

**TOWN OF EAST WINDSOR
BOARD OF SELECTMEN
11 RYE STREET
BROAD BROOK, CT 06016
First Selectman's Office - (860) 623-8122**

Regular Meeting Minutes

Tuesday, December 2, 2014 at 7:00 p.m.

BOARD MEMBERS

Denise Menard – First Selectman

Dale A. Nelson – Selectman

Jason E. Bowsza – Deputy First Selectman

James C. Richards – Selectman

Steve Dearborn – Selectman

These minutes are not official until approved at a subsequent meeting.

1. CALL TO ORDER

First Selectman Denise Menard called the Regular Meeting to Order at 7:02 p.m. at Town Hall.

2. ATTENDANCE

Present:

Denise Menard, First Selectman

Jason E. Bowsza, Deputy First Selectman

Steve Dearborn, Selectman

Dale A. Nelson, Selectman

James C. Richards, Selectman

3. ADDED AGENDA ITEMS

No added agenda items.

4. APPROVAL OF MINUTES

Regular Meeting Minutes of November 18, 2014

MOTION was made (Nelson) and **SECONDED** (Richards) that the Board of Selectmen approve the Special Meeting Minutes of November 18, 2014.

In Favor: Bowsza, Dearborn, Nelson, Richards. Opposed - None.

5. COMMUNICATIONS

None.

6. SELECTMEN'S REPORTS

A. Denise Menard

First Selectman Menard read her report - hereto attached as Attachment A.

B. Jason E. Bowsza

Deputy First Selectman Bowsza read his report - hereto attached as Attachment B.

C. Steve Dearborn

Selectman Dearborn reported on the following items:

- He attended a Zoning Board of Appeals meeting. It was a short meeting because the applicant withdrew his application because he wanted to re-do it.
- He walked through Broad Brook Elementary School to look at Modular Classrooms. He understands the need for more rooms. However, he said that as far as he could tell, the modular classrooms were in good condition and it seemed as though the only issue was with the bathroom. He suggests waiting a few years until there is enough money in the budget to build a “brick and mortar” addition onto the school rather than investing money into modular classrooms.

D. Dale A. Nelson

Selectman Nelson reported on the following items:

- She attended the Building Committee and Board of Education combined Meeting and said that it was very interesting.
- She said the same day that the Police Department “Stuff-A-Cruiser” Event took place, the Book Club celebrated its one year anniversary and local writers attended the event. She said that it was nice to see how well the Book Club was doing and all the support the owner received.

E. James C. Richards

Selectman Richards reported on the following items:

- Mr. Richards said that Former First Selectman Bob Watts had been of great guidance to him and the Town of East Windsor. He also mentioned that the first political involvement he had was serving on the Water Pollution Control Authority Board and it was because Bob Watts came to him and asked him to serve. Richards said that he was truly sorrowed by the passing of Bob Watts.

7. PUBLIC PARTICIPATION

None.

8. BOARD AND COMMISSIONS APPOINTMENTS

Resignations:

None

Re-Appointments:

MOTION was made (Bowsza) and **SECONDED** (Richards) to reappoint James Stremper to serve until December 1, 2017 on the Agricultural Commission as a regular member.

In Favor: J. Bowsza, S. Dearborn, D. Nelson, and J Richards. Opposed – None.

New Appointments:

MOTION was made (Nelson) and **SECONDED** (Richards) to appoint Elizabeth Burns to serve until December 31, 2016 on the Elderly Commission as an alternate member.

In Favor: J. Bowsza, S. Dearborn, D. Nelson, and J Richards. Opposed – None.

MOTION was made (Richards) and **SECONDED** (Bowsza) to appoint Michael Kowalski to serve until October 1, 2016 on the Planning and Zoning Commission as an alternate member.

In Favor: J. Bowsza, S. Dearborn, D. Nelson, and J Richards. Opposed – None.

MOTION made (Nelson) and **SECONDED** (Bowsza) to take Agenda Item 9B regarding the Schank Road Property out of order.

