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MEMORANDUM OF LAW

DATE: July 6, 2015

TO: Judy von Kalinowski, Director, Human Resources

FROM: City Attorney

SUBJECT: Fair Labor Standards Act Overtime Exemption for Emergency Response Officers In The San Diego Fire-Rescue Department

INTRODUCTION

This Memorandum is in response to a letter sent by the San Diego City Firefighters, International Association of Fire Fighters Local 145 (Local 145) to the City of San Diego Human Resources Department regarding the overtime-exempt status of Emergency Resource Officers (EROs) in the San Diego Fire-Rescue Department (Department). Pursuant to the City's Memorandum of Understanding with Local 145, EROs are classified as exempt from standard overtime under 29 U.S.C. § 207(k) (7k exemption). Local 145 contends that EROs do not qualify for the 7k exemption under the Fair Labor Standards Act (FLSA) and, as such, should be paid premium overtime rates for all hours worked in excess of 40 hours per work week. In support of its position, Local 145 relies on a recent federal case from the Ninth Circuit, *Haro v. City of Los Angeles*, 745 F.3d 1249 (9th Cir. 2014).

The Department employs three fire captains that are assigned as EROs in the Fire Communications Center (FCC). The ERO position is a second-level supervisor directly responsible for command and control of all dispatch floor operations. EROs play an integral role in the tactical and logistical functions of fire operations. Among other duties, EROs manage dispatch floor operations, oversee the correct response criteria for emergencies and manage the distribution of emergency resources in relation to the scale and threat of an emergency. EROs work 24 hour shifts and are sworn trained members of the Department in the same classification as fire captains.

The 7k exemption applies to employees engaged in fire protection activities and allows an employer to pay overtime only after an employee works 212 hours in a 28 day period.¹ Local 145 has alleged that EROs do not qualify for the 7k exemption because they do not engage in actual fire suppression at the scene of a fire.

QUESTION PRESENTED

Do EROs qualify for the 7k exemption from standard overtime under the FLSA?

SHORT ANSWER

Yes. EROs are exempt from standard overtime pursuant to the 7k exemption because they engage in fire protection activities, as the term is defined in 29 U.S.C. § 203(y). There are four requirements in 29 U.S.C. § 203(y) that an employee must satisfy to qualify for the 7k exemption and EROs satisfy all of them. In the alternative, EROs also likely qualify for the administrative or executive overtime exemptions, as defined in 29 U.S.C. § 213 and supporting federal regulations.

ANALYSIS

I. THE 7K EXEMPTION APPLIES TO EMPLOYEES ENGAGED IN FIRE PROTECTION ACTIVITIES.

The FLSA requires employers to pay their employees who work more than 40 hours in workweek overtime compensation at one and one-half times the regular rate. 29 U.S.C. § 207(a). The 7k exemption exempts employees in “fire protection activities” from standard overtime pay for all hours worked over 40 per work week. 29 U.S.C. § 207(k). This exemption permits employers to pay overtime on a “work period” basis. *Id.* A “work period” may range from seven consecutive days to 28 consecutive days in length. Overtime compensation is not required until the employee satisfies the maximum hour standard permitted for that work period. The maximum hour standard for fire protection personnel ranges from 53 hours worked in a seven day period to 212 hours worked in a 28-day period.

In 1999,² Congress enacted 29 U.S.C. § 203(y) to define an “[e]mployee in fire protection activities” as an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker, who: (1) is trained in fire suppression; (2) has the legal authority and responsibility to engage in fire suppression; (3) is employed by a fire department; and (4) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk. Any employee who satisfies these four requirements qualifies for the 7k exemption.

¹ This type of work schedule is commonly referred to as a “56 hour work week.” EROs and other firefighters work a 56 hour work week.

² Prior to 1999, the FLSA did not provide a statutory definition for “employee in fire protection activities.” The Department of Labor promulgated regulations to fill this void but this led to more confusion. After Congress enacted section 203(y) in 1999, Courts determined that all previous Department of Labor regulations that defined “fire protection activities” were now obsolete and without effect, unless expressly adopted or incorporated into this new statute. *Huff v. DeKalb County, Ga.*, 516 F.3d 1273, 1278 (11th Cir. 2008).

