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OPINION NO. 95-07

TO: Peter C. Harvey, City Manager

FROM: Stephen M. Kemp, City Attorney

DATE: April 17, 1995

SUBJECT: Compensation for Hours Worked

QUESTION:

Is time spent by an employee, in a City promotional proceedings (such as interviewing, testing, etc.) subject to compensation as hours worked pursuant to the Federal Fair Labor Standards Act (FLSA).

OPINION:

For purposes of this Opinion, some background information is provided. Periodically, throughout the year, the City advertises a number of job openings. Many of these openings are advertised to employees within the City as promotional opportunities. For example, an opening as a Police Sergeant may be advertised to police officers for the possibility of future promotions. As part of this process, the perspective City employee is required to complete an application and may have to engage in testing and/or interviews in order to be considered for that position. Apparently, in some departments, it has been a practice that employees who are called in to participate in such interviews or testing for their prospective promotions on their days off are provided compensation as if it were hours worked.

The starting point for making a determination as to whether time spent by an employee is subject to compensation under the Fair Labor Standards Act (FLSA) is to answer the question whether the time spent by the employee is in the interest of the employer versus the employee. For example, the City may send a secretary to a seminar on improving secretarial skills. Such hours spent at a seminar including those hours spent on a day when the secretary is not assigned to work, would clearly be subject to being counted as hours worked under the FLSA. Conversely, if the City were to send a secretary to a seminar on responsibilities of an accountant, such hours worked are not subject to being counted as to the benefit of the employer under the FLSA.

A second factor to be considered in the determination of hours worked, is whether the work is required to be done by the employer or the work is voluntarily assumed by the employee. For example, an employer may require a secretary to attend the secretarial seminar on an off-duty day to improve their secretarial skills. The employer is then required to count such a seminar as hours worked for purposes of the FLSA. Conversely, that same secretary may elect on her own to attend a local Community College course on English Language and Grammar. Clearly, the City may receive a residual benefit from that course work. However, if the course is not required by the City and is totally elected by the secretary as their own choice and discretion, such a course and the time spent on the course need not be compensated by the City under the FLSA.[1]

In this case, these two questions can be answered in the negative. First, the individual employee's participation in a promotional examination process is not for the benefit of the employer but the employee who has the likelihood of receiving additional compensation. While an employee may receive some residual benefits in learning how better to perform their existing job, it is not the intent to provide those benefits that is the basis of the process, rather it is the promotional process in itself.

Secondly, no employee is required to participate in a promotional examination. In many of the in-house City promotional examinations, there may be numerous qualified individuals, only some participate. Therefore, in reviewing Title 29, Section 785 of the Code of Federal Regulations which is the Department of Labor Regulations - FLSA, it is our opinion that time spent participating in promotional examinations need not be counted as

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[1]Obviously, it goes without saying that the City may well desire to compensate such an employee under its Tuition Reimbursement Policy. Such a decision is solely that of the City and not required under FLSA.

hours worked for compensation purposes under the FLSA.

Then the issue then becomes how should the City handle such time. In order to provide an equitable method for accounting for such time and to avoid the issue of overtime compensation, this office would recommend the following policy be followed:

1. For those employees who are participating in promotional examination processes on their days off and not during regular working hours, such time should not be counted as hours worked for purposes of the Federal Fair Labor Standards Act.

2. For those employees who are participating in promotional processes during working hours, such employees should be required to use comp time, administrative leave, vacation time or leave without pay or to make up such time to provide for forty (40) hours work within a regular work week the time spent in promotional examinations. This approach is consistent with the Federal Fair Labor Standards Act.

I trust that this answers your questions in this mater. If you should have any further questions, please do not hesitate to contact me.

SMK:jf

cc: Honorable Mayor and Council
Jan Graziano, City Clerk
Michelle Harris, Human Resources Manager
All Department Heads

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