No. 12-1231

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAUL MENDEL,

Plaintiff-Appellant,

v.

CITY OF GIBRALTAR,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Michigan

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT

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BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT

Pursuant to Federal Rule of Appellate Procedure 29, the Secretary of Labor ("Secretary") submits this brief as amicus curiae in support of Plaintiff-Appellant. For the reasons set forth below, the district court erred by concluding that the City of Gibraltar's ("the City") firefighters are volunteers rather than employees under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 201 *et seq.*, and therefore that Plaintiff-Appellant, Paul Mendel, was not an eligible employee under the Family and Medical Leave Act ("FMLA"), 29 U.S.C. 2601 *et seq.*

STATEMENT OF IDENTITY, INTEREST, AND SOURCE OF AUTHORITY TO FILE

The Secretary has a strong interest in the interpretation of the FLSA and the FMLA because she administers and enforces both statutes. *See* 29 U.S.C. 211(a) (Department of Labor Wage and Hour Administrator's investigative authority under the FLSA); 29 U.S.C. 216(c) (Secretary's enforcement authority under the FLSA); 29 U.S.C. 2616(a) (Secretary's investigative authority under the FMLA); 29 U.S.C. 2617(b) and (d) (Secretary's enforcement authority under the FMLA). Several of the regulations issued by the Department of Labor are central to the issue presented in this appeal concerning the volunteer status of firefighters under the FLSA. *See* 29 C.F.R. 553.100-553.106. In addition, several of the Department of Labor Wage and Hour Division's opinion letters interpreting these regulations are relevant to this appeal. The Secretary has a strong interest in ensuring that the FLSA and these regulations and opinion letters are properly interpreted and accorded appropriate deference.

This brief is filed in accordance with Federal Rule of Civil Procedure 29(a), which permits an agency of the United States to file an amicus-curiae brief without the consent of the parties or leave of the court.

STATEMENT OF THE ISSUE

Whether the district erred by concluding that the City's firefighters are volunteers rather than employees under the FLSA and therefore that Mendel was not an eligible employee under the FMLA.

STATEMENT OF THE CASE

A. Statement of Facts and Course of Proceedings

1. Paul Mendel worked for the City as a dispatcher. *See Mendel v. City of Gibraltar*, 842 F. Supp. 2d 1035, 1036 (E.D. Mich. 2012). The City has approximately 41 employees, including one firefighter, the Fire Chief. *See id.*; R. No. 17-7, VanCalbergh Aff., ¶ 3.[1] The Fire Chief is paid $20,000 per year and is expected to work approximately 20 hours per week. *See* R. No. 17-7, VanCalbergh Aff., ¶ 4; R. No. 17-6, VanCalbergh Dep., pp. 35-39. Assuming he works 52 weeks per year, this corresponds to $19.23 per hour.

2. Beyond these 41 employees, the City has approximately 34 firefighters that it treats as volunteers. *See* R. No. 23-7, Ex. B to Pl's Resp. to Mot. for Summ. J., p. 54. It pays these firefighters $15 per hour for responding to fire calls and maintaining equipment. *See Mendel*, 842 F. Supp. 2d at 1036.

[1] Pursuant to Local Rule 30(b), the Secretary has included in this brief an addendum designating the relevant district court documents, and cites to those documents as "R. No.," followed by the number corresponding to the record entry number from the district court docket.

The City does not, however, require the firefighters to respond to calls. *See id.* at 1037. The firefighters do not suffer any disciplinary actions if they do not respond to calls. *See id.* at 1042. They do not work set shifts or staff a fire station. *See id.* However, they are subject to a hiring process by the City, including completing an "Application for Employment" form; they can be promoted or discharged by the Fire Chief; and the City keeps a personnel file for each firefighter. *See id.* at 1043; R. No. 23-4, Ex. B to Pl's Resp. to Mot. for Summ. J., pp. 1-6. Lastly, the firefighters are required to attend trainings and take tests, but they do not receive any payment for this time. *See Mendel*, 842 F. Supp. 2d at 1037. The average annual payment to a firefighter is $1,500, *see id.* at 1036, which corresponds to approximately 100 hours of work per year for each firefighter.