II. EMERGENCY RESOURCE OFFICERS ARE EXEMPT UNDER THE 7K EXEMPTION BECAUSE THEY ENGAGE IN FIRE PROTECTION ACTIVITIES.

EROs play a vital role in fire suppression and emergency response to situations where life, property, or the environment is at risk. The general responsibilities of an ERO position, as defined by the City's job bulletin for the position, include, but are not limited to:

- Managing Dispatch floor operations including resource management of Fire and Emergency Medical Service units;
- Ensuring that city wide emergency response coverage is adequate during major incidents so that any potential emergency service level coverage is adequate and potential emergency service level impacts are identified and mitigated expeditiously;
- Overseeing the correct response criteria for major dispatched emergencies;
- Handling regional resource requests and associated paperwork; and
- Providing notifications to battalion chiefs, senior staff, elected officials and other high profile personnel.

The ERO position is a second-level supervisor position directly responsible for command and control of all dispatch floor operations. Only employees who have held the rank of fire captain for at least two years are eligible for assignment to an ERO position. As such, EROs are well trained in fire suppression and have protective firefighting gear available, if ever needed.

EROs are employees in "fire protection activities," as the term is defined in 29 U.S.C. § 203(y), because they (1) are trained in fire suppression, (2) have the legal authority and responsibility to engage in fire suppression, (3) are employed by a fire department, and (4) are engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

A. EROs Have the Responsibility to Engage in Fire Suppression

Employees who perform incidental firefighting functions – such as housekeeping, equipment maintenance, and inspecting homes for fire hazards – have no responsibility to engage in fire suppression. *Haro*, 745 F.3d at 1254. However, an employee need not actually hold a hose or enter a burning building to be "responsible" for fire suppression. Established case law demonstrates that the phrase "responsibility to engage in fire suppression" is much more expansive, and includes the job duties of EROs.

In *Huff v. DeKalb County, Ga.*, 516 F.3d 1273 (11th Cir. 2008), dual function firefighter/paramedics were found to engage in fire protection activities and qualify for the 7k exemption even though the vast majority of their time was devoted to medical duties and some had never engaged in actual fire suppression. The court reasoned that 29 U.S.C. § 203(y) "does not require actual engagement in fire suppression" because the language of the statute demonstrates that fire protection activities may include *both* the "prevention, control and

extinguishment of fires” or the “response to emergency situations where life, property, or the environment is at risk.” *Huff*, 516 F.3d at 1281. If Congress intended the exemption to only apply to employees actively engaged in the “extinguishment” of fires, it would have limited the statute as such. *Id.* The *Huff* decision also articulated that the term “responsibility” should not be interpreted to “imply any actual engagement in fire suppression,” and that “employees may have a ‘responsibility to engage in fire suppression’ without ever actually engaging in fire suppression themselves.” *Id.* at 1281; see also *Gonzalez v. City of Deerfield Beach, Fla.*, 549 F.3d 1331, 1335 (11th Cir. 2008) (finding that the fact that the plaintiffs “never actually engage in fire suppression is simply irrelevant.”)

Similarly, in *Cleveland v. City of Los Angeles*, 420 F.3d 981 (9th Cir. 2005), the court’s understanding of “responsibility” in 29 U.S.C. § 203(y) turned on accountability and control, not physical proximity. Looking to dictionary definitions, the *Cleveland* decision found that “responsibility” is “a duty, obligation or burden;” and to be “responsible for something” means “expected or obliged to account (for something, to someone), answerable, accountable” and “having an obligation to do something, or having control over or care for someone, as part of one’s job or role.” *Id.* at 998, 990. As such, the phrase “responsibility to engage in fire suppression” requires “some real obligation or duty to do so. If a fire occurs, it must be [the employee’s] job to deal with it.” *Id.* at 990.³

EROs satisfy all the characteristics of “responsibility” in regards to fire suppression. When a fire occurs, EROs have a duty, obligation and burden to use their discretion to orchestrate the appropriate amount of resources needed to suppress the fire. Implicit in this duty is an accountability to ensure that fire operations at the scene of the fire run smoothly and effectively. EROs also exert considerable “control over” the scene of the fire by managing the logistical and tactical use of emergency resources City wide and overseeing unit status on scene. As such, to use the Ninth Circuit’s words from *Cleveland*, if a fire occurs, it is most certainly their job to “deal with it.” *Cleveland*, 420 F.3d at 990.

