No. 08-55022

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOUISE PARTH,
Plaintiff-Appellant,

v.

POMONA VALLEY HOSPITAL MEDICAL CENTER,
Defendant-Appellee.

On Appellant's Petition for
Panel Rehearing and Rehearing En Banc

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE*

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BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE*

Pursuant to this Court's February 23 invitation, Federal Rule of Appellate Procedure 29, and Circuit Rule 29-2, the Secretary of Labor ("Secretary") submits this brief as *amicus curiae*. The Department of Labor's ("Department") position is that reductions in regular hourly wage rates in connection with employee schedule changes are permissible under the Fair Labor Standards Act ("FLSA" or "Act"), provided that the reduction is not designed to circumvent the Act's overtime requirements and the reduced rate is "bona fide."

INTEREST OF THE SECRETARY

The Secretary has a strong interest in the interpretation of the FLSA because she administers and enforces the Act. See

29 U.S.C. 204, 211(a), 216(c), 217. The Department's Wage and Hour Division has issued opinion letters addressing the permissibility under the Act of rate reductions of the type at issue in this appeal, and the Secretary has a strong interest in ensuring that the opinion letters are accorded appropriate deference.

ARGUMENT

REDUCTIONS IN REGULAR HOURLY WAGE RATES IN CONNECTION WITH EMPLOYEE SCHEDULE CHANGES ARE PERMISSIBLE UNDER THE FLSA, PROVIDED THAT THE REDUCTION IS NOT DESIGNED TO CIRCUMVENT THE ACT'S OVERTIME REQUIREMENTS AND THE REDUCED RATE IS "BONA FIDE"

The FLSA does not prohibit reductions in regular hourly wage rates in connection with employee schedule changes; however, the reduction must not be designed to circumvent the Act's overtime requirements, and the reduced rate must be "bona fide." This long-held position has been set forth in the Department's opinion letters, is consistent with caselaw, and is entitled to deference.

1. Rate Reductions May Not Be Designed to Circumvent the Act's Overtime Requirements

The FLSA requires that non-exempt employees be paid overtime pay at a rate at least equal to one and one-half times their regular rate for each overtime hour worked. See 29 U.S.C. 207(a). The Supreme Court has held that the regular rate cannot be an artificial rate designated by the employer, but instead is

the hourly rate actually paid to the employee. See Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419, 424 (1945) ("[R]egular rate refers to the hourly rate actually paid the employee for the normal, non-overtime workweek."); Walling v. Helmerich & Payne, Inc., 323 U.S. 37, 40 (1944) ("regular rate" means "the hourly rate actually paid for the normal, non-overtime workweek").

These Supreme Court cases invalidated pay plans that used artificial regular rates that were not based on the actual amounts paid to employees in order to avoid or underpay overtime due. In Helmerich & Payne, the workday's first four hours were paid at a "regular" rate designated by the employer, the second four hours were paid at an "overtime" rate equal to one and one-half times the designated "regular" rate, and no overtime premium was paid for overtime hours worked (instead, employees were paid at the designated "regular" or "overtime" rate for overtime hours). See 323 U.S. at 38-39. The Supreme Court concluded that the designated pay rates were "fictitious" and "illusory," and that the employer should have used the hourly rate the employee actually received for non-overtime hours (an average of the designated regular and overtime rates) and then multiplied that actual rate received by one and one-half to determine the correct overtime rate. Id. at 41-42. In Youngerman-Reynolds, the employer designated a regular rate and

an overtime rate, but actually paid its employees at a piece rate that was higher than both of the designated rates. See 325 U.S. at 422-23. The Supreme Court concluded that the designated regular and overtime rates were "artificial" and "never actually paid," and that the FLSA required conversion of the piece rate actually paid to an hourly rate that would be used as the regular rate for calculating overtime due. Id. at 424-26.

