



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

FLSA2008-5NA

March 7, 2008

Dear **Name***:

This is in response to your request for an opinion regarding the Fair Labor Standards Act (FLSA) exemptions for fire protection and law enforcement activities and occasional and sporadic employment. We conclude that section 7(p)(2) of the FLSA¹ permits law enforcement personnel to be employed on an occasional and sporadic basis performing civilian functions for their employer.

You state in your letter that the Sheriff's Department is divided into three divisions: Patrol, Detention, and Communications. The Patrol and Detention divisions are staffed by academy-trained and state-licensed peace officers who have the power to arrest. Detention officers are assigned to the jail and deal with inmate management. Patrol officers have general law enforcement duties. Patrol officers are assigned to work in the detention center from time to time as needed. Detention officers are not assigned patrol duties unless they receive additional training. Communications personnel answer 911 calls and communicate with law enforcement, fire, and emergency medical personnel. Additionally, the Communications personnel are responsible for "want and warrant" record checks, entering and maintaining warrant files and monitoring the detention facility via a television monitor as a back-up to the full-time detention facility staff. Communications personnel are not academy-trained or licensed. Generally, Patrol and Detention officers are not assigned to the Communications department because it requires specialized training.

The Department employs a Detention officer and a Patrol officer who previously worked as Communications personnel. You ask whether these officers can voluntarily work in the Communications department on an occasional and sporadic basis under the FLSA section 7(p)(2) exclusion. You also ask whether these employees can be paid at the part-time rate for the Communications position or whether they must be paid the same rate of pay they are paid for their regular work. If the section 7(p)(2) exclusion does not apply, you ask whether Communications personnel qualify under the section 7(k) partial overtime exemption. Finally, you ask whether these officers can qualify as "emergency response personnel," presumably referring to the FLSA section 7(o) compensatory time rules.

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.

FLSA section 7(p)(2) provides that

[i]f an employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency undertakes, on an occasional or sporadic basis and solely at the employee's option, part-time employment for the public agency which is in a different capacity from any capacity in which the employee is regularly employed with the public agency, the hours such employee was employed in performing the different employment shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

29 U.S.C. § 207(p)(2).

Pursuant to [29 C.F.R. § 553.30\(c\)](#), work in a different capacity “must not fall within the same general occupational category.” It is our opinion that the Detention and Patrol officers satisfy this aspect of the section 7(p)(2) exclusion because work performed in the Communications department is in a different capacity from the work they perform in the Detention and Patrol departments. The Communications personnel are performing “civilian” functions, not law enforcement duties. *See* [29 C.F.R. § 553.211\(g\)](#) (“Not included in the term ‘employee in law enforcement activities’ [under section 7(k) of the FLSA] are so-called ‘civilian’ employees of law enforcement agencies or correctional institutions who engage in such support activities as those performed by dispatcher[s], radio operations, . . . clerks and stenographers.”). As we have recognized in the context of public agency employees volunteering to perform other duties under section 3(e)(4) of the FLSA, “civilian” work is a different type of work than “law enforcement” work. *See* Wage and Hour Opinion Letter [FLSA2006-2 \(Jan. 13, 2006\)](#) (civilian code compliance officer does not perform same type of services as reserve police officer); Wage and Hour Opinion Letter Sept. 2, 1994 (civilian police department employees such as dispatchers do not perform same type of service as reserve police officers) (copy enclosed).

You ask us to assume that the work by the officers in the different capacity is performed on a “sporadic and voluntary basis.” The section 7(p)(2) exclusion requires, in addition to being in a different capacity as discussed above, that the work be only occasional or sporadic and must be done freely and without coercion by the employer. *See* 29 C.F.R. § 553.30. We assume for purposes of this response that both these requirements are met. Therefore, the Sheriff's Department can claim the section 7(p)(2) exclusion, and the hours the officers work in the Communications department need not be added to the hours worked as Detention and Patrol officers when calculating the hours for which the employee is entitled to overtime compensation. Moreover, the employer may pay the part-time rate for this time spent working in the Communications position, because nothing in the FLSA prohibits an employer from paying an employee at different rates for different types of work so long as no rate is less than the minimum wage. *See* Wage and Hour Opinion Letter [FLSA2005-1NA \(Feb. 14, 2005\)](#). Because we conclude that the Sheriff's Department may claim the section 7(p)(2) exclusion, we do not address your remaining questions under sections 7(k) and 7(o).

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 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,

Monty Navarro
Office of Enforcement Policy
Fair Labor Standards Act Team

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