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DATE: December 18, 1995

SUBJECT: What Constitutes "Employment" for Purposes of Tuition-Free Admission of Students Attending the Nebraska Law Enforcement Training Center's Basic Course

REQUESTED BY: Allen Curtis, Director
Nebraska Commission on Law Enforcement and Criminal Justice

WRITTEN BY: Don Stenberg, Attorney General
Timothy J. Texel, Assistant Attorney General

You have requested the opinion of this office regarding "what constitutes employment for the purpose of being admitted tuition free to the basic training of the Nebraska Law Enforcement Training Center." In the opinion request, you expressed concerns raised by the practice of some political subdivisions "sponsoring" persons attending the Nebraska Law Enforcement Training Center ("Training Center") instead of hiring the individuals prior to attending the Training Center's basic course. Under this arrangement, you explain that the political subdivision avoids having to pay the person while attending the Training Center, and the attendee avoids incurring any costs of certification pursuant to Neb. Rev. Stat. § 81-1413 (1994). You explained that the Training Center's concern is that if the attendee is not being paid, he or she is not really an "employee" of the political subdivision, and the Training Center may face liability if an attendee should bring an action to recover wages pursuant to the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 201 through 219 ("FLSA").

In discussions with our office, Director Miller at the Training Center expounded on the reasons for the request, indicating that the Training Center's concern is twofold. One issue is whether an attendee at the Training Center's basic class would be considered the "employee" of a law enforcement agency under the FLSA if the attendee is not being compensated during his or her mandatory training at the Training Center. Director Miller explained that persons attending the Training Center's basic course are attending mandatory training, and the FLSA requires compensation be paid to employees during mandatory training attendance. Thus, the Training Center is concerned that if compensation is found to be required, that the Training Center may incur liability for payment of any wages held to be due the attendees.

The second issue is what party is responsible for payment of the attendee's tuition and fees at the Training Center, based on his or her employment status. Director Miller informed us that law enforcement agencies sending persons to the Training Center must certify the person is an employee of the agency. The only "sponsorship" the Training Center recognizes is when an attendee is a paid member of the law enforcement agency responsible for sending the officer candidate to the basic course. Each issue will be addressed separately.

WHAT CONSTITUTES "EMPLOYMENT" UNDER THE FLSA FOR PURPOSES OF REQUIRING COMPENSATION TO PERSONS ATTENDING MANDATORY TRAINING

Title 29 U.S.C. § 203(e)(1) defines an "employee" as "any individual employed by an employer." Section 203(e)(2)(C), dealing with persons employed by public agencies, defines employees as "any individual employed by a State, political subdivision of a State, or an interstate governmental agency . . . ." Section 203(g) defines "employ" as meaning "to suffer or permit to work."

The Act contains language stating that it covers persons and enterprises engaged in commerce or in the production of goods for commerce. State and local employees engaged in traditional governmental activities were previously not covered by the Act. ***See National League of Cities v. Usery***, 426 U.S. 833 (1976). Subsequently, the U.S. Supreme Court, in ***Garcia v. San Antonio Metro. Transit Authority***, 469 U.S. 528 (1985), held that the FLSA's minimum wage and overtime pay protections could be applied to all state employees, specifically overruling the ***National League of Cities*** decision. In ***Council 13, AFSCME v. Casey***, 626 A.2d 683, 685 (Pa. Commw. 1993), the Court, citing to ***Garcia***, stated that "There is no doubt that the federal Act applies to employment by state governments . . . ."

The FLSA's definitions regarding what constitutes employment are very broad and, by themselves, provide little guidance on the topic. Courts facing issues concerning whether persons are

"employees" under the FLSA have noted this lack of clear guidance. One court commented that "[t]he FLSA itself provides little guidance in distinguishing between trainees and employees." ***Reich v. Parker Fire Protection Dist.***, 992 F.2d 1023, 1025 (10th Cir. 1993). ***See also Walling v. Portland Terminal Co.***, 330 U.S. 148, 152 (1947), ***Donovan v. American Airlines, Inc.***, 686 F.2d 267, 271 (5th Cir. 1982). It is therefore necessary to look to case law to provide us with interpretations of the FLSA's definitions. ***Bush v. Wilson & Co.***, 138 P.2d 457, 461 (Kan. 1943).