The Department has incorporated Helmerich & Payne and Youngerman-Reynolds into its regulations and has described more broadly the types of pay schemes that are not permitted because they circumvent the Act's overtime requirements. See 29 C.F.R. 778.316, 778.500 through 778.503. The regulations provide that employers cannot avoid overtime by, for example: setting an artificially low hourly rate upon which overtime pay is based; decreasing the hourly rate as the number of hours worked during the week increases; setting the employee's hourly rate for work during overtime hours lower than the hourly rate for identical work during non-overtime hours; providing that the hourly rate for the same type of work is lower during weeks when overtime is worked than during non-overtime weeks; agreeing with the employee that hours worked over 40 in a week do not count as hours worked; or paying employees the same total sum, comprising payment for both non-overtime and overtime hours each week,

without regard to the number of overtime hours worked in any week. See id.

The pay plan implemented by Appellee Pomona Valley Hospital Medical Center ("Hospital") for the 12-hour shift nurses who previously worked an 8-hour shift schedule does not appear to fall into any of the categories identified above.[1] The hourly rate paid by the Hospital to its 12-hour shift nurses for regularly scheduled hours does not seem artificially low and is not reduced as the nurses work more hours or reach overtime hours (in fact, it is increased to the 8-hour rate when those 12-hour shift nurses work shifts beyond their regular shifts). See Parth v. Pomona Valley Hosp. Med. Ctr., 584 F.3d 794, 796-97 (9th Cir. 2009); District Court's Order Granting Motion for Summary Judgment (ER Tab 76), 10. Most significantly, the 12-hour shift nurses are paid overtime when it is due them, and their overtime pay is calculated based on a regular rate that reflects the actual hourly rate paid to them. See Parth, 584 F.3d at 787.

[1] The nurses at the Hospital were subject to an "8/80" pay plan, which allows a hospital and its nurses to agree that the nurses will receive overtime pay when they work more than eight hours in a day or more than 80 hours in a two-week period (instead of on the usual 40-hour per week basis). See 29 U.S.C. 207(j). Accordingly, the change from 8-hour shifts to 12-hour shifts required the Hospital to pay its nurses at one and one-half times their regular hourly rate for the last four hours of each 12-hour shift.

Moreover, contrary to the assertion by Appellant Louise Parth, the Hospital's pay plan does not "make overtime payments cost neutral." Petition for Rehearing, 2. As the panel noted, Parth's characterization of the Hospital's pay plan is a reference to the Hospital's desire to implement the change to 12-hour shifts without increasing its overall wage costs. See Parth, 584 F.3d at 796-98. Overtime pay due, however, is not neutralized or avoided, but is paid to the nurses when due under the FLSA and is calculated based on the actual hourly rate paid to them. See id. at 797. Of course, it is true that Parth would have received overtime pay at a higher rate and earned more per hour under the 12-hour shift work schedule had the Hospital not reduced her regular hourly rate, but such reductions are permissible provided they are not designed to circumvent the Act's overtime requirements and are "bona fide" (see infra). And, Parth is correct that the Hospital was not required to reduce the regular hourly rate of nurses who opted for 12-hour shifts (see Petition for Rehearing, 1 & 7-8); the Hospital could have maintained the same hourly rate and absorbed the greater wage costs resulting from the change to 12-hour shifts. However, the issue is not whether the Hospital was required to reduce the regular hourly rate of the 12-hour shift nurses, but whether it was permitted to do so under the FLSA.

2. Reduced Rate Must Be "Bona Fide"

In addition to not being designed to circumvent the Act's overtime requirements, the reduced rate must be "bona fide." A reduced rate would be "bona fide" if it is: (1) agreed to by the employee; (2) in place for a substantial period of time; and (3) equal to or in excess of the Act's minimum wage. See April 27, 1988 Opinion Letter (copy attached as Exhibit A). These factors appear to be met in the present case. First, the rate reduction was agreed to by Parth and other 12-hour shift nurses in individual agreements, and was later included in their collective bargaining agreement ("CBA"). See Parth, 584 F.3d at 796-97.[2] Second, the rate reduction for 12-hour shift nurses has

