



FLSA2019-12

August 8, 2019

Dear Name*:

This letter responds to your request for an opinion on whether volunteer Reserve Deputies who perform paid security work for third parties maintain their status as volunteers or are instead employees under the Fair Labor Standards Act (FLSA). 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 county Sheriff's Office that has seen a substantial increase in demand from third-party businesses and individuals for certified peace officers to provide security protection ("extra duty work"). You represent that the Sheriff's Office has historically met this need through the county's Deputy Sheriff's Association which is incorporated as a separate entity but is staffed with Sheriff's Office employees. The Association maintains a roster of full-time deputies who seek to perform extra duty work, coordinates third-party requests for its member deputies to perform extra duty work, collects payments from the third parties, and disperses the payment to the deputies for their extra duty hours.

The Sheriff's Office also runs a volunteer program pursuant to state law whereby civic-minded individuals may volunteer to receive training as Reserve Deputies and serve, without compensation, as state-certified reserve officers. You state that the volunteer Reserve Deputies program and the Deputy Sheriff's Association have operated independently of each other for decades without any significant crossover. However, you represent that the significant increase in demand for extra duty work from third parties in recent years has led the Deputy Sheriff's Association to offer extra duty work to volunteer Reserve Deputies at the same hourly rate offered to full-time deputies.¹ You note that the volunteer Reserve Deputies program has allowed the growing public safety demands of the community to be met.

GENERAL LEGAL PRINCIPLES

Congress did not intend for the FLSA "to discourage or impede volunteer activities," but rather to "prevent any manipulation or abuse of minimum wage or overtime requirements through coercion or undue pressure upon individuals to ""volunteer" their services." 29 C.F.R.

¹ You represent that the demand for extra duty hours has increased approximately 37% from 2015 to 2018. You note that this increased demand for extra duty work is beyond the ability of the Deputy Sheriff's Association to supply through its full-time deputies. Nonetheless, Reserve Deputies accounted for only about 6% of the extra duty hours worked by all deputies in 2018.

§ 553.101(b). Indeed, the FLSA recognizes the generosity and public benefits of volunteering and allows people to freely volunteer time for religious, charitable, civic, humanitarian, or similar public services. *See* WHD Opinion Letter FLSA2018-22, 2018 WL 4562932, at *1 (Aug. 28, 2018); WHD Opinion Letter FLSA2006-4, 2006 WL 561849, at *1 (Jan. 27, 2006). An individual who volunteers to perform services for a public agency is not an employee under the FLSA if: (1) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and (2) such services are not the same type of services which the individual is employed to perform for such public agency. 29 U.S.C. § 203(e)(4)(A).

The Department’s regulations provide further guidance regarding public agency volunteers. *See* 29 C.F.R. §§ 553.100-.106. A “volunteer” is “[a]n individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered.” 29 C.F.R. § 553.101(a). The regulatory definition of volunteer should be applied in a “common-sense manner.” *Purdham v. Fairfax Cnty. Sch. Bd.*, 637 F.3d 421, 428 (4th Cir. 2011) (citation omitted); *see also Todaro v. Twp. of Union*, 40 F. Supp. 2d 226, 230 (D.N.J. 1999) (“The regulatory definition does not require that the individual be exclusively, or even predominantly, motivated by ‘civic, charitable, or humanitarian reasons’; therefore, the Court understands this phrase to be modified by an implied ‘at least in part.’”). Of course, the volunteer must offer his or her services “freely and without pressure or coercion, direct or implied, from an employer.” 29 C.F.R. § 553.101(c); *see* WHD Opinion Letter FLSA2019-2, 2019 WL 1225928, at *1 (Mar. 14, 2019); WHD Opinion Letter FLSA2006-18, 2006 WL 1836646, at *1 (June 1, 2006); *Acosta v. Cathedral Buffet, Inc.*, 887 F.3d 761, 767 (6th Cir. 2018) (“The type of coercion with which the FLSA is concerned is economic in nature, not societal or spiritual.”). An individual who volunteers for a public agency may be paid expenses, reasonable benefits, or a nominal fee for his or her volunteer work, but such volunteer work may not be the same type of services which the public agency employs the individual to perform. *See* 29 U.S.C. § 203(e)(4)(A); 29 C.F.R. §§ 553.101(d), 553.106(a). WHD regulations enumerate several specific examples of public agency volunteers, including auxiliary police. *See* 29 C.F.R. § 553.104(b).