3. In the district court proceedings, Mendel asserted that full-time employee-firefighters in neighboring communities are paid between $14 and $17 per hour. *See* R. No. 23-2, Kristy Mendel Aff., ¶ 9.[2] In addition, a publically-available

[2] As support for this assertion, Mendel relied on an affidavit of his wife, Kristy Mendel (she was a "volunteer" firefighter for the City for over a year). *See* R. No. 23-2, Kristy Mendel Aff. She stated in her affidavit that she and Paul Mendel reviewed full-time wages for entry level firefighters in nearby communities, and found that their wages ranged from $14.23 per hour to $15.42 per hour in 2008 and from $14.66 per hour to $17.17 per hour in 2010 and 2011. *See id.* at ¶ 9. The City did

collective bargaining agreement ("CBA") for employee-firefighters in one of these neighboring communities, the City of Trenton, confirms the accuracy of the information presented in Kristy Mendel's affidavit. *See* Addendum, Collective Bargaining Agreement, City of Trenton and Trenton Fire Fighters Union, Local 2701 International Association of Firefighters, July 1, 2008 - June 30, 2011 ("City of Trenton CBA"), pp. 5-6.[3] This CBA indicates that the hourly rate for starting employee-firefighters in the nearby City of Trenton was $15.04 in 2008, $17.00 in 2009, and $17.17 in 2010.

B. The District Court's Proceedings

In its summary judgment order, the district court concluded that the City's payment to its firefighters was not nominal.

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not challenge the reliability of this evidence in the district court proceedings.

[3] The Secretary requests that this Court take judicial notice of this CBA and the information it contains indicating the rate of pay for employee-firefighters in the neighboring community of the City of Trenton. *See* Fed. R. Evid. 201(b) (judicial notice appropriate for facts "not subject to reasonable dispute" that are either "generally known within the territorial jurisdiction of the trial court" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"); Fed. R. Evid. 201(f) (judicial notice may be taken at any stage of the proceeding); Fed. R. Evid. 1101(a) (Federal Rules of Evidence apply to United States courts of appeals); *Evans v. Metro. Life Ins. Co.*, 190 Fed. Appx. 429, 436 n.7 (6th Cir. 2006) (in reversing district court, this Court took judicial notice of the definition of "sedentary work" set forth in the Department of Labor's Dictionary of Occupational Titles, which the Social Security Administration adopted in its regulations).

See Mendel, 842 F. Supp. 2d at 1042. Despite this conclusion, the court ultimately concluded that the firefighters are volunteers because the City did not sufficiently control them. *See id.* at 1042-43. The court deemed it significant that the firefighters were not required to respond when a fire call went out and suffered no disciplinary measures when they did not respond to a call. *See id.* The court also found that the absence of a requirement to work a set schedule or staff a fire station showed a lack of control by the City. *See id.* Thus, although the court acknowledged that $15 per hour is not a nominal payment, it nonetheless concluded that the lack of control, together with the fact that the firefighters were required to train and be tested on their own time, outweighed the compensation they received in determining volunteer status. *See id.*

The court bolstered its conclusion that the lack of control by the City was determinative by relying on the definition of an "employee in fire protection activities" in 29 U.S.C. 203(y). *See Mendel*, 842 F. Supp. 2d at 1043.[4] Section 3(y) defines an "employee in fire protection activities," in part, as having "the legal authority and responsibility to engage in fire

[4] The definition of an "employee in fire protection activities" in 29 U.S.C. 203(y) relates to the partial overtime exemption for an "employee in fire protection activities" or an employee in law enforcement activities in 29 U.S.C. 207(k).

suppression." 29 U.S.C. 203(y)(1). The court concluded that the City's firefighters do not fit within this definition because they are not required to respond to a call. *See Mendel*, 842 F. Supp. 2d at 1043. The court rejected Mendel's argument that this term was limited to overtime wages, finding that there was no such limitation in the statute. *See id.*

SUMMARY OF ARGUMENT

The district court erred by concluding that the City's firefighters were volunteers rather than employees under the FLSA and therefore that Mendel was not an eligible employee under the FMLA. The district court acknowledged that $15 per hour is not a nominal fee under the FLSA. The court erred, however, when it failed to recognize the dispositive nature of this conclusion in determining whether an individual is an employee or a volunteer, and instead focused on control as the determining factor.

The FLSA is clear that volunteer status requires that any payment for services be nominal. *See* 29 U.S.C. 203(e)(4)(A)(i). If the individual receives payment for services that is more than a nominal amount, the individual does not qualify as a volunteer. The $15 per hour that the City pays its firefighters when they respond to fire calls and maintain equipment is more than nominal because it is more than 20 percent of what the City would have to pay a person to perform those same services and,

because it is paid on an hourly basis, it is tied to production and therefore is more akin to compensation than a nominal fee.

