STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
Legal Section
[illegible] Van Ness Avenue, Suite 4400
[illegible] Francisco, CA 94102

GEORGE DEUKMEJIAN, Governor

1990.02.22

COPY

February 22, 1990

Richard J. Simmons, Esq.
Musick, Peeler & Garrett
One Wilshire Blvd.
Los Angeles, CA 90017

Re: Alternate Work Schedules

Dear Mr. Simmons:

This letter is in response to your letter of February 9, 1990, wherein you request the Division's opinion and enforcement policy with respect to the overtime requirements that apply where an alternative work schedule is implemented pursuant to the new provisions of Section 3(B) of Wage Orders 4-89 and 5-89.

You state that the questions are prompted by what you consider to be ambiguous language in Interpretive Bulletin 89-3 regarding this subject. You ask the following questions on behalf of the California Association of Hospitals and Health Systems:

> (1) Has the DLSE adopted a policy that a full-time employee who is covered by an alternative work schedule pursuant to Section 3(B) which ordinarily involves three 12-hour shifts must be paid overtime for <u>any</u> work performed on a fourth day of work in the workweek, including the first eight hours[1/] of work on such day?

The answer to question (1) is yes.

Your attention is directed to the provisions of Interpretive Bulletin 89-3 which addresses the question of the intent of the IWC in adopting the language regarding work beyond the "scheduled hours" and summarizes the position of the Labor Commissioner. Page 4 of the Interpretive Bulletin at the next to last paragraph provides:

1/ Your question contemplates three 12-hour shifts (36 hours) an additional eight hours would equal 44. We need not point out that even under the federal Fair Labor Standards Act employees employed for forty-four (44) hours in a workweek are entitled to overtime. We will assume, for purposes of this response, that you meant "the first <u>four</u> hours of work on such day" after completion of the thirty-six hours.

> "The IWC, in effect, required a trade-off for exemption from the overtime requirements after eight hours. It would not require such overtime as long as employees' hours were agreed to by the employees and "regularly scheduled." In order to ensure that employers respect the "regular schedules" which provide for no overtime after eight hours, the IWC made the policy choice to require overtime whenever hours are worked beyond the regular schedule. Certainly, many employees and employers may desire more flexibility in scheduling, however, again, that is a policy choice than can only be made by the IWC."

The above cited conclusion is premised upon the Statement of Basis adopted by the IWC which clearly indicated that the term "regularly scheduled" was a term which was not used without forethought. The Statement of Basis states, inter alia:

> "The IWC retained the language which provided that weeks of work be 'regularly scheduled'. The IWC was not persuaded by testimony from persons in the restaurant and hotel/motel industries which suggested that employees' interests could best be met by allowing employees to work different hours every week within a 40-hour limitation. The IWC agreed that if employees wanted to take advantage of an alternative schedule, they should have the built-in protection of limiting that schedule to a certain number of hours and number of days in a week. This would allow employees to plan for their transportation and child care needs, educational pursuits, family and recreation time, and other personal activities."

We fail to see any ambiguity in Interpretive Bulletin 89-3 in this regard.

Your second question is:

> (2) Does the DLSE believe there is any distinction in the overtime requirements between alternative work schedules established pursuant to Section 3(B) and those established pursuant to Section 3(K) of Wage Order 5-89?

The obvious distinction, of course, is that the provisions of 5(K) only apply to an employer engaged in the operation of a licensed hospital or providing personnel for the operation of a licensed hospital. In addition, Section 3(K) specifically allows workweeks of not less than three working days of no more than twelve hours or no more than five working days of no more than nine hours; whereas Section 3(B) places no restrictions on the "regularly scheduled" workweeks.

Your argument regarding the "extra days of work" points out that Section 3(K)(1)(b) of Order 5-89 specifically provides that any employee required or permitted to work in "excess of the number of workdays specifically agreed to in the written agreement shall be compensated at" a premium rate of 1½ times the regular rate of pay. You then point out that the language contained in Section 3(B) does not contain that specific language. However, what you fail to point out is that the language in Section 3(B) does provide for a "regularly scheduled week of work consisting of such hours and days as shall be agreed upon" and that the employee must be paid 1½ times the regular rate for all hours:

> "worked in any workday in excess of the regularly scheduled hours established by the agreement for that workday..."

