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Alaska State Legislature

Senate

Office of the President

Official Business

Pouch V
State Capitol
Juneau, Alaska 99811

January 29, 1983

TO: Senator Richard Eliason, Chairman
Senate Labor & Commerce Committee

FROM: Senator Jay Kerttula
Senate President

The attached material concerning minimum wage from Leonard and Henrietta Nugen was recently received in my office. It is being forwarded for you information and for the perusal of your committee.

NUGEN'S RANCH

Alaska Alcoholism Rehabilitation Services, Inc.

January 7, 1985

Jalmar M. Kerttula
State Senator
Pouch V
Juneau, Alaska 99811

Dear Senator Kerttula:

We are enlisting your assistance in amending the law and/or drafting legislation concerning the payment of minimum wage to clients in long-term alcohol treatment here at the Ranch.

Enclosed are copies of our concerns regarding the minimum wage. We are also enclosing copies of materials pertaining to our law suit in the matter of client confidentiality. We hope you will have time to review this material.

Philip Volland, our attorney, is really up to date in the wage law, and is willing to answer any questions you might have or assist in any way he can in this matter. His telephone number is 276-5231.

We are enlisting the assistance of a number of legislators and will be contacting them as well and making this information available to them.

It really makes no sense for the State of Alaska to provide the funding for this program here at the Ranch, and then have to pay the minimum wage to the clients to grow potatoes, paint, work in the greenhouse, help in the kitchen, do chores, etc. It takes away from the program and ties our hands for treatment. We will just be warehousing people again. We want to get our clients well mentally and physically. We cannot pay them, so they will just sit. We are defeating ourselves with this requirement. These folks we work with do not need money. It is one of their worst enemies. Perhaps it would make sense to pay them $6 an hour, but $3.85 an hour--no way!

We need your help.

Sincerely,

Henrietta & Leonard

Henrietta and Leonard Nugen, Directors

HLN/pk
Enclosures

P.O. Box 1545 · Wasilla, Alaska 99687 · (907) 376-4934

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December 16, 1982

Rick Robertson
Assistant Attorney General
Pouch K
Juneau, Alaska 99811

Re: Mat-Su Council, et al. v. Korhonen, et al.

Dear Rick:

Enclosed please find a courtesy copy of the Complaint in the above-referenced matter. The Complaint should be filed in court late this afternoon or early tomorrow morning. Service will be accomplished by certified mail on the named defendants and the Attorney General.

As I mentioned on the phone, my clients are concerned about possible termination of their funding because of representations made by SOADA that any program which refused to comply with the MIS would face action to terminate their FY '83 grant awards. The Mat-Su Council was informed by SOADA that their third quarter advance (for the period beginning January 1, 1983) would not be approved if they continued to refuse to comply with the MIS. The Valdez Counseling Center has yet to receive its second quarter advance, presumably because of the Center's vociferous opposition to the MIS. I am prepared to seek injunctive relief if SOADA continues to refuse to extend funding to these programs now that litigation has been filed.

I am asking your office to consider entering into a stipulation on behalf of the defendants which would provide that the Department and SOADA take no action to compel the plaintiff programs to comply with the information reporting requirements of the MIS, nor any action to suspend or terminate their funding as a result of noncompliance with the MIS during the pendency of litigation. This would include a provision that second quarter funds for the Valdez Center be immediately extended.

Needless to say, little is accomplished by SOADA taking any punitive action against programs in an attempt to force compliance with the MIS. On balance, SOADA and the Department lose little by foregoing collection of data under the MIS until the court resolves the issues presented by the case. The plaintiff programs, on the other hand, will be forced to close their doors or produce information about their clients they believe to be constitutionally protected. The losers in either case are the clients served by the plaintiff programs. Under the circumstances, I believe the court would grant injunctive relief without hesitation.

While we may differ about the ultimate issues, litigation over injunctive relief would be unnecessarily time consuming and expensive. My clients intend to deal with this case in a straightforward and expeditious manner so as to promote an orderly and speedy judicial resolution of the issues. I would hope that the Department and SOADA share this perspective.

As I said, I am prepared for and will seek immediate injunctive relief for my clients if the Department and SOADA intend to force disclosure under MIS or take action to terminate my clients' funding. I will call you early next week to discuss the matter in more detail. In the meantime, I ask that your office discuss my request with the Department and SOADA so that I will know whether to seek injunctive relief next week.

Sincerely yours,

REESE, RICE & VOLLAND, P.C.

P. R. Volland

Philip R. Volland

cc: Andy Brennan
Leonard & Henrietta Nugen
David Hoxworth

Enc.
PRV/kkr

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December 16, 1982

Andy Brennan
Mat-Su Council on Alcoholism
P. O. Box 2270
Wasilla, Alaska 99687

Leonard & Henrietta Nugen
Nugen's Ranch
Box 1545
Wasilla, Alaska 99687

David Hoxsworth
Director, Valdez Counseling Center
P. O. Box 1050
Valdez, Alaska 99686

Re: Mat-Su Council, et al. v. Korhonen, et al.

Dear Friends:

Enclosed please find a copy of the Complaint for declaratory and injunctive relief which will be filed tomorrow morning in the Superior Court in Palmer. After I consult with the Assistant Attorney General assigned to the case, I will let you know if an application for injunctive relief will be necessary to keep your funding secure.

Please call me if you have any questions.