ARGUMENT

THE DISTRICT COURT ERRED BY CONCLUDING THAT THE CITY'S FIREFIGHTERS ARE VOLUNTEERS RATHER THAN EMPLOYEES UNDER THE FLSA BECAUSE THEY WERE PAID MORE THAN A NOMINAL FEE, AND CONSEQUENTLY ERRED IN CONCLUDING THAT MENDEL WAS NOT AN ELIGIBLE EMPLOYEE UNDER THE FMLA

A. Statutory and Regulatory Background

1. To be eligible for FMLA leave, the FMLA requires that an employee be employed at a worksite where the employer employs at least 50 employees within 75 miles of that worksite. *See* 29 U.S.C. 2611(2)(B)(ii). The FMLA uses the FLSA's definition of employee. *See* 29 U.S.C. 2611(3); 29 U.S.C. 203(e). The City has approximately 41 employees and 34 firefighters that it treats as volunteers. Thus, the City employs more than 50 employees only if the City's firefighters are employees under the FLSA. Consequently, Mendel's eligibility under the FMLA turns on whether the City's firefighters are employees or volunteers under the FLSA.

2. The FLSA defines "employee" as any individual employed by an employer. *See* 29 U.S.C. 203(e)(1).[5] "Employ" means "to suffer or permit to work." *See* 29 U.S.C. 203(g). The Supreme

[5] The FLSA's definition of employer includes a public agency. *See* 29 U.S.C. 203(d). "Public agency" is defined to include the government of a political subdivision of a State. *See* 29 U.S.C. 203(x). Neither party disputes the City's status as an employer under the FLSA.

Court has observed that the "striking breadth" of the definition of "employ" "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992). In *Nationwide Mut. Ins.*, the Supreme Court noted that the FLSA definition of employee is much broader than the common law employee analysis used under the Employee Retirement Income Security Act.[6] *See id.* The Court long ago commented that "[a] broader or more comprehensive coverage of employees [under the FLSA] . . . would be difficult to frame." *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945); *see Fegley v. Higgins*, 19 F.3d 1126, 1132 n.5 (6th Cir. 1994) (noting that the FLSA's definition of "employee" has been described as "'the broadest definition that has ever been included in any one act'" (quoting *Rosenwasser*, 323 U.S. at 363 n.3)). Given the remedial purpose of the FLSA, the Supreme Court has directed that the FLSA should "not be interpreted or applied in a narrow, grudging manner." *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944); *see Herman v. Fabri-Centers of Am., Inc.*, 308 F.3d 580, 585 (6th

[6] Further, as the Eleventh Circuit noted in *Smith v. BellSouth Telecommunications, Inc.*, 273 F.3d 1303, 1308 (11th Cir. 2001), the broad definition of "employee" under the FLSA was incorporated into the FMLA. "The legislative history of the FMLA indicates that when Congress chose to incorporate the FLSA definition [of employee], it acknowledged the definition's broad scope." *Id.* at 1308 n.5.

Cir. 2002) (quoting *Tennessee Coal*).

3. The FLSA excludes from the definition of employee an individual who volunteers for a public agency if the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the volunteer services and is not otherwise employed by the agency to perform those same type of services. *See* 29 U.S.C. 203(e)(4)(A)(i) and (ii); 29 C.F.R. 553.101 (a volunteer is an individual who: (1) performs services for a public agency for civic, charitable, or humanitarian reasons without expectation or receipt of compensation; (2) offers his services freely and without coercion from an employer; (3) is not otherwise employed by the public agency to perform the same services for which he volunteers). Thus, any payment made to an individual for performing services must be nominal for the individual to be a volunteer. Where the individual receives payment for performing services that is more than a nominal fee, the individual does not qualify as a volunteer. *See* 29 C.F.R. 553.104(a) (individuals are volunteers only "if their hours of service are provided with no expectation, or receipt of compensation for the services rendered, except for reimbursement for expenses, reasonable benefits, and nominal fees").

In assessing whether a payment for services is nominal, the regulation explains that a nominal fee "is not a substitute for

compensation and must not be tied to productivity." 29 C.F.R. 553.106(e). The regulation explains, however, that "this does not preclude the payment of a nominal amount on a 'per call' or similar basis to volunteer firefighters." *Id.*[7] In promulgating this regulation, the Department noted that "[t]he purpose of the prohibition against productivity-based fees for volunteers was to preclude payments which were so closely tied to work production as to constitute compensation on a 'piece rate' wage or production bonus basis[,]" but that this did not "preclude the payment of nominal per call fees to volunteer firefighters." Application of the Fair Labor Standards Act to Employees of State and Local Governments, 52 Fed. Reg. 2012, 2021 (Jan. 16, 1987) (preamble to Final Rule promulgating 553.106).

The regulation also identifies several factors relevant to determining whether a given amount is nominal, including "whether the volunteer has agreed to be available around-the-clock or only during certain specified time periods" and "whether the volunteer provides services as needed or throughout the year." 29 C.F.R. 553.106(e). Lastly, the regulation notes that determining whether a payment is nominal or constitutes compensation requires analyzing "the context of the economic realities of the particular situation." 29 C.F.R. 553.106(f).

