21 AB 2

PD

U. S. DEPARTMENT OF LABOR
Employment Standards Administration
Washington, D. C. 20210

JUN 29 1973

This is in reply to your letter of April 18, 1973, addressed to [redacted] our Chicago Regional Office. Our replies are keyed to the numbers of your questions.

1. If all six of the criteria listed on page 3 of the pamphlet, Employment Relationship, are met, the trainees are not employees within the meaning of the Fair Labor Standards Act. The monetary requirements of the Act do not apply where there is no employment relationship.

These tests were derived from two cases adjudicated by the Supreme Court in 1947. These cases involved voluntary participation in training programs. See Walling v. Portland Terminal Co., 330 U. S. 148, and Walling v. Nashville, Chattanooga and St. Louis Railway, 330 U. S. 158.

2. The phrase you quote concerning persons who "may work for their own advantage on the premises of another" was taken from the Portland Terminal case and must be read in context with the other criteria. There is no single rule or test for determining whether an individual is an employee under the Act. The purpose and the manner in which an individual enters a training program are among the factors to be considered in determining whether there is an employment relationship. Whether participation is voluntary is considered in context with the other enumerated criteria. If the work-training activity is voluntary and all six criteria given are met, the trainee would not be considered an employee under the Act. We would need more information to assess the situation given in part (b) of your question concerning a mentally retarded individual whose participation in a training program may not be "voluntary".

WH-229

3. We would need more information to respond fully to this question. In general, a program of 18 months of work-training in which the trainee does productive work would not appear to fit under the six criteria. The cases cited above, from which the criteria were taken, involved training programs of seven or eight days duration. Additionally, other criteria may be used in situations that are different from those in the Portland Terminal case. For example, we have departed from that case with respect to tasks performed by patients in mental hospitals who are required to remain under the treatment for extended periods when the tasks they perform have been determined, as a matter of medical judgment, to have therapeutic or rehabilitative value in the treatment of such patients.

4. Work done in work activities centers by resident patients of mental institutions has always been considered as being performed pursuant to an employment relationship between the patient and the institution. Whether the product worked on or produced by the employee is destined for purchase by a profit-making or a charitable organization would have no effect on the determination of employment relationship as such.

Sincerely,

Ben P. Robertson
Acting Administrator
Wage and Hour Division