



October 14, 2005

FLSA2005-40

Dear *Name**,

This is in response to your request for an opinion on the application of 29 C.F.R. Part 541 (copy enclosed) to high ranking police officers and fire fighters. Specifically you asked whether a particular city's Police Lieutenants, Police Captains, and Fire Battalion Chiefs are exempt from the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA).

The job duties of the Police Lieutenant include the following: supervising a group of Police Officers and Sergeants assigned to patrol duties; deploying patrol units in accordance with needs of the workload; planning, directing, and coordinating activities of any of the special units; assisting and instructing Police Officers and Sergeants in handling difficult problems; conducting and participating in training courses; supervising and participating in the development and maintenance of a police records system; performing employee appraisals on subordinates; and disciplining subordinates when required. Additionally, Police Lieutenants are responsible for the following duties: supervising, commanding and reviewing work of station and field personnel; assisting in the direction of the training and development of personnel; assisting in budget preparation and management; and coordinating and directing expenditures, material acquisition, and maintenance.

The Police Captain position is the commanding officer for one to several divisions of the Police Department. The Police Captain plans, coordinates, and controls the activities of division personnel regarding allocation and deployment of personnel and equipment as well as evaluates performance, recommends strategies and develops policies and procedures regarding division activities. Your letter lists the following job functions of the Police Captain: conducting and participating in training courses; performing employee appraisals on subordinates; holding subordinates accountable for rules, regulations and written directives; disciplining subordinates; making decisions in accordance with laws, regulations and policies; and assisting in budget preparation and management.

The Fire Battalion Chief performs work under the direction of the Assistant Fire Chief but manages and provides leadership for a section of the Fire Department. The position involves managing the administrative and operational functions of the assigned section while integrating the Department's goals into day-to-day operation. The Fire Battalion Chief position is responsible for the following activities: enforcing and implementing rules, regulations, procedures and values of the Fire Department; directing activities of personnel; taking proper action in all emergency situations until relieved by higher ranking officer; coordinating pre-fire planning, company inspection activities, and conducting routine fire cause investigations; preparing, reviewing and processing reports and records; and assisting in necessary research and preparation of budget needs. The completed questionnaire attached to your letter states that all three positions spend 50% or more of their time in management, customarily and regularly direct the work of at least 2 full time employees, and make suggestions regarding the hiring, firing, advancement and promotion of other employees which are given particular weight.

You have stated that the employees in question are paid at least \$455 a week on a salary basis as is defined in 29 C.F.R. § 541.602. Based on the information that you provided regarding the primary duties of each position, the three positions are exempt under the executive exemption, as explained below. We note that job titles alone are "insufficient to establish the exempt status of an employee," and the exempt status of any particular employee turns on "whether the employee's salary and duties meet the requirements of the regulations" 29 C.F.R. § 541.2.

As you know, Section 13(a)(1) of the FLSA provides an exemption from the minimum wage and overtime provisions for any employee employed in a bona fide executive, administrative, or professional capacity, as defined by the Department. The Department of Labor's updated Part 541 regulations that define certain executive, administrative and professional exempt employees were



published as a final rule in the Federal Register on April 23, 2004 (69 FR 22122). The revised Part 541 regulations went into effect on August 23, 2004.

Revised § 541.3(b) of the Regulations states that the §13(a)(1) exemptions do not apply to police officers, fire fighters or other first responder employees who perform work such as extinguishing fires, rescuing crime or accident victims, performing surveillance, pursuing or restraining suspects, interviewing witnesses, and other similar work identified in the regulations because their primary duty is not management or directly related to the management or general business operations of the employer. Thus, such employees do not qualify for an exemption as an executive or administrative employee under § 541.100 or § 541.200. These positions also do not meet the test for an employee in a professional capacity because there is no requirement of knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. 29 C.F.R. §§ 541.3(b)(1)-(4).

However, the § 13(a)(1) exemptions may apply to police lieutenants, police captains, and fire battalion chiefs positions so long as the employees in these positions meet all of the requirements set out in the Regulations. See 69 Fed. Reg. 22122, 22130 (April 23, 2004) (citing e.g. West v. Anne Arundel County, Maryland, 137 F.3d 752 (4th Cir.), cert. denied, 525 U.S. 1048 (1998)). Specifically, they may fit within the regulatory exemption for Executive Employees in § 541.100. Section 541.100 states that an employee is employed in a "bona fide executive capacity" for purposes of the exemption if the employee is:

- (1) Compensated on a salary basis at a rate of not less than \$455 per week..., exclusive of board, lodging or other facilities;
- (2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
- (3) Who customarily and regularly directs the work of two or more other employees; and
- (4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

Because the salary requirements of the regulation are met, application of the exemption to the three positions you described turns on whether the positions meet the primary duty requirement of § 541.100(a)(2)-(4).

Meeting the requirements of § 541.100(a)(2) depends on the employees' "primary duty" in their management position. Primary duty is defined in § 541.700(a) as "principal, main, major, or most important duty that the employee performs." Factors to consider in determining an employee's primary duty include "the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee." 29 C.F.R. §541.700(a). It is important to remember that the primary duty determination is based on all of the facts and circumstances in each individual case with major emphasis on the character of the employee's job as a whole. Further, although the amount of time spent on exempt work can act as a guide, time is not conclusive. However, employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. 29 CFR § 541.700(b).

Section 541.102 is a non-exhaustive list that illustrates what type of activities constitutes "management." Your letter included job descriptions which stated that each position involved the primary duty of management of a recognized department or subdivision for more than 50% of the time in each case. The management duties included, but were not limited to, selecting and training other employees; setting work schedules; directing the work of others; evaluating worker productivity; handling complaints and grievances; disciplining employees; determining techniques, materials, and equipment to be used; and determining supplies, equipment and tools to be purchased. Each of the



duties that you described is mentioned in the § 541.102 list. Therefore, so long as the employee's actual activities correspond with his or her job description, each position meets the primary duty requirement of management laid out in § 541.100(a)(2).

Next, § 541.100(a)(3) states that the employee must customarily and regularly direct the work of two or more employees. Again, you stated in your job description that the employees in the position of police lieutenant, police captain, and fire battalion chief regularly direct the work of at least two employees. Therefore, those positions meet the second part of the "executive" employee duties test.

The third duties requirement under the executive exemption is that the employee must have the authority to hire or fire other employees or have their suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees be given particular weight. 29 C.F.R. § 541.100(a)(4). In determining whether an employee's suggestions and recommendations are given "particular weight," factors such as whether it is part of the employee's job to make such recommendations, the frequency with which such recommendations are made or requested, the frequency with which the recommendations are relied upon, among others, are relevant. However, the regulations do not require the employee to have authority to make the ultimate decision and a higher level manager's recommendation may be given more importance. 29 C.F.R. §541.105. The questionnaires you provided stated that each employee's recommendation is given particular weight while others make the final decision regarding hiring, firing, advancement, or promotion of other employees (due to the civil service system). Thus, this requirement appears to be satisfied.

Accordingly, the duties described in your letter are sufficient to qualify the City's Police Lieutenants, Police Captains, and Fire Battalion Chiefs as exempt from the minimum wage and overtime provisions of the FLSA. Therefore, so long as the actual duties performed by these employees are consistent with those described, the referenced employees are exempt from these provisions of 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 questions 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: 29 C.F.R. Part 541

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