III. THE NINTH CIRCUIT’S DECISION IN HARO DOES NOT AFFECT THE EXEMPT STATUS OF EMERGENCY RESOURCE OFFICERS.

In *Haro*, 745 F.3d 1249, the Ninth Circuit considered a challenge by dispatchers for the City of Los Angeles to the city’s classification of them as 7k exempt employees engaged in fire protection.⁴ These dispatchers performed the typical duties of a ground-level dispatcher: they “receive emergency calls and send a dispatch message to the fire station and any specific vehicles to be dispatched.” *Id.* at 1252. On occasion they also acted as liaisons between the

³ Case law interpreting similar language in a workers’ compensation statute further supports the understanding that firefighting encompasses more than physically extinguishing flames. In *State Emp. Retirement System v. Workmen’s Compensation Appeals Board*, 267 Cal. App. 2d 611 (1968), the court construed the term “active firefighting member” in California Labor Code section 3212 to include “persons performing tactical and logistic functions as well as those who physically extinguish the flames.” *Id.* at 615. The court found that an employee in the Department of Forestry who worked out of an office preparing fire plans, prioritizing resources, and dispatching men, supplies and equipment from different districts to points of need during forest fires was an “active firefighting member.” *Id.* 613-615.

⁴ The Court also analyzed whether aeromedical technicians (paramedics assigned to air ambulance helicopters) qualify for the 7k exemption, but this Memorandum will not address this analysis because it is not relevant to the issue raised by Local 145.

incident commander at the scene and the Operations Control Division center to help dispatch further resources. *Id.* Analyzing these duties, the Court sided with the dispatchers and held that they do not engage in fire protection activities, as detailed in 29 U.S.C. § 203(y), because they do not have the “responsibility to engage in fire suppression.” *Id.* at 1257.

The *Haro* decision relied heavily on the analysis from an earlier Ninth Circuit decision in *Cleveland*, 420 F.3d 981, where the court found that certain paramedics do not qualify for the 7k exemption. The paramedics in *Cleveland* did not have the “responsibility to engage in fire suppression” because they did not assist, or even have the potential to assist, with actual fire suppression in any way; they only performed medical services. *Id.* The *Haro* decision noted that dispatchers were even further removed from the duties of fire suppression than paramedics providing medical services at the scene of a fire. *Haro*, 745 F.3d at 1257. At best, the *Haro* dispatchers performed “incidental nonfirefighting functions” only “causally related to combating fire” – but this contribution does not equate to fire suppression. *Id.* at 1254, 1257.

The *Haro* decision also underscored the City of Los Angeles’ inexplicable decision to treat dispatchers previously trained as paramedics different from dispatchers previously trained as firefighters.⁵ *Id.* at 1257. Despite performing the exact *same* duties, dispatchers previously trained as paramedics were paid standard overtime on a 40 hour workweek basis, but dispatchers previously trained as firefighters were not. *Id.* The court found no reason to treat the exempt status of these dispatchers differently based upon previous training. *Id.* Likewise, the court interpreted the fact that these dispatchers “need not be trained in fire suppression” to further evidence a lack of responsibility to engage in fire suppression. *Id.*

A. Emergency Resource Officers Are Distinguishable From Dispatchers

Local 145 has alleged that EROs should have the same exempt status as the dispatchers in *Haro* because EROs “manage the dispatch floor operations, overseeing that [sic] the correct response criteria for major dispatched emergencies as well [sic] other duties in the Communications Center.” Letter from A. Arrollado, President of Local 145, to Gina Conrad in the City of San Diego Human Resources Department (on file with author). However, there are several critical differences between EROs and the *Haro* dispatchers.

EROs are trained firefighters in a high level management position that requires at least two years of experience as a fire captain. They have possession of fire protective gear, fall within the same job classification as fire captains, and can volunteer to work shifts as a regular firefighter. The dispatchers in *Haro*, by contrast, did not need any prior training in fire suppression, were not issued any fire protective gear, and could not volunteer to work firefighting shifts. *Haro*, 745 F.3d at 1257. Also, EROs are decision-makers. Unlike the dispatchers in *Haro*, EROs are responsible for making decisions regarding the logistical and tactical management of emergency resources during ongoing fire operations. As the *Haro* court noted, the dispatchers in that case played no such role in determining the need for additional resources at the scene of a fire or elsewhere around the City – they fielded emergency calls and sent dispatch messages to the appropriate emergency units. *Id.* at 1252. These critical differences

⁵ The plaintiffs in the *Haro* case were all dispatchers previously trained as firefighters. *Haro*, 745 F.3d at 1257.

in training, job qualifications, job duties and responsibility materially distinguish the dispatchers in *Haro* from the City' EROs in terms of applying the 7k exemption.

IV. EMERGENCY RESOURCE OFFICERS LIKELY QUALIFY FOR OTHER OVERTIME EXEMPTIONS.

The scope of this Memorandum is limited to the 7k exemption; however, it is important to note that there are other FLSA exemptions that may exempt EROs from overtime eligibility.

