



## Legislation Text

File #: 07760, Version: 1

### Fiscal Note

A total of \$308,000 is available in Contingent Reserve to fund the \$122,693 cost of this settlement agreement through May 5, 2007. There is no impact on Expenditure Restraint Program eligibility. It is anticipated that the additional ongoing overtime cost associated with this agreement will be \$24,000 for the period from May 6, 2007 through the end of the year and will exceed \$35,000 per year thereafter based on recent staffing patterns and experience. These costs will be paid from budgeted Fire Department resources.

### Title

Approving a settlement of Fair Labor Standards Act litigation, Larry Acker, et al. v. City of Madison, Case No. 05CV467; authorizing the Mayor and City Clerk to sign settlement documents and related amendments to the Collective Bargaining Agreement with Local 311 of the International Association of Firefighters AFL-CIO to effectuate the approved settlement; transferring sufficient funds from the contingent reserve and amending the 2007 Operating Budget to appropriate the \$122,692.62 settlement costs and any on-going FLSA overtime payable under the agreement between May and the end of the budget year.

### Body

#### Background

In July, 2004, the Common Council adopted a resolution authorizing retaining outside counsel to represent the City in a potential wage and hour matter and to advise the Fire Department on compliance with state and federal wage and hour legislation. Outside counsel, City Attorney staff, Fire Department personnel, Human Resources personnel and staff from the Comptroller's office conducted a review of Fire Department practices in this area. This review included both the implementation of the Fire Department's creative staffing initiative and the Department's current payroll practices generally as they relate to the Fair Labor Standards Act (FLSA) requirements.

As a result of this review, the City took several affirmative steps: calculated and voluntarily paid identified FLSA arrearages (totaling \$41,468.45) going back two years from September, 2004; programmed the payroll system to calculate and pay FLSA overtime on a go forward basis; modified the system on an ongoing basis as necessary to correct errors.

In February, 2005, MFD firefighters filed a lawsuit broadly asserting FLSA violations. Since that time, the parties have worked to agree upon facts and isolate the legal issue(s) in dispute. The City has also continued to follow the compliance review recommendations regarding calculation of FLSA overtime generated under the Fire Department's creative staffing initiative.

The single legal issue in the case relates to FLSA overtime for substitutions (when one firefighter requests another firefighter to work the first firefighter's tour of duty in his/her place) and whether the City must count for overtime purposes under the FLSA the hours when a firefighter is on exchange and not working. During the course of the litigation, a federal district court case which had been originally decided favorably to the City's position on this very point was reversed on appeal. The appellate court, sustaining a U.S. Department of Labor (DOL) regulation as well as the DOL interpretation of that regulation, held that the hours when an employee is on exchange and being substituted for (i.e., not working) must be counted as hours worked for purposes of FLSA overtime. The DOL filed an amicus brief in support of the firefighters' position. The U.S. Supreme Court declined review. Given this legal development, the parties agreed that exploration of potential settlement options was appropriate.

Discussions resulted in an agreement in principle that includes the following elements:

1. In connection with the settlement, commencing effective February 16, 2003, the City shall credit the firefighter who is on exchange and does not work according to his/her normal schedule for that shift for purposes of his/her salary and treat such hours as actual hours worked for purposes of FLSA overtime.
2. Should any applicable law, judicial determination or administrative rule governing the State of Wisconsin

and/or the City of Madison determine that such hours on exchange do not count or need not be counted as actual hours worked for FLSA purposes, then the City may adjust its payroll practices accordingly.

3. The aggregate amounts due for substitutions from February 16, 2003 to May 5, 2007 is \$99,931.55 which shall be paid to individual plaintiff firefighters using the agreed upon FLSA methodology. FLSA overtime payable for substitutions from May 6, 2007 to the end of the budget year will be determined by the City Comptroller and paid to individual firefighters accordingly either in a separate check or as part of the ongoing normal payroll procedures.

4. \$12,500 of the total settlement amount will be paid to Local 311 of the International Association of Firefighters AFL-CIO (Union), and there is an additional payment of about \$10,261.07 on past creative staffing overtime.

5. The City and Union will execute an amendment to the Collective Bargaining Agreement (CBA) to effectuate certain agreed upon changes to the CBA related to creative staffing, hours of work and pay policy.

6. The settlement must be approved by the Mayor and the City Council and the CBA amendments must be approved by the Union and all necessary documents pertaining thereto fully executed on or before December 4, 2007 or the settlement is deemed rejected by the City.

The City Attorney, Fire Chief and City Comptroller all recommend that the City Council approve the settlement. The settlement amount is within the range of reasonableness, and avoids the costs and risks of full litigation. The City Attorney estimates that, if the case were tried and lost, the total amount that could have been payable to Plaintiffs might have included the above amounts plus liquidated damages up to twice the amount of the FLSA payments made under the settlement and Plaintiffs' attorney fees for the litigation. Further, the City would be exposed to substantial negative budgetary effects due to the interplay between substitutions and creative staffing that are mitigated by the CBA changes agreed to in the settlement.

#### **Resolution**

WHEREAS, the City of Madison and Plaintiff firefighters are involved in litigation and disputes regarding a claim that the City failed to pay FLSA overtime payable on hours worked in excess of 212 hours per work period during the three years preceding filing of the action; and

WHEREAS, the City, Plaintiffs and Local 311 engaged in extensive negotiation of the litigation and disputes; and

WHEREAS, the parties reached a tentative settlement of the litigation and disputes, subject to approval by the Common Council and the Mayor, the major terms of which are set out above.

NOW, THEREFORE, BE IT RESOLVED:

1. That the settlement outlined in this resolution is approved by the Common Council, and the Mayor and the City Clerk and are authorized to execute any documents necessary to effectuate the settlement.

2. That the settlement documents shall be reviewed and approved by the City Attorney as to form.

3. That the Council authorizes a payment of \$122,692.62 as well as additional FLSA overtime payments payable from May 6, 2007 to the end of the budget year, such amount being estimated as not to exceed \$30,000, from City resources to be paid to Plaintiffs and Local 311 to effectuate the settlement.

4. That the \$122,692.62 be appropriated from the Contingent Revenue Fund to recognize the City's share of settlement costs; and that the approximately \$30,000 be paid out of the Fire Department budget.