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January 19, 2012

Bill Owensby, President
Indianapolis Fraternal Order of Police Lodge #86
1525 S. Shelby Street
Indianapolis, IN 46203

RE: Supplemental Opinion – Super Bowl Overtime

Dear Bill:

You have requested a legal opinion regarding various overtime questions that have arisen in anticipation of the Super Bowl and the events surrounding it. Specifically, you have posed six questions regarding the Fair Labor Standards Act (FLSA), the working agreement (Contract) between the City of Indianapolis and the Fraternal Order of Police (FOP), IMPD Rules and Regulations (Rules), Indiana Code (IC), etc. It is my understanding that the IMPD has chosen, for FLSA purposes, a twenty-eight (28) day work period. It is further my understanding that the FLSA work period for the Super Bowl begins on January 21, 2012 and runs through February 17, 2012.

In preparing this opinion, I have reviewed all of the above referenced sources. I have not yet been provided any pertinent IMPD orders regarding staffing levels, schedule changes or work details regarding the Super Bowl and activities associated with it. The questions have been posed and my response to each follows:

Question No. 1: Does the FLSA allow for mandated trade day off (TDOs)?

Discussion: According to the 1985 FLSA amendments (29 U.S.C. §207 (p) (3)) state or local government personnel may trade or substitute tours of duty without the state or local government employer being subject to additional overtime compensation by virtue of the voluntary trading of time by such employee. The following criteria must be met in order for there to be no effect on hours worked to the employee:

- a. Substitution or trading is voluntary (i.e. solely at the employees' option); and

b. The substitution or trading is approved by the employer.

Further, the contract provides in Article VII, Section 10 that officers may voluntarily trade workdays. It is included in the contract for benefit of members, requires advanced approval and is permitted under the FLSA as set forth above.

The FLSA does require the employer to pay public safety employees overtime for hours worked in excess of 171 in a 28 day work period such as the work period used by the IMPD. However, the FLSA also allows for collective bargaining agreements to be more generous than the FLSA. In the case of IMPD the threshold for the payment of time and one-half overtime is 160 hours as guaranteed by the current contract, Article VI, Section 5(B).

The current contract does, however, provide under Article II, Section 3 (g), that the City retains the right to “establish work schedules and, if necessary, change those work schedules in accordance with applicable law and departmental policy.” The only restriction to altering a member’s work schedule is found in Article VI, Section 5(H) where it has been negotiated and agreed to that:

...the Department shall not alter working schedules for the purpose of avoiding the payment of overtime without making a good faith effort to give the affected officer at least five (5) working days notice except in the case of emergency, national disaster, required dignitary security or other condition beyond the Department’s control of which the Department has not had at least five (5) working days notice...”

The FLSA does allow a public safety employer to alter work schedules to meet the demands of public safety. However, any hours worked in excess of 171 (or 160 in the case of IMPD) within the same 28 day work period must be compensated at time and one-half.

Answer:

The FLSA allows voluntary substitution (trade) days but also allows the employer to alter work schedules. The FLSA requires time and one-half wage payments for all hours worked by law enforcement in excess of 171 in a 28 day period (160 by contract for IMPD).

Question No. 2: **Can the IMPD force a merit employee covered by our labor agreement to take a Trade Day Off (TDO) on a specific day set by management?**

Discussion: Pursuant to IMPD General Order 3.23, Section VII, Paragraph (F), "an officer may be required to trade days off if directed to do so by a supervisor, as long as it is in compliance with conditions set forth in the FOP labor agreement."

Answer: According to G.O. 3.23(F), it appears that the IMPD can require an officer to trade days. In doing so, however, the IMPD must comply with the conditions set forth in the FOP labor agreement. According to the FOP labor agreement – Article IV, Section 13 – "the City will maintain the current work schedule of six (6) consecutive days on duty followed by three (3) consecutive days off duty." Therefore, while the IMPD does appear to have the authority to require an officer to trade days, such requirement must be done within the confines of the FOP labor agreement. From what we have been provided, we can see no indication that the City will not "maintain" the 6-3 schedule for the term of the Agreement. Rather, it appears the City is altering some schedules as reserved to management under the same Agreement.

Question No. 3: **Can the IMPD cancel days off/alter schedules?**

Discussion: See No. 1 and No. 2 above.

Answer: The IMPD can alter work schedules and cancel days off with 5 days notice to the officers except in certain extraordinary circumstances when no notice may be required. They must, however, pay police officers time and one-half for all hours worked in excess of 160 in the same 28 day pay period. In addition, it appears the IMPD is authorized to require officers to trade days. In doing so, however, the IMPD must comply with the FOP labor agreement. Again, without reviewing the IMPD Super Bowl Plan it is impossible to determine if the City will be in full compliance with the Agreement.

Question No. 4: What is the threshold for overtime?

Discussion: See No. 1 above.

Answer: For a 28 day work period such as the IMPD the threshold is 171 hours worked in the same pay period. However, by contract IMPD must pay overtime for all hours worked in excess of 160 within the same 28 day work period.

Question No. 5: Are there any limits under FLSA, the Indiana Code or other binding agreements that limit the number of consecutive days worked with or without overtime?

Discussion: The FLSA does not address or in any way limit the number of consecutive days worked without days off or overtime. It simply provides that hours worked in excess of a certain number in any given FLSA work period must be compensated at time and one-half.

Pursuant to Indiana Code § 36-8-4-8, “a member of the police department may not be required, except in case of a public emergency as determined by the city executive, to work more than six (6) days of eight (8) hours each in one (1) week, or more than an average of forty-eight (48) hours per week in one (1) year.” Obviously, this statutory language is ambiguous. Although it could be argued that an officer cannot be required to work more than 6 days of 8 hours or more each in 1 week, it could also be argued that officers can be required to work more than 6 consecutive days as long as the 48 hour weekly average limitation is not breached.

The contract provides protection of the work schedule in Article IV, Section 13. This protection is limited by Article II, Section 3 (g). See number one (1) above.

Answer: The Indiana Code does provide limitations regarding the number of consecutive days worked. However, the language of the statute is not clear. Without reviewing the IMPD Super Bowl Plan, it is impossible to determine whether the plan would violate the applicable statute, or how a Court might rule on the ambiguous statutory language.

Bill Owensby, FOP President
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Question No. 6: **Are there any minimum staffing requirements per the contract, General Orders, Ordinances, etc.**

Discussion: Allocation and distribution of personnel is covered in General Order 2.4. It is entirely discretionary per the discretion of the Chief of Police and is a "guideline" only. There are no contractual or legal requirements regarding minimum staffing levels. However, officer safety should be of paramount consideration.

Answer: No.

My opinion is based upon all relevant facts as represented to me. Please feel free to contact me personally if you are in need of additional information.

Very truly yours,

RUCKELSHAUS, KAUTZMAN, BLACKWELL,
BEMIS & HASBROOK



Leo T. Blackwell

LTB/dlt