



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

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**FLSA2008-16**

December 18, 2008

Dear **Name\***:

This is in response to your request for an opinion concerning whether a Latino Victim Specialist (LVS) employed by a Police Department may volunteer as a Reserve Police Officer for the same public agency under the Fair Labor Standards Act (FLSA).<sup>1</sup> Based on a review of the information provided, it is our opinion that the LVS may not volunteer as a Reserve Police Officer because he is compensated for part of those services at greater than a nominal fee. Under appropriate circumstances, however, he may be employed in that position pursuant to section 7(p)(2) of the FLSA.

You state that a Police Department employee works full-time in a civilian capacity as the Crisis Unit LVS, providing victim assistance and other social work services. The employee also volunteers as a Reserve Police Officer. The Crisis Unit is the social work arm of the Police Department. Crisis Unit personnel provide counseling and other assistance to, among others, victims of crime, families experiencing domestic violence, citizens with mental or psychological difficulties who become involved in law enforcement matters, homeless persons, and parents having difficulties with delinquent children.

The major duties of the LVS are civilian rather than law enforcement in nature, and include providing follow-up services such as safety planning, counseling, court support/advocacy, and case management to all Latino crime victims within the jurisdiction of the Police Department; developing and maintaining a close working relationship with the District Attorney's Office and Court Liaison assigned to domestic violence and sexual assault cases; training police officers regarding cultural diversity and victim issues pertaining to Latino victims; developing a data collection and case tracking system for cases responded to by the Police Department; preparing case summaries of domestic violence and sexual assault cases involving Latino crime victims; counseling Latino crime victims to determine needs and appropriate services; assisting clients with obtaining domestic violence protective orders and warrants; providing crisis intervention services and counseling to Latino crime victims; reporting potential child and elder abuse to the appropriate agency; and assisting service agencies with program development, including ensuring coordination of services for clients. Positions in the Crisis Unit do not require law enforcement training or certification and, with the exception of the LVS, no other Crisis Unit employees are certified.

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<sup>1</sup> Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at [www.wagehour.dol.gov](http://www.wagehour.dol.gov).

The individual also serves as a Reserve Police Officer. In order to be a Reserve Police Officer with the Police Department, officers must meet firearms qualifications, complete other training requirements, and work as a police officer for ten hours per quarter during the year. If the Police Department requests the services of a Reserve Police Officer for a special assignment, *e.g.*, for Halloween, NCAA celebrations, or street fairs, the officer's work counts toward the required ten quarterly hours and the officer is paid for the work. When the Reserve Police Officer volunteers for hours that the Police Department has not specifically requested, the work is counted toward the ten-hour requirement, but the volunteered time is unpaid.

In a discussion with a member of the Wage and Hour Division staff, you stated that Reserve Police Officers receive \$17.31 per hour during the special assignments requested by the Police Department. This hourly rate is equivalent to the entry level pay of a Police Officer I employed in the Police Department. After two years of satisfactory service the Reserve Police Officer may receive an hourly rate of \$18.18, which is equivalent to the entry level pay of a Police Officer II employed in the Police Department. Reserve Police Officers are covered by the Police Department's workers' compensation and general liability insurance policies. For the two-quarter period from October 2004 to March 2005, the LVS in question served as a Reserve Police Officer on paid special assignments requested by the Police Department for a total of 20.5 hours. During the same time period, the LVS performed 8 hours of unpaid volunteer Reserve Police Officer service.

The FLSA recognizes the generosity and public benefits of volunteering and does not seek to impose 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 volunteer their services freely for charitable and public purposes within the legal constraints established by Congress.

FLSA section 3(e)(4)(A)(i) provides that an individual who volunteers to perform services for a public agency is not an employee if the individual receives no compensation or is paid expenses, reasonable benefits or a nominal fee. In addition, FLSA section 3(e)(4)(A)(ii) requires that the volunteer services cannot be the same type of services that the individual is employed to perform for the agency. The regulations, [29 C.F.R. §§ 553.101-.103](#), in addition to the statutory requirements, indicate that individuals are volunteers, not employees of a public agency, when they perform hours of service for civic, charitable, or humanitarian reasons without promise, expectation, or receipt of compensation for the services rendered and offer their services freely and without pressure or coercion, direct or implied, from the employer. Under the regulations, individuals can qualify as volunteers if they either volunteer to perform services for a different agency or perform different services than they are employed to perform for the same public agency.

