FLSA-730

October 9, 1990

This is in response to your letter on behalf of *** . As a result of an investigation made by the wage and Hour District Office in Tampa, Florida, you requested an opinion concerning whether *** is a public agency within the meaning of section 3(x) of the Fair Labor Standards Act (FLSA), and whether *** is an employer within the meaning of section 3(d) of the FLSA. We regret the delay in responding to your inquiry.

You state that *** State law divides *** into special fire districts and requires the County to contract with fire departments to provide services to those districts. The law specifically states that no fire department in existence at the time of the law's enactment can be abolished by the County. *** was in existence at the time of the law's enactment. Therefore, the County was compelled by *** statute to contract with *** for fire services.

You further state that *** was incorporated as a private nonprofit corporation by the volunteer firefighters who formed it. The corporation is solely "owned" by the volunteers who formed it. *** is managed by a board of directors who are elected by the "owners" who have one vote (for a total of 17 votes). The five board members each have three votes (for a total of 15 votes). Firefighters cannot, however, be members of the board, who must be residents of the fire district. *** is funded by ad valorem taxes.

You believe that since the *** law requires the County to contract with *** for fire protection services, this means that *** is an entity created by the State. Therefore, you believe that *** is a public agency within the meaning of section 3(x) of FLSA.

In NLRB v. Natural Gas Utility District of Hawkins County, Tennessee, 402 U.S. 600 (1971), the U.S. Supreme Court upheld the definition of the term "political subdivisions" adopted by the National Labor Relations Board (NLRB). Under this definition, political subdivisions are entities that are either (1) created directly by the State, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate (402 U.S. 604-5). These criteria for determining if an entity is a political subdivision of a State were also used by the courts in Williams v. Eastside Mental Health Center, 669 F.2d 671 (11th cir. 1982), and in Skills Development Services v. Donovan, 728 F.2d 294 (6th Cir. 1984), to define the term "political subdivision" in section 3(x) of the FLSA. In the *** case, the court held that while there existed controls uncommon in the context of normal private corporations contracting with the States the key factor is the authority of a public official to hire and fire the governing board of directors (669 F.2d at 679).

It is our opinion that *** is not a public agency as defined in section 3(x) of the FLSA. It is our view that *** ultimate control over *** managing board of directors is held by private individuals who are not subject to the authority of a public official and/or the general public, which is the key factor upon which the courts have focused. In this regard, see also Powell v. Tuscon Air Museum Foundation of Pima County, 771 F.2d 1309 (9th Cir. 1985). In Powell the court focused on two factors: The fact that the museum officials were not "directly responsible to public officials or the general public," and the fact that the museum was considered an "independent contractor" in holding that the museum was not a public agency.

It is our view that the *** law did not "create" *** as a public agency within the meaning of section 3(x) of the FLSA because it required the County to contract with *** for fire protection services. Rather, it appears that (among other matters) *** law was intended to protect fire organizations (that were in existence before its passage) from being abolished.

With respect to whether *** is an employer within the meaning of section 3(d) of the FLSA, it is necessary to consider the employment relationship between *** and its fire-fighters. In determining whether an employment relationship exists, the courts look to the economic realities of the situation. In this regard, see Rutherford Food Corp. v. McComb, 331 U.S. 772, 730 (1947).

Your position that is not an employer of its firefighters under the FLSA is based upon Wirtz v. Construction Survey Cooperative, 235 F. Supp. 621 (S. Conn. 1964). In that case the court held that members of a cooperative who incorporated themselves were not employees under FLSA. In addition, you cite Wage and Hour opinion Letter, WH-171 (July 12, 1963), which concluded that two tool and die makers who formed a corporation and assumed management responsibility were not employees for FLSA purposes. For the reasons discussed below, we do not believe that either of these citations support your contention that the firefighters are not employees of ***.

With respect to the opinion letter, it states in pertinent part that "... there is nothing to prevent a person from being a stockholder in a corporation and, at the same time, an employee of the corporation for purposes of the Act ..." While *** firefighters are members of the nonprofit corporation instead of shareholders, their status as employees of the corporation are not diminished by this fact. The firefighters work regular hours for the corporation under the supervision of a fire chief and they are paid wages as employees, which are negotiated through the collective bargaining process by the union representing the firefighters. It is well established that employees may be stockholders in a corporation without diminishing their status as employees of the corporation.

In Wirtz the court held that the FLSA was not applicable to the members of a cooperative because such members were not "employees" within the meaning of the FLSA since they constituted a small closely-knit partnership of technicians rendering services to clients in a construction field, since they were not regimented and conducted themselves as self-employed independent craftsmen who worked or refused to work at will, and since they shared the profits as well as the losses of the cooperative. No corporate structure was involved, and the organization had no officers, officials, or board of directors. No members received a salary. Each member had an equal voice in management, and unanimous consent was necessary on all decisions. Unlike the members in Wirtz , *** firefighters follow the usual path of employees and are dependent on *** for employment. They do not have the right to work or refuse to work at will. They receive wages for their labor under a contract negotiated by their union through the collective bargaining process, presumably at arm's length.

After a careful review of the facts as presented, it is our opinion that *** is an employer within the meaning of section 3(d) of the FLSA, and that its firefighters are employees of *** within the meaning of the FLSA.

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.

Sincerely,

Samuel D. Walker
Acting Administrator