MEMORANDUM OF LAW

DATE: November 30, 1993

TO: Bill Lopez, Labor Relations Assistant

FROM: City Attorney

SUBJECT: Volunteer Work by City Employees

BACKGROUND

Recently, several City employees have requested that they be allowed to volunteer their time doing City jobs that are outside the job classifications in which the employees currently work. The motivating factor for these requests has been articulated as a desire on the part of the employees to accrue time and gain experience to qualify for jobs or certifications which require work experience their current jobs do not provide. You have asked if there are any legal prohibitions barring this type of volunteer work by City employees.

ANALYSIS

The primary area of concern in such cases is the question of whether wages are due a volunteer who is also employed by the agency for which he or she is volunteering. The salient issues regarding employees who volunteer to provide service for the public agency by which they are currently employed are addressed in the Fair Labor Standards Act ("FLSA"). Under ordinary circumstances, work hours for an employee would entail the payment of premium overtime pay for any hours worked in excess of forty. To avoid the requirement of premium pay in the case of bona fide volunteers, Congress has adopted a number of regulations promulgated by the Department of Labor ("DOL") to help clarify when an individual is appropriately designated a bona fide volunteer and thus not entitled to premium pay. The regulations indicate:

> A volunteer is generally defined as an individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons. Moreover, a volunteer performs these services without promise, expectation or receipt of compensation for services

> rendered. If these conditions are met, an individual will not be subject to the FLSA (29 C.F.R. Section 553.10(a)).

Additionally, the FLSA at 29 U.S.C. section 203(e)(4)(a) provides:

> The term "employee" does not include any individual who volunteers to perform services for a public agency which is a state, a political subdivision of a state, or an interstate governmental agency, if-(i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and (ii) such services are not the same type of services which the individual is employed to perform for such public agency.

The current proposal does not anticipate work to be performed by volunteers for civic, charitable, or humanitarian reasons. Rather, the express purpose of the "volunteer" hours would be to allow an employee to receive the training necessary for a different career certification. The purpose then, is for self-benefit, not the benefit of the agency, in this instance the City.

However, beyond the question of the nature of the proffered service, there is the more fundamental question of whether the services performed in the volunteer position are of a similar type as those performed by the employee in his or her regular job. Such similarity triggers the requirement of premium pay, regardless of the individual's stated purpose for volunteering his or her services. Individuals may not volunteer for work for which they are otherwise paid. Again, the DOL through Congress, has adopted regulations to help clarify what an employer should look to in determining whether an employee is a bona fide volunteer. 29 C.F.R. Section 553.103(a) states that an employer may look to:

> (1) the duties and other factors contained in the definitions of the 3-digit categories of occupations in the Dictionary of Occupational Titles; and (2) the facts and circumstances in a

> particular case, including whether the volunteer service is closely related to the actual duties performed by or responsibilities assigned to the employee.

29 C.F.R. Section 553.103(a) (emphasis in original).

It is not enough for the employer to look to one or the other of the listed criteria. Rather, because the conjunctive "and" is used, the employer must consider both the Dictionary of Occupational Titles and the facts and circumstances of the particular case. Unfortunately, even with the two-pronged test, the regulations are vague enough that it may be difficult for an employer to determine whether the proposed volunteer service is closely related to the employee's paid duties. However, in a number of Wage Hour Opinion Letters, the DOL has emphasized that the work must be substantially different from the employee's paid work. Thus, the employer must make a factual determination of whether the volunteer work is substantially similar to the employee's paid job. The DOL has provided examples of jobs that are substantially different and therefore qualify as volunteer service. A few of the listed examples include:

> (1) A city police officer who volunteers as a part-time referee in a city basketball league.
>
> (2) An employee of the city parks department who serves as a volunteer city firefighter.
>
> (3) An office employee of a city hospital who volunteers to spend time with a disabled or elderly person in the same institution during off duty hours.

Note that in each of the examples, although the employee is volunteering time to the same public agency, the duties of the paid job and volunteer service have no factual similarities and are civic, charitable or humanitarian in nature. Thus, the services offered are truly volunteer and no wage provisions of the FLSA are triggered.

CONCLUSION

Based upon the DOL regulations, it is our opinion that a city employee may volunteer time in a separate City service, provided a factual determination has been made that the two positions are substantially different. If such a factual determination can be articulated, we suggest a waiver pursuant to the language of 29 U.S.C. Section 203(e)(4)(a) indicating the employee is voluntarily performing the additional duties and has

no expectation of compensation.

If you have any further questions, please feel free to call me.

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