



NOV 27 2001

Dear Chief

I am writing in reply to your letter of July 16, 2001, to Secretary of Labor Chao. You inquired whether career firefighters employed by _____ County must be compensated if they perform volunteer work for the independent non-profit volunteer fire and rescue corporations located in the County.

First, I would like to thank you, _____ and _____ for the time you spent meeting with me and staff members from my office and the Solicitor's Office. The meeting was very informative for us. The additional factual details you provided about how fire and rescue services are provided in _____ County and how the volunteer corporations operate were quite helpful.

You have requested that the Department reconsider its 1993 opinion that the Fair Labor Standard Act (FLSA) requires the County to compensate its career firefighters for time they spend volunteering similar services to the independent corporations in _____ County. You also explained that our 1993 opinion was a change from the Department's prior opinion, which concluded that career firefighters were not entitled to compensation from their employing agency when they provided volunteer services to a separate, non-profit volunteer corporation serving the same geographic area. As you noted in your letter, since our 1993 opinion, the United States Court of Appeals for the Fourth Circuit has issued a decision addressing this issue with regard to another locality. See Benshoff v. City of Virginia Beach, 180 F.3d 136 (4th Cir. 1999). You believe that the facts in _____ County are similar to those that the court addressed in Benshoff. Therefore, you ask the Department to conclude similarly that career firefighters may volunteer in _____ County without compensation. The holding of the court in Benshoff, of course, is binding in _____ County.

Under the FLSA, employees of a public agency are permitted to provide volunteer services in certain circumstances. The section of the FLSA relevant to this matter states that the "term 'employee' does not include any individual who volunteers to perform services for a public agency" if the individual receives no compensation or is paid a nominal fee, expenses or reasonable benefits, and if "such services are not the same type of services which the individual is employed to perform for such public agency." 29 U.S.C. §203(e)(4)(A). The question the court in Benshoff asked, thus, was whether the firefighters were performing volunteer services for the City when they volunteered to the private rescue squads.

In Benshoff, the court found that separately incorporated non-profit rescue squads, governed by their own boards of directors and bylaws, use all volunteer members to perform advanced life support (ALS) services throughout the City of Virginia Beach. They operate under a license from the State. The City uses career firefighters to provide firefighting services and basic life support services. Some career firefighters voluntarily obtained ALS certification and voluntarily joined one of the volunteer rescue squads. They were not coerced by the City into obtaining the certification or joining a squad. The court examined whether such firefighters were performing services as employees of the City (and thus were entitled to compensation under the FLSA) when they provided volunteer services to the rescue squads. 180 F.3d at 139-40.

The court considered all the facts and circumstances pertinent to the relationship between the City and the rescue squads. It found that the volunteer rescue squads had provided emergency medical services since the 1940s, pursuant to independent licenses from the State. Not until the 1970s did the City of Virginia Beach begin to oversee and coordinate the provision of such services. In 1990 the City created the Department of Emergency Medical Services (DEMS) to coordinate responses by the fire department and the volunteer rescue squads to emergencies. The court noted that the City's Director of the DEMS is responsible for establishing all the medical policies for patient care, medical training standards, and medical procedures and protocols that govern both career firefighters and volunteer rescue squad members. The City certifies emergency medical technicians who practice within the City, ensures that they meet required training and service requirements, and may revoke their certificates. The City also provides financial assistance to the rescue squads and provides the volunteers with workers' compensation and death benefits. Id. at 141-43.

With regard to operational control, the court noted that the City does some limited centralized scheduling of squad members, based upon information provided by the volunteers regarding shifts they are willing to work. Finally, the City selects, from among volunteer squad members who have been selected for management positions in their squads, Brigade and Squad Commanders to operate as liaisons between the squads and DEMS and to establish a hierarchy for control during emergency responses. Id. at 144.

The court then evaluated whether the City's involvement with the provision of services by the rescue squads "is sufficient to render plaintiffs' volunteer services 'employment' which is 'controlled or required' by the City for purposes of the FLSA." Id. at 142. In addition, the court asked whether the DEMS had such control and supervision over the rescue squads and their members so as "to render the rescue squad members 'employees' of the City under the FLSA when performing their rescue squad services." Id. at 143.

