

FLSA-510

January 17, 1992

This is in response to your inquiry concerning the application of the Fair Labor Standards Act (FLSA) to certain employees of the Town ***. You are particularly concerned about whether full-time highway department employees *** who also work additional hours for the Town as part-time police officers are exempt from FLSA overtime compensation under §213(b)(20).

As you know, the FLSA provides a number of special provisions for state and local government employees that are discussed in detail in Regulations, 29 CFR Part 553 (copy enclosed). Section 213(b)(20) of the FLSA provides a complete overtime exemption for any employee of a public agency who in any workweek is employed in fire protection activities or any employee of a public agency who in any workweek is employed in law enforcement activities ... if the public agency employs during the workweek less than 5 employees in fire protection or law enforcement activities, as the case may be." See section 553.200.

However, as indicated in §553.212, a person who spends more than 20 percent of his/her working time in activities that are not law enforcement activities (as described in §553.211) is not considered to be an employee engaged in law enforcement activities for the purposes of §§213(b)(20) and 207(k). As you correctly point out, an individual who is employed primarily in the highway department cannot qualify for exemption under § 213(b)(20).

The lengthy discussion on §§207(k) and 213(b)(20) in the legislative history of the 1974 FLSA Amendments identify only "police officers," "firefighters," "security personnel" in correctional institutions, and certain "ambulance and rescue personnel" as qualifying for these exemptions. It is noted that the language of the version of §213(b)(20) proposed by the House of Representatives, which would have provided a complete overtime exemption for firefighters and law enforcement personnel irrespective of the number of such personnel employed by the public agency, would also have resulted in an overtime exemption for all employees of such agencies. The House version read as follows: "(20) any employee of a public agency engaged in fire protection or law enforcement activities (including security personnel in correctional institutions)."

However, the House-Senate conferees specifically added language to the final versions of §§213(b)(20) and 207(k) which limits these exemptions to individuals who themselves are engaged in fire protection or law enforcement activities, or who are security personnel in correction institutions. Moreover, civilian support personnel of such agencies are nonexempt under §§213(b)(20) and 207(k). See the discussion of these issues on pages 2022 and 2023 of the regulations.

While the 1985 Fair Labor Standards Amendments permit the exclusion of certain hours of work in calculating overtime compensation for employees who work for two separate employers (in special duty work in fire protection or law enforcement activities) or in two separate capacities (occasionally or sporadically) for the same employer, such provisions do not apply to the situation you describe. See §§553.30 and 553.227 of the regulations.

With regard to changing the regulations to allow *** to claim §213(b)(20) for full-time highway department employees who also work part-time as police officers, the Department of Labor gave consideration to similar regulatory modifications during the 1987 rulemaking with respect to "civilian" employees of fire and police departments. See page 2022. The position stated in the regulations is consistent with the legislative history of the Fair Labor Standards Amendments of 1974. We appreciate your concern but do not believe (absent congressional action) that there is an adequate basis to presently change the regulations.

We trust that the above is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator