

July 14, 2004

The Honorable Cass Ballenger  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Congressman Ballenger:

This is in response to your letter of December 2, 2003, written on behalf of school districts. You request guidance under the Fair Labor Standards Act (FLSA) concerning the use of non-exempt school system-staff to assist with coaching sports or other extra-curricular activities. You ask, in a number of specific cases, whether the employees may be considered volunteers or whether the activities undertaken are additional duties that must be compensated under the FLSA. You seek a clear statement as to how the FLSA applies to these activities because the districts indicate that FLSA regulatory provisions are not clear or are interpreted differently in other states.

The FLSA recognizes the generosity and public benefits of volunteering, and does not seek to pose unnecessary obstacles to *bona fide* volunteer efforts for charitable and public purposes. Please be assured that this Administration fully supports volunteerism and is committed to work to ensure that citizens are able to freely volunteer their services for charitable and public purposes consistent with the law. As you may know, Wage and Hour Division (WHD) staff have previously met with and offered assistance on FLSA compliance to the School Boards Association.

Section 3(e)(4)(A) of the FLSA and 29 CFR 553.101 and 553.103 [enclosure #1] indicate that individuals are volunteers, not employees of a public agency, when they meet the following criteria:

- A. Perform hours of service for civic, charitable or humanitarian reasons without promise, expectation, or receipt of compensation for the services rendered. The statute clarifies that a volunteer performing such service can either receive no compensation or be paid expenses, reasonable benefits or a nominal fee to perform such services; and,
- B. Offer their services freely and without coercion, direct or

implied, from the employer; and,

- C. Are not otherwise employed by the same public agency to perform the same services as those for which they propose to volunteer. In other words, individuals can qualify as volunteers if they either volunteer for different agencies or perform different services than they are employed to perform.

The specific questions you present do not address each of these criteria. For the purpose of answering your questions, the WHD assumes that the individuals would meet those criteria not discussed in the response. Please note that in every individual case in which any of these criteria are not met, the services performed may constitute compensable time under the FLSA.

As your letter indicates, a determination of whether the services that volunteers seek to provide are the "same type of services" they are employed to perform requires "...consideration of all the facts and circumstances in a particular case..." see 29 CFR 553.103(a). Among the facts the regulation states will be considered is how the volunteered services and the services for which the volunteer is employed to provide are classified by the three digit categories of occupations in the *Dictionary of Occupational Titles* (DOT), published by the Employment and Training Administration (ETA). The DOT was recently superseded by the O\*NET system, also published by ETA. Of equal weight to the DOT/O\*NET, the Administrator will consider whether the volunteer services are "closely related to the actual duties performed or responsibilities assigned to the employee". *Id.* To the extent that any individual school employee's "actual duties" differ from those found in the O\*NET description, the answers below may not be valid and the services performed may constitute compensable time under the FLSA.

We will respond to the specific questions in your letter in the order posed.

**Same type of services**

1. May an individual who is a full-time bus driver for a school system volunteer to drive the basketball team to away games on the activity bus?

An individual who is a full-time bus driver provides a service of transporting students based upon the O\*NET description of duties [enclosure #2]. Driving a school bus constitutes the same, identical or similar service within the meaning of § 553.103, regardless of the characterization of the passengers as students or

student athletes and of whether the transportation is to and from school or school authorized activities. Thus, this individual driver would not qualify as a volunteer under the FLSA.

2. Will the answer change if the individual bus driver is a parent of the student on the basketball team?

The WHD does not assert FLSA violations for time spent by a public school employee who is also the parent (or who stands in loco parentis) of a child in that school, when the parent volunteers in activities directly involving the child's education and participation. The WHD will thus not enforce the provisions of the FLSA for the time spent driving the basketball team by a volunteer bus driver who is a parent of a student participating on the basketball team.

This WHD enforcement position applies only if the activities are done without expectation of compensation and there is no coercion or pressure on the employee by the employer to provide the volunteer services. Also, it does not waive or otherwise have any effect on an individual employee's right under Section 16(b) of the FLSA to maintain a future claim for appropriate FLSA compensation for "volunteer" hours.