[7] 29 C.F.R. 553.104(b) specifically recognizes firefighters as an example of volunteers.

4. Courts have formulated different multi-part tests to determine volunteer status (which includes a determination of whether any payment made is nominal). *See, e.g.*, *Cleveland v. City of Elmedorf*, 388 F.3d 522, 527 (5th Cir. 2004) ((1) the existence of a civic, charitable, or humanitarian reason for performing the service for a public agency; and (2) the absence of a promise, expectation, or receipt of compensation for the performance of those services); *Vonbrethorst v. Washington County*, No. CV06-0351-SEJL, 2008 WL 2785549, at *4 (D. Idaho July 15, 2008) ((1) the volunteer must submit to work voluntarily, without coercion; (2) must perform the service, at least in part, for humanitarian reasons; (3) may receive nominal fees or reimbursement for services; and (4) may not volunteer for the same type of work in which the person is otherwise employed).[8] Courts have indicated that "the regulatory definition of volunteer should be applied in a common-sense manner, which takes into account the totality of the circumstances." *Purdham v. Fairfax County School*, 637 F.3d 428, 434 (4th Cir. 2011) (internal quotation marks omitted); *see Cleveland*, 388 F.3d at 528 (same).[9]

[8] The Sixth Circuit has not addressed volunteer status under the FLSA.

[9] Whether a person is a volunteer or an employee under the FLSA is a question of law. *See Purdham*, 637 F.3d at 428; *Cleveland*, 388 F.3d at 526.

B. The District Court Erred By Failing to Recognize the Dispositive Nature of Its Conclusion that the $15 Per Hour Payment to the Firefighters Was Not Nominal.

1. The district court acknowledged that $15 per hour is not nominal. *See Mendel*, 842 F. Supp. 2d at 1042. This conclusion is dispositive. The statute is clear that any payment for services must be nominal in order for the person performing those services to be deemed a volunteer rather than an employee under the FLSA. *See* 29 U.S.C. 203(e)(4)(A) ("The term 'employee' does not include any individual who volunteers . . . if . . . the individual receives no compensation or is paid . . . a nominal fee to perform the services for which the individual volunteered[.]") (emphasis added). Thus, to qualify as a volunteer rather than an employee, the individual may receive only a nominal fee for services performed; he may not receive compensation for those services. If he receives payment that is not nominal, but rather is compensation, he is an employee. *See Vonbrethorst*, 2008 WL 2785549, at *4 (concluding that payment to emergency medical technicians was not nominal and therefore the technicians were not volunteers). Here, because the district court concluded that the $15 per hour payment was not nominal, it should have concluded as a matter of law that the City's firefighters are not volunteers under the plain meaning of the FLSA.

Thus, the district court erred when it focused on control

as the determining factor of volunteer status, even though it had already concluded that the $15 per hour payment was not nominal. *See Mendel*, 842 F. Supp. 2d at 1042-43.[10] Any question as to the amount of control exercised by the City over the firefighters becomes irrelevant once the payment is deemed to be compensation rather than a nominal fee.[11]

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[10] Courts have taken differing approaches to the relevance of "control" in determining volunteer status generally. *Compare Benshoff v. City of Va. Beach*, 180 F.3d 136, 142-44 (4th Cir. 1999) (concluding that the City of Virginia Beach did not sufficiently control the firefighters' services to establish an employer-employee relationship), *and Freeman v. Key Largo Volunteer Fire & Rescue Dep't*, 841 F. Supp. 2d 1274, 1278 (S.D. Fla. 2012), *appeal docketed*, No. 12-10915 (11th Cir. Feb. 17, 2012) (focusing on the authority to hire and fire, and supervise and dictate employee schedules in concluding that firefighter was a volunteer), *with Todaro v. Township of Union*, 27 F. Supp. 2d 517, 536 (D.N.J. 1998) (noting that the "right to control" factor in the economic realities test "is not helpful in distinguishing employees from volunteers because . . . [a] volunteer may be given substantial freedom in performing certain tasks, while another may be supervised closely; but the same applies to an employee as well"), *and Krause v. Cherry Hill Fire Dist. 13*, 969 F. Supp. 270, 275 (D.N.J. 1997) (the degree of control is not relevant in determining volunteer status). In *Benshoff*, *Freeman*, and *Todaro*, there was no nominal fee issue present, making further analysis of volunteer status necessary. In *Krause*, the court addressed the nominal fee issue after it concluded that the degree of control was not relevant in determining volunteer status.

