



December 13, 2004

FLSA2004-31NA

Dear *Name**,

This is in response to your letter concerning the application of the Fair Labor Standards Act (FLSA) to an individual employed in the office of constable.

You state that in *Name** the office of constable is an elected county office that is not subject to state or local government civil service laws. In a telephone conversation of August 27, you stated that this is a part-time position with work hours that vary depending upon the county. Such elected officials are excluded from coverage under section 3(e)(2)(C) of the FLSA, 29 U.S.C. 203(e)(2)(C), which states that such individuals are not employees.

You also stated that the constable may also serve as a part-time, nonexempt employee in the same county in which he or she is elected in a separate department (e.g., court bailiff or transporting prisoners for the sheriff's department). As such an employee, he or she is supervised by another elected official. His or her work hours may vary up to 30 in a workweek. You wish to know whether the time spent in carrying out the duties of elective office should be added to the hours worked as an employee in a separate county department, under the supervision of another elected official, to determine if overtime has been worked.

The FLSA is the Federal law of most general application concerning wages and hours of work. It requires that all covered and nonexempt employees be paid not less than the minimum wage and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek. The provisions of the FLSA apply to all employees of State and local governments except to those who are specifically excluded in section 3(e)(2)(C) of the FLSA and to those who may qualify for exemption from the minimum wage and/or overtime pay provisions of the FLSA.

Section 3(e)(2)(C) excludes from the definition of "employee" under the FLSA an individual who is not subject to the civil service laws of the State, political subdivision, or agency which employs him, and who (1) holds a public elective office of that State, political subdivision, or agency, (2) is selected by the holder of such an office to be a member of his personal staff, (3) is appointed by such an officeholder to serve on a policy making level, (4) is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office, or (5) is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

The constable in *Name** is an elected county official who is not subject to the civil service laws. Therefore, because a constable is statutorily excluded from the definition of "employee" by section 3(e)(2)(C)(i) of the FLSA, it is our opinion that the hours worked as constable would not have to be added to those worked as an employee of the county in a different capacity for the purpose of overtime compensation.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which 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 different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to pending 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.



We trust that the above information is responsive to your inquiry.

Sincerely,

Barbara R. Relford
Office of Enforcement Policy
Fair Labor Standards Team

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