FIREHOUSE LAWYER

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VOLUNTEERISM - A TRICKY ISSUE

The September issue of the Fair Labor Standards Handbook, a publication of the Thompson Publishing Group, had an excellent basic article on volunteerism in the public sector. The article examined key components of FLSA volunteerism provisions, relevant legislative proposals, and interpretive findings by the federal Dept. of Labor and the federal courts.

THE STATUTE

Basically, the FLSA provides entitlement only to "employees" with respect to the minimum wage and the maximum hour protections of the overtime provisions. The 1985 FLSA amendments exclude from the definition of "employee" persons who volunteer to perform services for public agencies. However, they must receive no compensation, but only "expenses, reasonable benefits or a nominal fee." Also, if the person is employed by the agency in addition to their "volunteer" work, the volunteer work cannot be in the "same type of services".

THE REGULATIONS

The implementing regulations of the DOL at 29 C.F.R. Section 553.101(a) elaborate. A volunteer performs services "for civic, charitable or humanitarian reasons, without promise, expectation or receipt of compensation". The regulations themselves give some examples of permissible payments that would not defeat volunteer status. For example, expenses can include a uniform allowance or reimbursement for dry cleaning expenses. Also payment for meals and transportation incidental to volunteering or books or supplies for training are acceptable.

The phrase "reasonable benefits" allows inclusion of volunteers in group insurance plans, pension plans and length of service awards.

The "nominal fees" language is sometimes a problem. These may not be linked to productivity, but can be given on a per call basis as with volunteer firefighters. In determining whether fees are nominal, DOL considers factors such as the distance traveled by the volunteers, the time and effort expended, the times during which the volunteer has agreed to be available, and whether services are provided as needed or throughout the entire year. DOL refuses, however, to give specific guidance as to what constitutes a nominal fee in their opinion. The department instead will examine all payments to volunteers in the "context of the economic realities of the particular situation."

DOL OPINIONS

Some Wage and Hour opinion letters are instructive, however. A 1987 letter found that reserve officers who received $8 to $25 per assignment, but were limited to two assignments per week plus expenses and benefits did qualify as volunteers.

However, in an opinion the following year in 1988 the DOL found that firefighters paid $7 per hour while on call were not volunteers under the Act. The employer's payment of an hourly wage established an employer/employee relationship, the DOL found. Similarly, in *Krause v. Cherry Hill Fire*

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District 13, the District Court in New Jersey, in civil action number 96-1269 on June 30, 1997 held that firefighters regularly paid between $5.05 and $9 per hour for their duties were employees and not volunteers. The court believed they both expected and received hourly compensation in an amount greater than a nominal fee.

Despite DOL's reluctance to define a nominal fee in the code of federal regulations, a July, 1995 opinion letter seems to establish the minimum wage as the threshold. The opinion letter states that a payment in excess of that amount (then $4.25 per hour) would have been considered more than nominal. By contrast, however, in *Harris v. Mecosta Co.,* the Western District of Michigan federal court held in February, 1996 that an hourly payment of $7.50 to volunteers - clearly more than the minimum wage - constituted "reasonable benefits" in light of relevant DOL opinion letters.

We believe the Michigan District court's reasoning is questionable, as the statutory language itself makes a distinction between a nominal fee, expenses and reasonable benefits. Clearly, the legislative intent when using the term "reasonable benefits" was not to refer to some hourly amount, but rather something more akin to the fringe benefits of employees such as pension or group insurance plans. We conclude that any department paying volunteers on an hourly basis, at a rate in excess of the minimum wage at the time, is asking for trouble and should probably change their method of paying volunteers for their voluntary service. Instead, volunteers should be recompensed on the basis of call outs, drills attended or on a per shift basis.

The whole issue of volunteering similar services arises only occasionally, in the fire service, and we will not elaborate on the issue here. We would mention, however, that the question whether so called independent fire or emergency medical service corporations are deemed to be separate employers has come up frequently. DOL has made it clear that paid firefighters and paramedics cannot volunteer during their off duty hours for ostensibly independent corporate entities that serve the same jurisdictions.

RECENT REFORM ACTIVITY

Some employers and employees remain dissatisfied with the restrictions on volunteering. Several legislative proposals are currently before Congress that would expand and clarify the definition of "volunteer" under the FLSA. H.R. 484 would amend the FLSA to allow public employees to volunteer unpaid services to their employers, even if they perform them as part of their regular job duties. Another bill (H.R. 94) would exclude from the term "employee" firefighters and rescue squad workers during periods when they volunteered services at facilities where they were not then regularly employed as long as they signed a legally binding waiver of overtime compensation. Also, a broader measure (H.R. 71) would allow individuals to volunteer to enhance their occupational opportunities. Individuals could volunteer only for a limited number of hours and would have to initiate the arrangement voluntarily. None of the above bills has yet been considered on the House or Senate floor.

