

October 29, 2004

William W. Thompson II, Esq.
Executive Director
Office of Compliance
Room LA 200
110 Second Street, S.E.
Washington, D.C. 20540-1999

Re: Comments to Notice of Proposed Rulemaking Regarding Substantive Rights and Protections Under the Fair Labor Standards Act

Dear Mr. Thompson:

The Office of Compliance Notice of Proposed Rulemaking (“NPR”) regarding amendments to the Substantive Rules of the Office of Compliance was published in the Congressional Record on September 29, 2004 (H7850 and S9917). In accordance with section 304(b)(2) of the Congressional Accountability Act (“CAA”) and the NPR, comments and observations are to be submitted to the Office of Compliance by October 29, 2004.

The proposed regulations seek to “define and delimit” the exemptions for executive, administrative, professional and computer employees as defined in 29 C.F.R. § 541 (2004) and adopted pursuant to section 225(f)(1) of the CAA under the provisions of the Fair Labor Standards Act (“FLSA”). The proposed regulations also seek to cover “highly compensated employees making greater than \$100,000 per annum.”¹

1. Background

As you know, the FLSA requires that most employees be paid at least the federal minimum wage for all hours worked and overtime for those overtime hours worked.¹ Section 13(a)(1) as applied through section 225(f)(1) of the CAA provides an exemption from FLSA overtime pay for employees employed as “bona fide” executive, administrative, and professional employees.

On August 23, 2004, the Department of Labor (“DOL”) implemented its final regulations “defining and delimiting” the exemptions for executive, administrative,

¹ Office of Compliance Regulation H553.201 governs a partial overtime pay exemption for law enforcement personnel who are employed by public agencies on a work period basis, rather than a forty-hour work week basis, and permits public agencies to pay overtime compensation in work periods of up to twenty-eight consecutive days only after 216 hours of work.

professional, outside sales, and computer employees. As part of those new regulations, the Department of Labor has added a new section stating that the 13(a) exemptions do not apply to “police officers, fire fighters, paramedics, emergency medical technicians and similar public safety employees who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; and similar work.” 69 Fed. Reg. 22122-01, 22122-23 (2004). The Office of Compliance issued its NPR in the Congressional Record seeing comment on the application of the Department of Labor regulations through the CAA. See 150 Cong. Rec. H7850-07 (daily ed. Sept. 29, 2004).

2. Comments and Observations

The Capitol Police Office of Employment Counsel and the Office of the General Counsel offer the following comments and observations with respect to this NPR.

The language of the NPR is tailored to an executive branch state and/or local law enforcement agency model which is sufficiently different from the legislative branch model to render the regulations ineffective in their application to USCP factual situations. Accordingly, certain sections of the new regulations should be eliminated or modified to reflect relevance to the legislative branch.

A. *Section 541.3(b) should be eliminated for good cause shown, or in the alternative modified to reflect a federal legislative branch model.*

The Board has previously stated that “there are other regulations that the Board has ‘good cause’ not to issue because, for example, they have no applicability to legislative branch employment.” Office of Compliance Regs. FLSA (Instrumentalities) (“OC FLSA Regs.”) at 5-C-10. New subsection 541.3(b) is one such provision.

Subsection 541.3(b) was added to respond to commentators, like the Fraternal Order of Police, who expressed concerns about the impact of the regulations on police officers and other first responders. Department of Labor stated that “[t]he current regulations do not explicitly address the exempt status of police officers, fire fighters, paramedics or EMTs. This silence in the current regulations has resulted in significant federal court litigation to determine whether such employees meet the requirements for exemption, administrative or professional employees.” 69 Fed. Reg. at 22129. The Department of Labor concluded that “for the first time, the Department intends to make clear in these revisions to the Part 541 regulations that such police officers . . . and other first responders are entitled to overtime pay. Police sergeants, for example, are entitled to overtime pay even if they direct the work of other police officers because their primary duty is not management or directly related to management or general business operations . . .”*Id.*

In evaluating comments under subsection 541.3(b), there were no responses from police organizations in the federal government or other organizations more similarly situated to the USCP. The comments provided by the Fraternal Order of Police responded generically to police work and not the unique work situations of the federal government police organizations, particularly a law enforcement entity within the federal legislative branch. See Comments from Fraternal Order of Police, Attached.

