FIREHOUSE LAWYER

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Firefighters Were Not City Employees, But Volunteers

The U.S. District Court for Eastern Virginia ruled, in a recent Fair Labor Standards Act (FLSA) case that paid city firefighters may serve as private rescue squad volunteers without mandating overtime or minimum wage payment. The plaintiffs were firefighters employed by Virginia Beach, Virginia Fire Department. That city also has a Department of Emergency Medical Services, which coordinates between the fire department and 11 private volunteer rescue squads that serve the same community. The plaintiffs provided services for the rescue squad in addition to their firefighting duties for the city. The firefighters sued the city, seeking unpaid overtime, claiming they were city employees, not volunteers, during their rescue squad work.

As is typical in these cases, the key issue in determining whether the plaintiffs were employees of the city or rescue squad volunteers was whether the private rescue squads were in fact part of city government. The court noted that the FLSA defines a public agency as an agency of the United States government, or of the state or a political subdivision thereof. In 1971, the U.S. Supreme Court expressed its opinion that a public entity is created directly by the State, constituting departments or administrative arms or the government, or is administered by individuals responsible to public officials or the electorate. By contrast, in this case the volunteer rescue squads were independently organized private non-profit organizations and thus not creatures of the state. The second factor was a somewhat closer question. The city's Department of Emergency Medical Services did retain a fairly extensive amount of supervisory control over the plaintiffs' actual delivery of medical services. Nevertheless, since the control was limited and not absolute, the court found in favor of the city.

In general, the FLSA exempts from the definition of "employee" those individuals who volunteer to perform services for a public agency such as a state or city, if the worker does not receive compensation for the services (other than expenses, nominal fees, or reasonable benefits), and does not perform the same type of services he or she is employed to perform for the same public agency. In this case, since the private rescue squads were not the same public agency as the city, the volunteer exemption still applied.

FLSA regulations provide that bona fide public volunteers are not employees entitled to minimum wage and overtime protections. Regulations provide that an individual who performs hours of service for a public agency for civic, charitable

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or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered, is considered to be a volunteer during such hours. See 29 CFR, Section 553.101(a). In other words, the gist of this regulation is that (1) the individual have humanitarian reasons for undertaking volunteer work and (2) that he or she expects no compensation.

As we have seen before in Firehouse Lawyer articles, these two factors are much more easily stated than applied. We know that frequently volunteers have a "career motivation" as much as a humanitarian one. Second, we see many volunteer programs that provide expenses, fees and benefits that are arguably more than nominal fees or reasonable benefits, thus blurring the line between compensation and reimbursement.

Another factor in such a case is whether both parties (the "volunteer" and the recipient of the service) understand that the work is performed voluntarily. The court in the Virginia Beach case found that these rescue squad workers were used as part time workers through independent privately organized, auxiliary-like rescue squads. It was important, however, that the city did not require the workers to give up outside employment that might interfere with their rescue work. While the city could discipline these workers, the terms "hiring" and "firing" were not used in the city operational manual. Further, rescue squad workers were described in pertinent documents as "members" rather than "employees".

We have often stressed to our clients operating volunteer programs and/or resident volunteer programs that the volunteer program description should be carefully reviewed to avoid words of employment law as referred to above.

Finally, the District Court for Eastern Virginia stressed the FLSA regulations' provisions relating to prevention of coercion and undue pressure on individuals to volunteer their services. The Court found no such evidence of coercion, finding instead that the plaintiffs initially volunteered their services (from all appearances) before they had any thought of compensation for their work.

Comp Time Used Up Before Annual Leave

Under the FLSA, public employers are allowed to establish a provision for compensatory time at a rate of one and one-half hours for each hour of overtime worked, in lieu of paying cash overtime. The FLSA also establishes limits of accruable comp time. The general limit is 240 hours (160 actual hours) for most employees but 480 hours for employees working in public safety, emergency response or seasonal activities. In a Fifth Circuit Court of Appeals ruling involving correctional sergeants at a Louisiana state correctional center, the Court ruled in favor of the employer. That public employer had required employees taking paid time off from work to use their accrued compensatory time before their banked annual leave.

