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July 6, 2004

Mr. John Dalton, President
City Council
c/o Ms. Susan Galeczka
City of Rochester Hills
1000 Rochester Hills Drive
Rochester Hills, MI 48309-3033

Re: Full-Time City Employees and Paid-On-Call Fire Fighters

Dear Council President Dalton:

City Councilman Robbins submitted three (3) questions to Attorney Staran concerning Rochester Hills Administrative Policy #001-2004 – Exclusion of Full-Time City Employees from City Service as Paid-On-Call (POC) Fire Fighters, which was signed by Mayor Somerville on or about December 22, 2003. This Policy states in pertinent part:

“It shall be the Policy of the City of Rochester Hills that any person employed in a full-time position with the City shall not simultaneously hold the position of Paid-On-Call Fire Fighter. This Policy shall be effective as of January 1, 2004.”

The Policy also contains an exception to this rule which states:

“Full-time employees currently serving as POCs as of the effective date of this Policy may continue to serve in this capacity provided there is no break in service for either position.”

Your questions are as follows:

1. Is this Policy appropriate as an Administrative Policy or should it be a Council Policy?
2. Is there any legal ambiguity by grandfathering current employees and disallowing other employees to serve as POCs? Meaning does this leave the City open to lawsuits from employees who feel this Policy unfairly discriminates against them?
3. What ramifications does this Policy have on Bargaining Unit Employees? Are they exempt because the issue should be covered under the Collective Bargaining Agreement?

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Before answering your questions I hope some background information will be helpful. The Fair Labor Standards Act of 1938 (FLSA) is the federal law that governs overtime pay. The FLSA was extended to employees of local governments in 1974 and Part 553 was added to the Code of Federal Regulations (CFR) to cover these employees. In a series of meetings in approximately 1986, the U. S. Department of Labor made it clear to the City that if it intended to maintain full-time employees as POCs, they must be paid as follows:

A. Since full-time fire fighters who served as POCs were providing services to the City in the same capacity, i.e., fire fighter, in both their full-time and POC positions, it is necessary that they be paid for overtime time and one-half of their full-time rate regardless of whether the work is full-time or paid-on-call. Therefore, most POC activity engaged in by full-time fire fighters was compensated at 2-3 times the rate of a POC who did not work for the City in any other position.

B. As to full-time City employees who were not professional fire fighters but worked at 2 different rates, i.e., the rate for the full-time job and the rate as a POC, the City had a choice:

1. Pursuant to CFR §778.419, determine the total amount of overtime pay in a week by multiplying the overtime hours by 1½ times whichever rate applied to the actual hours worked, e.g., if an employee's regular rate is \$18.00 per hour and the POC rate is \$12.00 per hour and 5 overtime hours were accumulated working at the employee's regular job and 5 overtime hours were accumulated by the employee working as a POC, that employee would receive total overtime for the week of 5 times \$27.00 and 5 times \$18.00 or \$225.00 for total compensation for the week of \$945.00. If the POC hours were earlier in the week so that hours 40-50 were all worked at the employee's full-time job, the overtime pay would be \$270.00 and total compensation for the week of \$990.00.

2. As authorized by CFR §778.115, the total overtime for the work week may be calculated by using the blended rate or a weighted average of the rates of pay, e.g., based on the above example, if the employee worked 45 hours at his regular job, that would equal 45 times \$18.00 or \$810.00, plus 5 hours as a POC which is 5 times \$12.00 or \$60.00 for a total of \$870.00. The \$870.00 is divided by the total number of hours worked, i.e., 50, which equals a \$17.40 blended rate. \$17.40 becomes the employee's regular rate for the week to determine overtime. If more POC hours are worked, the ratio changes and the blended rate decreases. Overtime for the week would be figured by multiplying ½ of the blended rate (\$8.70) by the number of overtime hours for the week (10) for a total compensation for the week of \$957.00). The reason overtime hours were multiplied by ½ of the blended rate is because the straight time was already part of the \$870.00. Since most POCs are paid \$12.00 per hour, it is obvious that it is much more costly for the City to utilize full-time employees as POCs.