The new subsection 541.3(b) regulations do not appear to be congruent with the operations of the USCP notwithstanding the applicability of provisions of Title 29 made applicable under the CAA. The language focuses on traditional police work performed by most state and local organizations and not the specialized work performed by the USCP for the Members of Congress and the U.S. Congress. Pursuant to the NPR issued by the Office of Compliance, the Board of Directors of the Office of Compliance can modify the FLSA regulations where, for “good cause” shown, the FLSA would be more effective for the implementation of the rights and protections under the CAA. 2 U.S.C. § 1313(c)(2) (1994). Because of the unique nature of the work and positions within the USCP, it is recommended that the Office of Compliance not adopt the provisions of section 541.3(b) to ensure effective implementation of the rights and protections under the CAA.

Department of Labor’s stated purpose for the adoption of section 541(b)(1) of the new FLSA regulations was to clarify the overtime regulations and reduce costly litigation on issues involving applicability of the statute. Initially, it should be recognized that the USCP has not engaged in costly litigation or uncertainty as highlighted in the DOL regulations, and does not suffer the uncertainty that existed within other police organizations. Thus, the premise for changing the regulations for police officers does not exist within the USCP.² Second, the provisions of section 541(b)(1) of the new FLSA regulations are ambiguous at best, and do not reflect the unique nature of the USCP work as an organization charged with providing comprehensive and fully

² It should be noted that the court decisions discussed in the DOL Final Rule comments were based on the specific facts and actual duties of the state and local police organizations before the court. None of those decisions involved federal police force entities or entities subject to the CAA. In its comments, the DOL highlights the relevance to specific state and local police officers by stating that Part 541 regulations cover “*such* police officers.” 69 Fed. Reg. at 22129 (emphasis added).

integrated security services which includes physical security and counter-terrorism components as well as a personal protective function, all requiring full and robust participation in the intelligence community. The regulation should be eliminated for good cause shown. In the alternative, a much more comprehensive analysis should be undertaken with respect to the USCP to be consistent with the rights and responsibilities of the Board of Directors of the Office of Compliance, as stated in § 203(c)(2). 2 U.S.C. § 1313(c)(2).

B. Section 541.601(d) should include sworn officers and civilian employees of the USCP.

For good cause shown, section 541.601(d) should include sworn officers and civilians whose primary duty includes performing office or non-manual work. The premise of the DOL regulations was that police officers and “public safety” employees do not perform “office or non-manual” work. 69 Fed. Reg. at 22129. Therefore, DOL concluded that such employees were not subject to section 541.601(b) for employees whose primary duty includes performing office or non-manual work. *Id.* Unlike state and local police organizations referenced in the Department of Labor comments, USCP has several officers and civilians whose primary duty includes performing office or non-manual work. For section 541.601(b) to have any relevance to the USCP, it should include reference to sworn officers and civilians whose primary duty includes performing office or non-manual work.

C. The NPR contains several provisions that are simply not applicable to the legislative branch of government.

The Board of Directors of the Office of Compliance, in its NPR, discussed their practice in 1996 to adopt regulations pursuant to CAA section 304 by providing regulations in parts H541 (made applicable to the House of Representatives), S541 (made applicable to the Senate) and C541 (made applicable to the other employing offices covered by section 203 of the CAA). The NPR by the Office of Compliance has not completed its task in properly issuing regulations related to each of these entities.

Throughout the regulations, there are references, among several others, to business owner (541.101),³ individuals responsible for production of sales records

³ By way of example, the first sentence of section 541.101 addressing “business owner” defines an employee in a bona fide executive capacity to include “any employee who owns at least a bona fide 20-percent equity interest in the enterprise in which the employee is employed, regardless of whether the business is a corporate or other type of organization, and who is actively engaged in management.” See 150 Cong. Rec. H7850-07, H7853 (daily ed. Sept. 29, 2004). As this provision has no application in the legislative branch, it is suggested that the sentence be eliminated.

