

APR 21 1995

This is in response to your inquiry on behalf of
Your constituents are
concerned about the application of the Fair Labor Standards Act
(FLSA) to their employment when they "volunteer" as reserve
deputies for the Sheriff's Department. They
indicate that they are employed as corrections officers by the
Department.

Before addressing your constituents' specific concerns, it might be helpful to consider the matter of volunteering in general. Under the FLSA, individuals may not volunteer services to private sector employers. On the other hand, in the vast majority of circumstances, individuals can volunteer services to public sector employers. When Congress amended the FLSA in 1985, it made clear that people are allowed to volunteer their services to public agencies and their community with but one exception -- public sector employers may not allow their employees to volunteer, without compensation, additional time to do the same work for which they are employed.

Public sector employees may volunteer to do different kinds of work in the jurisdiction in which they are employed, or volunteer to do similar work in different jurisdictions. For example, police officers can volunteer different work (non-law enforcement related) in city parks or schools, or can volunteer to perform law enforcement for a different jurisdiction than where they are employed. Additionally, there is no prohibition on anyone employed in the private sector from volunteering in any capacity or line of work in the public sector.

Section 3(e)(4)(A) of the FLSA makes clear that individuals are not "employees" entitled to compensation for hours of work if the volunteer services they provide to a public agency are not the same type of services which they are employed to perform by that agency. To allow public employees to volunteer to perform for their public agency employer the same type of services for which they are paid raises the potential for abuse which Congress clearly had in mind in enacting this section of the law. See Senate Report No. 99-159, October 17, 1985, page 14, 2 U.S. Cong. News 1985, page 662 ("the Committee wishes to prevent any manipulation or abuse of minimum wage requirements through coercion or undue pressure upon employees to 'volunteer'").

In this regard, we have found situations involving coercion or pressure to "volunteer" in a number of FLSA investigations. For example, an Ohio police department required auxiliary officers to "volunteer" unpaid hours in order to be eligible for paid assignments. Similarly, an Indiana police department required part-time paid officers who wanted to continue to be scheduled for part-time paid employment to fill-in and work night shifts as "volunteers" without pay. Such situations are considered to be violations of the FLSA.

Even where there is no evidence of coercion, allowing paid employees to provide the same type of services for their employer on an uncompensated "volunteer" basis if they chose to do so would in effect allow employees to waive their rights to compensation due under the FLSA. The Supreme Court has held that an employee may not waive his or her rights to compensation due under the FLSA. Brooklyn Savings Bank v. O'Neil, 328 U.S. 697 (1945). The Court observed that "while in individual cases hardship may result, the restriction will enure to the benefits of the general class of employees in whose interest the law is passed and so to that of the community at large (internal citations and quotations omitted)." Id. Similarly, in Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981), the Court held that a labor organization may not negotiate a contract provision that waives employees' statutory rights under the FLSA.

The Department's regulations, at 29 CFR §553.103, define "same type of services" to mean similar or identical services, and refers to the duties and other factors contained in the definitions of the three-digit categories of occupations in the Dictionary of Occupational Titles. Equally important are all the facts and circumstances in a particular case including whether the volunteer service is closely related to the actual duties performed by or responsibilities assigned to the employee who "volunteers."

We have taken the position that law enforcement duties such as transferring or taking custody of prisoners, booking, fingerprinting, restraining, etc., with respect to suspects or prisoners, are the same type of services whether performed by police officers, detectives, bailiffs, jailers, deputies, etc. Similarly, law enforcement duties such as patrolling streets, directing traffic, taking reports on stolen or recovered property, missing persons, collecting evidence and taking photos at crime scenes, performing matron duties with female prisoners, etc., whether performed by police cadets, community service officers, reserve deputies, auxiliary or regular police officers, are the same type of services for purposes of §3(e)(4)(A).

Consequently, it is our position that corrections officers employed by the Sheriff's Department who, for example, work in the jail to take custody, book, fingerprint, and secure suspects or prisoners, may not volunteer as reserve deputies without compensation in accordance with the FLSA. However, "civilian" employees such as dispatchers, clerks, secretaries, mechanics, etc. employed by the Sheriff's Department could volunteer as reserve or auxiliary deputies.

It is important to again make clear that individuals who are reserve deputy volunteers but who are not employed in any capacity by a public agency are not affected. As you know, sheriffs' departments or volunteer fire/rescue organizations are frequently served by individuals whose livelihood is earned principally in another vocation (mechanic, teacher, sales clerk, truck driver, construction worker, lawyer, etc.). Under FLSA, such individuals are not "employees" if they receive no compensation or are paid no more than expenses, reasonable benefits, or a nominal fee (or combination thereof) to perform the services for which they volunteer.

We trust that the above is responsive to your inquiry. If you have further questions, please do not hesitate to contact this office.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator