FLSA-717

May l2, 1986

This is in reply to your letter of April 3 in which you request an opinion as to the application of the minimum wage and overtime pay exemption contained in section l3(a)(3) of the Fair Labor Standards Act (FLSA) to seasonal employees hired during the summer months by the City ***. You specifically request that the City be determined to be a seasonal amusement or recreational establishment for the purpose of this exemption.

You state that the city is one of a small number of communities across the nation that constitutes a seasonal resort. During the summer months, the City's permanent resident population of just under 5,000 people increases to over 200,000 vacation residents. Because of this dramatic seasonal increase in population, the city government is forced to substantially expand its services during the summer tourist season. The city believes that the particular seasonal nature of the resort should entitle the city government to the exemption contained in section l3(a)(3) of FLSA during the tourist season (Memorial Day to the end of September).

It is your opinion that the City itself is in fact a seasonal recreational establishment during the summer season and should be deemed to be exempt under section l3(a)(3) of FLSA from the minimum wage and overtime pay provisions of FLSA. During the rest of the year, the off-season, the city reverts to a normal municipality which is fully subject to FLSA. In support of your opinion, you provide the following facts:

l. Of over 3,000 mercantile licenses issued, only 200 are active in the winter.

2. Where only 3 motels are open in the winter, there are over l0,000 rooms available to be rented in the summer.

3. Only 6 of the 6l liquor licenses are active in the winter.

4. A beach patrol which has no year-round employees has over 60 in the summer.

5. The police department increases from 38 officers employed year round to approximately l00 in the summer.

6. In the winter there are 2 trash collection routes; during the summer season, there are 5.

7. Seasonal employees are hired by the water and sewer authorities, the fire department, the emergency medical services, and almost all other governmental agencies.

The FLSA is the Federal law of most general application concerning wages and hours of work. It requires that all covered and nonexempt employees be paid not less than the minimum wage of $3.35 an hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek. The provisions of FLSA apply to all employees of State and local governments except for those who are specifically excluded in section 3(e)(2)(C) of FLSA and those who may qualify for exemption from the minimum wage and/or overtime pay provisions of FLSA.

The monetary provisions of FLSA apply to employees of State and local governments as a result of the decision by the U.S. Supreme Court in Garcia v. San Antonio Metropolitan Transit Authority et

al. (Garcia), 105 S.Ct. 1005 (February 19, 1985). In deciding Garcia, the Supreme Court expressly overruled its decision in National League of Cities v.Usery, 426 U.S. 833 (1976), that the minimum wage and overtime pay provisions of FLSA could not constitutionally be applied to employees of State and local governments who are engaged in traditional government functions.

On November 13, 1985, the Fair Labor Standards Amendments of 1985 (the Amendments), Public Law 99-150, were signed into law. On April 18, the Department of Labor (the Department) published proposed regulations which would implement this legislation. These proposed regulations contain rules concerning certain statutory exclusions and exemptions, recordkeeping requirements, and compensatory time provisions, which apply to State and local government workers in general, in addition to specific rules for volunteers and for fire protection and law enforcement employees.

The public has 45 days from the date of publication in which to submit comments on the proposed regulations. A copy of Public Law 99-150, a copy of the proposed regulations, and a summary of the Department's investigation policy with respect to the Amendments are enclosed for your information.

Section 13(a)(3) of FLSA provides a minimum wage and overtime pay exemption for employees who are employed by an amusement or recreational establishment, if (A) it is not open for more than 7 months in a calendar year, or (B) its average receipts during any 6 months of the preceding calendar year did not exceed one-third of its average receipts for the other 6 months of such year.

As used in FLSA, the term "establishment" refers to a "distinct physical place of business" rather than to an "entire business or enterprise" which may include several separate places of business. As you recognize, in order to be exempt under section 13(a)(3) an employee must be employed in an "amusement or recreational establishment;" and the recreational establishment"; and the establishment must meet either the seasonal operations test contained in section 13(a)(3)(A) or the seasonal receipts test contained in section 13(a)(3)(B),as discussed above. As you also recognize, the Department, in interpreting this exemption, has consistently held that an amusement or recreational establishment be a distinct working place for amusement or recreational employees and not an entire enterprise which consists of many separate establishments. Among the activities that the Department has determined may be amusement or recreational establishments operated by a city are stadiums, golf courses, swimming pools, summer camps, ice skating rinks, zoos, beaches, and boardwalk facilities.

It is clear from the information you provide that the city is comprised of many separate establishments, such as a water authority, sewer authority, police department, fire department, refuse department, and so forth. It is also clear that the city is a resort area during the summer months, where people come to reside for a period of time and visit restaurants, stores, and amusement and recreational facilities both inside and outside the city limits.

Since section 13(a)(3) of FLSA requires that in order to qualify for exemption an employee must be employed by an establishment which is a distinct physical place of business that the general public frequents for its amusement or recreation, we are of the opinion that the City with all its departments and subdivisions cannot be considered an amusement or recreational establishment for purposes of section 13(a)(3) of FLSA. However, employees engaged solely in the operation of amusement or recreational facilities operated on a seasonal basis by the city may qualify for exemption from the monetary provisions of FLSA where the tests for exemption are otherwise met. For example, lifeguards on a beach and other employees who are engaged in work solely connected with the operation of the beach would come within the exemption provided the establishment(the beach) is

not open as a recreational facility (i.e., protected swimming) for more than 7 months in any calendar year. However, this exemption would not apply to those employees of the city who are employed to clean the beaches if they are also engaged in work related to the cleaning of the city's streets. In addition, the exemption would not apply to comfort station attendants unless the stations which they operate are solely for the convenience of the persons patronizing the beach.

You may wish to note that in applying the receipts test contained in section 13(a)(3)(B) of FLSA, receipts are considered to be fees from admissions. A publicly-operated amusement or recreational establishment whose operating costs are met wholly or primarily from tax funds would fail to qualify under section 13(a)(3)(B) of FLSA. However, such an establishment may qualify for exemption under section 13(a)(3)(A) of FLSA.

We trust that the above responds to your inquiry.

Sincerely,

Susan R. Meisinger
Deputy Under Secretary

Enclosures