(541.102), employees in American Samoa employed by employers other than the Federal Government (541.200(a)), and insurance claims adjusters (541.202(g)), none of which have any applicability to the USCP much less the rest of the legislative branch of government. To include provisions not tailored specifically to the legislative branch confuses the applicability of the regulations and is not in conformance with the CAA. There is simply no “good cause” to include them as they are not applicable to the legislative branch of government. See OC FLSA Regs. 5-C-10 (“there are other regulations that the Board has ‘good cause’ not to issue because, for example, they have no applicability to legislative branch employment”)⁴.

Moreover, if the intent of the prior FLSA regulations was to have separate regulations for the House, Senate, and other employing offices, then the regulations must be tailored to those organizations. Otherwise, the different approach to approve the regulations by the Board of Directors would render separate approaches to the House (by resolution of the House), the Senate (by resolution of the Senate), and other employing offices (by concurrent resolution) simply meaningless.

⁴ The following FLSA provisions have no applicability to the legislative branch. FLSA section 541.202 pertains to discretion and independent judgment of an administrative employee, however, subsections (b), (d), (f)(a), (f)(b), (f)(c), (f)(d), (f)(f) and (f)(h) deal with representatives of business, volume of business, insurance claims, employees of the financial services industry, executive assistants of large businesses, purchasing agents for raw materials in excess of contemplated plant needs, and employees that grade lumber. FLSA section 541.300 also does not apply to the legislative branch. Specifically, 541.300 (e)(1), (e)(2), (e)(3), (e)(4), (e)(8) and (e)(9). FLSA section 541.302 deals with creative professionals and subsection (c) identifies that determination of exempt creative professional status is made on a case-by-case basis as in the case of conductors, soloists and animator of motion picture cartoons. FLSA section 541.303 exempts teachers and subsections (b) and (c) are specific to kindergarten or nursery school pupils and the possession of an elementary or secondary teacher’s certificate are with the scope of exemption for teaching professionals. Section 541.501 deals with making sales or obtaining orders. Subsections (a), (b) and (c) apply to the making of sales within the meaning of section 3(k) of the Act, sales that include the transfer of title to tangible property and outside sales work such as the selling of time on radio or television. FLSA section 541.502 deals with outside sales employees or those who sell door-to-door. Promotion Work, FLSA section 541.503 (a), pertains to promotional work that is incidental to sales made or made by someone else is not exempt outside sales work. FLSA section 541.504 pertains to drivers who sell indicates in subsections (b), (c), and (d)(2) that sales training, drivers who take orders for products and drivers who often call on established customers every day or week are considered exempt. FLSA 541.600 (c) deals with academic administrative employees and the amount of salary required. FLSA sections 541.601 deals with employees in excess of \$100,000 a year and section 541.602 (b)(4) deal with penalties imposed infractions of safety rules of major significance.

D. Section 541.0 Introduction Statement provides inaccurate information.

The first sentence of this section states that section 13(a)(1) of the Fair Labor Standards Act, as amended, and as applied pursuant to section 203 of the CAA, provides an exemption for, among others, bona fide executive, administrative, or professional employees. The application to the CAA is not pursuant to section 203 of the CAA, but rather section 225(f)(1) of the CAA. Section 13(a)(1) is not identified as an explicit adoption of an FLSA provision found in section 203 of the CAA.

Moreover, the last sentence of section 541.0 states that the equal pay provisions in section 6(d) of the Fair Labor Standards Act are “also administered and enforced by the Office of Compliance.” 150 Cong. Rec. at H7852. Nowhere in the CAA does the statute provide the Office of Compliance with the responsibility of *enforcing* the equal pay provisions in section 6(d) of the FLSA. Additionally, it is unclear whether the Office of Compliance is seeking to expand its jurisdiction by the use of the word *administered* regarding section 6(d) of the equal pay provisions of the FLSA. As stated in the Office of Compliance regulations, “the Board has no investigative power by which it can inform itself of conditions, circumstances and customs of employment in the legislative branch; . . . and, most importantly, the Board has no cause to advise employees and employing offices concerning how it will seek to enforce the statute, since it has no enforcement powers under the CAA.” OC FLSA Regs. 5-C-4.

Rather, the Board has defined its FLSA role to simply “adjudicate cases brought by covered employees.” OC FLSA Regs. 5-C-5. As stated by the Office of Compliance Board, “the CAA rather pointedly declines to confer upon the Board the investigatory and prosecutorial authority . . . outside of the regulatory and adjudicatory contexts.” OC FLSA Regs. 5-C-6. As the CAA specifically sets forth the Office of Compliance duties and responsibilities, it is recommended that the last sentence of 541.0 be deleted.

