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

**August 26, 2005** **FLSA2005-23**

Dear ***Name****,*

This is in response to your request for an opinion on the application of the Fair Labor Standards Act (FLSA) to court reporters and court coordinators of **Name*** County. You describe the court reporter as not subject to the civil service laws of the state and as appointed by, directly supervised by, and serving at the pleasure of the elected judge. The court reporters' responsibilities include taking the transcript of the court's proceedings. The court coordinators are similarly selected by the elected judge and serves at the judge's pleasure. A position description you provided shows that the coordinators report directly to the judge, meeting with him or her regularly. The coordinators' responsibilities include managing the office and budget, organizing the court calendars and dockets, monitoring court files, supervising others in the office, and interacting with the general public, attorneys and litigants. We conclude that the court reporter position is not exempt under the personal staff exemption, but that the coordinator position is exempt.

Generally, the FLSA, covers an employee of a covered enterprise such as a state or local government. However, FLSA § 3(e)(2)(C)(i)(II), copy enclosed, excludes from coverage any individual employed by a State, political subdivision of a State, or an interstate governmental agency who is not subject to the agency's civil service laws and who is selected by a public elective office holder of such an office to be a member of his or her personal staff. The legislative history of the personal staff exception in Title VII (which Congress expressly referenced in creating the FLSA exception) suggests that Congress intended to limit the exception to employees with an intimate relationship to elected officeholders. See 118 Cong. Rec. 4492-93 (1972).

The regulations implementing the personal staff exception of the FLSA identify some relevant considerations in applying the exception:

> The statutory term "member of personal staff" generally includes only persons who are under the direct supervision of the selecting elected official and have regular contact with such official. The term typically
> does not include individuals who are directly supervised by someone other than the elected official even though they may have been selected by the official. For example, the term might include the elected official's personal secretary, but would not include the secretary to an assistant.

29 C.F.R. § 553.11(b). The Wage and Hour Division's Field Operations Handbook (FOH) similarly explains that:

> The "personal staff" does not include individuals who are directly supervised by someone other than the elected official even though they may be selected by and serve at the pleasure of such official. Generally personal staff includes only persons who are under the direct supervision of the elected official and who have almost daily contact with him or her... It would typically not include all members of an operational unit, since all the members could not have a personal working relationship with the elected official.

FOH, ¶ 10d04.

To determine whether an employee falls under the personal staff exception, courts in Title III cases generally use the six factor test set out in *Teneyuca v. Bexar County*, 767 F.2d 148 (5th Cir. 1985). The factors are summarized below:

1. whether the elected official has the power to hire or fire
2. whether the employee is personally accountable to only the elected official

3. whether is employee represents the elected official in the eyes of the public
4. whether the elected official has a considerable amount of control over the employee
5. the location of the employee's position in the chain of command
6. the closeness or intimacy of the work between the elected official and the employee.

The Fourth Circuit in *Brewster v. Barnes*, 788 F.2d 985 (4th Cir. 1986), found it important that the position was not a high level position that did not require the rendering of advice in policy decisions. However, recently the Fifth Circuit in *Taplin v. Johnson*, 90 Fed.Appx. 736 (5th Cir. 2004), found that an office administrator who did not render advice on policy was a member of the personal staff of an elected sheriff for purposes of the statute. This court used the above six factor test, noting that the "exception should be 'narrowly construed' so as to only apply to an elected official's 'first line advisors'." *Id.* at 739.

With regard to court reporters, we have previously concluded that they do not fall within the exemption. See Opinion Letter dated November 27, 1998 (copy enclosed). As in your letter, the November 27th letter states that the court reporters at issue are appointed to their positions by a judge, are directly supervised by the judge, serve at his or her pleasure, and are not subject to the civil service laws of **Name*** . However, regardless of these factors, the November 27th letter explains that court reporters do not fall under the personal staff exemption because they do not have the highly intimate and sensitive position of responsibility necessary to qualify for this exemption. They do not render advice or counsel to the judges or have any intimate or sensitive status vis a vis the judges. We also do not believe they represent the judges in the eyes of the public or are first line advisors. Thus, because court reporters do not have responsibilities of this nature, the personal staff exemption does not apply.

The position of court coordinator has not been addressed in any previous opinion letters. However, in an opinion letter dated September 12, 1997, we concluded that the personal staff exception applied to a judge's administrative assistant who had similar levels of responsibility and interaction with the judge as the court coordinator here. We similarly conclude, in light of the factors discussed above, that the court coordinator falls within the exemption.

