

FLSA-909

August 27, 1990

This is in further response to your letter, with enclosures, concerning the application of the Fair Labor Standards Act (FLSA) to employees of a public agency performing "special duty" work in fire protection or law enforcement activities, as described in section 553.227 of Regulations, 29 CFR Part 553, for a private promoter staging a public event. We regret the delay in responding to your inquiry.

You describe a situation in which a private promoter has entered into an agreement with a public agency to sponsor a public event such as a parade or festival. Under the agreement, the promoter receives a grant from the public agency to assist the promoter in covering the expenses incurred in staging the public event. You wish to know whether the receipt of public funds by the promoter under the agreement with the public agency would affect the application of section 7(p)(1) of FLSA. In other words, would the contractual agreement between the public agency and the private employer affect the separate and independent status of the private employer? The promoter is responsible for public safety functions under the agreement and employs police, fire and rescue employees of the public agency in fulfilling the contract between the parties. You state that we are to assume that the special detail work for the promoter is performed solely at the employees' option.

As indicated in section 553.227, section 7(p)(1) makes special provision for fire protection and law enforcement employees of public agencies who, at their own option, perform special duty work in fire protection, law enforcement or related activities for a separate and independent employer (public or private) during off-duty hours. The hours of work for the separate and independent employer are not combined with the hours worked for the primary public agency employer for the purposes of overtime compensation. Section 7(p)(1) applies to such outside employment provided (1) the special detail work is performed solely at the employee's option, and (2) the two employers are in fact separate and independent.

This special provision applies even if the public agency facilitates the employment or affects the conditions of employment of such employees. Section 7(p)(1) applies to special details even where a State law or local ordinance requires that such work be performed and that only law enforcement or fire protection employees of a public agency in the same jurisdiction perform the work. These principles are exceptions to the usual rules on joint employment set forth in 29 CFR Part 791 (copy enclosed).

In other words, when a fire protection or law enforcement employee is jointly employed by both a public and private employer during the same workweek, the public employer would not be liable for the payment of any overtime compensation which may otherwise be due as the result of the joint employment. Section 7(p)(1) does not prevent a public agency from prohibiting or restricting outside employment by its employees. Private sector firms would still be obligated to pay "moonlighting" public employees, as any

other employees whom they employ, in accordance with the monetary provisions of the FLSA.

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 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 the FLSA.

Sincerely,

Samuel D. Walker
Acting Administrator

Enclosure