



October 29, 2004

FLSA2004-26NA

Dear *Name**,

This is in response to your letter concerning the application of Section 3(e)(4)(A) of the Fair Labor Standards Act (FLSA) to certain employees of the *Name** County Sheriff's Office.

You write that the *Name** County Sheriff's Office is divided into three primary departments: Administration, Detention, and Law Enforcement. Individuals employed as deputies in the Detention Division have recently asked if they could also volunteer in the Law Enforcement Division during their off-duty hours. You enclose copies of the job descriptions of both positions.

You contend that the job duties of the two positions differ greatly, that the positions require different sets of skill and knowledge, that the jobs are performed under different environmental conditions, and that expectations of the previous experience and background of candidates for the two positions are different. Based on the descriptions you have provided, Detention Deputies primarily provide security at the jail facilities while Deputy Sheriffs perform more diverse duties as they work toward providing security for residents of the county.

As you know, Section 3(e) of the FLSA and 29 CFR 553.103(a) provide that individuals performing volunteer services for units of State and local governments will not be regarded as "employees" under the FLSA when (a) their services are offered freely and without pressure or coercion, direct or implied, from an employer and (b) the individual is otherwise not employed by the same public agency to perform the same type of services as those for which the individual proposes to volunteer. The phrase "same type of services" means similar or identical services.

As your letter indicates, a determination of whether the services that volunteers seek to provide are the "same type of services" they are employed to perform requires "...consideration of all the facts and circumstances in a particular case..." See 29 CFR 553.103(a). Among the facts the regulation states will be considered is how the volunteered services and the services for which the volunteer is employed to provide are classified by the three digit categories of occupations in the Dictionary of Occupational Titles (DOT), published by the Employment and Training Administration (ETA). The DOT was recently superseded by the O*NET system, also published by ETA. Of equal weight to the DOT/O*NET is whether the volunteer services are "closely related to the actual duties performed or responsibilities assigned to the employee." *Id.*

As mentioned above, you indicate that the job duties for both the Detention Deputies and Deputy Sheriffs differ greatly. Detention Deputies are primarily responsible for security and patrolling of the jail facilities. Generally, Detention Deputies' job duties require them to be involved in one or more of the following areas: Security; Housing; Management Operations; Inmate Property; Mail and Money; Transportation; Visitation; Administration; Attorney Booth; Bookings; Disciplinary Review Board; Farm Supervisor; Food Service; Intoxilizer Maintenance; Judicial Complex; Dual Certified; Trustee Supervisor; and the Weekend Program. Also, they must search inmates and property, and prevent escapes. Detention Deputies direct evacuations of the facility, subdue disorderly inmates and monitor the inmates' behavior. In addition, they must assist with book-in procedures and verifying inmate identities.

On the other hand, Deputy Sheriffs are responsible for all aspects of detecting crimes against persons and property, and arresting criminal suspects. This includes interviewing witnesses and searching for evidence. In patrolling certain areas, Deputy Sheriffs are required to frisk and pat down individuals who are being searched, pursue vehicles, respond to rescue calls, bomb threats and civil unrest. Deputy Sheriffs are also responsible for serving arrest warrants and subpoenas. Other activities include traffic control and parking enforcement.

While the specific duties of the two positions in question may be different in the particular daily tasks performed, the overall similarity and commonality of the jobs as variations of law enforcement outweigh



these differences between them. The fact that the Sheriff's Office finds Detention Deputies qualified to act in the role of Reserve Deputies only reinforces the fact of the two jobs' similarity. In both instances, the Detention Deputies and Reserve Deputies are performing basic law enforcement functions. The Wage and Hour Division has taken the position, for example, that law enforcement duties such as transferring or taking custody of prisoners, and booking, fingerprinting, restraining, etc., with respect to suspects or prisoners are the same type of services whether performed by police officers, detectives, bailiffs, jailers, deputies, etc. See opinion letters dated September 26, 1991; February 18, 1992; March 18, 1992; and April 21, 1995 (enclosed).

Further, the O*NET description of duties performed by correctional officers and jailers (33-3012.00) and sheriffs and deputy sheriffs are similar and, in fact, are in the same job family, and are treated as related occupations. Moreover, the regulations provide that public safety employees taking on any kind of security or safety function for the same local government are never considered to be employed in a different capacity. 29 CFR 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. House Report No. 99-331, October 24, 1985, page 25. Thus, based on Section 3(e)(4)(A) and the information you have provided, the responsibilities of the jobs are sufficiently similar that the **Name*** County Sheriff's Office may not accept the volunteer services of the Detention Deputies as Reserve Deputies.

The Detention Deputies are allowed to volunteer in other capacities for the county government, such as assisting the coach of a high school baseball team, for example. The Wage and Hour Division would not question their volunteer status in such unrelated occupations so long as the other requirements of Section 3(e)(4)(A) are met. Also, the Division will not question the volunteer status of an individual who is not employed in any capacity by a public agency but who wishes to volunteer his or her services to a public agency.

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 information is responsive to your inquiry.

Sincerely,

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

Enclosures

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