



November 29, 2005

FLSA2005-15NA

Dear *Name**,

This is in response to your request for an opinion concerning whether educational incentive pay received by firefighters employed by local governments in Kentucky should be included in the employees "regular rate of pay" for the purpose of calculating all overtime compensation under the Fair Labor Standards Act (FLSA).

In your letter, you stated that local firefighters received a "cash salary supplement" when they participate in certain education and training requirements. Local governments that participate in the *Name** are obligated to pay firefighters who meet the education and training requirements the sum of \$3,000.00 per year. This additional compensation is paid by the local government from *Name** funds only to the firefighters who have met the Fund's education and training requirements. Pursuant to Kentucky Revised Statutes 95A.230, the Fund requires that:

1. All firefighters must successfully complete a basic training course of a minimum of four hundred (400) hours duration as mandated by the Commission on Fire Protection Personnel Standards and Education as to subject matter and number of hours for each subject, within one (1) year of the date of employment at a school or method certified or recognized by the Commission.
2. All firefighters must successfully complete in each calendar year an in-service training program, appropriate to the firefighters' rank and responsibility, of at least one hundred (100) hours duration at a school certified or recognized by the Commission.

Under the provisions of section 7(e) of the FLSA, 29 U.S.C. § 207(e), copy enclosed, all remuneration for employment must be included in calculating the regular rate of pay on which overtime compensation is paid except for eight specified types of payments. Among these excludable payments are discretionary bonuses, gifts and payments in the nature of gifts on special occasions, contributions by the employer to certain welfare plans, and payments made by the employer pursuant to certain profit-sharing, thrift, and savings plans.

These provisions do not provide an exclusion for guaranteed educational incentives that upgrade your firefighters' education and training. A bonus is discretionary and therefore excludable under section 7(e)(3) only when "both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period." 29 U.S.C. § 207(e)(3). Where a payment of a bonus is made in accordance with a prior promise or under a contractual obligation, it may not be excluded from the employee's regular rate computation for overtime. See 29 C.F.R. §778.211. When a local government participates in the *Name**, it has agreed in advance to pay the firefighters a bonus upon completion of an approved training program. Therefore educational incentive pay must be included in the regular rate of pay for calculating overtime compensation for these firefighters. See Opinion Letter May 19, 1975 (copy enclosed).

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of 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 request might require a different conclusion than the one expressed herein. You have represented that although some individual members of one or more *Name** affiliates are plaintiffs in litigation against the *Name**, Kentucky, neither *Name** nor its affiliates are parties to that litigation, and



therefore that this opinion is not sought by a party to a 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 the above information is responsive to your inquiry.

Sincerely,

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

Enclosures

29 U.S.C. § 207(e)
29 C.F.R. § 778.211
WH Opinion Letter May 19, 1975

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