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Inside This Issue

FLSA and Compensatory Time – When May It Be Denied Due to "Undue Disruption" of the Employer?

In *Beck v. Cleveland,* N.D. Ohio, No. 1:99 CV 1271, 2008 WL 483267, Feb. 20, 2008, a federal district court ruled that budget shortfalls alone did not constitute "undue disruption" of the employer's functions, so as to justify denial of the use of comp time. Apparently, budgetary problems left the City of Cleveland without the funds to pay overtime wages to substitute officers needed to replace police officers wanting to use their earned comp time. Recently, Cleveland has fired or laid off about 250 police officers. The City has eliminated special police units and allowed no wage increases for two years. The court said some of those struggles might lead to an undue disruption so that question was left for trial. But during the seven years when there was no such evidence of such problems or disruptions the city was found liable for unpaid overtime.

This is a continuation of an unfinished story about who controls the using of compensatory time, which is a common practice and problem for public employers. Most public employers allow and encourage the accrual of comp time instead of paid overtime, and the practice is officially sanctioned by the FLSA, which does provide "caps" on the accruals, and which does require a written agreement for such comp time arrangements.

Compare the *Beck* result with the 9th U.S. Circuit Court of Appeals ruling in *Mortensen v. County of Sacramento*, 368 F.3d 1082 (9th Cir. 2004), where the court ruled that an employer has the right to deny comp time usage based on the financial impact of having to pay a substitute officer overtime wages. However, there is also the 8th U.S. Circuit Court of Appeals ruling in *Heaton v. Moore,* 43 F.3d 1176 (8th Cir. 1994). In that case, budgetary constraints did not rise to the level of "undue disruption" to justify denying requests for comp time.

It would be difficult to quarrel with the 5th U.S. Circuit Court of Appeals ruling that the FLSA does not require a public employer to allow its employees to use accrued comp time on the days specifically requested,

subject to the request's "undue disruption" of the employer's function, but, instead, it requires that comp time be permitted within a reasonable period after the employee requests its use. See *Marticiuc v. City of Houston,* 330 F.3d 298 (5th Cir. 2003). This seems to us to be the most well-reasoned articulation of what the rule should mean.

I would recommend that employers document carefully the financial impact of requests for comp time, and only deny the request if there is a clear lack of funds in the budget for overtime compensation for the substitute.

TRAINING TIME – IS IT COMPENSABLE TIME UNDER THE FLSA?

This is a question that I have been asked a few times in the last twenty years or so. But a really good article in Thompson Publishing Group's Fair Labor Standards Handbook by Attorney Brian Waterman of Milwaukee suggested it may be time to revisit this issue. While the article addressed pre-employment training programs as well as training programs for current employees, I will address only the latter, as that seems to be the area of doubt for some fire service clients of mine.

Suppose you require your firefighters or emergency medical technicians to attend training, seminars, lectures, or classes. The question is whether the "training time" is actually hours worked for purposes of the FLSA, i.e. overtime compensation law. DOL regulations establish a four-part test to determine if such time is compensable. This time *need not* be counted as work time if:

a. attendance is outside regular working hours;
b. attendance is in fact voluntary;
c. the course, lecture, or meeting is not directly related to the employee's job; and
d. the employee does not perform any productive work during such attendance.

Training is *not* voluntary "if the employee is given to understand or led to believe that his present working conditions or the continuance of his employment would be adversely affected by nonattendance." 29 C.F.R. Section 785.28. In other words, if attending is a term or condition of employment, it is probably not voluntary and you must count it as work hours. Here is another good test or guideline: DOL regulations state that "training is directly related to the employee's job if it is designed to make the employee handle his job more effectively as distinguished from training him for another job, or to a new or additional skill." 29 C.F.R. Section 785.29.

Suppose, for example, you offer to pay the training cost to send your firefighters to paramedic classes, which would qualify them for an added certification as a medic, a different job classification, and career advancement. Could they claim that their time spent in class or even studying is compensable time too, so (to "add insult to injury") they can claim overtime pay as well. I have answered in the negative relying on the foregoing regulations. As you can see, in many cases the facts would seem to fit within the first regulation above, and since the class trains them for another job, as opposed to helping them to do their current job better, it seems to fit the second regulation as well.

The two foregoing articles are based largely on my reading of this month's current events or articles in the FLSA Handbook, so as I have done in the past in these pages, I heartily endorse that publication. If a fire department wants to have just one good source for FLSA answers, I think this Thompson Publishing Group offering is the best.

STATE AUDITOR OFFERS UPDATED GUIDANCE ON VOLUNTEERS

A March 18, 2008 memorandum updates the guidance from the office of the Washington State Auditor on the subject of volunteer firefighters' compensation, and the taxable status of the money they receive. Enclosed with the memo was a new page to insert in the BARS manual disseminated by that office for local government users. The guidance basically agrees with what I have said in the pages of the *Firehouse Lawyer* for years about volunteer compensation. See IRS Publication 963 as well for guidance in this area. As far as income taxes are concerned (and not the FLSA) a volunteer firefighter meets the common law definition of an employee. Therefore, payments for services rendered are considered wages, such as payments related to responding to calls or for training or drills. Reimbursements can only be excluded from "income" if they conform to the "accountable plan" criteria of the IRS. Volunteer firefighters do not meet the definition of emergency workers. Fire departments should provide W-2's and not 1099's to their volunteers. You may not like this, and neither do I, but the IRS is probably right in their interpretation, and the SAO is simply recognizing that.

I do not always agree with the State Auditor's pronouncements in the BARS manual. For example, I disagree with the SAO comments on that same updated page in the BARS manual, on which the material about the volunteer firefighters appears, i.e. page 7 of Part 3, chapter 8. The SAO opines that fire districts do not currently have the statutory authority to use their employees or volunteer firefighters as laborers for district public works projects. I disagree. It is well settled that fire districts have such power or authority as is granted to them by the legislature. In fact, fundamental doctrine holds that fire districts, as municipal corporations and political subdivisions of the state, possess those powers expressly granted by statute *and* such powers as are necessarily and fairly implied in or incident to the express powers, and also those essential to the declared objects and purposes of the corporation. *Farwell v. City of Seattle*, 43 Wash. 141, 86 P. 217 (1906); *City of Tacoma v. Taxpayers of Tacoma*, 108 Wn. 2d 679, 692, 743 P.2d 793 (1987); 1 John F. Dillon, Commentaries on the Law of Municipal Corporations Section 89 (4th ed. 1890). This is sometimes referred to as "the Dillon Rule".

RCW 52.12.021 and RCW 52.12.031 are, respectively, general and specific "powers" statutes applicable to fire districts. RCW 52.12.031 expressly grants the power to fire districts to own, maintain and operate real property. RCW 52.12.021 expressly grants the power to fire districts to appoint and employ the necessary officers, agents and employees to carry out its purposes, which of course would include owning and operating stations.

The test for determining the implied powers of municipal corporations was spelled out at length in *Taxpayers of Tacoma, supra.* The court in that case

stressed the distinction between the exercise of governmental powers and proprietary functions. The court said less opportunity exists for invoking the doctrines of liberal construction and of implied powers when a governmental function is involved. But when the function or activity is proprietary the corporation "may exercise its business powers very much in the same way as a private individual." 108 Wn. 2d at 693-95. In essence, the court in that case reduced the determination down to a four-part test. Activity will be held to be within the implied powers if the following conditions are met: (1) the city [or corporation] is exercising a proprietary power, (2) the action is within the purpose and object of the enabling statute, (3) the action is not contrary to express statutory or constitutional limitations, and (4) the action is not arbitrary, capricious, or unreasonable. Id. at 693-95.

Another way to distinguish governmental functions from proprietary functions, is to ask whether the act is for the common good of all, or whether it is for the special benefit or profit of the corporate entity. See *Okeson v. City of Seattle* (Okeson I), 150 Wn. 2d 540, 550, 78 P.3d 1279 (2003).

Now let us apply this legal doctrine, and the tests, to the question whether fire districts have the express or implied authority to hire their own employees or volunteer firefighters to work as laborers on district property. Take, for example, a simple remodeling project at a fire station, where the estimated cost of labor and materials is $7,500.00. The district essentially wants to act as its own general contractor, employing some paid firefighters and volunteers as temporary workers, because they happen to have skills in carpentry, drywall, and cabinetry. The district reasonably believes it will save time and money for the district treasury, and indirectly the taxpayers, by doing the project this way, instead of going out to bid and contracting with a general contractor. If the district proceeded that way, the prevailing wage laws would apply as well.

