CITY OF KINGMAN
MEETING OF THE COMMON COUNCIL
Council Chambers
310 N. 4th Street
MINUTES
REGULAR MEETING

5:30 PM **Tuesday, November 17, 2015**

Mayor: Richard Anderson; **Council**: Mark Abram, Larry Carver, Jen Miles, Stuart Yocum, Carole Young
Officers: John Dougherty, City Manager; Carl Cooper, City Attorney; Jackie Walker, Human Resources and Risk Management Director; Robert DeVries, Chief of Police; Rusty Cooper, Deputy Chief of Police; Jake Rhoades, Fire Chief; Greg Henry, City Engineer; Mike Meersman, Parks & Recreation Director; Tina Moline, Finance Director; Gary Jeppson, Development Services Director; Rob Owen, Public Works Director; Joe Clos, Information Services Director; Sydney Muhle, City Clerk; Erin Roper, Deputy City Clerk and Recording Secretary

CALL TO ORDER AND ROLL CALL

Mayor Anderson called the meeting to order at 5:30 P.M. All councilmembers were present.

INVOCATION

The invocation will be given by Mike Herdt of St. John's United Methodist.

Pastor Herdt was unable to attend the meeting. The invocation was given by City Attorney Carl Cooper after which the Pledge of Allegiance was said in unison.

PLEDGE OF ALLEGIANCE

THE COUNCIL MAY GO INTO EXECUTIVE SESSION FOR LEGAL COUNSEL IN ACCORDANCE WITH A.R.S.38-431.03(A) 3 TO DISCUSS ANY AGENDA ITEM. THE FOLLOWING ITEMS MAY BE DISCUSSED, CONSIDERED AND DECISIONS MADE RELATING THERETO:

1. APPROVAL OF MINUTES

a. The Work Session meeting minutes of October 26, 2015

Councilmember Abram made a MOTION to APPROVE the Work Session meeting minutes of October 26, 2015. Councilmember Young SECONDED and it was approved by a vote of 6-0.

b. The Regular Meeting minutes of November 3, 2015

Councilmember Abram made a MOTION to APPROVE the Regular Meeting minutes of November 3, 2015. Councilmember Yocum SECONDED and it was approved by a vote of 6-0.

2. AWARDS/RECOGNITION

a. Introduction of new canine officers

The Kingman Police Department will introduce two new canine officers to the Mayor, Council, and citizens of Kingman.

Officer Adam Simonsen and Officer Billy Fancher presented the Kingman Police Department's new canine officers, Amigo and Cyrus. Chief of Police Robert DeVries stated Lieutenant Bob Fisk was responsible for securing grant funding to pay for the canines, training and equipment.

3. CALL TO THE PUBLIC - COMMENTS FROM THE PUBLIC

Those wishing to address the Council should fill out request forms in advance. Action taken as a result of public comments will be limited to directing staff to study the matter or rescheduling the matter for consideration and decision at a later time. Comments from the Public will be restricted to items not on the agenda with the exception of those on the Consent Agenda. There will be no comments allowed that advertise for a particular person or group. Comments should be limited to no longer than 3 minutes.

Joanne Marquez thanked Mayor Anderson and the City Staff for their recent attention to a broken water line near her home. Ms. Marquez stated local government worked when citizens took the proper steps to work with Staff.

4. CONSENT AGENDA

All matters listed here are considered to be routine by the City Council and will be enacted by one motion. There will be no separate discussion of these items. If discussion is desired that item will be removed from the CONSENT AGENDA and will be considered separately.

a. Special Event Liquor License/Kingman Kiwanis

Applicant Regina Musumeci of Kingman Powerhouse Kiwanis has applied for a Special Event Liquor License for an event to take place Saturday, December 05, 2015 from 4:00 P.M. to 11:00 P.M. at the Central Commercial Building located at 112 N. Fourth Street in Kingman. **Staff recommends approval.**

b. Powerhouse rehabilitation grant project

Staff is working on a grant project to rehabilitate the Powerhouse Visitor Center. The City was awarded $220,241.00 in federal funds with a local match of $55,061.00 for a total of $275,302.00. The architect and Staff have submitted 95% plans, specifications, and cost estimate to the Arizona Department of Transportation (ADOT) for review and approval of the grant project. The ADOT Contract and Specifications (C&S) Department has reviewed these items and completed their own cost estimate, which is $47,262.00 more than the estimated project cost determined by the architect and City staff. An additional cost of $21,000.00 has been added to the project for the plan review time performed by ADOT C&S. In order for this project to continue, ADOT will invoice the City for the original local match, the additional over match funds, and the review fee cost. The exact amount required of City match funds will not be determined until the contract is awarded. At the November 5, 2015 TDC meeting, TDC approved the request for funds. **Staff recommends approval.**

c. Recommendation from the Tourism Development Commission (TDC) for the quarterly payment to Kingman Visitor Center, Inc. for tourism related services

The Kingman Visitor Center, Inc. receives a quarterly payment of $51,250 from the City upon submission and acceptance of the tourism quarterly report. The most recent quarterly report was submitted and accepted by TDC at the November 5, 2015 regular meeting. **Staff recommends approval.**

Councilmember Yocum made a MOTION to APPROVE the Consent Agenda as presented. Councilmember Miles SECONDED and it was APPROVED by a vote of 6-0.

5. OLD BUSINESS

a. Report to Council regarding the 2015 Best of the West on Route 66 Festival

Coordinator Dora Manley will provide a report to Council regarding the 2015 Best of the West on Route 66 Festival including information gathered via survey of the event and how the City's contribution to the event was spent.

Event Coordinator Dora Manley stated the festival was granted $25,000 by the Tourism Development Commission (TDC). Ms. Manley stated the funds were not spent exactly as budgeted due to the date the funds were received and the changes were necessary for effective marketing. Ms. Manley stated $15,000 was originally assigned for marketing and $10,000 for event coordination; however, the entire $25,000 was spent on marketing. Ms. Manley stated the festival was marketed in Kingman and the outlying areas including Needles, Flagstaff, Laughlin, Las Vegas, Sedona, and Parker. Ms. Manley stated 250 to 300 surveys were collected from attendees and the data was included in the agenda packet. Ms. Manley stated the surveys showed many people made day trips from Las Vegas to attend the festival. Ms. Manley stated people from 13 different countries attended as well. Ms. Manley stated the local hotels directed many people to the festival and tour buses were able to find the festival thanks to signage on the freeway. Ms. Manley stated 81 motel rooms were occupied due to the festival.

b. Update from Venture Club Regarding the Splash Pad

The Venture Club of Kingman has requested an agenda item to update the Council on the progress of the Splash Pad. This item is for discussion only.

