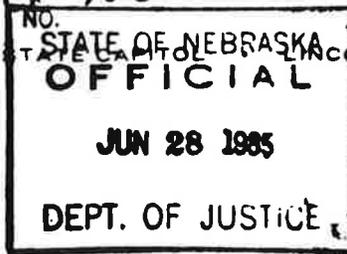


Jim W...

DEPARTMENT OF JUSTICE
STATE OF NEBRASKA
TELEPHONE 402/471-2682

106



STATE OF NEBRASKA LINCOLN, NEBRASKA 68509

ROBERT M SPIRE
Attorney General
A. EUGENE CRUMP
Deputy Attorney General

June 14, 1985

SUBJECT: Law Enforcement Reserve Officers

REQUESTED BY: Robert L. Tagg, Executive Director,
Nebraska Commission on Law Enforcement
and Criminal Justice

OPINION BY: Robert M. Spire, Attorney General
Sharon M. Lindgren, Assistant Attorney General

QUESTION: Whether law enforcement reserve officers are
subject to the minimum wage and overtime
requirements of the Fair Labor Standards Act?

CONCLUSION: Law Enforcement Reserve Officers would be
subject to the minimum wage and overtime
requirements of the Fair Labor Standards
Act, unless they qualify as law enforcement
volunteers under the provisions of
29 C.F.R. §553.11, and/or are employed by a
law enforcement agency that employs less than
five employees in law enforcement in a work
week.

Law enforcement reserve officer positions are established by Neb.Rev.Stat. §§81-1438, et seq. (Reissue 1981). While activated, the reserve officers are authorized to perform many of the same functions as full-time law enforcement officers.

Neb.Rev.Stat. §81-1441 (Reissue 1981) provides that the reserve officers shall be paid at a minimum rate of one dollar per year, that the governing body of a county or city may provide additional monetary assistance for the purchase and maintenance of uniforms and equipment used by the reserve officers, and that hospital and medical assistance shall be provided if a reserve officer is injured in the course of performing official duties. Neb.Rev.Stat. §81-1442 (Reissue 1981) provides that reserve officers may not participate in the retirement programs provided to regular law enforcement officers.

In the request for this opinion, it is stated that it is a common practice of local law enforcement agencies to utilize

L. Jay Bartel
John M. Boehm
Dale D. Brodkey
J. Kirk Brown
Martel J. Bundy
Dale A. Comer

Timothy E. Divis
Lynne R. Fritz
Ruth Anne E. Galter
Jill Gradwohl
Calvin D. Hansen
Royce N. Harper

Marilyn B. Hutchinson
Mel Kammerlohr
Sharon M. Lindgren
Charles E. Lowe
Harold I. Mosher
Patrick T. O'Brien

Bernard L. Packett
Terry R. Schaaf
LeRoy W. Sievers
Mark D. Starr
John R. Thompson
Linda L. Willard

reserve officers and pay them varying wages due to personnel shortages and budget constraints.

On February 19, 1985, the United States Supreme Court issued its opinion in Garcia v. City of San Antonio Metropolitan Transit Authority, 83 L.Ed.2d 1016 (1985). In that opinion, the Court ruled that the Fair Labor Standards Act could constitutionally be applied to the employees of a city. This ruling appears to be equally applicable to the employees of states, counties, and other political subdivisions.

The determination of whether a particular employee is subject to the provisions of the Fair Labor Standards Act must be made on a case by case basis. However, in making this determination, the courts broadly interpret the term "employee" to insure that the purposes of the Fair Labor Standards Act are fulfilled. Therefore, unless specifically exempt from the Act's coverage, an employee will be found to be subject to the Act's overtime and minimum wage provisions.

Under the Fair Labor Standards Act, "employee" is defined as "any individual employed by an employer." 29 U.S.C. §203-(e)(1). An employer ". . . includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency." 29 U.S.C. 203 (d). Employ ". . . includes to suffer or permit to work." 29 U.S.C. 203(g). Under these definitions, the reserve officers would be employees subject to the provisions of the Fair Labor Standards, unless specific exemptions are applicable.

The United States Department of Labor has promulgated rules and regulations that exempt "fire protection and law enforcement volunteers" from the provisions of the Fair Labor Standards Act. 29 C.F.R. §553.11 provides:

(a) Individuals who volunteer to perform fire protection or law enforcement activities, usually on a part-time basis and as a public service, are not considered to be employees of the public agency which receives their services. Such individuals do not lose their volunteer status because their tuition may have been paid or they may have been reimbursed for attending special classes or other training to learn about fire protection or law enforcement or because they are reimbursed for approximate out-of-pocket expenses incurred incidental to answering a call or to the cost of replacing clothing or other items of equipment which may have been consumed or damaged in responding to a call. Nor is the volunteer status of such individuals lost where

the only material recognition afforded them is the holding of an annual party, the furnishing of a uniform and related equipment, or their inclusion in a retirement or relief fund, a workman's compensation plan or a life or health insurance program or the payment of a nominal sum on a per call or other basis which may either be retained, in whole or in part, by the volunteer or donated to finance various social activities conducted by or under the auspices of the agency. Payments which average \$2.50 per call will be considered nominal. Payments in excess of this amount may also qualify as nominal, depending upon the distances which must be traveled and other expenses incurred by the volunteer. For purposes of this paragraph, it is not necessary for the agency to maintain an exact record of expenses.

(b) Where, however, individuals engaged in fire protection or law enforcement activities receive more than a nominal amount or payment on a basis which does not reasonably approximate the expenses incurred by them, they are employees rather than volunteers and must be paid in accordance with the Act's requirements.

Another exemption that might be applicable to certain reserve officers is found in 29 U.S.C. §213 (b) (20). This section provides that the provisions of 29 U.S.C. §207 (overtime) shall not apply to "any employee of a public agency who in any workweek is employed in fire protection activities or any employee of a public agency who in any workweek is employed in law enforcement activities (including security personnel in correctional institutions), if the public agency employees during the work week less than 5 employees in fire protection or law enforcement activities, as the case may be." Under this exemption, reserve officers employed by a public agency with less than 5 employees in law enforcement activities during a workweek would not be subject to the Act's overtime provisions, but would be subject to the minimum wage law.

Under these regulatory and statutory provisions, if a reserve officer is a "volunteer", he would be exempt from the provisions of the Fair Labor Standards Act. If a reserve officer does not qualify as a "volunteer", he would be subject to both the wage and overtime provisions of the Fair Labor Standards Act, unless the law enforcement agency employs less than five employees in law enforcement activities during the workweek. If the reserve officer is not a "volunteer" but the law enforcement agency employs less than five employees in law enforcement activities during the workweek, the reserve officer

Mr. Robert L. Tagg
June 28, 1985
Page 4

would be exempt from the Act's overtime requirements, but
subject to the minimum wage law.

Sincerely,

ROBERT M. SPIRE
Attorney General


Sharon M. Lindgren
Assistant Attorney General

APPROVED:



Attorney General