Although research did not uncover any case law precisely on the same issue as the one presented, there is a large body of federal case law dealing with interpretations of employment status under the FLSA. The number of cases dealing with the employment status and payment requirements for persons in training programs is considerably smaller, though. Some courts have noted that few reported decisions exist on this topic. ***See Bailey v. Pilots' Ass'n for the Bay and River Delaware***, 406 F.Supp. 1302 (E.D. Pa. 1976).

The leading case defining what constitutes "employee" status when dealing with trainees under the FLSA is ***Walling v. Portland Terminal Co.***, 330 U.S. 148, (1947).[1] In that case, the Administrator of the Wage and Hour Division of the U.S. Department of Labor[2] ("Administrator") sought to require a railroad to pay persons training to be yard brakemen minimum wage during their week-long training period. The railroad required the course before one could be hired as a brakeman. The U.S. Supreme Court found common law rules determining who is an "employee" or other statutory employer-employee classifications not to be of controlling significance under the FLSA because the Act contains its own definitions in that area.

In determining that the brakemen trainees were not railroad employees, the Court considered several general factors. Based primarily on the criteria set out in the ***Portland Terminal*** case, the Administrator of the Department of Labor's Wage and Hour Division has developed a six-part test for determining employment status questions when dealing with trainees. Courts have referred specifically to this test and have applied it or portions of it when examining issues dealing with trainee employment status. ***See Bailey v. Pilots' Ass'n for the Bay and River Delaware***, 406 F.Supp. 1302 (E.D. Pa. 1976), ***Donovan v. American Airlines, Inc.***, 686 F.2d 267 (5th Cir. 1982), ***Reich v. Parker Fire Protection Dist.***, 992 F.2d 1023 (10th Cir. 1993). Not all courts have specifically

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[1] ***See also*** the companion case of ***Walling v. Nashville Chattanooga & St. Louis Railway***, 330 U.S. 158 (1947).

[2] The U.S. Department of Labor's Wage and Hour Division has the responsibility for oversight and enforcement of the FLSA.

applied the Administrator's six-part test, but many of the courts dealing with the issue of employee status of trainees for purposes of compensation have followed generally the same criteria or used a test which includes several of the Administrator's criteria. ***See Donovan v. Trans World Airlines, Inc.***, 726 F.2d 415 (8th Cir. 1984). The Wage and Hour Division Administrator's test appears to include all the elements analyzed by different courts in this area.

The Administrator and the courts have found that the Wage and Hour Division's six-part test is a useful tool, but the determinative test is the totality of the circumstances. The six factors merely assist when assessing the totality of the circumstances in a given situation. ***See Reich***, 992 F.2d at 1027, and Wage and Hour Manual (BNA) 91:416 (1975), Employment Relationship Under the Fair Labor Standards Act , WH Publication 1297, U.S. Dept. of Labor (1980). As the criteria enunciated in the Wage and Hour Division's test can assist us in the current analysis, we will discuss the factors in the test.

The test states:

> If all of the following criteria apply, the trainees or students are not employees within the meaning of the Act:
>
> (1) the training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
>
> (2) the training is for the benefit of the trainees or students;
>
> (3) the trainees or students do not displace regular employees, but work under their close observation;
>
> (4) the employer that provides the training derives no immediate advantage from the activities of the trainees or students; and on occasion his operations may actually be impeded;
>
> (5) the trainees or students are not necessarily entitled to a job at the conclusion of the training period; and
>
> (6) the employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.

Employment Relationship Under the Fair Labor Standards Act, WH Publication 1297, U.S. Dept. of Labor (1980) (emphasis in original).

Although the above-cited pamphlet states it is intended for general information purposes, and should not be considered in the same light as official opinions by the Wage and Hour Administrator, it sets out the test in virtually identical language to the test as it appears in the cases which have applied it. The cases usually took the test from the Wage and Hour Manual (BNA) 91:416 (1975). According to the Nebraska Wage and Hour Division office, the 1975 manual has not been rescinded but is no longer actively used.

