

DOCUMENT RESUME

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Review of Constituent's Complaint on Investigation by the Department of Labor for Compliance with the Fair Labor Standards Act of 1938. HRD-77-153; B-133182. October 11, 1977. Released October 13, 1977. 9 pp.

Report to Sen. Russell B. Long; by Gregory J. Ahart, Director, Human Resources Div.

Issue Area: Income Security Programs: Programs to Protect Workers' Income (1306).

Contact: Human Resources Div.

Budget Function: Education, Manpower, and Social Services: Other Labor Services (505).

Organization Concerned: Department of Labor: Wage and Hour Div., New Orleans, LA.

Congressional Relevance: Sen. Russell B. Long.

Authority: Fair Labor Standards Act, as amended (29 U.S.C. 201 et seq.). Wage and Hour Publication 1282. Wage and Hour Publication 1308.

The Department of Labor's Wage and Hour Division investigated A. Leonard Soeller's establishment in Slidell, Louisiana, to determine compliance with minimum wage and overtime provisions of the Fair Labor Standards Act. Mr. Soeller alleged that area office personnel: used a method of determining his coverage by the act which was different from that explained in publications; incorrectly computed the date his establishment became subject to the act; incorrectly calculated back wages resulting from violations; became hostile when errors were pointed out; and threatened him with a court suit if he did not pay back wages. Findings/Conclusions: The compliance officers' determination that an establishment became subject to the act on January 1, 1976 was in error, possibly because of the method used by Mr. Soeller to record sales and layaway receipts. However, there was no evidence of attempts by officers to obtain explanations. A second analysis of date of coverage was found to be accurate. Two of three summaries of back wages due employees contained errors in computation. Although a publication did not explain the method used to calculate the period of coverage for the act, it was only intended as a guide. Another publication provided an adequate explanation of the method used in computing sales volume, but Mr. Soeller was not provided with this publication until after the investigation. He was advised that court suit could be filed to recover back wages but there was no evidence that officers were hostile or uncooperative. Some problems could have been avoided if matters of concern were discussed more fully with Mr. Soeller, (HTW)

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UNITED STATES GENERAL ACCOUNTING OFFICE

WASHINGTON, D.C. 20548

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HUMAN RESOURCES DIVISION

B-133182

IN REPLY REFER TO:

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OCT 11 1977

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The Honorable Russell B. Long
United States Senate

Dear Senator Long:

In response to your request dated April 11, 1977, and subsequent discussions with your office, we have examined into allegations made by Mr. A. Leonard Soeller of Slidell, Louisiana, about the Department of Labor's investigation of his establishment for compliance with the minimum wage and overtime provisions of the Fair Labor Standards Act, as amended (29 U.S.C. 201 et seq.). The investigation was made in March 1977 by Labor's Wage and Hour Division area office in New Orleans, Louisiana. In his letter to you dated April 2, 1977, Mr. Soeller alleges that the area office personnel

- used a method of determining how and when his establishment was covered by the act which was different from that explained in the Wage and Hour Division publications provided to him,
 - incorrectly computed the date his establishment first became subject to the act,
 - incorrectly calculated the back wages he owed his employees as a result of apparent violations to the act,
 - became uncooperative and hostile when he pointed out errors in the computations and calculations of the underpayments, and
- advised him with a court suit if he did not pay wages determined to be due his employees.

HRD-77-153
(990516)

The Fair Labor Standards Act establishes minimum wage, overtime pay, equal pay, and child labor standards for certain employees in the private and public sectors. The act covers any employee in a retail or service enterprise which has (1) an annual gross volume of sales made, or business done, of at least \$250,000 (exclusive of excise taxes) and (2) some 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.

The 1974 amendments to the act set minimum wage rates for covered employees at \$1.90 an hour beginning May 1, 1974. These rates increased to \$2.00 an hour on January 1, 1975, to \$2.20 an hour on January 1, 1976, and to \$2.30 an hour on January 1, 1977. The act also provides that covered employees are entitled to one and a half times their regular wage rates for all hours worked over 40 in a workweek.

The Wage and Hour Division in Labor's Employment Standards Administration is responsible for enforcing the minimum wage and other provisions of the act. Enforcement is carried out by compliance officers in area offices and field stations located throughout the United States.

The compliance officers conduct investigations at establishments and gather data on wages, hours, and other employment conditions in order to determine compliance with the act. When violations of minimum or overtime wage rates are found, the Wage and Hour Division personnel supervise the establishment's payment of back wages to employees. If the establishment refuses or fails to pay back wages found to be due during an investigation, the act authorizes the Secretary of Labor or the employee to institute court action against the establishment for recovery of the back wages.

The Wage and Hour Division's New Orleans area office is responsible for making investigations in Louisiana where Mr. Soeller's establishment is located. Mr. Soeller's establishment consists of two stores engaged in retailing the electronic items handled by franchises of the Radio Shack chain (a subsidiary of the Tandy Corporation). The first store opened in 1971 and the second in November 1976. Both stores are located in Slidell, Louisiana.

RESULTS OF THE WAGE AND HOUR
DIVISION'S INVESTIGATION

In December 1976, the New Orleans Area Office received a complaint that Mr. Soeller's employees were being paid below the minimum wage rates. As a result, the area office conducted an investigation of Mr. Soeller's stores in March 1977. The investigation was made by a compliance officer and a trainee.

Initial determinations of violations

To determine whether Mr. Soeller's stores were covered under the act, the compliance officers computed the first store's annual sales for calendar years 1974, 1975, and 1976. The compliance officers' analysis showed gross receipts for the store of \$284,390 from January 1 to December 31, 1975. The gross receipts included total sales, labor, and layaway receipts, less excise taxes. Thus, the compliance officers concluded that the store became subject to the act effective January 1, 1976. Mr. Soeller was allowed a 1-month grace period and coverage of the store started February 1, 1976.

The compliance officers determined that Mr. Soeller's second store became subject to the act effective January 1, 1977. Under the act, after January 1, 1977, the second store did not have to meet the \$250,000 annual sales volume requirement to be covered since it was part of an enterprise already subject to the act.

After determining that Mr. Soeller's stores were covered, the compliance officers reviewed the wages paid to his 18 employees from February 1, 1976 to February 25, 1977, the cutoff date for the investigation. The review showed that 15 of the 18 employees were paid rates which were below the minimum required by the Fair Labor Standards Act, as amended. Also, eight of the employees were paid straight time for hours worked above their 40 hour workweek, rather than overtime, as required by the act. The compliance officers calculated that the 18 employees were due \$3,776.17 in back wages.

At the conclusion of the investigation, Mr. Soeller was given a summary showing the back wages due his 18 employees. After reviewing the summary, Mr. and Mrs. Soeller pointed out that at times, several employees had worked exclusively in the second store, which was exempt from coverage until January 1, 1977. As a result, the compliance officers had to prepare a second summary, which showed that only 16 employees were due back wages totaling \$3,084.91, from February 1, 1976 to February 25, 1977.

The revised summary was presented to Mr. Soeller, who took exception to the alleged minimum wage violations for certain employees as well as the method used in determining when his stores were covered by the act. Mr. Soeller requested that a conference with area office officials be held to discuss his objections.

Final determinations
of violations

On April 1, 1977, the conference was held at the New Orleans Area Office, and during the conference Mr. Soeller presented evidence which showed that the compliance officers had counted layaway receipts twice in computing the annual gross receipts at his first store. Consequently, the compliance officers had to recompute the dollar volume of business. They found that Mr. Soeller's first store was covered effective April 1, 1976, rather than January 1, 1976, as they had originally calculated. The compliance officers also had to prepare a third summary of minimum and overtime violations based on the new coverage date. This summary reduced the back wages due the 16 employees from \$3,084.91 to \$2,733.31.

On April 4, 1977, Mr. Soeller agreed to pay the back wages to the 16 employees shown on the third summary. Payments were to be made in three installments, the first to 10 employees was to be paid on April 10, 1977, the second to 4 employees on May 10, 1977, and the third to the remaining 2 employees on June 10, 1977. At the time of our field work in August 1977, data in the case file showed that the back wages had been paid to only nine employees. The New Orleans Area Director told us on September 9, 1977, that he would follow up to determine whether Mr. Soeller paid the back wages to the remaining seven employees when the case file (which is in Washington for review) is returned.