First, we would argue that the two fire district powers statutes expressly provide authority to hire workers and operate the district's real property. Second, even if that were not true, the power is there under the implied powers doctrine. That is because the function is proprietary, not governmental. The work in question is not for the common good of all district citizens, but is really for the benefit of the district *as property owner.* See *Okeson.* Like any individual property owner, the district desires to do work on its own property. The district, to do so, does not need to be registered as a general contractor, since there are exemptions in that statute, applicable to municipal corporations and to any person working on his or her own property. See RCW 18.27.090. If the district wants to employ a person, that person is not in violation of the contractor statutes either, as they are not in the pursuit of an independent business, so as to bring them under the contractor statutes. They are just employees, and we have already seen that the district has express authority to hire workers.

I do not address the applicability of the public bid laws here, such as RCW 52.14.100, as they simply do not apply when the district works on its own property, but only when the district seeks contractors. For the foregoing reasons, I believe that the State Auditor is simply wrong, in their opinion that fire districts have no authority to hire employees or volunteers to work on projects on the district's own property. That statute relates only to "contracts" and "contracting" for work to be done, but the "contractor" statute expressly allows a municipal owner of property *not* to contract,

but instead to do the work by itself, as the owner of the property.

Q & A SECTION

Recently, someone asked, "Is it appropriate for publicly owned vehicles to bear or display decals provided by the local or international union?" While I am not able to cite any particular statute that expressly forbids this specific practice, I do not think it is appropriate and some day an auditor may call this practice into question. The fire and emergency medical vehicles operated by the public fire department are, obviously, equipment paid for by public funds and operated with the same. The displaying of union decals on such public assets may be perceived to mean that the union is somehow financing or operating the equipment, when such is not the case. For the benefit of both the department and the union, it is better to maintain a degree of autonomy and separateness between labor and management assets, accounts, and spheres of influence. It is well settled in Washington that a company-dominated union is not appropriate and can lead to unfair labor practices. One auditor complained about a district that had declared an apparatus surplus, but a private citizen was driving it in parades with the department logo prominently displayed, when in fact the equipment was by then private property. The auditor said that was confusing and seemed to be a misrepresentation of the true state of affairs. This "display of union decals" strikes me as being somewhat similar. Frankly, to me it is not a major problem or a question of misappropriation of funds, but it may be somewhat misleading or confusing to citizens, so I would discourage such a display of union decals on public property.

An operational and jurisdictional question was also asked this month. Suppose there is a multi-vehicle accident on a major highway, such as a state or interstate highway. Further, suppose your department cannot search for victims adequately (and safely!) and otherwise deal with the scene without first closing that major highway. Finally, suppose patrol officers of the Washington State Patrol are not readily available to ask permission to completely close down the highway for a time so you can do "triage". The question is, does the fire department have the authority or power to shut down the highway and stop traffic entirely for such purposes, on its own, without the approval of state or local authorities? Apparently, the scenario occurred recently somewhere along I-90.

The jurisdiction over state highways, and I believe interstate highways, in the State of Washington is with the Washington State Patrol. They control all aspects of the highway, working with the state Department of Transportation for items such as avalanche control, and even exercise incident command in hazardous materials incidents, pursuant to statute. While WSP officers may not be immediately available along the highway, due to other accidents and operations, I have to believe that the State Patrol has personnel available at their dispatch facility to notify of the above type of dilemma. Therefore, a command decision may be obtainable remotely, even without a WSP officer at the scene. I would say, therefore, that the appropriate approach is to contact the WSP at their local or regional headquarters and attempt to gain approval before proceeding to make major road decisions without having jurisdiction to do so.

I would make a distinction between these facts and the situation in which emergency fire responders may block a lane or two while dealing with an MVA or a car fire. There, if the fire responders arrive shortly before the police, it may be necessary to save lives and intervene medically without delay. Blocking a lane or more may be necessary incident to the rescue and to provide a safe working environment. To me, that is not the same as closing the highway completely.

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