The court concluded that the fact that the squads and their members were subject to general regulation and licensing and certification requirements did not "change the fact that the rescue squads are private organizations, governed by their own by-laws and policies." Id. The squads had independent authority to accept or reject candidates for membership in the squad. The squads could impose minimum duty requirements on members which exceeded the minimum requirement imposed by DEMS for licensure, and they could impose additional training requirements. The squads could require the members' attendance at mandatory squad meetings or at fundraising events in order for them to maintain continued membership in the squad. Moreover, the squads could impose disciplinary action upon members, including dismissal from the squads, whether or not DEMS had taken any such action. Id. at 143-45.

The court recognized that the City's involvement with the provision of emergency medical services was not insubstantial. However, based upon all the facts and circumstances, the court held that the creation of DEMS did not result in "either the evisceration of the independent nature of the rescue squads, some of which have existed since the 1940s, or in a *de facto* employer-employee relationship between the City and those individuals who chose to volunteer with rescue squads." Id. at 142. The court thus concluded that when a Virginia Beach firefighter provided volunteer services to an independent non-profit rescue squad, there was no employment relationship with the City with regard to that activity. Of course, the court left open the possibility

that the answer might differ in another context, particularly if there were "a 'sham' private volunteer corporation placed between an employee and his employer to avoid the compensation provisions of the Act." Id. at 149.

There are a number of factual differences between the Benshoff case involving the City of Virginia Beach and the situation in County. Most notable is the fact that in County the volunteers provide exactly the same services (both fire and emergency medical services) as do the career employees. In contrast, in Benshoff the City did not even possess a license from the State to provide the ALS services provided by the rescue squads. Moreover, the rescue squad volunteers in Virginia Beach did no firefighting.

However, based upon the information you provided, we believe that the primary facts that led the court of appeals in Benshoff to conclude that the FLSA did not require compensation for volunteer time also are present in County. For example, we understand that the non-profit volunteer fire and rescue corporations have a long history of independently providing services in County. Each is separately incorporated under state law, with its own bylaws and boards of directors. Indeed, the court in Conway v. Takoma Park Volunteer Fire Department, 666 F. Supp. 786 (D. Md.), appeal dismissed, 838 F.2d 465 (4th Cir. 1987), held that the corporations were private entities independent of the County.

As in Virginia Beach, County did not become particularly involved with the provision of fire and rescue services until the 1970s and 1980. That involvement has gradually increased over time, and in 1998 the County again revised its policies. The County Fire and Rescue Commission has the authority to create County-wide policies, procedures and plans for fire and emergency medical services. A County Fire Administrator heads the department and implements the policies of the Commission. The County establishes minimum standards and training requirements for career and volunteer personnel, and it imposes a code of personal conduct applicable to all personnel. The Fire Administrator has authority to take disciplinary action against both employees and volunteers for violations of law or policy; however, it may only discipline a volunteer by restricting the volunteer from participation in fire and rescue activities. The County also may withhold funding from a fire and rescue corporation if the Administrator finds that the corporation has not complied with the Commission's rules. However, you advised us that you could recall only one or two occasions in approximately 20 years in which the County either

restricted a volunteer from duty or cut off a corporation's funding.

Based upon your description, we understand that fire and emergency medical services are provided via an integrated command structure involving both career and volunteer firefighters. At some stations, services are provided almost exclusively by career firefighters. At other stations there is an even mix of career and volunteer personnel, while other stations are predominantly staffed by volunteers. At the scene of an emergency, to ensure the safe and efficient provision of services, the highest ranking officer (whether career or volunteer) directs the operations of all units that respond. However, you advised us that while firefighters are at the station, they take direction and supervision only from their own supervisor. Thus, a career officer may supervise only the career firefighters who are present, and a volunteer officer directs the volunteers.

With regard to the recruitment of volunteer firefighters, the volunteer corporations are free to impose any additional qualification standards that they choose, above and beyond the minimum requirements mandated by the County. Such additional standards may be a requirement that the volunteer live in the territory covered by the corporation or perhaps an additional educational requirement. A person may become a volunteer firefighter only by being voted in by the current membership of that corporation, typically after being recommended by the screening committee for that corporation. As you described it, the County has nothing to do with how someone becomes a member of a volunteer corporation, and the corporations have nothing to do with a hiring decision for a career firefighter position with the County. With regard to non-firefighters, the corporations hire their own employees, such as bookkeepers and secretaries, using their own employment standards.

