No. 05-3803

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ROB SENGER, et al.,

Plaintiff-Appellants,

v.

CITY OF ABERDEEN, SOUTH DAKOTA,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of South Dakota

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANTS

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STATEMENT OF INTEREST OF THE SECRETARY OF LABOR

Pursuant to Federal Rule of Appellate Procedure 29, the Secretary of Labor ("Secretary") submits this brief as amicus curiae in support of plaintiff-appellants ("firefighters"). The Department of Labor ("Department") is responsible for the administration and enforcement of the Fair Labor Standards Act ("FLSA" or "Act"). See 29 U.S.C. 204.

This case directly concerns the Department's longstanding regulation at 29 C.F.R. 553.31(a) interpreting section 7(p)(3)

of the Act, 29 U.S.C. 207(p)(3). That regulation provides that employees who "trade" time with other employees who then actually work that time are to be "credited" as if they had worked their originally scheduled shifts. The regulation supports the firefighters' position that they were entitled to overtime compensation for those hours that they were originally scheduled to work, but for which they arranged to have substitute employees work instead.

Because the district court decision effectively invalidated the Department's substitution regulation, the Department has a strong interest in this appeal.

STATEMENT OF THE ISSUE

In this case, city firefighters were denied overtime payments when they arranged to have other firefighters work part of their scheduled shifts, including overtime hours, pursuant to the "shift substitution" provision at section 7(p)(3) of the FLSA, 29 U.S.C. 207(p)(3). The issue presented is: Whether the Department's clear regulatory requirement at 29 C.F.R. 553.31(a), that public employers must pay overtime compensation to employees who would have been entitled to such compensation had they worked their originally scheduled hours, but arranged instead for other employees to work all or part of their scheduled shifts, permissibly interprets section 7(p)(3) and is therefore controlling.

STATEMENT OF THE CASE

A. Statement of Facts and Course of Proceedings

The plaintiffs are nine current or former employees of the City of Aberdeen, South Dakota ("City"), who are or were employed by the City in fire protection activities. The City permits its employees to substitute shifts pursuant to its "Stand-In Policy." Over the course of their employment with the City, plaintiffs (the "substituted-for" employees) were scheduled to work in excess of the hourly limits prescribed under the FLSA, entitling them to overtime pay,[1] but arranged for other employees (the "substituting" or "substitute" employees) to substitute for all or part of their scheduled shifts. Had plaintiffs worked their shifts as scheduled, their hours worked would have entitled them to overtime pay. The City, however, determined that because plaintiffs had not actually worked the hours that would have entitled them to overtime pay, they were not entitled to that pay. Notwithstanding the City's determination that the substituted-for employees were not entitled to overtime pay, the City paid them straight time for their originally scheduled overtime hours and used those hours

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[1] As described in greater detail infra, section 7(k) of the FLSA, 29 U.S.C. 207(k), by establishing a distinct work period for public employees in fire protection or law enforcement, provides a partial exemption for public employers of fire protection or law enforcement employees from the Act's general overtime requirement at section 7(a), 29 U.S.C. 207(a).

as the basis for paid leave, seniority, and benefits calculations. The City did not pay any compensation, regular or overtime, to the substitute employees for working the scheduled employees' hours.

On July 6, 2004, plaintiffs brought an action in the District Court for the District of South Dakota for declaratory judgment under 28 U.S.C. 2201 and 2202, and for compensatory and other relief under the FLSA. The complaint alleged, inter alia, that the City's failure to compensate plaintiffs for their assigned overtime hours that were actually worked by substitute employees pursuant to the City's Stand-In Policy was in violation of section 7 of the FLSA, 29 U.S.C. 207. Defendant filed a Motion for Summary Judgment on June 1, 2005.[2] On September 16, 2005, the district court issued a Memorandum

