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OFFICIAL OPINION 2003-4

Charles Johnson, III, C.P.A.
State Examiner
State Board of Accounts
302 W. Washington St.
4th Floor, Room E148
Indianapolis, IN 46204-2765

Re: Compensating Firefighters for Substituted Hours

Dear Mr. Johnson:

You requested our opinion on whether it is permissible for a firefighter to receive compensation for hours a volunteer firefighter substituted for that of another firefighter who worked in his place and did not receive compensation. You also requested that our opinion specifically address 29 C.F.R. § 553 ("Application of the Fair Labor Standards Act to Employees of State and Local Governments"), in addition to any other applicable statutes, rules or regulations.

BRIEF ANSWER

It is our opinion that the practice of "Exchange of Work Time" set forth in the Collective Bargaining Agreement, Article 14, ("CBA, Article 14"), between Firefighters Union Local #1348 and the City of Muncie, is not in violation of federal statutes.

FACTS

The audit report of the City of Muncie, filed with the State of Indiana on September 15, 1999, contained an audit result and comment regarding the substitution of working hours by firefighters, with the approval of their superiors. The findings in the audit report indicated that the firefighters had other firefighters ("volunteer firefighters") substitute for them; however, these firefighters did not reciprocate those substituted hours performed by the volunteer firefighters. The firefighters that did not work received compensation for those hours not

worked. However, the volunteer firefighters were not compensated for the substituted hours worked.

The audit report also contained information concerning whether paragraph 2 of the CBA, Article 14 is in violation of Indiana statute.

CBA, Article 14, paragraph 2, reads as follows:

All Fire Fighters shall be allowed to exchange working time, subject to the approval of their Lieutenant and/or their Captain and/or Battalion Chief and/or Deputy Chief of DEPARTMENT, and/or Chief and/or Chief of DEPARTMENT provided that the Fire fighter with whom the exchange is made is deemed qualified to perform the duties to be exchanged. No Fire fighter shall receive additional compensation for working out of classification.

Fire fighters shall be limited to a maximum of up to (10) ten exchanges or substitutions, without a requirement to reciprocate the (10) ten exchanges or substitutions per calendar year. This restriction does not affect the right of fire fighters to exchange or substitute fully reciprocated working time.

Under the facts as presented by the State Board of Accounts, we conclude that the contract provisions concerning compensating firefighters for hours not actually worked set forth in paragraph 2 of the CBA, Article 14 between Local #1348 and the City of Muncie are not in violation of federal statutes or regulations.

LEGAL ANALYSIS

Our analysis of the legality of firefighters not reciprocating substituted hours worked by other firefighters and receiving compensation for hours not worked is addressed below in the following manner:

- A. Pursuant to 29 C.F.R. § 553.31, can firefighters have other firefighters work their scheduled shift, but not be required to reciprocate those substituted hours?
- B. Is CBA, Article 14, paragraph 2, specifically provided for by federal statute?

A. Application of 29 CFR § 553.31 to non-reciprocal work by firefighters.

Your letter indicates that firefighters, with the approval of their superiors, were allowed to have volunteer firefighters work their scheduled shift hours. However, firefighters were not required to reciprocate the work performed by the volunteer firefighters for up to ten (10) exchanges or substitutions per calendar year based upon CBA, Article 14. In addition, those firefighters that did not work were given credit as if they did perform the work and received compensation for

hours worked by the volunteer firefighters. The volunteer firefighters received no credit or compensation for the substituted hours worked.

Pursuant to 29 CFR § 553.31(a), which speaks to the Fair Labor Standards Act (“FLSA”) exemption set forth at 29 U.S.C. § 207(p)(3), individuals employed in fire protection or law enforcement activities working in the same capacity, may be allowed to *substitute for one another*, at their own option and with the approval of the public agency (in this case, the fire department), during scheduled work hours. It would appear that firefighters who do not reciprocate those substituted hours violate this regulation. There are three parties affected by the substitution practice at the fire department: the paid firefighters, the volunteer firefighters, and the City of Muncie. However, according to the facts described in your letter, the volunteer firefighters who substitute for the paid firefighters do not appear to be protected by, or have a claim under, the FLSA. 29 U.S.C. § 203(e)(4)(A) states:

The term “employee” does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate government agency, if—

- i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and
- ii) such services are not the same type of services which the individual is employed to perform for such public agency.

With respect to the remaining parties, the FLSA is considered to be remedial social legislation and should be construed liberally in favor of workers whom it was designed to protect. *Klein v. Rush-Presbyterian-St. Luke’s Medical Center*, 990 F.2d 279, 282 (7th Cir. 1993). Any exemption from its terms must be narrowly construed. *Id.* In this case, it is the employees who have negotiated something different from what is called for in the FLSA.

29 C.F.R. § 553.31 (“Substitution—section 7(p)(3)”) directly addresses the FLSA exception found at 29 U.S.C. § 207(p)(3), and provides:

- (a) Section 7(p)(3) of the FLSA 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 the Act. Where one employee substitutes for another, each employee will be credited as if he or she had worked his or her normal work schedule for that shift.
- (b) The provisions of section 7(p)(3) apply only if employees’ decisions to substitute for one another are made freely and without coercion, direct or implied. An employer

may suggest that an employee substitute or “trade time” with another employee working in the same capacity during regularly scheduled hours, but each employee must be free to refuse to perform such work without sanction and without being required to explain or justify the decision. An employee’s decision to substitute will be considered to have been made at his/her sole option when it has been made (i) without fear of reprisal or promise of reward by the employer, and (ii) exclusively for the employee’s own convenience.

