



FLSA2006-40

October 20, 2006

Dear Name*:

This is in response to your letter written on behalf of a number of school districts. You request guidance under the Fair Labor Standards Act (FLSA) regarding the use of non-exempt school system staff to assist with coaching sports or other extracurricular activities, either as volunteers or as additional duties. You present several hypothetical fact patterns and inquire whether there is FLSA compliance. We will briefly describe the statutory and regulatory provisions that guide our analysis and then address each hypothetical in turn.

The FLSA recognizes the generosity and public benefits of volunteering and does not seek to pose unnecessary obstacles to *bona fide* volunteer efforts for charitable and public purposes. Please be assured that this Administration fully supports volunteerism and is committed to working to ensure that citizens are able to volunteer their services freely for charitable and public purposes consistent with the law. Wage and Hour Division (WHD) staff are prepared to work with and to offer assistance to school districts regarding FLSA compliance.

Under section 3(e)(4)(A) of the FLSA and 29 C.F.R. §§ 553.101 and 553.103,¹ individuals are volunteers, not employees of a public agency, when they meet the following criteria:

- A. They provide their services for civic, charitable, or humanitarian reasons without promise, expectation, or receipt of compensation for the services rendered, although a volunteer can be paid expenses, reasonable benefits, or a nominal fee to perform such services;
- B. They offer their services freely and without coercion, direct or implied, from the employer; and
- C. They are not otherwise employed by the same public agency to perform the same services as those for which they propose to volunteer; in other words, individuals can qualify as volunteers if they either volunteer for different agencies *or* perform services different from those they are otherwise employed to perform.

WHD has recently considered the application of the FLSA volunteer provision to schools and described the relevant considerations necessary to determine whether a *bona fide* volunteer relationship exists under different factual situations. See Wage and Hour Opinion Letter [FLSA2004-6](#) (July 14, 2004).

Your letter poses four specific questions concerning either volunteers or employees performing additional paid work for the employer. The questions you present do not specifically address

¹ Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at www.wagehour.dol.gov.

each of the three criteria set out above. Thus, for the purposes of this response, we will address only the issues presented and will assume that the individuals otherwise qualify as volunteers. Please note that in each case in which any of these criteria is not met, the services performed may constitute compensable time under the FLSA.

1. Instructional aides employed by the school district seek to volunteer their services in the schools their children attend. These instructional aides would perform as volunteers at least some of the same services that they are also employed by the school district to perform as employees. You ask whether these instructional aides may volunteer under these circumstances.

WHD does not assert FLSA violations for time spent by a public school employee who is also the parent (or who stands *in loco parentis*) of a child in that school, when the parent volunteers in activities directly involving the child's education and participation. WHD will thus not enforce the provisions of the FLSA for the time spent by a volunteer who is a parent of a student participating in the activity for which the parent is volunteering. *See Wage and Hour Opinion Letter FLSA2004-6; Field Operations Handbook § 59d08.*

This WHD enforcement position applies only if the activities are performed without expectation of compensation and there is no coercion or pressure on the employee by the employer to provide the volunteer services. Also, WHD's enforcement position does not waive or otherwise have any effect on an individual employee's right under section 16(b) of the FLSA to maintain a future claim for appropriate FLSA compensation for "volunteer" hours.

2. Secretarial and clerical employees of the school district wish to perform volunteer services for the Parent Teacher Association/Parent Teacher Organization and other school-associated organizations. They may be paid a nominal fee for performing the services, which are similar to the services they are otherwise employed by the school district to perform. You ask whether these activities constitute volunteer service.

Assuming any payment is in fact "nominal" (see answer to question 4 below), the evaluation of volunteer status turns on whether the PTA/PTO and other school associated organizations and the school are the same public agency. The PTA is generally a not-for-profit organization with its own governing board of directors and is independent from the school.² Although a PTA exists to support educational activities, we assume it is not the same public agency as the school. Consequently, the secretary or clerical employee may volunteer for the PTA, even though the secretary or clerical employee provides the same services to the PTA as the employee provides to the school.

3. Secretarial, clerical, and bookstore employees volunteer as ticket-takers, ushers, box office personnel, or security workers at games during football or basketball season or at infrequent special events such as concerts or theater performances. You ask whether these individuals must be paid for such work.

² The by-laws of the national PTA specify that the PTA is "organized exclusively for charitable, scientific, literary and educational purposes" under the IRS code provision governing not-for-profit organizations.

The employees may volunteer to perform such services to the extent that are not the same as or similar to those services they are otherwise employed by the school district to perform. A determination of whether the services that volunteers seek to provide are the “same type of services” they are employed to perform requires “consideration of all the facts and circumstances in a particular case.” 29 C.F.R. § 553.103(a).

Among the facts to be considered is how the volunteered services and the services that the volunteer is employed to provide were classified by the three-digit categories of occupations in the *Dictionary of Occupational Titles* (DOT), last published in 1991 by the Employment and Training Administration (ETA). The DOT was recently replaced by the O*NET system, also published by ETA. WHD will also consider whether the volunteer services are “closely related to the actual duties performed or responsibilities assigned to the employee.” *Id.* To the extent that any individual school employee’s “actual duties” differ from those found in the O*NET description, the answers below may not be valid, and the services performed may constitute compensable time under the FLSA.

