

FLSA-1113

March 3, 1992

This is in response to your letter requesting an opinion as to whether the two Fire Prevention Inspectors (FPIs) of the City of *** (the City) are exempt under section 13(a)(1) of the Fair Labor Standards Act (FLSA).

You state that the FPIs inspect buildings within the City and enforce all Federal, State, and local laws pertaining to fire prevention, and deal with all areas of fire safety. The FPIs also manage and administer all public relations and educational efforts for public fire prevention and safety on behalf of the City. They also investigate and determine the cause of all fires occurring within the City, as well as responding to fires and performing firefighting duties as needed. The FPIs are responsible for the compilation of data concerning fires and emergency runs within the City, the reporting of same to proper authorities, the compilations of the yearly report, and the inventory of the City.

You also state that the FPIs are paid a salary in excess of the exemption minimum and serve as both volunteer firefighters and officers for the City. As volunteer firefighters the FPIs are expected to respond to 30% of fire calls and to attend 75% of the training sessions. In addition, the FPIs receive a monthly stipend as a volunteer fire officer and hourly pay for training or fire calls.

Section 13(a)(1) of the FLSA provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in Regulations, Part 541, a copy of which is enclosed. An employee may qualify for exemption as a bona fide administrative employee if all the pertinent tests relating to duties responsibilities, and salary, as discussed in section 541.2 of the regulations, are met. In order for the administrative exemption to apply, an employee who is paid on a salary basis of at least \$250 per week must have as his or her primary duty the performance of non-manual work directly related to the management policies or general business operations of his or her employer or employer's customers, and must include work requiring the exercise of discretion and independent judgment.

From the information you provided it appears that the primary duty of the FPIs consists of the actual inspection of buildings and enforcement of fire safety standards within the City, and the making of determinations as to the causes of fires, as well as responding to fires and performing the duties of a fire fighter. Such functions, while important, do not relate to the administrative policies or the general management of the employer's business operations, and, as such, are not administrative in nature. Where the primary duty of an employee does not relate to the management policies or general business operations of either the employer or the employer's customers, as discussed above, such an employee cannot qualify for exemption as a bona fide administrative employee, as described in section 541.2 of the regulations, and must be paid in accordance with the monetary provisions of the FLSA, including its overtime pay provisions.

Regulations, 29 CFR Part 553 (copy enclosed), that implement the Fair Labor Standards Amendments of 1985, contain rules concerning statutory exclusions and exemptions, record keeping requirements, and compensatory time provision which apply to State and Local government workers in general. In addition, the Regulations contain specific rules for volunteers and for fire protection and law enforcement employees. As indicated in section 553.101(d) of the Regulations, an individual shall not be considered a volunteer if the individual is otherwise employed by the same public agency to perform the same type of service as those for which the individual proposes to volunteer. It is our opinion that the employees who are employed by the City's fire department as FPIs cannot be both paid employees and unpaid "volunteers" while performing the same type of services which the individuals are employed to perform for his or her employer. We consider the duties of the FPIs and the duties they perform as "volunteer" fire fighters to be sufficiently similar to constitute the "same type of services" for purposes of the FLSA. Therefore, in determining whether the monetary provisions of the FLSA are met, including its overtime pay provisions, the hours worked by the employees as FPIs must be combined with the hours worked as "volunteer" fire fighters under the FLSA.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of 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 also represented that this opinion is not sought on behalf of a client which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provision of the FLSA.

Sincerely,

Karen R. Keesling
Acting Administrator