For payroll purposes, their comp time was tracked separately from annual vacation leave. When an employee requested annual leave, the State of Louisiana first required the employee to use any accrued comp time before charging their annual leave time. If not enough comp time was available to cover the requested leave, then the employer deducted the necessary

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amount from their workers' annual leave bank. This policy was apparently motivated by the FLSA's requirement that employees must receive cash overtime payments after a threshold number of comp time hours is reached. Minimizing the accrued comp time hours can therefore allow employers to avoid paying cash overtime.

On appeal to the Fifth Circuit, the plaintiffs alleged that the language of the FLSA requires employees to have control over which of their accounts is affected when annual leave is requested. They relied on the FLSA provision regarding comp time, which states that use of the comp time shall be permitted by the employer within a reasonable period after the request is made as long as taking comp time off does not unduly disrupt the operations of the public agency. The plaintiffs also relied on the Eighth Circuit Court of Appeals ruling in Heaton v. Moore, 43 F.3d. 1176 (1994), which held that the FLSA creates a property right in comp time held by an employee. The Eighth Circuit found in Heaton that the FLSA prohibits an employer from forcing an employee to take comp time. In this case, the Louisiana Corrections employees comp time was deducted when they requested the time off, but they were not forced to take the time off.

Thus distinguishing the Heaton case, the Fifth Circuit court stated there is no real difference between earned comp time and earned annual leave. Both systems give the employee paid time off and it should not matter which type of leave is used when time off is requested by the worker, the court said. While it is understandable that an employee would want to use annual leave before using comp time (hoping that the employer would at some point be required to pay cash overtime) this desire on the employee's part is inconsistent with the primary purpose of comp time, the court said. The Fifth Circuit noted that Congress's intent in allowing public employers to give their employees comp time in lieu of cash overtime was to prevent undue hardship to such employers. The court noted that unlike private companies, public employers cannot pass expenses on to consumers but are limited to tax revenues for their expenditures. Thus, the appellate court noted that Congress's purpose for drafting the comp time option for the public sector would be greatly impeded if the employees were allowed to bank their comp time and force public employers to pay cash overtime. The court was also not persuaded that the comp time provision was designed to create a new property right for the employee.

It is important to remember, however, that public employers' compensatory time arrangements, to satisfy FLSA requirements, must be included in a formal written agreement with the employee or in the case of unionized employees, in the collective bargaining agreement.

On-Call Disputes Revisited

In three recent federal cases, the employer prevailed against employees claiming overtime payment for on-call time. In Priddy v. City of Kiowa, No. 97-3023 (10th Circuit, July 22, 1998), a former City utility worker claimed overtime for on-call time. This power line superintendent for a small town was told what his wages would be, but that he would be on standby 365 days per year. He was never told he would be paid extra for on-call hours, and was given a personnel manual that addressed overtime pay but did not discuss on-call time. About two years after he was hired, the City Council decided to pay him for four hours at regular rate, for every weekend that he had been or would be on call until a new lineman could be trained. Mr.

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Priddy conceded that in practice he was actually paid more under this arrangement than originally promised. He admitted that his on-call status had not prevented him from leaving home when he wanted to and that he relied on his wife or answering machine to take calls for him. Before leaving home he would notify the City Administrator or an electric utility facility of his absence. He did occasionally receive calls while off duty asking him to come back to work, but usually only after a storm or when there was a bad electrical connection. These calls were infrequent with weeks or months often passing without his being summoned. Sometimes he was not required to respond even when a callback was necessary because one of his apprentices or another electric utility facility was called instead. Under these circumstances, the court found that his activities were not so restricted that the time was not truly his own.

The usual test for whether on-call time is considered compensable working time, is found in the U.S. Supreme Court case of Armour & Company v. Wantock, 323 U.S. 126 (1944). It depends on whether the time is spent predominantly for the employer's benefit or for the employee's benefit. The Department of Labor regulations simply state that an employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is "working" while in an on-call status. But if an employee is not required to remain on premises but is merely required to leave word at home or with company officials where he may be reached, he is not working while "on-call".