- (c) A public agency which employs individuals who substitute or “trade time” under this subsection is not required to keep a record of the hours of the substitute work.
- (d) In order to qualify under section 7(p)(3), an agreement between individuals employed by a public agency to substitute for one another at their own option must be approved by the agency. This requires that the agency be aware of the arrangement prior to the work being done, i.e., the employer must know what work is being done, by whom it is being done, and where and when it is being done. Approval is manifest when the employer is aware of the substitution and indicates approval in whatever manner is customary.

In certain career fields, strict compliance and rigid regulation without any room for flexibility can prove to be a detriment to both employer and employee. Specifically, in a career field such as fire fighting, the firefighters’ work schedules are so unique that they are addressed specifically within the FLSA. For instance, 29 U.S.C. § 207(k) creates an exception to deal specifically with overtime compensation due the firefighters when working something other than a 40 hour week. Furthermore, because of the unorthodox work week, 29 U.S.C. § 207(k) provides that a firefighter with a work period of at least seven days but less than 28 days shall receive overtime compensation for all hours worked in excess of a number bearing the same ratio to the total days worked as 212 hours to 28 days. Thus, the FLSA allows both the employer and the employee the flexibility to find a practical solution in a career field such as fire fighting. Finding a flexible solution means that the parties involved must be able to negotiate.

Nothing in FLSA requires employers to continue to employ or employees to continue to work, except on terms mutually agreeable to both. *Atlantic Co. v. Walling*, 131 F.2d 518 (5th Cir. 1942). Employers and employees are free to make any terms they choose beyond the minimums set out within the FLSA. *Id.* Thus, it would appear that firefighters could have other firefighters work their scheduled shift without reciprocating as long as the employees within the protection of the FLSA freely reached this agreement and the agreement exceeds the statutory minimum protection.

B. CBA, Article 14, paragraph 2, is specifically provided for by Federal Statute

FLSA’s minimum protections cannot be abridged by any collective bargaining or other contract. *Vadino v. A. Valey Engineers*, 903 F.2d 253 (3d Cir. 1990). The reciprocity requirement in 29 C.F.R. § 553.31(a) is a minimum requirement that the firefighters are free to exceed when

negotiating and reaching an agreement. The FLSA was created to protect employees such as the firefighters from being taken advantage of by employers with unfair bargaining power. If the collective bargaining terms freely negotiated exceed the minimum requirement mandated by the FLSA, the firefighters should be allowed to receive the benefits. For example, in a case where the employer and employee contracted with reference to wages in excess of the statutory minimum, the court upheld the contract because it exceeded the statutory minimum and was freely agreed to by both parties. *St. Clair v. Russell & Pugh Lumber Co.*, 51 F. Supp. 47 (D. Idaho 1943).

In the facts described in the letter, the issue revolves around employees being compensated for time at work when they were not there. As a California court of appeals explained in *City of Sacramento v. Public Employees Retirement System*, there is nothing in the FLSA which would prohibit an employer and an employee covered by the FLSA's 40-hour maximum workweek from agreeing to work more or less hours each week as long as the employer compensates the employee with overtime when the employee exceeds the maximum. 280 Cal. Rptr. 847, 852 (Cal. App. 1991). "Since there is no absolute limitation in the Act . . . on the number of hours that an employee may work in any workweek, he may work as many hours a week as he and his employer see fit, so long as that required overtime compensation is paid him for hours worked in excess of the maximum workweek prescribed . . ." *Id.* (citing 29 C.F.R. § 778.102).

In a 1996 advisory opinion, the Department of Labor Wage and Hour Administrator determined that a negotiated agreement allowing firefighters to trade scheduled work days and off-duty days did not fall within the provisions of 29 C.F.R. § 553.31. Opinion Letter of the Wage and Hour Administrator Maria Echaveste (FLSA-1318, Jan. 30, 1996). Under that agreement, firefighters were given 12 days per year where they could avoid being locked into working or an off-duty day and could switch or "trade" by voluntarily placing the scheduled work day or off-duty day into a pool for redistribution. Like the provision in CBA, Article 14, paragraph 2, the switching or trading of days was not done in a reciprocal manner where two employees reciprocated substituting for each other. The Administrator determined that the trading of days into a pool was not found to be an issue within the provisions of the FLSA. The provision was found to be necessary to allow firefighters to adapt their work schedules to reduce the average hours worked in a workweek or work period.

As the United States Supreme Court has noted, Congress intended "to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights." *Jewell Ridge Coal Corp. v. United Mine Workers*, 325 U.S. 161, 167 (1945). Contracts between employer and employee inconsistent with, and prohibited by, terms of the FLSA are illegal and not binding on the employee. *Chepard v. May*, 71 F. Supp. 389 (S.D.N.Y. 1947). However, the contracts are not considered illegal if the employee the FLSA was designed to protect has agreed to a contract that rewards him or her with benefits that exceed the statutory minimums.

CONCLUSION

In conclusion, the practice of firefighters receiving compensation for substituted hours they have not worked is not a violation of federal statutes. The fire fighters are in a unique career field that requires certain flexibility in scheduling and compensating, which is provided for in some areas of the FLSA. Allowing the city and the fire fighters to freely negotiate a collective bargaining agreement that can effectuate the needs of the employer and employees best attains this flexibility. Although the FLSA may override contracts, courts have generally found it makes sense to let private arrangements endure. *Dinges v. Sacred Heart St. Mary's Hospital*, 164 F.3d 1056 (7th Cir. 1999). In this case, it is our opinion that the contract is not in violation of the FLSA if the employee the FLSA was designed to protect has agreed to a contract that rewards him with benefits that exceed the statutory minimums.

Sincerely,

Stephen Carter
Attorney General

Gregory F. Zoeller
Deputy Attorney General