Secretarial, clerical, and bookstore employees generally perform work that is substantially different from the tasks performed by ticket-takers, ushers, box office workers, or security guards. Both the DOT and O*NET descriptions illustrate that most of the tasks performed in the paid occupational categories and those performed in the volunteer categories are substantially different. Although the O*NET descriptions indicate that a few of the tasks that ticket-takers, ushers, and box office workers commonly perform also are performed by cashiers and clerical workers, none of the paid occupations shares the three-digit categories of occupations in the DOT with the volunteer job categories. Although you have not provided a description of the tasks the employees perform for the school district aside from the job titles, it appears the employees would be allowed to volunteer, assuming the job titles reflect the tasks normally performed by an employee in those positions.

As stated above, however, if the actual duties of a school employee differ from those described in O*NET or the DOT, the preceding answer regarding same or similar services may not be valid. Below you will find links to the corresponding job descriptions in O*NET and the Dictionary of Occupational Titles, the two databases used to consider whether or not work is sufficiently different to allow public employees to volunteer for their employer.

For the O*NET occupational descriptions, see the following occupational categories:

- *Clerical*: <http://online.onetcenter.org/link/summary/43-9061.00>;
- *Secretary*: <http://online.onetcenter.org/link/summary/43-6014.00>;
- *Cashier*: <http://online.onetcenter.org/link/summary/41-2011.00>;
- *Usher, Ticket-taker, Lobby attendant*: <http://online.onetcenter.org/link/summary/39-3031.00>; and
- *Security Guard*: <http://online.onetcenter.org/link/summary/33-9032.00>.

See also the DOT occupational categories:

- *Clerk*: <http://www.occupationalinfo.org/20/209562010.html>;

- *Secretary*: <http://www.occupationalinfo.org/20/201362030.html>;
- *Cashier*: <http://www.occupationalinfo.org/21/211462010.html>;
- *Security Guard*: <http://www.occupationalinfo.org/37/372667038.html>; and
- *Ticket-taker*: <http://www.occupationalinfo.org/34/344667010.html>.

4. Secretarial, clerical, and other employees volunteer to participate in extracurricular activities, such as dance chaperones, student proctors, field trip chaperones, or crowd control monitors. You indicate that the work is not the same as or similar to the work they are employed to perform. They receive a fee of approximately \$10 to \$20 per activity. You ask whether these individuals are volunteers or employees.

Assuming the work performed by paid employees of the school district is not the same as or similar to the work performed as volunteers, the answer depends on whether the payment of the \$10-\$20 per activity is a nominal fee or compensation for services. Section 3(e)(4)(A)(i) and the implementing regulations at 29 C.F.R. § 553.106 provide that a volunteer may be paid expenses, reasonable benefits, or a nominal fee, or any combination thereof, without losing volunteer status. The regulations list a number of examples of permissible payments, including such expenses as dry cleaning a uniform, transportation, books, or supplies, or a payment for benefits, such as participation in a group insurance plan. *See* 29 C.F.R. § 553.106(a)-(d).

Although the statute and the implementing regulations do not define what constitutes a “nominal fee,” the regulations provide guidance for determining whether a fee is nominal. If a fee is not nominal, then the individual would not qualify as a volunteer and would be considered an employee subject to the FLSA minimum wage and overtime provisions. In particular, 29 C.F.R. § 553.106(e) states that a fee is not nominal if it is a substitute for compensation or tied to productivity.

The factors to examine in making this determination include without limitation: (1) the distance traveled and the time or effort required of a volunteer; (2) the availability—limited or unlimited—of a volunteer to provide services; and (3) the basis—as needed or throughout the year—on which a volunteer agrees to perform services. These factors focus upon whether the fee is actually more analogous to a payment for services and, therefore, is not nominal, or a reflection of the volunteer’s commitment to the volunteer activities. *See* Wage and Hour Opinion Letter FLSA2004-6. “Another key factor in the context of school coaching or advising a club is whether the amount of the fee *varies* as the particular individual spends more or less time engaged in the volunteer activities, or *varies* depending upon the success or failure of a particular team or school activity.” Wage and Hour Opinion Letter [FLSA2005-51](#) (Nov. 10, 2005). Therefore, fees based upon “the win-loss record of a team, or the degree of student involvement in a particular club, or other similar factors relevant to the quality or quantity of the team, club, or activity” would be considered tied to productivity. *Id.*

Section 553.106(f) of the FLSA regulation provides that determining whether the expenses, benefits, or fees would preclude an individual from qualifying as a volunteer under the FLSA requires examining the total amount of payments in the context of the economic realities of a particular situation. WHD will presume that the fee paid is nominal as long as the fee does not exceed twenty percent of what the school would otherwise pay to hire a full-time employee for

the same services. See Wage and Hour Opinion Letters [FLSA2006-28](#) (Aug. 7, 2006) and FLSA2005-51.

Moreover, to the extent that these workers are part-time employees and not volunteers, the special overtime rule under section 7(p)(2) of the FLSA may apply. Section 7(p)(2) 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 the FLSA. The term “occasional or sporadic” means infrequent, irregular, or occurring in scattered instances. See 29 C.F.R. § 553.30.

Unfortunately, because of the limited information provided concerning your specific school districts, we are unable to provide a definitive answer regarding whether the fees proposed are nominal or whether section 7(p)(2) applies. I hope you will find the above discussion and analysis responsive to your request.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein.

You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

Sincerely,

Paul DeCamp
Administrator

Note: *The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. 552 (b)(7).