

The State of South Carolina



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September 23, 1985

Col. Jesse L. Altman, Jr.
Chief of Police
Police Department, City of Beaufort
Post Office Box 898
Beaufort, South Carolina 29901

Dear Colonel Altman:

This is in reply to your letter of August 23, 1985, concerning the application of the Fair Labor Standards Act to police officers who perform off duty employment in private security jobs, but who are compensated for that work through the City pursuant to a contract between the City and the private employer. The Fair Labor Standards Act, 29 U.S.C. § 201 et seq., appears to characterize this as a joint employment relationship and would, therefore, require that the hours worked in the private security job be included with the hours worked for the City, thus subjecting the City to the overtime requirements of the Fair Labor Standards Act when the total hours worked exceed 171 hours in a 28 day period. 29 C.F.R. § 553.9.

The federal act clearly permits an employee in some instances to engage in "dual employment" with related employers without subjecting the primary employer to liability for overtime compensation for hours worked in the employ of the other employer. Walling v. Friend, 156 F.2d 429 (8th Cir. 1946). However, for the primary employer to escape liability for overtime compensation for that other "dual employment," there must be no control by the primary employer over the other employment, see Hodgson v. Crossley, 365 F.Supp. 1131 (D.N.Y. 1973), and no benefit to the primary employer from the other employment. Walling v. Friend, supra. In this case, you indicated that there was clear control by the City over the off-duty employment of the police officers. Furthermore a court would quite likely find that there was also a benefit to the City

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from the off-duty employment of police officers. See, § 1, Act No. 529, S.C. ACTS & JT. RES., 1978. Thus, it is our conclusion that the "off-duty" employment of a police officer would probably be construed as "joint employment" with the City and this would require that the "off-duty" hours be included with the hours worked for the City for purposes of overtime compensation. Of course, our experience with this federal act is quite recent and perhaps a surer-footed interpretation of the act might be given by the U.S. Department of Labor.

It should be pointed out that the federal law does permit some involvement by the public employer in a law enforcement employee's "off-duty" employment without incurring overtime liability. For example, the applicable regulations permit a police department to engage in such "'brokering' functions as maintaining a list of officers available for extra outside work and referring employment requests to such officers." 29 C.F.R. 553.9(c). In addition, a police department would be permitted to "establish[] a wage scale for such extra outside work and approve[] it so as to avoid any conflict of interest problem." Supra. Perhaps on this basis the City can work out some other acceptable arrangement whereby officers may continue their "off-duty" employment without giving rise to a joint employment relationship, especially in light of the fact that state law does not require that this "off-duty" employment be actually compensated through the City. § 23-24-10, et seq., S.C. CODE, 1976 (as amended).

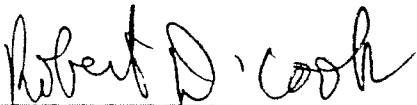
Sincerely yours,



David C. Eckstrom
Assistant Attorney General

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APPROVED AND REVIEWED BY:



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