

MEMORANDUM

DATE: June 28, 1995

TO: Herman T. Guerrero, President
Third Northern Marianas Constitutional Convention

FROM: Legal Team

SUBJECT: Weekend Compensation of Government Employee
Delegates

QUESTION: Are Delegates who are government employees entitled to overtime compensation for sessions or committee meetings which take place on weekends or after normal working hours?

SHORT ANSWER: No; unless they are either civil service employees or in an exempted service classification which is neither executive, managerial nor administrative. We are informed that none of the delegates fall into any of those categories which might entitle them to overtime compensation.

DISCUSSION:

You have asked us to render an opinion on the issue whether delegates who are government employees are entitled to overtime compensation for their presence at plenary sessions and committee meetings which may take place on weekends, holidays or outside of normal working hours.

To determine the answer to the question it is necessary to examine the relevant provisions of the Convention's enabling legislation, Public Law 9-18, as well as applicable federal and CNMI laws and regulations.

1. Government Employee Delegates

Thirteen delegates are employees of the Commonwealth Government within the following agencies:

Delegate	Government Agency
John Oliver DLR Gonzales	Legal Researcher, CUC
Herman T. Guerrero	Exec. Asst. to the Governor
Victor B. Hocog	Chair, CPA; Gov's Rep. to Rota

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Henry U. Hofschneider	Adm. Services Officer, PSS/Tinian
Donald B. Mendiola	Cultural Literacy Teacher, PSS
James M. Mendiola	Personnel Officer, Tinian
Felix R. Nogis	JTPA Administrator
Joey P. San Nicolas	Classroom Teacher, PSS/Tinian
Bernadita T. Seman	Classroom Teacher, PSS
Marylou Ada Sirok	Corporate Director, MIHA
Mariano Taitano	Benefits Manager, Retirement Fund
Helen-Taro Atalig	CHC Staff Physician
Lillian A. Tenorio	Chief of Staff, House of Representatives

All of these government employee delegates are contract employees, in exempted service.

2. Con Con Enabling Legislation

Section 18 of P.L. 9-18 reads in relevant part:

Delegates shall be paid at the rate of One Hundred Dollars (\$100.00) per day for every day or part of a day the delegate is actually present at a session of the Convention or a meeting of a committee thereof; provided that delegates who are employees of the Government of the Commonwealth of the Northern Mariana Islands, its subdivisions, instrumentalities, or independent agencies or authorities, shall be granted **administrative leave with pay** and be paid out of the funds of the Convention only the difference between their pro-rated daily salary and One Hundred Dollars (\$100.00) per day if their salary is less than the latter amount;

(Emphasis added.)

Government employee delegates are therefore on administrative leave status while serving as delegates to the Third Northern Marianas Constitutional Convention. "Administrative Leave" is an absence from duty administratively authorized, without loss of pay and without charge to accrued leave.¹ There is no overtime pay within the context of administrative leave.

Although there is no legislative history directly on point, the intent of section 18 reasonably appears to be to compensate government employee delegates at the same rate of pay and on the same terms as their current

¹ CNMI Personnel Service System Rules and Regulations, section VII.A.4.G.

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government employment. The only exception to this general rule is the authority for payment of any differential between the government employee delegate's pro rated daily salary and one hundred dollars. Any entitlement to overtime compensation by the government employee delegate would have to be derived from the terms of the delegate's employment with the Commonwealth Government.

3. Personnel Regulations

The CNMI Personnel Service System Rules and Regulations, promulgated under the authority of 1 CMC section 8117, CNMI Personnel Service System Rules and Regulations, "[a]ll classified employees shall be eligible for overtime pay, except as provided in 1 CMC section 8211."² "Classified" employees in this context are understood to mean civil service employees. Because none of the government employee delegates are members of the civil service, the overtime pay provision of the personnel regulations are inapplicable to them.

The Excepted Service Personnel Regulations provide that "[p]ursuant to 1 CMC section 8131(2)³, excepted service employees shall be deemed executive, administrative or professional personnel. Therefore, an excepted service employee does not qualify for overtime, compensatory time-off, or stand-by rates of pay unless the Civil Service Commission certifies an exception...."⁴ "Excepted service" employees in this context are understood to mean non-civil service employees. Because all government employee delegates are excepted service employees, under the excepted service regulations they are not entitled to overtime pay.