In Favor: J. Bowsza, S. Dearborn, D. Nelson, and J Richards. Opposed – None

9. UNFINISHED BUSINESS

B. Schank Road Property – Decision regarding ownership of West River Farms open space.

Jay Ussery of JR Russo explained why he thought the property would be beneficial to the Town of East Windsor. Selectman Dearborn asked if the developer would put an access road in before the Town potentially owned the open space. Mr. Ussery replied that it would be paid for and installed prior to East Windsor potentially owning the land. Selectman Bowsza inquired about the assessed value of the land. Mr. Ussery estimated the assessed value to be about \$4,000-\$5,000 an acre for a total of \$100,000. Selectman Nelson asked if the access ways were only in East Windsor. Mr. Ussery explained that the only access to the property was located in East Windsor but that the property continued into South Windsor. Selectman Richards expressed a concern as to whether or not East Windsor would be able to access the property if another town owned it. First Selectman Menard stated that she felt there would be access whether it was owned by East Windsor, South Windsor, or the State. Mr. Ussery asked the Selectman to be polled on whether or not the land be dedicated to the Town of East Windsor. Selectmen Dearborn and Richards were in favor. First Selectman Menard, Selectman Bowsza, and Selectman Nelson felt as though owning the land would not be an advantage to the Town of East Windsor.

A. Discussion of Part-time Paid Firefighters

First Selectman Menard met with Assistant Chief Gerry Bancroft, Volunteer Incentive Chairman Ron Masters, and Chief Jim Barton regarding the legal opinion hereto attached as Attachment C.

Chairman Ron Masters said that he and the firefighters reviewed the opinion letter from Town Attorney Joshua Hawks-Ladd and they decided to remove “part-time” from the incentive program because it will affect the status of the volunteer firefighters. Chief Barton said that there are fire departments in the area that have volunteers and paid employees working the same shift and that he will contact those departments to find out what some of their policies are and how they were able to make that legally work. The Incentive Committee informed the Board that they will come up with a new proposal for the incentive program and present it to the Board at the next Board of Selectmen meeting. The new incentive program will include the job description, their budget, requirements for the job, and preferred skills.

10. NEW BUSINESS

A. To recommend to Town Meeting replacement of dispatch console for the Police Department

MOTION made and **SECONDED** (Richards) to recommend to Town Meeting the purchase of the Motorola system not to exceed \$242,000 for the first year; payment of the unit would come from a supplement appropriation from the Fund Balance. In Favor: J. Bowsza, S. Dearborn, D. Nelson, and J Richards. Opposed - None.

B. Discussion of \$10,000 budgeted for an Economic Development Consultant

The Economic Development Commission has \$10,000 budgeted for an Economic Development Consultant. There was discussion about what requirements the applicants needed to possess in order to submit a proposal for consideration such as experience in marketing technologies. The Board of Selectman recommend the following changes to the Request For Proposal (RFP): under #5, Desired Scope of Work on page 1 of the RFP should be more specifically defined. On Page 1 in the first sentence where it says "Economic Development Commission," it should read "Town of East Windsor". First Selectmen Menard proposed to meet with Town Planner Laurie Whitten with the recommended changes and have the Request for Proposal completed by the next meeting for the Board of Selectmen to review so that it can be posted on the Town's website as soon as possible. Selectman Dearborn requested that the Board of Selectmen be more involved in this matter. He would like to see the Top 5 proposals that come into the Town for this position. First Selectman Menard agreed to bring the Top 5 proposals for the Board of Selectmen for consideration.

C. Senior Property Tax System

First Selectman Menard did not meet with the Tax Collector to discuss this matter. Discussion of Senior Property Tax System is postponed until next meeting.

D. Approval of Board of Selectmen Meeting Dates for 2015

MOTION made (Bowsza) and **SECONDED** (Richards) to adopt meeting dates as presented with the exception of November 3, 2015. November 3, 2015 meeting is cancelled because it is Election Day.

In Favor: J. Bowsza, S. Dearborn, D. Nelson, and J. Richards. Opposed - None.

E. Update regarding Property Maintenance and Zoning Clean-up

Building Official Rand Stanley and Assistant Town Planner Robin Newton put this information together to update the Board of Selectmen on this matter. Selectman Richards asked if the Board could have an update on the progress every 6 months. First Selectman Denise Menard said that was definitely possible.

F. Approval of Tax Refunds

MOTION was made (Nelson) and **SECONDED** (Richards) to approve tax refunds dated 11/26/2014 in the amount of \$464.67.

In Favor: J. Bowsza, S. Dearborn, D. Nelson, and J Richards. Opposed - None.

