FLSA-527

July 10, 1973

This is in further reference to your letter of March 26, 1973, concerning the application of the Fair Labor Standards Act to the *** .

The 1966 amendments to the act extended enterprise coverage to all activities performed in connection with the operation of an elementary or secondary school, whether public or private or whether operated for profit or not for profit, regardless of the annual dollar volume of the institution, provided there are in the enterprise employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods which have been moved in or produced for commerce by any person. This is discussed further in the enclosed WH Publication 1332.

Enterprise coverage under the act was extended to preschools (including day care centers, nursery schools, kindergartens, head start programs and any similar facility primarily engaged in the care and protection of preschool children) by the 1972 amendments to the Higher Education Act of 1965, which amended the Fair Labor Standards Act, effective July 1, 1972. The coverage of preschools is discussed in WH Publication 1364 which is also enclosed.

The report prepared by our Fort Worth Area Office on its investigation of the subject church and school has been reviewed. It was found among other things, that $364.14 in unpaid overtime compensation was owed to one female employee. This employee has been employed by the school as a kindergarten teacher for the past ten years. She spends about 25 hours per week teaching for which she is paid a salary of $200 per month. This same employee has also been employed by the same employer as a custodian for the past two years. These duties require that she clean and maintain the church, the school, and the kindergarten which is located in the basement of the church. She spends about 37 hours per week performing these custodial duties for which she receives a salary of $250 per month.

It is our opinion, after carefully considering all of the facts in this case, that the time spent by the employee as a kindergarten teacher and all of the time cleaning and maintaining the school and kindergarten is covered work and must be compensated for in accordance with the minimum wage and maximum hours and overtime compensation provisions of the Fair Labor Standards Act. It is our further opinion that the time spent by the employee cleaning and maintaining the church premises would not be covered by the act. Therefore, the hours of work as a custodian in the church proper and the pro rata share of the monthly salary which is paid for such work may be disregarded by the employer when determining his compliance with the monetary provisions of the act. This is so because performance of custodial work for a church, standing alone, would not subject an employee to the coverage provisions of the act. Of course, the employer's records must clearly show this delineation in duties performed and wages paid.

The report of investigation also indicates that $268.80 in unpaid minimum wages was found to be owed to the husband of the above employee. The husband helped his wife perform her custodial duties for 8 hours on Saturdays. A child labor violation, but not a monetary violation, was charged against the employer in that the 13 year old son of the couple referred to above assisted his parents by moving chairs about for 1 hour on Saturdays.

In this regard, it is our opinion that individuals who volunteer their services, usually on a part-time basis, to a church not as employees or in contemplation of pay are not employees within the meaning of the act. For example, persons who volunteer their services as lectors, cantors, ushers, or choir members would not be considered to be employees. Likewise, persons who volunteer to answer telephones, serve as doorkeeper, or perform general clerical, administrative, or custodial duties or functions would not be employees. However, in situations where the understanding is that the person will work for wages there will be an employment relationship. It's our opinion, based upon the particular facts and circumstances in this case, that neither the husband nor the son intended to work for wages and, therefore, no employment relationship existed within the meaning of the act. The facts may require a different result if the husband is regularly working at the school. However, we have concluded that this is not the case in the present situation.

The opinions expressed in this letter will be communicated to our Fort Worth Area Office and a representative of that office will contact the *** for the purpose of closing this investigation.

Sincerely,

Ben P. Robertson
Acting Administrator
Wage and Hour Division