



U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

FLSA2006-22NA

October 20, 2006

Dear Name*

This is in response to your letter addressed to Secretary Chao concerning the application of the Fair Labor Standards Act (FLSA) to your employment with the local Board of Education (Board). In particular, you inquire about the overtime requirement when you work in multiple jobs for your employer, and you indicate that you would like to waive the right to receive time and one half your regular rate of pay when you work more than 40 hours per week. You state that you work these jobs because you are compensated for services rendered.

You state that you work forty hours per week as a nonexempt office secretary for the Board. Your duties in that position include handling phone calls and mail and preparing equipment inventory. You also work for the Board as the Assistant Athletic Director and as a site manager, both of which are part-time positions. In a discussion with a member of the Wage and Hour Division staff, you indicated that as the Assistant Athletic Director, you perform secretarial/administrative duties such as keeping track of building permits for athletic events, placing phone calls to opposing schools, and mailing correspondence and contracts. On average, you perform these duties approximately one hour a day, Monday to Friday, with a maximum of ten hours per week, from August to May. You receive a flat fee of \$1,900 per school year for your services as Assistant Athletic Director.

In addition, you work as a site manager for sporting events, for which you are compensated a set amount per game. As the site manager for the volleyball and basketball games, you set up the tables and chairs inside the gym, supervise ticket takers, and count the money received after each game. During the school years 2003-2005, you worked as a site manager for volleyball games approximately two hours per day, two days per week. The volleyball season runs eight weeks, from the end of August to the beginning of October. During those same years, you also worked as a basketball site manager approximately three to four hours per day, three to four days per week. The basketball season runs from the end of November to the beginning of March.

You question why the Board, citing possible overtime liabilities under the FLSA, is now preventing you and other employees from working the additional part-time work. You also ask why you and other employees are not permitted to sign a contract waiving your right under the FLSA to any overtime pay in performing the additional part-time work.

The Wage and Hour Division of the Department of Labor administers and enforces the Fair Labor Standards Act, which is the Federal law of most general application concerning wages and hours of work. This law requires that all covered and nonexempt employees be paid not less than the minimum wage, \$5.15 per hour, for all hours worked, and overtime pay for all hours worked over 40 in a workweek. FLSA section 7(p)(2) provides that state and local government employees may, solely at their option, work occasionally or sporadically on a part-time basis for the same public agency in a different capacity from their regular employment,

and the hours worked in the different jobs need not be combined for the purpose of determining overtime liability under the FLSA. “The term ‘occasional or sporadic’ means infrequent, irregular, or occurring in scattered instances.” 29 C.F.R. § 553.30.¹

In order for employment in these occasional or sporadic activities to fall within the section 7(p)(2) overtime exemption, the regular government employment of the individual performing them must also be in a different capacity, *i.e.*, it must not fall within the same general occupational category.

Under the circumstances, it is our opinion that your part-time employment as the Assistant Athletic Director does not satisfy the requirement that such employment be in a different capacity from your primary position as an office secretary. The secretarial duties that you perform such as keeping track of building permits for athletic events, mailing correspondence and contracts, and making telephone calls are similar to the duties you perform as office secretary such as preparing equipment inventory, handling mail, and handling phone calls. In addition, working an average of one hour every day Monday through Friday and up to ten hours per week does not satisfy the requirement that such hours employed as the Assistant Athletic Director be on an occasional or sporadic basis. As the regulations provide, an employee who “in addition to his or her regular job, also regularly works additional hours on a part-time basis (*e.g.*, every week or every other week)” would not be considered to be working occasionally or sporadically. *See* 29 C.F.R. § 553.30(b)(3); Wage and Hour Opinion Letters September 10, 1997; May 30, 1989; and December 3, 1986 (copies enclosed). Furthermore, it is also our opinion that even though your part-time employment as a site manager for sports events is in a different capacity from your primary employment as an office secretary, the regular and recurring hours you work as a site manager for the volleyball and basketball games during the school year as described above are not infrequent, irregular, or occurring in scattered instances. Therefore, the occasional or sporadic basis requirement under section 7(p)(2) of the FLSA is not met.

We would like to point out that alternative methods of computing overtime pay for nonexempt employees whose part-time employment is not occasional or sporadic, or not in a different capacity, are described in 29 C.F.R. Part 778. Where such an employee works two or more jobs for which different non-overtime rates of pay have been established, the employee’s regular rate for that week generally is the weighted average of those rates. *See* 29 C.F.R. § 778.115. FLSA section 7(g)(2) also allows payment to be based on the type of work performed during the overtime hours. *See also* 29 C.F.R. § 778.419. In addition, state and local government employees may be furnished compensatory time off in lieu of overtime payment in cash for hours worked in excess of statutory standards. *See* 29 C.F.R. §§ 553.20-.28.

It should be noted that 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 requirements for overtime compensation for hours worked in excess of 40 in any workweek. In

¹ Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at www.wagehour.dol.gov.

Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 707 (1945), the Supreme Court wrote that the policy considerations of the Congress in enacting the FLSA “forbid waiver of basic minimum and overtime wages under the Act.” 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 is passed, and so to that of the community at large.” *Id.* at 713 (quoting *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 397 (1937)).

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 issues 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 this letter is responsive to your inquiry.

Sincerely,

Barbara R. Relford
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).**