[2] Defendant's first Motion for Summary Judgment, claiming sovereign immunity under the Eleventh Amendment, was filed on September 24, 2004, and was withdrawn almost two months later. The sovereign immunity defense was not raised in defendant's subsequent summary judgment motion. See, e.g., Jinks v. Richland Cty., South Carolina, 538 U.S. 456, 466 (2003) ("[M]unicipalities, unlike States, do not enjoy a constitutionally protected immunity from suit."); Alden v. Maine, 527 U.S. 706, 756 (1999) ("[Sovereign immunity] does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State.") (citations omitted); see also Hadley v. N. Arkansas Cmty. Technical Coll., 76 F.3d 1437, 1438 (8th Cir. 1996); Sherman v. Curators of the Univ. of Missouri, 16 F.3d 860, 864 (8th Cir. 1994).

Opinion and Order granting defendant's motion for summary judgment. The firefighters' appeal to this Court followed.

B. The District Court's Decision

The district court denied the substituted-for firefighters' claim on the ground that the FLSA authorizes overtime compensation only for time actually worked. The court thereby disregarded the Department's clear regulation interpreting the Act's ambiguous substitution provision, basing its decision instead on what it viewed as the plain language of sections 7(p)(3) and 7(a) of the Act, when read together.

Specifically, the district court first looked to the language of section 7(p)(3) of the FLSA, which permits public employees, with the approval of their employing agency, "to substitute during scheduled work hours for another individual who is employed by such agency in the same capacity." 29 U.S.C. 207(p)(3). The statutory provision further states that "the hours such employee worked as a substitute shall be excluded . . . in the calculation of the hours for which the employee is entitled to overtime compensation under this section." Id. The court therefore concluded that "the substituting employee is explicitly precluded from receiving overtime compensation under § 207(p)(3) of the Act." Senger, slip op. at 5.[3] The court

[3] The district court's decision, Senger, et al. v. City of Aberdeen, S.D., is published at 2005 WL 2257076 (D. S.D. 2005).

acknowledged, however, that this statutory provision does not address which overtime hours, if any, should be credited to the originally scheduled employee. Id.

While recognizing that 29 C.F.R. 553.31(a), the regulation that interprets and implements section 7(p)(3) of the Act, refers to "'each employee' being 'credited'" with his or her originally scheduled shift,[4] slip op. at 5, the court turned instead to the FLSA's general overtime provision at section 7(a) to determine the substituted-for employees' entitlement to overtime pay. Specifically, it noted that for purposes of this case, section 7(p)(3) must be read in conjunction with section 7(a). Id. Section 7(a) states that "no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." The court read that language as limiting an employee's eligibility for overtime compensation under section 7(p)(3) to those hours actually worked. Id. at 5-7. In the words of the district court: "By not working, the scheduled

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The references in this brief to the court's decision are to the slip opinion.

[4] The regulation states, in relevant part, "Where one employee substitutes for another, each employee will be credited as if he or she had worked his or her normal work schedule for that shift." 29 C.F.R. 553.31(a).

employee cannot collect overtime wages. . . . Under its stand-in policy, the City is in full compliance in its refusal to pay overtime to those who do not actually work." Id. at 7.

Accordingly, notwithstanding the regulatory requirement that the substituted-for employees be credited as if they had worked overtime consistent with their scheduled shifts, the court concluded that the City's refusal to pay overtime compensation to the substituted-for employees did not violate the FLSA. Id.

SUMMARY OF ARGUMENT

Pursuant to an express delegation of rulemaking authority, the Department, after notice and comment, promulgated a regulation that implements a statutory provision, 29 U.S.C. 207(p)(3), permitting the substitution of shifts by public employees. The statutory provision excepts the employer from the requirement to pay overtime compensation to the substitute employee, while remaining silent as to any payment of overtime compensation to the substituted-for employee. See 29 U.S.C. 207(p)(3); 29 C.F.R. 553.31(a). The Department's regulation, which is entitled to controlling Chevron deference, fills this statutory gap by providing, in language taken directly from the relevant legislative history, that "[w]here one employee substitutes for another, each employee will be credited as if he or she had worked his or her normal work schedule for that

shift." 29 C.F.R. 553.31(a). Thus, the regulation mandates the payment of overtime compensation to the substituted-for firefighters in this case.