Lisa Bruno presented slides, which are included at the end of this report. On slide one Ms. Bruno stated the Kingman Daily Miner ran weekly updates on the fundraising progress. On slide two Ms. Bruno stated the club was still accepting donations. Ms. Bruno read slide three. On slide four Ms. Bruno stated the club researched different splash pad systems and talked to various companies while raising money. On slide five Ms. Bruno stated communities generally had a use for the waste water when a flow through system was installed. On slide six Ms. Bruno stated the recirculation system acted like a mini pool. On slide seven Ms. Bruno stated the repurposing system was the initial focus of the project, however the tank would need to hold 30,000 to 50,000 gallons of water in order to be viable. Ms. Bruno stated there were few repurposing systems in the United States. Ms. Bruno reviewed slide eight. On slide nine Ms. Bruno stated the club had enough money to construct a recirculation system and the recircluation system would not restrict the amount of water used per day or the gallons per minute, which would allow big splash features. On slide 10 Ms. Bruno stated the disadvantage to the recirculation system would be the treatment of the water, which required monitoring the levels of chemicals in the water. On slide 11 Ms. Bruno stated it was hard to estimate the maintenance costs of the repurposing system due to the limited number of them in the United States. On slide 12 Ms. Bruno stated the club felt there was a lot of risk involved with installing a repurposing system. On slide 13 Ms. Bruno stated the club could provide one to two years of maintenance funds until the City could financially take on the obligations. On slide 14 Ms. Bruno stated the cities the club contacted were the same size as Kingman. On slide 15 Ms. Bruno stated funds would need to be set aside for shade structures. On slide 16 Ms. Bruno stated the club proposed a 3,000 square foot splash pad. On slide 17 Ms. Bruno stated the main water feature would be the water tower, which was a high volume water feature and popular with children. On slide 18 Ms. Bruno stated children in Kingman were currently using Monsoon Park on Eastern Street as a "splash pad." Ms. Bruno reviewed slides 19 and 20.

Mayor Anderson stated it was obvious the community wanted the splash pad.

Councilmember Miles asked if there was a good location at Centennial Park for the splash pad.

Ms. Bruno stated the club would defer to Parks & Recreation Director Mike Meersman to decide a location, but the club was adamant the splash pad remain free and available to everyone.

City Manager John Dougherty stated he spoke with Mr. Meersman and the club's timeline was possible. Mr. Dougherty stated the City had $150,000 in the Parks Department budget that could be used to fund a repurposing system if the Council approved it. Mr. Dougherty stated the club should have the final say on the structures in the park as they raised the money. Mr. Dougherty stated he would return the item to Council on the December 15, 2015 meeting.

c. Public Notice relating to estabishing a property tax

Notification of a public meeting to approve a property tax levy amount must be posted on the homepage of the City's website at least 60 days before the date of the public meeting. Notification will be placed on the City's website beginning November 18, 2015. The next City Council meeting following the 60-day requirement is January 19, 2016. **Staff recommends Council approve a property tax levy amount at the January 19, 2016 City Council regular meeting.**

Finance Director Tina Moline stated the next step in the process to establish a primary property tax would be to hold a public meeting to determine the amount to be levied. Ms. Moline stated the 60 day notification period for the public meeting would begin on November 18, 2015 and the notice would be posted on the City website. Ms. Moline stated the decision to send the tax to a special election ballot in May, 2016 would be brought before Council at the January 19, 2015 meeting.

6. NEW BUSINESS

a. Consideration of Ordinance 1800 to amend the business license renewal schedule

Ordinance 1800 will amend Chapter 8, Article IV of the City of Kingman Code of Ordinances Section 8-124 Renewal and Transfer and Section 8-125 Fees by changing the date of expiration to one year from the date issued instead of December 31st of the year issued. **Staff recommends adopting Ordinance 1800.**

City Clerk Sydney Muhle stated there was one change to the proposed ordinance, which was the removal of the increase to the temporary transfer fee from $5 to $11. Ms. Muhle stated the fee would be amended at a later date.

Councilmember Carver made a MOTION to ADOPT Ordinance 1800 with the removal of the $11 change to the temporary transfer fee. Councilmember Miles SECONDED and it was APPROVED by a vote of 6-0.

b. Information on Water finances

The Public Works Director has requested additional money for the Professional Services -Temp Help line due to a staffing shortage in the department. The City Manager has authorized the transfer within the department and will provide information to the Council on the transfer.

Public Works Director Rob Owen stated the department was using temporary workers to address unfunded positions, current vacancies and employees on medical leave. Mr. Owen stated the temporary workers were vital to completing repairs to reduce leaks and the water loss rate. Mr. Owen stated temporary workers were also used to complete brush removal in easements in order to allow the contracted meter reader to access water meters. Mr. Owen stated approximately $500,000 would be recouped in the operating account. Mr. Owen stated the Water Department was down six people and the Streets Department was down eight people and completing necessary work would not be possible without the temporary help.

Mr. Doughtery stated there would be no need to return to Council to ask for additional funding if no major issues occurred within the year, however, if a major repair became necessary Council would be asked to consider awarding additional funding.

c. Discussion and direction regarding the possibility of a Landscape Maintenance District to overlay both the northern and southern planned development districts (PDDs) surrounding Kingman Crossing

After this topic arose at the Regular Council Meeting of November 3, 2015, Councilmember Miles requested an agenda item to discuss the possibility of a Landscape Maintenance District to overlay both the northern and southern planned development districts (PDDs) surrounding Kingman Crossing. Staff is seeking direction from Council on whether or not to pursue this matter further. **Council discretion.**

Development Services Director Gary Jeppson stated the Arizona Revised Statutes (ARS) allowed cities to create landscape maintenance districts, which were similar to improvement districts. Mr. Jeppson stated landscaping on public property would be maintained with funds obtained by taxing the property owners within the boundaries of the district. Mr. Jeppson stated other communities hired private firms to maintain the landscaping. Mr. Jeppson stated the landscape maintenance district would not be tied to the zoning ordinance. Mr. Jeppson stated the district would provide the ability to maintain enhanced landscaping without taxing the entire community. Mr. Jeppson stated the process to establish the district would be the same as for an improvement district, including public hearings, and would not impact the Kingman Crossing timetable.