11. EXECUTIVE SESSION

MOTION was made (Bowsza) and **SECONDED** (Richards) to go into Executive Session at 8:40 p.m.

In Favor: J. Bowsza, S. Dearborn, D. Nelson, and J Richards. Opposed - None.

The Board came out of Executive Session at 9:32 p.m.

12. ADJOURNMENT

MOTION to adjourn made (Nelson) and **SECONDED** (Dearborn). Unanimous. The meeting was adjourned at 9:36 p.m.

Respectfully Submitted,

A handwritten signature in cursive script that reads "Amanda Schroll".

Amanda Schroll
Recording Secretary

December 2, 2014

My report to the Board of Selectmen

I hope you all had a great Thanksgiving. I am beginning my report with some sad news, former First Selectman Bob Watts passed away last night. I have no information on the arrangements but will let you know when I hear what they are.

The budget process had begun with CIP projects submitted and ready for review by the Capital Improvement Planning Committee next Monday. Jennifer and I also have begun working on the process for the 2015-2016 budget.

The Police Department organized and volunteered their time on Saturday to "Stuff A Cruiser" with children's toys for the Human Services Department's holiday program. They were in front of Walmart from 9-3. It was a wonderful display of the great Police Officers we have and also great that they put the event together to help another Town department. Thank you to our Police Officers for their generosity.

Congratulations to the Broad Brook Fire Department. Through the efforts of Firefighters Gerry Bancroft and Nick Macsata, the Department was approved for a Volunteer Workforce Solutions Program grant. The focus of the program is to provide significant assistance with recruiting and retaining volunteers for the Fire Department.

Wreaths Across America will be celebrated at noon on December 13 at the Veterans' Cemetery. It is a great ceremony that you are all invited to attend.

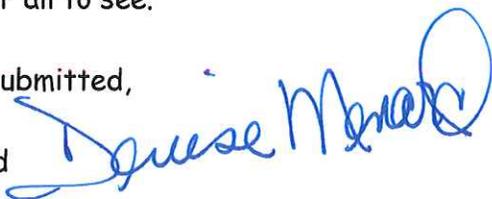
I met with the Director of the Housing Authority to assist with a possible Small Cities Block Grant application for updating of their fire alarm system, sidewalks and a generator in the coming round of Small Cities grants.

As a member of CCM's Board of Directors, I participated in a meeting to discuss the potential cuts that may be needed to address the State's projected deficit. The Board of Directors agreed that CCM will advocate for reductions in funding towns were supposed to receive from the State this year but were not relied on as part of the towns' budgets. Those opportunities are minimal and some examples that were discussed by some of the towns would not affect East Windsor. We may have one such grant that we were discussing how to use but will hold off committing on anything until we also will be asking (as we have as long as I've been involved) that the State eliminate any unfunded mandates they can and not create any new unfunded mandates going forward. I will let you know as I hear more detail on the deficit and its impact on East Windsor.

Finally, please check out the map of the Route 5 corridor that the Planner has displayed in the hallway across from the Building and Town Clerk's offices. There will be a targeted study of the corridor as part of the Plan of Conservation and Development update and the Planner thought it would be a helpful visual of the area for all to see.

Respectfully submitted,

Denise Menard



Attachment B

Selectmen's Report - December 2, 2014

The Pension Board met on 11/19. The board adopted an amendment to the investment policy to allow for investment in international and emerging markets.

The Building committee/BOE met jointly on 11/24. Discussion topics included the extensive project cost overruns on the modular replacement project at BBES, and the nursing station upgrades at the .

Points of contention arose around the number of classrooms, specifically whether 10 classrooms with dividers satisfies the referendum requirement of 14 classrooms, site plan requirements, to say nothing of the lack of additional space to accommodate the special education equipment storage needs currently kept in hallways throughout the building.

Regarding the renovation of the nurses office at the EWMS, another update will be forthcoming in the near future.

The Ag Commission met on 11/24. They established their 2015 meeting dates. Members have also performed outreach to 2014 community garden participants to solicit feedback and secure 2015 participants. There were 11 participants this year, which is an increase from the year before.

The Ag Commission has also transmitted their recommendations for the leasing/renting of town owned agricultural land to the selectmen's office for future consideration.

The Conservation Commission met on 11/24. They will be meeting on the 4th Wednesdays at 6:30pm in 2015. They discussed the town inventory of properties.

