



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

FLSA2008-13

December 18, 2008

Dear **Name***:

This is in response to your request for an opinion regarding whether paid emergency medical technicians (EMTs) employed by the county may volunteer to provide the same services for the local volunteer emergency crew (crew) under the Fair Labor Standards Act (FLSA).^{*} It is our opinion that county EMTs may volunteer for the crew.

You state that the crew has provided emergency response services in the county since 1970. The crew is tax-exempt and maintains its own by-laws and policies. The volunteers elect a Board of Trustees made up of members of the general public who govern the crew's budget. The crew has independent authority to accept or reject volunteers; there are, however, minimum duty and training requirements imposed by the Commonwealth. The crew independently exercises day-to-day control over the positions volunteers may hold, what they do, and when they do it. The crew may impose disciplinary action on volunteers and may require attendance at meetings or fundraising events. The volunteers are not subject to the county's grievance procedure, but the crew receives partial funding from the county. Information gathered from public filings indicates that the county provides less than 20% of the crew's operating expenses, but provides the crew's facilities. Additionally, all property acquired by public funds or donations is titled to the county.

In 2002, in response to a growing need for emergency services, the county hired five paid EMTs and a Director of Emergency Services to supplement the crew's work. Some of the paid EMTs previously volunteered for the crew and wish to continue volunteering while employed by the county. You ask whether EMTs employed by the county may serve as volunteer EMTs for the crew.

Section 3(e)(4)(A) of the FLSA and [29 C.F.R. § 553.101](#) indicate that the individual is a volunteer, not an employee of a public agency, when the individual meets the following criteria:

1. They provide their services for civic, charitable, or humanitarian reasons without promise, expectation, or receipt of compensation for the services rendered, although a volunteer can be paid expenses, reasonable benefits, or a nominal fee to perform such services;

* Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at www.wagehour.dol.gov

2. They offer their services freely and without coercion, direct or implied, from the employer; and
3. They are not otherwise employed by the same public agency to perform the same services as those for which they propose to volunteer; in other words, individuals can qualify as volunteers if they either volunteer for a different public agency *or* perform services for the same agency different from those they are otherwise employed to perform.

Your request focuses specifically on whether the county and the crew are the “same public agency” under the FLSA in light of the Fourth Circuit’s decision in *Benshoff v. City of Virginia Beach*, 180 F.3d 136 (4th Cir. 1999). We assume, for purposes of this letter, that the EMTs volunteer freely for civic, charitable, or humanitarian purposes and do so without expectation of compensation. *See* 29 C.F.R. § 553.101.

In *Benshoff*, privately incorporated volunteer rescue squads provided emergency medical services, which the City of Virginia Beach (city) oversaw through the Department of Emergency Services (DEMS). DEMS oversaw both the volunteer rescue squads and the city’s fire department. Several career firefighters obtained certification to provide advanced life support services and volunteered for the private rescue squads in addition to their work as firefighters for the city. The issue before the court was whether the control DEMS exercised over the volunteer rescue squads was “sufficient to render plaintiffs’ volunteer services ‘employment’ which is ‘controlled or required’ by the City for purposes of the FLSA.” *Benshoff*, 180 F.3d at 142.

The court considered the following factors in assessing the relationships between the city, the rescue squads, and the volunteers: whether the organizations are separate and independent legal entities with their own by-laws and boards of directors controlling their decisions; which entity establishes the licensing and certification standards; whether the volunteer companies impose additional requirements related to the training or duties of their members; who determines eligibility for rescue squad volunteers; who schedules the volunteer shifts and determines rates and methods of compensation; who controls the volunteer duty assignments and provides supervision for the work; whether the city or the rescue squads have authority to discipline volunteers; and whether there is evidence that “‘a sham’ private volunteer corporation [was] placed between an employee and his employer to avoid the compensation provisions of the Act.” *Id.* at 141-144, 149; *see also* Wage and Hour Opinion Letter FLSA2004-15 (Oct. 18, 2004) (“Association’s plans to create a foundation [to hire and place] paid EMS employees [in member] volunteer companies [could result in employees] providing both paid and volunteer services to the same entity. . .”). Although the court found that the city’s involvement with the provision of emergency medical services was not insubstantial, it nevertheless determined that rescue squads exercised primary control over the volunteers. The court further found that, considering the circumstances as a whole, the city’s activities did not “result in the evisceration of the independent nature of the rescue squads . . . or in a *de facto* employer-employee relationship between the city and those individuals who chose to volunteer with rescue squads.” *Id.* at 142.