Mayor Anderson asked if the City would pay into the district if it owned the property.

Mr. Jeppson stated all property owners who paid a property tax would pay into the district.

Kingman resident Doug Dickmeyer asked the Council to approve the creation of a landscape maintenance district on the north and south properties. Mr. Dickmeyer stated it would enhance the look of the property and add continuity.

Councilmember Carver stated he wanted to see photographs of landscape enhanced public property.

Mayor Anderson agreed and wanted to know what the additional cost to property owners would be.

Mr. Jeppson stated he could provide graphics of streetscapes from other communities, but determining a cost would be challenging as there was currently no developer for the property.

Mr. Dougherty stated he wanted photos from Kingman showing examples of what the area could look like if the landscape maintenance district was not implemented. Mr. Dougherty stated the Public Works Department did not have time to clean areas that were the responsibility of the property owners and there were many places in Kingman where property owners were not taking care of their areas of responsibility.

d. Battalion Chief - Operations reclassification

The position of Battalion Chief – Operations for the Fire Department is currently an "exempt" status position due to their supervisory status and responsibilities within the department based on their assignment as "Shift Commanders." The individuals within these positions serve in a mixture of exempt and non-exempt status however lose many of the benefits associated with each classification. The work schedule and the requirements of this position bring the conclusion that these individuals would be better served and better serve the City of Kingman in a non-exempt classification. **Staff recommends the approval of the reclassification of the position of Battalion Chief - Operations as non-exempt status within the adopted pay plan for the city of Kingman.**

Mr. Dougherty stated Kingman Fire Department Chief Jake Rhodes met with him, the Finance Department and the Human Resources Department and Mr. Dougherty agreed with Chief Rhodes on the reclassification. Mr. Dougherty stated the Operations Battalion Chiefs (BC) were assigned to work specific shifts, did not have the flexibility otherwise granted to exempt employees, and could not obtain overtime pay as non-exempt employees did for time worked over 40 hours. Mr. Dougherty stated Chief Rhodes would need to work with the existing department budget and wanted the reclassification to take place the first pay period of January, 2016.

Chief Rhodes stated the three Operations BCs had different work assignments than most exempt employees who worked 40 hour work weeks. Chief Rhodes stated the Operations BCs were part of the department's minimum staffing standards and if an individual was on vacation, sick leave or light duty the department relied on the Operations BCs, paid on call personnel, or regular personnel on overtime. Chief Rhodes stated a mandatory call back system could be put into place, but it was not a fair or reliable system. Chief Rhodes stated part of the money for the reclassification would come from letting an unnecessary engineer position lapse.

Councilmember Young asked if the reclassification would address the compression issues in the department.

Chief Rhodes stated if would address some of the issues and it was a priority for the department.

Councilmember Miles asked if there was a way to differentiate the titles of the two types of BCs.

Chief Rhodes stated it was possible to change the title of the Administrative BCs to "Division Chiefs."

Councilmember Abram stated the Department of Labor had definitions of exempt and non-exempt standards.

Chief Rhodes stated he was aware of the differences and the reclassification was based

on the fact that the Operations BCs were assigned to a shift.

Kingman Police Lieutenant Jim Brice stated he, Lieutenant Fisk and Lieutenant Mark Chastain were opposed to the reclassification. Lieutenant Brice stated the matter should be discussed in the Compensation Committee that was created to bring united views on salary to the City Manager. Lieutenant Brice stated there were other public safety employees in the same pay grade and the reclassification would not be fair to them.

Mr. Dougherty stated it was not a compensation issue, rather a matter of whether an employee was able to take advantage of exempt status and the Operations BCs could not. Mr. Dougherty stated he recognized the Police Department was overworked and understaffed as many other exempt employees were, but unlike other employees the Operations BCs could not have another employee cover for them for brief periods of time.

Councilmember Miles stated it seemed unusual to have exempt and non-exempt employees at the same place on the salary scale as exempt employees should be at a point where their pay was higher than a non-exempt employee.

Chief Rhodes stated classifying the Operations BCs as exempt employees was abnormal when compared to the rest of the state.

Councilmember Carver stated there was an exemption under the United States Department of Labor that could apply to BCs and police lieutenants. Councilmember Carver stated there was also a challenge in Kern County regarding BCs. Councilmember Carver stated he wanted more information before proceeding. Councilmember Carver's notes on the referenced statute and court case are included at the end of this report.

Councilmember Carver made a MOTION to TABLE the reclassification of the Battalion Chief - Operations positions. Councilmember Miles SECONDED and it was APPROVED by a vote of 6-0.

Mayor Anderson stated he wanted to see similar adjustments made to the Police Department staff, but did not want to drag the decision out as it directly affected the Operations BCs.

e. Railroad Museum presentation and request for expansion

The Whistle Stop Railroad Club wishes to address the Council with a presentation to request expansion into the vacant suite formerly occupied by Hertz Rent-A-Car in the railroad depot at 4th Street and Andy Devine Avenue. **Staff recommends denying the request.**

Mr. Dougherty stated Staff's recommendation was changed to a neutral to "for" position as he recently learned Hertz terminated their agreement for the space. Mr. Dougherty stated the space was now vacant and there was no other use for it.

Whistle Stop Railroad Club Treasurer Lorraine Brownfield stated the club was out of space and needed the Hertz suite to store supplies and display artifacts. Ms. Brownfield stated the museum would also have a nicer entrance due to the wheelchair access ramp and historic baggage counter in the Hertz suite. Ms. Brownfield stated the additional suite would provide a dedicated place for people to sit and enjoy the club's library

materials as people currently had to stand in the doorway while they read. Ms. Brownfield stated the club was planning a Thomas the Tank Engine hands-on play area and also needed a place to hold their popular hands-on demonstrations and workshops. Ms. Brownfield stated the club survived solely on its $2 entrance fee and donations and used the funds to pay for insurance, professional janitorial service for the restrooms, restroom supplies, improvements to artifacts and make charitable contributions in the community. Ms. Brownfield stated the club and its museum were an asset to Kingman as it was a tourist attraction.

Councilmember Abram asked how many visitors the museum received per day.

Ms. Brownfield stated the average was 30 per day, however the club allowed service people, schools and disabled people in free of charge.