[11] While control is a relevant factor in determining whether a worker is an independent contractor or employee under the FLSA, *see Donovan v. Brandel*, 736 F.2d 1114, 1117-19 (6th cir. 1984), the City, as noted by the district court, did not assert that its firefighters are independent contractors, *see Mendel*, 842 F. Supp. 2d at 1042-43. In fact, in its district court pleadings, the City implied that it does not consider its firefighters to be independent contractors. *See* R. No. 25, Def's Reply to Mot. for Summ. J., p. 10 (the City's firefighters "are not per se

2. Additionally, in focusing on control, the district court incorrectly resorted to a common-law analysis. The court relied on control as "a pertinent factor in deciding whether the relationship is that of master-servant or something else." *Mendel*, 842 F. Supp. 2d at 1043. Not only was control not a relevant factor once the court concluded that the City's payment to its firefighters was not nominal, but Supreme Court precedent explicitly states that employee status under the FLSA is not limited to traditional notions of master-servant. "[I]n determining who are 'employees' under the [FLSA], common law employee categories or employer-employee classifications under other statutes are not of controlling significance." *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150 (1947).

3. The court further erred by distinguishing a volunteer who receives some form of monetary payment from a volunteer who receives no compensation, labeling the former an "enhanced volunteer." *Mendel*, 842 F. Supp. 2d at 1040-41, 1044. Thus, the court formulated a new category -- "enhanced volunteer" -- to represent a person who is paid for his services but is not an employee, and concluded that the City's firefighters fit into this "enhanced volunteer" category. There is, however, no statutory basis for creating this new category of volunteer. The FLSA's broad definition of "employee" excludes a volunteer

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employees merely because they are not independent contractors").

only if certain criteria are met. *See* 29 U.S.C. 203(e)(4). In other words, a person who performs services for an employer and receives payment for those services is an employee unless they met the criteria of a volunteer set out in the statute.[12] No court has read an additional category of "enhanced volunteer" into the statute as the district court did in this case.[13]

C. The District Court Correctly Concluded that the $15 Per Hour Payment to the Firefighters Was Not Nominal.

Although the district court concluded that the payment to the firefighters was not nominal, and therefore that issue is not directly on appeal, the Secretary explains below why that conclusion was correct in the event this Court chooses to address that issue.

1. The Department of Labor's Wage and Hour Division has addressed what constitutes a nominal fee for volunteers under

[12] Of course, if an individual is deemed to be an independent contractor, he would not be an employee under the FLSA. *See Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 523 (6th Cir. 2011).

[13] The district court also erred in relying on the definition of "employee in fire protection activities" in section 3(y) of the FLSA, 29 U.S.C. 203(y). *See Mendel*, 842 F. Supp. 2d at 1043. That definition is only relevant to the partial overtime exemption for employees in fire protection activities in section 7(k), 29 U.S.C. 207(k). Section 7(k) establishes a higher threshold for when overtime compensation is due to an employee employed in fire protection activities than the 40-hour-a-workweek threshold generally applicable to employees. The definition of an "employee in fire protection activities" in section 3(y) defines those employees who qualify for this specific provision. It has no bearing on determining whether a firefighter is an employee or volunteer under the FLSA.

the FLSA in numerous opinion letters. In these letters, Wage and Hour has indicated that a payment is nominal if it is no more than 20 percent of what the employer would pay to hire someone to perform those same services. In a 2005 opinion letter addressing the volunteer status of school coaches who received a $3,675 stipend for a season of coaching, Wage and Hour articulated this 20-percent test. *See* Opinion Letter FLSA 2005-51 at 3, 2005 WL 3308622 (November 10, 2005) ("2005 Opinion Letter"). Wage and Hour opined that a nominal fee is the same as an incidental or insubstantial fee and looked to the statutory definition of "incidental" that appears in the child labor portion of the FLSA at 29 U.S.C. 213(c)(6)(G). *See* 2005 Opinion Letter at 3.[14] Wage and Hour stated that the economic realities test set out in 29 C.F.R. 553.106(f) requires comparing the payment made to the purported volunteer to what the employer would otherwise pay a full-time person to perform those same services. *See* 2005 Opinion Letter at *3-4. If the payment is no more than 20 percent of the wage the employer would pay an employee to perform those same services, the payment is a permissible nominal fee. *See id.* Wage and Hour further noted that a willingness to accept no more than 20

[14] Section 213(c)(6)(G) permits 17-year-olds to drive, when, among other things, such driving is "only occasional and incidental," and uses a 20-percent test in defining "occasional and incidental."

percent of the wage an employee performing those same services would earn likely indicates that the person is performing the services in a spirit of volunteerism. *See id.* at 4. Thus, this letter established the 20-percent test as the appropriate measure of the economic realities to determine if a payment is a nominal fee, as directed by 29 C.F.R. 553.106(f).