Obviously, if the agreement calls for a regularly scheduled workweek of, for instance, three twelve-hour days, there are no regularly scheduled hours on the fourth, fifth, sixth or seventh workdays in that workweek. Consequently, if the employee is required or permitted to work on any non-scheduled day, any hours worked on that day would be in excess of the number of hours[2/] agreed to pursuant to the agreement and would have to be paid at the premium rate of 1½ times the employee's regular rate of pay.

That such a result was contemplated by the IWC is apparent from a reading of the final clause in Section 3(B) which provides that a premium rate of double the employee's regular rate must be paid for all hours in excess of eight hours on such non-scheduled days. The requirement that double time be paid for work in excess of eight hours on non-scheduled days is consistent with the provisions of Section 3(A)(2) which provides for double time after eight hours on the seventh day of work. The first eight hours of that seventh day would, of course, need to be compensated at time and one-half. (See Section 2(A)(1))

2/ Section 3(B) allows the time and one-half rate for all hours up to twelve in the event that the hours worked are in a workday which was regularly scheduled for less than twelve hours. However, the last clause of Section 3(B) requires double time for all hours after eight in the event the work is performed on a day which was not scheduled.

The IWC has historically imposed a graduated premium rate and has never imposed a double time rate directly from a regular rate. The provisions of Section 3(C) are consistent with that history.

It would be inconsistent with long-established policy of the IWC in California to assume that the IWC had intended to allow an employer to simply pay straight time wages for the first eight hours of non-scheduled days, but require double time for all hours in excess of eight.

As you know, the DLSE is mandated to interpret the IWC Orders and such interpretation must be compatible with the intent of the wage order. (Skyline v. DIR (1985) 165 Cal.App.3d 239, 249) Clearly, from the language used in the Statement of Basis which we have cited above, the intent of the IWC was to prevent employers from requiring employees to work other than "regularly scheduled" hours. Thus, the DLSE's enforcement position interprets the order to require the payment of premium pay for work which is beyond the regular schedule. This enforcement policy is, in our opinion, compatible with the intent of the order.

Question (3) asks:

> "Is it permissible under the DLSE's enforcement policy for an employer to establish a "regular schedule" pursuant to which part-time employees or "per diem" employees (Defined by you as employees in an on-call capacity where they do not have a fixed schedule each week but have agreed to be "in a pool" of employees who work as needed only in departments of a hospital that have alternative work schedules) agree to work a different number of days during different weeks (e.g., two days one week and three days in another week), as long as they (a) understand that their schedules may involve a different number of days on different weeks when they vote for or against the arrangement in the secret ballot election, and (b) they are advised of the number of days they are scheduled for a particular week when they are told of their schedule for that week?

Frankly, your definition of "per diem" employees seems to correspond with the common definition of part-time, on-call employees. Since they are only scheduled as needed, they would have no "regular schedule" and consequently would not be eligible for the 3(B) exception. The question of part-time employees employed on a scheduled basis was covered in detail in Interpretive Bulletin 89-3.

In Question (4) you ask:

"Does the DLSE intend Interpretive Bulletin No. 89-3 to mean that part-time employees who are covered by an alternative wrok schedule that also applies to full-time employees in their same department must receive overtime for work on an "extra" day in the workweek even though (when the extra day is considered) they work less than the number of days and hours worked by full-time employees covered by the same alternative work schedule?

The answer is yes.

Initially, in answer to this question, allow us to reiterate that the IWC made a specific finding that the flexible scheduling it was adopting would not allow for employees to work different hours every week. In regard to this issue, the IWC agreed that if the "employees wanted to take advantage of an alternative schedule, they should have the built-in protection of limiting that schedule to a certain number of hours and number of days in a week." In view of this, it appears quite clear to the Division that any deviation from the "regular schedule concept" would not be compatible with the IWC's intent.

As noted above, the Labor Commissioner concluded that the IWC required a trade-off for exemption from the overtime requirements after eight hours. Consequently, any proposed alternative schedule which did not specifically set out the hours certain which the employee was to work would not meet the requirements of Section 3(B). Thus, as pointed out above, if the part-time worker is scheduled to work, for instance, two days per week, and is required or permitted to work an extra day, the worker must be paid the applicable premium pay for all hours on the extra day.

We hope this adequately addresses the questions you raise in your nine-page letter of February 9th.

Yours truly,

H. Thomas Cadell, Jr.

H. THOMAS CADELL, JR.
Chief Counsel

c.c. James Curry
Simon Reyes ✓