Sincerely yours,

P. R. Volland

Philip R. Volland

Enc.
PRV/kkr

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MEMORANDUM

TO: Governor's Review Board on Alcoholism

FROM: Philip R. Volland, Attorney for
Alaska Alcoholism Rehabilitation Services, Inc.

DATE: May 25, 1982

RE: Payment of Wages to Clients
Engaged in Work Therapy at Nugen's Ranch

In the program's FY '83 grant application, and SOADA's review of the funding request, reference has been made to the allocation of funds for clients engaged in work therapy at Nugen's Ranch. This memorandum has been prepared in order to assist you in evaluating the projected costs of work therapy at the facility.

As you are aware, an essential component of the treatment philosophy at Nugen's Ranch is to have clients there engage in a form of "work therapy." The work therapy is designed to provide clients with basic learning, life, and employment skills; to enhance the clients' sense of belonging at the facility; and to prevent the "warehousing" of clients over a long period of time. Work therapy projects for each client will be tailored to the client's individual treatment plan. Originally, the work therapy project was designed to involve clients in the final renovation of the facility (painting, laying carpet, etc.), as well as to involve them in gardening activities, the raising of livestock, etc.

The work therapy plan that was proposed for the Ranch raised a legal question of whether or not clients should be paid for their work. After a review of this question by my office, and the office of the Attorney General, it was concluded that the Alaska Wage and Hour Act (AS 23.10.050-150) and the the Fair Labor Standards Act, (29 USC 201 et seq.), required that clients be paid the statutory minimum wage ($3.85) per hour) for certain work (e.g., renovations), but not for other work (such as general housekeeping). Although I disagreed with the Assistant Attorney General's conclusion about paying clients for "farming" activities, it was clear that the program would have to budget monies for the payment of clients engaged in work therapy, particularly if the work resulted in any consequential economic benefit to the

program. Without discussing the legal aspects of this particular problem in detail, I will simply note that the issue presents some far-reaching implications for residential drug and alcoholism treatment programs which involve clients in work therapy. I have at my disposal and will provide to any interested Review Board members copies of the legal opinions prepared on the issue by myself and by Linda Scocsia, Assistant Attorney General.

The uncertainty surrounding this issue presented a unique planning problem for the program this year. Because of the original plan to engage clients in a variety of work therapy, including renovation of the facility, and because the legal questions about payment were yet unresolved, the program submitted a grant request sufficient to cover the payment of wages for all anticipated work therapy. At the same time, the program pursued the alternative of complete renovation of the facility by a general contractor and the elimination of renovation work from the client work therapy plan. Both alternatives had to be pursued while awaiting a response from the Attorney General's office. As a consequence, the FY '83 grant request includes approximately $235,000 for client wages even though the renovation contract for the facility calls for the completion of all finish work in the main building. Nonetheless, a sufficient amount of grant funds need to be allocated to the program to cover those work therapy activities which do require the payment of wages.

The program hopes to redesign its work therapy program so as to involve clients in activities which can provide the benefits of personal labor, but which will not require the payment of the statutory minimum wage. For instance, it is anticipated that clients could raise crops and bedding plants in a greenhouse for sale to the community, not be paid an hourly wage for this work, but yet retain the proceeds from sale in a special fund reserved exclusively for the benefit of clients. The program also intends to pursue legislative amendments to the Alaska Wage and Hour Act next year in order to provide a clarification of the current state of the law and enable drug and alcohol programs to fully fund work therapy projects.

None of this is to suggest that the program is opposed to paying clients a wage for the work they perform during work therapy. Rather, the payment of wages to clients has its own inherent therapeutic value -- it assists in the enhancement of personal pride and dignity and permits clients to manage their own finances. But the payment of a statutory minimum wage for all work therapy presents a significant economic cost to the program that threatens the development of successful work therapy projects unless adequate funds are provided. Hopefully, the problem can be resolved during the coming year.

Your evaluation of the program's request for grant funds to cover client wages should be made in recognition of the fact that this issue is yet unresolved, and that the work therapy program employed at Nugen's Ranch may not incur the expenses originally estimated by the grant request.

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April 2, 1982

Honorable Donald E. Clocksin
House of Representatives
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Don:

Last summer you expressed some interest in my work with an alcoholism treatment facility in Anchorage (The Studio Club), and problems that my clients were encountering with the State Office of Alcoholism and Drug Abuse (SOADA). Since that time, my clients have asked me to contact you to request your support and assistance on a number of matters. With this rather lengthy letter, I hope to give you a complete history of what happened to The Studio Club and how that problem affected the establishment of a long-term care project called Nugen's Ranch. I also want to request your assistance with two issues which may best be resolved through the legislative process.

Specifically, the program requests your support in these areas:

(1) Continued support for the funding of alcoholism programs through the State Office of Alcoholism and Drug Abuse;

(2) Your support for possible legislative remedies which would guarantee fair procedures for the review of state-funded programs; and

(3) Your support for legislative amendments to the Alaska Wage and Hour Act and the Uniform Alcoholism and Intoxication Treatment Act which would enable drug and alcoholism programs to pay clients less than a minimum wage while engaged in "work therapy."

I know that you have a deep interest in alcoholism programs and the operation of the State Office of Alcoholism and Drug Abuse. For me to adequately explain my client's concerns, I need to go into some detail about the operation of its programs and the problems it has encountered over the last year.

The History of the Program.