In a 2006 letter, Wage and Hour applied the 20-percent test in the context of firefighters. *See* Opinion Letter FLSA2006-28 at 3, 2006 WL 2792442 (Aug. 7, 2006) ("2006 Opinion Letter"). Wage and Hour concluded that payments made to firefighters could be nominal if they were no more than 20 percent of what the employer would pay to employ a full-time firefighter for comparable services (there were insufficient facts provided by the requester for Wage and Hour to make this determination). *See id.* at 5; *see also* Opinion Letter FLSA2008-15, 2008 WL 5483055 (Dec. 18, 2008) (the 20-percent test is appropriate to determine if a monthly or per call stipend paid to firefighters is nominal); Opinion Letter FLSA2007-3NA, 2007 WL 5130267 (Sept. 17, 2007) (the 20-percent test is appropriate to determine if a per shift or per call stipend paid to firefighters is nominal).

Notably, in a 2008 opinion letter, Wage and Hour applied the 20-percent test and concluded that a payment was <u>not</u> nominal, and therefore the payment "creates an employment relationship." Opinion Letter FLSA2008-16, 2008 WL 5483056

(Dec. 18, 2008) (a payment of $17.31 or $18.18 per hour for reserve police officers, which corresponded to the entry level pay of a Police Officer I and Police Officer II, cannot be considered a nominal fee).[15]

2. In addition to setting out this 20-percent test as the central method for determining whether a payment is nominal, the 2005 Opinion Letter reiterates Wage and Hour's long-standing position that a payment tied to productivity (such as hourly wages for services rendered, which are similar to piece rates or production bonuses) is more akin to compensation than a nominal fee. Wage and Hour stated that a "key factor" to consider in the context of school coaching is whether the amount paid varies

[15] While several of these letters refer to the cost to hire a "full-time" person to perform "the same services," the fact that the cost is linked to a person performing "the same services" means that the relevant inquiry is the cost to hire a person to perform services for the same amount of time that the purported volunteer performs them. One of the 2008 letters provided an explicit example: "[I]f a volunteer firefighter staffs the equivalent of three shifts during a month, the nominal fee should not exceed 20 percent of what it would cost to employ a firefighters to staff these three shifts." Opinion Letter FLSA2008-15, 2008 WL 5483055 (Dec. 18, 2008). Thus, the City's argument below that its average payment of $1,500 per year to its firefighters is below 20 percent of what it would cost to hire a full-time employee-firefighter, *see Mendel*, 842 F. Supp. 2d at 1036, is based on a faulty interpretation of the 20-percent test. Whether comparing the hourly rate of $15 or the average yearly payment of $1,500 for approximately 100 hours of service, the proper comparison is between the amount paid to the City's firefighters and the amount the City would pay an employee-firefighter to perform those same services (e.g., the cost to hire an employee-firefighters to work 100 hours per year).

according to the number of hours the coach spends on team-related activities and/or according to the performance of the team. 2005 Opinion Letter at 2; *see* Opinion Letter FLSA2004-6, 2004 WL 2146926 (July 14, 2004) ("2004 Opinion Letter"); Opinion Letter FLSA2002-4, 2002 WL 32406594 (July 19, 2002); Opinion Letter, 1999 WL 1788140 (Aug. 6, 1999). In the 2006 Opinion Letter addressing firefighters, Wage and Hour reiterated that where payments are tied to productivity, such as a payment of hourly wages for services rendered, there is a greater likelihood that the payment is not nominal. *See* 2006 Opinion Letter at 2-3, 5.[16] This position is consistent with the regulation at 29 C.F.R. 553.106(e), which states that "[a] nominal fee . . . must not be tied to productivity."[17]

3. There is scant case law addressing what constitutes a

[16] After stating that payments tied to productivity are likely not nominal, Wage and Hour noted that payments on a per call or similar bases may be nominal as long as they may be "characterized as tied to the volunteer's sacrifice rather than productivity-based compensation." 2006 Opinion Letter at 3, 5.

[17] The Secretary acknowledges that the 2004 Opinion Letter, which preceded Wage and Hour's introduction of the 20-percent test, stated that if a payment is determined to be nominal, then the manner in which it is paid -- be it hourly, a day rate, or a flat rate -- is less significant. *See* 2004 Opinion Letter at 4. Wage and Hour has continued, however, to note in its opinion letters that whether a payment is tied to productivity is a key factor in determining if the payment is a substitute for compensation. *See* 2006 Opinion Letter at 5; 2005 Opinion Letter at 2. Therefore, a payment made on an hourly basis and thus tied to productivity is, at a minimum, a factor weighing in favor of viewing that payment as not nominal, but rather more like compensation.

