



FLSA2006-21NA

October 5, 2006

Dear **Name***:

This is in response to your request for an opinion as to whether the City of **Name*** (the City) and the **Name*** (the Board) are separate public agencies under the Fair Labor Standards Act (FLSA) for purposes of determining whether the hours police officers work must be aggregated for overtime purposes when police officers work for both entities.

The City has occasion to hire off-duty police officers on a part-time basis for providing security at the City's municipal arena during events or providing security at the City's airport passenger screening check points (this work is normally performed by Airport Police, who are City employees and not members of the police force and work under the control and direction of the City).

Your letter states that the City's police force is not a City department but is a separate entity created by the Missouri Legislature under the control of the state-created Board. Mo. Rev. Stat. §§ 84.350, 84.470. The Board is appointed by the governor and can be removed by the governor. Mo. Rev. Stat. §§ 84.350, 84.390. The Board also:

- is authorized and required to employ a police force, Mo. Rev. Stat. § 84.470;
- has exclusive management and control of the police force, Mo. Rev. Stat. § 84.460;
- has the duty and responsibility to preserve the public peace, prevent crime and arrest offenders, protect the rights of persons and property, etc., Mo. Rev. Stat. § 84.420;
- hears all complaints or charges filed against any member of the police force, Mo. Rev. Stat. § 84.430;
- appoints the police chief, Mo. Rev. Stat. § 84.480;
- approves the chief's hiring of police officers with the minimum and maximum salaries set by state statute, Mo. Rev. Stat. § 84.510; and
- audits the police department's accounts, Mo. Rev. Stat. § 84.840.

The City Council is specifically prohibited by state statute from passing any ordinance that conflicts or interferes with the Board's powers. Mo. Rev. Stat. § 84.460. The City's only function with regard to the police force is to appropriate funds for the Board's budget. Mo.

Rev. Stat. § 84.730. Each year, the Board prepares a budget estimating funds necessary for the next fiscal year and certifies the budget to the City Council. The City Council is required to appropriate the total amount so certified, but not in excess of one-fifth of the general revenue fund for that year. Mo. Rev. Stat. § 84.730. The state Supreme Court has held that, under state law, the City's police department "is a department of the state government, and not of the municipal government of that city." *State v. Smith*, 329 Mo. 1019 (1932).

You provided the following additional information in a conversation with a member of my staff:

1. The City and the Board have their own separate payroll systems.
2. The off-duty police officers working special duty at the airport are supervised by the airport police.
3. The City and the Board have separate budgets; however, the City funds more than 50 percent of the Board's budget with its general revenue funds. The Board also receives monies from state and federal grants and receives miscellaneous funds from forfeitures from criminal activity.
4. The City and the Board have separate employee retirement systems.
5. The City and the Board have the authority to sue and can be sued in their own names.

The Board hires a police officer to act as the "Off-Duty Supervisor." This officer coordinates requests from private businesses that desire to hire an off-duty police officer and matches a business with an officer who desires to work off-duty. If the City desires to hire an off-duty officer, it also goes through the Off-Duty Supervisor just like a private entity.

Currently, the City is required by FAA Security Directive SD 1542-02-01 and by a Memorandum of Agreement with the United States to provide law enforcement officers at the City airport passenger screening locations. The City is not required to use only off-duty police officers employed by the Board but may also use the airport police and hire off-duty certified police officers employed by neighboring jurisdictions, including the Platte County Sheriff Department and Missouri Highway Patrol. When the City inquired of the police force about hiring off-duty officers, the Board requested that the City enter into a Memorandum of Understanding (MOU). This MOU requires the City to pay officers at overtime rates.¹ Of course, employers may agree contractually to pay more than the FLSA requires.

¹ To the extent that the off-duty police are paid overtime rates for all hours worked at the airport, even if it is determined that the Board is the employer, it is unlikely that the Board would confront any overtime issue because the overtime rate has been paid by the airport.

Section 7(p)(1)² of the FLSA contains special provisions for fire protection and law enforcement employees of public agencies who, at their own option, perform special duty work in fire protection or law enforcement or related activities for a separate and independent employer (public or private) during their off-duty hours. *See* 29 U.S.C. § 207(p)(1). Under these special rules, the “hours of work for the separate and independent employer are not combined with the hours worked for the primary public agency employer for purposes of overtime compensation.” *See* 29 C.F.R. § 553.227(a). Such “outside employment” is subject to section 7(p)(1) only where the special detail work is performed solely at the employee’s option and the two employers are in fact separate and independent. 29 C.F.R. § 553.227(b). The exemption applies even though the primary employer facilitates the special detail employment and affects the conditions of the employment, such as by maintaining a roster of employees who want to participate, negotiating their pay rate, processing the pay, and requiring officers to observe their normal standards of conduct during the details. *See* 29 C.F.R. § 553.227(d).

