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

November 14, 2005 **FLSA2005-14NA**

Dear ***Name****,*

This is in response to your letter requesting an opinion concerning the applicability of the Fair Labor Standards Act (FLSA) to firefighters employed by the City Fire Department (FD). Specifically, you ask whether the firefighters may work for the local Life Saving Crew (LSC), which is a private non-profit corporation, without the FD incurring overtime pay liability. You also ask whether firefighters employed by FD may work for the LSC to staff an ambulance assigned to one of the fire stations. Based on the facts presented, it is our opinion that the firefighters employed by the FD would be able to work for the LSC without causing the FD to violate the FLSA or incur additional overtime liability.

The discussions between you and a member of the Wage and Hour Division staff revealed that this request for an opinion was made because some of the firefighters would like to work, at their own option, for LSC during their off-duty hours. You also noted that LSC provides emergency medical and rescue services. LSC's funding is derived from the fees it charges for its services, and from donations. LSC receives no funding or donation from the City. The City is not involved in the selection, appointment, or termination of the members of LSC's board of directors. Employees of LSC do not participate in the retirement system of employees of the City, nor are LSC employees protected by the City's civil service regulations. The City does not own an ambulance. Therefore, the City Council several years ago designated LSC as the City's primary emergency response provider. Only when staff of LSC is unable to respond to emergency calls does the central dispatcher of the City Police Department refer such calls to other ambulance services.

You also stated that the FD does not charge LSC any fees associated with having an ambulance housed at the fire station. An ambulance owned, equipped, and operated by LSC has been housed continuously at the fire station since 1992. Currently, LSC has stationed two paid emergency medical technicians (EMTs) at the fire station 24 hours a day, ready to respond to emergency service calls. These EMTs share quarters with the firefighters. You note that by having an ambulance and its crew on site at the fire station, the response time to emergency service calls is reduced considerably. Due to staffing difficulties faced by LSC in the past, the FD, prior to February 1, 2004, directed one of its EMT-certified firefighters to supplement the ambulance crew of LSC stationed at the fire station.

In the past, the FD directed the firefighter to work one of his/her regular shifts to help the one remaining employee of LSC assigned to the fire station operate the ambulance on certain emergency service calls. The FD had complete supervisory control over the firefighter during the entire shift spent in support of LSC functions. The firefighter continued to receive compensation for this work from the FD. Your office has since stopped the practice of directing one of the firefighters to supplement the LSC staff at the fire station pending a response from the Wage and Hour Division regarding your request for an opinion.

You state that if the FD now allows a firefighter, at his/her own option, to work for LSC as an EMT during off-duty hours, the FD would cease to exercise any control, supervisory or otherwise, over the firefighter during this time. LSC would assign this firefighter to work his/her shift as an EMT at the fire station. LSC would pay the firefighter directly for his/her hours worked as an EMT.

As explained in the Department of Labor's regulations, section 7(p)(1) of the FLSA "makes special provision[s] for fire protection and law enforcement employees of public agencies who, at their own option, perform special duty work in fire protection, law enforcement or related activities for a separate and independent employer (public or private) during their off-duty hours. The hours of work for the separate and independent employer are not combined with the hours worked for the primary public agency employer for purposes of overtime compensation." 29 C.F.R. § 553.227(a) (copy enclosed); *see also* FLSA § 7(p)(1), 29 U.S.C. § 207(p)(1) (copy enclosed). In addition, "[s]ection

7(p)(1) applies to such outside employment provided (1) The special detail work is performed solely at the employee's option, and (2) the two employers are in fact separate and independent." 29 C.F.R. § 553.227(b) (copy enclosed). We assume, for purposes of this reply, that the duties of the firefighter and the EMT in this situation are related activities as discussed in 29 C.F.R. § 553.215 (copy enclosed). In your case, section 7(p)(1) applies because the firefighters would perform special detail work for LSC at their own option, and as discussed below, we believe that the FD and LSC are in fact separate and independent employers.

Moreover, as indicated in 29 C.F.R. § 553.227(d) (copy enclosed), this special provision applies even if the public agency facilitates the employment or affects the conditions of employment of such employees. *See* 29 C.F.R. § 553.227(e) (stating that § 7(p)(1) applies to special detail work even where a state law or local ordinance requires that such work be performed and that only law enforcement or fire protection employees of a public agency in the same jurisdiction perform the work) (copy enclosed). Where an employee is directed by the public agency to perform work for a second employer, section 7(p)(1) does not apply. *See* 29 C.F.R. § 553.227(g) (copy enclosed). However, as stated in 29 C.F.R. § 553.227(f) (copy enclosed), the principles set forth in paragraphs (d) and (e) of 29 C.F.R. § 553.227 are exceptions to the usual rules on joint employment set forth in 29 C.F.R. Part 791 (copy enclosed). In other words, when a fire protection or law enforcement employee is jointly employed by both a public and a private (or separate and independent public) employer during the same workweek, the primary public employer would not be liable for the payment of any overtime compensation that may otherwise be due as a result of joint employment. The facts presented fit the first prong of the section 7(p)(1) exception, requiring that employees perform the work at their own option, because the firefighters work for the LSC voluntarily and not because of any direction by the FD to perform the work. *See also* 29 C.F.R. § 553.227(b)(1) (copy enclosed).

With regard to the exception's second requirement, as indicated in 29 C.F.R. § 553.102(b) (copy enclosed), the determination of whether two employers are, in fact, separate and independent is made on a case-by-case basis. It is our opinion that the FD and the LSC are separate and independent employers for purposes of section 7(p)(1) of the FLSA. Specifically, the LSC is a private, non-profit corporation, and the City has no involvement in the selection, appointment or termination of LSC's board of directors. The LSC employees are not protected by the City's civil service rules, and they do not participate in the retirement system. In addition, there are separate payroll systems, and the FD does not exercise control over the firefighters while they are working for the LSC. Therefore, we believe that section 7(p)(1) applies in this case. The FD thus would not be obligated to include the hours worked by firefighters on special detail to LSC in calculating and paying overtime. *See* Opinion Letters dated March 18, 1986, April 24, 1990, and June 7, 2002 (copies enclosed).

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.

We trust that this letter is responsive to your inquiry.

Sincerely,

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

Enclosures: 29 C.F.R. Part 791
29 C.F.R. §§ 553.102, .215, .227
Section 7(p)(1) of the FLSA
Opinion Letters dated March 18, 1986, April 24, 1990, and June 7, 2002

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