

FLSA 1214

December 3, 1986

This is in response to your letter of June 2 concerning the application of the overtime pay provisions of the Fair Labor Standards Act (FLSA) to employees of the County, *** Public Schools. You are specifically concerned about support services employees who, in addition to their regular jobs, perform extracurricular activities such as coaching sports or cheerleaders, sponsoring educational clubs or drama presentations by students, and similar activities. We regret the delay in responding to your inquiry.

You state that employees such as building service workers, secretaries, food service workers, carpenters, and similar support services employees are paid \$7.00 an hour for performing extracurricular duties of the type indicated.

The Fair Labor Standards Act (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 to 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. 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 were previously furnished to you.

Section 7(p)(2) of FLSA provides that State and local government employees may, 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, and the hours worked in

the different jobs need not be combined for the purpose of determining overtime liability under FLSA. The term "occasional or sporadic" means infrequent, irregular, or occurring in scattered instances. See section 553.30 of the proposed regulations.

A support service employee of the type listed above would be considered to be employed in a different capacity when performing such extracurricular activities as coaching sports or cheerleaders, sponsoring educational clubs or drama presentations by students, and similar activities. However, it is also essential that such extracurricular work be intermittent and irregular. Where, for example, a support services employee, in addition to his or her regular job, also works part-time on a daily or nearly daily basis doing extracurricular work with students, such hours must be combined with hours worked in the primary job for the purpose of computing proper overtime compensation due under FLSA.

A custodian who also works as an assistant coach during the football or other sports season would not be employed on an occasional or sporadic basis as discussed above. However, in the case of a support service employee who also coaches cheerleaders during the school year or sponsors an educational club, we are unable to provide a definitive ruling in the absence of additional details. Critical to such a determination would be information concerning the amount of time worked each day and the number of days worked each week, months or semester in such capacity.

We would also like to point out alternative methods of computing overtime pay for those support service employees whose extracurricular employment is not occasional or sporadic. Where such an employee works at two or more different types of work for which different nonovertime rates of pay have been established the employee's regular rate for that week is the weighted average of such rates. See section 778.115 of 29 CFR Part 778 (copy enclosed). An alternative method of overtime compensation provided in section 7(g)(2) of FLSA is discussed in sections 778.415 through 778.421 of Part 778.

In addition the Amendments provide that employees may be furnished compensatory time off in lieu of overtime payment in cash for hours worked in excess of statutory standards. See sections 553.20 through 553.28 of the proposed regulations.

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

Sincerely,

Paula V. Smith
Administrator

Enclosure