

**OPINION NO. 80-061**

**Syllabus:**

1. Under 29 U.S.C. §§207 and 213, there is a presumption that an employee of a county children services board, or of any other "employer" as defined in R.C. 411.01(D), is not exempt from the overtime provisions of R.C. 411.03.
2. A social worker, as defined by the Mahoning County Children Services Board job description of a "child welfare caseworker 2,"

is not a "professional" as defined by the Fair Labor Standards Act of 1938, as amended, and is, therefore, not exempt from the requirement of R.C. 4111.03 that overtime pay be provided.

3. Under R.C. 4111.03(A), a county children services board, or any other county appointing authority, shall pay overtime to its employees who are not exempt from the overtime provisions of R.C. 4111.03, or it may, at the election of the employee, pursuant to R.C. 4111.03(C) or another policy adopted by the authority, grant compensatory time off in lieu of overtime pay.
4. Under the present wording of R.C. 5153.12, a county children services board has the authority to grant overtime pay or compensatory time off to those employees who are exempt from the overtime provisions of R.C. 4111.03.

**To: Vincent E. Gilmartin, Mahoning County Pros. Atty., Youngstown, Ohio**  
**By: William J. Brown, Attorney General, September 30, 1980**

I have before me your request of February 16, 1978, which concerns the status of social workers employed by the Mahoning County Children Services Board. Specifically, you have raised the following questions:

1. Would an employee of the Mahoning County Children Services Board, specifically a social worker, be classified as a professional as defined by the Fair Labor Standards Act of 1938, as amended, and thereby be excluded from overtime pay, pursuant to R.C. 4111.03?
2. Does a children services board have the authority, pursuant to R.C. 4111.03 and R.C. 5153.12, to provide for compensatory time off, in lieu of overtime pay, to employees who are not exempt from the overtime provisions of R.C. 4111.03?
3. Under R.C. 5153.12, does a children services board have the authority to grant overtime pay or compensatory time off to those who would otherwise be exempted from the overtime provisions of R.C. 4111.03?

You indicate further that there is apparently no uniformity of treatment of social workers among the various children services boards across the state.

R.C. 4111.03, to which your questions refer, was amended by S.B. 246, 112th Gen. A. (1978) (eff. June 16, 1978). It now provides, in part, as follows:

(A) An employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's wage rate for hours worked in excess of forty hours in one workweek, in the manner and methods provided in and subject to the exemptions of section 7 and section 13 of the "Federal Fair Labor Standards Act of 1938," 52 Stat. 1060, 29 U.S.C. 207, 213, as amended.

. . . .

(B) For the purposes of this section, the number of hours worked by a county employee in any one workweek shall be deemed to include, in addition to hours actually worked, all periods in an active pay status.

(C) If a county employee elects to take compensatory time off in lieu of overtime pay, for any overtime worked, such compensatory time may be granted by his administrative superior, on a time and one-half basis, at a time mutually convenient to the employee and the administrative superior within one hundred eighty days after the overtime is worked.

(D) A county appointing authority with the exception of the county welfare department may, by rule or resolution as is appropriate, indicate the authority's intention not to be bound by division (B) or (C) of this section, and to adopt a different policy for the calculation and payment of overtime that [sic] is embodied in those divisions. Upon adoption, the alternative policy prevails. (Emphasis added.)

The definition of "employer" set forth in R.C. 4111.01(D) includes "the state of Ohio, its instrumentalities, and its political subdivisions and their instrumentalities." Therefore, employees of a county children services board are clearly protected by R.C. 4111.03.

The "professional" exemption, to which your first question refers, is found in 29 U.S.C. §213. The relevant portion of that section states:

- (a) The [overtime] provisions. . . shall not apply with respect to--
- (1) any employee employed in a bona fide executive, administrative, or professional capacity. . . as such terms are defined and delimited. . . by regulations of the Secretary. . . .

