May 6, 1994

OPINION NO. 94-024

The Honorable Gregory A. White
Lorain County Prosecuting Attorney
226 Middle Avenue, 4th Floor
Elyria, Ohio 44035

Dear Prosecutor White:

You have requested an opinion on the following questions:

1. May a township pay an employee for overtime hours accumulated over several years, when there has been no formal policy adopted by resolution concerning the accumulation of overtime from year to year?

2. If you find that payment is allowable, would it be mandatory upon the township?

3. If payment is allowable would a sworn affidavit from the employee stating he performed a certain number of hours, but does not detail the specifics of the work performed, be sufficient documentation to support payment [?]

Statutory Scheme Governing Overtime Compensation

Pursuant to R.C. 4111.03(A): "An employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's wage rate for hours worked in excess of forty hours in one work week, in the manner and methods provided in and subject to the exemptions of section 13 of the _Federal Fair Labor Standards Act of 1938,_ 52 Stat. 1060, 29 U.S.C. 207, 213, as amended." Thus, R.C. 4111.03(A) imposes a mandatory duty upon an employer to compensate an employee at the specified rate for hours worked in excess of forty in a single workweek, in accordance with 29 U.S.C. §§207 and 213 (1988 & Supp. IV 1992). *See generally Dorrian v. Scioto Conservancy District*, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (the use of the word "shall" in a statute indicates the mandatory nature of the duty imposed).

Further responsibilities are imposed upon employers by R.C. 4111.08, which states in part:

> Every employer subject to [R.C. 4111.01-.17], or of any regulation issued thereunder, *shall make and keep for a period of not less than three years a record* of

> the name, address, and occupation of each of his employees, the rate of pay and the amount paid each pay period to each employee, *the hours worked each day and each work week by the employee*, and other information as the director of industrial relations prescribes by regulations as necessary or appropriate for the enforcement of [R.C. 4111.01-.17], or of the regulations thereunder. (Emphasis added.)

Employers and Employees Subject to R.C. 4111.03

As used in R.C. 4111.03, the word "employer" includes the state's political subdivisions and their instrumentalities. R.C. 4111.01(D). Because a township is a political subdivision of the state, a township is an "employer" for purposes of R.C. 4111.03(A) and is subject to the requirements of that statute.

R.C. 4111.01(E) defines the term "[e]mployee," for purposes of R.C. 4111.03, as meaning generally "any individual employed by an employer." R.C. 4111.01(E) excludes eight types of employees from the definition of "employee." The question of whether a particular individual fits within one of the exclusions is a question of fact dependent upon the nature of the duties involved in that position. 1980 Op. Att'y Gen. No. 80-061. Further, an employer has the burden of proving that a particular individual is excluded from coverage under R.C. 4111.03; any such exemption will be narrowly construed against the employer. *See Graham v. Harbour*, 20 Ohio App. 3d 293, 486 N.E.2d 184 (Franklin County 1984). For purposes of discussion, however, this opinion will assume that the employee about whom you ask is an "employee," as defined in R.C. 4111.01(E), for purposes of R.C. 4111.03.

Obligation of Township to Pay Overtime Compensation

Your first questions asks whether a township may pay an employee for overtime hours accumulated over several years, when there has been no formal policy adopted by resolution concerning the accumulation of overtime from year to year. Whether or not a township has adopted a formal policy concerning the accumulation of overtime by township employees, R.C. 4111.03 imposes a mandatory duty upon the township to pay a township employee "for overtime at a wage rate of one and one-half times the employee's wage rate for hours worked in excess of forty hours in one work week, in the manner and methods provided in and subject to the exemptions of [29 U.S.C. §§207 and 213]."

Concerning an employer's obligation to pay an employee for overtime hours worked, R.C. 4111.10 states:

> (A) *Any employer who pays any employee less than wages to which the employee is entitled under [R.C. 4111.01-.17], is liable to the employee affected for the full amount of the wage rate*, less any amount actually paid to the employee by the employer, and for costs and reasonable attorney's fees as may be allowed by the court. Any agreement between the employee and the employer to work for less than the wage rate is no defense to an action.