As indicated in 29 C.F.R. § 553.102(b), “[w]hether two agencies of the same State or local government constitute the same public agency can only be determined on a case-by-case basis. One factor that would support a conclusion that two agencies are separate is whether they are treated separately for statistical purposes in the Census of Governments issued by the Bureau of Census, U.S. Department of Commerce.” *See also* 29 C.F.R. § 553.227(c). The Census of Governments, which makes its determination based on an examination of the organization’s existence as an organized entity, its governmental character, and whether it exercises substantial autonomy, does not consider the City and the Board to be separate agencies. They consider the Board to be part of the City government. However, the preamble to 29 C.F.R. § 553.102 states that while the Census might identify an entity as being dependent upon another public agency, an agency may be, in fact, independent for FLSA purposes. 52 Fed. Reg. 2012, 2020 (Jan. 16, 1987). Thus, it is necessary to look at other factors to determine whether the City and the Board are independent public agencies.

Previous opinion letters identify other factors that are relevant to determining whether two agencies are separate employers. These factors include: (1) whether the employers have separate payroll systems; (2) whether the employers have separate retirement systems; (3) whether the employers have separate budgets and funding authorities; (4) whether the employers are separate legal entities with the power to sue and be sued; (5) whether the employers deal with each other at arm’s length concerning the employment of the individuals in question; (6) how the employers’ relationship is treated under state law; and (7) whether one employer controls the appointment of the officers of the other agency. *See* Wage and Hour Opinion Letters [FLSA2006-13](#) (Apr. 28, 2006), [FLSA2003-2](#) (Apr. 14, 2003), [FLSA2002-3](#) (June 7, 2002), and July 1, 1993 (copy enclosed).

As you indicated, the City and the Board have separate payroll and retirement systems. However, the Board is fiscally dependent on the City for more than half of its funding, although it also receives funds from state and federal grants. The court in *Johnson v. Unified*

² Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at www.wagehour.dol.gov.

Government of Wyandotte County, 127 F. Supp. 2d 1181, 1193 (D. Kan. 2000), identified the extent to which one entity provides financing for or controls the budget of another entity as “an important factor in determining whether the two entities are separate and independent.” See Wage and Hour Opinion Letter dated July 1, 1993. Nevertheless, despite the fact that the City provides the majority of the Board’s funding, it does not “control” the Board’s budget because, under state law, the Board independently identifies its fiscal needs, and the City must provide the requested funds, up to 20% of the City’s general revenue. Thus, the Board essentially controls its own budget, separate from the City budget, despite its lack of independent authority to levy taxes.

Furthermore, the City Council does not control the make-up of the Board. Under state law, the Mayor of the City is a member of the Board, with the four remaining members appointed (and removed) by the Governor. The City and the Board are separate legal entities, with the power to sue and be sued, and the state courts have concluded that the City is not liable for wrongs committed by the police. *Harmon v. City of Kansas City*, 197 F.3d 321 (8th Cir. 1999). Moreover, the state Supreme Court has held that the police department is a department of the state government and not the City government.

With regard to whether the entities deal with each other at arm’s length concerning the employment of the individuals performing special duty work, you have advised that the City uses the same “off-duty supervisor” system for requesting an officer that private entities use. You also have stated that the Board, not the City, supervises the off-duty police officers working special duty at the airport. However, based upon a conversation with a member of my staff and the Chief of the airport police, it was clarified that the City, in fact, supervises and controls the employment of the off-duty police officers working special duty at the airport. The Chief advised that his staff assigns the off-duty police officers to a workstation at a screening checkpoint, provides a relief period to the officers during the work shift, and supervises the officers. If a problem occurs with an off-duty police officer, the airport police staff would remove the officer from the airport assignment and contact the “off duty supervisor” system for a replacement. The Board is then responsible for disciplining the officer. Therefore, the Board’s supervision does not appear to extend beyond the requirement that officers observe their normal standards of conduct, which is expressly allowed by 29 C.F.R. § 553.227.

Based upon our application of the factors listed above, it appears that the City and the Board are separate employers for purposes of the FLSA and, therefore, that the hours worked for the separate and independent employer need not be combined with hours worked for the primary employer for purposes of overtime compensation.

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 the above information is responsive to your inquiry.

Sincerely,

Barbara R. Relford
Office of Enforcement Policy
Fair Labor Standards Team

Enclosure

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