



December 20, 2005

FLSA2005-16NA

Dear *Name** :

This is in response to your letter asking whether certain volunteer activities performed by a paraeducator, in addition to her regular duties, for a school district in the State of *Name** represent hours worked under the Fair Labor Standards Act (FLSA). You represent the Public School Employees of *Name**, an independent labor organization, and believe that the time spent in these volunteer activities is compensable. As we explain below, the Wage and Hour Division agrees that most of the volunteer activities are compensable.

The employee has volunteered in several capacities for the school district in the last 10 years and, in a telephone conversation with a member of my staff, she stated that she has also been paid for some of the work performed for the schools since approximately 1996 or 1997. In February 2001, she was hired to work three hours per day as a paraeducator performing one-on-one assistance in the classroom to a special needs student. When the employee completes her three hours of paid work she continues in the same classroom in a volunteer capacity by providing general assistance to the teacher, grading papers, entering grades in the computer, running weekly progress reports sent home with the students, running off papers and typing tests, maintaining bulletin boards, calendars, and lunch charts, preparing information packets sent home with students, assisting with art projects, correcting, charting, and refilling Precision Math folders, assisting in state standardized testing, printing quarterly grade sheets and compiling report card information. In addition, she volunteers in other rooms for several other teachers.

You have enclosed a job description that defines a paraeducator as one who "works alongside a licensed teacher to provide instructional or other direct services to the teacher, students or their families in order to facilitate the education process." This work is conducted "under the supervision of a certificated/licensed staff member who is responsible for the overall conduct and management of the classroom or program, including the design, implementation and evaluation of instructional programs and student progress." In a telephone conversation with a member of my staff on November 14, 2002, you explained that the term paraeducator is used throughout the State of *Name** and in many parts of the country as a replacement for the former job of "teacher's aide." You indicated that a paraeducator may perform all tasks in a school except those for which State teacher's license is required. For example, with the supervision of a licensed teacher, paraeducators can prepare lessons plans and provide classroom instruction. Paraeducators also are used to supervise children during lunch period and on the playground.

You also enclosed a letter from the employee in which she describes her history as a volunteer in the school district and her current volunteer duties. The employee also discussed these activities by telephone with a member of my staff on October 14, 2003. Based on the employee's assurances, it appears clear that she has offered her services freely and without coercion of any kind. Thus the issue under consideration is whether the employee is volunteering to provide the same type of service for which she is employed.

As you know, Section 3(e) of the FLSA, 29 U.S.C. § 203(e)(4)(A), and 29 C.F.R. § 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) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee, 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. See FOH 10b31.

Section 3(e)(4)(A)(ii) of 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. "The phrase "same type of services" means similar or identical services." 29 C.F.R. § 553.103(a). 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..." *Id.*



Among the facts considered is how the volunteered services and the services which the volunteer is employed to provide are classified by the three digit categories of occupations in the *Dictionary of Occupational Titles* (DOT). The DOT was recently superceded by the O*NET system. In addition to the DOT/O*NET, one must also consider whether the volunteer services are "closely related to the actual duties performed by or responsibilities assigned to the employee." 29 C.F.R. § 553.103(a). Based on the information provided, it appears that the employee's duties, both as an employee and a volunteer, are within the general occupational categories of Teacher Aide I (099.327-010) in the DOT and the definition of Teacher Assistant (25.9041.00) in O*NET, the analogous occupation to the DOT classification. See WH Opinion Letters dated September 7, 2004 and November 5, 2004, (O*Net and DOT categorization of occupations based on description of duties performed by a putative volunteer are considered in determining if volunteer activities constitute the "same or similar" to those performed as an employee.)

Equally important in such a determination will be the consideration of 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. A description of the employee's responsibilities as a paid paraeducator and a classroom volunteer was included with your letter. The duties performed by the employee, as both a paid paraeducator and a classroom volunteer are clearly the performance of the "same type of services." In both capacities, the employee assists the classroom teacher in providing instruction, correcting and grading students' work, performing documentation and recordkeeping duties, and physically supervising students, among other duties. Therefore, it is our opinion that the employee's volunteer activities in the classroom where she is also paid to perform the paraeducator job activities are *not* of a sufficiently different nature that the school may accept such work as an unpaid volunteer activity. All assistance the employee provides in the classroom is a continuation or variation of her work as a paid paraeducator. However, the activities she performs outside the classroom, such as keeping statistics at high school athletics events or working once a year at the high school front office performing clerical tasks that require no classroom involvement with students or teachers are sufficiently different from the job as a paraeducator to be volunteer. The school district may continue to accept the employee's volunteer work in these limited areas.

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 letter might require a conclusion different from 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 Relerford
Office of Enforcement Policy
Fair Labor Standards Team

Enclosures

FOH 10b31
WH Opinion Letter September 7, 2004
WH Opinion Letter November 5, 2004

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