4. Minimum Wage Laws.

Certain provisions of the Fair Labor Standards Act ("FLSA") are applicable to the CNMI through the operation of section 502(a) of the Covenant. Although the CNMI is specifically exempted from the minimum wage provisions of the FLSA under section 503(c) of the Covenant,

It should be noted that other provisions of the Fair Labor Standards Act, which deals with such matters as maximum

² Id., IV.B16.

³ 1 CMC section 8131 (2) provides that excepted service positions are special, unique and non-permanent.

⁴ Excepted Service Personnel Regulations, section I.7.C.

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hours and **overtime pay**, will be applicable to the Northern Marianas under the formula stated in Section 502 (a).

Section by Section Analysis of the Covenant at 58. (Emphasis added.)

The FLSA sets out specific standards for categories of employees who are not entitled to overtime pay. Unless an employee is within one of the exempt categories, the employee is entitled to time and a half overtime pay. The generally exempt categories are executive, administrative and professional employees. There is an extensive body of law which seeks to define these categories. We attach an Attorney General's Opinion dated March 27, 1991 which summarizes the requirements for each of these exempt categories. Generally, an employee who exercises discretion with a minimum of supervision, or is a professional such as a doctor, lawyer or teacher, is not entitled to overtime pay under the FLSA.

The Commonwealth Minimum Wage Law reiterates the provisions of the FLSA with regard to overtime:

§ 9223. Exemptions:

(a) The provisions of sections 9221[minimum wages] and 9222[overtime pay] of this chapter do not apply with respect to:

(2) A person employed in a bona fide executive, administrative or professional capacity. . . .

4 CMC section 9223.

Therefore, unless a government employee delegate can show that he or she is not employed in a bona fide executive, administrative or professional capacity, the delegate is not entitled to overtime pay.

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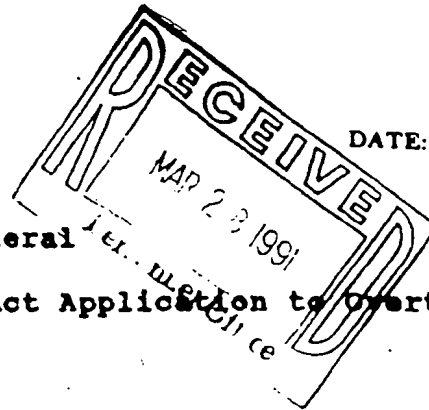


TO : Personnel Officer

DATE: 3/27/91

FROM : Assistant Attorney General

SUBJECT: Fair Labor Standards Act Application to Overtime Work



You have requested our opinion as to whether or not 1 CMC § 8249(a) may be in conflict with the Fair Labor Standards Act insofar as it applies to non-executive, administrative, and professional employees in the CNMI who earn more than \$25,000.00.

As you correctly stated in your request for a legal opinion, the Fair Labor Standards Act applies to the Commonwealth in such areas as maximum hours and overtime pay. 1 CMC § 8249(a) prohibits payment of overtime, hazardous, night differential, or standby differential to unclassified employees and to classified employees earning more than \$25,000.00. As you also correctly note, the Fair Labor Standards Act provides specific exemption for overtime pay for executive, administrative, and professional employees who meet the tests set forth in each category. The tests set forth are quite specific and there has been substantial litigation over the interpretation of the regulations.

As stated above, there are three separate exemptions to the overtime pay requirements. We will review each exemption, and briefly summarize the requirements thereof. The first is someone who is employed as an executive. In summary, an executive is an employee whose;

1. primary duty is management, and
2. directs the work of two or more employees, and
3. who has authority to hire and fire or substantial input into hiring or firing, and
4. exercises discretionary powers, and
5. does not devote more than 20% of his or her time to activities which are not covered by those mentioned in 1-4.

(Emphasis added.)