In many ways, the situation here is similar to the facts in *Benshoff*. First, as in *Benshoff*, the volunteer squads have traditionally provided emergency services and the county only recently became involved in the process. *See id.* at 141. While the order of establishment certainly is not determinative, in this case it adds to the impression that the volunteer squads were not established to avoid compensation under the FLSA. *See id.* at 141-44. Second, the squads in *Benshoff* had their own by-laws and independently selected officers and directors. *See id.* at 143. You state that all members of the county's volunteer squads vote to elect their officers, as well as a board of trustees made up of members of the public, and the squads maintain their own set of by-laws and policies.

Third, in *Benshoff* the court held that, despite the power of DEMS to oversee and revoke the certification of emergency service providers, "it is the rescue squads that hold the ultimate authority to accept or reject candidates for membership even if otherwise approved for certification . . ." *Id.* The "fact that [the rescue squads] are regulated and licensed by governmental entities . . . does not change the fact that the rescue squads are private organizations." *Id.* In the situation here, the volunteer squads also make the independent and final determination on who may volunteer and may impose standards on members that exceed those of the county or the state. In other words, in order to join a volunteer squad, a volunteer must meet at least the government's certification standards. *See e.g., id.* ("[B]ecause DEMS certification is always contingent upon membership in a rescue squad under whose license the member can actually practice, the rescue squad retains authority to prohibit any individual from performing emergency medical services within the City even if he or she is otherwise qualified for DEMS certification."). The county does not control the personnel decisions of the volunteer squad members—the power to dismiss or discipline volunteer squad members lies strictly with the volunteer squad officers. Therefore, when they perform their volunteer services, the squad members cannot be considered employees of the county within the meaning of the FLSA. *See id.*

Fourth, *Benshoff* held that government's "mere recognition of the value of its volunteer rescue squads, through its provision of some financial assistance" does not result in an employment relationship. *Id.* at 145. Here, the county provides a portion of the volunteer squads' budgets with the remaining funding coming from donations and other sources.

There is one difference between *Benshoff* and the situation here. In *Benshoff*, the city did not employ anyone to perform advanced life support, nor did it possess a state license to do so; this was entirely done by the volunteer rescue squads. A firefighter with basic life-saving training crossed over to serve as an EMT with advanced life support skills. In this case, on the other hand, the county employs its own EMTs to perform exactly the same services as the volunteer squads and it is these employees who wish to volunteer their services. We previously determined, however, that even though volunteers and career employees performed the same services, a public agency was not required to pay career firefighters for the time spent volunteering for nonprofit volunteer rescue squads in the same county, because the rescue squads were separate and independent nonprofit corporations. *See Wage and Hour Opinion Letter [FLSA2001-19](#)* (Nov. 27, 2001). Similarly, we held in *Wage and Hour Opinion Letter [FLSA2002-1](#)* (June 5, 2002), that a county firefighter/paramedic employee could volunteer similar services to local nonprofit

fire and rescue corporations. *See Benshoff*, 180 F.3d at 147 (plaintiffs do not seriously argue that rescue squads are public agencies, and it is irrelevant that plaintiffs rendered the volunteer services “for the benefit of the City”).

It is our opinion that, given the situation as a whole, the county has not eviscerated the independent nature of the crew and that the crew remains separate and independent under the FLSA. There is no evidence that the crew operates as a “sham” corporation. Therefore, EMTs employed by the county may volunteer for the crew.

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,

Alexander J. Passantino
Acting Administrator

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