In the instant case, plaintiff firefighters were scheduled to work shifts that would have entitled them to overtime pay, but they did not work the entirety of their shifts as scheduled. Instead, plaintiffs arranged for other employees to work all or part of those shifts. Therefore, the originally scheduled employees did not actually work hours in excess of those required to trigger the employer's duty to pay overtime compensation.

In concluding that the City was not required to pay overtime compensation to the substituted-for employees, the district court expressly declined to apply the Department's shift-substitution regulation. Instead, the district court relied on what it deemed to be the plain language of 29 U.S.C. 207(p)(3) (substitution of time) "in conjunction with" the statute's general overtime provision at 29 U.S.C. 207(a). The court interpreted the general overtime provision to limit an employer's legal obligation to pay overtime compensation to those instances where an employee had actually worked hours in excess of a statutorily prescribed period of time. The Department's regulation at 29 C.F.R. 553.31(a), however, implements a statutory exception to the general overtime rule,

i.e., one specifically permitting the substitution of shifts by public employees. That regulation, which permissibly interprets the statutory exception at section 7(p)(3), demands a different result than that reached by the district court in regard to the substituted-for employees' entitlement to overtime compensation.

Moreover, the Department's rule does not burden employers. It does not create additional overtime compensation obligations, but merely honors an employer's expectation, created by the assignment of overtime shifts, that it will be required to pay overtime compensation in accordance with that assignment. The rule also permits employers to refuse substitution requests. And, even if a substitution is allowed to go forward, the rule does not impose extensive oversight or recordkeeping obligations on the employer, as the employees negotiate "repayment" of the hours between themselves.

For all of these reasons, the Department's longstanding regulation requiring the payment of overtime compensation to substituted-for employees is reasonable, and thus controlling.

ARGUMENT

THE DEPARTMENT'S REGULATION, PROMULGATED PURSUANT TO SPECIFIC CONGRESSIONAL AUTHORIZATION AND AFTER NOTICE AND COMMENT, REQUIRES THAT WHEN TRADING SHIFTS THE SUBSTITUTED-FOR EMPLOYEE MUST RECEIVE THE OVERTIME PAY TO WHICH HE WOULD HAVE BEEN ENTITLED HAD HE WORKED HIS ORIGINALLY SCHEDULED SHIFT

The key language in the relevant regulation states that "[w]here one employee substitutes for another, each employee will be credited as if he or she had worked his or her normal work schedule for that shift." 29 C.F.R. 553.31(a). For the reasons stated below, the regulation provides a permissible interpretation of the statute, and indeed gives full effect to congressional intent as expressed in the legislative history.

1. Congress has recognized that some public employees, including firefighters, must work irregular schedules that warrant special treatment under the FLSA. The FLSA's general overtime provision, mandating that an employer pay to its employees who work over 40 hours in a workweek compensation at a rate of at least one and one-half times their regular rate of pay, was enacted as part of the original law in 1938. See Act of June 25, 1938, c. 676, § 7, 52 Stat. 1060, 1063 (1938); 29 U.S.C. 207(a). The 1974 FLSA Amendments, Pub. L. No. 93-259, 88 Stat. 55, brought under the coverage of the Act all public agencies, including those of local and state governments. See 29 U.S.C. 203(d) and (x). Thus, those government agencies were

required, among other obligations, to pay overtime compensation to their employees in accordance with the general overtime provision of section 7(a). However, as a result of a compromise between the House (which advocated a total overtime exemption) and Senate (which pressed for a limited exemption), Congress added section 7(k) to the FLSA, 29 U.S.C. 207(k), providing a partial exemption for public employers of fire protection or law enforcement employees from the Act's general overtime requirement.[5] See H.R. Conf. Rep. No. 93-953, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 2862, 2864; 29 C.F.R. 553.32(b) and 553.201(a).[6]

