

§ 553.31

in the case of public safety employees as discussed below in section (3)), as well as all the facts and circumstances in a particular case, in determining whether employment in a second capacity is substantially different from the regular employment.

(3) For example, if a public park employee primarily engaged in playground maintenance also from time to time cleans an evening recreation center operated by the same agency, the additional work would be considered hours worked for the same employer and subject to the Act's overtime requirements because it is not in a *different capacity*. This would be the case even though the work was *occasional or sporadic*, and, was not regularly scheduled. Public safety employees taking on any kind of security or safety function within the same local government are never considered to be employed in a *different capacity*.

(4) However, if a bookkeeper for a municipal park agency or a city mail clerk occasionally referees for an adult evening basketball league sponsored by the city, the hours worked as a referee would be considered to be in a different general occupational category than the primary employment and would not be counted as hours worked for overtime purposes on the regular job. A person regularly employed as a bus driver may assist in crowd control, for example, at an event such as a winter festival, and in doing so, would be deemed to be serving in a different capacity.

(5) In addition, any activity traditionally associated with teaching (e.g., coaching, career counseling, etc.) will not be considered as employment in a *different capacity*. However, where personnel other than teachers engage in such teaching-related activities, the work will be viewed as employment in a *different capacity*, provided that these activities are performed on an occasional or sporadic basis and all other requirements for this provision are met. For example, a school secretary could substitute as a coach for a basketball team or a maintenance engineer could provide instruction on auto repair on an occasional or sporadic basis.

29 CFR Ch. V (7-1-11 Edition)

§ 553.31 Substitution—section 7(p)(3).

(a) Section 7(p)(3) of the FLSA provides that two individuals employed in any occupation by the same public agency may agree, solely at their option and with the approval of the public agency, to substitute for one another during scheduled work hours in performance of work in the same capacity. The hours worked shall be excluded by the employer in the calculation of the hours for which the substituting employee would otherwise be entitled to overtime compensation under the Act. Where one employee substitutes for another, each employee will be credited as if he or she had worked his or her normal work schedule for that shift.

(b) The provisions of section 7(p)(3) apply only if employees' decisions to substitute for one another are made freely and without coercion, direct or implied. An employer may suggest that an employee substitute or "trade time" with another employee working in the same capacity during regularly scheduled hours, but each employee must be free to refuse to perform such work without sanction and without being required to explain or justify the decision. An employee's decision to substitute will be considered to have been made at his/her sole option when it has been made (i) without fear of reprisal or promise of reward by the employer, and (ii) exclusively for the employee's own convenience.

(c) A public agency which employs individuals who substitute or "trade time" under this subsection is not required to keep a record of the hours of the substitute work.

(d) In order to qualify under section 7(p)(3), an agreement between individuals employed by a public agency to substitute for one another at their own option must be approved by the agency. This requires that the agency be aware of the arrangement prior to the work being done, i.e., the employer must know what work is being done, by whom it is being done, and where and when it is being done. Approval is manifest when the employer is aware of the substitution and indicates approval in whatever manner is customary.