The regulations which "define and delimit" the term "professional" for purposes of this section are found in 29 C.F.R. §541.3 and §§541.301-.315. The general definition of the term "professional" is found in 29 C.F.R. §541.3, and it reads:

The term "employee employed in a bona fide. . . professional capacity" in [29 U.S.C. §213(a)(1)] shall mean any employee:

- (a) Whose primary duty consists of the performance of:
- (1) Work requiring knowledge of an advance [sic] type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or
- (2) Work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee, or
- (3) Teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in the school system or educational establishment or institution by which he is employed; and
- (b) Whose work requires the consistent exercise of discretion and judgment in its performance; and
- (c) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and
- (d) Who does not devote more than 20 percent of his hours worked in the workweek to activities which are not an essential part of and necessarily incident to the work described in paragraphs (a) through (c) of this section; and
- (e) Who is compensated for services on a salary or fee basis at a rate of not less than \$170 per week. . . exclusive of board, lodging, or other facilities: Provided that this paragraph shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches. . . . Provided further that an employee who is compensated on a salary or fee basis at a rate of not less than \$250

per week. . . exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance either of work described in paragraph (a)(1) or (3) of this section, which includes work requiring the consistent exercise of discretion and judgment, or of work requiring invention, imagination, or talent in a recognized field of artistic endeavor, shall be deemed to meet all of the requirements of this section. (Emphasis added; italics omitted.)

Under federal law, it is well settled that the employee's duties, rather than his title, must be compared to the regulations in order to determine whether or not he is a "professional." Craig v. Far West Engineering Co., 265 F.2d 251 (9th Cir. 1959). Hence, a comprehensive answer to your first question is not really possible in the form of an opinion since it would require a factual examination of the duties performed in each social worker position involved.

The attorney for the Mahoning County Children Services Board provided this office with the job description currently utilized by such children services board for social workers; the job description consists of the classification specification for a child welfare caseworker 2, established by the Department of Administrative Services. This job description states, in part, as follows:

**ESSENTIAL KNOWLEDGES, ABILITIES AND SKILLS**

Ability to do work in community organization and interpretation.

**QUALIFICATIONS (MINIMUM)**

1 course in counseling (or 1 month's experience); 1 course in interviewing (or 1 month's experience); 1 course in psychology (or 1 month's experience); 3 courses in social work (or 3 month's [sic] experience); 1 course in office practices and procedures (or 1 month's experience); 1 course in speech (or 1 month's experience); or equivalent. **MAY REQUIRE DRIVER'S LICENSE.** The probationary period for this classification is 180 days.

29 C.F.R. §541.302 states, in pertinent part, as follows:

(a) The "learned" professions are described in § 541.3(a)(1) as those requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study as distinguished from a general academic education and from an apprenticeship and from training in the performance of routine mental, manual, or physical processes.

(b) The first element in the requirement is that the knowledge be of an advanced type. Thus, generally speaking, it must be knowledge which cannot be attained at the high school level.

(c) Second, it must be knowledge in a field of science or learning. This serves to distinguish the professions from the mechanical arts where in some instances the knowledge is of a fairly advanced type, but not in a field of science or learning.

(d) The requisite knowledge, in the third place, must be customarily acquired by a prolonged course of specialized intellectual instruction and study. Here it should be noted that the word "customarily" has been used to meet a specific problem occurring in many industries. As is well known, even in the classical profession of law, there are still a few practitioners who have gained their knowledge by home study and experience. Characteristically, the members of the profession are graduates of law schools, but some few of their fellow professionals whose status is equal to theirs, whose attainments are the same, and whose word is the same did not enjoy that opportunity. Such persons are not barred from the exemption. The word "customarily" implies that in the vast majority of cases the specific academic training is prerequisite for entrance into the profession. It makes the exemption available to the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry, etc., but it does not include the members of such quasi-professions as journalism in which

the bulk of the employees have acquired their skill by experience rather than by any formal specialized training. It should be noted also that many employees in these quasi-professions may qualify for exemption under other sections of the regulations in Subpart A of this part or under the alternative paragraph of the "professional" definition applicable to the artistic fields.

(e)(1) Generally speaking the professions which meet the requirement for a prolonged course of specialized intellectual instruction and study include law, medicine, nursing, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical, and biological sciences, including pharmacy and registered or certified medical technology and so forth.

29 C.F.R. §541.302(e)(1) further states that the "typical symbol of the professional training and the best prima facie evidence of its possession is, of course, the appropriate academic degree." Moreover, regardless of the degree of inherent talent which an individual may possess, the professional person attains such "professional" status after a prolonged course of specialized intellectual instruction and study. 29 C.F.R. §541.302(e)(2). The course qualifications listed in the job description for a Mahoning County social worker not only do not require a degree, but do not necessarily require the person to have taken academic courses if the individual possesses experience in the particular areas, e.g., interviewing.

