

DOCUMENT RESUME

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[Complaints concerning Investigation for Compliance with Fair Labor Standards Act]. HRD-78-113; B-133182. May 16, 1978. Released May 23, 1978. 7 pp.

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

Issue Area: Federally Sponsored or Assisted Income Security Programs: Regulatory Legislation and Wages (1315).
Contact: Human Resources Div.
Budget Function: Education, Manpower, and Social Services: Other Labor Services (505).
Organization Concerned: Department of Labor.
Congressional Relevance: Sen. Russell B. Long.
Authority: Fair Labor Standards Act of 1938 (29 U.S.C. 201).
Fair Labor Standards Amendments of 1961. =29 C.F.R. 779.
Wage and Hour Publication 1308. Wage and Hour Publication 1340.

Certain allegations were made by A. Leonard Soeller with regard to GAO's report concerning the Department of Labor's investigation of his enterprise for compliance with the minimum wage and overtime provisions of the Fair Labor Standards Act. GAO did not contact Mr. Soeller or his accountant regarding the allegations. Direct contact with the employer was considered inappropriate because at that time the case was under investigation with potential for litigation to enforce payment for unpaid back wages. Contrary to Soeller's contention, the report neither stated nor implied that his stores were subsidiaries of the Tandy Corporation. The Department's use of the rolling (or tumbling) quarter method in computing Soeller's annual gross volume of sales was consistent with applicable provisions of the Fair Labor Standards Act. Wage and Hour (WH) Publication 1308 adequately describes this method of determining coverage under the act. Despite any shortcoming of WH Publication 1308, both Mr. Soeller and his accountant had specific knowledge of the rolling quarter method of computing annual gross volume of sales. However, Soeller was correct in his contention that WH Publication 1308 does not spell out an employer's specific rights to a higher-level review or administrative appeal in the event of disagreement with compliance procedures or findings. Contrary to Sceller's contention, the compliance officers applied published rules in determining that two employees did not qualify for exemption from minimum wage and overtime pay requirements. (RKS)

RELEASED 5/23/78



UNITED STATES GENERAL ACCOUNTING OFFICE

WASHINGTON, D.C. 20548

HUMAN RESOURCES
DIVISION

B-133182

May 16, 1978

The Honorable Russell B. Long
United States Senate

Dear Senator Long:

By letter dated October 26, 1977, you forwarded to us correspondence from Mr. A. Leonard Soeller of Slidell, Louisiana, commenting on our October 11, 1977, report to you (HRD-77-153) concerning the Department of Labor's investigation of his enterprise for compliance with the minimum wage and overtime provisions of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201 et seq.). In his October 17, 1977, letter to you, Mr. Soeller took exception to our report and to the actions of the Department, contending that

- General Accounting Office representatives did not interview him or his accountant to further substantiate what transpired during their meetings with the Department's Wage and Hour officials.
- Our Office accepted the Department's investigation results without performing our own investigation of the matter.
- Our report erroneously stated that Mr. Soeller's stores were a subsidiary of the Tandy Corporation, thus implying a controlling interest in his stores.
- The Department's use of the so-called "rolling quarter" method of computing annual gross volume of sales, in determining when Mr. Soeller's stores became covered under the act, is either contrary to the act or not clearly described in the Department's Wage and Hour (WH) Publication 1308, entitled "Retail and Service Establishments Under the Fair Labor Standards Act."

HRD-78-113
(20152)

- WH Publication 1308 does not, but should, spell out an employer's rights in the event he disagrees with the findings of a Wage and Hour investigation of his enterprise.
- The Department's compliance officers applied an unpublished rule in calculating back wages due two employees whom Mr. Soeller considered to be "store managers."
- The Department's compliance officers, in making their third and final calculations of back wages due, chose not to grant Mr. Soeller's enterprise a 1-month grace period from initial coverage under the act. In their original calculations, a 1-month grace period had been allowed.

As you requested in your letter, and so that your office may respond to Mr. Soeller's contentions, the following additional information is provided.

SCOPE OF GAO REVIEW

As stated in our October 1977 report, we reviewed the compliance officers' investigation report and related documents, and discussed the case with Wage and Hour Division officials at the Department's Washington headquarters. Although our Office did not perform an independent review of Mr. Soeller's enterprise, we reviewed the compliance officers' investigation report, examined all supporting documentation, reviewed their analyses and computations of annual sales volumes, and independently recomputed the minimum wage and overtime back wages due each of the 16 employees listed on the third and final Summary of Unpaid Wages (Form WH-56) presented to Mrs. Soeller on April 4, 1977. As stated on pages 5 and 6 of our October 1977 report, we found the compliance officers' final computations to be accurate and their determination of coverage to be in accordance with the Department's regulations and the act.