With respect to the court coordinator, the first factor in the six factor test is met because you indicated that court coordinators are chosen by the elected judge, report directly to him or her and serve at his or her pleasure. Second, in the job description that you submitted to the Wage and Hour Division, you indicated that the court coordinator's only supervisor is the elected judge. Therefore, the coordinator is accountable to the official only. The third factor is also met because the job description indicated that the coordinator had daily communications with the general public, attorneys, law enforcement personnel, and others, both in phone and in person, on behalf of the judge.

Fourth, the job description also noted that in making the most important decisions of the position, the sole standard used to help make or approve the decisions was the elected official. This illustrates the fourth factor, that the official has a considerable amount of control over the employee.

In looking at the fifth factor, it is important to consider whether the coordinator is a "first line advisor." *Taplin*, 90 Fed. Appx. at 740. The nature of the position was described as that of a supervisor over other members of the office. Further, because the coordinator is accountable to the judge only, in carrying out the responsibilities for scheduling all matters before the court, monitoring all court files throughout the progress of each case, and serving as the office manager/budget manager in running the office, the coordinator is a first line advisor.

The sixth factor is the most difficult to resolve. In determining the closeness and intimacy of the working relationship, it is helpful to consider the *Bland* case. In *Bland v. New York*, 263 F. Supp.2d 526, 540 (E.D.N.Y. 2003), the employee was a personal secretary who was hired by the judge, reported directly to him, and whose position and responsibilities were directly controlled by him. The judge also directly supervised her and she answered his phone, thereby representing him in the eyes of the public. Therefore, the court found that she "possessed an intimate and sensitive working relationship" with the judge. *Id*.

Similarly, the court coordinator described in your letter is hired/fired by the judge, reports directly to him/her, meets with the public on a daily basis, is supervised solely by the judge, is a supervisor of others in the office, and has full control over the schedule of the docket which is reviewed only by the judge. Therefore, like the judge's administrative assistant in the September 12, 1997 letter, we find that the court coordinator fits under the personal staff exception laid out in Section 3(e)(2)(C)(i)(II) of the FLSA and thus is exempt under the statute.

Although you did not specifically inquire about the applicability of the overtime provisions to court reporters, it may be helpful to refer to Section 7(o)(6) of the FLSA (copy enclosed):

> The hours an employee of a public agency performs court reporting transcript preparation duties shall not be considered as hours worked for the purposes of subsection (a) if—
>
> (A) such employee is paid at a per-page rate which is not less than—
>  (i) the maximum rate established by State law or local ordinance for the jurisdiction of such public agency,
>  (ii) the maximum rate otherwise established by a judicial or administrative officer and in effect on July 1, 1995, or
>  (iii) the rate freely negotiated between the employee and the party requesting the transcript, other than the judge who presided over the proceedings being transcribed, and
>
> (B) the hours spent performing such duties are outside of the hours such employee performs other work (including hours for which the agency requires the employee's attendance) pursuant to the employment relationship with such public agency.

In a fax received by the Department of Labor on November 12, 2004, you stated that the District Judges decided as a group that the per page rate that court reporters can charge the county is $3.50 per page; and they charge outside attorneys more and that rate is sometimes negotiable. Thus, if this rate (or a lower maximum rate) was in effect on July 1, 1995 or an outside party freely negotiated this rate with the reporter, then the first part of the statute is met.

However, with regard to FLSA § 7(o)(6)(B), you stated that if a transcript is needed for the Court of Appeals, then the Judge is required to give the court reporter time off to prepare the record, and he or she is paid for that time as if he/she was sitting in the courtroom. In the enclosed Committee Report that accompanied the Court Reporter Fair Labor Amendments of 1995 (which added § 7(o)(6)(B) to the FLSA), the Committee on Economic and Educational Opportunities explained, "If the work is being performed while the official court reporter's attendance at the courthouse or some other location is required as part of the employment relationship, the time spent preparing the transcript in that location will continue to be considered 'hours worked' for purposes of the FLSA." Therefore, when the court reporter is required to take time off from his/her usual workday to prepare a transcript and is paid as if he/she was sitting in the courtroom, then those hours spent preparing the transcript must be considered for overtime purposes. H. Rep. 104-219, p.5.

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 different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to a 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 discussion is responsive to your inquiry.

Sincerely,

Alfred B. Robinson, Jr.
Deputy Administrator

Enclosures: FLSA § 3(e); November 27, 1998 opinion letter; FLSA § 7(o)(6)

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