Mr. Dougherty stated there was very little use for the space other than what the club could use it for. Mr. Dougherty stated the City would prefer to rent the space, but it was a poor location for many types of businesses due to the train noise. Mr. Dougherty stated the goal now was to keep the building occupied.

Mr. Cooper stated the Council that initially granted the lease to the club determined the rent-free space did not violate the gift clause because the club offered services by drawing in tourists and making improvements to the building.

Councilmember Yocum asked who paid for the utilities.

Mr. Owen stated the City paid for the club's utilities.

Councilmember Yocum asked if the club would be willing to pay for their electricity.

Ms. Moline stated the utilities were $2,500 per year, which was approximately $200 per month.

Ms. Brownfield asked if the City contributed money to the other museums in Kingman.

Councilmember Young stated the club paid for janitorial services and all supplies.

Ms. Brownfield stated the club spent $125 per month on janitorial services and supplies.

Councilmember Yocum made a MOTION to DIRECT Staff to develop an occupancy contract with the Whistle Stop Railroad Club. Councilmember Young SECONDED and it was APPROVED by a vote of 6-0.

7. REPORTS

Board, Commission and Committee Reports by Council Liaisons

There were no reports.

8. ANNOUNCEMENTS BY MAYOR, COUNCIL MEMBERS, CITY MANAGER

Limited to announcements, availability/attendance at conferences and seminars, requests for agenda items for future meetings.

Mr. Dougherty stated the Kingman animal shelter would hold the Whiskers & Wine Fundrasier on December 5, 2015 and tickets would be available for $40 per individual or $75 per couple. Mr. Dougherty stated City budget analyst Diane Richards was relieved of duties due to an open investigation with the Arizona Attorney General's Office and the United States Department of Homeland Security. Mr. Dougherty stated he was working with the department director and the investigators to correct all issues.

9. EXECUTIVE SESSION

Councilmember Abram made a MOTION to ENTER into Executive Session to discuss the Golf Course Management Agreement. Councilmember Yocum SECONDED and it was APPROVED by a vote of 6-0.

The Council entered Executive Session at 7:09 P.M.

The Council returned from Executive Session at 7:24 P.M.

Mayor Anderson directed Staff to pursue the contract and return to Council for action on it.

Councilmember Abram made a MOTION to ENTER into Executive Session to discuss the Council vacancy. Councilmember Young SECONDED and it was APPROVED by a vote of 6-0.

The Council entered Executive Session at 7:25 P.M.

The Council returned from Executive Session at 7:36 P.M.

Mayor Anderson stated there were four individuals that would be invited to speak for three minutes each: Erin Cochran, Kenneth Dean, Travis Lingenfelter and Joe Longoria.

Erin Cochran stated she was a councilmember for four and a half years, held a masters degree in public administration, and was currently in a doctorate program. Ms. Cochran stated she was passionate about Kingman and volunteered in several community groups including the Cancer Unit and Rotary. Ms. Cochran stated she worked with the Youth Advisory Commission and the majority of the current Council and intends on running for a Council seat next year.

Kenneth Dean and Travis Lingenfelter were not present.

Joe Longoria stated he was a long-time citizen of the community and graduated from Kingman High School in 1972. Mr. Longoria stated he was a member of the Clean City Commission and worked with the community on several cleanup and beautification projects. Mr. Longoria stated he was civic-minded and had the abilities and leadership necessary to help improve Kingman.

Councilmember Carver made a MOTION to RETURN to Executive Session to discuss the Council vacancy. Councilmember Young SECONDED and it was APPROVED by a vote of 6-0.

The Council entered Executive Session at 7:43 P.M.

The Council returned from Executive Session at 8:09 P.M.

Councilmember Miles made a MOTION to APPOINT Kenneth Dean to fill the remainder of Mark Wimpee, Sr.'s term. Councilmember Abram SECONDED and it was approved by a vote of 5-1 with Councilmember Carver voting NAY.

Councilmember Carver made a MOTION to ADJOURN. Councilmember Miles SECONDED and it was APPROVED by a vote of 6-0.

ADJOURNMENT - 8:11 P.M.

ADJOURNMENT

ATTEST:

Sydney Muhle
City Clerk

APPROVED:

Richard Anderson
Mayor

STATE OF ARIZONA)
COUNTY OF MOHAVE)ss:
CITY OF KINGMAN)

CERTIFICATE OF COUNCIL MINUTES
I, Erin Roper, Deputy City Clerk and Recording Secretary of the City of Kingman, Arizona, hereby certify that the foregoing Minutes are a true and correct copy of the Minutes of the Regular Meeting of the Common Council of the City of Kingman held on November 17, 2015.

Dated this 1st day of December, 2015.

Erin Roper, Deputy City Clerk and Recording Secretary

CITY OF KINGMAN INCORPORATED 1952 ARIZONA

United States Department of Labor
Wage and Hour Division
Wage and Hour Division (WHD)

FLSA2005-40

October 14, 2005

Dear ***Name****,

This is in response to your request for an opinion on the application of 29 C.F.R. Part 541 (copy enclosed) to high ranking police officers and fire fighters. Specifically you asked whether a particular city's Police Lieutenants, Police Captains, and Fire Battalion Chiefs are exempt from the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA).

The job duties of the Police Lieutenant include the following: supervising a group of Police Officers and Sergeants assigned to patrol duties; deploying patrol units in accordance with needs of the workload; planning, directing, and coordinating activities of any of the special units; assisting and instructing Police Officers and Sergeants in handling difficult problems; conducting and participating in training courses; supervising and participating in the development and maintenance of a police records system; performing employee appraisals on subordinates; and disciplining subordinates when required. Additionally, Police Lieutenants are responsible for the following duties: supervising, commanding and reviewing work of station and field personnel; assisting in the direction of the training and development of personnel; assisting in budget preparation and management; and coordinating and directing expenditures, material acquisition, and maintenance.

The Police Captain position is the commanding officer for one to several divisions of the Police Department. The Police Captain plans, coordinates, and controls the activities of division personnel regarding allocation and deployment of personnel and equipment as well as evaluates performance, recommends strategies and develops policies and procedures regarding division activities. Your letter lists the following job functions of the Police Captain: conducting and participating in training courses; performing employee appraisals on subordinates; holding subordinates accountable for rules, regulations and written directives; disciplining subordinates; making decisions in accordance with laws, regulations and policies; and assisting in budget preparation and management.

