

FLSA 1210

January 29, 1987

This is in further response to your letter of April 14, 1986, concerning the application of the Fair Labor Standards Act (FLSA) to an individual who is employed by **** Township (the Township) as a zoning inspector. You wish to know if the zoning inspector (1) is excluded from the coverage of FLSA or (2) is specifically exempt from this law's minimum wage and overtime pay requirements. We regret the delay in responding to your inquiry.

The duties and responsibilities of the zoning inspector are referred to in your letter and in the job description which is enclosed with it. In addition to certain clerical activities such as processing and filing applications for zoning permits, the zoning inspector's duties include making on-site inspections issuing advisory notices to property owners, investigating code violations, and supervising one other employee in the zoning department. The zoning inspector receives an annual salary of \$17,010.

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 to those who are specifically excluded in section 3(e)(2)(C) of FLSA and to those who may qualify for exemption from the minimum wage and/or overtime pay provisions of FLSA.

You indicate that the zoning inspector is appointed by the Township's Board of Trustees and that this individual is not subject to the civil service laws of the State of Ohio. Based on these circumstances and on the fact that the zoning inspector must post a surety bond, it is your contention that this individual is excluded from the coverage of FLSA pursuant to the provisions of section 3(e)(2)(C).

Section 3(e)(2)(C) excludes from the coverage of FLSA an individual who is not subject to the civil service laws of the State, political subdivision, or agency which employs him, and who (1) holds a public elective office of that State, political subdivision, or agency, (2) is selected by the holder of such an office to be a member of his personal staff, (3) is appointed by such an officeholder to serve on a policymaking level, or (4) is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office. Although the zoning inspector to whom you refer is not subject to the State's civil service laws, this condition alone is not a sufficient basis for the application of section 3(e)(2)(C). Furthermore, the information which you have provided indicates that the zoning inspector is not appointed to serve on a policymaking level, and this individual is not an immediate or personal adviser to an elected official. Therefore, it

is our opinion that the zoning inspector does not qualify for exclusion from the coverage of FLSA as provided by section 3(e)(2)(C).

As an alternative to the application of section 3(e)(2)(C) as described above, you wish to know if the zoning inspector qualifies as an exempt administrative employee. Section 13(a)(1) of FLSA provides a minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative or professional capacity, as those terms are defined in Regulations, 29 CFR Part 541 (copy enclosed). An employee may qualify for exemption as a bona fide administrative employee if all of the pertinent tests relating to duties, responsibilities and salary, as discussed in section 541.2 of the regulations are met. However, pursuant to section 541.2(e)(2), an employee, such as the zoning inspector, who is paid a salary of at least \$250 per week may qualify for exemption as a bona fide administrative employee if the employee's primary duty consists of the performance of office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customers, which includes work requiring the exercise of discretion and independent judgment.

Based on the information which you have provided, it is clear that the primary duty of the zoning inspector does not require the exercise of discretion and independent judgment of the type required by section 541.2 of Part 541. Although you refer to the fact that the zoning inspector's duties are related to "establishing and enforcing" the zoning codes, the information which you have provided indicates that this employee's principal activity is that of "enforcing" as opposed to "establishing".

A zoning code is established and maintained as a result of policymaking decisions by responsible officials, and this is obviously the type of exempt work which requires discretion and independent judgment as described in Part 541. In this case, the responsible officials are the members of the Township's Board of Trustees, the Zoning Board of Appeals, and/or the Zoning Commission. These bodies have the authority to revise the zoning code and to rule on matters of dispute under the code. On the other hand, the zoning inspector's duties as an "enforcer" include, among other things, investigating violations of the zoning code, reviewing applications for zoning or sign permits, and issuing permits. This type of work, while requiring a certain expertise or knowledge of procedures, is performed in accordance with an established set of rules (the zoning code) and does not require the requisite degree of discretion or independent judgment. Therefore, it is our opinion that the zoning inspector described in your letter does not qualify for exemption as a bona fide administrative employee under the provisions of section 13(a)(1) of FLSA.

We trust that the above is responsive to your inquiry.

Sincerely,

Paula V. Smith
Administrator

Enclosure