Under section 7(k), a public employer of firefighters may avoid being in violation of section 7(a) by establishing for its employees (either individually or as a group, see 29 C.F.R. 553.224(b)), a recurring work period of seven to twenty-eight consecutive days, and by paying overtime compensation for only those tours of duty within that period which exceed, at the outer limit of 28 days, 212 hours. See 29 C.F.R. 553.230(c) (by

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[5] Section 13(b)(20) of the Act provides for a complete exemption from the overtime pay provision of Section 7(a) for public employers with fewer than five firefighters or law enforcement personnel during the course of a workweek. 29 U.S.C. 213(b)(20); 29 C.F.R. 553.32(b) and 553.200(a). That section does not apply to this case.

[6] Relevant portions of the legislative history and Wage and Hour Opinion Letters cited in this amicus brief are reproduced in the Addendum.

which the Secretary, pursuant to a congressional directive at section 6(c)(3) of the FLSA Amendments of 1974, determined the average number of hours worked by firefighters on their tours of duty within a 28-day work period, and from those numbers deduced proportionately the average number of hours worked in all work periods between seven and twenty-eight days (48 Fed. Reg. 40518-19 (1983)). See also 29 C.F.R. 553.224(a).[7]

Congress explained that this new "tour of duty" rule codified a practice already in use by public sector employees and that was "generally applicable in fire fighting":

> Firefighters may be needed at any time of any day to fight fires. But to do so effectively, they need to be constantly prepared. Our safety in our homes depends as much on their ability to maintain their equipment and their own physical condition as it does on their willingness to risk their lives to save our lives and our property. They are on duty, in some jurisdictions, for 24 hours in a row. In others they work 10 and 14-hour shifts or 9 and 15-hour shifts. Whatever their varying schedules, they are subject to our call. They are not free to follow their own pursuits. They must be there ready to respond immediately to the alarm, whether it be false or not.

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[7] As the legislative history to the 1985 amendments to the FLSA states, "Congress established these special provisions [section 7(k)] in recognition of the special needs of governments in the area of public safety and the unusually long hours that public safety employees must spend on duty. Section 7(k) was intended to alleviate the impact of the FLSA on the fire protection and law enforcement activities of state and local government by providing for work periods of up to 28 days (instead of the usual seven-day workweek) [and] establishing somewhat higher ceilings on the maximum number of hours which could be worked before overtime compensation had to be paid, and providing for a gradual phase-in period." S. Rep. No. 99-159, 99th Cong., 1st Sess. (1985), reprinted in 1985 U.S.C.C.A.N. 651, 653.

120 Cong. Rec. S8760 (1974).

2. The legislative history to the 1974 Amendments reflects Congress's intent also to preserve a related, longstanding practice among public employees, that of "trading" or "substituting" time:

> [T]he committee expects the Secretary of Labor to adopt regulations which permit the continuation of the practice of "trading time" both within the tour of duty cycle, the 28-day "averaging" work period and from one cycle or period to another within the calendar or fiscal year without the employer being subject to the overtime rate by virtue of the voluntary trading of time by employees.

120 Cong. Rec. S8760 (1974). The 1974 FLSA Amendments delegated general legislative rulemaking authority to the Secretary to implement the Act. Pub. L. No. 93-259, § 29(b), 88 Stat. 55, 76 (1974) ("[T]he Secretary of Labor is authorized to prescribe necessary rules, regulations, and orders with regard to the amendments made by this Act.").

The Department's regulations promulgated in response to this explicit congressional directive addressed the concept of "trading time" in this way:

> Another common practice or agreement among employees engaged in fire protection or law enforcement activities is that of substituting for one another on regularly scheduled tours of duty (or for some part thereof) in order to permit an employee to absent himself or herself from work to attend to purely personal pursuits. This practice is commonly referred to as "trading time." Although the usual rules for determining hours of work would require that the additional hours worked by the substituting employee be counted in computing his or her total hours of

> work, the legislative history makes it clear that Congress intended the continued use of "trading time" "both within the tour of duty cycle * * * and from one cycle to another within the calendar or fiscal year without the employer being subject to [additional overtime compensation] by virtue of the voluntary trading of time by employees" (Congressional Record, March 28, 1974, page S4692).[8]

Employees of Public Agencies Engaged in Fire Protection or Law Enforcement Activities, 39 Fed. Reg. 44142, 44147 (Dec. 20, 1974).