E. Section 541.4 Second Sentence is inaccurate, in part.

The NPR states in the second sentence of 541.4 that “[e]mployers must comply, for example, with any Federal, State, or municipal laws, regulations or ordinances establishing a higher minimum wage or lower maximum workweek than those established under the Act.” See 69 Fed. Reg. at 22130. While it is true that legislative branch entities may be required to comply with applicable federal laws regarding wages or workweeks, they are not required to comply with State or municipal laws, regulations or ordinances. Accordingly, the second sentence should be modified to accurately reflect the requirements for federal legislative branch entities.

Should you have any questions, about our response to this NPR, please let us know. Again, thank you for the opportunity to submit comments to the Board of Directors of the Office of Compliance concerning proposed substantive regulations for certain substantive provisions of the FLSA made applicable through the CAA.

Sincerely,

John T. Caulfield
General Counsel

Frederick M. Herrera
Employment Counsel



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JAMES O. PASCO, JR.
EXECUTIVE DIRECTOR

27 June 2003

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Re: Comments on Proposed Rule for 29 CFR Part 541 (RIN 1214-AA14)

Dear Administrator McCutchen:

Attached to this letter, please find the written comments of the Grand Lodge, Fraternal Order of Police regarding the proposed regulations at 29 CFR Part 541, "Defining and Delimiting the Exemptions for Executive, Administrative, [and] Professional... Employees," published in the *Federal Register* on 31 March 2003.

With respect to the current proposal, the F.O.P. is not concerned with how the exemptions have been applied in the past to State and local public safety employees by their employers, the Department of Labor, or the courts; but rather with how they are to be applied in the future. Indeed, we believe that a new standard for these employees is required in light of the new realities faced by police officers, firefighters and EMTs following the 11 September 2001 terrorist attacks; one which reflects the unique nature of public safety work.

On behalf of the more than 306,000 members of the Fraternal Order of Police, thank you in advance for your attention to our concerns on this important issue. We look forward to working cooperatively with the Department of Labor throughout the rulemaking process, and remain open to discussions regarding amendments to the proposed rule which will positively impact public safety officers. Please do not hesitate to contact me, or Executive Director Jim Pasco, through our Washington office if we can provide you with any additional information.

Sincerely,


Chuck Canterbury
National President

Enclosure





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JAMES O. PASCO, JR.
EXECUTIVE DIRECTOR

Grand Lodge, Fraternal Order of Police

Statement of Position

On the Notice of Proposed Rulemaking

**“Defining and Delimiting the Exemptions for Executive, Administrative,
Professional, Outside Sales and Computer Employees” (29 CFR 541)**

**As Published in the *Federal Register*
31 March 2003**

On 31 March 2003, the U.S. Department of Labor (DOL) published in the *Federal Register* a Notice of Proposed Rulemaking to amend 29 CFR Part 541, “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees.” According to the Notice, the purpose of the proposed rule is to “update and revise” the regulations governing the so-called “White Collar” exemptions from minimum wage and overtime pay for certain employees under the Fair Labor Standards Act (FLSA).¹ These regulations, implementing Section 13(a)(1) of the FLSA [29 USC 213(a)(1)], require employees to meet “certain minimum tests related to their primary job duties and be paid on a salary basis at not less than specified minimum amounts” to be considered exempt under FLSA.² The Department notes that the amendments are necessary because the “duties” tests were last modified in 1949, and the compensation levels required under the “salary” tests have not been updated since 1975.

The Fraternal Order of Police is the largest law enforcement labor organization in the nation, with over 306,000 members in 43 State lodges, and approximately 2,000 local lodges. The membership is composed of any regularly appointed or elected and full-time employed law enforcement officer of the United States, any State or political subdivision thereof, or any agency which may be eligible for membership. The F.O.P. is responding to the Department’s request for “specific public comments on any issues of concern to public employees and public employers.”³

¹ Notice of Proposed Rulemaking (NPRM) U.S. Department of Labor, *Federal Register* (Vol. 68, No. 61) 31 March 2003, Page 15560.