**PULLMAN
& COMLEY LLC
ATTORNEYS**

Attachment C

Joshua A. Hawks-Ladds
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Hartford, CT 06103-3702
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jhawks-ladds@pullcom.com
www.pullcom.com

November 26, 2014

First Selectman Denise Menard
Town of East Windsor
Town Hall
11 Rye Street, P.O. Box 213
Broad Brook, CT 06016

Re: Volunteer Firefighter Incentive Program

Dear Denise:

I am writing in response to your request for a legal opinion regarding the Town of East Windsor's volunteer firefighters' request that the Town consider an incentive program that would pay volunteer firefighters certain stipends and other payments. I have reviewed the proposed Volunteer Firefighter Incentive Program provided by the Firefighter Volunteer Incentive Committee chairman, as well as your e-mail to me of November 18, 2014 in which you request that I answer certain questions.

I therefore provide the following legal opinion relating to the legal impact of the proposed Volunteer Firefighter Incentive Program (the "Program").

History of the Program

Based on my communications with you, it is my understanding that the Town agreed to allot some funds toward the hiring of part-time paid firefighters in order to provide daytime relief to the volunteer firefighters. The intent was to hire paid firefighters who were not currently volunteer firefighters working on behalf of the Town. The Program was proposed to the Board of Selectmen in furtherance of that intent.

The proposed Program provides for the following payments:

- Annual compensation to be paid on a quarterly basis to the fire chief, assistant fire chief, deputy fire chief, all fire captains and all fire lieutenants. The stipends range from \$500 to \$1,500 per person per quarter.
- Payment to all personnel of \$12 per emergency call and \$12 per hour for each emergency stand-in.
- Payments of "incentives" to firefighters, EMRs, fire instructors and EMTs for training courses. It is unclear to me whether that means that the individuals would receive a

First Selectman Denise Menard

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stipend for providing the training or that they are receiving a stipend for attending the training. That requires clarification.

- Compensating personnel for attending all other training courses and training sessions at \$50 per half day and \$100 per full day upon submission of proof of attendance.
- Payment of a daily stipend to all fire personnel in the amount of \$144 per day. The proposal states that "fire personnel will be paid this daily stipend for facility, apparatus, and fire equipment maintenance."

The proposed Program also provides various descriptions regarding the duties and assignments for all fire personnel and that all benefits would carry over from one East Windsor fire department to the other if a firefighter transfers between departments.

The proposed Program does not differentiate between paid firefighters and volunteers and I cannot determine from the proposal whether it was intended to so differentiate. The Program appears to intend to provide payments for the current volunteer firefighters as opposed to creating a part-time paid firefighting force; but, that is difficult to discern from the document. The Program does not discuss the hiring of any new paid firefighters.

Your Specific Questions

You asked me to respond to the following questions relating to the proposed Program:

- (1) Under the Program, volunteer firefighters receive a stipend with taxes taken out of the stipend, yet are intended to remain volunteers. Can volunteers that sign up for a four to eight hour daytime shift with assigned duties also be considered volunteers?
- (2) What differentiates a part-time firefighter "employee" from a part-time firefighter "volunteer" if they get paid a stipend?
- (3) If a part-time firefighter signs up and works a four or eight hour shift in the day and gets paid a stipend as described in Section D of the Program, can they also receive the "emergency call" stipend stated in Section B for responding to a call that same evening or does it turn into an overtime problem?
- (4) Finally, you asked me to comment on the impact of classifying the firefighters as "per diem," which I understand to mean that they are considered part-time employees of the Town.

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My explanation of the legal issues presented, responses to your questions, and my conclusions regarding the potential impact of the proposed Program on the Town follow.

The Legality of Treating Firefighters as Volunteers

Under the state and federal wage hour laws, and specifically the federal Fair Labor Standards Act (FLSA), public employers are obligated to pay employees at least the minimum wage and overtime compensation. The FLSA, however, exempts public employers from paying minimum wage and overtime to individuals who qualify as "volunteers." Under the law, volunteers must be motivated to contribute services for civic, charitable or humanitarian reasons. An individual who performs services for a public agency (including the Town) qualifies as a volunteer, if:

- They provide their services for civic, charitable, or humanitarian reasons without promise, expectation, or receipt of compensation for the services rendered, although a volunteer can be paid expenses, reasonable benefits, or a nominal fee to perform such services;
- They offer their services freely and without coercion, direct or implied, from the employer; and
- They are not otherwise employed by the same public agency to perform the same services as those for which they propose to volunteer; in other words, individuals can qualify as volunteers if they either volunteer for different agencies *or* perform services different from those they are otherwise employed to perform.¹

If an individual meets the above criteria for volunteer status, he or she will not be considered an employee covered by FLSA minimum wage and overtime provisions, and the Town is not obligated to compensate the individual for hours of volunteer services performed.