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Largely because of the cost and because POC staffing was adequate without them, the Fire Department obtained the policy that no one hired as a full-time fire fighter after June 1, 2001 could participate in the paid-on-call program. Three full-time fire fighters who were POCs as of June 1, 2001 could remain POCs but only through December 31, 2004. I believe only one of these individuals is still a POC.

On December 11, 2003, I was advised that Chief Walterhouse wanted to apply essentially the same policy to non-fire fighter City employees. On or about December 22, 2003, Mayor Somerville signed Administrative Policy #001-2004 which is virtually identical to the policy that applies to the fire fighters except non-fire fighter employees who were POCs as of January 1, 2004 could remain POCs as long as they continued to work for the City.

The following are your questions and my responses:

1. Is this Policy appropriate as an Administrative Policy or should it be a Council Policy?

I believe this Policy is appropriately an Administrative Policy. Pursuant to Section 8.1 of the City Charter, "The executive and administrative powers of the City, except as otherwise provided herein, shall be vested in, and exercised by, the Mayor and administrative officers, boards and commissions prescribed or permitted to be created by this Charter." Section 8.3.10 of the Charter states that as the administrative and executive head of the City, one of the powers and duties of the Mayor is to "Approve administrative rules and regulations of all Departments, boards and commissions of the City government, before such rules and regulations shall become effective, except as otherwise provided by this Charter;"

However, Section 8.3.16 states that the Mayor is to "Recommend to the Council personnel policies and procedures for the City;"

The application of the separation of powers described in Section 1.5 of the Charter to the supervision of employees and other employment matters has been debated, sometimes hotly debated, for nearly 20 years. The City maintains dozens of administrative policies, that were effectuated over many years and several administrations, that were not approved or even submitted to the Council. I have opined several times over the last two decades that I believe that as the "administrative and executive head of the City", the Mayor is the "boss" of the employees and as such possesses the authority to issue administrative policies involving employees including Administrative Policy #001-2004.

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2. Is there any legal ambiguity by grandfathering current employees and disallowing other employees to serve as POCs? Meaning does this leave the City open to lawsuits from employees who feel this Policy unfairly discriminates against them?

I do not believe there is any legal ambiguity by grandfathering current employees and disallowing other employees to serve as POCs nor do I believe this Policy increases the risk of the City to successful lawsuits from employees who feel this Policy unfairly discriminates against them. For any employees to successfully prosecute a discrimination claim against the City, they would need to prove that the City discriminated against them for an unlawful motive such as race, age, sex, religion, national origin or union status. I do not see a claim of this kind resulting from the City's decision to permit current POCs to continue in that capacity.

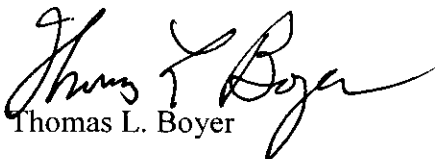
3. What ramifications does this Policy have on Bargaining Unit Employees? Are they exempt because the issue should be covered under the Collective Bargaining Agreement?

POC activity is not specifically covered by any collective bargaining agreement. In fact, the City was issued an arbitration opinion and award in 1998 affirming this position. It is possible that one of the AFSCME units could have argued that POC activity is a working condition supported by a past practice even though there is no written agreement. Of course, the City could construct arguments to the contrary. In any event, for the City to be compelled to bargain this issue, it would have been necessary for one or both of the bargaining units to contend that POC activity is a condition of employment and demand bargaining. Neither bargaining unit contacted the City in this regard.

I apologize for the length of this letter, but I hope that this information is useful to your analysis and that I have adequately answered your questions. If you have any other questions or require anything further, please do not hesitate to contact me.

Very truly yours,

KEMP, KLEIN, UMPHREY, ENDELMAN & MAY
Professional Corporation

By: 
Thomas L. Boyer

TLB/vlh/419488
cc: Mayor Pat Somerville (P&C)
John Staran, Esq.