



October 22, 2004

FLSA2004-25NA

Dear *Name\**,

This is in response to your letter requesting an opinion concerning the applicability of the Fair Labor Standards Act (FLSA) to Corrections Officers desiring to volunteer as Special Deputies for the same employer.

You state that Corrections Officers are non-sworn, non-deputized civilian employees assigned to the *Name\** County jail. Corrections Officers possess no powers of arrest. Their duties primarily consist of the processing, maintenance, and discharge of jail inmates. They fingerprint, photograph, and perform searches of inmates. Other duties include arranging for court appearances of inmates, and providing for telephone calls and visitation for inmates.

Law enforcement activities are performed primarily by full-time sworn, state certified Deputy Sheriffs, and by unpaid volunteer Special Deputies on an occasional basis. The duties, qualifications, and responsibilities of a Deputy Sheriff and a volunteer Special Deputy are identical. Service as a volunteer Special Deputy enhances an individual's opportunity to become employed in a law enforcement position in your office and elsewhere. At the same time, increasing the ranks of volunteer Special Deputies also serves the needs of the *Name\** County Sheriff's Office by expanding its capacity to respond to the rising demand for law enforcement personnel during a period of extremely tight budget restraints.

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 limited circumstances. Under the FLSA, in the vast majority of circumstances, individuals can volunteer services to public sector employers. When Congress amended the FLSA in 1985, it made clear that people are allowed to volunteer their services to public agencies and their community with but one exception – the FLSA does not permit an individual to perform hours of volunteer service for a public agency when such hours involve the same type of services which the individual is employed to perform for the same public agency (emphases added). Whether two agencies of the same State or local government constitute the same public agency can only be determined on a case-by-case basis. 29 CFR § 553.102. Your letter makes clear the volunteer activities would be performed for the same public agency. The issue, then, is whether the volunteer Special Deputies would be performing the "same type of services."

Public sector employees may volunteer to do different kinds of work for the same public agency for which they are employed, or volunteer to do similar work for different public agencies. For example, police officers can volunteer for different work (non-law enforcement related) in city parks or schools, or can volunteer to perform law enforcement for a different jurisdiction than where they are employed. Additionally, there is no prohibition on anyone employed in the private sector from volunteering in any capacity or line of work in the public sector.

Section 3(e)(4)(A) of the FLSA makes clear that individuals are not "employees" entitled to compensation for hours of work if the volunteer services they provide to a public agency are not the same type of services which they are employed to perform by that agency. To allow public employees to volunteer to perform for their public agency employer the same type of services for which they are paid raises the potential for abuse which Congress clearly had in mind in enacting this section of the law. See Senate Report No. 99-159, October 17, 1985, page 14, 2 U.S. Cong. News 1985, page 662 ("the Committee wishes to prevent any manipulation or abuse of minimum wage requirements through coercion or undue pressure upon employees to 'volunteer'").

29 CFR Section 553.103 defines "same type of services" to mean similar or identical services, and refers to the duties and other factors contained in the definitions of the three-digit categories of occupations in the Dictionary of Occupational Titles. Equally important are all the facts and circumstances in a particular case including whether the volunteer service is closely related to the actual duties performed by or responsibilities assigned to the employee who "volunteers."



We consider law enforcement duties such as transferring or taking custody of prisoners, booking, fingerprinting, restraining, etc., with respect to suspects or prisoners, to be the same type of services whether performed by police officers, detectives, bailiffs, jailers, deputies, etc. See opinion letters dated April 21, 1995; November 6, 1995; and March 18, 1992. Similarly, law enforcement duties such as patrolling streets, directing traffic, taking reports on stolen or recovered property, locating missing persons, collecting evidence and taking photos at crime scenes, performing matron duties with female prisoners, etc., whether performed by police cadets, community service officers, reserve deputies, auxiliary or regular police officers, are the same type of services for purposes of section 3(e)(4)(A). The regulations provide that, "public safety employees taking on any kind of security or safety function within the same local government are never considered to be employed in a 'different capacity.'" See 29 CFR Section 553.30(c)(3). This is based on the 1985 legislative history instructing the Department to interpret the phrase working in a "different capacity" in the "strictest sense" with regard to public safety employees. See House Report No. 99-331, October 24, 1985, page 25.

Consequently, it is our opinion that Corrections Officers employed by the *Name*\* County Sheriff's Office who work in the county jail to take custody, book, fingerprint, and secure suspects or prisoners, may not volunteer as Special Deputies for the same employer without compensation in accordance with the FLSA.

It is important to again make clear that individuals who serve as volunteer Special Deputies but who are not employed in any capacity by a public agency are not affected. As you know, sheriffs' departments or volunteer fire/rescue organizations are frequently served by individuals whose livelihood is earned principally in another vocation (mechanic, teacher, sales clerk, truck driver, construction worker, lawyer, etc.). Under the FLSA, such individuals are not "employees" if they receive no compensation or are paid no more than expenses, reasonable benefits, or a nominal fee (or combination thereof) to perform the services for which they volunteer.

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 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.

We trust that the above is responsive to your inquiry.

Sincerely,

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

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