In order to determine whether the LVS may perform volunteer duties as a Reserve Police Officer for the Police Department, we assume, for discussion purposes, that the LVS performs Reserve Police Officer duties for civic, charitable, or humanitarian reasons, and offers his services freely, without pressure or coercion, direct or implied, from the employer. For the volunteer arrangement to meet the criteria above, we must then determine whether the LVS and Reserve Police Officer perform the "same type of

services,” and whether the amounts paid the LVS for performing Reserve Police Officer duties during special assignments requested by the Police Department constitute a “nominal fee” under FLSA section 3(e)(4)(A)(i).

Determining whether the services 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 C.F.R. § 553.103(a). One factor considered under the regulation is how the volunteered services and the services that the volunteer is employed to perform are defined by the three digit categories of occupations in the *Dictionary of Occupational Titles* (DOT), as supplemented by the O\*NET system, published by the Employment and Training Administration (ETA). Of equal weight to the DOT/O\*NET system, the Administrator of the Wage and Hour Division will consider whether the volunteer services are “closely related to the actual duties performed or responsibilities assigned to the [paid] employee.” *See* Wage and Hour Opinion Letter [FLSA2004-6](#) (July 14, 2004).

The O\*NET description (copy enclosed) for duties performed by police officers under the classification of “protective service occupations” are to “[m]aintain order, enforce laws and ordinances, and protect life and property in an assigned patrol district. Perform combination of following duties: patrol a specific area on foot or in a vehicle; direct traffic; issue traffic summonses; investigate accidents; apprehend and arrest suspects, or serve legal processes of courts.” O\*NET § [33-3051.00](#). *See also* DOT 375.263-014 Police Officer I (copy enclosed). On the other hand, the LVS is a civilian employee of the Crisis Unit of the Police Department. Civilian employees are not considered to be engaged in law enforcement activities. *See* [29 C.F.R. § 553.211\(g\)](#). Moreover, the job duties and responsibilities of the LVS as described above are similar to the job duties performed by social workers and counselors, which are classified under O\*NET as “community and social services occupations.” O\*NET § [21-0000](#) (copy enclosed). *See also* DOT 195.107-010 Caseworker, and DOT 195.367-018 Community Worker (copies enclosed). The DOT/O\*NET system does not regard a social worker and police officer as being in the same job family and, thus, does not treat them as related occupations.

After reviewing the information you provided and the DOT/O\*NET treatment of these occupational categories, we believe that a LVS and Reserve Police Officer are not providing the same or similar services. *See* Wage and Hour Opinion Letter September 17, 1999 (finding that work of juvenile counselor does not constitute same type of services as work of reserve sheriff), nominal fee determination withdrawn by Wage and Hour Opinion Letter [FLSA2005-51](#) (Nov. 10, 2005); Wage and Hour Opinion Letter January 8, 2001 (concluding that youth services counselor employed by city police department may participate in city’s reserve officer force) (copies enclosed). As discussed below, however, it does not appear that the amounts paid to “volunteer” Reserve Police Officers for work performed during special assignments for the Police Department constitute a “nominal fee,” as defined by the statute and regulations. Therefore, the special assignment work is not performed as a volunteer.

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)(i); *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.

The regulations focus on preventing payment for performance, which is inconsistent with the spirit of volunteerism contemplated by the FLSA. Thus, a fee would not be considered nominal if it is, in fact, a substitute for compensation or tied to productivity. *See* 29 C.F.R. § 553.106(e); *see also* Wage and Hour Opinion Letter FLSA2005-51 (Nov. 10, 2005) (“[T]he regulations are focused on preventing payment for performance, which is inconsistent with the spirit of volunteerism . . . .”); Wage and Hour Opinion Letter FLSA2004-6 (July 14, 2004) (“to the extent payments are tied to productivity (*e.g.*, payment of hourly wages for services rendered) . . . there is a greater likelihood that such fees are not nominal”). Generally, a key factor in determining if a payment is a “substitute for compensation” or “tied to productivity” is “whether the amount of the fee varies as the particular individual spends more or less time engaged in the volunteer activities.” Wage and Hour Opinion Letter FLSA2005-51. If the amount varies, it may be indicative of a substitute for compensation or tied to productivity and therefore not nominal. *See id.*; *see also* 29 C.F.R. § 553.106(e). Whether the nature and structure of payments made to individuals would result in their losing volunteer status is determined by examining the total amount of payments made (expenses, benefits, and fees) in the context of each particular situation. *See* 29 C.F.R. § 553.106(f); Wage and Hour Opinion Letter [FLSA2002-4](#) (July 19, 2002).