² *Id.*

³ NPRM, page 15583

Introduction/Statement of Position

There is no doubt that much has changed in the workforce since the enactment of the Fair Labor Standards Act, or indeed since the Part 541 regulations were last revised. New and technologically-driven industries have moved to the forefront of the American economy, and in some cases, have made obsolete those occupations which were contemplated when the FLSA was enacted in 1938. Improvements in the protections available to public and private sector employees, pay and benefit plans, and even the way in which work is performed, have also gone hand in hand with these changes.

The nature of public safety work has also changed dramatically during this time, particularly since the terrorist attacks of 11 September 2001. Since 9/11, the responsibilities inherent to police, firefighting and EMS work have taken on a never before imagined importance. Given the altered nature of public safety work in this post-9/11 environment, the Fraternal Order of Police believes that the proposed revisions to the regulations governing the "white collar" exemptions under the FLSA fail to reflect the increased workloads and hazards associated with modern day public safety work, nor do they meet the needs of the professions which comprise it; the changes to the Part 541 regulations may lead to the exemption of public safety employees currently receiving overtime pay; and the provision governing "highly compensated employees" may also lead to the reclassification of first- and second- level supervisors who are currently considered non-exempt. Therefore, the Fraternal Order of Police believes that in its issuance of final regulations, the Department of Labor should provide for the exclusion of public safety employees from the Part 541 regulations, and the exemptions for executive, administrative, professional, and highly compensated employees. The proposed regulations offer a unique opportunity to correct actual and perceived deficiencies in the application of the current regulations to public safety employees, without substantially altering the intent or impact of the statutory language.

The Proposed Part 541 Regulations Do Not Reflect the Unique Nature of Public Safety Work

In the opening of the Fair Labor Standards Act, Congress laid out the necessity for its enactment as due to "the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well being of workers."⁴ In essence, Congress sought to stem the tide of labor-related business practices which, among other things, "interfere[d] with the orderly and fair marketing of goods in commerce."⁵ When the FLSA was amended in 1985 to readjust how it applied to public sector employees, "Congress enacted no special provisions for public agencies related to the section 13(a)(1) exemptions or the 541 regulations," and therefore, the same basic rules for determining exempt or non-exempt status in the private sector have been generally applied to public sector employees.⁶

⁴ 29 USC 202(a).

⁵ *Id.*

⁶ NPRM, page. 15583.

Likewise, the proposed regulations which will govern the exemptions for executive, administrative and professional employees were also primarily designed with the private sector worker in mind, as well as for State and local government employees engaged in the business of ensuring the efficient delivery of services to the "customers" of their respective agencies. For example, the definition of "primary duty" in all three proposed "white collar" exemptions is not easily applicable to public safety occupations. Under the proposal, "primary duty" is defined as the "principal, main, major or most important duty that the employee performs."⁷ Clearly, the most important function for the public safety employee is to ensure the protection of citizens and property. Regardless of the "office" functions they perform on a daily basis, all of these employees are required to work longer hours, often at great personal risk, when the safety of the public is threatened. When public safety employees work overtime, it is generally not to finish a report or meet a project deadline, but rather to respond to a critical and possibly immediate need for first responders such as that imposed by events or intelligence information which necessitates a heightened homeland security alert status.

With respect to the current proposal, the F.O.P. is not concerned with how the exemptions have been applied in the past to State and local public safety employees by their employers, the Department, or the courts; but rather with how they are to be applied in the future. Indeed, we believe that a new standard for these employees is required in light of the new realities of public safety work. Public safety occupations have always been unique as compared to others in the workforce, as the primary mission of those who fill them is the protection of the public and their property. No other private- or public-sector employee is required to stand as the first line of defense for their fellow citizens, nor to place their lives on the line in this regard.

During the last two years, the uniqueness of public safety work has become even more evident. Since 9/11, our nation's first responders have been asked to work countless hours of overtime to meet the staffing requirements of their agencies as they try to cope with new threats to the safety and security of the communities they serve. This is particularly true for those workers employed by departments which are experiencing personnel shortages due to the recent call ups of military reservists. In addition, the increased burdens of homeland security on State and local public safety officers have not fallen entirely on the shoulders of rank-and-file employees, as first- and second-level supervisors also must work extra hours to ensure the protection of critical infrastructure and their fellow citizens. While these brave men and women have willingly answered the call of duty, the heightened importance of homeland security has not been without its share of costs for our nation's first responders. As one police chief noted, "[e]xcessive overtime takes its toll not only on the officers, but also on their spouses, their children and their communities. Excessive overtime can lead to increased risk for accidents and injuries, chronic fatigue and diminished decision-making ability."⁸ Clearly, now more

⁷ NPRM, page 15595.