I have been representing Alaska Alcoholism Rehabilitation Services, Inc. (formerly Alaska Social and Health Services) since early June, 1981. At that time, the program was operating a short-term alcoholism treatment facility in Anchorage known as The Studio Club and was in the process of obtaining state funding for the operation of a long-term care facility in the Mat-Su Valley known as Nugen's Ranch. Leonard and Henrietta Nugen, who had operated The Studio Club for some eight years, were hired by the program to operate the long-term care facility in Wasilla.

The two facilities are quite different. The Studio Club was operated as a short-term care facility, that is, a treatment program akin to a half-way house for alcoholics. Clients resided at The Studio Club for a period of time that normally did not exceed 45 days. Clients were generally referred from the court system or from other programs and participated in daily AA meetings and counseling sessions. The Studio Club was not designed to treat the chronic alcoholic.

Recognizing the treatment limitations of The Studio Club, the program had also developed a plan to open up a long-term care facility (called Nugen's Ranch) to treat the chronic inebriate. The Governor's Review Board on Alcoholism had approved funding for Nugen's Ranch, and state monies were extended to the program in FY '81 for the purchase of a building in the Mat-Su Valley which was to be used as the facility. The design of Nugen's Ranch envisioned a considerably longer treatment period (between six months and two years) which involved not only traditional forms of alcoholism counseling, but also a work therapy plan. This work therapy called for client involvement in gardening, the raising of livestock, greenhouse work, and minor renovation at the facility. The program felt quite strongly that "warehousing" clients for a long-term period would be of little benefit whatsoever. If the chronic alcoholic was to gain the skills necessary to reintegrate back into his local community, some physical activity would be needed to regain his health, and to give him some employment skills. As mentioned, this plan had met with full approval by the state and the necessary review agencies, and FY '81 funds were extended for the operation of Nugen's Ranch.

But in early June, 1981, the program began encountering problems with the operation of The Studio Club. An anonymous letter of complaint was written to the Municipality of Anchorage, Department of Health and Environment Protection

(Behavioral Health), the State Department of Health & Social Services (the Department), the Anchorage office of SOADA, and various state legislators. Simultaneously, the Municipal office of the Ombudsman was investigating an individual client complaint about the fee charged her for treatment. Finally, a $2,000 per month rent increase demanded by The Studio Club's landlord caused the program to close The Studio Club in late June.

At the same time, the program's FY '82 grant application for Nugen's Ranch was in the process of review by SOADA. Although the Department had already extended FY '81 grant funds for the purchase of the facility, additional funds were needed for extensive renovation of the building, and for operating the Ranch once renovation was complete. Unfortunately, the problems associated with The Studio Club led to a suspension of state funding for the Ranch.

The program's troubles all began on June 1, 1981 with the delivery of an "anonymous letter" to various state and municipal offices. Inexplicably, and without informing the program of their planned activities, representatives of the Department, the Anchorage office of SOADA and Behavioral Health met in Anchorage on the morning of June 3, 1981 - just 48 hours after receipt of that letter - and convened a joint state and municipal review team to investigate The Studio Club. Despite the fact that a number of the state and municipal officials knew that the "anonymous letter" was in fact drafted by ex-employees of The Studio Club who had apparently approached the municipality with their complaints, the program was never given the opportunity to respond to the allegations prior to the decision to establish the review team, nor were the identities of the authors of that letter ever disclosed to the program throughout the entire review process. In retrospect, it's difficult not to reach a conclusion that the program was set up. I for one find it hard to believe that an anonymous letter of complaint would, under normal circumstances, prompt a special meeting of Jim McMichael, Burt Hall, and Fred McGinnis, in less than two days' work time.

Initially, however, the program was not concerned about the state/municipal review. As recent as April of 1981, SOADA had given The Studio Club a 95 percent overall compliance rating with JCAH standards for alcoholism treatment programs. The anonymous letter itself was written in such an exaggerated and vituperative tone that it seemed obvious that the authors had a personal grudge against the program. Although hurt by the

allegations, Leonard and Henrietta Nugen felt that a fair and speedy review would vindicate The Studio Club. At that time, I concurred with their judgment and recommended that they ride out the storm.

But as the review proceeded, I became concerned about the impartiality and fairness of the process. Initial requests on my part to determine the scope of the review, and to meet with representatives of the review team and the Department prior to initiating the actual review, were received as indications that the program was not cooperating and "had something to hide." Even the reasonable request on my part that the investigation be conducted in a manner consistent with the program's obligation to preserve client confidentiality pursuant to 42 CFR 2.1 et seq. was reported by one review team member as an attempt by the program to prevent the review team from talking to Studio Club clients. Nothing could have been further from the truth; the program always intended to and did fully cooperate with the review.

Nethertheless, after the review was completed in August, I concluded that the investigation was conducted in a rather shallow manner. Although the review team had been supplied with a list of all current and past employees during The Studio Club's last year of operation, the review team interviewed only six former employees other than Leonard and Henrietta - three counselors, a secretary, the after-care specialist, and a receptionist who had only worked there five weeks. All three counselors who were interviewed - one of whom had worked at The Studio Club only one month - had either resigned or been dismissed as a result of policy disputes about the program. The only client the review team interviewed was the one client who had complained to the Municipal Ombudsman's office about the fee charged to her in April. Most of the allegations were accepted by the review team at face value. Despite the identification of clients who were allegedly "abused" in the program, the review team never attempted to contact these clients themselves in order to corroborate the allegations. Similarly, the allegation that The Studio Club served spoiled food was never adequately pursued. Although the program had hired a nutritionist to examine and prepare menus and had a list of all suppliers of foodstuffs, the review team never saw fit to talk to these individuals regarding the various allegations. Most of the current staff and clients who were supportive of the program were never even contacted, let alone interviewed.