The test's first criteria to be used in determining if trainees are employees and therefore entitled to at least minimum wage compensation under the FLSA is whether the training provided is similar to that provided by vocational schools.

The Training Center is probably in the best position to have knowledge of and evaluate the similarities or differences between criminal justice or law enforcement programs offered at vocational schools or other similar schooling programs. The courts have not limited their review to other schools in the same state or even geographic region as the training program being examined. When evaluating this factor, other states' training programs, as well as colleges or vocational schools which may offer programs similar to the instruction provided by the Training Center, should be taken into account. The fact that no other school is available which has the authority to certify persons as law enforcement officers may affect this determination, also.

One factor which may make Training Center attendees less likely to be considered employees of "sponsoring" law enforcement agencies is that the training is performed away from the sponsoring agency's workplace. As is clear from the first criteria, the Administrator's test assumes trainees are usually trained at least partly on the employer's premises. The Training Center's basic course attendees do not serve their "sponsoring" agencies as law enforcement officers during the period of instruction at the Training Center.

Probably the most closely analogous facts to the issue in your opinion request were presented in ***Reich v. Parker Fire Protection Dist.***, 992 F.2d 1023 (10th Cir. 1993). In that case, a local fire fighting academy had not paid fire fighter trainees while they attended the defendant district's academy. The Secretary of Labor brought suit to recover the minimum wages he alleged should have been paid to the trainees during their ten-week training course. Just as with prospective officers at the Training Center, successful completion of the fire fighting training course was required in order to become a fire fighter. The court analyzed the situation under the Administrator's six-part test and determined

that the totality of the circumstances showed the fire fighters were not employees.

The fire protection district argued that its academy was not similar to vocational schools because only one other school in the country provided similar training, and there were no vocational schools for fire fighters in Colorado. The court disagreed, finding that other fire fighting academies throughout the region and associate degree programs at Colorado community colleges offered training comparable to defendant's academy. ***Id.*** at 1027. The court stated, "A training program that emphasizes the prospective employer's particular policies is nonetheless comparable to vocational school if the program teaches skills that are fungible within the industry." ***Id.*** at 1028. The fungibility of the skills taught at a training facility within the profession involved is a common theme addressed by courts examining this area. It would seem that the skills taught at the Nebraska Training Center are useful for anyone seeking employment as a law enforcement officer or security personnel. This is certainly true within the State of Nebraska and probably for law enforcement positions in general. We assume the Training Center's instruction would be even more broad-based than the fire academy in ***Reich***, which admittedly devoted at least part of its instruction to policies and equipment unique to that particular fire protection district.

Some of the facts presented in the ***Reich*** case did differ significantly from those in your opinion request. In ***Reich***, the fire fighters were required to attend the training course by the employer or prospective employer itself. The Training Center's attendance is required by state law, not the individual law enforcement agency hiring an officer. Although an agency may indeed require an officer to attend the Training Center, that requirement is a necessary and legally imposed duty upon all similarly situated law enforcement candidates regardless of their employer. The officials at the Wage and Hour Division indicated to us that the analysis may be quite different when dealing with training mandated by the state and not an employer. Language in the Code of Federal Regulations states, "Attendance [at training programs] is not voluntary, of course, if it is required **by the employer.**" 29 C.F.R. § 785.28 (1995) (emphasis added). ***See also*** Interpretive Bulletin, Part 785: Hours Worked Under the Fair Labor Standards Act of 1938, As Amended, WH Publication 1312, U.S. Dept. of Labor (Reprinted 1984). Unfortunately, this particular area has not been addressed by the Administrator nor the courts.