⁸ Statement of Michael Chitwood, Chief of Police, Portland, Maine Police Department, before the Senate Committee on Governmental Affairs, 9 April 2003.

than ever, policies which provide at a minimum fair compensation for all hours worked by police, fire, and EMS personnel is necessary.

Changes to the Part 541 Regulations Could Lead to the Exemption of Public Safety Employees Currently Receiving Overtime Pay

The F.O.P. is also concerned that, under the proposed rule, many public safety officers currently considered as non-exempt from the FLSA's overtime provisions would be reclassified as exempt employees by State and local governments intent on increasing staffing without increasing the impact on their budgets. This potential loss of overtime pay, coupled with the increased demands on public safety officers, could negatively impact a department's ability to recruit and retain these vital public employees, and further affect their ability to effectively engage in homeland security activities.

As a whole, it is estimated that the proposed rule will mean "a net difference of 280,000 to 1.4 million additional workers who would no longer be eligible for FLSA premium overtime pay" in both the public and private sectors.⁹ In its *Preliminary Regulatory Impact Analysis* (PRIA), the Department notes that the changes to the Part 541 exemptions will also affect "over 87,400 State and local governmental entities."¹⁰ If adopted in their current form, the new regulations would provide these employers with "an overall annual savings of between \$27 million and \$42 million, according to DOL's preliminary estimates."¹¹ The F.O.P. is concerned that, of the number of public-sector workers who would be "more readily identified as exempt...because the updated duties tests will replace the current duties tests in determining their exemption," there could be a disparate impact on the nation's public safety officers.¹²

Recent news accounts have highlighted the current funding crisis faced by many, if not all, State and local governments. According to estimates by the U.S. Conference of Mayors, "when Washington raises the threat level to Code Orange, it costs the nation's localities \$70 million per week," due in part to overtime expenses and the costs of placing police officers, firefighters and EMT's on alert.¹³ This is occurring at the same time that public safety agencies are being asked to provide additional services to protect against threats to homeland security. As a result, many departments which are required to do more with less are left to consider "layoffs, hiring freezes and other cost cutting measures" to meet these competing demands.¹⁴ In addition, some agencies have been forced to cope with the loss of experienced officers to the military reserves by "paying

⁹ "Special Report: What Employers Need to Know About Proposed Changes to DOL's White-Collar Exemption Rules," Thompson Publishing Group, Inc., May 2003, Page 31.

¹⁰ NPRM, Page 15573.

¹¹ "Special Report: What Employers Need to Know About Proposed Changes to DOL's White-Collar Exemption Rules," Thompson Publishing Group, Inc., May 2003, Page 32.

¹² NPRM, page 15580.

¹³ "In the Red Over Code Orange," by E.J. Dionne, Jr., *The Washington Post*, 13 June 2003, page A29.

¹⁴ "Grappling with Budget Constraints," by Robert K. Olson, *Subject to Debate*, Police Executive Research Forum, March 2003.

overtime, juggling schedules, restricting vacations and cutting back on nonemergency services."¹⁵

Congress recognized the critical situation faced by State and local public safety agencies in the recently-enacted supplemental appropriations measure by stating that the payment of "overtime expenses incurred and related to heightened security levels are an eligible use of funds" provided by the Office of Domestic Preparedness for "both critical infrastructure grants and discretionary grants to high-threat, high density urban areas and for the protection of critical infrastructure."¹⁶ The U.S. Department of Justice's Office of Community Policing Services (COPS Office) has also tried to come to the aid of State and local agencies faced with mounting costs by establishing the Homeland Security Overtime Program (HSOP), which offers agencies the opportunity to receive partial "officer overtime funding to support community policing and homeland security efforts."¹⁷ It is interesting to note, however, that while the Office states its recognition of the vital role filled by supervisory personnel in these efforts, the funds can "only be used for non-supervisory sworn personnel."¹⁸

The F.O.P. is concerned that the combination of the fiscal constraints faced by State and local governments with the need of public safety agencies to increase services in the post-9/11 environment, may lead employers to seek to reclassify or challenge the non-exempt status of public safety officers in general, and first- and second-level supervisors in particular, resulting in continued litigation over who is and is not exempt.