3. May an individual who is a full-time bus driver for the school system volunteer to be an assistant coach for the basketball team?

Yes, the bus driver may volunteer as an assistant basketball coach under the FLSA. The O\*NET descriptions of the duties performed by a bus driver [enclosure #2] and a coach [enclosure #3] are sufficiently dissimilar that they would not constitute the same or similar services.

4. Will the answer change if the coach is required to drive the activity bus to away games as part of his role as coach?

Yes, the answer changes because a bus driver/volunteer coach who is required by an employer to drive the activity bus is not volunteering freely and without coercion pursuant to the second criteria. Also, the bus driver/volunteer coach is providing the same services for the same public agency and hence fails to satisfy the third criteria.

The time spent by the bus driver performing services as a volunteer coach would not constitute the same or similar services and, thus, would not be compensable. However, the time spent by such an

individual performing required services of driving an activity bus to games would constitute the same services and thus would be compensable.

5. May a teacher assistant who works in the classroom with students during the day volunteer to be an assistant coach for the basketball team?

Yes, a teacher assistant may volunteer to be an assistant coach under the FLSA. The O\*NET description of duties performed by a teacher assistant [enclosure #4] and a coach [enclosure #3] are not closely related, and thus they do not constitute the same or similar services within the meaning of § 553.103.

6. May a teacher assistant volunteer to help as a parent in his or her child's classroom as parents of other students in the classroom may do?

See the answer to Question #2 above.

7. May a cafeteria worker for the school system volunteer to serve a meal at the PTA meeting he/she attends as a parent?

While the duties performed by the cafeteria worker and volunteer are not described, we assume that they are sufficiently similar as to constitute the same type of services. The evaluation of volunteer status thus turns on whether the PTA and the school are the same public agency. The PTA is generally a not-for-profit organization with its own governing board of directors which is independent of the school. While a PTA exists to support educational activities, we assume it is not the same public agency as the school. Consequently, the cafeteria worker/parent could volunteer for the PTA, even though the cafeteria worker provides the same services to the PTA as the worker provides to the school.

8. May a school secretary volunteer to be the head volleyball coach?

Yes, the school secretary may volunteer to be the head volleyball coach under the FLSA. The O\*NET descriptions of the duties performed by a school secretary [enclosure #5] and head volleyball coach [enclosure #3] are not closely related, and thus they would not constitute the same or similar services within the meaning of § 553.103.

9. May a teacher assistant volunteer to be the chess club sponsor at the high school where s/he works?

O\*NET appears to encompass a chess club sponsor in both the classification of *Secondary School Teachers, Except Special and Vocational Education* and the classification of *Educational, Vocational and School Counselors*. Both classifications include the task of "sponsor extracurricular activities such as clubs, student organizations and academic contests" [enclosure #6]. In contrast, the O\*Net list of tasks for a teacher assistant [enclosure #4] does not include club sponsor tasks. Thus, the teacher assistant and the chess club sponsor do not provide the same or similar services within the meaning of § 553.103. Consequently, a teacher assistant may volunteer as the chess club sponsor under the FLSA.

As stated above, however, if the actual duties of a school employee, such as a teacher assistant, differ from those described in O\*NET, the preceding answer on same or similar services may not be valid.

Insofar as this answer is different from the answer provided in the Department's 1997 opinion letter (September 22), that letter is withdrawn. We note that the earlier letter was written prior to the advent of the O\*NET system. The facts now available on O\*Net indicate that the Department can no longer rely upon assumptions made in the earlier letter.

10. May a school secretary/bookkeeper volunteer to keep the books for the athletic booster club?

Without the benefit of a detailed description of each, we assume that the duties of secretary/bookkeeper and keeping the books for the athletic booster club are sufficiently similar to constitute the same type of services within the purview of § 553.103. Assuming the foregoing is accurate, the evaluation of volunteer status thus turns on whether the athletic booster club is the same public agency as the school.