In light of the nature of the review itself, it was not at all surprising that the conclusions reached by the review team were unfavorable to The Studio Club. Even those favorable aspects of the review (e.g., the absence of any evidence that client records were altered) went unreported in a summary issued by the Commissioner's office. As a result of the anonymous letter and the pending review, all transactions between AARS and SOADA regarding the funding of Nugen's Ranch were put "on hold" indefinitely.

To complicate matters, the Municipal Ombudsman's office conducted its own investigation into the practices of The Studio Club. In May, the Ombudsman's office recevied a complaint from a former Studio Club client related to the treatment fee charged the client. This complaint was thought to be resolved to everyones' satisfaction in early June. Without notifying Studio Club officials, however, the Ombudsman's office initiated its own investigation into the program. This was apparently prompted by the fact that the Municipality transmitted a copy of the anonymous letter to the Ombudsman's office immediately after it was received by Behavioral Health. The Municipal Ombudsman's report was issued in early August.

The Ombudsman's report was especially outrageous. Defamatory comments were repeated either without any basis in fact, or knowing that they were contrary to fact. At least one document critical to an allegation that the program had improperly charged fees, was either intentionally or negligently mischaracterized. Unfortunately, the state/municipal review team referred to the findings of the Ombudsman's office as evidence of mismanagement by The Studio Club. My response to the Ombudsman's report (a copy of which is enclosed) should give you an indication of the maltreatment that the program received from the Municipal Ombudsman's office. The program is still considering litigtion against the Muncipal Ombudsman's office as a result of that report.

Finally, in early fall, the materials compiled by the state/municipal review team were referred to the Attorney General's office for the purpose of review. After a formal request, I was able to obtain the review team's records and began negotiations with Bruce Bothelo, Assistant Attorney General. In early December, I met in Juneau with Botelho and George Mundell from SOADA and finalized a Memorandum of Agreement which resolved the matter and provided for the refunding of Nugen's Ranch. The program was then awarded funds to provide for renovation of the facility ($225,000), plus

operational funds through April 15, 1982, as well as funds to pay for all expenses incurred since July 1, 1981, including attorney's fees.

In fairness, the program's experience with the review process took a dramatic turn once the entire issue was referred to the Attorney General's office and to the Juneau office of SOADA. The frank and realistic negotiations that I experienced with Bruce Botelho and George Mundell should have occurred in early June. SOADA's realistic assessment of the anonymous letter, and Botelho's independent analysis of the quality of the state review, saved the program and the state the needless expense of proceeding through a complicated, time consuming, expensive, and unnecessary administrative hearing.

Although the program got back on its feet, the entire experience exposed the vulnerability of non-profit corporations to the political whims of the funding process. Had there been existing procedures to guarantee a certain amount of speed and due process to the investigation, the situation would have been resolved in a considerably more expeditious manner. The real losers were of course the clients, since the program has now been delayed some nine months. I address my specific concerns about the review process in more detail below.

The delay has already led to one problem, and that is the increased cost of the renovation of the facility. In June of last year, at the time the facility was purchased, an architectural survey estimated the renovation cost at $225,000. But the estimate of the renovation cost has now more than doubled. Although a significant portion of the increased costs are due to additional renovations to conform with health and safety codes, it is fair to say that some $40,000 of the increase is attributable to inflation as a result of the delay, and increased damage to the heating system as a result of the vacant facility lacking heat during the winter. The program is now in the position of having to reapply to the Department for the increased costs necessary to complete the renovation.

This leads me to the issue of your support for continued funding for alcoholism programs throughout the state. The program knows of your excellent history in supporting social service programs in the past, and seeks your continued support for alcoholism funds in particular.

It is my understanding that the House has considered a $3.3 million decrease in the Governor's proposed budget for alcoholism grant programs. This would mean an FY '83 budget that is less than the $17.2 million budgeted for alcoholism programs in FY 1982. Alcoholism programs can hardly expand their treatment facilities, let alone keep up with the costs of inflation, if proposed fundings levels are significantly less than what has been budgeted for this fiscal year.

Although SOADA has reaffirmed its commitment to long-term alcoholism treatment, the political reality for grant-in-aid program funding is that any general reduction in alcoholism monies as a whole will have an echoing affect on funds otherwise earmarked for treatment. Because the need for long-term alcoholism treatment in this state is so critical, and because the Nugens have demonstrated a high degree of success in treating alcoholism in the past, the citizenry of this state simply cannot afford any reduction in monies that can be made available for either short-term or long-term alcoholism treatment. The need for long-term care is particularly evident in Anchorage where the problem with the chronic inebriate is so visible.

The fact of the matter is that both long-term and short-term programs need to be funded on an acceptable level. Nugen's Ranch must work in cooperation with all other programs around the state. This is because clients will only be accepted at the Ranch after referral to and screening by the appropriate local alcoholism program. The Ranch, as a state-wide operation, must be sensitive to the needs of urban and rural areas, and allocate its limited bed space (48) so as to maximize the program's impact on a state-wide alcoholism program. In order to accomplish this, the program must develop a healthy and trusting working relationship with those local programs. Unfortunately, if short-term and long-term programs are forced to compete for limited alcoholism funds, that working relationship can be jeopardized. It makes absolutely no sense to have the various programs fighting with each other for money, when they should be working with each other regarding the problems of clients.