nominal fee for volunteers under the FLSA. This Court has not addressed the issue, but the Fourth and Eighth Circuits have, as have several district courts. The Fourth Circuit concluded that a public school's golf coach was a volunteer because his stipend of approximately $2,000 was a nominal fee and the coach chose how much time to devote to coaching and the amount paid remained fixed and was not tied to productivity. *See Purdham*, 637 F.3d at 434. The court also noted that the stipend was likely less than the federal minimum wage once the hours spent coaching were taken into account. *See id.* The Eighth Circuit concluded, without any analysis, that election poll workers paid between $35 and $50 per day were volunteers, not employees, under the FLSA. *See Evers v. Tart*, 48 F.3d 319, 320-21 (8th Cir. 1995); *see also Krause*, 969 F. Supp. at 272, 277-78 (firefighters who had previously been paid between $5.05 and $9 per hour during eight-hour overnight shifts, but who were later characterized as volunteers and paid $20 per overnight shift were employees, not volunteers, because the hourly rate they were paid before they were characterized as volunteers was greater than a nominal fee and their employer could not unilaterally change their status to that of a volunteer); *Harris v. Mecosta County*, No. 1:95-CV-61, 1996 WL 343336, at *3-4 (W.D. Mich. Feb. 6, 1996) (citing Wage and Hour opinion letters in which small amounts (i.e., $8 and $25 per assignment, $48 per week, or $2.20 per hour) were deemed

nominal, and concluding that payments of $5 or $7.50 per hour to medical first responders were nominal).[18]

The most apposite case in terms of the 20-percent test is *Vonbrethorst*, decided by the District Court of Idaho, in which emergency medical technicians were paid a flat fee of $5 or $10 per on-call shift and were paid an additional hourly rate of between $5.15 and $8.00 per hour if they were called during their shift. *See* 2008 WL 2785549, at *1. The employer had conceded that the on-call payments to the emergency medical technicians were above 20 percent of a full-time employee's pay for the same on-call shift. *See id.* at *5. The court cited the Department's regulations at 29 C.F.R. 553.101-553.106 and a 2007 Wage and Hour opinion letter (cited above) setting out the 20-percent test, and concluded that under this test, the emergency medical technicians were paid more than a nominal fee and therefore were not volunteers under the FLSA. *See* 2008 WL 2785549, at *4-5.

4. In this case, the City's payment of $15 per hour to the firefighters is not a nominal fee, but instead is compensation for services. The $15 per hour that the City pays its firefighters is more than 20 percent of what the City would pay

[18] To the extent that the district court in *Harris* did not take into account as a relevant factor the fact that the payments were made on an hourly basis and thus tied to productivity, the Secretary disagrees with the court's analysis.

to hire a firefighter. For instance, the City's Fire Chief (an employee) is paid $19.23 per hour for working 20 hours per week. Twenty percent of $19.23 per hour is $3.85 per hour. The $15 per hour paid to the City's firefighters is significantly more than $3.85 per hour.[19] Additionally, there is evidence in the record that employee-firefighters in surrounding communities are paid between $14 and $17 per hour. *See* R. No. 23-2, Kristy Mendel Aff., ¶ 9; *see also* Addendum, City of Trenton CBA, pp. 5-6 (indicating that hourly rate for starting firefighters was $15.04 in 2008, $17.00 in 2009, and $17.10 in 2010). Thus, the $15 per hour paid to the City's firefighters is nearly the same as the amount paid to full-time employee-firefighters in surrounding communities, and is certainly well more than 20 percent of what the City would pay to hire a firefighter. Indeed, an employee-firefighter would have to earn $75 per hour for the City's $15 per hour to fall below this 20-percent threshold. In the district court proceedings, the City did not point to anything in the record indicating that employee-

[19] The City argued in the district court proceedings that it is not a proper to compare the Fire Chief's wage to that paid to the City's firefighters because the Fire Chief is in a management position and is not required to perform firefighting work or maintain firefighting certifications. *See* R. No. 25, Def's Reply to Mot. for Summ. J., p. 6. Presumably, however, it would cost less to employ a non-management firefighter than a Fire Chief.

firefighters earn $75 per hour in the surrounding communities.[20]

The decision in *Vonbrethorst* is instructive on this issue. Like the payments of between $5.15 and $8.00 per hour to the emergency medical technicians that the court in *Vonbrethorst* concluded were not nominal because these hourly rates were more than 20 percent of a full-time employee's pay for the same on-call shift, the payment of $15 per hour to the City's firefighters is also more than a nominal amount because it is more than 20 percent of what the City would pay to hire a firefighter to perform those same services.

Furthermore, the City's hourly payments to its firefighters are tied to production, and therefore are more akin to compensation for services than to a nominal fee. *See* 29 C.F.R.