In ***Donovan v. American Airlines, Inc.***, 514 F.Supp. 526 (N.D. Tex. 1981), ***aff'd*** 686 F.2d 267 (5th Cir. 1982), the Secretary of Labor sued to force the defendant airline to pay prospective flight attendants and reservations agents attending the airline's five-week course for their time spent in training. In examining the issue of similarity of instruction to that available at vocational

schools, the district court in ***American Airlines*** noted that the training American Airlines provided was performed by qualified instructors, in a separate location from the work premises, and the students did not interact with the customers. The court found the training to be "plainly and simply a school." ***American Airlines***, 514 F.Supp. at 533. The court went on to hold that the persons attending the American Airlines training school were not employees under the FLSA. The district court stated:

> We find little in the history of the Act or in the prior cases that suggests that employer offered training to develop skills unique to the employer's operations necessarily demands Fair Labor Standards Act protection. But we need not reach so far because we have found the skills acquired by students at the training school to be substantially fungible.

American Airlines, 514 F.Supp. at 533.

The Fifth Circuit, in its opinion, noted that the district court had found the skills learned at the airline's training course could be utilized by other airlines with minimal additional training. ***American Airlines***, 686 F.2d at 270. Under the type of analysis employed in ***American Airlines***, the Training Center's course would likely be considered fungible within the area of law enforcement. Even though only the Training Center can provide certification as a law enforcement officer in Nebraska, that would not necessarily appear to be sufficient to mean the skills acquired at the Training Center would not be easily transferred to other law enforcement related fields in Nebraska or to law enforcement jobs in other states. Certainly minimal additional training would be required after graduating from Nebraska's Training Center.

The second criteria in the Administrator's test is whether the training is for the benefit of the trainee. It is closely related and comparable to the Administrator's fourth criteria, namely whether the employer providing the training gains an immediate advantage from the activities of the trainees. Due to their similarity, many courts have considered these two criteria together. ***See Reich***, 992 F.2d at 1028, ***American Airlines***, 686 F.2d at 271-72, ***Bailey***, 406 F.Supp. at 1307, and ***McLaughlin v. Ensley***, 877 F.2d 1207, 1209-10 (4th Cir. 1989). These two factors will likewise be combined in the following discussion.

In applying the situation presented in your opinion to the case law dealing with this part of the test, we believe the training is for the benefit of the trainees, and the employers do not gain an immediate advantage from the trainee activities. Under normal circumstances, a law enforcement agency hires an individual, who is then placed on the payroll and begins his or her duties as an officer. The person is allowed to function as an officer pending admission in the next available basic course. However, the

situation presented in your opinion is that a person is not "hired" by an agency but rather is "sponsored." The person is not on the agency's payroll, is not entitled to benefits, and does not perform law enforcement functions for the agency. The person may or may not be hired after completing the Training Center's basic course. Evidently, the Training Center believes the person is sometimes merely "sponsored" by the agency for the convenience of the attendee, with neither party intending Training Center attendance to be a precursor to employment or creating any potential expectation of employment. The "sponsoring" agency evidently does not receive any direct benefits from the sponsored person's attendance whatsoever. Under those facts, the case law appears clear that the training is for the benefit of the trainee.

In the ***American Airlines*** decision, the Fifth Circuit recognized that no company would operate a training school solely for the benefit of trainees, unless out of altruism or public pro bono. The court held that a balancing test was therefore more appropriate to use when examining whether training is for the benefit of the trainees. ***American Airlines***, 686 F.2d at 272. This language only serves to show that the Training Center is operated for the benefit of the trainees, as that phrase is used in the context of an evaluation of employee status under the FLSA. The case law shows that the analysis compares whether the benefits from operation of a training facility flows to trainees or to the company or entity operating the facility. In this case the entity operating the facility does not derive benefits from the training of officers. The Training Center's purpose is not to train its own future employees, as with training facilities operated by corporate entities or local public agencies such as the fire fighters in the ***Reich*** case. Neither do the "sponsoring" agencies receive any immediate benefit from the trainees attending the basic course, such as performance of duties during attendance.