Subsequent amendments in 1985 to the FLSA's public employee provisions codified the practice of trading time at section 7(p)(3) of the Act, providing that public employees, with the agreement of their employers, could substitute shifts with other employees:

> If an individual who is employed in any capacity by a public agency which is a State, political subdivision of a State, or an interstate governmental agency agrees, with the approval of the public agency and solely at the option of such individual, to substitute during scheduled work hours for another individual who is employed by such agency in the same capacity, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

29 U.S.C. 207(p)(3). The legislative history to the 1985 Amendments reflects Congress's continued recognition of the longstanding "tradition" among public employees of trading time. And, significantly, this history clearly indicates that such "trade" is meant to result in each employee, the substitute and

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[8] This pinpoint citation is incorrect; see excerpted legislative history at page S8760, supra.

substituted-for, being "credited" for the initial work schedule:

> Public employees have been allowed to work for one another, with the approval of their employer, without affecting the computation of overtime for either employee. Current Fair Labor Standards Act regulations may raise questions as to the propriety of such a practice. Subsection 7(p)(3) would allow one employee to substitute and work for another such employee if the substitution was (1) voluntarily undertaken and agreed to solely by the employees and (2) approved by the employer. If two employees trade hours pursuant to this subsection, each employee will be credited as if he or she had worked his or her normal work schedule.

H.R. Rep. No. 99-331, at 25 (1985) (emphases added); see also S. Rep. No. 99-159, at 13 (1985), reprinted in 1985 U.S.C.C.A.N. 651, 661.

Congress specifically authorized the Secretary to promulgate legislative rules to carry out the 1985 FLSA Amendments. See Pub. L. No. 99-150, § 6, 99 Stat 787, 790 (1985) ("The Secretary of Labor shall . . . promulgate such regulations as may be required to implement [these] amendments."). The Department's regulations implementing the 1985 Amendments, including the newly enacted 29 U.S.C. 207(p)(3), state in pertinent part:

> Section 7(p)(3) of the FLSA provides that two individuals employed in any occupation by the same public agency may agree . . . to substitute for one another during scheduled work hours in performance of work in the same capacity. The hours worked shall be excluded by the employer in the calculation of the hours for which the substituting employee would otherwise be entitled to overtime compensation under the Act. Where one employee substitutes

> for another, each employee will be credited as if he or she had worked his or her normal work schedule for that shift.

29 C.F.R. 553.31(a) (emphasis added).[9] This last sentence in the Department's regulations is virtually identical to the sentence from the 1985 House Report excerpted above. The Preamble to the rule, faithful to the express legislative intent, clearly explains that substituted-for employees should be credited for the time they were scheduled to work:

> Several commenters stated that this section [of the proposed regulation] was not clear as to which employee (if any) is credited with the hours worked when substitution occurs. As explained in the last two sentences of § 553.31(a), the employee scheduled to work receives credit (and compensation) as if he or she had worked; the employee actually working (substituting) receives no credit (or compensation) from the employer for the hours involved. This position is set forth in the legislative history (H. Rep., p. 25; S. Rep., p. 13).

Application of the Fair Labor Standards Act to Employees of State and Local Governments, 52 Fed. Reg. 2012, 2018-19 (Jan. 16, 1987).

The 1985 Amendments added another important provision facilitating the substitution of shifts, as well as indicating an intent to have such time credited as initially scheduled: employers are not required to keep a record of substitute work hours for purposes of overtime compensation. See 29 U.S.C. 211(c); 29 C.F.R. 553.31(c). Thus, the employer can permit the employees to "swap" shifts, and any "payback" is left for the

[9] This regulation, published in 1987, remains unchanged.