A bona fide volunteer may perform, without compensation:

- Different work for the same agency
- Same or similar work for a separate and independent agency
- Different work for a separate and independent agency

¹ 29 USC § 203e(4)(A); 29 CFR §§ 553.100-.106.

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Payments to Volunteer Firefighters

In accordance with Department of Labor (DOL) regulations, towns may pay volunteers for expenses, reasonable benefits, a nominal fee, or any combination thereof, without jeopardizing their volunteer status.² However, the Town may not compensate "volunteers" for services rendered without converting the individual from volunteer status to being deemed an employee for purposes of FLSA minimum wage and overtime liability.³

Expenses

The Town can reimburse volunteers for approximate, out-of-pocket expenses incurred by volunteers incidental to providing volunteer services to the Town, including the following:

- Meals
- Transportation
- Uniforms and Related Equipment
- Tuition and Other Costs Involved in Attending Classes Related to Volunteer Services
- Books, Supplies or Other Materials for Training

The DOL regulations allow volunteers to be paid "expenses, reasonable benefits, a nominal fee, or any combination thereof, for their service without losing their status as volunteers." 29 C.F.R. § 553.106(a). With regard to expenses, the regulations recognize that an individual "does not become an employee because he or she receives a uniform allowance, or reimbursement for reasonable cleaning expenses or for wear and tear on personal clothing worn while performing hours of volunteer service." 29 C.F.R. § 553.106(b). Similarly, an individual may be "reimbursed for the approximate out-of-pocket expenses incurred incidental to providing volunteer services, for example, payment for the cost of meals and transportation expenses." *Id.*

Reasonable Benefits

The Town also does not alter the status of volunteers by providing reasonable benefits to

² 29 U.S.C. § 203(e)(4)(A)(i); see also 29 C.F.R. § 553.106(a) ("Volunteers may be paid expenses, reasonable benefits, a nominal fee, or any combination thereof, for their service without losing their status as volunteers."); 29 C.F.R. § 553.106(e) ("Individuals do not lose their volunteer status if they receive a nominal fee from a public agency.").

³ To determine whether the individual loses volunteer status by virtue of payments made by the public agency for "volunteer" work, the DOL will evaluate "the total amount of payments made (expenses, benefits, fees) in the context of the economic realities of the particular situation." 29 C.F.R. § 553.106(f).

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- Liability Insurance
- Health Insurance
- Life Insurance
- Disability Insurance
- Workers' Compensation
- Pension Plans
- Length of Service Awards
- Personal Property Tax Relief

Nominal Fee

Although the Town may pay a nominal fee to volunteers, the fee must not be a substitute for wages and must not be tied to productivity. See 29 C.F.R. § 553.106(e). Compensating volunteers with more than a nominal fee likely will create an employment relationship, thereby destroying the volunteer status of the individuals. The DOL has indicated that fire departments may consider the following factors when providing nominal fees to bona fide volunteers:

- Distance traveled
- Time and effort expended
- Whether the volunteer has agreed to be available around-the-clock or only during certain specified time periods
- Whether the volunteer provides services as needed or throughout the year⁹

Generally, a key factor in determining if a payment is a substitute for compensation or tied to productivity is "whether the amount of the fee varies as the particular individual spends more or less time engaged in the volunteer activities."⁴ If the amount varies, it may be indicative of a substitute for compensation or tied to productivity and therefore not nominal.⁵

Tuition for Training Courses

As mentioned above, it is not clear whether the Program is intended to pay firefighters for attending training sessions or for providing the training. If the former, tuition to attend the Fire Academy and other training expense reimbursement is permissible. As indicated in 29 C.F.R. § 553.106(c), "[i]ndividuals do not lose their status as volunteers because they are reimbursed for

⁴ Wage and Hour Opinion Letter FLSA2005-51 (Nov. 10, 2005).

