February 10, 1967

Willard R. Harris, Director — Personnel

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Fair Labor Standards Act and State Employees.

FACTS:

In your memorandum of January 12, 1967 you ask the question as to whether or not the Fair Labor Standards Act applies to the minimum wages of state employees, and whether or not time and one half must be paid for hours worked in excess of 44 in any given workweek to employees of a state hospital.

OPINION:

Prior to the 1966 amendments to the Fair Labor Standards Act, employees of the state were not subject to the terms of said Act. Extensive amendments to the F.L.S.A. made by Congress now clearly provide that certain state employees shall be subject to its terms. The 1966 amendments are to become effective on February 1, 1967 as set forth in 29 U.S.C. § 603.

Employees engaged in work made subject to the Act by the 1966 amendments must be paid at least $1.00 an hour beginning February 1, 1967, with specific hourly wage rate increases provided therefor in subsequent years. 29 U.S.C. § 206.

29 U.S.C. § 203d of the F.L.S.A. provides in part as follows:

> "'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to any employee but shall not include the United States or any State or political subdivision of a State (except with respect to employees of a State or a political subdivision thereof, employed (1) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section, or (2) in the operation of a railway or carrier referred to in such sentence), . . ."
> (Emphasis supplied)

The last sentence of 29 U.S.C. § 203, subsection "r" reads as follows:

> ". . . . For purposes of this subsection, the activities performed by any person or persons -
>
> (1) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit), or
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> (2) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit) shall be deemed to be activities performed for a business purpose."

Employees of the state or political subdivisions of the state who are employed in the business activities as set forth in 29 U.S.C. § 203 (d) and (r) quoted above are clearly entitled to payment of the minimum hourly wage rate of $1.00 per hour as set forth in 29 U.S.C. § 206 (b).

The basic overtime payment provision of the F.L.S.A. sets forth a maximum workweek of forty hours with payment of time and one half for all hours worked in excess thereof in any given workweek.

29 U.S.C. § 207 (a) (1). Employees covered under the new 1966 amendments to the F.L.S.A. are to receive overtime pay for all hours worked in excess of forty-four in any workweek, beginning February 1, 1967, with gradual yearly reductions down to the normal forty hour limit. 29 U.S.C. § 207 (a) (2). Thus state employees of a hospital, school, or even a motor carrier, as provided in 29 U.S.C. § 203 (d), would clearly be subject to the forty-four hour workweek overtime provisions of the F.L.S.A. as set forth in section 207 (a) (2).

It should be pointed out that not all state employees of hospitals, schools, or motor carriers are subject to the minimum wage and overtime payment provisions of the Act however. 29 U.S.C. 213 (a) (1) provides an exemption in regard to:

> "(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), . . ." (Emphasis supplied)

Thus, when we use the term "employees" in this opinion we are not referring to those employees exempt from coverage under the Act as set forth in section 213 (a) (1).

A difficult question arises as to whether employees of our state hospitals are entitled to overtime payment for all hours worked in excess of forty-four in any given workweek. 29 U.S.C. § 213 (b) (8) provides that an employee who is employed in an institution "(other than a hospital) primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises," shall be subject to overtime payment only for hours worked in excess of forty-eight in any given workweek.

Thus, in regard to employees of a state mental institution, if such an institution is in reality a hospital then its employees would be entitled to overtime payments at time and one half for hours worked in excess of forty-four in any given workweek. On the other hand, if mental institutions such as our state hospitals at Bangor and Augusta are not classified as hospitals, then the employees of such institutions would be subject to the overtime payment provisions of 29 U.S.C. 213 (b) (8), to wit: overtime

pay for all hours worked in excess of forty-eight in any work-week.

> "A 'hospital' is a place for the care of the sick whether in mind or body." Bennet v. Bennet, 27 Ill. App. 2d 24, 169 N.E. 2d 172.

The two state hospitals at Bangor and Augusta are established primarily, if not solely, for the treatment of the mentally ill. The treatment and care provided would clearly appear to be medical treatment. We therefore believe that such institutions are properly classified as hospitals and that certain employees of such institutions are in fact hospital employees and subject to the forty-four hour per week overtime payment provisions of 29 U.S.C. § 207 (a) (2).

To add confusion to the issue it must be pointed out that the overtime payment provision of 207 (a) (2) may be avoided by the hospital employer however. A special provision of the F.L.S.A., 29 U.S.C. § 207 (j) permits hospitals to adopt a 14-day period instead of the usual 7 day workweek provided at least time and one half the employee's regular rate of pay is paid for hours worked in excess of 8 in any workday and in excess of 80 in the 14-day period. In the absence of such an agreement between the hospital and its employees however, it would appear that employees of hospitals should receive overtime pay at time and one half their regular rate of pay for all hours worked in excess of forty-four in any given workweek.

Addendum

In your memorandum you have specifically asked whether employees in our state hospitals are entitled to payment of time and one half for hours worked in excess of forty-four in a workweek. We have answered said question in the affirmative. We would call to your attention the fact that the minimum wage and overtime payment provisions of time and one half for hours worked in excess of forty-four in a workweek will also apply to employees of our state teacher colleges, vocational

and technical schools, and schools operated by the Department of Education in unorganized territories, provided that said employees are not employed in a bona fide executive, administrative, or professional capacity as set forth under the exemption clause of section 213 (a) (1), of the Act quoted in the main body of this opinion.

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