[2] In evaluating the Hospital's pay plan, the panel repeatedly referred to Parth's and other nurses' agreement to the lower hourly rate and its inclusion in the CBA. See, e.g., Parth, 584 F.3d at 796-97 (Parth voted for 12-hour shifts, "entered into a voluntary agreement" with the Hospital reducing her regular rate when she changed to 12-hour shifts, was a member of the union's bargaining committee that negotiated the CBA, and was a signatory to the CBA); id. at 798 (12-hour shifts were "initiated at the nurses' request" and "memorialized in [the CBA] as a result of negotiations between [the nurses' union] and [the hospital] (again initiated at the nurses' request)"). Although an employee's agreement to the reduced regular rate is a factor in showing that the reduced rate is bona fide, an employee may not by agreement waive FLSA rights and convert a pay plan that is unlawful under the FLSA into a lawful pay plan. See Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 740-41 (1981) (right to overtime under FLSA is "nonwaivable," "cannot be abridged by contract", and trumps contrary provisions in collective bargaining agreement); Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 704-07 (1945) (employees may not waive right to compensation under FLSA); Collins v. Lobdell, 188 F.3d 1124, 1127-28 (9th Cir. 1999) (FLSA

been in place at the Hospital since 1989 or 1990 and has applied to Parth since 1993. See id. Third, the reduced regular hourly rate paid to 12-hour shift nurses -- between $34.64 and $46.92 in the 2004 CBA depending on which shift was worked (see id. at 797) -- clearly exceeds even the current minimum wage of $7.25. See 29 U.S.C. 206(a).

The fact that the rate reduction in the present case results in payment to the 12-hour shift nurses at a lower hourly rate than the 8-hour shift nurses for performing the same work (albeit on different shifts) does not violate the FLSA. The FLSA does not prohibit employers from paying different rates to employees who perform the same job.[3] Moreover, 29 C.F.R. 778.316, which provides that pay rates for particular work may not be lowered because the work is performed during overtime hours or during weeks when overtime is worked, cannot be read to prohibit rate reductions that apply generally to all hours and weeks worked by an employee without regard to whether overtime is worked. As the Supreme Court noted, employers and employees are generally free to establish their pay rates as long as

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rights are guaranteed to individual workers and may not be waived through collective bargaining).

[3] However, the Equal Pay Act, 29 U.S.C. 206(d), added to the FLSA in 1963, does prohibit employers from paying employees who perform substantially the same job at different rates because of their sex.

minimum wages and overtime are paid when due. See Youngerman-Reynolds, 325 U.S. at 424.

3. The Department's Position Is Long-Standing, as Set Forth in its Opinion Letters

The Department has previously set forth this position in several opinion letters issued by the Wage and Hour Division. In its April 27, 1988 Opinion Letter, the Department responded to an employer whose employees requested a change from 8-hour shifts to 12-hour shifts. The employer proposed to reduce the employees' hourly rates so that the employees would receive "virtually identical compensation" (including the new overtime pay) for the same number of hours worked under the 12-hour shift schedule as the 8-hour shift schedule. Apr. 27, 1988 Opinion Letter. The Department responded that, as a general matter, setting pay rates above the minimum wage "is a matter for agreement between the employer and the employees or their authorized representatives." Id. It stated that "there is no provision in FLSA which prohibits an employer from reducing an employee's rate of pay if such reduction is bona fide and is not designed to circumvent the overtime requirements of FLSA." Id. According to the Department, as set out supra, such reduced rates would be bona fide if they: (1) are agreed to by the employee; (2) operate for a substantial period of time; and (3) equal or exceed the FLSA's minimum wage. See id. The

Department concluded that the proposed pay plan appeared to meet those factors. See id.

