



March 10, 2006

FLSA2006-10

Dear **Name***:

This is in response to your letter requesting guidance under the Fair Labor Standards Act (FLSA) regarding compensating law enforcement canine handlers at different rates for their dog care activities as opposed to their law enforcement activities.

You accept the position taken in the WH Opinion Letter August 11, 1993 that law enforcement canine handlers must be compensated by their employing agency for feeding, grooming, and otherwise caring for their assigned canine. Your first question relates to whether the following language from the Opinion Letter is still valid:

We take the position that dog care activities of the type illustrated do not have to be compensated at the same rate of pay as paid for law enforcement activities. If different pay rates are used, the employer may, pursuant to an agreement or understanding arrived at with the employee before performance of the work, pay for overtime hours engaged in such work at time and one-half the special rate pursuant to § 7(g)(2) of the FLSA.

Thus, your question is whether a law enforcement agency may compensate its officers for canine care at a rate of pay that is less than the rate paid to the officers for normal law enforcement duties that require greater training, judgment, and discretion. Assuming that the answer is yes, you then ask whether the FLSA requires that this rate of pay be negotiated with the individual officer and, if so, whether the negotiated agreement must be in writing prior to the initiation of the labor.

Section 7(g)(2) of the FLSA (copy enclosed) allows the employer, pursuant to a bona fide agreement, to compensate its law enforcement canine handlers at a different regular hourly rate for canine care and time and one-half of that rate for canine care duties performed during overtime hours. A bona fide agreement to pay in accordance with the provisions of section 7(g)(2) may be made on an individual, group, or collective bargaining basis. There is no requirement that the agreement or understanding be in writing so long as the employee is notified.

Section 7(g) of the FLSA states in part:

No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection –

...

in the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during non-overtime hours;

...

and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (e) are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

29 U.S.C. § 207(g).

Additionally, as stated in 29 C.F.R. § 778.419(a) (copy enclosed):

Under section 7(g)(2) an employee who performs two or more different kinds of work, for which different straight time hourly rates are established, may agree with his employer in advance of the performance of the work that he will be paid during overtime hours at a rate not less than one and one-half times the hourly nonovertime rate established for the type of work he is performing during such overtime hours. No



additional overtime pay will be due under the act provided that the general requirements set forth in § 778.417 are met and;

- (1) The hourly rate upon which the overtime rate is based is a bona fide rate;
- (2) The overtime hours for which the overtime rate is paid qualify as overtime hours under section 7(e)(5), (6), or (7); and
- (3) The number of overtime hours for which the overtime rate is paid equals or exceeds the number of hours worked in excess of the applicable maximum hours standard.

Moreover, “[a]n hourly rate will be regarded as a bona fide rate for a particular kind of work if it is equal to or greater than the applicable minimum rate therefor and if it is the rate actually paid for such work when performed during nonovertime hours.” 29 C.F.R. § 778.419(b).

In accordance with the above regulatory language, where a state agency has established different straight time hourly rates for its officers’ normal law enforcement duties and for its officers’ canine duties, the agency may compensate its officers during overtime hours at time and one-half the lesser canine hourly rate provided the work performed during the overtime hours involves canine, not law enforcement, duties. *See* WH Opinion Letters February 14, 2005; September 5, 1997; July 1, 1986; November 10, 1986; December 16, 1980; and FOH § 32h (copies enclosed).

In response to your second question regarding section 7(g)(2)’s requirement that there be an agreement or understanding in advance of the performance of the work, the Wage and Hour Division has concluded that the agreement may be reached on an individual, group, or collective bargaining basis, provided it is a bona fide agreement of which the employee is aware. *See* WH Opinion Letter January 22, 1957 (copy enclosed). Moreover, it has long been the Department’s view that there is no requirement that the agreement or understanding be in writing. *See* WH Opinion Letter May 29, 1958 (copy enclosed). All of the facts of a particular case will determine whether the required agreement has been reached. Please note that these two opinion letters refer to section 7(f)(2) of the FLSA. As explained in the enclosed WH Opinion Letter of March 30, 1967, section 7(g)(2) was formerly designated section 7(f)(2).

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 issues 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 this letter is responsive to your inquiry.

Sincerely,

Alfred B. Robinson, Jr.
Acting Administrator

Enclosures:

Section 7(g) of the FLSA
29 C.F.R. § 778.419

WH Opinion Letters February 14, 2005; September 5, 1997; July 1, 1986; November 10, 1986; December 16, 1980; March 30, 1967; May 29, 1958; and January 22, 1957
FOH § 32h

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