The Fire Battalion Chief performs work under the direction of the Assistant Fire Chief but manages and provides leadership for a section of the Fire Department. The position involves managing the administrative and operational functions of the assigned section while integrating the Department's goals into day-to-day operation. The Fire Battalion Chief position is responsible for the following activities: enforcing and implementing rules, regulations, procedures and values of the Fire Department; directing activities of personnel; taking proper action in all emergency situations until relieved by higher ranking officer; coordinating pre-fire planning, company inspection activities, and conducting routine fire cause investigations; preparing, reviewing and processing reports and records; and assisting in necessary research and preparation of budget needs. The completed questionnaire attached to your letter states that all three positions spend 50% or more of their time in management, customarily and regularly direct the work of at least 2 full time employees, and make suggestions regarding the hiring, firing, advancement and promotion of other employees which are given particular weight.

You have stated that the employees in question are paid at least $455 a week on a salary basis as is defined in 29 C.F.R. § 541.602. Based on the information that you provided regarding the primary duties of each position, the three positions are exempt under the executive exemption, as explained below. We note that job titles alone are "insufficient to establish the exempt status of an employee," and the exempt status of any particular employee turns on "whether the employee's salary and duties meet the requirements of the regulations" 29 C.F.R. § 541.2.

As you know, Section 13(a)(1) of the FLSA provides an exemption from the minimum wage and overtime provisions for any employee employed in a bona fide executive, administrative, or professional capacity, as defined by the Department. The Department of Labor's updated Part 541 regulations that define certain executive, administrative and professional exempt employees were published as a final rule in the Federal Register on April 23, 2004 (69 FR 22122). The revised Part 541 regulations went into effect on August 23, 2004.

Revised § 541.3(b) of the Regulations states that the §13(a)(1) exemptions do not apply to police officers, fire fighters or other first responder employees who perform work such as extinguishing fires, rescuing crime or accident victims, performing surveillance, pursuing or restraining suspects, interviewing witnesses, and other similar work identified in the regulations because their primary duty is not management or directly related to the management or general business operations of the employer. Thus, such employees do not qualify for an exemption as an executive or administrative employee under § 541.100 or § 541.200. These positions also do not meet the test for an employee in a professional capacity because there is no requirement of knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. 29 C.F.R. §§ 541.3(b)(1)-(4).

However, the § 13(a)(1) exemptions may apply to police lieutenants, police captains, and fire battalion chiefs positions so long as the employees in these positions meet all of the requirements set out in the Regulations. See 69 Fed. Reg.22122, 22130 (April 23, 2004) (citing e.g. West v. Anne Arundel County, Maryland, 137 F.3d 752 (4th Cir.), cert. denied, 525 U.S. 1048 (1998)). Specifically, they may fit within the regulatory exemption for Executive Employees in § 541.100. Section 541.100 states that an employee is employed in a "bona fide executive capacity" for purposes of the exemption if the employee is:

1. Compensated on a salary basis at a rate of not less than $455 per week..., exclusive of board, lodging or other facilities;
2. Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
3. Who customarily and regularly directs the work of two or more other employees; and
4. Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

Because the salary requirements of the regulation are met, application of the exemption to the three positions you described turns on whether the positions meet the primary duty requirement of § 541.100(a)(2)-(4).

Meeting the requirements of § 541.100(a)(2) depends on the employees' "primary duty" in their management position. Primary duty is defined in § 541.700(a) as "principal, main, major, or most important duty that the employee performs." Factors to consider in determining an employee's primary duty include "the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative

freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee." 29 C.F.R. §541.700(a). It is important to remember that the primary duty determination is based on all of the facts and circumstances in each individual case with major emphasis on the character of the employee's job as a whole. Further, although the amount of time spent on exempt work can act as a guide, time is not conclusive. However, employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. 29 CFR § 541.700(b).

Section 541.102 is a non-exhaustive list that illustrates what type of activities constitutes "management." Your letter included job descriptions which stated that each position involved the primary duty of management of a recognized department or subdivision for more than 50% of the time in each case. The management duties included, but were not limited to, selecting and training other employees; setting work schedules; directing the work of others; evaluating worker productivity; handling complaints and grievances; disciplining employees; determining techniques, materials, and equipment to be used; and determining supplies, equipment and tools to be purchased. Each of the duties that you described is mentioned in the § 541.102 list. Therefore, so long as the employee's actual activities correspond with his or her job description, each position meets the primary duty requirement of management laid out in § 541.100(a)(2).

Next, § 541.100(a)(3) states that the employee must customarily and regularly direct the work of two or more employees. Again, you stated in your job description that the employees in the position of police lieutenant, police captain, and fire battalion chief regularly direct the work of at least two employees. Therefore, those positions meet the second part of the "executive" employee duties test.

The third duties requirement under the executive exemption is that the employee must have the authority to hire or fire other employees or have their suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees be given particular weight. 29 C.F.R. § 541.100(a)(4). In determining whether an employee's suggestions and recommendations are given "particular weight," factors such as whether it is part of the employee's job to make such recommendations, the frequency with which such recommendations are made or requested, the frequency with which the recommendations are relied upon, among others, are relevant. However, the regulations do not require the employee to have authority to make the ultimate decision and a higher level manager's recommendation may be given more importance. 29 C.F.R. §541.105. The questionnaires you provided stated that each employee's recommendation is given particular weight while others make the final decision regarding hiring, firing, advancement, or promotion of other employees (due to the civil service system). Thus, this requirement appears to be satisfied.

Accordingly, the duties described in your letter are sufficient to qualify the City's Police Lieutenants, Police Captains, and Fire Battalion Chiefs as exempt from the minimum wage and overtime provisions of the FLSA. Therefore, so long as the actual duties performed by these employees are consistent with those described, the referenced employees are exempt from these provisions of the FLSA.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the questions presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to a pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor. This opinion letter is issued as an official ruling of the Wage and Hour Division for purposes of the Portal-to-Portal Act, 29 U.S.C. 259. See 29 C.F.R. 790.17(d), 790.19; Hultgren v. County of Lancaster, Nebraska, 913 F.2d 498, 507 (8th Cir. 1990).

We trust that the above discussion is responsive to your inquiry.

Sincerely,

Alfred B. Robinson, Jr.
Deputy Administrator

Enclosures: 29 C.F.R. Part 541

*** Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. 552 (b)(7).**

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ABSHIRE v. COUNTY OF KERN

NO. 88-15154

908 F.2d 483 (1990)

Dan ABSHIRE, Dennis Carroll, Larry Frank, Bill Rickman, Tom Blackmon, Richard Pellerin, Billie McKenzie, Bob Temple, Barry Schulz, Jim Chapman, Bob Turner, and Steve McLemore, Plaintiffs-Appellants, v. COUNTY OF KERN, Defendant-Appellee.

