U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

March 2, 2009

Dear **Name***:

Enclosed is the response to your request for an opinion letter dated January 15, 2009 and designated as Wage and Hour Opinion Letter FLSA2009-2NA. It does not appear that this response was placed in the mail for delivery to you after it was signed. In any event, we have decided to withdraw it for further consideration by the Wage and Hour Division. We will provide a further response in the near future.

Sincerely,

John L. McKeon
Deputy Administrator for Enforcement

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

FLSA2009-2NA

This Opinion Letter is withdrawn.
January 15, 2009

Dear **Name***:

This is in response to your request for an opinion on the application of the Fair Labor Standards Act (FLSA)* to certain terms of a collective bargaining agreement (CBA) between a Texas municipality (the City) and firefighters and alarm operators employed by the City. You describe the proposed methods for paying these employees and ask whether the formulas used to calculate the hourly rate comply with the provisions of the FLSA. We believe that the formulas, which you describe as a negotiated compromise, do not produce a true regular rate of pay for overtime for the firefighters but compute overtime correctly for the alarm operators.

Firefighters: Under the CBA, the firefighters work on a 21-day, 168-hour pay schedule. They receive two different types of paychecks. One type of paycheck is received bi-weekly and is intended to cover 106 hours. The amount of this check (which covers 106 hours) is calculated by adding an employee's annual salary and annual bonus and dividing by 17.333 to determine the pay period salary (which covers 159 hours). You indicated in correspondence with a member of our staff that the annual bonus is additional pay, such as certification pay, education pay, and longevity pay, that is annualized, with an equal amount then added to every bi-weekly check. The firefighters' regular rate is computed by dividing the work period salary by 168 scheduled hours.

The second type of paycheck is paid every three weeks, at the end of the firefighter's 168-hour pay period. It is intended to cover any payments owed for hours worked over 159 in the 21-day pay period (i.e., hours in excess of the 106 hours from weeks one and two that were covered by the previous bi-weekly paycheck, and hours in excess of the 53 hours for week three that will be paid as part of the subsequent bi-weekly paycheck). In this check, the City pays additional straight time and overtime pay for any hours worked over 159. This paycheck also determines any possible "offsets," which are overpayments in the bi-weekly checks for which the employee must now reimburse the City.

The firefighters are subject to the partial overtime exemption of section 7(k) of the FLSA for firefighters and law enforcement personnel who are employed by a public agency on a work period basis. Under section 7(k) and 29 C.F.R. § 553.230, firefighters may be scheduled for a work period between 7 and 28 days as long as the ratio between maximum hours worked and days in the work period bears the same relationship as 28 days bears to 212 hours, as 159 hours in 21 days does. The City's formula for determining "regular time hours," upon which a straight time rate is paid, differs from the

* Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at www.wagehour.dol.gov.

FLSA's formula, because the FLSA requires pay only for hours actually worked and not for holidays or vacation time.

As discussed in 29 C.F.R. Part 778, the regular rate of pay under the FLSA must be calculated each workweek based on the hours worked. 29 C.F.R. § 778.108. "Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the wage contracts." *Walling v. Youngerman-Reynolds Hardwood Co., Inc.*, 325 U.S. 419, 424-25 (1945). As the regulations explain, "[t]he 'regular rate' of pay under the Act cannot be left to a declaration by the parties as to what is to be treated as the regular rate for an employee; it must be drawn from what happens under the employment contract." 29 C.F.R. § 778.108. Therefore, when an employee is paid a salary, the regular rate "is computed by dividing the salary by the number of hours which the salary is intended to compensate." 29 C.F.R. § 778.113(a). Nothing in the FLSA prohibits an employer from paying employees more than is due. However, when evaluating what hours the salary is intended to cover, the fact that the City computes and pays firefighters extra straight time pay for hours in a work period between 159 and 168, in addition to the half-time overtime pay that is due for those hours, indicates that the salary is intended to cover only 159 hours rather than all 168 scheduled hours. *See* Wage and Hour Opinion Letter November 19, 1986 (copy enclosed). (In contrast, if the City had agreed to pay a premium of, for example, $1 or $2 per hour for the hours between 159 and 168, that would indicate the salary was intended to cover all 168 scheduled hours.) Therefore, the City must compute the regular rate by dividing the salary and any payments for working beyond 159 hours in the work period and any other additional pay not excluded under section 7(e) of the Act by the actual hours worked during the work period. The fact that, as part of a "negotiated compromise," the CBA states that the regular rate is computed by dividing by the 168 scheduled hours has no effect on the true regular rate required by the FLSA. *See Walling*, 325 U.S. at 424-25; 29 C.F.R. § 778.108.

Alarm operators: Alarm operators are not eligible for the partial exemption of section 7(k). They are paid bi-weekly, and overtime is computed after 40 hours in a week. The regular rate is calculated by dividing the annual base salary by 2080 hours. The pay for regular hours due is determined by subtracting the number of overtime hours due in weeks one and two from the total hours, including actual hours worked, vacation, sick, and holiday hours, and multiplying this figure by the regular rate. The overtime rate is calculated by dividing the annual base salary plus annual bonuses by 2080 and multiplying this amount by 1.5. Premium pay is determined by multiplying the total overtime hours due by the overtime rate. Pay period bonuses are calculated by dividing the annual bonus by 26 pay periods.

The overtime rate for the alarm operators includes the annual bonus while the regular rate for non-overtime hours does not. The FLSA does not dictate the method of regular rate calculation for non-overtime hours so long as the minimum wage is met for all hours. Therefore, if the regular rate calculation for purposes of overtime compensation includes all compensation received, except those types specifically excluded by FLSA section 7(e), the method of calculating overtime proposed in the CBA will comply with the

FLSA. Payment in excess of that required by the FLSA does not result in a violation of the Act.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, express 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. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We trust that this letter is responsive to your inquiry.

Sincerely,

Monty Navarro
Office of Enforcement Policy
Fair Labor Standards Team

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