In an April 27, 1989 Opinion Letter, the Department provided a nearly identical response to a state/local government employer whose employees requested that their 8-hour shifts and 40-hour workweek be changed to 12-hour shifts and alternating 36-hour and 48-hour workweeks. See 1989 WL 1632939 (copy attached as Exhibit B). Because the 48-hour workweeks would trigger overtime, the employer proposed a reduction in hourly rates which, together with the new overtime pay, would maintain the level of wage payments and not increase costs. See id. The Department responded that the proposed rate reduction would "comply with FLSA provided that the reduced rates constitute bona fide hourly rates" and were not designed to circumvent overtime requirements. Id. It identified the same three factors for ensuring that such a reduced rate is bona fide (employee agreement, reduction is long-term, and reduced rate meets or exceeds minimum wage). See id.[4]

[4] In the April 27, 1989 Opinion Letter, the Department also addressed whether the rate reduction violated the anti-retaliation provision in the Fair Labor Standards Amendments of 1985 ("1985 FLSA Amendments"). The 1985 FLSA Amendments provided that state and local government employees became subject to the FLSA's overtime provisions effective in 1986 (see Public Law 99-150, 99 Stat. 787 (Nov. 13, 1985)), and the anti-retaliation provision in Section 8 of the 1985 FLSA Amendments provided that, for a specified period of time as state and local governments came into compliance with the FLSA's overtime

The Department reiterated this position in a May 27, 1999 Opinion Letter. See 1999 WL 1002410 (copy attached as Exhibit C). The employer proposed, as an alternative to five 8-hour shifts per week, a schedule of rotating 12-hour shifts that would result in some regularly scheduled 36-hour weeks and 44-hour weeks (44-hour weeks would result in overtime due for four regularly scheduled hours). See May 27, 1999 Opinion Letter. The employer proposed to pay the 12-hour shift employees a lower regular hourly rate than the 8-hour shift employees so that their regular earnings (including the new overtime pay for regularly scheduled hours) would remain the same for the same number of regularly scheduled hours. See id. The Department emphasized that "there is no provision in the FLSA which prohibits an employer from reducing an employee's rate of pay if such reduction is bona fide and is not designed to circumvent the overtime requirement of the FLSA." Id. The Department again identified the same three factors for ensuring that such a

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provisions, they could not retaliate against their employees who asserted overtime coverage. See id., 99 Stat. at 791. The Department's position was that a unilateral reduction in pay by a state or local government employer to avoid the impending overtime requirements violated this anti-retaliation provision and was therefore prohibited. The Department concluded in the April 27, 1989 Opinion Letter that the rate reduction in connection with the change to 12-hour shifts would not violate the anti-retaliation provision. See Apr. 27, 1989 Opinion Letter. In any event, this prohibition against rate reductions applied only to state and local government employers (the Hospital is not such an employer), and it applied only through August 1, 1986. See Pub. L. 99-150, 99 Stat. at 791.

reduced rate is bona fide, and concluded that the proposed rate reduction would comply with the FLSA. See id.

4. The Department's Position Is Entitled to Deference

The Department's position, as set forth in the opinion letters, should be accorded deference. See Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (Department's interpretations and opinions entitled to respect; weight of respect depends upon such factors as thoroughness of consideration and consistency of opinions); see also Christensen v. Harris County, 529 U.S. 576, 587 (2000) (Department's statutory interpretations in opinion letters are entitled to respect under Skidmore to the extent they have power to persuade). The Department's position is longstanding, as the consistent opinion letters demonstrate. Moreover, the Department's position reflects a reasoned consideration of the issue in that it acknowledges the ability of employers and employees generally to agree to their own pay rates above the minimum wage, incorporates the Department's concerns that regular rate reductions not be used to avoid overtime requirements, and identifies factors for a permissible, bona fide rate reduction.