United States Court of Appeals, Ninth Circuit.
Decided July 11, 1990.

Duane W. Reno, Davis, Reno & Courtney, San Francisco, Cal., for plaintiffs-appellants.

B.C. Barmann, County Counsel, Robert D. Woods, Chief Deputy — Litigation, County of Kern, Bakersfield, Cal., for the defendant-appellee.

Before TANG, REINHARDT and WIGGINS, Circuit Judges.

REINHARDT, Circuit Judge:

At issue in the instant appeal is whether employees whose pay is subject to deduction for absences of less than a day are paid "on a salary basis" according to the regulations implementing the Fair Labor Standards Act. We conclude that they are not, and that therefore such employees are not "bona fide executives" exempt from the protections of the Act.

Appellants, Battalion Chiefs in the Kern County Fire Department ("Department"), brought a class action against Kern County ("County") seeking back overtime pay plus interest allegedly due them under the overtime provisions of the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. § 201, *et. seq.* (1982), as amended, Pub.L. 99-150 (1985). The FLSA requires employers to provide overtime compensation for hours worked in excess of a prescribed work week. 29 U.S.C. § 207. Under the Act, however, "bona fide executives" are exempt from the FLSA's overtime provisions. 29 U.S.C. § 213(a)(1). After a bench trial, the district court ruled that the Battalion Chiefs are "bona fide executives" and are therefore not entitled to relief. The Battalion Chiefs appeal. We reverse.

The administrative regulations promulgated pursuant to the FLSA establish a "duties test" and a "salary test" for determining whether an employee is a "bona fide executive." *See* 29 C.F.R. § 541.1(a-e) (1988); 29 C.F.R. § 541.1(f) (1988). Generally, in order to claim an exemption, an employer must prove that the employee meets *both* tests. Here, the district court concluded that the Battalion Chiefs met both. In the alternative, the court ruled that the salary test does not apply to the Battalion Chiefs. It based this conclusion on a Department of Labor letter ruling which held that the salary test is inapplicable to persons covered by a state or local law that precludes payment of regular compensation to absent public employees. Because we find that the court erred both in concluding that the appellants met the salary test and in determining in the alternative that the salary test is inapplicable, we

[908 F.2d 485]

need not decide whether appellants satisfy the criteria set out in the duties test.

The essential facts are not in dispute. The County concedes that the Department is an employer subject to the FLSA and has been so since April 15, 1986. The ranks held by employees in the Department, and the number of employees in each rank, are as follows: Chief (1), Deputy Chief (4), Battalion Chief (28), Captain (171), Engineer (193), Firefighter (111), and Heavy Equipment Operator (6). The majority of employees who perform fire suppression duties are "56-hour fire duty" employees, whose work schedules commence

salaried professional employee may not be docked pay for fractions of a day of work missed." *Donovan v. Carls Drug Co., Inc.*, 703 F.2d 650, 652 (2nd Cir.1983). Subjecting an employee's pay to deductions for absences of less than a day, including absences as short as an hour, is completely antithetical to the concept of a salaried employee. A salaried employee is compensated not for the amount of time spent on the job, but rather for the general value of services performed. It is precisely because executives are thought not to punch a time clock that the salary test for "bona fide executives" requires that an employee's predetermined pay not be "subject to reduction because of variations in the ... quantity of work performed" — especially when hourly increments are at issue.

There is no dispute in this case that the pay of Kern County's Fire Battalion Chiefs is subject to reduction for absences of less than a day. A Battalion Chief who did not have accrued paid or compensatory leave in a given pay period would, under Kern County's rules, have his pay docked on an hourly basis for any time that he is tardy or absent from work. If a Battalion Chief took four hours of vacation or compensatory time off from work during a pay period but had only accrued three hours of vacation or compensatory time, his pay for that period would be reduced by one hour. This scheme of compensation simply does not comport with the requirements of section 541.118(a).

Our conclusion that appellants are not paid on a salary basis is supported by the overtime policy for Battalion Chiefs. Battalion Chiefs receive overtime pay or compensatory time off for every tenth of an hour which they work outside of their regularly scheduled hours of duty. Thus, when a Battalion Chief attends meetings within the fire department or stays past the scheduled end of his shift to continue fighting a fire or to fill out a report, he receives additional compensation. Compensatory time off is provided on an hour-by-hour basis; thus a Battalion Chief who works one hour of overtime will receive one hour of compensatory time off. Such additional compensation for extra hours worked is also not generally consistent with salaried status. *See Brock v. Claridge Hotel and*

Casino, 846 F.2d 180, 184-85 (3rd Cir.), *cert. denied sub nom. Claridge Hotel and Casino v. McLaughlin*, 488 U.S. 925, 109 S.Ct. 307, 102 L.Ed.2d 326 (1988); *Banks v. City of North Little Rock*, 708 F.Supp. 1023, 1024 (E.D.Ark.1988).[2]

The County argues that Battalion Chiefs are "salaried" even though their pay is admittedly subject to deductions for part days missed because no such deductions have ever actually been made. That fact, however, is both misleading and irrelevant. That Battalion Chiefs will generally accrue sufficient compensatory or leave time to avoid an actual reduction in their take-home pay does not change the fact that deductions from pay based on hourly attendance are explicitly provided for under the County's policy. The policy provides, in effect, that the deductions shall be made first from accrued compensatory or leave time and then from the employee's base pay. However, whether the employee's base pay is the first or second source for recoupment of monies paid for hours missed is of no significance for purposes of section 541.118(a). The dispositive factor is that under the County's policy, the employee's pay is at all times *"subject to"* deductions for tardiness or other occurrences. Either pay is fixed and immutable, and not subject to such deductions, or it is contingent. Battalion Chiefs' pay is contingent. Section 541.118(a) does not require that a deduction for an absence of less than a day *actually* have been made, but only that an employee's pay be *"subject to"* such a deduction.[3] That, it clearly is. In short, the deductions provided for by the County's policy meet the "subject to" standard and that is all that the regulations require.[4]

The County also argues that a January 15, 1986 Wage and Hour Division Letter Ruling supports its position that the Battalion Chiefs are "salaried" employees. A paragraph near the end of the letter ruling states:

> *Where an occasional deduction that is not permitted is made from the salary of an otherwise exempt employee, the exemption would be lost in that workweek when the deduction is made. However, if such deductions are regular and*

at 8:00 a.m. and conclude at 8:00 a.m. two days later, for a scheduled duration of 48 hours. These employees are scheduled to work 144 hours during each 18-day cycle. Of the 28 Battalion Chiefs: 21 are permanently assigned to particular battalions; three are assigned to provide relief duty for other Battalion Chiefs who are temporarily absent; and one is assigned to each of the following units — Training, Arson, Fire Prevention, and Hazardous Material Control. With the exception of the Battalion Chiefs assigned to Training, Arson, Fire Prevention, and Hazardous Material Control, all of the Battalion Chiefs are "56-hour fire duty" employees. The others are "40-hour safety" employees.