The case law also shows that the mere benefit of creating a ready pool of prospective employees is not an immediate benefit to an employer sponsoring a training program. The U.S. Supreme Court in the ***Walling*** decision held that persons attending the railroad's training course could not be considered employees "merely because the school's graduates would constitute a labor pool from which the railroad could later draw its employees." ***Walling***, 330 U.S. at 153. The court in ***American Airlines*** pointed out that "[a]lthough training benefits American by providing it with suitable personnel, the trainees attend school for their own benefit, to qualify for employment they could not otherwise obtain." ***American Airlines***, 686 F.2d at 272. Under this analysis, Training Center attendees who are not already working at an agency when they attend the course would probably be held to be benefiting themselves by securing the necessary credentials for employment. In the ***Reich*** decision, the Tenth Circuit stated that there is no question that "in acquiring skills transferable within the industry and required by defendant for its career fire fighters, the trainees benefitted

from their training." ***Reich***, 992 F.2d at 1028. This would probably be analogous to the situation for law enforcement officer candidates attending the Training Center's basic course.

The third criteria in the Administrator's test is whether the trainees displace the sponsoring entity's regular employees. It appears clear from the scenario you presented in your opinion request that employees merely "sponsored" by an agency do not displace any regular employees of that agency. This factor is intended to address a situation where a trainee takes on the job normally handled by regular employees of the training or sponsoring entities. A situation such as this was addressed by the court in ***Bailey v. Pilots' Ass'n for the Bay and River Delaware***, 406 F.Supp. 1302 (E.D. Pa. 1976). In that case an apprentice ship pilot was held to be an employee of the ship. The court pointed out that the apprentice stood watch as a regular crewman, was counted as a crewman for purposes of the ship having a full complement, and ran launches to ferry pilots to and from vessels. Under such conditions, the court stated "the Plaintiff was not taking a training course but was performing tasks necessary to the functioning of the pilot boat." *Id.* at 1307 (footnote omitted). Officer candidates at the Training Center's basic course do not perform functions necessary for the operation of their respective "sponsoring" agencies.

The test's fifth criteria is whether the trainees are entitled to a job at the conclusion of the training period. Your opinion request explains that after successful completion of the basic course and obtaining certification, the agencies "sponsoring" attendees at the Training Center may (but are not required to) hire the trainee. The Training Center believes that sometimes the "sponsoring" agencies have no intent nor agreement to hire the sponsored trainees. The arrangements are sometimes merely for convenience. The trainee avoids payment of tuition and fees, and the sponsoring agency does not incur any costs. Whatever the arrangement, at most the sponsoring agency has an option to hire the certified officer but would not be bound to do so. This differs from the normal situation where an officer candidate is hired, and the basic course training is merely the final prerequisite to be met for permanent employment. In those cases, the officer is guaranteed employment with the agency upon successful graduation.

An agreement or understanding between a trainee and an employer that the trainee is not an employee and is not guaranteed employment after completion of training can be used to show the trainees' expectations. It may be used in determining employment status under the totality of the circumstances. An employee cannot waive FLSA benefits, however. ***American Airlines***, 686 F.2d at 269, citing to ***Barrentine v. Arkansas-Best Freight System***, 450 U.S. 728, 739 (1981).

Under the Administrator's test, if the "sponsoring" agency guaranteed the trainee employment upon successful completion of the Training Center's basic course, that would weigh in favor of the trainee being considered an employee under the FLSA. If the agreement was only that the trainee might be offered employment if he or she graduates, this would indicate the trainee was not an employee of the sponsoring agency. Of course, if the arrangement was merely one of convenience to avoid fees, with no expectation of employment, that would provide evidence that the trainee was not an employee for purposes of the FLSA.

The sixth and final criteria in the Administrator's test is whether the trainee and employer understand that the trainee is not entitled to wages during the training period. Under the FLSA, even when a trainee does not expect or demand compensation, the FLSA may still require payment of at least minimum wage if the trainee meets the other criteria indicating he or she is actually an employee. The court in ***Bailey*** acknowledged that the parties did not contemplate compensation for the apprenticeship period. Despite that the court held the apprentice was entitled to backpay. ***Bailey***, 406 F.Supp. at 1307. In the majority of cases where the courts have held trainees not to be employees, the trainees and employers understood that the trainee was not entitled to wages during the training period. ***See Portland Terminal***, 330 U.S. at 150, ***Trans World Airlines***, 726 F.2d at 416 (8th Cir. 1984), ***Reich***, 992 F.2d at 1025, ***American Airlines***, 686 F.2d at 273. ***See also Turner v. Unification Church***, 473 F.Supp. 367, 377 (D.R.I. 1978).

