



NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INC.

Representing America's Finest

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April 29, 2014

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United States Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

SEAN M. SMOOT

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Re: The President's Memorandum of March 13, 2014 and the Section 207(k)
Exemption for Law Enforcement Officers (FLSA Overtime)

KEITH DUNN

Sergeant-at-Arms
New Jersey State Policemen's
Benevolent Association

Dear Mr. Secretary and Principal Deputy Administrator Fortman:

JOHN A. FLYNN

Executive Secretary
Patrolmen's Benevolent
Association of New York City

I write to you on behalf of the roughly one million hourly-wage earning law enforcement officers in this country, especially the several hundred thousand represented by our association. As you know, the President, by his Memorandum of March 13 of this year, directed the Department to update regulations regarding who qualifies for overtime protection. In so doing, the Department is to consider how the regulations could be revised to:

WILLIAM J. JOHNSON

Executive Director

- Update existing protections in keeping with the intention of the Fair Labor Standards Act.
- Address the changing nature of the American workplace.
- Simplify the overtime rules to make them easier for both workers and businesses to understand and apply.

One item that of direct relevance to each of these points is the current status of the Section 207(k) exemption as applied to law enforcement officers.

Statutory and Regulatory Background. When Congress applied the FLSA to state and local governments in 1974, it enacted a partial overtime exception for public safety employees as 29 U.S.C. § 207(k). As written, the Section 207(k) exemption set an overtime threshold of 216 hours in a 28-day period. However, Section 207(k) also authorized the Secretary to conduct a study of the average number of hours worked by fire protection and law enforcement personnel, and to establish by rule different overtime thresholds depending upon the result of that study.

Before the Secretary's study was complete, the Supreme Court had held in *National League of Cities v. Usery* 426 U.S. 833 (1976), that the FLSA could not constitutionally be applied to state and local governments. In response, the Secretary's study reviewed the work hours of only Federal employees. When a court found the failure to include state and local firefighter and law enforcement hours in the study was erroneous, the Secretary redid the study, and published the final results at 48 F.R. 50,518 (September 8, 1983). After the Supreme Court reversed *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*, the Secretary issued the overtime standards as 29 C.F.R. § 553.230. Those standards set the maximum hours for law enforcement personnel at 171 hours in a 28-day work period, with lower maximum standards if work periods of less than 28 days are chosen; the firefighter maximum threshold is 212 hours.

The Issue – The Need To Revise The Maximum Hours Threshold. Much has changed in the more than 25 years since the Secretary's work hours study was concluded. It is clear that the average work hours for law enforcement personnel are much less than 171 hours in a 28-day period. In most of the country, law enforcement officers work the equivalent of 40-hour weeks. In some parts of the country, the prevailing hours are even less than 40 hours a week owing to the particular shift schedules used by employers. The same changes have occurred, though not to the same extent, with fire protection work hours.

It is hard to overstate the impact of the inappropriately high maximum work thresholds of 29 C.F.R. § 553.230. Under 29 U.S.C. § 207(h), an employer is allowed credits against its overtime liability under the FLSA if it makes premium payments described in 29 U.S.C. §207(e)(5)-(7). Since most law enforcement employees have schedules that approximate 40-hour weeks, their employers make premium payments for work outside normal shift schedules. The result is that Section 207(h) credits allow law enforcement employers to avoid compliance with a wide variety of the FLSA's provisions. It is difficult to imagine, for example, how such credits would not completely erode any liability for non-compliance with the FLSA's regular rate and time-of- payment provisions. Once again, the same is true of fire protection employees, though not to the same extent.

Beyond this, the thresholds in 29 C.F.R. § 553.230 are factually inaccurate. They do not reflect the reality of public safety work hours in the country, and have not for many years. Those thresholds should be updated.

On behalf of America's law enforcement officers, then, we would respectfully request that this vitally important area of the FLSA overtime regulations be addressed as part of the Department's response to the President's Memorandum.

Respectfully submitted,



William J. Johnson
Executive Director and General Counsel

cc: The President
The Vice President