An employee employed in a bonafide administrative capacity is one;

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1. whose primary duty consists of either non-manual work related to management policies, or works in the administration of a school system, and
2. exercises discretion and independent judgment, and
3. who assists an owner or an executive or administrative employee or who performs supervisory work requiring special training, expertise, or knowledge, or works under general supervision, and
4. does not devote more than 20% of his or her time to activities which are non-administrative.

If an employee employed in a bonafide professional capacity is an employee;

1. whose primary duty consists of the performance of
 - (a) work requiring advance training, or
 - (b) original or creative work, which is artistic in nature, as opposed to general intellectual ability, or
 - (c) teaching, and
2. consistently exercises discretion, and
3. whose work is predominantly intellectual with non-stative results, and
4. does not devote more than 20% of his or her time to non-professional activities.

As a general rule, a person who exercises discretion with minimal supervision or is a professional, such as a doctor, lawyer, or the like, is exempt from the Fair Labor Standards Act. If there are employees of the Commonwealth government who are not professional and who are supervised on a regular basis without the ability to independently control their own work assignments nor direct others, they would not be exempted from the Fair Labor Standards Act. Those individuals should be paid overtime wages if they work more than 40 hours per week.

It is impossible to determine exactly which positions would fall within these exempt categories. Obviously, doctors employed at CHC and attorneys employed with the Attorney General's Office would qualify as professionals. Executives of departments

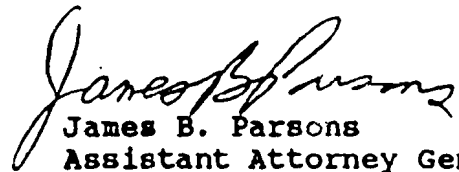
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and division heads would also qualify as executive or administrative. Other employees must have their position reviewed on a case by case basis to determine whether or not they fall within any of the exemptions.

Please take note that under each exemption, all of the requirements must be made. For instance, an employee in order to be considered an executive, must not only exercise discretionary power, but must direct the work of two or more employees and have the authority or substantial input into the hiring or firing of those employees. An administrative employee must perform non-manual work dealing with management policies, exercise discretion and execute, under general supervision, special assignments and tasks. If the employee's position does not allow for any one of those functions, he or she is not exempted and must be paid overtime.

Our office is unaware of how many Commonwealth employees currently earn more than \$25,000.00 per year. The Commission must review each position to determine if they are exempt, and then inform each department head that they must comply with the provisions of the Fair Labor Standards Act regarding overtime pay.

We will be happy to work with you further on this matter, should you have specific questions dealing with particular positions. Please contact us if you need further help in this regard.


James B. Parsons
Assistant Attorney General

THIRD NMI CONSTITUTIONAL CONVENTION

MATERIALS: _____

TOMAS B. ALDAN	Retired
VICENTE S. ALDAN	SHC - w/pay - private
MARIAN ALDAN-PIERCE	SPS - w/pay - private
FRANCES LG. BORJA	c-ment w/pay - private
CARLOS S. CAMACHO	Retired
ESTHER S. FLEMING	private
JOHN OLIVER DLR. GONZALES	contract - CMC
HERMAN T. GUERRERO	contract - Gov's Office
VICTOR B. HOCOG	contract - Gov's Rep. Rtn
HENRY U. HOFSCHEIDER	contract - P&S
DAVID L. IGTOL	Retired
JOSE R. LIFOIFOI	Retired
BENJAMIN T. MANGLONA	Retired
DAVID Q. MARATITA	Retired
DONALD B. MENDIOLA	contract - P&S
JAMES M. MENDIOLA	contract - Personnel Rep. Irian
FELIX R. NOGIS	contract - Administrator STPA
JUSTO S. QUITUGUA	Retired
JOEY P. SAN NICOLAS	teacher - St Irian Elem. Sch. - <i>diff. ex pay by conlon</i>
TERESITA A. SANTOS	not employed
BERNADITA T. SEMAN	teacher - SHS (diff. paid by conlon)
MARYLOU ADA SIROK	contract - Director MH Corp.
MARIANO TAITANO	contract - Retirement
HELEN TARO-ATALIG	contract - CMC
JUAN S. TENORIO	Retired
LILLIAN A. TENORIO	contract - Legislature
JOAQUIN P. VILLAGOMEZ	Retired