

FLSA 1229

December 26, 1985

This is in further response to your letters of June 6 and July 24 concerning the effect of the decision by the U.S. Supreme Court in Garcia v. San Antonio Metropolitan Transit Authority et al. (Garcia), 105 S.Ct. 1005 (Feb. 19, 1985), on the application of the Fair Labor Standards Act (FLSA) to the *** Schools' Police Liaison Program. Under this program, police officers of various *** jurisdictions teach courses in public service occupations and law awareness, and have other law enforcement-related responsibilities in *** Public Schools. You wish to know whether the public officers in this program would qualify as executive, administrative, or professional employees under section 13(a)(1) of FLSA. We regret the delay in responding to your inquiry.

You state that the *** County School Board has cooperative agreements with six different law enforcement agencies in *** County. Under this program, a police officer is assigned on a full-time basis to one of 27 *** County secondary schools. The contract between *** County and a jurisdiction provides that the police officer shall teach two classes relating to: 1) police and their role in society, 2) laws, 3) juvenile and adult criminal justice systems, and 4) career opportunities in law enforcement. Each police officer is assigned full time to one school and teaches two regularly scheduled classes each day. Each class has approximately 30 seventh or eighth grade students. However, the police liaison officer shall remain responsive to the chain of command of the police departments and shall remain an employee thereof. Under the contract, the school board pays the jurisdiction for the cost of the training.

The contract also specifies additional duties and responsibilities that are required to be performed by the police liaison officer. These include: counseling students and parents, acting as a resource person to students and staff, attending school functions, and attending parent/faculty meetings. The contract also requires that the liaison officer be a full-time police officer and that the officer meet the necessary requirements for a *** State Teaching Certificate (Public Service 7). The officer must be eligible to become a certified teacher by the State of *** Department of Education.

In a telephone conversation with a member of my staff on July 15, you advised that a police liaison officer teaches two 55-minute classes per day over a 9- or 18-week cycle. About 80 percent of the students in a particular school will take such classes provided that the student does not have a program schedule conflict. The officer works a full 8-hour day and also may attend school functions outside of the regular workday. In other words, you feel that the officer functions as a typical academic teacher. This includes giving tests, assignments, and grading papers. You also advised that officers in the program are paid salaries averaging about \$22,000 per annum.

You also furnished supplemental information with your letter of July 24. This information includes an instructor's guide used by the police liaison officer, a "handout" on the police school liaison program, and a liaison program brochure published by the *** County Sheriff's Office. These materials show that the police liaison officer remains a law enforcement officer under the program in relation to the students and the neighborhood. The officer is required to respond to criminal complaints and investigate crime committed on the campus as well as in the neighborhood around the school. He or she deals with juvenile crimes such as vandalism, breaking and entering, and simple battery (fights). You emphasize that "(t)he Police School Liaison Program in *** County is truly a Crime Prevention Program." Its purpose is "to build a better relationship with the schools and communities and to reduce juvenile crime."

Section 13(a)(1) of FLSA provides a minimum wage and overtime pay exemption for any employee employed in a bona fide executive administrative, professional or outside sales capacity as those terms are defined and delimited in Regulations, 29 CFR Part 541 (copy enclosed). In order to qualify for exemption under section 13(a)(1), an employee must meet all of the pertinent tests relating to

duties, responsibilities and salary as contained in the appropriate section of Part 541. However, as explained in section 541.3(e), the salary test does not apply to certain bona fide professional employees including teachers in a school system or educational establishment.

A determination of the exempt or nonexempt status of any employee must be made on an individual basis that takes into account all of the pertinent facts relating to the actual work performed by the employee in question. The exemption under section 13(a)(1) is applied on the basis that each workweek constitutes a separate period of exemption.

As indicated in section 541.3(a)(3) and 541.302(g), a person whose primary duty is teaching, tutoring, instructing or lecturing in the activity as a teacher in the school system by which he or she is employed will qualify as an exempt professional employee within the meaning of section 13(a)(1) and Part 541, provided the other tests for exemption contained in section 541.3 are met.

Under the principle of "joint employment," the police liaison officer is considered to be jointly employed by the police department of the jurisdiction and the Orange County School Board. Joint employment is discussed on page 6 of WH Publication 1459 and in greater detail in Interpretative Bulletin 29 CFR Part 791 (copies enclosed). Because we would consider the officer to be jointly employed by the School Board and the police department one of the tests discussed above - employment by the school system - is satisfied.

The key question to be addressed is whether the "primary duty" of the police liaison officer is teaching. As indicated in section 541.304(b), the primary duty of an employee employed as a teacher must be that of activity in the field of teaching. The words "primary duty" have the effect of placing major emphasis on the character of the employee's job as a whole. Therefore, employment and engagement in the activity of imparting knowledge as a primary duty is determinative as to whether the employee is employed within the meaning of the exemption as a teacher.

In the ordinary case it may be taken as a good rule of thumb that primary duty means the major part, or over 50 percent, of the employee's time. Time alone, however, is not the sole test of primary duty. For a general explanation of the term primary duty, see the discussion of this term in section 541.103.

Whether the police liaison officer is primarily engaged in teaching and, therefore exempt as a bona fide professional employee under section 13(a)(1) of FLSA is a close question. On balance, we are inclined to conclude that the police liaison officer could qualify for exemption under section 13(a)(1) in any workweek in which he or she is employed in the Orange County Public Schools under the program, provided that the officer does not spend substantially more than 50 percent of his or her time in law enforcement activities. The exemption would not apply, however, in any workweek in which school is not in session. Presumably, in nonschool workweeks, the officer would be engaged full time in law enforcement activities for the police department which employs the officer.

However, we also wish to advise you that the courts have not always accepted the position of the Wage and Hour Division that the primary duty test is to be applied on a workweek basis. Marshall v. Western Union Telegraph Co. (Western Union), 24 WH Cases 704 (Third Cir., 1980). Examining the primary duties of a police liaison officer over a much longer period than a workweek could lead to a conclusion that the police liaison officer is a law enforcement official rather than a teacher.

The regulations have not been changed in light of Western Union and, as indicated above, we still adhere to the position that the exemption is applicable on a workweek basis. However, because of potential liability under section 16(b) of FLSA, we are advising you of the holding by the Third Circuit. Section 16(b) gives an employee an independent right to bring an action against an employer to recover unpaid minimum wages and/or overtime compensation and an additional equal amount as liquidated damages plus attorney's fees and court costs.

On November 19, 1985, the Department of Labor (the Department) published an Advance Notice of Proposed Rulemaking (copy enclosed) in the Federal Register (50 FR 47696) to obtain the views of

the public on needed changes in Regulations 29 CFR Part 541. The Department is interested in the views of the public with respect to all aspects of the regulations. Comments will be received until January 21, 1986.

The Fair Labor Standards Amendments of 1985 (Public Law 99-150), which were enacted on November 13, 1985, change certain provisions of FLSA as they relate to employees of State and local governments. The amendments will become effective on April 15, 1986. Prior to that date, the Department will issue regulations as may be required to implement this legislation. A summary of the amendments and the Conference Report is enclosed for your information.

We trust that the above discussion satisfactorily responds to your inquiry. Please let us know if you have any further questions.

Sincerely

Herbert J. Cohen
Deputy Administrator

Enclosures