U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

September 9, 2005 **FLSA2005-32**

Dear ***Name****,*

This is in response to your letter requesting an opinion concerning the applicability of the Fair Labor Standards Act (FLSA) to a situation where volunteer reserve deputies are temporarily employed by the County Sheriff's Department to provide security services during a regional state fair.

You state that the County operates a Sheriff's Department, which has a volunteer reserve deputy program. The volunteer reserve deputies do not receive compensation for the volunteer services they provide for the Sheriff's Department. However, in the past, volunteer reserve deputies were temporarily employed and paid $10-$15 per hour for security duties performed during the weeklong regional state fair held annually in August. At the conclusion of the fair, the Sheriff's Department terminated the employment of the reserve deputies and returned them to volunteer reserve status. Several years ago, due to FLSA concerns, the County discontinued this practice. However, since that time, the County and the Deputy Sheriff's Association have jointly reviewed various Wage and Hour Opinion Letters that raise questions about whether the practice of temporarily employing volunteer reserve deputies during the fair week would impair the reserve deputies' status as bona fide volunteers.

You state that an opinion letter dated February 21, 1992, a copy of which you attached, appears to suggest that even if employment of volunteer reserve deputies is temporary in duration, the FLSA precludes a reserve deputy from volunteering to provide the same type of services for the same employer. On the other hand, you believe that the determining factor in an opinion letter dated June 9, 1988, a copy of which you also attached, is whether the Wage and Hour Division would consider the weeklong regional state fair as "occasional or sporadic" type of work, thus, allowing for the practice described in your letter. In a telephone discussion with a member of the Wage and Hour Division staff on February 7, 2005, you asked us to assume, for purposes of this discussion, that the security duties the reserve deputies perform for the Sheriff's Department during the weeklong fair are the same type of services as their volunteer functions, and these services are performed for the same public agency.

The FLSA recognizes the generosity and public benefits of volunteering, and does not pose obstacles to bona fide volunteer efforts for charitable and public purposes except in very narrow circumstances. By enacting the 1985 FLSA amendments, Congress sought to ensure that true volunteer activities were neither impeded nor discouraged, while at the same time minimizing the potential for abuse or manipulation of the FLSA's minimum wage and overtime requirements through coercion or undue pressure on individuals to "volunteer" their services.

In this regard, an individual who "performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for the services rendered, is considered to be a volunteer during those hours." 29 C.F.R. § 553.101(a). However, under the legislative compromise that Congress reached in the 1985 FLSA Amendments, an individual is not considered a volunteer if the individual is otherwise employed by the same public agency to perform the same type of services as those for which the individual proposes to volunteer. This limitation is found in the statutory definition of "employee" in section 3(e)(4) of the FLSA, 29 U.S.C. § 203(e)(4) (copy enclosed). Consequently, under the FLSA, an employee of a public agency may volunteer to perform the same type of service for a different public agency, or may volunteer to perform a different type of service for the same public agency that employs him or her without restriction.

We note that the opinion letter dated February 21, 1992 concerns reserve officers employed by the County Sheriff's office who wished to volunteer the same type of services for the same employer during *off-duty* hours without compensation. The response correctly states that "[t]he FLSA makes no distinction with respect to whether an employee has temporary or permanent status with an employer." It continues to be our position that employees of public agencies may not perform the same type of services as volunteers for the same employer with no compensation. *See* 29 C.F.R. § 553.103.

On the other hand, the analysis in the opinion letter dated June 9, 1988 is applicable to the practice described above. That opinion refers to a situation where the County Sheriff's office proposes a policy whereby it hires reserve officers as temporary part-time employees to work in place of regular full-time police officers who are absent. Upon the regular full-time police officer's return, the reserve officer is terminated as a temporary part-time employee and returned to reserve status. The Wage and Hour Division determined that the policy would not comply with the FLSA, since the kinds of personnel actions the City proposed with regard to the reserve officers did not change the fact that these individuals were employees of the City and, as such, could not volunteer their services in the same capacity for which they were being paid. *See* Opinion Letter dated June 9, 1988.

However, the June 9, 1988 letter went on to state that "[w]e would consider your proposed solution to be in compliance with the provisions of FLSA where the compensated work is performed only on an occasional or sporadic basis. In such a situation the volunteer reserve officers would be considered to be employees of the City only during workweeks when such work is performed, and would retain their volunteer status during other workweeks in which no compensated work is performed. If, however, the compensated work occurs at regular intervals, or occurs on a predictable basis, the volunteer reserve officers would be considered to be part-time employees of the City rather than volunteers and thus be precluded from volunteering their services in any workweek."

As discussed in part in 29 C.F.R. § 553.30(b), "[t]he term *occasional or sporadic* means infrequent, irregular, or occurring in scattered instances." We believe that employing volunteer reserve deputies for a period of one week a year to perform security services qualifies as *occasional or sporadic* in nature and duration. Therefore, it is our opinion that the County Sheriff's Department may employ volunteer reserve deputies for the weeklong regional state fair, terminate their employment at the conclusion of the fair and return them to volunteer reserve status, provided that the reserve deputies:

1. were not converted unilaterally by the employer to volunteer status in order to avoid the minimum wage provisions or overtime protection of the FLSA. *See Krause v. Cherry Hill Fire Dist.*, 969 F. Supp. 270, 277-79 (D.N.J., 1997);

2. serve as volunteers for civic, charitable, or humanitarian reasons without promise, expectation or receipt of compensation, although expenses, reasonable benefits or a nominal fee may be provided;

3. offer their service freely and without coercion, direct or implied, from the agency; and

4. are not otherwise employed by the same public agency to provide the same services for which they volunteer.

These criteria should be applied on an individual basis to determine if the circumstances indicate that a specific individual qualifies as a bona fide volunteer under the FLSA.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor. This opinion letter is issued as an official ruling of the Wage and Hour Division for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259. *See* 29 C.F.R. §§ 790.17(d), 790.19; *Hultgren v. County of Lancaster, Nebraska*, 913 F.2d 498, 507 (8th Cir. 1990).

We trust that the above is responsive to your inquiry.

Sincerely,

Alfred B. Robinson, Jr.
Deputy Administrator

Enclosure: Section 3(e)(4) of the FLSA

***** *Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. 552 (b)(7).*