5. The Department's Position Is Consistent with Caselaw

The Department's position is consistent with the pertinent caselaw. The district court's decision in Conner v. Celanese, Ltd., 428 F. Supp.2d 628 (S.D. Tex. 2006), is the only federal

court decision (other than the district court's and the panel's decisions in this case) to address whether an employer already covered by the FLSA may reduce its employees' regular rates in connection with a schedule change, so that its wage costs after the change are the same as they were prior to that change. In Conner, the employees sought 12-hour shifts in addition to 8-hour shifts, and the employer, who paid overtime for hours worked over eight in a day despite not being required to by the FLSA, reduced the regular rate paid to 12-hour shift employees so that the effect of the schedule change on its wage costs was "neutral." 428 F. Supp.2d at 631-32. The district court in Conner concluded that reducing employees' regular rates when changing to 12-hour shifts, so that the employees' total pay remained the same after the change as it was before, did not violate the FLSA. See id. at 636-37. The court in Conner rejected employees' claims that their regular rate for calculating overtime due was the 8-hour rate and not the lower 12-hour rate (they were paid overtime using the 12-hour rate as the regular rate). See id. at 637. Citing Helmerich & Payne and Youngerman-Reynolds, the court concluded that the regular rate is the hourly rate actually paid to the employees and that the employer therefore was correct in using the 12-hour rate it actually paid them to calculate their overtime pay. See id.

In addition, federal appellate courts have held that rate reductions by state and local government employers in anticipation of application of the FLSA's overtime provisions to their employees (and made to ensure that total wages paid after FLSA coverage were the same as before) were permissible under the Act.[5] In York v. City of Wichita Falls, 48 F.3d 919, 920-22 (5th Cir. 1995), the Fifth Circuit concluded that the employer's reduction of its employees' hourly rate, so that their regular earnings (including overtime pay) remained the same, did not violate the anti-retaliation provision in Section 8 of the 1985 FLSA Amendments and did not violate the FLSA because the Act did not apply to the employer at the time. Of more relevance, however, the employer's continued use of the reduced regular rate once the FLSA became applicable was deemed permissible given that the employer paid its employees the required overtime premium for each hour worked based on the actual rate paid to them. See id. at 922-23. In Anderson v. City of Bristol, 6

[5] Although addressed by the panel in its decision and by the parties in their briefs, these cases are not entirely on point because the impetus for the rate reductions was not an employee schedule change during a period when the FLSA was already applicable. Moreover, these cases addressed the permissibility of the rate reductions in light of Section 8 of the 1985 FLSA Amendments, the temporary anti-retaliation provision available only to state and local government employees, which the Department interpreted to prohibit a unilateral reduction in pay by a state or local government employer made to avoid the impending overtime requirements. As explained in footnote 4, supra, the prohibition on rate reductions in Section 8 of the 1985 FLSA Amendments is not applicable here.

F.3d 1168, 1169-73 (6th Cir. 1993), the Sixth Circuit held that the employer's reduction of its employees' hourly rate, so that it still maintained the same compensation for its employees after the FLSA's overtime requirement become applicable to it, did not violate the anti-retaliation provision in Section 8 of the 1985 FLSA Amendments because the rate reduction occurred before enactment of Section 8. Further, the FLSA "does not prohibit changes in wage rates," and there was no overtime violation because the employees were paid overtime for overtime hours worked. Id. at 1173-74.

In Wethington v. City of Montgomery, 935 F.2d 222, 225-28 (11th Cir. 1991), the Eleventh Circuit held that the employer's "budget-neutral" conversion of employees from salaried to hourly, which resulted in the same pay for the same number of hours worked although at a reduced hourly rate, did not violate the FLSA because the reduction occurred prior to application of the FLSA's overtime provisions to the employer. Significantly, the court further stated: "Nothing in the Act prohibits such a reduction. Indeed, the Supreme Court has held that schemes designed to maintain the same wage after the Act's effective date cannot be invalid solely because they seek such consistency." Id. at 228 (citing Walling v. A.H. Belo Corp., 316 U.S. 624 (1942)). The employer's continued use of the reduced hourly rate did not violate the FLSA because employees

were paid for overtime worked and overtime was calculated using a regular rate reflecting the actual rate of pay. See id. at 227; see also Adams v. Dep't of Juvenile Justice of the City of New York, 143 F.3d 61, 67 (2nd Cir. 1998) ("nothing in the FLSA prevents an employer from contracting with its employees to pay them the same total wages received prior to FLSA applicability, so long as the regular rate equals or exceeds the minimum wage" and is "not a sham"). These cases' discussions of Section 8 of the 1985 FLSA Amendments and the rate reductions' timing are not directly pertinent; however, each of these cases also concluded that it was permissible under the FLSA to continue to use the reduced rate as the regular rate for calculating overtime. This conclusion is relevant to the analysis of the present case.[6]