Proposed Provision on "Highly Compensated Employees" Could Lead to Reclassification of Non-Exempt Public Safety Officers and Impact "Working Supervisors" Provision

Under proposed Subpart G, Section 541.601, "an employee who performs office or non-manual work and is guaranteed a total annual compensation of at least \$65,000" is deemed exempt from overtime if he or she performs at least one of the "exempt duties or responsibilities of an executive, administrative or professional employee."¹⁹ What is not clear from this section, nor from DOL's summary of the rule, is whether the performance of some, and exactly how much, office or non-manual work by such an employee is enough to qualify him or her to be considered as exempt under this provision. This provision could be particularly problematic for public safety officers due to the lack of a definition for the phrase "office or non-manual work."²⁰ The F.O.P. is therefore

¹⁵ "Report: Military Deployments Leaving Local Police Short Staffed," KGTV theSanDiegoChannel.com, 11 March 2003.

¹⁶ Conference Report, H.R. 1559, "Making Supplemental Appropriations for the Fiscal Year 2003, and for Other Purposes," H. Rpt. 108 - 76 (12 April 2003), page 83.

¹⁷ "Homeland Security Overtime Program Application Packet," Office of Community Oriented Policing Services, U.S. Department of Justice, pg. iii.

¹⁸ *Id.*

¹⁹ NPRM, page 15592-15593

²⁰ See NPRM page 15573 and 15595-15596. Although the summary of the proposed rule denotes a definition for "office or non-manual work" contained in proposed section 541.703, the referenced section

concerned with the impact of this proposed section on public safety employees, particularly first- and second-level supervisors, who necessarily perform a certain amount of office or non-manual work as part of their daily responsibilities, but who are also engaged in the law enforcement or firefighting activities of their department.

In some jurisdictions across the country, police officers already earn a base salary above the \$65,000 per year threshold. In Nassau County, New York for example, police officers currently receive a \$70,563 annual salary after six years of service. With the Los Angeles Police Department (LAPD), the salary range of a Police Officer II is from \$50,000 to over \$66,000 per year, and from \$66,000 for a Detective I to a maximum of \$91,000 for a Detective III.²¹ At the Detective III level, an employee is not only responsible for conducting investigations and performing surveillance, but also "reviews reports prepared by his/her subordinates, informs the commanding officer of the status of pending investigations, ... trains and supervises newly assigned Detectives and civilian personnel, and performs related administrative duties."²² While the officers in these two departments may or may not be immediately affected by the proposed rule due to existing collective bargaining agreements, etc., the above information does highlight the potential impact on those public safety officers who are governed by the FLSA's overtime provisions, are similarly compensated, and who perform both law enforcement and supervisory functions.

The F.O.P. is also concerned about the potential impact of Section 541.601 on the continued efficacy of the "working supervisors" provision. Under Section 541.106 of the proposed rule, "'working supervisors' who have some supervisory functions," but who also perform work unrelated to the supervisory activities, are not considered exempt executives if, "instead of having management as their primary duty...their primary duty consists of either the same kind of work as that performed by their subordinates...or routine, recurrent or repetitive tasks."²³ DOL notes in its summary of the proposed rule that an example of a working supervisor is "a police officer who directs the work of other police officers on the conduct of an investigation but is also a member of a bargaining unit. Bargaining unit members do not become exempt employees simply because they are given some supervisory responsibilities."²⁴ Although the Department also notes in the summary that "no substantive changes are intended," it is unclear whether in certain situations the "working supervisors" or the "highly compensated employees" provisions will take precedence. The F.O.P. is concerned that an employee who is currently non-exempt under the existing "working foremen" provision of current regulations (Section 541.115) and who would otherwise meet the proposed "working supervisor" provision in the proposed rule, may still be exempted by his or her department under the generally less

actually contains the definition for "directly and closely related." No definition exists under Subpart H for "office or non-manual work."

