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

June 5, 2002

FLSA2002-1

Dear ***Name**,*

I am writing in response to your letters of December 21, 2001, and January 14, 2002, in which you requested an opinion regarding whether a career firefighter/paramedic employee could volunteer to provide similar services to the local volunteer fire departments, which are part of the ***Name*** County integrated fire service, without having the volunteer time count as compensable hours worked under the Fair Labor Standards Act (FLSA). We previously had addressed this issue in a November 27, 2001, opinion letter to ***Name***. However, you were concerned that we did not have all the relevant facts available to us when we first considered this question. Therefore, you included in your letters information describing the integrated nature of the career and volunteer branches of the fire and rescue service in ***Name*** County. You also provided us with the ***Name*** Regulation adopted in 2001 and the ***Name*** Regulation adopted in 2002. We also received a letter on the same issue from ***Name***, counsel to the ***Name***, which included a lengthy description of the delivery of fire and rescue services in ***Name*** County. That letter included additional materials, including a copy of the County Code ***Name*** pertinent to the Fire and Rescue Service, and your August 12, 1999, legal memorandum to the ***Name*** concluding that the ***Name*** County situation differed from that which the court addressed in Benshoff v. Virginia Beach, 180 F.3d 136 (4th Cir. 1999). We also received a joint letter dated February 25, 2002, from ***Name***, and ***Name***, addressing this issue.

In addition to receiving these written materials, we had a meeting with you and a number of other individuals on April 23, 2002. You brought with you a number of officials from the Fire and Rescue Service, as well as two representatives from the ***Name*** Volunteer Fire Department and a career firefighter from the union. We appreciate the time that all of those individuals spent with us to ensure that we had a thorough understanding of how the ***Name*** County Fire and Rescue Service is organized, and how it provides services in an integrated fashion involving both career and volunteer firefighters/ paramedics. After that meeting, we received additional information in follow-up letters from you dated May 2, 2002, from the ***Name***, dated May 15, 2002, and from the ***Name*** dated May 22, 2002.

As we stated in our November 27, 2001, opinion letter, the decision of the court in Benshoff is binding in ***Name*** County. As that court recognized, under the FLSA, a public agency employee may not volunteer to provide "services for a public agency" that are "the same type of services which the individual is employed to perform for such public agency." 29 U.S.C. § 203(e)(4)(A). We set out in greater detail in our November 2001 letter the facts pertinent to that court's analysis of whether career firefighters were performing volunteer services for the City of Virginia Beach when they volunteered as paramedics to the private rescue squads located in the City. In summary, the Virginia Beach Department of Emergency Medical Services (DEMS) coordinated responses by the fire department and the volunteer rescue squad to emergencies; the DEMS established all the medical policies for patient care, medical training standards, and medical procedures and protocols that governed both career firefighters and volunteer rescue squad members; the City certified the squads' emergency medical technicians to practice within the City, ensuring that they met required training and service requirements, and the City could revoke their certificates; the City did centralized scheduling of rescue squad members, based upon shifts the volunteers were willing to work; the City selected volunteer squad managers to operate as liaisons between the squads and the DEMS and to establish a hierarchy for control during emergency responses; the City provided financial assistance to the rescue squads; and the City provided the volunteers with workers' compensation and death benefits. Id. at 141-44.

The Benshoff court then evaluated whether the City's control and supervision over the provision of services by the rescue squads "is sufficient to render plaintiffs' volunteer services 'employment' which is 'controlled or required' by the City for purposes of the FLSA." 180 F.3d at 142. The court concluded that the fact that the squads and their members were subject to general regulation and licensing and certification requirements did not "change the fact that the rescue squads are private organizations,

governed by their own by-laws and policies." Id. at 143. The squads had independent authority to accept or reject candidates for membership in the squad. The squads could impose minimum duty requirements on members that exceeded the minimum requirement imposed by DEMS for licensure, and they could impose additional training requirements. The squads could require the members' attendance at mandatory squad meetings or at fundraising events in order for them to maintain continued membership in the squad. Moreover, the squads could impose disciplinary action upon members, including dismissal from the squads, whether or not DEMS had taken any such action. Id. at 143-45.

The court in Benshoff recognized that the City's involvement with the provision of emergency medical services was not insubstantial. However, based upon all the facts and circumstances, the court held that the creation of DEMS did not result in "either the evisceration of the independent nature of the rescue squads, some of which have existed since the 1940s, or in a *de facto* employer-employee relationship between the City and those individuals who chose to volunteer with rescue squads." 180 F.3d at 142. The court thus concluded that when a Virginia Beach firefighter provided volunteer services to an independent non-profit rescue squad, there was no employment relationship with the City with regard to that activity. The court left open the possibility that the answer might differ in another context, particularly if there were "a 'sham' private volunteer corporation placed between an employee and his employer to avoid the compensation provisions of the Act." Id. at 149.

In our November 2001 letter, we applied the Benshoff analysis to ***Name**** County. We noted that there are a number of factual differences between the Benshoff case and the situation in ***Name**** County, the most significant being that in ***Name**** County the volunteers provide exactly the same services (both fire and emergency medical services) as do the career employees. In contrast, in Benshoff the City was not licensed by the State to provide the advanced life support services provided by the rescue squads, and the rescue squad volunteers did no firefighting.

However, we concluded that the primary facts that led the court in Benshoff to conclude that the FLSA did not require compensation for volunteer time were similar in ***Name**** County. The non-profit volunteer fire and rescue corporations have a long history of independently providing services in ***Name**** County. Each is separately incorporated under state law, with its own by laws and boards of directors. The volunteer corporations determine how a person becomes a volunteer firefighter, and their service is governed by the corporation's by laws, which can and do impose requirements not imposed by the County. The volunteer corporations control how members are selected for promotion within the volunteer ranks. At the scene of an emergency, to ensure the safe and efficient provision of services, the highest ranking officer (whether career or volunteer) directs the operations of all units that respond. However, at all other times, the chain of command is separate, and a career officer supervises only the career firefighters who are present, while a volunteer officer directs the volunteers.

Based upon your request and the other requests we received, we reconsidered our 2001 opinion. We had already taken account of most, but not all, of the materials that we now have available. Considering all the facts and circumstances brought to our attention, we continue to believe that the ***Name**** County volunteer firefighters' situation is similar to that of the volunteer rescue squad members in Benshoff. There is no evidence that the current structure for providing fire, rescue and emergency medical services in ***Name**** County has eviscerated the independent nature of the long-standing, separately incorporated, private fire and rescue departments. Those separate corporations exercise day-to-day control over what positions volunteers hold, what they do, and when they do it. Although the public agency has some control over the volunteers, that control primarily is exercised by setting minimum certification standards and by establishing the broad guidelines and procedures under which services are provided. The court in Benshoff did not view the imposition of such standards and protocols as sufficient evidence of control so as to render the volunteers employees of the public agency when performing their rescue squad services.

Therefore, in light of the Benshoff decision, we conclude that the FLSA does not require ***Name**** County to pay its career firefighters if they volunteer, freely and without coercion, to provide services to the non-

profit fire and rescue corporations in the County. This is true whether they are providing services as a firefighter or as an emergency medical technician.

This opinion is based exclusively upon the information provided to us. The existence of other factual information not contained in your description might require a different conclusion than the one expressed herein. To the extent appropriate, this letter may be used to establish a defense to liability under the Portal-to-Portal Act, 29 U.S.C. § 259.

Sincerely,

Tammy D. McCutchen
Administrator

cc:

*Note: * The actual name(s) was removed to preserve privacy.*