Finally, the Supreme Court decisions from the 1940s addressing regular rates in the context of employers' compliance with the then-recently enacted FLSA also support the

[6] The district court's decision in Rhodes v. Bedford County, 734 F. Supp. 280 (E.D. Tenn. 1990), is distinguishable and unpersuasive. In that case, the court held that a rate reduction similar to those by the employers in the circuit courts of appeals cases addressed above, but after the FLSA's application to state and local government employees, violated the Act's overtime requirements. See 734 F. Supp. at 292. It summarily concluded that the employer artificially altered the employees' regular rate to avoid overtime obligations. See id. Unlike here, however, that case involved a local government employer and did not involve an employee schedule change. Moreover, the court's reasoning is cursory and is not consistent with the Department's long-held position or the weight of the caselaw.

Department's position. Belo is the most analogous, as the employer sought to achieve "as far as possible the payment of the same total weekly wage after the Act as before." 316 U.S. at 630. The Supreme Court concluded that "nothing in the Act bars an employer from contracting with his employees to pay them the same wages that they received previously, so long as the new rate equals or exceeds the minimum required by the Act." Id. In Youngerman-Reynolds and Helmerich & Payne, the regular rates established by the employers were rejected as artificial and improper for calculating overtime due because they did not reflect what the employees were actually paid. See Youngerman-Reynolds, 325 U.S. at 425-26; Helmerich & Payne, 323 U.S. at 41-42. Significantly, the Supreme Court recognized in both of these cases that the FLSA does not prohibit, subject to certain conditions, employers and employees from establishing bona fide regular pay rates above the minimum wage. See Youngerman-Reynolds, 325 U.S. at 424; Helmerich & Payne, 323 U.S. at 42.

CONCLUSION

The Hospital's reduction of the nurses' regular hourly wage rates does not appear to be designed to circumvent the Act's overtime requirements and appears to meet three factors identified by the Department for ensuring that reduced rates are bona fide. Furthermore, the panel's decision does not conflict with a decision of the Supreme Court or a decision of this

Court. Therefore, neither panel rehearing nor rehearing en banc is warranted. See Fed. R. App. Proc. 35 and 40; Cir. R. 35-1.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(c)(5) and 32(a)(7)(C), I certify that the foregoing Brief for the Secretary of Labor as *Amicus Curiae*:

(1) was prepared in a monospaced typeface using Microsoft Office Word 2003 utilizing Courier New 12-point font containing no more than 10.5 characters per inch, and

(2) complies with the type-volume limitation of Circuit Rule 29-2(c)(2) because it contains 4,176 words, excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Date: June 23, 2010

/s/
DEAN A. ROMHILT
Attorney

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, the Secretary of Labor states that there are no known related cases pending in this Court.

EXHIBIT A

April 27, 1988

This is in response to your letters concerning the application of the overtime compensation provisions of the Fair Labor Standards Act (FLSA) to certain employees of your client, who is engaged in chemical manufacturing. We regret the delay in responding to your inquiry.

The employees at issue work in the utilities (power plant) operation of your client's facility, which requires continuous operation 24 hours per day, 7 days per week. You indicate that the employees presently work 8-hour shifts and that the employees rotate between the three shifts over a repetitive cycle. Utilities employees have approached management with a request that your client establish work schedules under which the employees would work 12-hour shifts and under which they would receive additional consecutive days off. The proposed rotating schedule would provide four consecutive 12-hour "graveyard" shifts, four consecutive days off, four consecutive 12-hour "graveyard" shifts and so forth. The schedule would recycle each 16 weeks. Apparently, other employers operating utilities in the vicinity use such scheduling which is viewed as a benefit and conductive to recruitment, retention, and overall employee morale.