Once someone has become a volunteer firefighter of a corporation, the volunteer is governed by the corporation's bylaws. Those bylaws may impose additional training or promotion requirements beyond those imposed by the County. Individual corporations also establish their own methods for selecting members for promotion. You advised us that some corporations elect all of their officers, while others elect only the chief, who is then free to appoint the other supervisors from among those who are eligible.

The corporation also establishes its own staffing rules for volunteer firefighters. It decides what level of fire protection is needed and how to provide it. It may require its volunteers

to serve a certain number of shifts or days per month, and that requirement may be in excess of the minimum number required by the County to maintain a certification. The corporation decides which volunteers will be assigned to work particular days, what their duties will be, and whether volunteer firefighters must work at the fire station or may be on-call from home. If a volunteer is sick and does not report as scheduled, it is up to the corporation to determine how to handle the situation. The County has no role in volunteer staffing.

The corporation also is responsible for the discipline of its volunteers and ultimately for termination of membership. The County may discipline a volunteer only by imposing the ultimate sanction of withdrawing an individual's certification to act as a firefighter. You explained that this would occur only if the County believed that the corporation had not taken adequate and appropriate disciplinary action in response to a very serious situation, and you could only recall one or two times in 20 years that such an action had occurred. Generally, discipline of volunteers is an internal matter of the fire and rescue corporation. Indeed, members may be sanctioned for matters totally irrelevant to the County, such as for violating internal requirements imposed by the corporation's bylaws.

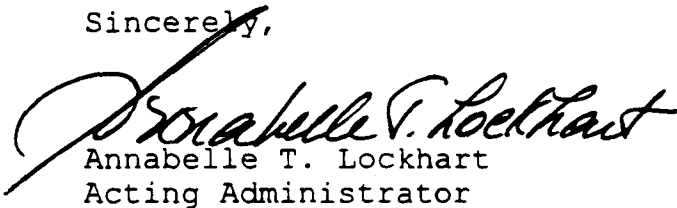
Based upon all the facts and circumstances, we believe that the County volunteer firefighters' situation is similar to that of the volunteer rescue squad members in Benshoff. They are volunteering to a separate and independent non-profit corporation, with its own bylaws and board of directors, and not to the public agency. That separate corporation exercises day-to-day control over what, if any, position they hold as a volunteer, what they do, and when they do it. Although the public agency has some control over the volunteers, that control primarily is exercised by setting minimum training and qualification standards for initial certification and for promotion. The court in Benshoff did not view the imposition of such minimum standards as sufficient evidence of control so as to render the volunteers employees of the public agency when performing their rescue squad services. The Department of Labor fully agrees with this reasoning.

We see no evidence that the current structure for providing fire, rescue and emergency medical services in County has eviscerated the independent nature of the long-standing, separately incorporated, private fire and rescue departments. Certainly there is no evidence that the corporations exist as "sham" corporations. Therefore, we conclude that the FLSA does not require County to pay its career firefighters if

they volunteer, freely and without coercion, to provide services to the non-profit fire and rescue corporations in the County.

This opinion is based exclusively upon the information you provided. The existence of other factual information not contained in your description might require a different conclusion than the one expressed herein. This opinion letter supersedes all prior Department of Labor letters issued to you or to _____ County on this issue, including the letters dated June 23, 1993 (to the County Attorney) and November 3, 2000 (to the President of the _____ County Volunteer Fire-Rescue Association). We also are hereby withdrawing four opinion letters issued to other public agencies (letters dated April 20, 1993 - 1993 WL 901159; April 20, 1993 - 1993 WL 901160; March 18, 1993 - 1993 WL 901155; and March 10, 1993 - 1993 WL 901152). Those letters concluded, without a detailed analysis of the facts, that career firefighters who volunteer their services to private non-profit corporations that serve the same jurisdiction are volunteering for their employing public agency and must be compensated.

Sincerely,


Annabelle T. Lockhart
Acting Administrator