⁵ See id.; see also 29 C.F.R. § 553.106(e).

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tuition . . . costs involved in their attending classes intended to teach them to perform efficiently the services they provide or will provide as volunteers.”

However, while the payment of tuition to attend training is permitted, paying the firefighters an “incentive” to attend does not appear to be permissible under the FLSA without risking the volunteer status of the firefighters. This issue is discussed in more detail below under “Stipends.”

Payments at an Hourly Rate

Regarding a payment of “Emergency Stand-by” fees of \$12 per hour, the DOL has opined that payment to volunteer firefighters on a per hour basis destroys bona fide volunteer status and creates an employment relationship.⁶ This type of payment is akin to hourly wages based on productivity and is not indicative of a volunteer relationship. See discussion below.

Stipends and Call Payments

The DOL’s regulations specify that the payment of a nominal amount on a per-call basis to volunteer firefighters is acceptable so long as the payment may fairly be characterized as tied to the volunteer’s sacrifice rather than productivity-based compensation.⁷

The proposed Program would pay volunteer firefighters a daily stipend of \$144 per day. The stated purpose of this payment is specifically to compensate the firefighters for their “maintenance” of “facility, apparatus and fire equipment.” Thus, the payment would appear to fail the threshold issue of volunteerism because the firefighters would be receiving compensation for their services rendered.⁸ Accordingly, this payment as described would likely create an employment relationship under the FLSA.

In the event, however, the proposed payment could be characterized as a reasonable reimbursement for transportation, meal expenses, or other costs incurred by the volunteer, or a combination of expense reimbursement and a nominal fee (as discussed more fully below), the payment would be allowable, assuming it approximates the costs incurred and meets the

⁶ 29 U.S.C. § 203(e)(4)(A); see 29 C.F.R. § 553.106(a).

⁷ See 29 U.S.C. § 203(e)(4)(A)(i); 29 C.F.R. § 553.106.

⁸ See 29 U.S.C. § 203(e)(4)(A); 29 C.F.R. § 553.101(a) (A volunteer must perform “hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation, or receipt of compensation for services rendered.”).

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requirements for a nominal fee. See 29 C.F.R. § 553.106(c) (noting that among others, transportation and meal costs can be reimbursed) and § 553.106(e) (allowing a nominal fee for volunteers).

The Program would also pay to all personnel \$12 per emergency call and \$12 per hour for each emergency stand-in. I assume that this is intended to be a nominal fee payment to the volunteers. If it is pure compensation, then it would ruin the volunteer status of the firefighters.

Although the statute and the implementing regulations do not define what constitutes a "nominal fee," the DOL regulations provide guidance for determining whether a fee is nominal and permissible. If a fee is not nominal, then the individual does not qualify as a volunteer and is considered an employee who may be covered by the FLSA minimum wage and overtime provisions. The factors to examine in determining whether an amount is nominal include without limitation:

- (1) the distance traveled and the time or effort required of a volunteer;
- (2) the availability, limited or unlimited, of a volunteer to provide services; and
- (3) the basis, as needed or throughout the year, on which a volunteer agrees to perform services.⁹

These factors focus on whether the fee is akin to a payment for services. Thus, to the extent that payments are tied to productivity (e.g., payment of hourly wages for services for maintaining equipment), are similar to "piece rates," or are comparable to "production bonuses," there is a greater likelihood that such fees are not nominal and create an employment relationship.

However, the DOL noted that almost 30 percent of all volunteer firefighters are paid a small fee for each fire call to which they respond, and the DOL rules are not intended to invalidate such payments.¹⁰ Moreover, consistent with the discussion of factors to be considered (e.g., distance traveled, time and effort expended, around-the-clock versus limited availability, throughout the year versus upon request), payment per call or other similar bases may be acceptable as long as they may fairly be characterized as tied to the volunteer's sacrifice rather than productivity-based compensation. Accordingly, nothing in the statutory language precludes the payment of nominal per-call or even per-shift fees to volunteer firefighters, and indeed section 553.106(e) specifically provides that a nominal fee can be paid on a "per call" or similar basis for volunteer firefighters.

⁹ See 29 C.F.R. § 553.106(e).

¹⁰ See 52 Fed. Reg. 2012, 2021 (Jan. 16, 1987).