"swapping" employees to resolve between themselves. See Wage and Hour Opinion Letter, 1993 WL 901178 (Dec. 13, 1993).

There is, accordingly, no question that the Secretary's regulation is consistent with the legislative history, and that it requires overtime payment to the substituted-for employees in this case.

3. In concluding that the FLSA does not require payment of overtime compensation for hours not actually worked by the substituted-for employee, the district court failed to defer to the Department's controlling regulation, promulgated pursuant to specific congressional authorization and after notice and comment. This failure constitutes reversible error. The rule reasonably interprets section 7(p)(3) of the FLSA to require the payment of overtime compensation to the employee originally scheduled to work the overtime hours.

When construing a statute, a court must begin with its language to determine whether it has a plain meaning. Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc., 467 U.S. 837, 842-43 (1984). Thus, the first step in any statutory construction case is to determine "whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." Barnhart v. Sigmon Coal Co., Inc, 534 U.S. 438, 450 (2002) (internal quotation marks omitted). Where "the statutory language is unambiguous and the

statutory scheme is coherent and consistent," the inquiry ceases. Id.

If, however, the statute is silent or ambiguous with respect to the issue, the reviewing court must defer to the agency's construction of the statute, so long as it is reasonable. See Chevron, 467 U.S. at 843; see also United States v. Mead Corp., 533 U.S. 218, 229 (2001); Shelton v. Consumer Products Safety Comm'n, 277 F.3d 998, 1006 (8th Cir. 2002). As the Supreme Court recently stated in Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 125 S. Ct. 2688, 2699 (2005): "[A]mbiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. . . . If a statute is ambiguous, and if the implementing agency's construction is reasonable, Chevron requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." This is because "Chevron's premise is that it is for agencies, not courts, to fill statutory gaps." Id. at 2700.

When considering whether an agency's interpretation of a statute is permissible, a court "must decide (1) whether the statute unambiguously forbids the Agency's interpretation, and, if not, (2) whether the interpretation, for other reasons,

exceeds the bounds of the permissible." Barnhart v. Walton, 535 U.S. 212, 218 (2002). Among other factors, courts may also consider whether the interpretation makes sense in terms of the statute's basic objectives, and whether it is one of "longstanding duration." Id. at 219-20.

Chevron applies where Congress has delegated to an agency authority to "speak with the force of law." Mead, 533 U.S. at 229. As the Supreme Court noted in Mead, "a very good indicator of delegation meriting Chevron treatment [can be found] in express congressional authorizations to engage in the process of rulemaking . . . that produces the regulations . . . for which deference is claimed." Id. Thus, a regulation promulgated pursuant to express congressional authorization and after notice and comment, such as the one at issue here, must be given "controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." United States v. O'Hagan, 521 U.S. 642, 673 (1997) (internal quotation marks omitted). Moreover, an agency's interpretation of its own legislative rules, as contained in opinion letters and legal briefs, are entitled to the same high level of deference. See Auer v. Robbins, 519 U.S. 452, 461-63.

4. Section 7(p)(3) of the FLSA specifically addresses the calculation of overtime compensation for a substituting employee, but is silent on the issue of overtime pay for a

substituted-for employee. See 29 U.S.C. 207(p)(3). This silence creates a "gap" or ambiguity in the statute. See, e.g., Barnhart v. Walton, 535 U.S. at 218 ("[S]ilence, after all, normally creates ambiguity. It does not resolve it."). Although acknowledging the gap in section 7(p)(3), the district court disregarded the Department's controlling regulation, and instead relied on section 7(p)(3) of the Act "in conjunction with" section 7(a), and concluded that section 7(a) precludes overtime pay for the substituted-for employee. While it is entirely appropriate to look to the overall statutory scheme in determining the proper construction of a statutory provision, see, e.g., Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 86 (2002); Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997), the district court's conclusion that section 7(a) limits the extent of section 7(p)(3) is unsupported by the structure of the Act.

