

SEP 10 1997

This is in response to your inquiry on behalf of _____ is concerned about the application of the Fair Labor Standards Act (FLSA) to his employment by the _____

As you know, Mr. _____ is employed as a full-time custodian by the School District, and has been seeking to be employed as a substitute teacher by his employer. There is nothing in the FLSA that prevents an employer from employing an individual in two or more jobs or capacities. As a general rule, however, all hours worked from the employer must be combined for the purpose of determining proper minimum wage and/or overtime compensation.

An exception to this general rule is provided by § 7(p)(2) of the FLSA. If the terms of this exception are met, the School District would not be obligated to combine the hours worked in both jobs for FLSA overtime pay purposes. The issue of concern is whether this provision can be applied in Mr. _____ case.

Section 7(p)(2) provides that where State or local government employees, solely at their option work occasionally or sporadically on a part-time basis for the same public employer in a different capacity from their regular employment, the hours worked in the different jobs shall not be combined for the purposes of determining overtime compensation under the FLSA. The part-time employment must meet both tests. This is explained in 29 CFR § 553.30, which was previously furnished to your constituent.

Clearly, the "different capacity" test would be met in the employment situation described. However, the occasional or sporadic employment test is problematic. This is because the need for "substitute" teachers is difficult to predict. Thus, the School District (upon the advice of its counsel) has been reluctant to use this exception. We have been advised that the District's budget cannot sustain overtime compensation for _____ combined employment should the 7(p)(2) exception not apply.

On May 15, 1997, a conference call was initiated by the School District and its labor counsel with this office on Mr. _____ behalf. He was advised that it is not possible for us to conclude that the occasional and sporadic test would be met without specific facts concerning the frequency of the substitute teaching assignments. In response to our questions, we were advised that in all likelihood, _____ would be substituting at least one day per week should the School District employ him in such capacity.

As indicated in 29 CFR § 553.30, the Department has determined that where an employee, in addition to his or her regular job, works additional hours on a part-time basis every week or every other week, the additional work does not constitute intermittent and irregular employment within the meaning of § 7(p)(2). Absent any facts to the contrary, we conclude that this exception could not apply, if the substitute teaching occurred with the frequency discussed above.

We thought that your constituent understood our position after the conference call, and that we did not agree with his view that substitute teaching qualified, per se, as occasional or sporadic employment within the meaning of § 7(p)(2). We regret any misunderstanding that may have occurred. Ultimately, whether _____ will be employed as a substitute teacher in addition to his regular employment by the School District is a management decision that has to be made by the District.

If you have any further questions, please do not hesitate to contact this office.

Sincerely,

Daniel F. Sweeney
Office of Enforcement Policy
Fair Labor Standards Team

cc: Washington, D.C., Office