Under the FLSA, individuals "employed in a bona fide executive, administrative, or professional capacity" are completely exempt from overtime compensation. 29 U.S.C. § 213(a)(1). To qualify for these exemptions an employee must meet both a "salary" test and the appropriate "duties" test for the exemption that applies. *See* 29 C.F.R. § 541.100(a)(2) (executive employees' primary duty must be "management of the enterprise"); 29 C.F.R. § 541.200(a)(2) (administrative employees' primary duty must be "office or other non-manual work directly related to . . . management or general business operations"); 29 C.F.R. § 541.708 ("[A]n employee whose primary duty involves a combination of exempt administrative and exempt executive work may qualify for [an] exemption."). It is possible that EROs meet the standards required to qualify for the executive and/or administrative exemptions.

Numerous courts have found that firefighters in management positions – such as district fire chiefs, battalion chiefs, and captains – qualify for the administrative or executive exemptions. *See e.g., Monroe Firefighters Ass'n v. City of Monroe*, 600 F. Supp. 2d 790 (W.D. La. 2009) (finding deputy fire chiefs "administrative employees" exempt from FLSA's overtime compensation provision); *Smith v. City of Jackson, Miss.*, 954 F.2d 296 (5th Cir. 1992) (district chiefs and battalion chiefs were exempt administrative employees); *Quirk v. Baltimore Cnty., Md.*, 895 F. Supp. 773, 787-88 (D. Md. 1995) (firefighters holding the rank of captain were exempt executive employees); *McGuire v. City of Portland*, 159 F.3d 460 (9th Cir. 1998) (battalion chiefs were exempt from FLSA overtime requirements). Also, the performance of first responder duties does not automatically disqualify an employee from the administrative or executive exemptions. *See Maestas v. Day & Zimmerman, LLC*, 664 F.3d 822, 827 (10th Cir. 2012) ("high-level employees who perform some first responder duties, like police lieutenants or fire chiefs, can nonetheless be exempt executives if their primary duty is managerial.")

There is a strong argument that EROs qualify for the administrative or executive exemption. In addition to being engaged in fire protection services, EROs perform office work directly related to the Department's operations and frequently exercise their discretion with respect to matters of significance to the Department, such as city wide emergency response. Likewise, EROs fully manage the dispatch floor operations including dispatch procedures, the quality of customer service, dispatcher performance expectations and schedule coordination. Although the City permits EROs to collect overtime consistent with the 7k exemption, for FLSA purposes only, EROs may be completely exempt from overtime pursuant to the administrative or executive exemptions. Our Office is available to conduct further analysis into this issue, if requested.

CONCLUSION

Unlike the plaintiffs in *Haro*, who were regular dispatchers, EROs have a responsibility to engage in fire suppression. They manage the tactical and logistical functions of fire operations and use their discretion to orchestrate the appropriate amount of emergency resources needed to suppress a fire. When a fire occurs it is an ERO's job to deal with it. As such, EROs are employees in fire protection activities and qualify for the 7k exemption.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Gregory L. Halsey

Gregory J. Halsey

Deputy City Attorney

GJH:sc
ML-2015-11
Doc. No. 1045176

Attachment No. 1: Emergency Resource Officer Recruitment Bulletin, August 14, 2013
Attachment No. 2: Letter from A. Arrollado, President of Local 145, to Gina Conrad in the
City of San Diego Human Resources Department

cc: Scott Chadwick, Chief Operating Officer

Attachment 1

BULLETIN

NO: 13-089
DATE: August 14, 2013
TO: All Captains
FROM: Susan Infantino, Communications Manager
SUBJECT: Emergency Resource Officer Recruitment

The San Diego Fire-Rescue Department is currently accepting letters of interest for the position of full time Emergency Resource Officer (ERO).

The ideal candidate will have:

- Resource management experience
- Competent computer/technology skills
- Knowledge of 800MHz and VHF radios
- Knowledge of City-wide geography
- Wildland firefighting/ strike team/ auto and mutual aid experience
- A strong understanding of the San Diego EMS System
- Basic knowledge of the principles of System Status Management
- Effective supervisory, multi-tasking, organizational and customer service skills
- Knowledge of disciplinary and personnel procedures
- Excellent written and verbal communication skills and political acumen
- Interpersonal and conflict resolution skills
- A minimum of two years of field operations experience as a captain

Applicants must meet the following requirements:

- Rank of captain for at least two years
- A minimum rating of "Satisfactory" during the last employee performance rating period
- Must not be currently on a Performance Development Plan
- Must not be on a Last Chance Agreement
- No sustained discipline of suspension or higher within the last two years

Responsibilities of this position include, but are not limited to:

- Report to the Communications Manager
- Liaison to shift commander and senior staff
- Manage Dispatch floor operations including resource management of Fire and EMS units
- Oversee the correct response criteria for major dispatched emergencies
- Handle regional resource requests and associated paperwork
- Responsible for notifications to battalion chiefs, senior staff, elected officials and other high profile personnel

August 15, 2013
Open Emergency Resource Officer Position

Qualified candidates will be interviewed and chosen to fill the current vacancy for a minimum commitment of two years (56-hour work schedule). Seniority will be a consideration in the selection process but will not be the sole determining factor. Final selection will be based on the most qualified person to perform the duties and responsibilities of the position.