You state that about 93 percent of the affected employees have agreed to the proposal, and that your client has agreed to implement such scheduling, provided, among other things, that FLSA overtime costs would not be increased. To meet this objective, your client proposes to reduce current base hourly rate of pay by approximately 14 percent. Current base hourly rates range from $9.64 an hour for trainees to $15.35 an hour for senior technicians; after the 14-percent reduction, base hourly rates would range from $8.26 to $13.16 an hour.

Under the proposal, the affected employees will work approximately the same number of hours per year as under the current 8-hour schedule, and the employees will receive virtually identical compensation. Overtime pay at one and one-half times the reduced hourly rate will be paid for any hours worked in excess of 8 in a day, 40 hours worked in a workweek, and regularly scheduled hours on a holiday.

A "premium" rate of pay in excess of one and one-half times the reduced hourly base rate of pay will be paid for hours worked in excess of 12 in a day, hours worked on a seventh consecutive day, or any hours worked in excess of 12 hours on a holiday. In addition, certain other adjustments will be made in calculating pay for fringe benefits such as vacation, holiday, funeral leave, jury duty, sick leave, call-out pay, reporting pay, paternity leave pay, and other benefits.

You state that the employer plans to implement the 12-hour schedule indefinitely, and in any event, for not less than a trial period of 3 months. You further emphasize that the employees will be paid on the basis of the hours actually worked each workweek.

It is our opinion that the 12-hour shift schedule plan would comply with FLSA provided the specified rates constitute bona fide hourly rates. The specified hourly rates would be

bona fide if they are (1)agreed to by the employees, (2) operative for substantial periods of time, and (3)not less than the applicable minimum wage required by FLSA. Under the conditions you describe, the proposed plan would appear to meet these conditions.

In summary, there is no provision in FLSA which prohibits an employer from reducing an employee's rate of pay if such reduction is bona fide and is not designed to circumvent the overtime requirements of FLSA. The establishment of rates of pay which are not less than the minimum wage required by FLA. is a matter for agreement between the employer and the employees or their authorized representatives.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which 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 also represented that this opinion is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of FLSA.

Sincerely,

Paula V. Smith
Administrator

EXHIBIT B

1989 WL 1632939 (DOL WAGE-HOUR)

Wage and Hour Division
United States Department of Labor

Opinion LetterFair Labor Standards Act (FLSA)

April 27, 1989

***

This is in further response to your letter concerning the application of the Fair Labor Standards Act (FLSA) to a public employer client whose employees have requested that their current 8-hour workshifts and scheduled 40-hour workweek be changed to 12-hour workshifts with alternating scheduled workweeks of 36 and 48 hours. We regret the delay in responding to your inquiry.

You state that your client would like to accommodate the employees' request to change their work schedules. However, the employer is not willing to increase its costs for overtime premium pay, which would be required for the longer 48-hour workweek under the proposed alternating workweek schedule. You indicate that the employees have devised a reduction in base hourly rates which, together with overtime premium pay, will yield the current wage payments in order to meet your client's objective of not increasing costs. You ask whether a reduction in hourly rates, as devised by the employees to accommodate the proposed schedule changes they are requesting, would be prohibited by section 8 of the Fair Labor Standards Amendments of 1985.

Section 8 of the Amendments provides that a public agency which discriminates against an employee with respect to the employee's wages or other terms or conditions of employment, because on or after February 19, 1985, the employee asserted coverage under the overtime pay provisions of section 7 of FLSA, shall be held to have violated section 15(a)(3) of FLSA. Section 15(a)(3) prohibits discrimination against any employee who, among other things, has filed any complaint or instituted any proceeding under or related to FLSA. The Conference Report on the Amendments makes clear that the provisions of section 8 are “intended to apply where an employer's response to an assertion of FLSA coverage is to reduce wages or other monetary benefits for an entire unit of employees” (page 8 of Conference Report 99-357). As further explained in the Conference Report, the discrimination provisions of section 8 are intended to make unlawful “(a) unilateral reduction of regular pay . . . that is intended to nullify . . . application of overtime compensation to State and local government employees . . . .”

