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

FLSA2006-19NA

July 24, 2006

Dear **Name*:**

This is in response to your request for an opinion concerning whether a City Council member who also worked as a paid City firefighter may subsequently volunteer as a firefighter for the City under the Fair Labor Standards Act (FLSA). Based on a review of the information provided, it is our opinion that the City Council member (who was recently elected mayor) may volunteer as a firefighter for the City.

The person has served as a member of the City Council and more recently as mayor. Some years ago, while serving as a City Council member, the City hired him as a paid firefighter. Subsequently, the City sued the person, alleging a series of conflict of interest violations because he was both a City Council member and an employee of the City. In order to settle the litigation, the person agreed to terminate his employment as a paid City firefighter, but wanted to continue on a volunteer basis. In addition, you state that for purposes of this reply we are to assume that the person volunteers as a firefighter for civic, charitable, or humanitarian reasons without promise, expectation, or receipt of compensation for the services rendered.

You are concerned that the arrangement may not conform with FLSA section 3(e)(4)(A) (copy enclosed) concerning volunteers to public agencies. In particular you question whether the requirement that the volunteer service for civic, charitable or humanitarian reasons must be performed freely and without coercion is somehow impaired by the fact that the volunteer status arose from an agreement to settle active litigation against the person.

The FLSA recognizes the generosity and public benefits of volunteering, and does not pose obstacles to bona fide volunteer efforts for charitable and public purposes except in very narrow circumstances. By enacting the 1985 FLSA amendments, Congress sought to ensure that true volunteer activities were neither impeded nor discouraged, while at the same time minimizing the potential for abuse or manipulation of the FLSA's minimum wage and overtime requirements through coercion or undue pressure on individuals to "volunteer" their services.

Under the FLSA, all covered and nonexempt employees must be paid not less than the minimum wage of $5.15 an hour for all hours worked and overtime pay for all hours worked over 40 in a workweek. FLSA section 3(e)(4)(A) provides an exception to the definition of the term "employee" for "any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency," if:

i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and
ii) such services are not the same type of services which the individual is employed to perform for such public agency.

29 U.S.C. § 203(e)(4)(A). The Department of Labor's regulations provide further guidance regarding the public agency volunteer exemption. *See* 29 C.F.R. §§ 553.100-.106 (copies

enclosed). A volunteer is an individual who performs services for "civic, charitable, or humanitarian reasons" without expectation of compensation. 29 C.F.R. § 553.101(a). Volunteers must not be coerced or pressured into "volunteering" their services. Further, an individual is not considered a volunteer if the individual is otherwise employed by the same public agency to perform the same type of services as those for which the individual proposes to volunteer. Consequently, under the FLSA, a public agency employee may volunteer without restriction to perform the same type of services for a different public agency, or may volunteer to perform a different type of service for the same public agency that employs him or her. *See* Wage and Hour Opinion Letter November 5, 2004 (copy enclosed).

Your specific concern is whether the fact that the person stopped accepting payment as a firefighter as the result of an agreement to settle litigation over his status as a paid firefighter under state conflict of interest law somehow "coerced" the person into volunteering, as discussed in 29 C.F.R. § 553.101(b). For purposes of this letter, we will assume the duties of a firefighter and the duties of a mayor/City Council member are not the same type of services.

In *Krause v. Cherry Hill Fire Dist.*, 969 F. Supp. 270, 278 (D.N.J. 1997), the court addressed the prohibition in the 1985 amendments against employees volunteering to their employer to perform their same job and concluded "Congress forbade employees from unilaterally offering to volunteer their services to an employer, out of concern that employers might pressure employees to volunteer, or employees might feel obliged to volunteer." We believe that the FLSA does not prevent public agency employees from terminating their paid employment and becoming a volunteer in the same capacity, provided that the employees were not converted unilaterally by the employer to volunteer status in order to avoid the minimum wage provisions or overtime protection of the FLSA and there is no evidence that the employee was coerced to do so. *See id.* at 277-79; Wage and Hour Opinion Letter September 9, 2005 (copy enclosed).

The fact that the person resigned as a paid city firefighter in order to comply with conflict of interest laws is not evidence that the employer unilaterally converted the person's firefighter position to volunteer status in order to avoid the minimum wage provisions or overtime protection of the FLSA. The fact that the person resigned the paid firefighter position to settle a suit alleging conflict of interest under state law is not evidence of coercion to continue volunteering since there is no evidence that he was obliged or even encouraged to volunteer as a firefighter in order to retain his position either as City Council member or mayor. Based on the facts provided, the person may continue to volunteer as a firefighter for the City as long as the other requirements of 29 C.F.R. §§ 553.100-.103 are fulfilled.

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.

We trust that this letter is responsive to your inquiry.

Sincerely,

Barbara R. Relerford
Fair Labor Standards Team
Office of Enforcement Policy

Enclosures:

FLSA section 3(e)(4)(A)
29 C.F.R. §§ 553.100-.106
Wage and Hour Opinion Letters September 9, 2005 and November 5, 2004

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