

AREA 3 REGIONAL WEAPONS OF MASS DESTRUCTION AND
HAZARDOUS MATERIALS RESPONSE TEAM, INCORPORATED

STANDARD OPERATING GUIDELINES

TASK FORCE 3-SOG-A4

LOCAL GOVERNMENT SUPPORT AND AUTHORITY

PURPOSE

To establish the procedures for the development of affiliation of agreements between counties in the TASK FORCE 3 operating area.

DIRECTION AND CONTROL

Authority

These guidelines have been developed and approved by the Board of Directors. The Secretary shall review these procedures as needed, but not less than annually, and submit any changes to the Board of Directors for approval.

Responsibility

The Secretary is primarily responsible for implementation of these procedures. Responsibility for implementation of these procedures shall fall to the Administrator should the primary be unavailable.

Maintenance

These procedures shall be effective upon approval of the Board of Directors and shall remain in effect until revised or rescinded.

CONCEPT OF OPERATIONS

The A3/RWMD/HMRT, Incorporated Regional Hazardous Materials Response (TASK FORCE 3) Team shall, in accordance with KRS 39, et sequentia, be formally affiliated as a volunteer regional hazardous materials response team with the Emergency Management organizations of the seven (7) county *operating area*. A3/RWMD/HMRT will, when responding to a hazardous materials incident within the jurisdiction of such EMA organizations, function as an operational unit thereof. The statement of affiliation shall be automatically renewed annually and be effective unless terminated by the Board of Directors or either party with a minimum of thirty (30) days notice given in writing.

- A. The agreements shall be signed by the President and sent to the emergency management directors in each county. It shall be the responsibility of the emergency management director or Administrator to obtain the necessary signature(s) on the agreements.
- B. The personnel of the TASK FORCE 3 will continue under the command and control of their regular officers, but the operational unit(s) thereof shall be under the direction of the Local Emergency Management Agency (EMA) for mission-type assignment.
- C. In addition, memorandum of agreements will be developed between TASK FORCE 3 and all local industry supporting TASK FORCE 3 within the normal operating area.

The President of A3/RWMD/HMRT, Inc. and the designated representative of the industry involved shall sign these agreements.

ATTACHMENT

1. Sample county affiliation agreement (Note: Sample Attached)
2. Sample affiliation agreement with industry (Note: Need to create)
3. U. S. Department of Labor Ruling
4. KRS Workers Compensation (Pertaining to Regional Teams)

APPROVAL

President, A3/RWMD/HMRT, Inc.

Date

Adopted 12/2009

U.S. Department of Labor Ruling

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

June 5, 2002

Charles W. Thompson, Jr.
County Attorney
Montgomery County
101 Monroe Street, 3rd Floor
Rockville, Maryland 20850

Dear Mr. Thompson:

I am writing in response to your letters of December 21, 2001, and January 14, 2002, in which you requested an opinion regarding whether a career firefighter/paramedic employee could volunteer to provide similar services to the local volunteer fire departments, which are part of the Montgomery County integrated fire service, without having the volunteer time count as compensable hours worked under the Fair Labor Standards Act (FLSA). We previously had addressed this issue in a November 27, 2002, opinion letter to Chief Baker of the Burtonsville Volunteer Fire Department. However, you were concerned that we did not have all the relevant facts available to us when we first considered this question. Therefore, you included in your letters information describing the integrated nature of the career and volunteer branches of the fire and rescue service in Montgomery County. You also provided us with the Montgomery County Integrated Emergency Command Structure Regulation adopted in 2001 and the code of Ethics and On-Duty Personal Conduct Regulation adopted in 2002.

We also received a letter on the same issue from Thomas A. Woodley, counsel to the Montgomery county Career Fire Fighters Association, which included a lengthy description of the delivery of fire and rescue services in Montgomery County. That letter included additional materials, including a copy of the County Code of Ordinances pertinent to the Fire and Rescue Service, and you August 12, 1999, legal memorandum to the Fire Administrator concluding that the Montgomery County situation differed from that which the court addressed in *Benshoff v. Virginia Beach*, 180 F. 3d 136 (4th Cir. 1999). We also received a joint letter date February 25, 2002 from Harold A. Schaitberger, President of the International Association of Fire Fighters, and John M. Buckman, President of the International Association of Fire Chiefs, addressing this issue.

In addition to receiving these written materials, we had a meeting with you and a number of other individuals on April 23, 2002. You brought with you a number of officials from the Fire and Rescue Service, as well as two representatives from the Rockville Volunteer Fire Department and a career firefighter from the union. WE appreciate the time that all of those individuals spent with is to ensure that we had a thorough understanding of hoe the Montgomery County Fire and Rescue Service is organized, and how it provides services in an integrated fashion involving both career and volunteer firefighters/paramedic. After that meeting, we received additional information in follow-up letters from you dated May 2, 2002, from the Montgomery County Career Fire Fighters Association, Inc., IAFF Local 1664, dated May 15, 2002, and from the General Counsel for the Rockville Volunteer Fire Department dated May 22, 2002.

