

FLSA - 1165

July 26, 1988

This is in further response to your letter to the Area Director of the *** Area Office concerning application of the Fair Labor Standards Act (FLSA) to Parole Agents 2 and 3 who are employed by the Board of Probation and Parole, (the Board), ***. You wish to know whether the minimum wage and overtime pay exemption contained in section 13(a)(1) of FLSA is applicable to these employees. We regret the delay in responding to your inquiry.

The FLSA is the Federal law of most general application concerning wages and hours of work. This law requires that all covered and nonexempt employees be paid not less than the minimum wage of \$3.35 an hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek. The provisions of this law apply to all employees of State and local governments except to those who are specifically excluded in section 3(e)(2)(C) of FLSA or who may qualify for exemption from the minimum wage and/or overtime pay requirements of the statute.

On January 16, 1987, the Department of Labor published final Regulations, 29 CFR Part 553, which implement the Fair Labor Standards Amendments of 1985 (the Amendments). These regulations contain rules concerning statutory exclusions and exemptions, recordkeeping requirements and compensatory time provisions which apply to State and local government workers in general, in addition to specific rules for volunteers and for fire protection and law enforcement employees. A copy of the regulations is enclosed for your information.

The primary duty of the Parole Agents 2 and 3 is to perform the responsibilities of the job in conformance with the management policies and procedures of the *** revised code as it affects the Board of Probation and Parole. The Parole Agents are peace officers with the power to arrest any parolee or probationer for violating the terms of his or her probation or parole. This can include forcible entry into buildings or premises. The Parole Agent determines if a parole violation has occurred and if it is necessary to have that person arrested. Agents have been sued for their decision not to restrict the freedom of a violator when the parolee commits a serious offense.

As part of their daily supervision of parolees, the Parole Agents recommend the degree of supervision the parolees should be provided, including determining the minimum number of direct and collateral contacts. The Agents also determine where the direct contacts should occur and what collateral contacts should be initiated based upon his or her knowledge of the parolee or probationer's entire case record. The Parole Agents are also responsible for prosecuting the cases against violators in hearings before the Board. These hearings provide the violator with due process. The Agent's role is to prepare and present the case against the violator by proving that a violation has occurred. This requires the Agent to select witnesses to prove his or her case, determine the order of witnesses, request that subpoenas be issued if necessary, and argue the case before the hearing examiner.

The Agent's work requires contact with dangerous and often volatile individuals and in places which are often unsafe. It is within this environment that an Agent must perform his counseling and supervision. The Agents carry weapons and have the authority to use them when necessary. The Agents are also responsible for conducting pre-sentence and pre-parole investigations. These investigations require the gathering of information necessary for the sentencing process and the assessing of the suitability of the pre-parole plan. The Agents conduct these investigations independently, and their reports are based on their findings. Information contained in those reports has a direct bearing on the status of the parolee. The Board makes recommendations to the Governor for clemency using the investigation reports submitted by the Parole Agent to arrive at their decision. The Parole Agents perform office or non-manual work and meet the \$250 per week salary test.

In a phone conversation with a member of my staff, *** of the Labor Relations office, stated that the

only distinction between the Parole Agent 2 and Parole Agent 3 is the complexity or difficulty of the parolee assigned to the Agent. *** also stated that Parole Agent 2 and 3 act as training persons for the entry level Parole Agent 1.

Section 13(a)(1) of FLSA provides a minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in Regulations, 29 CFR Part 541. An employee may qualify for exemption as a bona fide administrative employee if all of the pertinent tests relating to duties, responsibilities and salary, as discussed in section 541.2, are met. Pursuant to section 541.2(e)(2), an employee who is paid on a salary or fee basis of at least \$250 per week may qualify for exemption as a bona fide administrative employee if the employee's primary duty consists of the performance of office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customers, which includes work requiring the exercise of discretion and independent judgment.

Section 541.205 differentiates between activities which are "directly related to management policies or general business operations of the employer or the employer's customers" and activities which do not meet this test. The phrase describes those type of activities which relate to the administrative operations of a business as distinguished from the production operations of a business.

In determining whether activities are "directly related to management policies or general business operation" of the employer, it is important to consider the nature of the "business" itself, or in this case, the function of the government agency in question. Inasmuch as the Board has as one of its functions the providing of probation services, the probation and parole activities performed by the Parole Agents would appear to be related more to the ongoing day-to-day "production" operations of the Board than to management policies or "general business operations". Therefore, it is our opinion on the basis of the information you provided, that the employees employed as Parole Agents 2 and 3 cannot qualify as bona fide administrative employees under section 541.2 of the Regulations.

The *** may elect to use the partial overtime pay exemption provided by section 7(k) of FLSA with respect to the employment of Parole Agents 2 and 3. Section 7(k) Of FLSA provides the partial overtime exemption for public agency employees employed in law enforcement activities (including security personnel in correctional institutions). Under this provision, an employer may establish a work period of 7 to 28 consecutive days for the purpose of paying overtime compensation to employees employed in law enforcement activities. The maximum hours standard for law enforcement personnel ranges from 43 hours worked in a 7-day work period to 171 hours worked in a 28-day work period.

We trust that the above is responsive to your inquiry.

Sincerely,

Paula V. Smith
Administrator