

FLSA-2

January 2, 1987

This is in response to your letter of November 19, 1986, addressed to ***. You wish to know if the provisions of the Fair Labor Standards Act (FLSA) apply to the *** (the Center).

The FLSA is the Federal law of most general application concerning wages and hours of work. It requires that all covered and nonexempt employees be paid not less than the minimum wage of \$3.35 an hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek. A copy of FLSA is enclosed for your information.

The Center is a wildlife organization which has been established as a nonprofit, public corporation to promote the conservation of birds of prey. This organization received \$38,758 in total income during 1985.

The Center's conservation effort extends to the rehabilitation of injured birds and related research activities which are conducted by the organization's staff at its headquarters. In addition, the Center publishes a newsletter and conducts educational programs as a means of increasing public awareness of the environmental importance of birds of prey.

You indicate that the Center meets its operating expenses by raising income from membership subscriptions, donations or contributions, and the sale of merchandise which is exhibited in conjunction with the educational programs. Additional financial support was provided by the government of *** County in the form of salary grants which enabled the Center to hire three administrative employees. In addition to these three employees, the Center's operating staff is comprised of approximately 50 volunteer workers and a number of other individuals who are serving a limited internship with the organization.

With regard to the volunteer workers who are referred to in your letter, it should be noted that coverage under FLSA depends on the existence of an employer-employee relationship. This requires an "employer" and an "employee" as well as the act of condition of employment. The U.S. Supreme Court, in Walling v. Portland Terminal Company, 330 U.S. 148, made it clear that the employment relationship under FLSA is broader than the traditional common-law concept of master and servant. The differences between the employment relationship under FLSA and that under common law arises from the fact that the term "employ", as defined in section 3(g) of FLSA, includes "to suffer or permit to work." However, it is also stated in this decision that FLSA is not intended "to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another" (*id.* at 152). Therefore, individuals who volunteer or donate their services for public service, religious, or humanitarian objectives, not as employees and without

contemplation of pay, are not considered to be employees of the religious, charitable, or nonprofit organizations which receive their services.

The FLSA applies to (1) employees who are individually engaged in or producing goods for interstate commerce and (2) employees who are employed by certain enterprises. Section 2(a) of FLSA provides a statement of the legislative intent regarding individual coverage; section 3(s) refers to specific types of covered enterprises.

The application of individual coverage to any particular employee of the Center is determined by the type of duties which this employee performs during the workweek. Employees may be individually covered under FLSA if they regularly and recurringly use the mails, the telephone or telegraph in interstate communication, or prepare, handle, or distribute published material for distribution in interstate commerce.

Enterprise coverage, as described in section 3(r) of FLSA, applies only to activities performed for a business purpose and does not attend to eleemosynary, religious, educational or similar activities or organizations such as the Center which are operated on a nonprofit basis, other than the following: hospitals; institutions primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institutions; schools for the mentally or physically handicapped or gifted children; preschools; elementary or secondary schools; and institutions of higher education. It is our opinion that the activities of the Center, as described in your letter, are not performed for a business purpose and, therefore, do not constitute an "enterprise" for the purpose of applying the provisions of FLSA.

We trust that the above is responsive to your inquiry.

Sincerely,

Paula V. Smith
Administrator

Enclosure