As agreed with your office at the time of our earlier review in 1977, we did not contact Mr. Soeller or his accountant regarding the allegations made by Mr. Soeller. We considered direct contact with the employer by our Office as being inappropriate because, at that time, this case was under investigation in the Department with potential for litigation to enforce payment by the employer of unpaid back wages due his employees. Also, because Mr. Soeller has still not paid in full the back wages due his employees, there is a continuing potential for litigation.

TANDY CORPORATION SUBSIDIARY

Contrary to Mr. Soeller's contention, our report neither stated nor implied that his stores were subsidiaries of the Tandy Corporation. We regret that such an inference was drawn by him from our report. Our background statement, on page 2 of the report, stated that Mr. Soeller's enterprise, consisted of two retail stores which were franchises of the Radio Shack (which is a subsidiary of the Tandy Corporation) chain. We were aware that Mr. and Mrs. Soeller were operating their enterprise as a family-owned corporation, A. L. Soeller, Inc.

USE OF ROLLING QUARTER METHOD

The Department's use of the rolling (or tumbling) quarter method in computing Mr. Soeller's annual gross volume of sales-- i.e., computing, at the beginning of each 3-month calendar or fiscal quarter, the gross sales volume (excluding taxes) of the previous 12-month period to determine when the enterprise's sales volume reached or exceeded the annual dollar minimum (\$250,000) for coverage under the act--is, in our judgement, consistent with the applicable provisions of the Fair Labor Standards Act. We continue to believe that WH Publication 1308 adequately describes this method of determining coverage under the act.

However, as stated in the document itself, WH Publication 1308 " * * * is for general information and is not to be considered in the same light as official statements of position contained in Regulations, Interpretative Bulletins and other such releases formally adopted and published in the Federal Register." Another Wage and Hour publication available to employers is Interpretative Bulletin 779 which contains a complete reprint of Title 29, Part 779 of the Code of Federal Regulations. Its purpose is to provide an official statement of the Department's views with respect to the application and meaning of those provisions of the act which govern the rights and obligations of employees and employers in the various enterprises in which retail sales of goods and services are made.

Section 779.266 of the bulletin sets forth a complete description of the rolling quarter method of computing annual gross volume of sales. As intended by the Congress and as specifically expressed in Senate Report 145, 87th Congress,

first session, on the then proposed Fair Labor Standards Amendments of 1961, 1/ this method must be used for the computation of annual gross dollar volume in all cases when such a computation becomes necessary to determine the applicability of provisions of the act. The method used by the Department's compliance officers in computing Mr. Soeller's annual gross volume of sales was in conformance with the act and the procedures described in section 779.266.

In this regard, it should be noted that, in a memorandum, dated June 23, 1977, to the Area Director, New Orleans Wage and Hour Area Office, the compliance officers stated that, during the final conference held at Mr. Soeller's main store on March 24, 1977, a copy of Interpretative Bulletin 779 was given to Mr. Soeller and his accountant, and section 779.266 was specifically pointed out to them. Therefore, it would appear that, despite any actual or perceived shortcomings of WH Publication 1308, both Mr. Soeller and his accountant had specific knowledge of the rolling quarter method of computing annual gross volume of sales.

NOTICE OF EMPLOYER'S RIGHTS

Mr. Soeller is correct in his contention that WH Publication 1308 does not spell out an employer's specific rights to a higher-level review or administrative appeal in the event of disagreement with compliance investigation procedures or findings. Because of the "general information" nature of this publication, however, it does advise the employer, on page 1, that, "If you have specific questions about the statutory requirements, contact the Wage and Hour Division's nearest office for answers to your questions."

Another publication available from local Wage and Hour area offices is WH Publication 1340, entitled "The Wage and Hour representative is here." This publication explains in laymen's language the purposes of and procedures followed in making compliance investigations and advises the employer that:

"If you are not sure about any point raised in the investigation and want additional information, the compliance officer will give you the name and address of the Area Director who supervises Wage and Hour operations in your area."

1/ subsequently enacted on May 5, 1961, as Public Law 87-30.

USE OF UNPUBLISHED RULE
IN COMPUTING BACK WAGES

Mr. Soeller contends that the compliance officers " * * * took two persons who we had as store managers on flat salary, and with nothing in the document to back it up, said we could not call them store managers and therefore recalculated their income to fit a non-published rule." Our examination disclosed that, contrary to Mr. Soeller's contention, the compliance officers applied published rules in determining that the two employees did not qualify for exemption from the minimum wage and overtime pay requirements of the act.