> (B) At the written request of any employee paid less than the wages to which he is entitled under [R.C. 4111.01-.17], the director of industrial relations may take an assignment of a wage claim in trust for the assigning employee and may bring any legal action necessary to collect the claim. The employer shall pay the costs and reasonable attorney's fees allowed by the court. (Emphasis added.)

It is clear, therefore, in answer to your first two questions, that if a township has not paid a township employee in accordance with R.C. 4111.03 for overtime hours worked, R.C. 4111.10(A) imposes full liability upon the township to make such payment, irrespective of whether there exists a formal township policy governing the accumulation of overtime.

Proof of Claim for Overtime Compensation under R.C. 4111.03

Your final question asks: "If payment is allowable would a sworn affidavit from the employee stating he performed a certain number of hours, but does not detail the specifics of the work performed, be sufficient documentation to support payment"? The type of documentation needed to establish an employee's claim for overtime compensation is not addressed in R.C. 4111.03. R.C. 4111.08, however, requires each employer to "make and keep for a period of not less than three years a record of ... the hours worked each day and each work week by [each] employee." Reference to such records would, therefore, appear to document the number of hours for which overtime compensation must be paid.

Should the records required by R.C. 4111.08 be unavailable, the amount of overtime compensation for which an employee is entitled to be paid under R.C. 4111.03 may be established by other means. In *Eads v. Axle Surgeons, Inc*, 42 Ohio App. 3d 24, 536 N.E.2d 387 (Sandusky County 1987), the court set forth the following standard of proof in assessing claims for overtime compensation under R.C. 4111.03, using the standard of proof applicable to claims made under 29 U.S.C. §207:

> "* * * [A]n employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate. * * *"

Id. at 27-28, 536 N.E.2d at 390 (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1945)). Based upon this standard, an employee's affidavit may be sufficient documentation to establish the overtime compensation to which he is entitled, provided the affidavit raises a just and reasonable inference as to such sum and the employer's evidence to the contrary, assuming there is any, fails to negate the reasonableness of the inferences drawn from the evidence presented by the employee.

Conclusion

Based on the foregoing, it is my opinion, and you are hereby advised that:

1.R.C. 4111.03 imposes upon each employer, as defined in R.C. 4111.01(D), including a township, a mandatory duty to pay its employees, as defined in R.C. 4111.01(E), for overtime at a wage rate of one and one-half times the employee's wage rate for hours worked in excess of forty hours in one workweek, in the manner and methods provided in and subject to the exemptions of 29 U.S.C. §§207 and 213 (1988 and Supp. IV 1992).

2.In order to establish a claim for overtime compensation under R.C. 4111.03, a township employee has the burden of proving that he did, in fact, perform work for the township for which he was not properly compensated under the statute and the amount and extent of such work as "a matter of just and reasonable inference." The burden of proof then shifts to the township, as the employer, to present evidence as to the precise amount of work performed, or to negate the reasonableness of the inferences to be drawn from the evidence presented by the employee.

Respectfully,

LEE FISHER
Attorney General

May 6, 1994

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SYLLABUS: 94-024

1. R.C. 4111.03 imposes upon each employer, as defined in R.C. 4111.01(D), including a township, a mandatory duty to pay its employees, as defined in R.C. 4111.01(E), for overtime at a wage rate of one and one-half times the employee's wage rate for hours worked in excess of forty hours in one workweek, in the manner and methods provided in and subject to the exemptions of 29 U.S.C. §§207 and 213 (1988 and Supp. IV 1992).

2. In order to establish a claim for overtime compensation under R.C. 4111.03, a township employee has the burden of proving that he did, in fact, perform work for the township for which he was not properly compensated under the statute and the amount and extent of such work as "a matter of just and reasonable inference." The burden of proof then shifts to the township, as the employer, to present evidence as to the precise amount of work performed, or to negate the reasonableness of the inferences to be drawn from the evidence presented by the employee.