Furthermore, in comparing the particular job description of a social worker of the Mahoning County Children Services Board with the criteria contained in 29 C.F.R. §541.3, it appears obvious that the position does not meet any of the professional standards set forth in paragraphs (a)(1), (2), or (3) of that section. In order to be termed a professional under this regulation, one's work duties must not only fit into at least one of those three categories, but also meet the requirements of 29 C.F.R. §541.3(b), (c), (d), and (e). According to the job description, the social worker for the Mahoning County Children Services Board is not performing work that results from a "prolonged course of specialized intellectual instruction and study" under 29 C.F.R. §541.3(a)(1). In addition, the work involved is not "in a recognized field of artistic endeavor" as noted in 29 C.F.R. §541.3(a)(2). This category includes "such fields as music, writing, the theater, and the plastic and graphic arts" according to 29 C.F.R. §541.303(b). Finally, the social worker is not "teaching, tutoring, instructing, or lecturing" as required by 29 C.F.R. §541.3(a)(3). Since none of these criteria are met, it is not necessary to refer to the remaining paragraphs of 29 C.F.R. §541.3(b), (c), (d), and (e), for they are to be applied only after first satisfying the terms of 29 C.F.R. §541.3(a)(1), (2), or (3).

It is, therefore, my opinion that the job description for a Mahoning County Children Services Board social worker, labeled as a "child welfare caseworker 2" does not fulfill the requirements of 29 C.F.R. §541.3 concerning a "professional" position. The above analysis is limited to the job description of "child welfare caseworker 2" outlined above.

In specific answer to your first question, then, a social worker of the Mahoning County Children Services Board, as defined by the Mahoning County Children Services Board job description of a "child welfare caseworker 2," is not a "professional" as defined by the Fair Labor Standards Act of 1938, as amended, and, therefore, is not exempt from the overtime pay requirements of R.C. 4111.03. Whether an employee who holds a position with a different job description is a "professional" depends upon the facts surrounding that employee's position.

It is clear that an employee is presumed to be non-exempt, Stanger v. Vocafilm Corp., 151 F. 2d 894 (2d Cir. 1945), and, therefore, the employer must be prepared to prove all of the elements established by the regulations in order to exempt an employee from the overtime provisions. Walling v. General Industries, Co., 330 U.S. 545 (1947); Usery v. Associated Drugs, Inc., 538 F. 2d 1191 (5th Cir. 1976). There is a general presumption that an employee is not exempt from the overtime requirements of 29 U.S.C. §207 as a "professional." The exemption applies if the employer can show that all of the elements of the definition of the

term "professional" set forth in the regulations of the Secretary of Labor exist within the duties actually performed by the employee.

Your second and third questions involve R.C. 4111.03 and, in addition, R.C. 5153.12. R.C. 5153.12 provides, in part:

All employees of the county children services board or county department of welfare shall be in the classified civil service. The board may establish compensation rates and vacation benefits for any of its employees. Insofar as practicable, all employees holding positions in the classified service, whose duties are transferred by this section to the board or department, shall be continued, with like status, by the appointing authority before any other appointments are made.

In relation to the above section, you ask whether a children services board has the authority to grant compensatory time off, in lieu of overtime pay, to its employees. With respect to employees who are subject to the provisions of R.C. 4111.03, R.C. 4111.03(C) expressly provides that a county employee may be granted compensatory time off (on a time and one-half basis) in lieu of overtime pay, if he so elects. R.C. 4111.03(D) permits a county appointing authority (other than the county welfare department) to adopt a different policy for granting compensatory time than that set forth in R.C. 4111.03(C). It does not, however, permit a county appointing authority to alter the requirements of R.C. 4111.03(A) concerning the payment of overtime wages. Under R.C. 5153.12, a county children services board may set compensation rates for its employees, and, under R.C. 4111.03(D), the board may adopt a policy for the calculation and payment of overtime or compensatory time off other than that policy set forth in R.C. 4111.03(B) and (C). However, the mandatory language of R.C. 4111.03(A) does not permit the children services board the option of granting compensatory time off rather than overtime pay except at the election of individual employees.

In formulating a policy pursuant to R.C. 4111.03(D), the board should be aware of 1975 Op. Atty Gen. No. 75-078, wherein it was stated that an overtime plan adopted with respect to county workers must be equal and uniform in its application to all employees who perform a substantially similar job.

Therefore, in specific response to your second question, under R.C. 4111.03(A), a county children services board, or any other county appointing authority, shall pay overtime to its employees who are not exempt from the overtime provisions of R.C. 4111.03, or it may, at the election of the employee, pursuant to R.C. 4111.03(C) or another policy adopted by the authority, grant compensatory time off in lieu of overtime pay.

