



## FLSA2005-51

November 10, 2005

Dear **Name\***:

This is in response to your letter of September 23, 2004 written on behalf of your client school district. You request guidance as to whether certain stipends the school district provides to non-teaching, nonexempt school employees who volunteer as coaches or advisors for the school's sports teams and clubs constitute "nominal fees" as described in 29 C.F.R. § 553.106(e) and (f).

You state that all such employees are nonexempt staff, such as secretaries or custodians. They volunteer for roles as coach, assistant coach, club advisor, or staff for athletic events. You further state that based on their specific duties as school district employees such employees' volunteer services are different from the services for which the school employs them.

Your letter mentions a specific example of a nonexempt school custodian who has coached the Varsity Track team for a number of years. The school provides the individual with a stipend of \$3,675 for a season of volunteer coaching. You indicate the custodian is not required to coach any team as a condition of employment, and that the stipend, which the school provides regardless of the performance of the team or number of hours the coach spends in team-related activities, is not intended or provided as a substitute for wages. Nor is the stipend based on the amount of time spent on coaching or the productivity of the team. For example, there is no extra payment for participation in play-offs, regional or state championships, or tournaments. In addition, the school does not base the stipend on the length of the season or the number of meets the team attends. You also state that the custodian spends his own money to provide certain extra benefits to the students, *e.g.*, hamburgers, pizza, ice cream, an end of season party, plaques or trophies, and commemorative booklets and that this practice is common among coaches. You state that the coaches provide these "extras" due to their love of coaching and because it enriches the experience for the students, and that the school does not separately reimburse the coaches for these expenses.

The Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, 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. The Department of Labor is committed to ensuring that citizens are able to freely volunteer their services for charitable and public purposes within the legal constraints established by Congress.

As you may be aware, in enacting the 1985 FLSA Amendments, Congress sought to ensure that true volunteer activities were neither impeded nor discouraged. Congress was explicit in its 1985 Amendments that a "volunteer" may receive "no compensation," but may be paid "expenses, reasonable benefits, or a nominal fee." 29 U.S.C. § 203(e)(4)(A);



*see also* 29 C.F.R. § 553.106(a) (“Volunteers may be paid expenses, reasonable benefits, a nominal fee, or any combination thereof, for their service without losing their status as volunteers.”); 29 C.F.R. § 553.106(e) (“Individuals do not lose their volunteer status if they receive a nominal fee from a public agency.”). Neither the FLSA nor the Senate Committee Report to the 1985 Amendments further defines the term “nominal fee.” Rather, the Committee Report directed the Department to issue regulations providing guidance in this area. Employees of a public agency are permitted to provide volunteer services in certain circumstances, and the FLSA regulations governing this issue are found at 29 C.F.R. §§ 553.100-.106 (copy enclosed).

Under the Department’s regulations, the term “employee” does not include individuals who volunteer for a public agency if the volunteer:

1. Performs hours of service for a public agency for civic, charitable or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered. Although a volunteer can receive no compensation, a volunteer can be paid expenses, reasonable benefits or a nominal fee to perform such services;
2. Offers services freely and without pressure or coercion, direct or implied, from an employer; and
3. Is not otherwise employed by the same public agency to perform the same type of services as those for which the individual proposes to volunteer.

*See* 29 C.F.R. §§ 553.101, 553.106. Your inquiry assumes a full-time, nonexempt school employee who agrees to volunteer, without pressure or coercion from the school, as a sports coach for a season and that there is a humanitarian nature to the volunteer service. The specific question you ask is whether this type of arrangement constitutes a permissible “nominal fee.”

There are regulations that address the nominal fee issue which are relevant in the high school coaching context. Specifically, “[a] nominal fee is not a substitute for compensation and must not be tied to productivity.” 29 C.F.R. § 553.106(e). In determining whether a fee constitutes “a substitute for compensation” or whether it is “tied to productivity,” the Department looks at the “economic realities of the particular situation.” 29 C.F.R. § 553.106(f). A key factor in the context of school coaching or advising a club is whether the amount of the fee *varies* as the particular individual spends more or less time engaged in the volunteer activities, or *varies* depending upon the success or failure of a particular team or school activity. For example, if the fee does not vary based upon the win-loss record of a team, or the degree of student involvement in a particular club, or other similar factors relevant to the quality or quantity of the team, club, or activity, the Department generally would not find that the fee was a “substitute for compensation” or “tied to productivity.” *See* 29 C.F.R. § 553.106(e).



The regulations also list several factors the Department will examine in determining whether a given amount is nominal. Specifically, the Department looks at “the distance traveled and the time and effort expended by the volunteer; whether the volunteer has agreed to be available around-the-clock or only during certain specified time periods; and whether the volunteer provides services as needed or throughout the year.” *Id.* With respect to the factors listed in 29 C.F.R. § 553.106(e), your letter states your view that such factors are more relevant to a volunteer firefighter situation than a school coach’s situation. The Department agrees that, historically, the factors enumerated in § 553.106(e) were intended to provide guidance in the context of whether firefighters were paid a nominal fee and qualify as *bona fide* volunteers. However, in the context of school coaching or club sponsorship, the “substitute for compensation” and “tied to productivity” standards are still generally relevant. As the attached opinion letter states, “These factors focus upon whether the fee is actually analogous to a payment for services or recompense for something performed and, hence, is not nominal.” *See* July 14, 2004 Opinion Letter.

