



WHD-OL-1993-0012

March 18, 1993

Name*

This is in response to your inquiry concerning the application of the Fair Labor Standards Act (FLSA) to certain emergency medical service (EMS) employees employed by New Hanover County that volunteer services to the Ogden-New Hanover Volunteer Rescue Squad, Inc. (Ogden). The issue of concern is whether County EMS employees are precluded from volunteering their services to Ogden without compensation in accordance with the overtime requirements of the FLSA. We regret the delay in responding to your inquiry.

You state that Ogden is an autonomous private non-profit corporation that contracts with the County to provide emergency medical and rescue services on an "as needed basis." For purposes of this response, we assume that Ogden is in fact a separate and independent private entity the members of whose board of directors are not appointed or otherwise responsible to County officials. Thus, Ogden would not be a "public agency" within the meaning of the Act. (See the enclosed opinion letter of March 18, 1986, in which this issue is discussed).

As we understand the arrangement, New Hanover County has permitted its EMS employees to volunteer additional hours of service to Ogden without compensation. The County has chosen to provide emergency medical and rescue services to the public through its own career employees as well as through noncareer citizen volunteers stationed at Ogden's facilities.

The County's contract with Ogden requires that Ogden provide emergency medical and rescue services within a defined area in the County, as well as back-up assistance to the County wherever dispatched by the County Central Dispatch. In addition, Ogden is required to provide the same emergency medical response and rescue services at night and on weekends that the County furnishes to the public with its own EMS employees during the day on weekdays. According to the County EMS Director _____ (May 7, 1991 letter), Ogden also offers volunteer personnel to the County either to "ride along" as a supplement to the existing County EMS crew or as a substitute for a County EMS crew member who is sick or on personal leave. Ogden's facilities and equipment may be used by County EMS employees when necessary.

Under the circumstances presented by this case, including the integrated structure of the County's EMS services, it is our view that all work involving like duties or services performed by a career EMS employee within New Hanover County, whether the worker reports to the County or to Ogden, is compensable and must be included in determining whether he or she has worked overtime hours for purposes of the FLSA. We view the underlying purpose and rationale of section 3(e) (4) (A) as requiring this result. Pursuant to section 3(e) (4), an individual is not permitted to "volunteer" to perform services for a public agency if such services are the same type of services which the individual is employed to perform for the public agency. Although Ogden is a corporate entity separate from the County, services performed by its "volunteer"

personnel, who are also County employees, are clearly performed “for” the County. Not only do the services directly benefit the County, but they are identical to the services performed by these and other County employees, at places and times when County personnel are unavailable.

To allow EMS employees to “volunteer” to perform through Ogden, for the County, the same services for which they are paid by the County raises the potential for abuse which Congress had in mind in enacting section 3(e) (4) (A). See Senate Report No. 99-159, October 17, 1985, page 14, 2 U.S. Cong. News 1985, page 662 (“the Committee wishes to prevent any manipulation or abuse of minimum wage requirements through coercion or undue pressure upon employees to ‘volunteer’”). In this vein, we note that in the agreement of February 19, 1992 between the County and Ogden, at page 3, it is agreed that any employee who wishes to volunteer for Ogden must agree, in violation of the FLSA, that any wages ultimately found owing by the County to the employee as a result of this activity must be donated by the employees to Ogden. Such sums, if any, are then deducted from future contractual payments by the County to Ogden.

Furthermore, even if Ogden were a public agency, this would not be the type of situation envisioned by section 3(e) (4) (B) of the Act and 29 C.F.R. 553.105. These sections provide for mutual aid agreements between two or more public agencies, whereby employees of one agency may perform volunteer services for a second agency without thereby being considered employees of the first agency while serving as a volunteer. It should be noted, however, that these provisions contemplate cooperative relationships between separate geographic jurisdictions. They do not countenance the performance of regular volunteer duties by employees of a public agency, acting for exclusive benefit of that same agency, as a direct supplement to the work force, but through the device of another agency, as is the case here.

We have also considered the provision in section 7(p) (1) of the Act, 29 U.S.C. 207(p) (1), separating for overtime purposes the hours worked voluntarily on a special detail by police or fire fighters for a separate and independent employer. The legislative history of this provision, which is reflected in 29 C.F.R. 553.227(a), makes clear that the second employer must be both separate and independent from the principal employer. We have concluded that, under the circumstances present here, Ogden cannot be said to be “independent” of the County. Although Ogden is not a “public agency” within the meaning of the FLSA, it has a close contractual relationship with the County. Its principal purpose is to provide the same services for the County, through the use of “volunteers,” which regular employees of the County otherwise provide. It is therefore not truly “independent” of the County in the sense contemplated by section 553.227. The illustrations given in that section all concern outside employers primarily engaged in activities unrelated to the public agency’s law enforcement function, which occasionally have need for law enforcement personnel to provide security functions.

We wish to make clear that EMS and rescue volunteers who are members of the Ogden Squad but are not employed by New Hanover County as EMS and rescue employees are not affected. As you know, volunteer fire and rescue departments are frequently served by individuals whose livelihood is earned principally in another vocation (mechanic, teacher, truck driver, lawyer, etc.). The FLSA excludes such individuals as employees of the public agency that serve if they receive no compensation or are paid expenses, reasonable benefits, or a nominal fee (or combination thereof) to perform the services for which they volunteered.

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 that 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.

Sincerely,

Acting Administrator

Enclosure

*Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b)(7).