The district court found that Battalion Chiefs are paid an amount expressed and computed as a biweekly salary and that their pay exceeds $250.00 per week. The parties have stipulated that the pay of Battalion Chiefs is subject to a potential deduction for absences from work of less than a day's duration if the absence cannot be "covered" or paid as vacation, sick leave, or accrued compensatory time off. There does not appear to be any evidence that such a deduction has in fact ever been made. The parties have also stipulated that Battalion Chiefs are paid overtime "for each tenth of an hour that they work outside of their regularly scheduled work shifts." However, appellants are only paid their usual hourly rates rather than time and one-half for their attendance at training activities outside of their work shifts, and this is one of the parties' major points of contention. Finally, the County concedes that Department personnel who are not "bona fide executives" and who have work periods of 18 days must be paid at the rate of time and one-half for all hours worked in excess of 136 hours during any such work period.[1] The forty-hour employees who are not "bona fide executives" must, of course, be paid overtime after forty hours.

The principles governing our review are well established. Exemptions to FLSA are to be narrowly construed in order to further Congress' goal of providing broad federal employment protection. *Mitchell v. Lublin, McGaughy & Assoc.*, 358 U.S. 207, 211, 79 S.Ct. 260, 263, 3 L.Ed.2d 243 (1959); Employers who claim that an exemption applies to their employees not only have the burden of proof, *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97, 94 S.Ct. 2223, 2228-29, 41

L.Ed.2d 1 (1974), but they must show that the employees fit "plainly and unmistakenly within [the exemption's] terms." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 80 S.Ct. 453, 456, 4 L.Ed.2d 393 (1960). Moreover, since a determination of the Battalion Chief's salary status requires an application of the facts to the law, our standard of review is *de novo*. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714, 106 S.Ct. 1527, 1530, 89 L.Ed.2d 739 (1986).

As noted above, in order to be considered a "bona fide executive" exempt from the minimum wage provisions of the Fair Labor Standards Act ("FLSA"), an employee must be paid on a salary basis rather than on an hourly basis. In distinguishing these two methods of compensation, the regulations implementing the FLSA provide that:

> *An employee will be considered to be paid `on a salary basis' within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked.*

29 C.F.R. § 541.118(a) (emphasis added). In order to satisfy the salary test, an employee's pay cannot be *subject to* deductions for absences of less than a day. The Department of Labor has stated that "deductions from the salary of an otherwise exempt employee for absences of less than a day's duration for personal reasons, or for sickness or disability, would not be in accordance with sections 541.118(a)(2) and (3)." U.S. Department of Labor, Wage and Hour Division, Letter Ruling of January 15, 1986. The only court of appeals to have considered this question has also concluded that "[a]

recurring, we would question whether the employee is actually paid `on a salary basis' and the exemption may be denied in all workweeks in which it is claimed, including those weeks when no deductions are made. The County interprets this letter ruling as saying that whether or not employees' base pay is subject to deductions, the employees only lose their salary status for the specific weeks in which an employer actually makes a deduction not permitted by section 541.118 (a). The letter ruling responded to a request by certain counties for an opinion as to whether they were compensating their employees on a salary basis. The counties had a policy of reducing employees' pay for absences due to illness of less than a day but only when an employee had already exhausted all earned sick leave. Thus the policy presented precisely the same legal question as does the policy before us. The counties requesting the letter ruling asked specifically whether the deductions provided for in their policies could be made under the Department's regulations. The Deputy Administrator responded that they could not, and that an employee whose pay was reduced pursuant to those policies would not meet the criteria for a salaried employee exempt from the FLSA provisions. At the end of the letter ruling, after answering the counties' question in the negative, the Deputy Administrator added the ambiguous paragraph on which the County relies. Although the Deputy Administrator's statement that an occasional unpermitted deduction would not change an individual's overall salary status appears at first glance to provide some support for the County's view, the statement would make little sense if deemed applicable to an employer's general policy providing for unpermitted deductions as a matter of course. The purpose of the statement was quite to the contrary. It was to ensure that an employer is not permanently penalized for an inadvertent or unintentional deduction. Where there is an occasional deduction made because of an error on the part of a government entity or because of an individual decision by a supervisor, there is good reason to say that the affected employee's status will be changed only for the week in which the unpermitted deduction was made. Cf. § 541.118(a)(6) (where individual error made and corrected). But where an employer deliberately adopts a policy rendering employees' pay subject to deductions for unpermitted reasons, the frequency with which an employer is forced to apply that policy is irrelevant. If there is any cause to determine the frequency with which an employer makes unpermitted deductions, it is only to help in determining whether such a policy exists (causing the Department to question whether the employee is actually paid `on a salary basis'). Here there is no question that the County's policy provides for such deductions. To read the letter ruling differently would be to write the subject to language out of the Department's regulations. It is unlikely that the Deputy Administrator in a casual paragraph added after completing his answer to the counties' question — a paragraph that does not even mention the subject to provision — intended to make so drastic a change in the regulations. Nor, even if that were the Deputy Administrator's intention, could he have effectively done so, for an Administrator's letter ruling cannot override the express provisions of a Department of Labor regulation. For similar reasons, we reject any suggestion that subsection (6) of section 541.118(a) is applicable to the present case. The complete text of subsection 541.118(a)(6) provides: The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future. Once again, the thrust behind the regulations is to facilitate the determination whether an employer has a general policy of deducting for absences of less than a day or whether a deduction is made as a result of

