



FLSA2019-11

August 8, 2019

Dear **Name***:

This letter responds to your request for an opinion regarding whether an employee of a public agency who works for both the agency's fire department and its police department is entitled to any overtime pay "irrespective of the number of hours worked in either position, or cumulatively, provided the hours comply with the 29 U.S.C. § 207(k) exemption." This opinion is based exclusively on the facts you have presented. You represent that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating or for use in any litigation that commenced prior to your request.

BACKGROUND

You inquire on behalf of a public agency that has employees who hold or seek to hold positions in both the police department and the fire department "of the same public agency." You state that the employees perform fire protection activities for the fire department and law enforcement activities for the police department. You advise that "each position requires the employees [to] work more than 7 days in a 28 day work period and work within the maximum hour standards set forth in 29 C.F.R. § 553.230."

GENERAL LEGAL PRINCIPLES

If an employee works for separate and distinct employers, each employer may disregard work performed by the employee for the other employer when determining its responsibility under the Fair Labor Standards Act (FLSA). 29 C.F.R. § 791.2. However, where the employee performs "fire protection activities" for the fire department and "law enforcement activities" for the police department of the same public agency, as you state is the case here, the hours are aggregated.

Section 7(k) of the FLSA provides a partial overtime exemption on a "work period" basis. 29 U.S.C. § 207(k). Specifically, Section 7(k) provides that "[n]o public agency shall be deemed to have violated subsection (a) [requiring the payment of overtime compensation] with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities" if the employee's hours remain within certain limits. *Id.* Section 7(k) of the FLSA as well as applicable regulations set forth maximum hours standards for employees who are engaged in both law enforcement and fire protection. 29 U.S.C. § 207(k); 29 C.F.R. § 553.230. As 29 C.F.R. § 553.230 explains, no overtime is owed to an employee engaged in fire protection who works 212 or fewer hours in a 28-day work period or that same ratio of hours to days in any work period from 7-27 days (approximately 7.57 hours per day over the entire work period). *See* 29 C.F.R. § 553.230(a), (c). No overtime is owed to an employee engaged in law enforcement who works 171 or fewer hours in a 28-day work period or that same ratio of

hours to days in any work period from 7-27 days (approximately 6.11 hours per day over the entire work period). *See* 29 C.F.R. § 553.230(b)-(c).

Further, 29 C.F.R. § 553.213(b) clarifies that when an employee is engaged in both fire protection and law enforcement, “the applicable [maximum hours] standard is the one which applies to the activity in which the employee spends the majority of work time during the work period.” 29 C.F.R. § 553.213(b).

OPINION

In your request, you gave two examples of the division of hours an employee at the public agency might work when engaged in both fire protection and law enforcement activities. In the first example, in a 28-day work period, an employee works 17 days and no more than 129 hours engaged in fire protection for the fire department, and the employee works 7 days and no more than 43 hours engaged in law enforcement for the police department. The employee’s total hours are no more than 172 (129 + 43). Section 553.213(b) instructs that the fire protection maximum hours standard applies since the employee spent the majority of work time in fire protection, rather than law enforcement. The maximum number of hours an employee may work for a fire department in a 28-day period and remain within the partial overtime exemption provided by Section 7(k) is 212. 29 C.F.R. § 553.230(a). As 172 (the total hours worked in fire protection and law enforcement in this example) is less than 212, this employee does not have to be paid overtime, even though the total hours is greater than the maximum for employees solely engaged in law enforcement. *See* 29 C.F.R. § 553.213(b); 29 C.F.R. § 553.230.

In the second example, the employee still works 17 days and no more than 129 hours engaged in fire protection but now works 11 days and no more than 67 hours in law enforcement. However, this increase of hours working in law enforcement does not change the end result. The fire protection maximum hours standard still applies since the employee still spends the majority of the work time in the 28-day period with the fire department. 29 C.F.R. § 553.213(b). As 196 (the total hours worked in fire protection and law enforcement in this example) is less than 212, the employee does not have to be paid overtime. *See* 29 C.F.R. § 553.213(b); 29 C.F.R. § 553.230.

However, if these numbers were reversed, and the employee worked 129 hours in law enforcement activities and 43 or 67 hours in fire protection activities, the employee would spend the majority of the work time in law enforcement, and therefore the lower maximum of 171 hours for employees engaged in law enforcement would apply. 29 C.F.R. § 553.213(b). Because the total hours worked would exceed 171 hours in the 28-day work period, the public agency would have to pay the employee overtime for either 1 hour, in the first example (129 + 43 - 171), or 25 hours in the second (129 + 67 - 171). *See* 29 C.F.R. § 553.213(b); 29 C.F.R. § 553.230. This is the case even when, as in your examples, in “each position . . . the employees . . . work within the maximum hour standards” for that particular position.

We trust that this letter is responsive to your inquiry.

Sincerely,

A handwritten signature in blue ink that reads "Cheryl M. Stanton". The signature is written in a cursive style with a long horizontal flourish at the end.

Cheryl M. Stanton
Administrator

***Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b)(6).**