This position offers the opportunity to add operational command and control into the Fire Communications Center. The position provides an excellent opportunity to gain knowledge about the San Diego Fire-Rescue Department from a multi-dimensional perspective. Captains who are currently on the promotional list for battalion chief and those seeking future promotions are strongly encouraged to apply. A comprehensive training program will be provided which may include a combination of straight-day and shift assignments for on-the-job training.

Letters of interest listing all relevant qualifications, questions or requests for information regarding this opportunity should be directed to Susan Infantino, Communications Manager at (858) 573-1301 or via email at sinfantino@sandiego.gov. The existing EROs, Vadid Cisneros (A), Derrin Austin (B) or Marcus Alfaro (C) are also available to answer questions regarding the position via email or by calling 858-974-0101.

The deadline for submission of letters of interest is September 12, 2013.


Attachment 2

SAN DIEGO CITY
10405 SAN DIEGO MISSION RD., STE. 201
PHONE 619-563-6161



FIRE FIGHTERS
SAN DIEGO, CALIFORNIA 92108
FAX 619-563-0351

LOCAL 145, I.A.F.F.

Affiliated with: INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS AFL-CIO, SAN DIEGO-IMPERIAL COUNTIES LABOR COUNCIL, CALIFORNIA LABOR FEDERATION, CALIFORNIA C.O.P.E., SAN DIEGO COUNTY C.O.P.E., CALIFORNIA PROFESSIONAL FIRE FIGHTER'S / P.A.C. 

Gina Conrad
Human Resources Officer
City of San Diego
Human Resources Department
1200 Third Avenue
Suite 1316
San Diego, Ca. 92101

Re: Emergency Resource Officers

Dear Ms. Conrad:

IAFF Local 145 is requesting a meeting to discuss the City's obligation under the Fair Labor Standards Act ("FLSA") to pay the Emergency Resource Officers standard overtime because they do not fall within an exemption for employees "engaged in fire protection." It is the position of Local 145 that these employees are not exempt from standard overtime pay, because they are not exempt under FLSA §207(k) and §203(y).

The Emergency Resource Officers perform shift work in the Fire Communications Center. Their primary duty is ensuring that the dispatchers properly handle calls into the Center. They provide the field expertise needed to properly dispatch fire calls. They are not engaged in fire protection activities. In the performance of their duties as Emergency Resource Officers they are not "engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk."

The Ninth Circuit Court of Appeals recently decided the case *Haro v the City of Los Angeles* (9th Cir. 2014) _ F3d _ I have attached a copy of that decision. This decision supports the position of Local 145 that the Emergency Resource Officers are not exempt under FLSA §207(k) and §203(y). In that case the firefighters worked as dispatchers in the Operations Control Division. In San Diego, the Emergency Resource Officers manage the dispatch floor operations, overseeing that the correct response criteria for major dispatched emergencies as well other duties in the Communications Center. The most recent Bulletin for recruitment for the position of Emergency Resource Officer delineates the responsibilities of the position. There are no fire suppression duties. A copy of the August 14, 2013 recruitment is attached. The responsibilities of the position have essentially remained unchanged since 2007. We can provide copies of the various bulletins from 2007, 2009, and 2011. The Emergency Resource Officer Task Booklet details duties none of which are fire suppression. A copy is attached.

The Fire Department presently has other positions which are recognized as 40 hour non-exempt positions.

The City was put on notice concerning the requirements for a fire department employee to be FLSA exempt in 1999 when the case of *Cleveland v City of Los Angeles* was issued (9th Cir. 2005) 420 F 3d 981, *cert denied* (2006) 546 U.S. 1176. This knowledge allows for an extension of the statute of limitations from two to three years because of the City's wilful violation of the FLSA. The officers would also be entitled to liquidated damages.

Local 145 is requesting a meeting to discuss resolving the improper failure to pay the Emergency Resource Officers weekly overtime compensation under the FLSA without the filing of litigation.



Alan Arrollado

President

San Diego City Fire Fighters

International Association of Fire Fighters, 145