



June 1, 2006

FLSA2006-19

Dear **Name ***,

This is in response to your letter requesting an opinion on whether the city is required by sections 6 and 7 of the Fair Labor Standards Act (FLSA) to compensate police officers for time spent in training on the use of a firearm that the officers carry voluntarily during off-duty hours.

In your letter, you state that neither the state nor the police department requires that police officers carry firearms while off-duty, and the police department does not require off-duty officers to take action if confronted with a "situation." However, officers do have the "power of arrest" while off-duty when in their own jurisdiction and elsewhere if faced with a situation where the use of deadly force is appropriate. The police department authorizes the use of specific weapons during off-duty hours, just as it authorizes use of specific weapons during duty hours. Officers who wish to carry the approved off-duty firearm must purchase it themselves. In the past, the approved off-duty firearm was a smaller version of the weapon carried while on-duty, the mechanical operation of which was identical.

Recently, however, officers proposed that a different firearm be selected as the official off-duty firearm and the police department has chosen a revolver that weighs less and is easier to conceal than the semi-automatic pistol used during duty hours. You state that the operation of the revolver is fundamentally different from the on-duty firearm.

Both the state and the police department require that officers qualify and demonstrate competency and familiarity with their on-duty firearms, and they are paid for their time while qualifying. The police department also requires that officers qualify with their *off-duty* firearm annually and train with it quarterly to demonstrate competency. The "qualification shoot," when the officers are graded for accuracy, occurs during one of the four training sessions. Training and qualification take place at the police department firing range and follow a prescribed training syllabus. The officers who conduct the firearms instruction are compensated for their teaching time. The city provides the targets and ammunition needed.

Because neither the state nor the police department requires that an officer purchase an off-duty weapon or take action while off-duty, you ask whether the department is required to compensate the officers for time spent in training with the *off-duty* weapon.

In your letter, you stated the police department requires training with the *off-duty* weapon to ensure that the officer is familiar with and trained to use it. As further explanation, you mention that should an officer use the weapon in an off-duty situation, the city could be named in any civil litigation that ensued and, if so, the subject of adequate training would likely be raised. It is clear then that the city wants the officers trained on all weapons the city has officially sanctioned for their use. In a phone conversation with a member of the Wage and Hour Division staff, you indicated that the state requires that an officer be certified on any weapon discharged in the course of duty, including off-duty firearms fired while the officer is off-duty. Therefore, you ask us to assume that the state requires that the officers be trained on the off-duty weapon as well as their duty weapon.

At 29 C.F.R. Part 553, the regulations provide guidelines for the application of the FLSA to employees of state and local governments. Section 553.226 (copy enclosed), provides a special exemption from hours worked for time spent outside of regular working hours by public employees in certain training sessions. The requirements for this exemption are as follows:

- (1) Attendance outside of regular working hours at specialized or follow-up training, which is required by law for certification of public and private sector employees within a particular governmental jurisdiction (e.g., certification of public and private



emergency rescue workers), does not constitute compensable hours of work for public employees within that jurisdiction and subordinate jurisdictions.

(2) Attendance outside of regular working hours at specialized or follow-up training, which is required for certification of employees of a governmental jurisdiction by law of a higher level of government (e.g., where a State or county law imposes a training obligation on city employees), does not constitute compensable hours of work.

29 C.F.R. § 553.226(b)(1) - (2).

The provisions of section 553.226(b)(2) were added to the regulations in recognition “that State law for certain types of specialized training often only applies to public sector employees such as police . . . and not to employees performing similar activities (if any) in the private sector.” 52 Fed. Reg. 2,025 (January 16, 1987) (copy enclosed). Additionally, “if the training is required by law of a higher level or government (e.g., a State or county requirement imposed on city employees), the training time would not be compensable.” *Id.* According to Minnesota Statute § 626.8452 (copy enclosed), “the head of every local and state law enforcement agency shall provide instruction on . . . the use of firearms to every peace officer. . . . This instruction must come before the agency issues a firearm to the officer or *otherwise authorizes the officer to carry a firearm in the course of employment.*” (emphasis added.) The state provides courses throughout the state “for training police officers and constables . . . in the use of approved equipment.” Minn. Stat. § 626.848 (2004) (copy enclosed).

The off-duty firearm training fulfills the requirements of 29 C.F.R. § 553.226. The training sessions in question occur outside of the officer’s regular working hours, thereby meeting the first requirement of the exemption. Secondly, the firearm training is specialized for the officers and the type of gun on which they are being trained. Finally, based on your representations that the state requires that the officer be trained on any weapon that is approved for use by the officer, including off-duty weapons that are fired while the officer is off-duty, it is our opinion that the “law of a higher level of government” imposes the off-duty firearm training.¹ Additionally, the state “certifies” the firearm training by requiring the training of officers who carry and fire the firearm. See Minn. Stat. § 626.8452. See also Wage and Hour Opinion Letter November 4, 1998 (copy enclosed). Because this training is required for all officers in the state who carry a firearm off-duty, the training sessions qualify for the section 553.226 exemption. See Wage and Hour Opinion Letter August 2, 1989 (copy enclosed).

Because the off-duty firearm training qualifies under 29 C.F.R. § 553.226, we conclude that time spent by the officers training on the use of an off-duty weapon is not hours worked under the FLSA if the training occurs outside the officer’s regular working hours. However, any time spent training during the officer’s regular working hours or while the officer is on duty must be counted as hours worked.

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 issue 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.

¹ We have not independently researched, and express no opinion regarding, Minnesota’s requirements concerning off-duty weapons.



We trust the above information is responsive to your inquiry.

Sincerely,

Alfred B. Robinson, Jr.
Acting Administrator

Enclosures:

29 C.F.R. § 553.226

52 Fed. Reg. 2,025

Wage and Hour Opinion Letters 11/4/1998 and 8/2/1989

Minn. Stat. §§ 626.8452 and .848

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