As we stated in our November 27, 2001, opinion letter, the decision of the court in *Benshoff* is binding in Montgomery County. As that court recognized, under the FLSA, a public agency employee may not volunteer to provide "services for a public agency" that are "the same type of services which the individual is employed to perform for such public agency." 29 U.S.C. § 203(e)(4)(A). WE set out in greater detail in our November 2001 letter the facts pertinent to that court's analysis of whether career firefighters were performing volunteer services for the City of Virginia Beach when they volunteered as paramedics to the private rescue squads located in the City. In summary, the Virginia Beach Department of Emergency Medical Service (DEMS) coordinated responses by the fire department and the volunteer rescue squad to emergencies; the DEMS established all the medical policies for patient care, medical training standards, and medical procedures and protocols that governed both career firefighters and volunteer rescue squad members; the City certified the squads' emergency medical technicians to practice within the City, ensuring that they met required training and service requirements, and the City could revoke their certificates; the City did centralized scheduling of rescue squad members, based upon shifts the volunteers were willing to work; the City selected volunteer squad Managers to operate as liaisons between the squads and the DEMS and to establish a hierarchy for control during emergency responses; the City provided financial assistance to the rescue squads; and the City provided the volunteers with workers' compensation and death benefits. *Id.* At 141-44.

The *Benshoff* court then evaluated whether the city's control and supervision over the provision of services by the rescue squads "is sufficient to render plaintiffs 'volunteer services employment' which is 'controlled or required' by the City for purposes of the FLSA" 180 F. 3d at 142. The court concluded that the fact that the squads and their members were subject to general regulation and licensing and certification requirements did not "change the fact that the rescue squads are private organizations, governed by their own by-laws and policies." *Id.* At 143. The squads had independent authority to accept or reject candidates for membership in the squad. The squads could impose minimum duty requirements on members that exceeded the minimum requirement imposed by DEMS for licensure, and they could impose additional training requirements. The squads could require the members' attendance at mandatory squad meetings or at fundraising events in order for them to maintain continued membership in the squad. Moreover, the squads could impose disciplinary action upon members, including dismissal from the squads, whether or not DEMS had taken any such action. *Id.* At 143-45.

The court in *Benshoff* recognized that the City's involvement with the provision of emergency medical services was not insubstantial. However, based upon all the facts and circumstances, the court held that the creation of DEMS did not result in "either the evisceration of the independent nature of the rescue squads, some of which have existed since the 1940s, or in a de facto employer-employee relationship between the City and those individuals who choose to volunteer with rescue squads." 180 F.3d at 142. The court thus concluded that when a Virginia Beach firefighter provided volunteer services to an independent non-profit rescue squad, there was no employment relationship with the City with regard to that activity. The court left open the possibility that the answer might differ in another context, particularly if there were "a sham" private volunteer corporation placed between an employee and his employer to avoid the compensation provisions of the Act." *Id.* At 149.

In our November 2001 letter, we applied the *Benshoff* analysis to Montgomery County. We noted that there are a number of factual differences between the *Benshoff* case and the situation in Montgomery County, the most significant being

that in Montgomery County the volunteers provide exactly the same services (both fire and emergency medical services) as do the career employees. In contrast, in Benshoff the City was not licensed by the State to provide the advanced life support services provided by the rescue squads, and the rescue squad volunteers did no firefighting.

However, we concluded that the primary facts that led the court in Benshoff to conclude that the FLSA did not require compensation for volunteer time were similar in Montgomery County. The non-profit volunteer fire and rescue corporations have a long history of independently providing services in Montgomery County. Each is separately incorporated under state law, with its own bylaws and boards of directors. The volunteer corporations determine how a person becomes a volunteer firefighter, and their service is governed by the corporation's bylaws, which can and do impose requirements not imposed by the County. The volunteer corporations control how members are selected for promotion within the volunteer ranks. At the scene of an emergency, to ensure the safe and efficient provision of services, the highest ranking officer (whether career or volunteer) directs the operations of all units that respond. However, at all other times, the chain of command is separate, and a career officer supervises only career firefighters who are present, while a volunteer officer directs the volunteers.

Based on your request and the other requests we received, we reconsidered our 2001 opinion. We had already taken account of most, but not all, of the material that we now have available. Considering all the facts and circumstances brought to our attention, we continue to believe that the Montgomery County volunteer firefighters' situation is similar to that of the volunteer rescue squad members in Benshoff. There is no evidence that the current structure for providing fire, rescue and emergency medical services in Montgomery County has eviscerated the independent nature of the long-standing, separately incorporated, private fire and rescue departments. Those separate corporations exercise day-to-day control over what positions volunteers hold, what they do, and when they do it. Although the public agency has some control over the volunteers, that control primarily is exercised by setting minimum certification standards and by establishing the broad guidelines and procedures under which services are provided. The court in Benshoff did not view the imposition of such standards and protocols as sufficient evidence of control so as to render the volunteers employees of the public agency when performing their rescue squad services.

