FIREHOUSE LAWYER

Vol. 1, No. 1 Joseph F. Quinn, Editor April 29, 1997

U.S. SUPREME COURT RULES FOR CITY IN SALARY BASIS CASE

A frequent and important Fair Labor Standards Act (FLSA) issue with respect to local governments relates to the "salary basis" question. Exempt personnel such as executives, administrators and other professionals are only exempt from the overtime requirements when they meet the "salary basis" test. Various federal circuits including the 9th U.S. Circuit Court of Appeals (covering the State of Washington) have held that even the theoretical possibility that an exempt employee's pay might be reduced, properly or improperly could disqualify the employer from calling them exempt, requiring the payment of overtime pay.

In *Auer v. Robbins*, the U.S. Supreme Court ruled in February that the mere theoretical possibility is not enough to disqualify such employees from exempt status. There must be an actual reduction of pay or a significant likelihood of reduction. The Supreme Court

also reiterated that the "window of correction" rules could allow the employer to correct the problem after the fact. See 29 CFR Section 541.118(a)(6).

In the *Auer* case, various St. Louis, Missouri police officers sued the St. Louis Board of Police Commissioners for unpaid overtime. The court held that because Congress had not directly addressed the precise question, it would uphold the view of the Secretary of Labor that public employers are not so different with regard to disciplining employees as to require a wholesale revision of the rule that disciplinary deductions do not disqualify from exempt status. Because the FLSA entrusts such matters to the discretion of the Secretary of Labor, the disciplinary deduction rule of the Secretary could not be found invalid as applied to law enforcement personnel.

Thus, it appears that the court has clarified this exempt status issue a good deal. Only when there has been an actual reduction of the exempt employee's pay or a significant likelihood of such a deduction would the salary test be violated.

Inside This Issue

1	**Supreme Court Ruling in Salary Basis Case**
2	**Paramedic and EMT not entitled to Overtime for On-call Hours**
3	**Discrimination for Political Activism Prohibited**

PARAMEDIC AND EMT NOT ENTITLED TO OVERTIME FOR ON-CALL TIME

A U.S. District Court in Arizona ruled in December on a significant on-call pay case. The paramedic and EMT were required to serve 24 hours a day, 5 days a week - 120 consecutive hours - on an on-call basis, but only received an average of .6 calls per day. They were paid a fixed hourly rate for a 40 hour work week. They sued the town claiming the on-call time should be compensable and sought overtime pay. They claimed there was a requirement to respond within 10 minutes, wearing a beeper that only operated within a 10 mile area. They were supposed to keep the dispatchers informed of their location, refrain from drinking alcohol, wear a uniform and drive the ambulance at all times. They claimed that their on-call time was primarily for the employer's benefit and therefore compensable. The town argued that the Plaintiffs were generally free to engage in personal activities and therefore the time was non-compensable.

Historically, the U.S. Supreme Court has found that on-call time may or may not qualify as compensable "work" under the FLSA, depending on whether the time is spent primarily for the benefit of the employer and its business or whether it's primarily personal. The court has set forth various factors for making the determination. An agreement providing for compensation may be significant. On the other hand, an agreement indicating payment only for time spent actually working and not merely waiting to work indicates non-compensability. Such agreements may be express or implied if the employees seem to voluntarily accept the terms of the policy by beginning work after the policy has been implemented. An agreement may be "constructive" if the employees learn of an on-call policy and continue to work under it. In this case the court found the employees continued working for the town despite being aware of the overtime compensation policy or lack thereof. They never objected to the policy before bringing suit and therefore the court found a constructive agree- ment.

The court extensively addressed the employees' freedom to engage in personal activities.

In the past, the 9th U.S. Circuit Court of Appeals has identified the following factors to balance and consider when determining freedom to engage in personal activities:

- Whether there was an on premises living requirement;
- Whether there were excessive geographical restrictions on employee's movements;
- Whether the response time was unduly restrictive;
- Whether the frequency of calls was high or low;
- Whether the employee could easily trade on-call responsibilities (as in shift trades);
- Whether use of a pager was involved;
- Whether the employee actually engaged in personal activities during on-call time

In this Arizona case, the court weighed each of these factors and found four of them pointed to non-compensability and three pointed to compensability. While the case may have presented a close call, it does not seem that the court simply counted up the number of factors for and against. It seems that the court relied heavily on the idea that the plaintiffs had a constructive

Paramedic/EMT Overtime (cont.)

agreement because they knew of the overtime policy and continued to work without objection until filing suit. The court did concede that the Plaintiffs could not perform personal activities with the same freedom they could if they were not on-call. Interestingly, however, the court said that the FLSA's overtime provisions did not require overtime for "oppressive and confining conditions of employment." The court also said the Plaintiffs were compensated for restrictive conditions in that they were paid at the same hourly rate for 40 hours per week regardless of the number of calls they might take.

DISCRIMINATION FOR POLITICAL ACTIVISM PROHIBITED

The Washington State Supreme Court in *Nelson v. McClatchy Newspapers* ruled in favor of the employer (the Tacoma News Tribune) in an unusual case. The February decision involved a relatively new statute on campaign reform. A little noticed provision was placed in the law, the Fair Campaign Practices Act, at RCW 42.17.680(2). The statute prohibits employment discrimination on the basis of an employee's political activity or lack thereof. The court held that an employer cannot discriminate against an employee who refuses to abstain from political involvement. In the particular case, the Supreme Court held that the News Tribune did not discriminate against Nelson in an unlawful manner, because the court held that the provision was an unconstitutional restraint on the first amendment rights of free press. Absent that constitutional protection, it appears that the employer would have been held liable. The statute appears to apply to public employers as well as private employers and local government should be careful not to take any job action against employees because of their political stances on candidates or ballot propositions.

Published by:

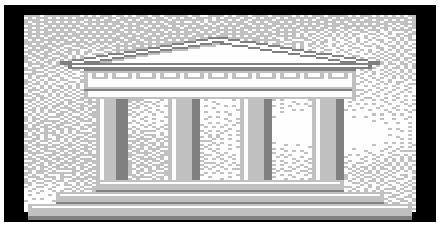
Joseph F. Quinn

Attorney at Law

7509 Grange St. W. Suite A

Lakewood, WA 98467

(253) 475-6195



Mr. Quinn is general counsel to nine Pierce County fire districts under a Professional Services Contract. His office is located in the headquarters of FPD 2 (Lakewood) and Pierce County FPD 3 (University Place) at the above address.