FLSA-52

February 27, 1981

This is in reply to your letter of January 5, 1981, concerning the application of the Fair Labor Standard Act to employees of the *** Arboretum of the *** Botanical Garden.

The act applies to employees individually engaged in or producing goods for interstate commerce and to employees in certain enterprises. Employees who regularly order or receive goods or materials from outside the State or who regularly communicate across State lines by telephone, telegraph or the mail are individually covered under the law, and are entitled to a minimum wage of $3.35 an hour and overtime premium pay for all hours worked over 40 in a workweek, unless specifically exempt.

Enterprise coverage under section 3(s)(1) of the Act would apply to enterprises that have employees engaged in commerce or in the production of goods for commerce, or employees handling, selling or otherwise working on goods or materials that have been moved in or produced for commerce by any person, and the enterprise has an annual dollar volume of sales made or business done of not less than $250,000, exclusive of excise taxes at the retail level which are separately stated. The dollar volume that is attributable to educational, eleemosynary, and religious activities of a nonprofit organization is not included in determining whether or not the annual volume test discussed above is met, since such activities are not considered to be performed for a business purpose. Please note that even though enterprise provisions under section 3(s)(1) of the Act may not apply to some nonprofit enterprises, employees may be covered on an individual basis and subject to the Act's monetary provisions if they are individually engaged in or producing goods for interstate commerce, as discussed in the second paragraph above.

You state that the employer, its employees and the labor organization want to defer the actual payment of the compensation for the overtime hours to a future time. It is contemplated that an employee could accrue overtime hours worked and then take that time as paid time off (at the rate of one and one-half paid hours off for each overtime hour worked) some time after this workweek within which the overtime is earned. It is further contemplated that accruing the hours rather than receiving immediate one and one-half time payment in the same workweek would be voluntary on the part of each employee each time the employee worked overtime.

It is our opinion that such a plan would not be in compliance with the overtime pay provisions of the act. The language of the act and the controlling court decision make it clear that a covered employee cannot waive his or her right to be paid the minimum wage or overtime compensation for all hours worked in excess of the applicable maximum standard. In Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, the Supreme Court said that the policy consideration of Congress in enacting the FLSA "forbids waiver of basic minimum and overtime wages under the Act." Therefore, a plan in which a covered

nonexempt employee can take overtime hours off at some future date other than the workweek in which they are earned, even at a rate of one and one-half times his or her regular rate of pay, would not be permissible.

If after reading the enclosed material you have any further questions concerning the application of the Fair Labor Standards Act, you may find it more convenient to get in touch with our Area Office in ***.

That office will be pleased to offer every possible assistance.

Sincerely,

Henry T. White, Jr.
Deputy Administrator

Enclosures