Therefore, in light of the Benshoff decision, we conclude that the FLSA does not require Montgomery County to pay its career firefighters if they volunteer, freely and without coercion, to provide services to the non-profit fire and rescue corporations in the County. This is true whether they are providing services as a firefighters or as an emergency medical technician.

This opinion is based exclusively upon information provided to us. The existence of other factual information not contained in your description might require a different conclusion than the one expressed herein. To the extent appropriate, this letter may be used to establish a defense to liability under the Portal-to-Portal Act, 29 U.S.C. 259.

Sincerely,

Tammy D. McCutchen
Administrator

TASK FORCE 3 EQUIPMENT AGREEMENT

Agreement between Task Force 3 and Daviess County (the host county for Task Force 3) and _____ County, concerning the equipment therein supplied to the county by Task Force 3, to be stored, responded and utilized per Task Force 3's By-laws and Standard Operating Guidelines (SOG's). A detailed list of the equipment will be made available. It is hereby agreed that the county will accept this equipment with the understanding that it shall be maintained and insured by the county. The aforementioned equipment shall be housed by an emergency services agency within the county that has the facilities and resources to adequately inventory, maintain and respond said equipment upon an official request for activation from Task Force 3.

Task Force 3 retains the right to inspect and/or request an inventory of the equipment therein as deemed necessary by Task Force 3. If for reasons the Board of Directors of Task Force 3 feels the county is not fulfilling the revisions of this agreement, then Task Force 3 shall have the authority to repossess said equipment. For all general purposes the equipment shall become the property of the county, and be used for Task Force 3 activities.

Further, the equipment may be utilized by any official agency within the county, for non-Task Force 3 activities, subject to the conditions of this agreement and pre-designated approval of the county Emergency Management director. However, Task Force 3 would require all supplies used by such agency utilizing the equipment, for any non-Task Force 3 official activity, to replace such supplies, at their expense, and return the equipment to its previous state of readiness.

Any official activation of the county's equipment by Task Force 3 shall activate the cost recovery resources of Task Force 3 and Task Force 3 would replace supplies used for said activities. I also understand that Task Force 3 will respond to any legitimate request for assistance from the county that falls within the scope and purpose of Task Force 3, as outlined in the by-laws and SOG's of Task Force 3 regardless of whether the county accepts or declines this equipment.

I, _____ Judge Executive of _____ County, do hereby agree to accept this equipment from Task Force 3 and agree to maintain it as described within this document.

39C.110 Workers' compensation coverage -- Limitations.

Local emergency management agencies, including local directors or their deputies, and other local emergency management agency staff personnel and workers, and local emergency management agency-supervised operating units or personnel officially affiliated with the local disaster and emergency services organizations pursuant to KRS 39B.070, paid or volunteer, for the purposes of receiving workers' compensation benefits paid by the division, shall be covered by those benefits when performing emergency assessment, mitigation, preparedness, response, or recovery functions, with the following limitations:

(1) The local emergency management agencies, including local directors or staff personnel and workers, and local emergency management agency-supervised operating units or personnel, shall not be covered when performing fundraising functions, unless all proceeds of the function are to be dedicated to the administration or operation of the local emergency management agency or operating unit.

(2) No person shall be covered when performing hazardous materials emergency response operations defined in 29 C.F.R. 1910.120 which are above the first-responder operations level, on-scene incident commander level excluded, except as provided in subsection (3) of this section.

(3) A volunteer hazardous materials response team as defined in 29 C.F.R. 1910.120 which meets all provisions of 29 C.F.R. 1910.120(q), operates on a regional basis, and is supervised by a local emergency management agency may, by action of the director pursuant to administrative regulations, be provided Kentucky emergency management workers' compensation coverage. Such hazardous materials response teams shall take no actions involving environmental clean-up, removal, or transportation of hazardous substances or materials except as may be essential for initial emergency control or initial emergency stabilization when there is a clear and evident risk of harm to people.

(4) No person shall be covered unless enrolled on a workers' compensation enrollment form that is filed with the area manager of the division, except when the magnitude of an emergency, or a preparedness exercise activity, is so great that a local director must solicit additional workers. At these times, the local director may develop and maintain a list of workers, to include names, Social Security account numbers, missions assigned, and dates covered, and submit a copy of the list to the area manager within twenty-four (24) hours of the conclusion of the emergency, or the preparedness exercise activity.

Effective: July 15, 1998

History: Created 1998 Ky. Acts ch. 226, sec. 50, effective July 15, 1998.