OPINION

Based on the facts you have provided, the volunteer Reserve Deputies’ performance of extra duty work for third parties does not result in the loss of their volunteer status.

First, the Reserve Deputies volunteer for the Sheriff’s Office and thus are not otherwise employed by the Sheriff’s Office.² Additionally, the facts you have provided here make clear that volunteer Reserve Deputies in the program are not “compensated” merely by receiving

² Your request cites 29 C.F.R. § 553.227; however, that regulation addresses outside employment by police officers who are employees, as opposed to volunteers, of public agencies. Also, this letter does not analyze whether there may be a joint employer when Reserve Deputies are performing extra duty work for third parties or whether the Sheriff’s Office and the Deputy Sheriff’s Association are the same or separate public agencies. *See* 29 C.F.R. § 553.102.

potential access to extra duty work.³ Importantly, there is no indication that their access is related to how many hours they volunteer, or the type or quality of their volunteer work, for the Sheriff's Office. The Reserve Deputy program has existed for about 35 years, but the Association did not make extra duty work available to Reserve Deputies until several years ago, due to a significantly increased demand for such services. Whether the volunteer Reserve Deputies actually perform extra duty work depends on the needs of third parties who request security services, among other factors. There is no indication that such access induces individuals to volunteer as Reserve Deputies.

In the alternative, even if a volunteer's access were to be construed as compensation, such access would be a "reasonable benefit" for volunteering and would not alter his or her volunteer status. 29 U.S.C. § 203(e)(4)(A)(i). WHD regulations state that including individual volunteers in group insurance plans or pension plans is generally a reasonable benefit. *See* 29 C.F.R. §§ 553.106(d). Further, WHD has previously opined that \$1,500 in annual relief from personal property taxes during the term of a volunteer's service is a reasonable benefit. *See* WHD Opinion Letter, FLSA2006-28, 2006 WL 2792442, at *5 (Aug. 7, 2006). Individuals do not lose their volunteer status if they are provided reasonable benefits by a public agency for whom they perform volunteer services. *See* 29 C.F.R. § 553.106(d). Giving the volunteer Reserve Deputies access to extra duty work for third parties is one such reasonable benefit. This access is offered to all officers on the same general terms, is not guaranteed, and is contingent upon the changing needs of private third parties, and Reserve Deputies account for only about 6% of extra duty hours worked. Moreover, the access to extra duty work has no cost to the Sheriff's Office. *See Todaro*, 40 F. Supp. 2d at 231 (concluding that, among other things, access to paid work was a reasonable benefit because there was "no detriment or cost" to the public agency). Thus, the furnishing of this access, examined in the context of the economic realities of this particular situation, is reasonable.

A federal district court in New Jersey reached the same conclusion in a substantially similar case. There, the plaintiffs served as unpaid "special law enforcement officers" for the town, in part to be eligible for paid positions with private entities. *See Todaro*, 40 F. Supp. 2d at 231. The court concluded that the plaintiffs satisfied the criteria for volunteers and that their eligibility for paid positions with private entities was a reasonable benefit that did not invalidate their status as volunteers. *See id.* at 231-32.

Finally, there is no indication that the Sheriff's Office manipulated or abused the minimum wage or overtime pay requirements by coercing or unduly pressuring individuals to volunteer as Reserve Deputies. *See* 29 C.F.R. § 553.101. Rather, the Reserve Deputies appear to be offering their services without any expectation of compensation, and without any pressure or coercion. As such, access to potential external employment opportunities from private third parties does not

³ *See Todaro v. Twp. of Union*, 27 F. Supp. 2d 517, 539 (D.N.J. 1998) (explaining that "plaintiffs have not provided any case law demonstrating that mere eligibility to accept paid employment in and of itself constitutes compensation" and "[t]he Court is unwilling to extend the commonsense definition of 'compensation' to incorporate such intangible benefits as the eligibility to accept potential paid employment.").

change the Reserve Deputies' volunteer status. The volunteer status of the Reserve Deputies appears to be analogous to the "auxiliary police" example provided in 29 C.F.R. § 553.104(b).

We trust that this letter is responsive to your inquiry.

Sincerely,



Cheryl M. Stanton
Administrator

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