Finally, a reduction in funds allocated to the administration of SOADA is neither a well thought out nor adequate solution to the problems regarding the state review process which were exposed during The Studio Club's investigation. Although I must confess a temptation to "get back" at some Department heads by isolating them during the funding process, the only really effective way to insure that other programs do not experience what The Studio Club suffered during the last

six months is to develop state regulations and procedures that accord full due process to a program that is accused by clients, former staff, or the administration, of mismanagement. The program has also buried the hatchet with SOADA. What was once an antagonistic and distrustful working relationship has become a mutually cooperative one.

The bottom line is that state grant-in-aid funds are the life blood for alcohlism treatment facilities in this state. It is the clients, and therefore the public, who lose when those funds are restricted. Please encourage your colleagues to continue adequate support for these programs and the silent constituents they serve.

Other Issues

As I mentioned, there are two other issues I would like to bring to your attention on the program's behalf. It is the program's hope that these problems can be resolved through the legislative process.

A. The State Review Process

As I mentioned, the review process which The Studio Club experienced last summer reeked of politics and lacked the most basic principles of fundamental fairness. Had there been adequate guidelines for state-sponsored investigations, the program and the Department may have saved themselves considerable time and expense.

There are some existing protections for programs whose funding is jeopardized, but these regulations have significant failings. For example, 7 AAC 78.310 establishes an appeal procedure to challenge the Commissioner's decision to suspend or terminate a grant. The regulations establish a notice procedure and give the program an opportunity to request a hearing (a hearing, however, to be granted or denied at the Commissioner's discretion). AS 47.37.260 also makes it clear that actions by the state office are governed by the Administrative Procedure Act. Thus, a decision by the Department or the state office to suspend or revoke the operating authority of the program would involve the statement of issues, hearing, and administrative review process of the APA.

But neither of these remedies were particularly appropriate in The Studio Club's situation. This is because neither the state regulations, nor the APA address the scope of an investigation prior to a decision to suspend or revoke a grant, nor do they address an administrative decision to put a funding application "on hold."

In The Studio Club's case, a decision was made to conduct an open-ended investigation without informing the organization of the allegations that had been made against it. This was done by public officials who knew that the allegations came from former employees who had a grudge against the program. Although the allegations in the "anonymous letter" were fairly specific about a number of alleged abuses, and the content of the letter suggested that these abuses occurred in the spring of 1981, the municipal/state review team felt it was entitled to investigate all aspects of The Studio Club's operation regardless of time. Representatives of the organization were not entitled to participate in the selection of the review team, nor were they entitled to be present during the review team's interview of various complaining witnesses. Until a formal request was made pursuant to AS 09.25.110, the organization was even denied access to the review team's records. Prior to that time, the only information the program was given about the investigation was an artfully drafted "summary" of the review team's findings prepared by a member of the Commissioner's office.

All of this suggests the need for a regulatory scheme which governs investigations of state-funded grant-in-aid programs when allegations are made regarding client or other abuses. At a minimum, I would see these regulations guaranteeing programs the right to:

(1) be informed of the allegations against it and have the opportunity to respond prior to a decision to convene an investigation, and have the identity of its accusers disclosed;

(2) either participate in the selection of the review team or be able to disqualify review team members as a matter of right;

(3) limit the investigation to a reasonable time and scope related to the allegations;

(4) participate in any and all interviews conducted of complaining witnesses and have the right to cross-examine those interviewed;

(5) have access to records or statements compiled by the review team, as those records are compiled;

(6) comment on the preliminary findings of the review team prior to a decision concerning funding; and

(7) present witnesses and records in support of its position during the investigatory process.

The second problem with the current scheme is that it has no provisions for addressing the problem of the Department withholding a decision with respect to a pending grant application. In The Studio Club's situation, the grant for FY '82 had not yet been awarded. Therefore, the program had not entered into a contractual relationship with the agency, and there was no grant to suspend, nor was the pending grant ever denied. All that happened was that SOADA decided to "put on hold" any transactions related to the FY '82 grant application.

Undoubtedly, the program could have pursued remedies in court to secure certain protections during the process of review. But that is an illusory remedy for a non-profit organization that depends entirely on state funding. The program simply had no funds to finance the litigation that would have been necessary to prevent the kind of administrative abuse that the program never expected to happen in the first place.

It would appear to me that regulations could be adopted pursuant to 7 AAC 78.010 et seq. to provide the kind of procedural protections that I have listed above. This would certainly happen if the legislature amended AS 47.37 to mandate the appropriate regulations.

B. The Payment of Wages to Patient Workers

An entirely separate and unique issue to the program is the question of its legal obligation to pay clients a minimum wage for activities performed during "work therapy." As you recall, the scheme of Nugen's Ranch involves client activities in gardening, greenhouse work, housecleaning, and renovation work on the facility.

Although the question seems straightforward, the answer is not. I have enclosed with this letter my legal memorandum to SOADA outlining the results of my research. I encourage you to read it so that you can get a complete understanding of the various issues involved.

Current state and federal law clearly suggests that patient workers be paid a minimum wage. This is understandable in light of the fact that the case law developed from wholesale institutional abuses of clients in mental institutions who were required to perform work of questionable therapeutic value. But viewed from the program's perspective, this obligation makes little sense. First of all, the economic impact on the program is tremendous. Our estimates are that the increased operational costs for Nugen's Ranch for paying minimum wages to 48 clients

for only a few hours of work per day amounts to $230,000 annually. This is without an analysis of fringe, overhead costs, and the possible necessity to add additional clerical help to handle the administrative burden related to the payroll.