You stated in your opinion request that the Training Center has concerns that if the attendees are actually employees and were held to be entitled to compensation, that the Training Center may be culpable under the FLSA. Even if the attendees were held to be employees, we do not believe the Training Center would face any potential liability under the FLSA. Although we do not believe the trainees are employees under the FLSA, if they were so held to be, they would be employees of their sponsoring agencies, not the Training Center. Under the standards in the FLSA, the Training Center does not derive any immediate benefits from the trainees attendance. The U.S. Supreme Court, in its ***Portland Terminal*** decision, stated that the FLSA's definitions were not intended to define all persons working for their own advantage without an expectation of compensation to be employees. "Otherwise, all students would be employees of the school or college they attended, and as such entitle to minimum wages." ***Portland Terminal***, 330 U.S. at 152. The Court noted that the FLSA's definitions regarding "employee" and "employ" are very broad. The Court went on to state:

> But, broad as they are, they cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction. Had these trainees taken courses in

> railroading in a public or private or vocational school, wholly disassociated from the railroad, it could not reasonably be suggested that they were employees of the school within the meaning of the Act.

Portland Terminal, 330 U.S. at 152. ***See also Bailey***, 406 F.Supp. at 1306.

Under the above language, it appears clear that schools operated separately and independently from the employer will not be held responsible for the FLSA's requirements when considering the status of trainees and students.

In order to determine whether a person attending the Training Center is an employee of a sponsoring agency for purposes of the FLSA, the Training Center will have to examine the facts of the situation in light of the above test and case law. Ultimately the decision must be made based on the totality of the circumstances. Based on the facts as we understand them, we do not believe persons attending the Training Center who are merely "sponsored" by law enforcement agencies are employees of those agencies under the provisions of the FLSA.

RESPONSIBILITY FOR PAYMENT OF TUITION AND FEES BY PERSONS ATTENDING THE TRAINING CENTER

There are two Nebraska statutes to be considered when dealing with this issue, both of which you pointed out in your opinion request. Nebraska Rev. Stat. § 81-1413 (1994) states:

> Tuition, fees, and such other expenses incurred in the training of a law enforcement officer admitted to the training center shall be paid by the training center when the course the officer is attending is a course mandated by state law, a course prescribed by the council, or a course that has been funded by the training center through special external funding. Tuition, fees, and such other expenses incurred in the training of all other persons admitted to the training center shall be the responsibility of the person or his or her sponsoring agency.

Nebraska Rev. Stat. § 81-1414(2) (1994) requires that all Nebraska law enforcement officers must attend and complete the Training Center's basic course. The term "law enforcement officer" is defined by the pertinent part of another statute as follows:

> Law enforcement officer shall mean any person who is responsible for the prevention or detection of crime or the enforcement of the penal, traffic, or highway laws of the state or any political subdivision of the state for

> more than one hundred hours per year and is authorized by law to make arrests, and includes but is not limited to:
>
> (i) A full or part-time member of the Nebraska State Patrol;
>
> (ii) A county sheriff;
>
> (iii) A full or part-time employee of a county sheriff's office;
>
> (iv) A full or part-time employee of a municipal or village police agency

Neb. Rev. Stat. § 81-1401(3)(a) (1994).

The statute continues on to include arson investigators, and excludes probation and parole officers and employees of the Departments of Corrections and Revenue. The Training Center's rules and regulations mirror this same definition in 79 NAC 1, ¶ 004.14.

These two Nebraska statutes require that the Training Center pay tuition and fees for law enforcement officers attending courses mandated by state statute. Law enforcement officers are defined as full or part-time employees of the listed categories of law enforcement agencies within Nebraska. Neither the Nebraska statutes nor the Training Center's rules and regulations provide any further definition of the term "employment" than what is provided in § 81-1401(3)(a).