Employees who are "professionals" or who, for other reasons, are not subject to the provisions of R.C. 4111.03, are not entitled to overtime pay or compensatory time off under statutory provisions. You have asked whether a children services board may, nonetheless, provide such employees with overtime pay or compensatory time off.

It would appear that the general grant of authority in R.C. 5153.12 to "establish compensation rates and vacation benefits for any of its employees" permits the board to allow overtime pay or compensatory time off to "professionals" or other employees exempt from the provisions of R.C. 4111.03(A). This language was added to the Revised Code by H.B. 734, 112th Gen. A. (1977) (eff. Oct. 11, 1977), apparently in response to 1976 Op. Atty Gen. No. 76-007, which stated that, absent a grant of power in R.C. Chapter 5153 to fix compensation or increase vacation benefits for employees, neither the executive secretary nor the children services board could establish vacation benefits for its employees that exceeded those provided for in R.C. 325.19. Since R.C. 5153.12 now contains such a grant of authority, 1976 Op. Atty Gen. No. 76-007 is no longer valid under existing law.

In addition, the recent case of Ebert v. Stark County Board of Mental Retardation, 63 Ohio St. 2d 31, 33, 406 N.E. 2d 1098, 1100 (1980), involving the power of a county board of mental retardation to adopt a sick leave policy in excess of the minimum level of R.C. 124.38, has ruled that, "for the power to employ to have any significance, it must, of necessity, include the power to fix the compensation of such employees." In finding the board's decision valid, the Ebert decision focused on the lack of any restrictive language in R.C. 5126.03(C), which authorized the county board of mental retardation to "[e]mploy such personnel and provide such services, facilities, transportation, and equipment as are necessary."

In comparing the language of R.C. 5126.03(C) with that of R.C. 5153.12, I find a similar lack of restrictive language in the county children services board's power to "establish compensation rates and vacation benefits for any of its employees." Furthermore, the wording of R.C. 5153.12 evinces a more expansive grant of authority to the children services board by expressly including the ability to "fix compensation in its terms. Included in the power to fix compensation is the ability to establish rates for overtime and compensatory time off for employees. Such payments are closely akin to fringe benefits of employees, which were found to be "as much a part of the compensations of office as a weekly pay check," in State ex rel. Parsons v. Ferguson, 46 Ohio St. 2d 389, 391, 348 N.E. 2d 692, 694 (1976). Therefore, based on the present wording of R.C. 5153.12, and the interpretation given an analogous statute by Ebert, I conclude in response to your third question that, under R.C. 5153.12, a county children services board has the authority to grant overtime pay or compensatory time off to those who are exempt from the overtime provisions of R.C. 4111.03.

It should be noted that R.C. 4111.03(D) provides that the county welfare department is bound to follow R.C. 4111.03(B) and (C), and may not adopt a different policy for the calculation and payment of overtime from that which is embodied in those divisions. Even though a county children services board may carry out some of the same duties as a county welfare department, see R.C. 5153.16, it is my understanding that your question solely concerns a county children services board. Thus, the language of R.C. 4111.03(D) does not affect my conclusion that the county children services board is free to determine whether to adopt divisions (B) and (C) of R.C. 4111.03 or to adopt a different policy for its calculation and payment of overtime.

Accordingly, it is my opinion, and you are advised, that:

1. Under 29 U.S.C. §§207 and 213, there is a presumption that an employee of a county children services board, or of any other "employer" as defined in R.C. 4111.01(D), is not exempt from the overtime provisions of R.C. 4111.03.
2. A social worker, as defined by the Mahoning County Children Services Board job description of a "child welfare caseworker 2," is not a "professional" as defined by the Fair Labor Standards Act of 1938, as amended, and is, therefore, not exempt from the requirements of R.C. 4111.03 that overtime pay be provided.
3. Under R.C. 4111.03(A), a county children services board, or any other county appointing authority, shall pay overtime to its employees who are not exempt from the overtime provisions of R.C. 4111.03, or it may, at the election of the employee, pursuant to R.C. 4111.03(C) or another policy adopted by the authority, grant compensatory time off in lieu of overtime pay.
4. Under the present wording of R.C. 5153.12, a county children services board has the authority to grant overtime pay or compensatory time off to those employees who are exempt from the overtime provisions of R.C. 4111.03.