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The DOL utilizes an "economic realities" test to evaluate what constitutes a nominal fee for determining an individual's volunteer status. Specifically, that DOL has opined that that when a public agency employee volunteers, the fee paid can be presumed to be "nominal" so long as it does not exceed 20 percent of what the public agency would otherwise pay to hire a full-time employee for the same services.¹¹ The DOL has stated that a willingness to volunteer for 20 percent of the prevailing wage for the job is also a likely indication of the spirit of volunteerism contemplated by the 1985 amendments to the FLSA. This interpretation of "nominal fee" applies equally in the context of firefighters.¹²

With regard to the Stipend proposed in the Program, I am unable to answer whether stipends of \$144 per day for volunteer firefighters can be considered nominal due to the limited information provided concerning what the Town would otherwise pay to hire a full-time firefighter for the same services and what the individual's out-of-pocket expenses are. A good benchmark for this calculation would be to compare what other towns of similar demographics pay to full time firefighters (or even by looking to information from the Department of Labor's Bureau of Labor Statistics). The calculations must be based on an approximation of the prevailing wages of a firefighter within the Town's area and the fee amount must not exceed 20 percent of that firefighter's wages for the same services. In that instance, I would feel comfortable that the DOL would find that such a fee is nominal within the meaning of 29 C.F.R. § 553.106.¹³

Conclusion and Answers to Questions

- (1) Under the Program, volunteer firefighters receive a stipend with taxes taken out of the stipend, yet are intended to remain volunteers. Can volunteers that sign up for a four to eight hour daytime shift with assigned duties also be considered volunteers?

Not if the stipend is more than nominal and is tied to productivity as opposed to the volunteer's sacrifice to the community as explained above. As currently proposed, it is impossible to determine whether the \$144 daily stipend is appropriate under the FLSA.

- (2) What differentiates a part-time firefighter "employee" from a part-time firefighter "volunteer" if they get paid a stipend?

¹¹ This 20 percent rule is derived from the FLSA and its implementing regulations. See Wage and Hour Opinion Letter FLSA2005-51 (The FLSA uses a 20 percent test to assess whether something is insubstantial with regard to prohibited driving on public roadways by employees who are 17 years of age.).

¹² See DOL Wage and Hour Opinion Letter FLSA2006-28 (Aug. 7, 2006).

¹³ See, e.g., DOL Wage and Hour Opinion Letters FLSA2007-3NA (Sept. 17, 2007) and FLSA2008-15 (Dec. 18, 2008).

**PULLMAN
& COMLEY, LLP**
ATTORNEYS

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As explained in detail above, the payment of a nominal stipend to a bona fide volunteer is acceptable so long as the payment may fairly be characterized as tied to the volunteer's sacrifice rather than productivity-based compensation. If the stipend is in lieu of wages, then it will destroy the volunteer nature of the relationship.

- (3) If a part-time firefighter signs up and works a four or eight hour shift in the day and gets paid a stipend as described in Section D of the Program, can they also receive the "emergency call" stipend stated in Section B for responding to a call that same evening or does it turn into an overtime problem?

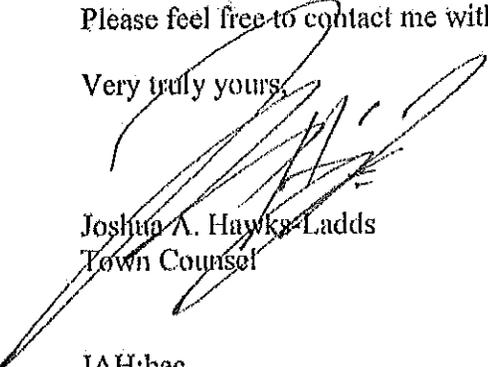
As explained in detail above, the payment of an hourly "fee" for emergency calls would ruin the volunteer nature of the relationship as would a stipend paid in lieu of wages. As proposed, these proposals seem problematic.

- (4) Finally, you asked me to comment on the impact of classifying the firefighters as "per diem," which I understand to mean that they are considered part-time employees of the Town.

Based on the current proposal I believe that there are significant risks in implementing the Program as requested. Certain aspects of the Program would clearly convert the volunteer firefighters who receive payments into paid employees. Other aspects of the proposed Program are too vague for me to determine the impact.

Please feel free to contact me with any questions or comments.

Very truly yours,



Joshua A. Hawks-Ladds
Town Counsel

JAH:bac