In determining if the attendees are employees of their "sponsoring" law enforcement agency, the Training Center will have to analyze the relationship between the attendee and the agency. Based on information provided by Director Curtis and the Training Center's legal counsel, the agency sponsoring an attendee must certify that the attendee is in fact the agency's employee. The Training Center's Application for Training includes a section which is filled out by the Department or Agency sending the officer candidate. The head of the agency must certify that certain statements are true and correct. The ninth statement the agency head must certify as true deals with employment status. It states: "9. The applicant is an employee of the agency or department making this application, with the full knowledge and approval of the local governing board."

If the Training Center and the Commission on Law Enforcement and Criminal Justice believe some law enforcement agencies are sending individuals to the Training Center who are not actually employees, the Training Center or Commission may wish to expound on and clarify their definition of what constitutes "employment" for purposes of tuition-free admission the Training Center. We believe

ultimately the decision as to what constitutes "employment," under Nebraska statutes involved and the Training Center's regulations for purposes of admittance to the Training Center is a decision which must be made by the Training Center and the Commission.

Based on our opinion dealing with the employment status of Training Center attendees under the FLSA, as well as the Training Center's apparent uneasiness regarding the current situation, the Training Center may wish to clarify what is meant by the term "employment" in its regulations. The Nebraska Supreme Court has held that an administrative agency's interpretation or construction of a statute it is charged with enforcing is to be accorded considerable weight, particularly where the legislature fails to act to change that interpretation. ***Omaha Pub. Power Dist. v. Nebraska Dept. of Revenue***, 248 Neb. 518, ___ N.W.2d ___ (1995), ***McCaul v. American Sav. Co.***, 213 Neb. 841, 331 N.W.2d 795 (1983). Deference is normally accorded an agency's interpretation of its own regulations unless the interpretation is plainly erroneous or inconsistent. ***Omaha Pub. Power Dist. v. Nebraska Dept. of Revenue***, 248 Neb. 518, ___ N.W.2d ___ (1995), ***Slack Nursing Home v. Department of Soc. Servs.***, 247 Neb. 452, 528 N.W.2d 285 (1995), ***In re Application of Jantzen***, 245 Neb. 81, 511 N.W.2d 504 (1994), ***Department of Health v. Lutheran Hosp. & Homes Soc'y.***, 227 Neb. 116, 416 N.W.2d 222 (1987). Of course, the administrative agency cannot use its rule-making power to enlarge or modify the provisions of a statute which the agency administers.

CONCLUSION

In order to determine whether a person is an "employee" of the agency sending him or her to attend the Law Enforcement Training Center under the Fair Labor Standards Act, the totality of the circumstances must be examined. The Department of Labor's Wage and Hour Division Administrator created a six-part test based on criteria drawn from the U.S. Supreme Court's decision in ***Portland Terminal*** to assist in analyzing employee status questions concerning trainees and students. Many courts, when examining this same issue, have applied the Administrator's test. Other courts have used similar tests or modifications of it. We believe the Administrator's test is a useful place to begin when examining issues regarding whether trainees are "employees" under the FLSA.

Applying the available case law and administrative decisions to the facts you have presented to us, we do not believe persons attending the Training Center meet the FLSA's definition of "employees" of the agencies sponsoring them. We do not believe the Training Center would face any potential liability under the FLSA even if attendees were held to be employees, though. The Training Center's position is most analogous to that of a vocational school or college, which the courts have held to be well beyond the intended scope of the FLSA. As such, the attendees would at most be employees of their sponsoring agencies, not the Training Center.

What constitutes "employment" for purposes of tuition-free admission to the Training Center's basic course is a determination within the discretion of the Training Center and the Commission. Neither the controlling statutes nor the Training Center's regulations provide a definition of the term "employee" for these purposes. It is probably up to the Training Center or the Commission to make that determination, as the agency charged with administration and enforcement of the involved statutes and regulations. So long as the interpretation is not clearly erroneous or inconsistent with the statutory intent, and the interpretation does not modify, alter, or enlarge the statute's provisions, the Training Center's interpretation will be accorded deference if reviewed by a court.

Sincerely,

DON STENBERG
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Timothy J. Texel
Assistant Attorney General

08-07-14.op

Approved:

Attorney General