

FLSA-1151

December 18, 1989

This is in further response to your letter concerning the application of the Fair Labor Standards Act (FLSA) to an individual who is employed by the Village *** as a zoning inspector. You wish to know if the zoning inspector falls within the exclusions set forth in section 3(e)(2)(C) of FLSA. We regret the delay in responding to your inquiry.

The FLSA is the Federal law of most general application concerning wages and hours of work. This law 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) and to those who may qualify for exemption from the minimum wage and/or overtime compensation provisions.

You indicate that the zoning inspector is appointed by the Mayor of the Village subject to approval by the Village Council and that this individual is not subject to the civil service laws of the State of Ohio. In addition to interpreting and enforcing the zoning laws of the Village, the zoning inspector, reports directly to the Mayor and is supervised by the Mayor. He is considered to be one of the administrative officers of the Village. The zoning inspector may be removed from the job at any time by the Mayor with the concurrence of two-thirds of the members of Council.

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 or her, 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 or her personal staff, (3) is appointed by such an office holder 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 or her office. Although the zoning inspector to whom you refer is not subject to the State's civil service law, this condition alone is not a sufficient basis for exclusion under section 3(e)(2)(C). The information which you have provided indicates that the zoning inspector is not an elected official, is not appointed to serve on a policymaking level, and is not an immediate or personal adviser to an elected official on constitutional or legal matters.

Whether the zoning inspector is a member of the Mayor's personal staff must be resolved by a careful examination of the nature and circumstances of the zoning inspectors role in the Mayor's office. The fact that the zoning inspector was hired by the Mayor (with the concurrence of the council) and is supervised by the Mayor is not tantamount to being on the Mayor's personal staff. In an analogous situation in which the exclusion under section 3(e)(2)(C) was at issue, a Federal appellate court held that a correctional officer hired by a sheriff was not a member of the sheriff's personal staff when the correctional officer performed general correctional duties at the county jail. See Brewster v. Barnes, 788 F.2d 985, 989-991 (4th Cir. 1986).

It is our opinion that a zoning inspector whose duties primarily involve reviewing and processing zoning permit applications, on-site inspections, investigation of code violations, and similar duties is not excluded from FLSA pursuant to section 3(e)(2)(C) (ii).

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying or requiring compliance with, the provisions of FLSA.

We trust that the above information is responsive to your inquiry.

Sincerely,

Nancy M. Flynn
Administrator