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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-202851 DATE: June 17, 1982

MATTER OF: R. A. Gottlieb, Inc.

DIGEST:

Amounts paid employee for meals and lodging while working about 200 miles from employee's permanent residence are credited against Davis-Bacon Act wage underpayments.

The Associate Solicitor, Fair Labor Standards, Office of the Solicitor, Department of Labor (DOL), requests that we reconsider our determination that lodging and meal expenses paid to an employee by a Government construction contractor, R. A. Gottlieb, Inc., should be credited against the Davis-Bacon Act, 40 U.S.C. § 276a (1976), wage underpayment to the employee.

The work which the employee performed was located about 200 miles from the employee's permanent residence. The contractor paid the employee $65 per week for lodging and meals while the employee worked at the distant location. A DOL Administrative Law Judge decided that the amount paid the employee for lodging and meals should not be included in the wages the employee received. Notwithstanding the ruling of the Administrative Law Judge, in discharging our function under section 3 of the Davis-Bacon Act, 40 U.S.C. §§ 276a-2, which authorizes us to find the amount due the employee, we concluded that the payments should be considered in determining whether the employee was underpaid under the Davis-Bacon Act.

In DOL's view, subsistence payments made by an employer to an employee temporarily working on a construction site away from the home locality of the employer must be considered as payment of subsistence expenses and not payment of wages or fringe benefits within the meaning of the Davis-Bacon Act. In support of its position, DOL refers to the manner in which board and lodging payments are treated

under other labor standards acts and in court decisions interpreting those acts. Also, DOL refers to the Internal Revenue Code and decisions under the code for guidance.

However, for the reasons indicated below, we sustain our determination that lodging and meal expenses should be credited against Davis-Bacon wage underpayments.

DOL has observed that there are no court decisions as to the application of board and lodging expenses under the Davis-Bacon Act. While DOL cites other labor standards acts, the tax code and judicial interpretations of those laws, it is not our responsibility to decide what constitutes payment under those other labor standards acts or taxable income under the Internal Revenue Code. Rather, we are concerned that the employee not receive less than the protection afforded under the Davis-Bacon Act.

The Davis-Bacon Act provides that an employee shall be paid "the full amounts accrued at the time of payment, computed at wage rates not less than those stated in the advertised specifications." 40 U.S.C. § 276a(a) (1976). This provision states how the employee's salary will be computed. This provision does not state what constitutes payment of the salary. The Davis-Bacon Act states a variety of ways, including payment in cash, for the employer to discharge the obligation to the employee. 40 U.S.C. § 276a(b) (1976).

As DOL recognizes, the contractor has no statutory obligation to pay for meals and lodging for out-of-town work. Thus, in this case, if the contractor had made the $65 a week part of the employee's salary and assumed no responsibility for the employee's food and lodging expense, the employee would have been no better off than he was here where he received one payment for wages and another for expenses. Since the contractor was under no statutory obligation to reimburse the employee for his expenses, the employee lost nothing by being paid voluntarily by the employer an allowance in cash for expenses. Therefore, we do not consider the $65 per week paid for expenses to be pure food and lodging expenses when the employer could have avoided that result simply by the mere expedient of

increasing the employee's wages by that amount without labeling it as a food and lodging allowance. In the circumstances, the employee was not prejudiced by the payment of a subsistence expense in lieu of comparable wages. Either way the employee would have netted the same amount. The statements in this paragraph are made in context of the Davis-Bacon Act and without regard to any obligations or liabilities the parties may have outside the Davis-Bacon Act. In view of our analysis, we will treat the expense allowance as an amount to be considered along with wages paid in determining the extent to which "the full amounts accrued at the time of payment" have been paid to the employee.

Harry R. Van Cleve
for Comptroller General
of the United States