himself or herself, as you propose, must be paid proper overtime compensation for hours worked in excess of the FLSA maximum hours standard for the workweek or work period during which the additional day is worked. As is indicated in section 778.104 of Interpretative Bulletin, 29 CFR Part 778 (copy enclosed), FLSA does not permit averaging of hours over 2 or more weeks (or work periods) even if the employee voluntarily agrees to do so. An employee may not agree to waive his or her rights to overtime compensation. Similarly, a labor organization also may not negotiate a provision which waives an employee's statutory right under FLSA. In this regard, see Brooklyn Sayings Bank v. O'Neil, 324 U.S. 697 (1945); Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981).

We do wish to point out that, as indicated in section 553.231(b) of the revised Regulations, section 7(k) of FLSA permits public agencies to "balance" the hours of work over an entire work period for law enforcement and fire protection employees. In effect, the employee does not work in excess of the maximum hours standard for the work period under the balancing arrangement.

We have also enclosed for your information, the provisions of the "time off plan" which, under certain conditions described in the plan, could achieve the objective of a "trade" as you have proposed. Please note, however, that proper overtime compensation must be paid under the time off plan, and that there are difficulties inherent in administering a time off plan.

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 questions presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein.

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

Sincerely,

Samuel D. Walker
Acting Administrator

Enclosures