A detailed description of the relationship between the school and the athletic booster club is necessary before we can offer an opinion on whether they are the same agency. The club and school will not be the same public agency if they are independent (see response #7 above). In such circumstances, the school secretary/bookkeeper may volunteer to keep the books for the booster club under the FLSA.

11. May a teacher assistant volunteer to accompany his or her child's class on a field trip as other parents do?

See the answer to #2 above.

## "Occasional and sporadic" volunteer activities

12. Must volunteering be only "occasional and sporadic" to qualify as volunteer work or may a non-exempt school employee volunteer to be an assistant coach for an entire football or basketball season?

The "occasional and sporadic" provisions of Section 7(p)(2) of the FLSA do not apply to the FLSA provisions on volunteers. Thus, a non-exempt school employee may volunteer to perform services as long as criteria A, B & C above are met.

However, if an individual employed by the school system in any **non-exempt capacity is also employed** (as opposed to volunteering) as the assistant coach, then the coaching duties would not be considered "occasional or sporadic" for purposes of Section 7(p)(2) of the FLSA, given the recurring nature of a typical coach's duties. Please note that individuals who are employed by the school system and are classified as exempt under 29 CFR 541, can also be employed (as opposed to volunteering) as coaches without effecting their exempt status.

## "Nominal fee"

13. What is the hourly rate of pay that is considered nominal for purposes of considering someone a volunteer? See 29 CFR 553.106 [enclosure #7]

Unfortunately, it is not possible to answer this question as definitely as the others because it presumes that a "nominal fee" and an "hourly rate" are one-in-the-same or interchangeable concepts. However, neither the FLSA nor the implementing regulations discuss permissible expenses, reasonable benefits, or nominal fees, or any combination thereof, in terms of an "hourly rate." Section 3(e)(4)(a)(i) [enclosure #1] and the implementing regulations at 29 CFR §553.106 provide that a volunteer may only be paid expenses, reasonable benefits, or a nominal fee, or any combination thereof, without losing volunteer status. Examples of permissible expense or benefit payments are described as a payment for expenses, such as dry cleaning; an allowance for a requirement, such as a uniform; reimbursement for an out-of-pocket expense, such as transportation; a payment to provide materials, such as supplies; or a payment for benefits, such as participation in group insurance plans. 29 CFR 553.106(a)-(d)

While the statute and the implementing regulations do not define what constitutes a "nominal fee", the regulations provide guidance for determining whether a fee is nominal and permissible. If a fee

is not nominal, then the individual would not qualify as a volunteer and would be considered an employee who is covered by the FLSA minimum wage and overtime provisions. In particular, §553.106(e) states that a fee is not nominal if it is:

1. a substitute for compensation; or
2. tied to productivity.

The factors to examine in making this determination include, but are not limited to: 1) the distance traveled and the time or effort required of a volunteer; (2) the availability - limited or unlimited - of a volunteer to provide services; and (3) the basis - as needed or throughout the year - on which a volunteer agrees to perform services. These factors focus upon whether the fee is actually more analogous to a payment for services or recompense for something performed and, hence, is not nominal. Thus, to the extent that a fee is based upon the factors delineated, there is a greater likelihood that such fee is not nominal. For example, to the extent that payments are tied to productivity (e.g., payment of hourly wages for services rendered), are similar to "piece rates" or are comparable to "production bonuses", there is a greater likelihood that such fees are not nominal.

Finally, §553.106(f) provides that the determination of whether the expenses, benefits or fees would preclude an individual from qualifying as a volunteer under the FLSA must be made by examining the total amount of payments in the context of the economic realities of a particular situation. Once a fee is determined to be nominal, then the manner in which it is paid - be it an hourly rate, day rate or a flat rate - is less significant.

This opinion is based exclusively on the facts and circumstances described in your request. Existence of any other factual or historical background not contained in your request might require different conclusions than those expressed herein.

I hope you will find the above discussion and analysis responsive to your request. Thank you for your inquiry. Please contact us if you have further questions.

Sincerely,

Alfred B. Robinson  
Acting Administrator

Enclosures