But the more important concern is the therapeutic value of the work to clients at the Ranch. It is in this area where the work therapy program planned for the Ranch differs from the activities normally required of patient workers in other institutions.

The program's treatment philosophy starts from the premise that it makes no sense to have clients sit around for two years while going through a long period of sobriety. The health of a chronic alcoholic has often deteriorated, and physical activity is necessary to restore this health. Equally true is the fact that a typical long-term inebriate has become a public pariah who lacks self-esteem, motivation, self-worth, and the most minimal of job skills. Work therapy can enable that individual to regain self-confidence and acquire some skills. And anyone in the treatment field will tell you that an alcoholic who has just recently stopped drinking needs something to occupy the time and energy that was once spent drinking. If nothing else, the work therapy helps keep the alcoholic from drinking by keeping him busy.

Unfortunately, the law does not address the different therapeutic values that work therapy holds for recovering alcoholics and drug addicts compared to patient workers in other kinds of institutions. The law simply applies an "economic reality test" as the rubric for wher clients are to be paid the minimum wage. By definition, however, almost any form of work therapy will arguably meet the economic reality test and therefore require the payment of wages.

The options open to the program are not especially attractive. If the work therapy concept is scrapped because of the economic cost to the program, the Ranch will find itself stripped of a treatment technique which is critical to the success of the program. If the Ranch is compelled to divert substantial operational funds each year for the payment of client wages, other equally important aspects of the program - renovation, staff salaries, administration, etc. - will suffer.

The legal authority for the program to recoup wages paid to clients by charging them a higher fee for their cost of care amounts to a scam that has no practical or therapeutic value. The program would simply be "paying" clients with one hand, and taking it back with the other. This kind of charade to meet the requirements of the law would only serve to generate client resentment toward the program.

The program is not suggesting that the clients be paid no wages at all. Rather, it hopes to pay the clients some form of compensation so that each client can have his or her own money to use for the purchase of incidentals and gifts during treatment, and also be able to build up a reserve fund to be used at the time of release from treatment. All the program is asking for is relief from the obligation to pay each client $3.85 per hour.

I believe that this can be accomplished by an amendment to the Alaska Wage and Hour Act which would exempt drug and alcoholism centers from the obligation to pay a minimum wage to patient workers. I also believe it would be appropriate to amend the Uniform Alcoholism and Intoxication Treatment Act by adding a new section which would authorize the Department to fund programs for work therapy projects, including monies to pay a certain minimal compensation to clients (less than $1.00 per hour I would think). HB 194 currently contemplates an analogous institutional employment scheme for state prisoners and it might be possible to pay residents in long-term treatment centers at the same rate.

If these amendments are considered, it would be essential to include language stating that the legislation serves an important and exclusive state function (the treatment of alcoholism through funding to private, non-profit programs). This language, I believe, would protect the program from the application of the Fair Labor Standards Act by virtue of the holding in National League v. Usury.

Unfortunately, this entire problem regarding the payment of wages to clients just recently surfaced. I realize the practical problems of seeking these amendments this late in the legislative session. Please let me know if you see any way of obtaining the relief before the session ends.

Representative Pat Carney and Senator Kerttula have been strong supporters of the Ranch and are aware of the problems that the program experienced last year. I have also asked them for assistance with the issues I have discussed.

Feel free to call or write if you need any additional information.

Sincerely,

REESE, RICE & VOLLAND, P.C.

Philip R. Volland

cc: Leonard and Henrietta Rugen
Board of Directors
PRV/kkr

LAW OFFICES OF
REESE, RICE AND VOLIAND
A PROFESSIONAL CORPORATION

JOHN REESE
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(907) 276-5231

April 2, 1982

Senator Jalmar Kerttula
Alaska State Legislature
Pouch V
Juneau, AK 99811

RE: Nugen's Ranch

Dear Senator Kerttula:

Leonard and Henrietta Nugen have asked me to write you concerning the past developments regarding the funding of Nugen's Ranch, the long-term alcoholism treatment facility operated by Alaska Alcoholism Rehabilitation Services (formerly Alaska Social & Health Services) under the direction of Leonard and Henrietta Nugen. As you are undoubtedly aware, a grant from the State Office of Alcoholism and Drug Abuse (SOADA) in December of 1981 renewed funding for the facility after state funding had been suspended for a six-month period. The program expects to be operational by early summer, presuming that renovation is complete on the facility, and that sufficient operational funds are extended. I know that you have expressed an interest in the program, and I thought that a complete history of events would be helpful in understanding why the project has been delayed in reaching its full operational phase.

On behalf of the program, I would also like to take this opportunity to request your support for continued state funding of the alcoholism treatment programs. I also hope that you can be of some guidance in addressing two problems that may best be resolved through the legislative process: (1) the appropriate standards for review of state-funded programs, and; (2) the apparent obligation of residential treatment programs to pay a minimum wage to patients whose "work" at the facility is part of a therapeutic treatment program.

I have been representing Alaska Alcoholism Rehabilitation Services (AARS) since early June, 1981. At that time, the organization was in a particularly troublesome period with its two treatment programs, The Studio Club, and Nugen's Ranch. The Studio Club, the short-term care facility in Anchorage operated by the Nugens, had run into difficulty because of an anonymous letter of complaint written to the Municipality of Anchorage Department of Health and Environmental Protection (Behavioral Health), the State Department of Health & Social Services (the Department), the Anchorage office of SOADA, and various state legislators. Simultaneously, the Municipal Office of the Ombudsman was investigating an individual client complaint about the fee charged her for treatment. Finally, a $2,000 per month rent increase demanded by The Studio Club's landlord forced the program to close its doors in late June of last year.