The traditional factors that courts look at when considering whether on-call time is compensable include physical restrictions, the amount of time allowed to respond after being called, the frequency of actual calls during on-call periods, how the employee actually uses their on-call time, and whether disciplinary action can be taken against an employee who fails to answer calls. The more restrictive the policy is (using these factors) the more likely it is that a court will find on-call time to be compensable under the FLSA.

In a second case, Bartholomew v. City of Burlington, Case No. 96-4184-DES (D. Kan., April 7, 1998) police patrol officers were required to be on-call following their normal working shifts. They sued their employer seeking payment for the on-call time. The court found the plaintiffs were free to remain at home. They were not allowed to use their patrol cars for personal activities, but were required to respond to calls in the patrol cars. The plaintiffs therefore claimed that these requirements effectively confined them to their homes while on call. But the court found this claim was refuted, partly because the city issued hand-held radios which allowed officers to move about the entire city during their on-call time. The evidence showed the officers left their homes during on-call time and were able to engage in personal activities, including shopping, visiting relatives and attending church. The court also found evidence indicated they were subject to call-backs on average less than once a week.

The department's rules did not provide a specific time limit for response, but the plaintiffs claimed their response had to be immediate. The court discounted this factor, noting that in a previous case another court had found that even a five or ten-minute response time did not make the on-call time compensable. There was also no evidence that the response time was enforced through punitive means such as discipline. Applying these factors, the court found the on-call time was predominantly the plaintiffs' own personal time and not the city's

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time, therefore denying compensation under the FLSA.

A third and similar case was Ingram v. County of Bucks, No. 97-1360 (3d Cir., May 12, 1998). In that case, deputy sheriffs were assigned to certain shifts and required to be on-call overnight and on weekends. The Third Circuit Court of Appeals noted that the plaintiffs were not required to remain at the sheriff's office or stay in uniform, but had to carry a pager, if not at home. They were required to respond after being paged, within a reasonable time. The plaintiffs did not show that the response time rule was overly restrictive. Deputy sheriffs were able to trade shifts and the evidence showed they could participate in personal activities such as reading, watching television and shopping. The court recognized that the activities allowed did not represent the full range of activities in which the deputies would like to engage. However, the court pointed out that the test is not whether employees have substantially the same freedom they would have if not on-call, as if that were the case almost all on-call time would be working time.

In summary, in looking at these three cases, employers can see that there is no bright line rule distinguishing compensable from non-compensable on-call time. Nonetheless, there are several factors and criteria that should provide adequate guidance for employers using on-call time to ensure that emergency responders can get back to work in a timely manner and still have considerable off-duty time of a personal nature.

Employment Contracts -- Binding Beyond Elected Officials' Term?

A September 1998 Washington State Supreme Court case, Crossler v. Hille, 136 Wn. 2d. 287, - P.2d. - (1998) raises an interesting question about the duration of binding personal services contracts. Judy Crossler was a district court deputy clerk working in the Ritzville, Adams County district court of Judge Adalia Hille. In 1988, before Crossler was hired by the District Court judge, the Adams County Commissioners and other elected officials had adopted a personnel policy in a handbook form. That policy or handbook was adopted by, among others, the former district court judge. The handbook included termination and discipline standards and various procedures, including a pretermination hearing between the employer and employee. In 1997, Judge Hille terminated Crossler as a deputy clerk and Crossler requested a grievance hearing before the County Commissioners in accordance with the handbook. The County Commissioners told Crossler they had no authority to review the District Court judge's employment decisions. Crossler alleged the handbook created a contract of employment barring her termination for other than just cause and that any termination must by contract be preceded by a pretermination hearing.

While the case is interesting for its discussion of the particular intricacies of employment-related matters for these judicial employees, we refer to it here for a different reason. We can disregard the special circumstances of these judicial employees, wherein their employer for purposes of wages and salary matters is the county commissioners, but their employer for other "working condition" purposes is the judicial branch.

