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

November 4, 2005 **FLSA2005-49**

Dear ***Name****,*

This is in response to your letter requesting an opinion as to whether staff respiratory therapists at a hospital run by a state university may "substitute" shifts with other employees so that they may work straight 12-hour shifts. It is our opinion that such a practice is consistent with the requirements of the Fair Labor Standards Act (FLSA).

The respiratory therapists are classified as non-exempt and, therefore, must be paid time and a half for all hours worked over 40 in a week. Currently, the employees work two 12-hour shifts and two 8-hour shifts per week or three 12-hour shifts and one 4-hour shift per week. The employees have approached the hospital and requested to be allowed to work two weeks of three 12-hour shifts and one week of four 12-hour shifts, which is 120 hours over three weeks. The hospital cannot bear the additional cost associated with comp time or overtime payments required if such a plan were implemented. The employees then suggested being allowed to substitute shifts with one another so that they may in effect work 12-hour straight shifts. For example, employee A would take the 4-hour shift of employee B and add it to the end of employee A's 8-hour shift and vice-versa. The hospital is run by the state university, which is a political subdivision of the state. *See* 29 U.S.C. § 203(x) (copy enclosed).

Staff members have asked the following questions regarding shift substitution:

1) Can staff members voluntarily agree to substitute hours outside the 40-hour week to accommodate straight 12-hour shifts and not result in overtime?
2) If yes, are there any restrictions as to when staff can voluntarily agree to "substitute?" Can it be before the schedule is posted or do the staff members have to wait until after the schedule is posted?
3) What is the best method to document that staff members are substituting on a voluntary basis?

Section 7(p)(3) of the FLSA (copy enclosed) states:

> If an individual who is employed in any capacity by a public agency which is a State, political subdivision of a State, or an interstate governmental agency, agrees, with the approval of the public agency and solely at the option of such individual, to substitute during scheduled work hours for another individual who is employed by such agency in the same capacity, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

29 U.S.C. § 207(p)(3). Therefore, an employee may substitute for another employee if their employer, which is a public agency, approves of the substitution and the substitution is solely at the option of the employees involved in the substitution. If these requirements are met, the employer is not required to pay overtime for the additional hours worked for which the employee was not originally scheduled to work.

The FLSA regulations provide guidance concerning whether the substitution is "solely at the option of the employee," stating that "[a]n 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." 29 C.F.R. § 553.31(b) (copy enclosed). Furthermore, "[a]n 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." *Id.*

Therefore, if the respiratory therapists volunteer to substitute shifts with another employee, and the employee will suffer no negative repercussions if the employee chooses not to substitute, then the proposed substitution plans are consistent with the requirements of the FLSA. Additionally, "there is no provision in section 7(p)(3) … that could be construed to require one individual to 'repay' the other individual who agrees to work a substitution agreement." WH Opinion Letter November 23, 2004 (copy enclosed). Therefore, if employee B volunteers to work a shift for employee A, employee A is not obligated by the FLSA to volunteer to work a shift for employee B. Any repayment, whether monetary or by means of hours worked, is at the option of the employees involved in the substitution.

Next, you inquire as to when an employee may make a substitution agreement. The statute and regulations do not impose any time limit upon how early employees may enter into such agreements. Therefore, it is our opinion that there is no limitation on when the employee may agree to the substitution, because the agreement to substitute is a matter between the employees involved and not the employer. *See Naval Station Mare Island and Int'l Ass'n of Firefighters, Local F-48*, 28 F.L.R.A. 1057, 1059 (1987). Indeed, in WH Opinion Letter January 2, 1987 (copy enclosed), we stated that there is no limitation on the number of substitutions into which an employee may enter.

Finally, you ask what is the best method of documenting whether the substitution is voluntary. "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." 29 C.F.R. § 533.31(c). The regulation does not impose any additional record keeping requirements when employees are substituting for one another. However, the substitution must be approved by the employer, and the employer must "be aware of the arrangement prior to the work being done … know what work is being done, by whom it is being done, and where and when it is being done." 29 C.F.R. § 553.31(d). Approval may be indicated in any manner that is customary to the employer and employee. *Id.*

Therefore, it is our opinion that the substitution plan proposed by the respiratory therapists is consistent with the terms of the FLSA, so long as the employees voluntarily enter into the substitution.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on 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 letter might require a conclusion different from 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. This opinion is issued as an official ruling of the Wage and Hour Division for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259. *See* 29 C.F.R. §§ 790.17(d), 790.19; *Hultgren v. County of Lancaster*, 913 F.2d 498, 507 (8th Cir. 1990).

We trust that the above is responsive to your inquiry.

Sincerely,

Alfred B. Robinson, Jr.
Deputy Administrator

Enclosures: FLSA § 7(p)(3) and 3(x)
29 C.F.R. § 553.31
WH Opinion Letters November 23, 2004 and January 2, 1987

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