

FLSA-1095

March 31, 1987

This is in response to your letter of November 6, 1986, with attachments, on behalf of your client ***. You question a finding of the local Wage and Hour Office that an employment relationship exists between the *** and participants in a rehabilitation/work program. Although you object to this finding, you nonetheless request the Administrator to determine the reasonable cost or fair value of board, lodging, and other facilities provided to participants.

As outlined in your letter, your client owns and operates a *** to the homeless, the hungry, and the addicted. *** operates two facilities in ***. The first, at ***, provides meals, shelter, overnight lodging, used clothing, counseling, and workshop services to individuals. At the second location, *** provides, in addition to the services listed above, a rehabilitation program for those with an addiction problem. As part of the rehabilitation program, the *** operates a workshop at the *** facility. The work performed there consists of the repair of wooden skids or pallets and the cleaning of plastic parts trays which are returned to the *** for eventual shipment to *** plants in other states. In return for their work, program participants are paid a small weekly allowance determined by the type of work performed and the participants' productivity.

The Fair Labor Standards Act (FLSA) is the Federal law of most general application concerning wages and hours of work. The law requires that all covered and nonexempt employees receive the applicable minimum wage of \$3.35 an hour for hours worked and not less than one and one-half their regular rates of pay for all hours worked over 40 in a workweek. Section 14 of FLSA allows the payment of subminimum wages to individuals handicapped by age or physical or mental deficiency or injury under special certificates issued by the Department of Labor.

As defined in section 3(g) of FLSA, the term "employ" includes to suffer or permit to work. It is clear from your letter that productive work, namely the repair of pallets and the cleaning of parts trays, is being performed at the *** facility.

Employees are subject to the provisions of FLSA if the work they are performing is covered either on an individual basis or an enterprise basis. In the past, the Wage and Hour Division has taken the position that the activities of a sheltered workshop or retail outlets of sheltered workshops are not ordinarily performed for a business purpose under the meaning of section 3(r) of FLSA. Therefore, enterprise coverage has not been applied in the past to such programs unless they are operated by hospitals, institutions, residential care facilities, or schools which are considered by definition to have a business purpose and are covered under section 3(s)(5) of FLSA.

Traditionally, the Wage and Hour Division has applied the concept of individual coverage to employees of sheltered workshops. Individual coverage is applicable in any workweek in which an employee is engaged in the production of goods for interstate

commerce, the movement of goods in interstate commerce, or in any operation or process which is closely related and directly essential to the movement of goods in interstate commerce. Since the wooden skids or pallets and the plastic parts trays are shipped to other states, individual coverage under FLSA is applicable to those who work on the skids or pallets and trays in any given workweek. Individual coverage is also applicable to the employees performing work which is closely related and directly essential to the movement of such goods in interstate commerce, such as those who keep records pertaining to the shipments received and sent out and individuals who keep the work area clean.

Section 3(m) of FLSA defines the term "wage" to include the "reasonable cost" as determined by the Secretary of Labor, to an employer of furnishing any employee with board, lodging, or other facilities, if such items are customarily furnished by the employer to his or her employees. The term "reasonable cost" is not more than the actual cost to the employer of the board, lodging, or other facilities and does not include a profit to the employer or to any affiliated person.

Section 3(m) also gives the Secretary the authority to determine the "fair value" of such facilities on the basis of average cost to the employer or to groups of employers similarly situated, on average value to groups of employees, or other appropriate measures of "fair value." Under Regulations, Part 531, if the reasonable cost is more than the fair rental value (or the fair price of commodities or facilities offered for sale), the fair rental value (or the fair price of the commodities or facilities offered for sale) shall be reasonable cost. Thus, the lesser of the two calculations is to be credited toward the employer's wage obligation. Regulations, Part 531, a copy of which is enclosed for your information, contains guidelines in section 531.3 of the types of expenses which may be counted in the determination of reasonable cost.

The statement of income which you provided with your letter does not contain sufficient detail to enable us to make a reasonable cost or fair value determination. Credit can only be given for expenses directly attributable to the provisions of board, lodging, or other facilities. For example, only those utility costs incurred as a result of providing room and board to program participants may be counted in the reasonable cost determination. Utility costs associated with the operation of the workshop or with the room and board provided at the facility must be excluded. Only certain supervisory and payroll expenses are allowable in a reasonable cost determination. We are providing you with a November 17, 1980, letter from former Deputy Administrator Henry T. White to a similar facility on the types of allowable supervisory and payroll expenses.

To the extent that the *** is reimbursed for board, lodging, or other facilities provided to program participants, those reimbursements must be subtracted from the employer's calculation of costs associated with the provision of board, lodging, or other facilities. It appears from the statement of income that the *** may be receiving funding from governmental sources for beds provided to program participants. If so, those payments must be subtracted from the *** calculations of expenses incurred in the provision of board, lodging, or other facilities.

We trust that this information will be helpful to you. If you should require additional assistance, please contact Ms. of my staff at ***.

Sincerely,

Paula V. Smith
Administrator

Enclosures