As the district court itself noted, section 7(a) creates a general rule providing that employees must be paid overtime compensation for all hours over 40 worked in a workweek. Congress, however, has enacted a number of exceptions to the FLSA's general overtime provisions, including sections 7(k) and 7(p). The language of section 7(a) stating that the general rule of overtime is to be followed "[e]xcept as otherwise provided in this section" clearly recognizes that exceptions to

the general overtime rule exist. The FLSA's "trading time" provision at section 7(p)(3) creates such an exception to the general overtime rule.[10] Thus, section 7(a) does not modify section 7(p)(3); rather, section 7(a) sets out a general rule, to which section 7(p)(3), as interpreted by the Department's regulation, creates a "trading time" overtime exception.

As noted above, section 7(p)(3) does not explicitly explain how to determine overtime compensation for a substituted-for employee. But the Department's regulation interpreting section 7(p)(3), at 29 C.F.R. 553.31(a), permissibly fills the gap left by section 7(p)(3)'s silence. The plain language of the regulation stating that "[w]here one employee substitutes for another, each employee will be credited as if he or she had worked his or her normal work schedule for that shift" leaves no doubt as to the regulation's meaning. It is also a reasonable interpretation of the statute; in fact, this critical language of 29 C.F.R. 553.31(a) comes directly from the legislative history to the 1985 FLSA Amendments. See H.R. Rep. No. 99-331, at 25 (1985); S. Rep. No. 99-159, at 13 (1985). Moreover, this

[10] This reading is supported by general rules of statutory construction. See Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384-85 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general[.]"); see also U.S. v. Windle, 158 F.2d 196, 199 (8th Cir. 1946) (the rule stating that the specific terms of a statute prevail over the general exists to give effect to the presumed intention of the law-making body).

regulation is of longstanding duration; it was promulgated in response to specific congressional authorization soon after enactment of the 1985 Amendments, and has remained unchanged from that date. All the criteria for giving a regulation controlling deference are thus fully met.

Contrary to the district court's analysis, the regulation is also consistent with the statute's objectives. See Barnhart v. Walton, 535 U.S. at 219. From the inception of the substitution regulation in 1974, Congress indicated its intent to: (1) preserve the longstanding tradition among public employees of trading time and (2) shield employers from further overtime liability. See H.R. Rep. No. 99-331, at 25 (1985) ("Public employees have been allowed to work for one another, with the approval of their employer, without affecting the computation of overtime for either employee."); 120 Cong. Rec. S8760 (1974) (directing the Secretary to promulgate trading time regulations "without the employer being subject to the overtime rate by virtue of the voluntary trading of time by employees").

As illustrated by the following example, utilizing a 40-hour workweek, the Department's regulation gives effect to each of these congressional objectives. In this example, the substitute employee is scheduled for a 40-hour shift, while the substituted-for employee is originally scheduled for a 48-hour shift. They "trade" the eight hours beyond 40. For purposes of

calculating overtime compensation, therefore, the substitute employee who was scheduled for 40 hours is only entitled to 40 hours of pay, even if he worked 48 hours. The substituted-for employee, whose hours were covered and who was originally scheduled to work 48 hours, is entitled to 48 hours of pay, including 8 hours of overtime, even though he only worked 40 hours. It is between the employees to decide how those 8 hours will be "repaid." Thus, the Department's regulation fulfills the congressional objectives in authorizing the substitution of time: employees are permitted to trade shifts without extensive oversight or paperwork, and are allowed to negotiate "repayment" of the hours between themselves. Moreover, because the substitute employee does not "accrue" hours based on his substituted hours, the regulation shields employers from any additional overtime obligation. The employer is required to pay overtime compensation only to the substituted-for employee. There is no indication that Congress intended for an employer to be able to absolve itself completely of any responsibility for paying overtime compensation for the overtime hours worked when employees trade time. Therefore, since the statute clearly states that the substitute employee is not paid overtime, the substituted-for employee must be paid overtime compensation.