We have opined that generally an amount not to exceed 20 percent of the total compensation that the employer would pay someone for performing comparable services would be deemed nominal. *See* Wage and Hour Opinion Letter FLSA2005-51. Thus, it is our opinion that payment of \$17.31 or \$18.18 per hour for services performed by Reserve Police Officers during special assignments, which corresponds respectively to the entry level pay of a Police Officer I and Police Officer II employed by the Police Department, cannot be considered a “nominal fee.” Therefore, the Police Department’s practice of paying volunteer Reserve Police Officers hourly rates that are in excess of what can be considered “nominal” under the FLSA creates an employment relationship.

A separate issue arises regarding whether the hours worked as an LVS must be combined with the hours worked as a Reserve Police Officer in calculating the hours for which the employee is entitled to overtime compensation. Under FLSA section 7(p)(2), where employees of a public agency, 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, the hours worked in the different jobs shall not be combined for the purpose of determining overtime compensation due under the FLSA. As noted in [29 C.F.R. § 553.30\(b\)](#), “[t]he term *occasional or sporadic* means infrequent, irregular, or occurring in scattered instances.” As stated earlier, it is our opinion that employment as a Reserve Police Officer is employment in a different capacity than an LVS. Furthermore, we

believe that performing services as a Reserve Police Officer during paid special assignments, which occurs an average of ten hours per quarter, may be deemed “occasional or sporadic.” *See* Wage and Hour Opinion Letter December 6, 2001 (copy enclosed). Therefore, if the provisions of section 7(p)(2) are met, the Police Department would not have to combine the hours worked on both paid jobs for purposes of computing overtime pay.

Finally, we note the general rule that if the LVS is employed part-time as a Reserve Police Officer, he may not volunteer as a Reserve Police Officer for the same public agency due to the FLSA’s prohibition against an individual being an unpaid “volunteer” while performing the same type of services that the individual is employed to perform for his employer. *See* 29 U.S.C. § 203(e)(4); Wage and Hour Opinion Letter [FLSA2005-32](#) (Sept. 9, 2005); Wage and Hour Opinion Letter August 19, 1994 (copy enclosed); Wage and Hour Opinion Letter June 9, 1988 (copy enclosed); Wage and Hour Opinion Letter September 12, 1985 (copy enclosed). However, where the compensated work of the part-time Reserve Police Officer is performed only on an occasional or sporadic basis, the Reserve Police Officer would be considered to be a paid Reserve Police Officer of the Police Department only during workweeks when such special assignment work is performed and, therefore, would retain his or her volunteer status during other workweeks in which no compensated work is performed. If, however, the compensated work of the part-time Reserve Police Officer occurs at regular intervals, or occurs on a predictable basis, the part-time Reserve Police Officer would be precluded from volunteering his or her services in the Reserve Police Officer corps in any workweek, as he or she would be considered an employee in all workweeks. *See* Wage and Hour Opinion Letter FLSA2005-32 (Sept. 9, 2005); Wage and Hour Opinion Letter June 9, 1988 (copy enclosed).

Therefore, based on an analysis of the information provided, it is our opinion that the LVS may be employed, solely at the employee’s option, on a part-time basis as a Reserve Police Officer during paid special assignments, which occur on an occasional or sporadic basis, in accordance with FLSA section 7(p)(2) without needing to combine the hours worked on a part-time basis with the hours worked in regular employment for purposes of calculating entitlement to overtime. In order for the LVS who is employed on an occasional and sporadic part-time basis as a Reserve Police Officer also to volunteer in the Reserve Police Officer corps, he should be considered a paid Reserve Police Officer during workweeks when he performs special assignments requested by the Police Department and be ineligible to volunteer during those workweeks. The Police Department may then terminate the LVS’s occasional and sporadic part-time employment as a Reserve Police Officer at the conclusion of such special assignments and return him or her to volunteer Reserve Police Officer status during other workweeks in which no compensated work is performed, provided that the part-time Reserve Police Officer position was not converted unilaterally by the Police Department to volunteer status in order to avoid the minimum wage and overtime provisions of the FLSA. *See Krause v. Cherry Hill Fire Dist.*, 969 F. Supp. 270, 277-79 (D.N.J. 1997); Wage and Hour Opinion Letter FLSA2005-32.

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,

Alexander J. Passantino  
Acting Administrator

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