At the same time, the organization's FY '82 grant application for Nugen's Ranch - the long-term care facility to be located in the Valley - was in the process of review by SOADA. Although the Department had already extended FY '81 grant funds for the purchase of the facility, additional funds were need for extensive renovation of the building, and for operating the Ranch once renovation was complete. Unfortunately, the problems encountered with The Studio Club led to a suspension of funding for Nugen's Ranch.

The problems all began on June 1, 1981 with the delivery of an "anonymous letter" to various state and municipal offices. Inexplicably, and without informing the program of their planned activities, representatives of the Department, the Anchorage office of SOADA and Behavioral Health met in Anchorage on the morning of June 3, 1981 -- just 48 hours after receipt of the letter -- and convened a joint state and municipal review team to investigate The Studio Club. Despite the fact some of the state and municipal officials knew that the "anonymous letter" was drafted by ex-employees of The Studio Club, the program was never given the opportunity to respond to the allegations prior to the decision to establish the review team, nor were the identities of the authors of that letter ever disclosed to the program.

Initially, however, Leonard and Henrietta were not concerned about the state/municipal review. As recently as April, 1981, SOADA had given The Studio Club a 95 percent overall compliance rating with JCAH standards for alcoholism treatment programs. The anonymous letter itself was written in such an exaggerated and vituperative tone that it seemed obvious that the authors had a grudge against the program. Although concerned about the allegations, the Nugens felt that a fair and speedy review would vindicate The Studio Club's record.

But as the review proceeded, I became concerned about the impartiality and fairness of the process. Initial requests on my part to determine the scope of the review, and to meet with representatives of the review team and the Department prior to initiating the actual review, were received as indications that the program was not cooperating and "had something to hide." Even the reasonable request on my part that the investigation be conducted in a manner consistent with the program's obligation to preserve client confidentiality pursuant to 42 CFR 2.1 et seq. was reported by one review team member as an attempt by the program to prevent the review team from talking to Studio Club clients. Nothing could have been further from the truth; the program always intended to and did fully cooperate with the review.

Nevertheless, after the review was completed, I concluded that the investigation was conducted in a rather shallow manner. Although the review team had been supplied with a list of all current and past employees during The Studio Club's last year of operation, the review team interviewed only six former employees other than Leonard and Henrietta - three counselors, a secretary, the after-care specialist, and a receptionist who had only worked there five weeks. All three counselors - one of whom had worked at The Studio Club only one month - had either resigned or been dismissed as a result of policy disputes about the program. The only client the review team interviewed was the one client who had complained to the Municipal Ombudsman's office about the fee charged to her in April. Most of the allegations were accepted by the review team at face value. Despite the identification of clients who were allegedly "abused" in the program, the review team never contacted those clients themselves in order to corroborate the allegations. Similarly, the allegation that The Studio Club served spoiled food was never adequately pursued. Although the program had hired a nutritionist to examine and prepare the menus and had a list of all suppliers of foodstuffs, the review team never saw fit to talk to these individuals regarding the various allegations. Most of the current staff and clients who were supportive of the program were never even contacted, let alone interviewed.

In light of the nature of the review itself, it was not surprising that the conclusions reached by the review team were unfavorable to The Studio Club. Even those favorable aspects of the review (e.g., the absence of any evidence that client records were altered) went unreported in a summary issued by the Commissioner's office. As a result of the preliminary findings of the review team, funding for the renovation and operation of Nugen's Ranch was suspended indefinitely. To complicate matters, the Municipal Ombudsman's office conducted its own investigation into the practices of The Studio Club. In May, the Ombudsman's office

received a complaint from a former Studio Club client related to the treatment fee charged the client. This complaint was thought to be resolved to everyones' satisfaction in early June. Without notifying Studio Club officials, however, the Ombudsman's office initiated its own investigation into the program. This was apparently prompted by the fact that Behavioral Health transmitted a copy of the anonymous letter to the Ombudsman's office immediately after it was received. The Municipal Ombudsman's report was issued in early August.

The Ombudsman's report was especially outrageous. Defamatory comments were repeated either without any basis in fact, or knowing that they were contrary to fact. At least one document critical to an allegation that the program had improperly charged fees, was either intentionally or negligently mischaracterized. Unfortunately, the state/municipal review team referred to the findings of the Ombudsman's office as evidence of mismanagement by The Studio Club.

In early fall, the materials compiled by the state/municipal review team were referred to the Attorney General's office for the purpose of review. I also obtained the review team's records and began negotiations with Bruce Botelho, Assistant Attorney General. Finally, in early December, I met in Juneau with Botelho and George Mundell from SOADA and finalized a Memorandum of Agreement which resolved the matter and provided for the refunding of Nugen's Ranch. The program has now been awarded funds to provide for the renovation of the facility ($225,000) plus operational funds through April 15, 1982, as well as funds to pay for all expenses incurred since July 1, 1981, including partial attorney's fees. Despite a loss of time and credibility during the review process, the program now expects to be back into the business it does so well, treating alcoholics, by late May or early June.