Furthermore, the relevant statutory and regulatory provisions do not burden employers. First, trading time does

not create additional overtime obligations, but merely fulfills the employer's expectation that it will be subject to overtime obligations by assigning overtime shifts in the first instance. Second, an employer can avoid paying overtime compensation for substitute hours by rejecting a substitution request. See 29 U.S.C. 207(p)(3) (substitution of shifts contingent upon the employer's approval); 29 C.F.R. 553.31(a) (same); Wage and Hour Opinion Letter, 2005 WL 3308620 (Nov. 4, 2005) ("[A]n employee may substitute for another employee if their employer, which is a public agency, approves of the substitution. . . ."). Thus, if an employer objects to paying overtime compensation to a substituted-for employee for hours not worked, the employer may simply decline to approve the substitution. Finally, shift substitution does not require an employer to engage in extensive oversight or recordkeeping. Rather, the FLSA's recordkeeping provision at 29 U.S.C. 211(c) reflects Congress' intent to preserve the informal practice of trading time, where the "trading" employees are solely responsible for determining how the substituted time will be paid back. See Wage and Hour Opinion Letter, 1993 WL 901178 (Dec. 13, 1993); see also 29 C.F.R. 553.31(c).

In sum, the district court erred by not deferring to the Department's interpretation of section 7(p)(3) contained in the

controlling regulation, and by consequently concluding that the plaintiffs were not entitled to overtime compensation.

5. Even if the Department's regulation is deemed to be ambiguous on the question of overtime compensation owed to a substituted-for employee, the Department's interpretation of its legislative rule is entitled to Chevron-type deference, and is "controlling unless plainly erroneous or inconsistent with the regulation." Auer, 519 U.S. at 461; see also Mead, 533 U.S. at 230-31. The Department's contemporaneous interpretation of its regulation in the Preamble explains that "the employee scheduled to work receives credit (and compensation) as if he or she had worked; the employee actually working (substituting) receives no credit (or compensation) from the employer for the hours involved." 52 Fed. Reg. 2012, 2018-19 (Jan. 16, 1987). This statement that "the employee scheduled to work receives credit (and compensation)" even where he has not worked unambiguously supports the Department's position that the substituted-for employee is entitled to overtime compensation. The Department has also consistently interpreted its trading time regulation in this manner in a number of opinion letters. See, e.g., Wage and Hour Opinion Letter, 2004 WL 3177870 (Nov. 23, 2004) ("Generally, the FLSA and the implementing regulations provide that public agency employees may agree to substitute for each other and that the pay of both the substituting and substituted

employee is unaffected."). As courts "must give substantial deference to an agency's interpretation of its own regulations," the Department's Preamble statement and opinion letters (as well as the views expressed in this brief) should control if there are any ambiguities in the rule itself. Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994); see also Barnhart v. Walton, 535 U.S. at 217 (citing Auer, 519 U.S. at 461 ("Courts grant an agency's interpretation of its own regulations considerable legal leeway.")); Human Dev. Corp. of Metro. St. Louis v. U.S. Department of Health and Human Servs., 312 F.3d 373, 379 (8th Cir. 2002).

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's grant of summary judgment for the City.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(c)(5) and (d), and 32(a)(7)(C), and 8th Cir. R. 28A(c) and (d), I certify the following with respect to the foregoing amicus brief of the Secretary of Labor:

1. This brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) because this brief contains 5,868 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. 32(a)(5)(B) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a monospaced typeface of 10.5 characters per inch, in Courier New 12-point type style. The brief was prepared using Microsoft Office Word 2003.

3. The digital copy of this brief on diskette provided to the court pursuant to 8th Cir. R. 28A(d) has been scanned for viruses and is virus-free.

_____ _____

DATE

MARIA VAN BUREN
Senior Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing Secretary of Labor's Amicus Brief In Support of Plaintiff/Appellants Rob Senger, et al., as well as a digital copy of the brief (on a 3.5 inch diskette), in compliance with 8th Cir. R. 28A(a) and (d), have been sent via **Federal Express Overnight Mail** on this 11th day of January 2005 to the following:

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