

OPINION LETTER

JUN 07 2002

This is in response to your letter concerning the application of the Fair Labor Standards Act (FLSA) to employees of the City. You request an opinion on the City's liability for overtime compensation if the Downtown Development Authority (DDA) utilizes off duty City police officers for downtown security.

DDA is a board of five members authorized to perform certain municipal functions pertaining to economic conditions of the metropolitan area. The City and DDA seek an arrangement whereby City police officers would be given the opportunity to voluntarily provide extra off duty contractual security services for the DDA. Such services would be performed within the city limits and the DDA would compensate the police officers directly for their services.

The City believes that under this arrangement the DDA will be a separate employer for purposes of the FLSA because:

- (1) DDA has its own payroll and has authority to hire and compensate its personnel;
- (2) DDA has independent authority to make employment decisions;
- (3) DDA has separate budget and funding authorities;
- (4) DDA personnel do not participate in the City's retirement systems;
- (5) DDA has the authority to sue and be sued in its own name;
- (6) Work for DDA by the police officers would be voluntary;
- (7) Officers would not be promised additional work from the DDA;
- (8) Work for the DDA would be occasional or irregular;
- (9) Officers would work for the City a higher percentage of time than for the DDA;
- (10) Terms and conditions of employment for the City would not affect the terms and conditions of employment with the DDA.

You indicate that the police union believes that DDA will not be a separate employer because of the express terms of which describes the DDA as a body corporate and an agency of the City with designated municipal functions.

The questions you asked related to your opinion request are restated below, followed by our response:

1. Are the City and the DDA separate employers for purposes of FLSA overtime compensation?

Section 7(p)(1) of the FLSA (enclosed) provides a "special detail" exception to the usual rules on joint employment set forth in 29 CFR Part 791 (enclosed). This exception applies to fire protection and law enforcement employees of public agencies who, at their own option, are employed on a special detail by a separate and independent employer in fire protection, law enforcement or related activities. The hours of such employment for the separate and independent employer are not combined with the hours worked for the primary public agency employer for purposes of overtime compensation. Regulations 29 CFR Part 553.227 (enclosed) discuss this exception.

As indicated in Section 553.102(b) (enclosed) the determination of whether two employers are, in fact, separate and independent is made on a case-by-case basis. The information you provided is reviewed in light of the relevant factors (cited as questions) as follows:

A. Do the employers have separate payroll systems?

The City and DDA operate separate payroll systems

B. Do the employers maintain separate retirement systems?

DDA employees do not participate in the City's retirement system

C. Do the employers have separate budgets?

The City and DDA have separate budget and funding authorities.

D. Are the employers independent legal entities?

The DDA has the authority to sue and be sued in its own name, one indication of separate legal identity. However the 1997 Census of Governments classifies a Florida downtown development and improvement authority such as DDA as a subordinate agency rather than as a separate government agency. Further the statute creating DDA characterizes it as "... a body corporate and an agency of the City and performance by the Authority of its duties and exercise of its powers are hereby designated municipal functions and shall so be construed", Florida Statute,

E. Do the employers deal with each other at arm's length concerning the employment of the individuals in question?

The information you have provided is insufficient to determine the extent to which the City controls the activities of the officers during their employment by DDA.

It is our opinion that the City and DDA appear to be separate and independent employers based on the preceding evaluation of factors. Evidence that the City exercised substantial control over the police officers in their performance of DDA duties may lead to a different conclusion.

2. Should the time the officers work for the DDA be aggregated with the time the officers work for the City for purposes of determining liability for overtime under the FLSA?

No, presuming the factors discussed in #1 are present and absent evidence that the City substantially controlled the police officers in their performance of DDA duties.

3. Is the City liable for the overtime compensation if the DDA utilizes off duty City police officers for downtown security?

See the answer to #2 above.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which 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 different conclusion than the one expressed herein. This opinion is also provided on the basis that it is not sought on behalf of an employer that is under investigation by the Wage and Hour Division, or that is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with the provisions of the FLSA.

We trust that the above information is responsive to your inquiry.

Sincerely,

Tammy D. McCutchen
Administrator

Enclosures