



FLSA2007-12

December 31, 2007

Dear **Name***:

This is in response to your letter and follow-up communications requesting an opinion concerning the applicability of section 7(p)(1) of the Fair Labor Standards Act (FLSA) to officers of the City's Police Department who perform security duties during their off duty hours for the **Name*** (the "Authority"), a private non-profit corporation organized under state law.¹ As discussed more fully below, based on your representations, it is our opinion that the City Police Department would not be obligated to include the hours worked by police officers on special assignment to the Authority in calculating and paying overtime due them.

The Agreement and Lease regarding the City's Convention Center/Arena attached to your letter describes that in spring 2000, voters of the City approved the formation of the Authority to manage the construction and operations of the new convention center. You state that the Authority is charged with complete responsibility for and control over the development and operation of the downtown convention center and arena, and its lease extends for 99 years. The Authority has independent power to schedule the operation of the facility, to set fees, to rent parts of the facility, and to grant concessions. It has no taxing power but receives its funding from fees, rental charges, and other revenue generated at the facilities and, only for a period of 10 years, from the City's annual budget. The Authority makes all decisions regarding the use of funds it receives from any source, including those provided by the City. The Authority is headed by a chief executive officer who reports to a five person board of directors appointed by the Mayor and the City Council and confirmed by the City Council. Members of the board of directors may only be removed for incompetence, neglect of duty, or malfeasance in office.

You further state that the Authority has its own payroll budget, negotiates its own pay scale, offers its own pension and benefit plans, and maintains its own accounting system for compensating employees and paying contracts for services. It has full power to hire and compensate all personnel necessary to operate the facility.

The Authority anticipates hiring off-duty City police officers to provide security. Police officers undertake these special details for the Authority voluntarily. Pursuant to the collective bargaining agreement with the union representing police personnel, the off-duty employment must first be approved by the Police Chief to ensure that the employment is not inconsistent with the interests of the City. The terms of the security work for the Authority are negotiated between the Authority and the individual officers. The City is not involved in paying the officers for work done on behalf of the Authority.

¹ Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at www.wagehour.dol.gov.

A follow-up discussion between the Deputy City Attorney and a member of my staff confirmed that the Authority personnel do not participate in the City's retirement system. The Authority has the power to sue and be sued in its own name. Police officers would work for the City a higher percentage of time than for the Authority. It was the Authority's chief executive officer who decided to employ officers of the Police Department, with no City involvement in this personnel decision. Follow-up correspondence states that the City's \$2 million yearly contribution to the Authority initially represented 10.07% of the Authority's total operating income. However, the Authority's operating income is expected to increase in the coming years and, with the City's contribution remaining unchanged, the percentage of income represented by the City's support is expected to decrease.

Section 7(p)(1) of the FLSA, 29 U.S.C. § 207(p)(1), makes special provision for fire protection and law enforcement employees of public agencies who, at their own option, perform special duty work in fire protection, law enforcement or related activities for a separate and independent employer (public or private) during off-duty hours. The hours of work for the separate and independent employer are not combined with the hours worked for the primary public agency employer for the purposes of overtime compensation. Section 7(p)(1) applies to such outside employment provided (1) the special detail work is performed solely at the employee's option, and (2) the two employers are in fact separate and independent. *See* 29 C.F.R. §§ 553.227(a)-(b).

This special provision applies even if the public agency facilitates the employment or affects the conditions of employment of such employees. Section 7(p)(1) applies to special details even where a state law or local ordinance requires that such work be performed and that only law enforcement or fire protection employees of a public agency in the same jurisdiction perform the work. These principles are exceptions to the usual rules on joint employment set forth in 29 C.F.R. Part 791. *See* 29 C.F.R. §§ 553.227(d)-(f).

In other words, under section 7(p)(1), when a public agency fire protection or law enforcement employee is jointly employed by a separate and independent employer during the same workweek, the primary public employer would not be liable for the payment of any overtime compensation which may otherwise be due as a result of the special detail joint employment. Section 7(p)(1) does not prevent a public agency from prohibiting or restricting outside employment by its employees. *See* 29 C.F.R. § 553.227(h).

As indicated in 29 C.F.R. § 553.227(c), the determination of whether two employers are, in fact, separate and independent is made on a case-by-case basis. One factor that is relevant to whether two agencies are separate is whether they are treated separately for statistical purposes in the Census of Governments. *See* 29 C.F.R. § 553.102(b). However, the Census is just one factor, and the preamble to that regulation explains that while the Census might identify an entity as being dependent upon another public agency, an agency such as a school district or port authority may, in fact, be independent for FLSA purposes. *See* 52 Fed. Reg. 2012, 2019-20 (Jan. 16, 1987) (copy enclosed). Our prior opinion letters identify other factors that also are relevant to the determination of whether two agencies are separate employers, including: (1) whether the employers have separate payroll/personnel systems; (2) whether the employers have separate retirement systems; (3) whether the employers have separate budgets and funding

authorities; (4) whether the employers are separate legal entities with the power to sue and be sued; (5) whether the employers deal with each other at arm's length concerning the employment of the individuals in question; (6) how they are treated under state law; and (7) whether one employer controls the appointment of the officers of the other entity. *See* Wage and Hour Opinion Letters [FLSA2006-21NA](#) and [FLSA2002-3](#).

Analyzing these factors, it is our opinion that the City Police Department and the Authority appear to be separate and independent employers for the application of section 7(p)(1) of the FLSA. The 2002 Census of Governments (the most recent available) does not include the Authority, because the Authority was not fully operational when it was prepared. With regard to the other factors, the Authority has a separate payroll system, negotiates its own pay scale, and has independent personnel authority. The Authority also has a separate retirement system. It has an accounting system for compensating employees and paying contracts for services. Although the Authority temporarily obtains a small percentage of its funding from the City, the City exercises no discretion over how the Authority uses those funds, and the vast majority of the Authority's funding comes from fees, rental charges, concessions, and other revenue generated at the facility. Moreover, the Authority is a non-profit entity organized under state law, with the authority to sue and be sued in its own name. Finally, although the Mayor and City Council appoint and confirm the members of the Authority's board of directors, they may only be removed for incompetence, neglect of duty, or malfeasance in office. Therefore, provided the other provisions of section 7(p)(1) are met, the City Police Department would not be obligated to include the hours worked by police officers on special assignment to the Authority in calculating and paying overtime due them.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issues addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We trust that this letter is responsive to your inquiry.

Sincerely,

Paul DeCamp
Administrator

*** Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. § 552(b)(7).**