In evaluating the nominal fee issue in the case of the school coach, we recognize that a coach might travel significant distances for away games, which may occur at the volunteer’s expense. Any such unreimbursed expenses will increase the amount of the stipend that may qualify as nominal. In addition, a coach’s expected time commitment often will depend on the sport he or she coaches, as the length of the season can vary greatly depending upon the sport. The time commitment also can vary depending upon other factors, such as whether the sport is varsity or junior varsity. The stipends established for different sports may vary based upon such broad variations in the coaches’ time commitments and still qualify as nominal. However, the length of the season also could vary significantly depending on whether the team makes the play-offs and how far the team advances in the play-offs. If a school paid a coach more because his team made the play-offs, the Department would likely view such a payment as a “substitute for compensation” or a payment “tied to productivity.” As indicated in the July 14, 2004 Opinion Letter, the regulations are focused on preventing payment for performance, which is inconsistent with the spirit of volunteerism contemplated by the FLSA.

The FLSA permits volunteers to be paid a nominal fee, which we believe is the same as an incidental or insubstantial fee. Since the FLSA does not define “nominal fee,” the Department believes the definition of “incidental” in 29 U.S.C. § 213(c)(6)(G) of the FLSA to be informative here. In that provision, Congress set out a 20-percent test to determine whether something is insubstantial. That provision, which lays out the terms under which a 17-year old employee may drive an automobile or truck on public roadways, states that “occasional and incidental” activities are those that are no more than 20 percent of an employee’s worktime in a workweek.

In determining whether the \$3,675 stipend at issue here is a permissible “nominal fee,” the Department looks to the “economic realities” of the situation and must compare the volunteer stipend to what it would otherwise cost to compensate someone to perform



those services. If the stipend is no more than 20 percent of what the district would otherwise pay to hire a coach or advisor for the same services, it would appear to be a permissible “nominal fee.” Such a threshold assumes that the coaches are freely volunteering their services and the school district simply provides a lump-sum payment or series of payments without regard to wins or losses or hours worked as discussed above.<sup>1</sup> Moreover, a willingness to volunteer for an activity for 20 percent of the prevailing wage for the job is a likely indicium of the spirit of volunteerism contemplated by the 1985 amendments to the FLSA. *See* 29 U.S.C. § 203(e)(4)(A). Therefore, when a public agency employee volunteers as a coach or extracurricular advisor, the Department will presume the fee paid is nominal as long as the fee does not exceed 20 percent of what the public agency would otherwise pay to hire a full-time coach or extracurricular advisor for the same services.

With regard to your specific school district, the Department is unable to answer whether the fee of \$3,675 is nominal due to the limited information provided concerning what the school district would otherwise pay to hire a full-time coach or advisor for the same services. However, the market information necessary to complete this good faith determination is generally within your client school district’s knowledge and control. Thus, any coaches the school district has on its payroll would be a good benchmark for this calculation. Absent such information, your client may look to information from neighboring jurisdictions, the state, or ultimately, the nation including data from the Department of Labor, Bureau of Labor Statistics. So long as your calculations are based on an approximation of the prevailing wages of a coach and the fee amount does not exceed 20 percent of that coach’s wages for the same services, the Department would find that such a fee would be nominal within the meaning of 29 C.F.R. § 553.106.<sup>2</sup>

This opinion is based exclusively on the facts and circumstances described in your request and is given based on 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

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<sup>1</sup> In the case of public school employees, a 20 percent level also appears reasonable given that various states have endorsed significant lump sum amounts of compensation as “nominal” for state public agency volunteers; and we believe current coaching stipends of 20 percent would likely not reach such amounts. *See* Ind. Code § 36-8-12-2 (2005) (“‘Nominal compensation’ means annual compensation of not more than twenty thousand dollars (\$20,000).”); *see also* Minn. Stat. § 144E.001, Subd. 15 (2005) (nominal fee for volunteer ambulance attendant may be up to \$6,000 annually).

<sup>2</sup> We are withdrawing the opinion letter dated July 11, 1995 as it relates to “nominal fee.” The Department does not believe this letter fully took into account the “economic realities” of the particular situation of coaches and extracurricular sponsors as discussed in this letter including the humanitarian nature of the volunteer effort, the lack of pay for performance, and the fact that school districts often do not track or control their coaches’ hours. The Department is also withdrawing opinion letters dated July 15, 1988, April 2, 1992, and September 17, 1999 to the extent they are inconsistent with the interpretation of nominal fee in this opinion.



between a client or firm and the Wage and Hour Division or the Department of Labor. This opinion 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*, 913 F.2d 498, 507 (8th Cir. 1990).

We trust you will find the above discussion and analysis responsive to your request.

Sincerely,

Alfred B. Robinson, Jr.  
Deputy Administrator

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