GAO REVIEW OF INVESTIGATION

As agreed with your office, we reviewed the compliance officers' investigation report and related documents, and discussed the case with Wage and Hour Division officials at the Washington headquarters. The review covered the compliance officers' determination as to when Mr. Soeller's stores were covered by the act, the computation of the back wages due his employees; and Mr. Soeller's allegations regarding inadequate publications provided him, the threat of a court suit, and uncooperative behavior by the area office personnel.

Coverage of stores under the act

The compliance officers' two analyses to determine when Mr. Soeller's stores became subject to the act were based on sales records for calendar years 1974, 1975, and 1976, provided by Mr. Soeller and his accountant. The sales and income records for 1975 and 1976 (the only records available in the file) listed total sales, receipts for labor, and layaway sales separately; the compliance officers, in computing total receipts, added the three figures.

Mr. Soeller's sales and income records did not include a statement or notation that the layaway sales were included in total sales figures. This factor may have been the cause for the error by the compliance officers in including the layaway receipts twice in their first computation, showing Mr. Soeller's store as being covered effective January 1, 1976. The New Orleans Area Director stated that Mr. Soeller's accountant was present when the compliance officers were making their analysis, but the accountant did not comment on the sales figures being used in the analysis. However, we found no evidence in the case file that, during the investigation, the compliance officers had requested from Mr. Soeller or his accountant an explanation of the method used in recording sales and layaway receipts.

We also reviewed the compliance officers' second analysis which showed that Mr. Soeller's store was covered by the act effective April 1, 1976. The analysis and computations were accurate, and the determination of coverage was made in accordance with Labor regulations and the act.

Computation of back wages

The compliance officers provided Mr. Soeller three separate summaries of back wages due his employees. On the first two summaries, the compliance officers erred in computing the amount and number of employees due back wages.

The first summary erroneously included employees who worked in the second or exempt store. This error appeared to be due to the firm's lack of adequate payroll and time records. The compliance officers claimed that many records had to be reconstructed from memory by Mrs. Soeller, and that there were no indications on the payroll records that some employees had worked at both stores.

Also, according to the New Orleans Area Office Director, all of the employees were carried on one payroll so the compliance officers included all as working in the first store, which was subject to the act. The Area Office Director stated that no one told the compliance officers during the investigation that some employees were working exclusively at the second or exempt store. We found no evidence in the case file to show that during the investigation the compliance officers had discussed this possibility with Mr. Soeller, or with Mrs. Soeller, who helped reconstruct the payroll records.

The errors on the second summary of back wages due were caused by the compliance officers' mistake in computing the period the first store was subject to the act.

On the third summary provided to Mr. Soeller, the compliance officers' computations showed that \$2,733.31 in minimum wage and overtime pay was due 16 employees. Our review showed that the computations and determinations of wages due were accurate and appeared to be related to the period when the stores were covered under the act.

Adequacy of publications
provided Mr. Soeller

Mr. Soeller alleges that neither of the wage and hour publications provided him contain an adequate explanation of the annual dollar volume method used by the compliance officers in calculating the period his stores were covered under the act. The publications were Wage and Hour (WH) Publication 1282, entitled "Handy Reference Guide to the Fair Labor Standards Act," and WH Publication 1308, entitled "Retail and Service Establishments under the Fair Labor Standards Act."

Mr. Soeller is correct in asserting that WH Publication 1282 does not explain the method used to calculate the period of coverage for the act. This publication had been provided to Mr. Soeller several months before the investigation. According to a note on the publication, it is a guide intended to provide general information about the application of the act.

We believe that WH Publication 1308 provides an adequate explanation of the method used in computing an establishment's annual gross volume of sales to determine whether it is covered or exempt from the act. The method explained in the publication is the method used by compliance officers in determining whether Mr. Soeller's stores were covered. We noted, however, that

Mr. Soeller was not provided a copy of WH Publication 1308 until after the investigation had been completed and the conference held on March 24, 1977 at his store.