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[20] The City argued in the district court proceedings that the wages for employee-firefighters in the surrounding communities that were cited by Mendel are not an accurate reflection of actual wages because they do not take into account the benefits full-time employee-firefighters receive, such as overtime compensation, premium pay, and health insurance. *See* R. No. 25, Def's Reply to Mot. for Summ. J., p. 6. While none of Wage and Hour's opinion letters has specifically addressed whether the 20-percent test applies to the hourly wage or should also include the value of other employment benefits that employees receive, it should apply only to the hourly wage, as that is consistent with the regular rate concept used throughout the FLSA. *See* 29 U.S.C. 207(e) ("regular rate" defined as all remuneration paid to employee excluding, among other things, payments for vacation, holiday or illness, premium pay, and payments for health insurance, retirement and similar benefits); *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424 (1945) ("[T]he regular rate refers to the hourly rate actually paid the employee for the normal, non-overtime workweek for which he is employed.").

553.106(e) ("A nominal fee . . . must not be tied to productivity."). As noted above, Wage and Hour has repeatedly stated in its opinion letters that a payment tied to production, such as a payment made on an hourly basis, is likely not a nominal fee. *See, e.g.*, 2006 Opinion Letter at 3, 5 (if the amount paid varies, it may be indicative of a substitute for compensation or tied to productivity and therefore not nominal); 2005 Opinion Letter at 2 (a critical factor in determining whether the payment is nominal is whether the amount paid varies according to the number of hours the coach spends on team-related activities and/or according to the performance of the team).

5. The City argued in the district court proceedings that the firefighters did not receive compensation for the time they were required to devote to training and testing, and that this time must be included in calculating the total hours they performed services for the City, which means that they earned less than $15 per hour. *See* R. No. 25, Def's Reply to Mot. for Summ. J., pp. 4-6. The district court appeared to view the training and testing time similarly: after concluding that the $15 per hour payment was not nominal, the court commented that this did not take into account the number of hours the firefighters must train and test for which they receive no payment. *See Mendel*, 842 F. Supp. 2d at 1042.

However, viewing the training and testing time in this way rests on faulty logic. In situations in which training time is compensable, *see* 29 C.F.R 785.27-785.32, but the employer has not compensated its employees for that training time, the employer owes its employees additional wages for that uncompensated training time at the regular rate it had been paying the employees (unless this time constitutes overtime hours worked). Such uncompensated training time is not used to recalculate the hourly rate that has been paid or that should be paid to the employees. Moreover, the $15 per hour that the City pays its firefighters is strictly linked to the time spent by the firefighters responding to fire calls and maintaining equipment; it is not linked to the time spent in training or testing. Thus, there is no basis to use the time that the City's firefighters devote to training and testing to recalculate the hourly rate that the City pays the firefighters when they respond to calls, and thus there is no basis for including training time in the 20-percent analysis.[21]

[21] Even if the training time were included in calculating the hourly wage paid to the City's firefighters, it would not lower the hourly wage to the 20 percent threshold discussed above. According to the City, its firefighters are required to attend 70 percent of the City's weekly training sessions, which last between one and three hours. *See* R. No. 25, Def's Reply to Mot. for Summ. J., pp. 5-6. Thus, the City's firefighters spend, on average, 70 percent of two hours per week in training, which equates to 73 hours per year (.70 x 2 hours per week x 52 weeks per year). If they perform firefighting services for an average

6. Finally, the Department's interpretation of the statute through its interpretive regulations, opinion letters, and position in this amicus brief are entitled to substantial deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Although "not controlling upon the courts," the Department's statutory interpretations and opinion letters under the FLSA "constitute a body of experience and informed judgment to which courts . . . may properly resort for guidance." *Id.* The weight given to the Department's interpretations depends "upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier pronouncements, and all those factors which give it power to persuade[.]" *Id.; see Fazekas v. Cleveland Clinic Found. Health Care Ventures, Inc.,* 204 F.3d 673, 677 (6th Cir. 2000) (applying *Skidmore* deference to the Department's "well-considered and well-reasoned" position in its opinion letter). The Department's position in this case should similarly receive *Skidmore* deference because it is reasonable and reflects the Department's careful consideration of the issue.

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of 100 hours per year (as occurred in this case), their total time performing services for the City per year, including the training time, would be 173 hours. They are paid $1,500 per year on average. Thus, they are paid $8.67 per hour ($1,500 divided by 173 hours) if their training time is included. The amount of $8.67 is above 20 percent of what the City pays its Fire Chief (20 percent of $19.23 per hour is $3.85 per hour) and the average hourly wage for employee-firefighters in surrounding communities (20 percent of $17 per hour is $3.40 per hour).

CONCLUSION

For the foregoing reasons, the district court's decision should be reversed.

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I certify that the brief for the Secretary of Labor was served electronically through this Court's CM/ECF filing system to all counsel of record on this _1st_ day of August, 2012:

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