# NYSPELRA Newsletter: May 2008

## THE EFFECT OF LONGEVITY PAY ON OVERTIME CALCULATIONS

This article has been written by NYSPELRA member Kenneth A. Rosenberg, Esq., an associate with Fox Rothschild LLP; 75 Eisenhower Parkway; Roseland, NJ 07068. He can be reached at krosenberg@foxrothchild,com or 973/994-7510. The firm's Labor and Employment Department represents public and private sector employers in various labor relations matters including contract negotiations, interests and grievance arbitrations, disciplinary hearings, unionization campaigns, unit clarification petitions, and improper practice proceedings. The views and conclusions expressed are those of the author.

Complying with the federal Fair Labor Standards Act (FLSA), 29 U.S.C. §201 et seq. , is often a difficult challenge for many employers. This is particularly true for public employers who often are confronted with the issue of whether to include longevity pay in base pay for the purpose of calculating overtime because neither the FLSA nor its implementing regulations specifically address this issue. As such, public employers have had to examine several sources including, but not limited to, the U.S. Department of Labor's (DOL) advisory opinions and existing case law which interpret the FLSA and its regulations for guidance on this issue.

In general, the FLSA requires employers to compensate their employees who work more than 40 hours per week at a rate "one and one-half times the regular rate of pay." 29 U.S.C. §207(a). The term "regular rate of pay" is defined to include "all remuneration for employment paid to, or on behalf of, the employee, except for payments specifically excluded by the statute and regulations. 29 U.S.C. §207(e). This provision has been interpreted as including non-discretionary bonuses. See 29 CFR §§778.208-778.211 and Walling v. Harnischfeger, 325 U.S. 427 (1944). Hence, it is imperative for public employers to correctly determine whether longevity payments are discretionary or non-discretionary payments when calculating an employee's regular rate in order to avoid the FLSA's stiff penalties.

According to the DOL regulations, a bonus is deemed discretionary if the employer retains discretion both as to the fact of payment and the amount of the payment. 29 C.F.R. §778.211(b). In order to be excluded, the amount must be determined by the employer without prior contract, agreement or promise. 29 CFR §778.211(c). The DOL and courts have interpreted this regulation as requiring longevity payments to be included in the "regular rate" where they are made pursuant to a municipal ordinance or a collective bargaining agreement. August 26, 1986 advisory opinion of the U.S. Dept. of Labor, Wage and Hour Division; Featsent v. City of Youngstown, 70 F.3d 900 (6th Cir. 1995); and Local 359 v. City of Gary, 1995 U.S.Dist. LEXIS 21729 (N.D. Ind. 1995).

However, confusion often arises where the bonus or extra payment is made in exchange for collectively bargained wage concessions because they may fall within the "other similar payments" exclusion to the regular rate of pay rule. The DOL has opined that a one-time, lump-sum payment to employees negotiated by an employer and a union was excludable from the regular rate of pay pursuant to §207(e)(2) of the FLSA. October 15, 1981 advisory opinion, U. S. Dept. of Labor, Wage and Hour Division, reviewing a payment made in exchange for a union's agreement to forego a cost-of-living allowance and settle a strike. Although the DOL characterized the issue as a "close question," it excluded the payment because it was made unconditionally to employees on the payroll as of the date of the contract ratification, and the payments were not related to the quality or quantity of the employees' past or future services.

But see Admin. Ltr. Rul.: Dept. of Labor, Wage and Hour Div. (April 21, 1986), where the DOL later equivocated on the issue of whether the same exclusion would apply to periodic lump-sum payments made in exchange for wage increases where the employee had to remain on the payroll to receive the future bonus payment.

Fortunately, the court in Minizza v. Stone Container Corp., 842 F.2d 1456 (3rd Cir.), cert. denied 488 U.S. 909 (1988) resolved this issue. There, the court held that lump sum payments made to employees based on the duration of their employment and pursuant to a labor contract does not have to be included in the calculation of the "regular rate" for overtime purposes and were excludable from the regular rate of pay as "other similar payments" because the lump sum payments were an inducement for ratification of the contract, were negotiated as a "trade-off" for wage increases, and were unrelated to hours of employment. Id. at 1462-1463; see also Moreau v. Klevenhagen, 956 F.2d 516, 521 (5th Cir. 1992) (longevity pay in the nature of a gift for years of tenure is not part of the "regular rate" of pay for computing overtime). Hence, the court concluded that the payment was discretionary and thus excludable.

As such, it is evident that whether longevity payments must be included in the "regular rate" for overtime purposes depends on whether the payments are considered compensation for hours worked or services rendered. Such a determination depends upon whether the longevity payments are construed as a gift, such as a discretionary bonus or reward for service, or as a fixed amount given pursuant to public policy or collective bargaining agreement. Longevity payments that are not in lieu of other wage increases or are not made as an inducement to ratify the agreement, will likely be construed as a "fringe benefit" based on years of service. Such payments are more akin to the longevity payments found in Featsent than the lump-sum payments made in Minizza and thus must be included in the regular rate.

Since a public employer's failure to correctly interpret the rules established by the DOL and the courts can result in it violating the FLSA (which many employers have recently learned carry stiff penalties as a result of lawsuits brought by employees alleging FLSA violations), it is important for public employers to pay close attention as to how they are treating longevity payments when calculating an employee's regular rate for the purpose of calculating overtime. Of course, if an employer is uncertain as to whether longevity payments should be included in the regular rate of pay for calculations of FLSA overtime, it should consult with counsel for guidance.

**PERB DECISIONS**

These decisions have been issued by the Public Employment Relations Board or its staff. Any summary that might be of interest should be reviewed as to the facts and circumstances of the case to assure the decision might be applicable to circumstances in which you may have an interest. In addition, any decision should be researched to ascertain its subsequent disposition, if in fact an appeal to the Board was made, and, if it was, further researched to determine if a court appeal followed. Email your editor John Galligan at galli14@earthlink.net for a copy of any decision summarized. Use the PERB web site (www.perb.state.ny.us) where summaries of recent decisions appear and the agency's forms can be downloaded.

• in order for a union to establish a prima fascie case of employer retaliation against an employee for having engaged in activity protected by the Taylor Law, there must be proof that 1) employee was engaged in protected activity, 2) those responsible for the employer's conduct knew of that activity, and 3) they acted because of it. July 2 ALJ decision in Westchester County;

• the applicable test for establishing a binding past practice was set forth by the Board in Nassau County, 24 PERB ¶3029 (1991). What was required was a showing that an alleged practice was

unequivocal and was continued on uninterrupted basis for a period of time sufficient to create a reasonable expectation among bargaining unit employees that the practice would con-tinue. A "reasonable expectation" is driven by the extent to which current employees and/or their representatives had actual or constructive knowledge of the benefit. Since that time, there have been Board decisions on this issue which have utilized language that varied from the standards set forth in Nassau County. Such variations can only be characterized as inadvertent. Decisions requiring knowledge or acquiescence by either the CEO of a public employer or its legislative body are overruled. July 25 Board decision in Chenango Forks CSD; and

• if an enforceable past practice existed regarding a mandatory subject of negotiation, a public employer would violate the Taylor Law by discontinuing the practice with respect to bargaining unit members, even if the practice relates to a benefit to be provided upon retirement. July 25 Board decision in Chenango Forks CSD.