KRAUSE v. CHERRY HILL FIRE DISTRICT

Another important aspect of the *Krause* case was the unique fact situation. The employer had established an employer/employee relationship with part-time firefighters by paying them above the minimum wage. Then, the employer attempted to unilaterally transform the employees to volunteers by reducing their pay to a nominal rate below the minimum wage. In the *Krause* case, the court found the employees were entitled to more than $35,500.00 in unpaid minimum wages and liquidated damages. They were paid at a rate above the minimum wage for about a year and a half before the

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reduction. Initially they were paid $8 or $9 per hour for duty crew shifts lasting six or eight hours. For nighttime "sleep-in shifts" they were paid $5.05 per hour. In August, 1995, when the change was made, they were no longer allowed to work certain duty crew shifts and were paid a lump sum of $20 rather than an hourly rate for sleep in shifts.

The court looked to the economic realities test, a standard often used in weighing employment relationships. In determining economic reality the court reviews various factors including:

- The degree of the employer's right to control the manner in which the work is done;
- The alleged employee's opportunity for profit or loss;
- The alleged employer's investment in equipment or materials;
- Whether the service rendered requires a special skill;
- The degree of permanence of the working relationship; and
- Whether the service rendered is an integral part of the alleged employer's business.

In the *Krause* case, the court found that test was not much help, stating that the test was more helpful to clarify employee v. independent contractor status. The court did find the last two factors more significant and both favored employee status for the firefighters. Evidence showed they had been working continuously for several months and had not worked as firefighters for any other organizations, indicating their permanence. And because the fire district's primary purpose was unquestionably to provide fire protection services, the plaintiff's services were obviously an integral party of the district's work.

Perhaps more important than the above factors, the court said, was the issue of whether these firefighters would be defined as "volunteers" under the Act's language. The court noted that the implementing regulations required the service to be performed for civic, charitable or humanitarian reasons and not for actual compensation.

Also in the *Krause* case, the district had requested an opinion letter from U.S. DOL well over a year after it began paying the hourly rates. DOL replied that the payment of $8 or $9 per hour was more than a nominal fee creating an employment relationship and destroying volunteer status. (Probably it was this opinion letter that prompted the district to change the arrangement.)

This case points out the difficult problem that a public employer would have if it paid "volunteers" more than a nominal fee per hour and then attempted to transform them into volunteers.

LIQUIDATED DAMAGES

Under the FLSA, employees who state valid back pay claims may also be entitled to liquidated damages in an equal amount to the pay claims. The court has discretion to withhold such an award if the employer shows it acted in good faith and had reasonable grounds for violating the act. This district did take steps by requesting a DOL opinion to learn the requirements of the FLSA. However, it took no steps to ascertain whether a pay cut and reorganization would make the firefighters volunteers. The letter to DOL did not request guidance on whether the employer could unilaterally end the employment relationship, the court said. In light of this evidence, the court found it mandatory to award the plaintiffs liquidated damages equal to their back pay, for a total award of $35,530.00.

Employers with volunteer programs and resident volunteer programs, including fire

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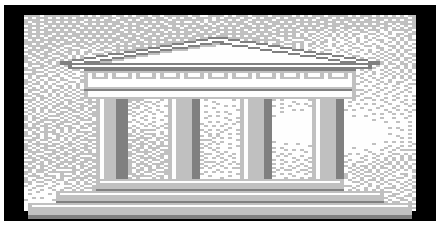
protection districts in Washington, should look carefully at these issues to make sure that they have not created an ad hoc employment situation with their volunteers or resident volunteers. As the *Krause* case demonstrates, it is always best to go back to the intent of the legislation, with the assistance of the interpretive regulations of DOL. There are no ironclad rules, but it seems that payment of hourly rates of equal to or greater than the minimum wage is a definite red flag.

Specific advice about compliance with the FLSA should be obtained by contacting the employer's attorney or specific labor counsel.

PROPERTY TAX RESOLUTIONS

Referendum 47 brings before the voters substitute Senate Bill 5835 in November. It is very possible that this legislation will pass at the next general election, and it may have an impact on certain fire protection districts. One section of the bill would limit property tax levies to the amount levied in the previous year and districts are well advised to pass a resolution overcoming that restriction of the bill.

A more often discussed section of the bill is only applicable to districts with a population of 10,000 or more. It would limit property tax revenue growth to an inflation limit factor instead of the 106% increase otherwise allowed by law. In order to obviate the application of this section and get back to the 106% lid, district over 10,000 population need to pass a resolution. Fire districts with three commissioners need two affirmative votes and those with five commissioners or more need four affirmative votes to pass such a resolution. Obviously, to exceed the 106% lid, an election is still required. Please contact Joseph F. Quinn or the district's lawyer to obtain the appropriate resolutions, if you have not already received them from *The Firehouse Lawyer*.



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NOTA BENE:

Since January 1, 1997, Mr. Quinn has developed a fire department safety checklist and a set of forms for safety officers. Designed to help fire departments comply with the new WAC 296-305 safety standards, these materials are available to non-participating Pierce County departments for $50.

In June, 1997, a model Safety Resolution and complete set of operating instructions (SOPs) have been completed, to comply with the "vertical standards". Mr. Quinn has also been developing numerous policy Resolutions and SOPs on various department topics such as open meetings, open records, patient records, etc.

Please call for information.