Under section 13(a)(1) of the act, an exemption from both the minimum wage and overtime pay requirements is provided for any employee employed in a bona fide executive, administrative, or professional capacity, or as an outside salesman, as these terms are defined and delimited in regulations of the Administrator of the Department's Wage and Hour Division. As stated on pages 8 and 9 of WH Publication 1308:

"An employee will qualify for exemption if all the pertinent tests relating to duties, responsibilities and salary as stipulated in the applicable section of Regulation, Part 541 [1/] are met. This exemption applies to such employees in any kind of business organizations, including retail or service establishments.

"Among the basic requirements for exemption are the following: An executive employee's primary duty must be the management of the enterprise, or of a recognized department or subdivision; * * *. In addition, the employee must devote no more than a specified percentage of time to activities which are not directly and closely related to the primary duty and other specified duties and responsibilities stipulated in the regulations. For an executive or administrative employee of a retail or service establishment, as defined in the Act, the tolerance for such nonexempt work is 40%." (Underscoring supplied.)

1/ Title 29, Part 541 of the Code of Federal Regulations.

In addition to the primary duty of management, Part 541 of the regulations stipulates, among other things, that the bona fide executive employee must (1) customarily and regularly direct the work of two or more other employees; (2) have the authority to hire or fire other employees or have his or her hiring, firing, and promotion recommendations given particular weight; (3) customarily and regularly exercise discretionary powers; and (4) not devote more than 40 percent of his work hours to activities not directly and closely related to the above duties. In the case of Mr. Soeller's two "store managers," the compliance officers found during their investigation that these employees were basically salesmen who usually supervised only one other employee at a time and who had no authority to hire or fire employees. As such, they could not qualify for exemption under the act.

DISALLOWANCE OF GRACE PERIOD

Mr. Soeller's final contention regarding the compliance officers' investigation of his enterprise appears to have been the disallowance, during the second-level conference, of a requested 1-month grace period in determining the date of his enterprise's initial coverage under the Fair Labor Standards Act. Originally, the compliance officers had allowed a 1-month grace period.

The authority for and limitations on allowing a 1-month grace period are contained in 29 CFR 779.268, which states that:

"Where it is not practicable to compute the annual gross volume of sales or business * * * [under section 779.266(b)] in time to determine obligations under the act for the current quarter, an enterprise or establishment may use a 1-month grace period. If this 1-month grace period is used, the computations made under this section will determine its obligations under the act for the 3-month period commencing 1 month after the end of the preceding calendar or fiscal quarter. Once adopted the same basis must be used for each successive 3-month period." (Underscoring supplied.)

The New Orleans Assistant Area Director stated that, in response to Mr. Soeller's request for the grace period, made during the second-level conference in his office, he advised Mr. Soeller that, since his enterprise was not a new business--it was started in 1971--Mr. Soeller should have known, based on analyzing his sales prior to the end of the

fourth quarter (March 31, 1976), that the annual gross volume of sales would exceed the \$250,000 limitation by the end of that fourth quarter.

In view of the detailed record of daily sales being maintained for Mr. Soeller's enterprise by his accountant, we tend to agree with the Assistant Area Director's position. Regardless of the initial decision of the compliance officers to allow a 1-month grace period, the subsequent and final decision of the Assistant Area Director, in our view, was consistent with the authority and limitations contained in 29 CFR 779.268.

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As stated in our previous report to you, on April 4, 1977, Mr. Soeller had agreed to pay \$2,733.31 in back wages due 16 of his employees, as finally determined by the Department's compliance officers, in three installments over a period of about 2 months. We also stated that as of August 1977, back wages had been paid to only 9 of the 16 employees and that follow-up action was to be taken by the Department's New Orleans Area Director.

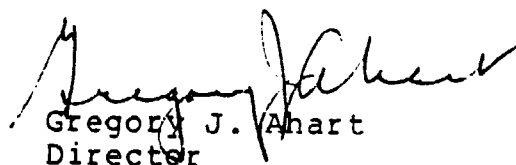
We have recently been advised by the Department that no further back wage payments have been made by Mr. Soeller and that about \$1,830 is still owed to 7 of the 16 employees.

A draft of this report was reviewed informally by officials of the Department, and they advised us that they had no comments to offer on 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.

We trust that this additional report will be of assistance to you in responding to your constituent.

Sincerely yours,


Gregory J. Ahart
Director