inadvertence or error. The exception in subsection (6) is for an employer that makes a one-time improper deduction and then corrects its error. This provision is of no relevance in the case of an employer that, like the County of Kern, has adopted an express policy of deducting for part-day absences when an employee has no accrued leave, and has continued to adhere to such a policy. Finally, the County argues that even if appellants cannot be considered salaried under the regulations, the salary test is inapplicable to the Kern County Battalion Chiefs in light of Article XVI, section 6 of the California Constitution. In a January 9, 1987 Letter Ruling, the Wage and Hour Division announced that it would not apply the salary test to public employees where the public employer can show that a provision contained in the applicable state or local law in effect prior to April 15, 1986, prohibits payments to an employee for absence(s) ... which are not covered by available paid leave. The County contends that Article XVI, section 6, is such a provision. In ruling in the alternative that the salary test does not apply to the Battalion Chiefs, the district court apparently accepted this argument. It erred in doing so. Article XVI, section 6 of the California Constitution provides that the Legislature shall not have power to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever. There is neither any authority nor any logic to support a holding that a general constitutional provision like Article XVI, section 6, which on its face simply bars gifts of public funds, constitutes a requirement that a deduction be made from the compensation of any salaried public employee who takes an hour or so off from work. With the exception of the district court below, no court, state or federal, in the long history of Article XVI and its predecessors has drawn the conclusion that the California Constitution's prohibition against gifts of public funds mandates the reduction of state employees' pay for absences from work. The unique suggestion that the California Constitution precludes the state from paying any state employee, including the Governor, a full salary without making deductions for an extra long lunch hour or time off during work to get a haircut, is simply untenable. In fact, the California Constitution's prohibition against gifts of public funds is designed to ensure that public monies are expended for public, rather than private, purposes. Numerous California cases interpreting this provision have held that, where money is spent for a public purpose, the appropriation is not a gift even though private persons are benefited by the expenditure. Los Angeles County v. La Fuente, 20 Cal.2d 870, 877, 129 P.2d 378, 382 (1942), cert. denied, 317 U.S. 698, 63 S.Ct. 441, 87 L.Ed. 558 (1943). In the case before us, not only is the purpose public, but also the benefited employees. California courts have repeatedly recognized that the payment of salaries and employment benefits to government employees in order to remain competitive in the labor market with private companies constitutes a legitimate public purpose. See, e.g., San Joaquin County Employee's Association, Inc. v. County of San Joaquin, 39 Cal.App.3d 83, 86, 113 Cal.Rptr. 912, 914 (1974); Jarvis v. Cory, 28 Cal.3d 562, 578 n. 10, 170 Cal.Rptr. 11, 21 n. 10, 620 P.2d 598, 607 n. 10 (1980) (en banc). Nothing in private or public employment law suggests that a bona fide executive must punch a time clock, nor that he must suffer a pay-deduction if he is late for work or occasionally uses a small portion of his time to take care of personal necessities, and we see no reason to construe Article XVI, section 6 of the California Constitution as proclaiming so odd a policy. The January 1987 letter ruling is therefore not a reason to hold that the salary test does not apply to the Kern County Battalion Chiefs. For the above reasons, we hold that the appellants are not salaried within the meaning of section 541.118(a) and thus are not bona fide executives exempt from the provisions of the FLSA. REVERSED AND REMANDED. FootNotes 1. The Department has elected to avail itself of the provisions of 29 U.S.C. § 207(k), which deals specifically with the calculation of maximum hours for firefighters and police, by declaring an 18-day work week for its fire protection personnel. Subsection 207(k) provides: (k) Employment by public agency engaged in fire protection or law enforcement

activities No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if — (1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or (2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days, compensation at a rate not less than one and one-half times the regular rate at which he is employed. 2. Although the salary status of Deputy Chiefs and the Fire Chief is not at issue in this case, the emphasis on hours worked for Battalion Chiefs is even more apparent when the treatment of Battalion Chiefs is contrasted with the treatment of Deputy Chiefs (and the Fire Chief). Deputy Chiefs are not required to report absences of a short duration and thus will not have such absences charged against accrued leave time or deducted from their salary. Similarly, their salary is not subject to deduction for tardiness. Nor do Deputy Chiefs receive overtime pay or even compensatory time off for hours worked beyond their normal work hours. Thus, if a Deputy Chief worked beyond his regularly scheduled hours to fill out a report, he would not receive extra time off. Only under special circumstances might he receive compensatory time — for example, if a large fire required his presence outside of his normal work hours; even in such an instance, however, the compensatory time would be measured loosely, not balanced hour-by-hour. 3. In fact, a strong argument can be made that even if deductions were required only from fringe benefits such as leave time, and not from base pay, the affected employees would still not qualify as salaried. However, we need not decide that question here. 4. Although no circuit courts have yet faced the question, a majority of district courts that have addressed it have held that employees whose pay is subject to reduction for such absences are not salaried, even if no deductions have actually been made. See, Banks, 708 F.Supp. at 1025 (no showing of actual deductions is needed); Hawks v. City of Newport News, Virginia, 707 F.Supp. 212, 215 (E.D.Va.1988) ([I]t is the defendant's policy which is under attack in a suit brought under the FLSA. The fact that the policy has not been applied to a particular group of employees does not alter the policy itself.); Persons v. City of Gresham, Oregon, 704 F.Supp. 191, 194 (D.Or.1988) (that employees did not allege any instance in which county had reduced pay of employee who had no accrued leave for an absence of less than a day did not alter the fact that their pay was subject to such deductions); D'Camera v. District of Columbia, 693 F.Supp. 1208, 1212 (D.D.C.1988) ([T]he test under 29 C.F.R. § 541.118(a) is whether a sergeant's paycheck is `subject to reduction,' not the frequency with which a sergeant's pay is so reduced.); Knecht v. City of Redwood, 683 F.Supp. 1307 (N.D.Cal.1987) (That no Fire Captain has actually had his pay reduced as a result of a short-term absence since April 15, 1986 does not alter the undisputed fact that Fire Captains' pay checks are `subject to reduction' for such absences.); but see Harris v. District of Columbia, 709 F.Supp. 238, 241 (D.D.C.1989) (declining plaintiffs' invitation to declare them eligible for overtime compensation at this stage of the proceeding because, since no unauthorized deduction has actually been made, the court is unable to analyze the facts and circumstances surrounding such a deduction). Comment Name Email Comment Your Comments on this Decision 1000 Characters Remaining Leagle.com reserves the right to edit or remove comments but is under no obligation to do so, or to