



October 8, 2004

FLSA2004-20NA

Dear *Name**,

This is in response to your letter dated December 21, 2000 written on behalf of the *Name** Board of Education. You request guidance under the FLSA concerning the use of non-exempt school system employees to assist as volunteers with extra-curricular activities such as coaching sports, sponsoring clubs, etc., or to perform additional duties. You seek clarity as to how the FLSA applies to these activities.

The FLSA recognizes the generosity and public benefits of volunteering, and does not seek to pose unnecessary obstacles to bona fide volunteer efforts for charitable and public purposes. Please be assured that this Administration fully supports volunteerism and is committed to work to ensure that citizens are freely able to volunteer their services for charitable and public purposes within the legal constraints established by Congress. The Wage and Hour Division (WHD) staff is prepared to work with and offer assistance to school districts on FLSA compliance.

Section 3(e)(4)(A) of the FLSA and 29 CFR 553.101 and 553.103, copies enclosed, indicate that individuals qualify as volunteers, and are not employees of a public agency, when they meet the following criteria:

- A. Perform hours of service for civic, charitable or humanitarian reasons without promise, expectation, or receipt of compensation for the services rendered. The statute clarifies that a volunteer performing such service can either receive no compensation or be paid expenses, reasonable benefits, or a nominal fee to perform such services.
- B. Offer their services freely and without coercion, direct or implied, from the employer; and,
- C. Are not otherwise employed by the same public agency to perform the same services as those for which they propose to volunteer. In other words, individuals can qualify as volunteers if they either volunteer for different agencies or perform different services than they are otherwise employed to perform.

The WHD recently considered the application of the FLSA volunteer provisions to schools and described the relevant considerations necessary to determine whether an individual who volunteers to provide services for a public entity is a bona fide volunteer in different factual situations. The letter is attached for your consideration.

You pose two specific questions that we will address below.

1. Would the *Name** Board of Education be required to pay Educational Assistants overtime for their coaching time if they volunteer as a coach and work 40 hours within the classroom as an Educational Assistant?

As you will see from the enclosed letter, the determination of whether the Educational Assistants may volunteer to coach will be decided, in part, by whether the coaching duties are the same or similar to those performed as Educational Assistants. Your letter requesting guidance does not describe the duties of either the Educational Assistants or a coach; therefore, we cannot advise whether the test for bona fide volunteer status has been met. The enclosed letter does set out the criteria used to make such a determination, and your application of the particular facts in the Rutherford County schools to the test set out in the letter will allow you to make an informed judgment about volunteer status.

2. Would signed waiver of overtime benefits by an Educational Assistant who wished to coach sports be enforceable by the Board of Education or could the Educational Assistant subsequently demand overtime for his or her coaching hours?



The language of the FLSA and the controlling court decisions make it clear that neither an employer nor an employee has the authority to waive the statutory requirement for overtime compensation for hours worked in excess of 40 in any workweek. In Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945), the Supreme Court of the United States said that the policy considerations of the Congress in enacting the FLSA "forbid waiver of basic minimum and overtime wages under the Act." 324 U.S. at 707. The Court stated further that, "while in individual cases, hardship may result, the restriction will enure to the benefit of the general class of employees in whose interest the law was passed, and so to that of the community at large." 324 U.S. at 713, quoting West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

We trust you will find the above discussion and analysis responsive to your request. We stand ready to work with you at any time to support the wonderful spirit of volunteerism that sustains this country.

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.

Sincerely,

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

Enclosure

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