Threats of court suit

Mr. Soeller alleges that during the investigation, Wage and Hour Division Area Office officials threatened him with a court suit if he did not pay his employees the back wages and that the officials became hostile and uncooperative when he pointed out errors in their calculations.

From the data in the case file, it appears that the issue of a court suit arose during the conference at the New Orleans Area Office, when Mr. Soeller asked what would happen if he refused to pay the back wages. He was advised by the Assistant Area Office Director that he would refer the case file to the Dallas Regional Office with a recommendation that a suit be filed to recover the back wages due his employees.

Also, a Wage and Hour Division headquarters official told us that firms under investigation are usually told of the possibility of court action by Labor or the employees if the firms refuse to pay back wages due employees. He said that compliance officers are required to do this as part of Wage and Hour Division's enforcement policy and investigation procedures.

During our review of documents and data in the case file, we found no evidence that the Wage and Hour Area Office compliance officers and other officials were hostile when errors were called to their attention by Mr. Soeller or were uncooperative in making adjustments to the back wages as a result of their errors. Also, it appears that the compliance officers followed Wage and Hour Division procedures during the investigation.

However, from the documents and reports on the investigation in the case file, it was readily apparent that Mr. Soeller was concerned about the overall investigation, particularly about not being given an adequate explanation of the method used by the Wage and Hour Division Area Office in determining when his stores became subject to the act. It appears that the New Orleans Area Office Assistant Area Director and the compliance officers could have more thoroughly discussed this and other matters with Mr. Soeller during the investigation and some of the problems might have been avoided.

COMMENTS AND ACTION BY THE
DALLAS REGIONAL OFFICE

As agreed with your office, we referred Mr. Soeller's allegations to the Department of Labor and requested that an investigation be made. In his report on the investigation, the Employment Standards Administration Regional Administrator for the Dallas Region, who has jurisdiction over the New Orleans Area Office, acknowledged that there were problems in the handling of the investigation. The Regional Administrator's report stated:

"Based upon all the memorandum provided to my office, it is my conclusion there should have been better communication between the employer and the compliance officers; thus, we could have avoided the issuing of three different summaries of back wages due. One of these compliance officers was a trainee, however, one was a journeyman compliance officer. Based upon the information available to me, a complete and thorough discussion with the employer at the opening conference should have eliminated many of the problems which were encountered within this case. Part of the problems centered around employees for two establishments being on a single payroll record. This should have been explored fully by the compliance officers and they should not have issued a back wage summary that contained names of employees who at the time were working for an exempt retail establishment. There were also questions, two different times, concerning the annual dollar volume of the establishment. Contrary to Mr. Soeller's April 2, 1977 letter, the publication provided him, publication 1308 pertaining to Retail and Service Establishments Under the Fair Labor Standards Act, does indeed explain fully how computations for the annual dollar volume are made. The computations as made, using the "rolling quarter" basis are correct and the interpretations contained in the publication given to Mr. Soeller are quite clear.

"As new facts and new evidence were pointed out to the compliance officers and later on to the management staff at the Area Office, appropriate adjustments were made; in this case, in favor of Mr. Soeller.

These adjustments were quite proper as insufficient facts could lead to incorrect conclusions and we do not want an employer paying back wages which are not justifiably due. Once an error is made, it is our responsibility to take appropriate action to see to it that corrections are made. This is the procedure we followed in this case."

The Regional Administrator stated further that he had discussed this matter with both compliance officers involved in this case in order to see that such action does not take place in the future. He said that the errors made on this case do not support any other action. However, the Regional Administrator said that he was taking regionwide actions to see the area office management staff more carefully review the findings and conclusions of subordinate staff.

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The contents of this report were discussed with officials of the Wage and Hour Division at the headquarters, and their views were considered in preparing the report.

As agreed with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 7 days from the date of the report. At that time we will send copies to interested parties and make copies available to others upon request.

Sincerely yours,


Gregory J. Ahart
Director