²¹ See "LAPD Annual Salaries—July 2002 to June 2003," www.lacity.org/per/salary.htm ("A Police Officer I is a probationary officer who automatically advances to Police Officer II upon successful completion of his/her probationary period.")

²² See "Becoming a Los Angeles Police Officer," www.lapdonline.org

²³ NPRM, page 15586.

²⁴ NPRM, page 15565.

burdensome duties tests of the "highly compensated employees" provision if they also earn above \$65,000 per year.

Conclusion/Recommendations

As mentioned above, Section 13(a)(1) of the Fair Labor Standards Act provides for the exemption from both minimum wage and overtime pay for "any employee employed in a bona fide executive, administrative or professional capacity."²⁵ The term "employee" is defined under Section 203(d)(2)(C) as "any individual employed by a State, political subdivision of a State, or an interstate governmental agency," except for elected officials, political appointees, and those "not subject to the civil service laws of the State, political subdivision, or agency which employs him." While DOL and the courts have ruled that public safety personnel may qualify as exempt under Section 13(a)(1), there is no specific statutory requirement mandating their inclusion as exempt executive, administrative or professional employees. In fact, the only exemption specifically tailored to police and firefighters in this section is contained in 29 USC 213(b)(20). This provision holds that a public agency engaged in fire protection or law enforcement activities is exempt from the FLSA's overtime provisions if they employ less than five employees in any workweek.

Section 207(k) of Title 29 also provides a "partial overtime pay exemption for fire protection and law enforcement personnel (including security personnel in correctional institutions) who are employed by public agencies on a work period basis."²⁶ Under this provision and the accompanying regulations in 29 CFR Part 553, "employees engaged in law enforcement activities...are entitled to overtime pay if they work an aggregate of 171 hours during a 28-day work period or this same ratio for a work period of at least seven but less than 28 days."²⁷ For firefighters, the ratio is 212 hours during a 28-day work period.

Since the heinous terrorist attacks on our nation nearly two years ago, America's State and local public safety officers have consistently answered the call of duty. Like many of their fellow citizens, some have temporarily laid down their badges to serve our nation's armed forces in the war against terrorism. Other police officers, firefighters and EMTs have responded by working countless hours of overtime to help ensure the safety of their communities and the citizens they serve. The strain of these additional hours of work, coupled with the stress of preparing to respond to critical incidents takes its toll on all public safety personnel. Clearly, the new realities of modern-day public safety work highlight the need to ensure fair compensation for all hours worked by these brave men and women.

In light of these facts, and the potential impact of the provisions cited above, the Fraternal Order of Police recommends the exclusion of public safety personnel from the

²⁵ 29 USC, Section 213(a)(1)

²⁶ 29 CFR Ch. V, Section 553.201 (7-1-02 Edition)

²⁷ "Law Enforcement Issues and the FLSA," by Paul Campo, *Journal of the Missouri Bar*, Volume 56- No.6, November-December 2000.

Part 541 regulations, and the exemptions it contains for executive, administrative, professional, and highly compensated employees. Such an amendment to the proposed rule would not alter or affect the statutory requirements of Sections 213(b)(20) and 207(k) of Title 29, and would thus not be applicable to officers who work for departments which employ less than five police officers or firefighters, or whose overtime is determined on a "work period" basis. This exclusion would also not be applicable to those not already defined as "employees" under the FLSA, including elected officials and political appointees. It would, however, ensure that overtime compensation is available to the majority of public safety officers whose continued performance of overtime work is vital to the security of our nation.

As noted in proposed Section 541.2, "a job title alone is insufficient to establish the exempt status of an employee."²⁸ Similarly, the responsibilities for working extra hours when the safety of our communities is threatened do not fall solely on one particular rank of public safety employee. However, these responsibilities and the unavoidable obligation to sometimes make the ultimate sacrifice in the line of duty, make the public safety professions unique as compared to every other private- and public-sector worker. The F.O.P. believes that the exclusion of public safety officers from the Part 541 regulations appropriately accounts for the challenges faced by our nation's police, fire, and rescue personnel in the post-9/11 environment, and is ready to work cooperatively with the Department of Labor on regulations which more appropriately account for the unique nature of the work performed by police, firefighters and EMS employees.

²⁸ NPRM, page 15585