

LEGAL AND REGULATORY NOTES, OCTOBER 2012

Vernon Police Chief not entitled to overtime compensation under Fair Labor Standards Act

The Vermont Supreme Court has held that a municipal police chief is not entitled to overtime compensation under the Fair Labor Standards Act (FLSA), even if a significant portion of the chief's duties involve ordinary patrol work. *Turnley v. Town of Vernon*, 2012 VT 69. The FLSA provides that a nonexempt employee who works more than forty hours in a week must receive compensation "at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1). However, workers employed in a "bona fide executive, administrative, or professional capacity" are exempt from the FLSA overtime mandate. 29 U.S.C. § 213(a)(1). The Code of Federal Regulations defines an "executive" as any employee:

- (1) Compensated on a salary basis at a rate of not less than \$455 per week ...
- (2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
- (3) Who customarily and regularly directs the work of two or more other employees; and
- (4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight. 29 C.F.R. § 541.100(a).

An executive employee's 'primary duty' must be the performance of exempt work. *Id.* § 541.700(a). In the law enforcement context, the definition of primary duty is qualified by the so-called "first responder" rule. *Id.* §541.3(b)(1). Under this rule, the executive exemption does not apply to:

police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators ... and similar employees, regardless of rank or pay level, who perform work such as ... preventing or detecting crimes; conducting investigations or inspections for violations of the law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work. 29 C.F.R. § 541.3(b)(1).

Officers whose primary duty is to investigate crimes, catch suspects, and perform other field police work are still entitled to overtime pay under the FLSA even though in the course of performing those tasks they may direct the work of other police officers. *Id.* § 541.3(b)(2). These first responders are not exempt executives "because their primary duty is not management of the enterprise in which the employee is employed." 29 C.F.R. § 541.3(b)(2).

In 2006, Kevin Turnley became Vernon's police chief under a verbal agreement with the Vernon selectboard and a written job description outlining the chief's duties. Turnley's compensation

was calculated from an hourly rate but he received a weekly salary and was not docked for vacation or sick leave. In 2009 Turnley sued Vernon seeking compensation for allegedly unpaid overtime hours. Turnley asserted that he was a first responder under the FLSA and entitled to overtime because his department was so chronically understaffed he was forced to take on a significant amount of extra patrol work that would normally be left to a regular police officer. The Town responded that the chief was a non-covered executive employee as defined by the FLSA and not entitled to overtime compensation.

The Supreme Court found that Turnley's job description and other evidence placed the chief squarely within the FLSA's executive exemption. The Court noted that while the FLSA first responder rule clarifies that a law enforcement officer, primarily charged with field operations, is not a manager simply because the officer directs the field operations of other officers, it does not turn a chief of police, whose primary duty is management, into a non-manager simply because he is required to perform patrol work.

Turnley also argued that because he did not have final say in the hiring and firing regular of department officers, he did not have the requisite authority of an executive under the FLSA. Twenty four V.S.A. § 1931(b) provides that "[t]he direction and control of the entire police force ... shall be vested in the chief of police." However, under 24 V.S.A. § 1931(a), a town's legislative body, or the town manager, "may establish a police department and appoint police officers and a chief of police who shall be a police officer." The Court noted, "read together, § 1931(a) and (b) envision a police department created by town government, the operations of which are directed by a chief, but which is concurrently and ultimately subject to the authority of town government. By itself, § 1931(b) ... means simply that the chief of police is in charge of the other people who work at the police department."

According to the Court, while the Vernon selectboard had final say on hiring and firing decisions in the department, the chief's recommendations influenced the selectboard's decisions. Under the FLSA, the chief's "recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees" in the department were given the "particular weight" of an exempt executive employee. A copy of the decision is archived at <http://info.libraries.vermont.gov/supct/current/op2011-351.html>.

Jim Barlow, Senior Staff Attorney
VLCT Municipal Assistance Center