Based upon the information you have provided, it is our opinion that the proposed reduction of the employees' hourly rates does not constitute a violation of section 8 of the Amendments. Further, we conclude that the reduced hourly rates, which are intended to implement the 12-hour shift plan proposed by the employees, comply with FLSA provided that the reduced rates constitute bona fide hourly rates. The reduced hourly rates would be bona fide if they are (1) agreed to by the employees, (2) operative for substantial periods of time, and (3) not less than the applicable minimum wage required by FLSA.

In summary, there is no provision in FLSA which prohibits an employer from reducing an employee's rate of

pay if such reduction is bona fide and is not designed to circumvent the overtime requirements of FLSA. The establishment of rates of pay which are not less than the minimum wage required by FLSA is a matter for agreement between the employer and the employees or their authorized representative.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which 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 also represented that this opinion is not sought on behalf of a client which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of FLSA.

Sincerely,
Paula V. Smith
Administrator

1989 WL 1632939 (DOL WAGE-HOUR)
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EXHIBIT C

1999 WL 1002410 (DOL WAGE-HOUR)

Wage and Hour Division
United States Department of Labor

Opinion LetterFair Labor Standards Act (FLSA)

May 27, 1999

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This is in response to your letter requesting an opinion concerning the application of the Fair Labor Standards Act (FLSA) to an alternative shift schedule for operators, linemen, maintenance workers, truck drivers, and power plant employees. We regret the delay in responding to your inquiry.

You represent a company which, in agreement with a union, seeks to adopt provisions in a collective bargaining agreement relating to the compensation of two groups of employees. Under this proposed agreement, employees would have their choice of working schedules of eight hours a day, five days a week, or an alternative shift schedule that involves a rotating 12-hour shift. Under the latter schedule, employees would be scheduled to work four week cycles with workweeks of 36, 44, 40 and 40 hours. The choice of one of the two work schedules would be completely at the employees' option.

The agreement would also provide that the employees who choose to work the 12-hour shift cycles would be paid a slightly lower hourly rate than the employees scheduled for 8-hour days. The two hourly rates would be based on a percentage factor determined by comparing the total number of hours on an annual basis for which the two groups of employees are scheduled to be compensated, on an annual basis. The employees on the 12-hour shift cycles would have an hourly rate that was .9639 percent of the hourly rate of the employees in the 8-hour per day group.

It is the employer's intent to pay both groups of employees overtime compensation for all hours worked in excess of 40 in a workweek at time and one-half their respective regular rates, including the four hours of overtime regularly scheduled every four weeks for the 12-hour shift employees. Any unscheduled overtime worked by employees in either group would also be compensated at time and one-half the employees' respective regular rates of pay.

Even if this procedure results in the employees receiving a lower rate of pay in the future than they currently receive, there is no provision in the FLSA which prohibits an employer from reducing an employee's rate of pay if such reduction is bona fide and is not designed to circumvent the overtime requirements of the FLSA. The setting of rates of pay which are above the minimum wage required by the FLSA is a matter for agreement between employers and employees or their authorized representatives. It is our opinion that the 12-hour shift schedule plan would comply with the FLSA provided the specified rates constitute *bona fide* hourly rates. The specified hourly rates would be *bona fide* if they are (1) agreed to by the employees or their representative; (2) operate for substantial periods of time, and (3) not less than the applicable minimum wage required by the FLSA. Under the conditions described above, including the recognition that all hours worked in excess of 40 in a workweek by

employees in both groups must be compensated an time and one-half the employees' regular rate of pay, the proposed plan is consistent with the FLSA.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which 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 different conclusion than the one expressed herein. This opinion is also provided on the basis that it is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying or requiring compliance with the provisions of the FLSA.

We trust that this information is responsive to your inquiry.

Sincerely,
Daniel F. Sweeney
Office of Enforcement Policy Fair Labor Standards Team

1999 WL 1002410 (DOL WAGE-HOUR)
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