We are only interested in that portion of the case which holds that a prior elected official (such as a prior judge) has no authority to bind their successor to an employment contract. The Court cited McQuillin, the Law of Municipal Corporations, Section 29.101 at page 44. Under the "McQuillin test", the ability of

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elected officials to form employment contracts binding beyond their elected term is stated as follows: The general rule is that a contract of employment extending beyond the term of office of members of a public board if made in good faith is ordinarily a valid contract. However, where the office or employment is such that the municipal board or officer must exercise supervisory control over the appointee or employee, together with the power of removal, such employment or contract constitutes the exercise of a **governmental function** and such contracts must not be extended beyond the life of the board. Applying the McQuillin test, the court found that Crossler's employment was "governmental" because the position required supervisory control by the judge. The judge retained the power of removal and the judge's tenure was for a finite period of time, as a District Court judge serves a term of four years. The Court also noted that the McQuillin test had been used by other courts, particularly in the State of Oregon.

Crossler unsuccessfully argued that her employment was not "governmental" but was simply clerical. The Court found she was a governmental employee because she was performing tasks for which the judge was responsible, and the judge was required to supervise her employment and able to terminate her. Therefore, the Court held Crossler was an at-will employee of the District Court judge and that neither the Adams County Commissioners, the former District Court judge, nor the other District Court judge in that county had the authority to bind Judge Hille to the policies contained in the handbook.

Judges Talmadge and Matson, concurring, agreed with the majority as to the above questions certified by the federal court, but wrote separately to emphasize the reason for their answer. They stressed that the ruling in the case should be limited to the facts presented by a small district court system and could not necessarily be deemed precedential in a larger, more complex district court system present in a more populated county.

We include discussion of this case due to its implications for fire protection districts in Washington and similar boards elsewhere.

Applying the four-part test of Crossler to fire districts in Washington, we ask the question whether the employment contract of a fire chief or chief executive officer is binding upon future boards. The four-part McQuillin test would seem to be satisfied: A fire chief or similar executive official's employment is certainly "governmental" because the only supervisor that the fire chief has is the elected or appointed board. Ordinarily, the Board of Commissioners retains the power of removal, whether it be for cause, or even if the chief or executive serves at the pleasure of the board. The chief or executive performs services for which the Board of Commissioners is ultimately responsible, as they are the elected officials with overall responsibility to administer the district. Finally, board members do serve for a finite period of time, *i.e.*, six-year terms.

Of course, there is an interesting question that arises, in distinction from the Crossler case, because of the "staggered" nature of fire district board terms. RCW 52.14.060 provides that a district (as initially formed) has three commissioners, but then their terms are staggered in accordance with the statute. The result for fire districts is that a new commissioner is elected to fill a term every two years, and so the board changes its composition periodically. Therefore, the question arises as to how the McQuillin test would be applied when the employer is not one elected official but a

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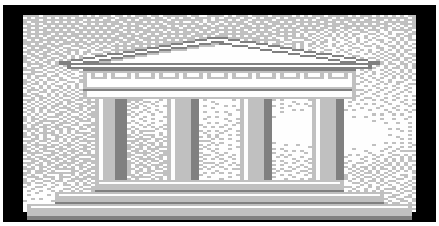
three-member board serving staggered terms. Certainly there is a considerable risk that the rule could be applied as in the Crossler case, whenever the contract that the fire chief claims to be in effect is not signed by a majority of the current board. We would urge fire district commissioners and chiefs to examine their current employment contracts with any personnel directly supervised by the fire commissioners, such as the fire chief, executive director or CEO to ensure that the executed contract currently being used is not one executed by a prior board, as the Crossler decision renders such contracts questionable.

We recommend that such professional services contracts, or personal service contracts, be executed for a duration of no more than three years. They probably should not contain automatic renewal clauses. Instead, such contracts between boards of commissioners and fire chiefs/CEOs should be revisited at least every two years, renegotiated and re-executed with the current board as needed.

Sector Boss Underutilized

Our Question and Answer column, entitled The Sector Boss, will not be included this month, because no questions were submitted. We did receive a good number of inquiries this month from clients with respect to the necessary resolution or resolutions needed to comply with RCW 84.55, sometimes referred to as the Referendum 47 requirements. Any fire district in Washington that needs to address the property tax limitations otherwise imposed by this legislation is invited to contact the Firehouse Lawyer for sample resolutions and other clarifying information.



Joseph F. Quinn

6217 Mt. Tacoma Dr. S.W.

Lakewood, WA 98499

(253) 589-3226

(253) 589-3772 FAX

e-mail: firehouselaw@earthlink.net

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