In fairness, the program's experience with the review process took a dramatic turn once the entire issue was referred to the Attorney General's office and to the Juneau office of SOADA. The frank and realistic negotiations that I experienced with Bruce Botelho and George Mundell should have occurred in early June. SOADA's realistic assessment of the anonymous letter, and Mr. Botelho's independent analysis of the state review, saved the program and the state the needless expense of proceeding through a complicated, time consuming, expensive, and unnecessary administrative hearing.

I can't say that representatives of the program, and Leonard and Henrietta in particular, don't still harbor some ill feelings and distrust as a result of the treatment they received during the summer and early fall of last year. But despite those feelings, the program and the Nugens urge you to continue to support full state funding for alcoholism treatment programs. Although SOADA has reaffirmed its commitment to long-term alcoholism treatment, the political reality for grant-in-aid program funding is that any general reduction in alcoholism monies as a whole will have an echoing affect on funds otherwise earmarked for treatment. Because the need for long-term alcoholism treatment in this state is so critical, and because the Nugens have demonstrated a high degree of success in treating alcoholism in the past, the citizenry of this state simply cannot afford any reduction in monies that can be made available for either short-term or long-term alcoholism treatment.

The fact of the matter is that Nugen's Ranch must work in cooperation with all other programs around the state. Clients will only be accepted at the Ranch after referral and screening by the appropriate local alcoholism program. The Ranch, as a state-wide operation, must be sensitive to the needs of urban and rural areas, and allocate its limited bed space (48) so as to maximize the program's impact on the state-wide alcoholism problem. The program must not only develop clearly written cooperative working arrangements with short-term alcoholism programs around the state, but it must also develop a healthy and trusting working relationship with those local programs. Unfortunately, if short-term and long-term programs are forced to compete for limited alcoholism funds, that working relationship can be jeopardized. We simply cannot afford to have the various programs fighting with each other for money, when they should be working with each other regarding the problems of clients.

Lastly, a reduction in grant-in-aid funds available for alcoholism programs, or those funds allocated to the administration of SOADA, is neither a well thought out nor adequate solution to the problems regarding the state review process which were exposed during The Studio Club's investigation. The only effective way to insure that other programs do not experience what The Studio Club suffered last year is to develop state regulations and procedures that accord full due process to a program that is accused, by clients or former staff, of mismanagement.

This is one area where you may be of some assistance to the program. Although current state regulations provide some administrative remedies to programs whose funding is terminated by the Department, there are no regulations which

give the program any protection during the course of a state sponsored investigation. The absence of any such guidelines was particularly harmful to AAKS last year. The program was forced to suffer through an unjustified -- and perhaps politically motivated -- investigation without any remedies to insure that the investigation was conducted fairly. I have some ideas regarding legislation which would direct the adoption of appropriate regulations by the Department to prevent this problem in the future. The program has asked me to inquire of you whether or not you would be supportive of such legislation, and if so, how your office may be of assistance in this effort.

It is also our understanding that a decrease in state revenues may result in significant cuts to various state programs and departments. Alcoholism monies may be particularly vulnerable to these cutbacks because of the silent constituency served by alcoholism programs. I know that the House has already considered a substantial decrease in the Governor's proposed budget for alcoholism monies. Were a similar decrease to be approved by the Senate, alcoholism programs would hardly be able to expand their facilities, let alone keep up with the cost of inflation.

I know that you have been a strong supporter of alcoholism programs in the past, and the program wishes to encourage your continued support of this issue in the future. We particularly hope that you will keep in mind the fact that any cut in alcoholism monies could adversely affect Nugen's Ranch, and thereby limit the effectiveness of the only long-term alcoholism program in the state.

The program is now particularly concerned about funding because of two recent developments which have dramatically increased the costs of operating the facility. Due to the now almost nine-month delay in beginning renovations, and because of the increased renovation work that is necessary by health and safety codes, the cost of renovating the facility to be used as Nugen's Ranch has more than doubled. Although the program has already been awarded a portion of these renovation costs ($225,000), it must now seek an additional $300,000 from FY '82 funds simply to complete the necessary renovations. Even with these increased renovation costs, the total cost of purchasing and renovating the facility is at least half the cost of what would be involved for the construction of an entirely new facility of equal size. The program expects to receive full support from the Department in obtaining the necessary renovation funds, but we are nonetheless aware that the increased renovation costs will use up a large portion of SOADA's FY '82 funds earmarked for long term care. We simply hope that this one-time expense, although greater than originally anticipated, will be viewed as a necessary -- and still

comparitively inexpensive cost for establishing the long term alcoholism rehabilitation program so desperately needed in this state.

Secondly, the program may confront increased operational costs because of an obligation to pay clients at the facility a minimum wage while engaged in what is called "work therapy." The therapeutic design for Nugen's Ranch involved a scheme whereby clients, as part of their daily routine, would be involved in gardening, raising livestock, greenhouse activities, minor renovations on the facility, and the like. The program feels strongly that chronic alcoholics get no benefit from simply being "warehoused" at an institution for a period between six months and two years. Clients must be actively engaged in activities which will increase their health, occupy some of their time, and train them in minimal employment skills that can be helpful with their eventual reintegration into their community. This work therapy, when combined with traditional forms of counseling, should result in a high rate of success in treating chronic alcoholism.

But my analysis of state and federal law indicates that the program may be under an obligation to pay clients at least a minimum wage while engaged in the work therapy. For reasons that are not clear, state regulations pursuant to the Alaska Wage and Hour Act specifically exclude alcoholism and drug treatment programs from provisions which would otherwise enable the program to pay less than a minimum wage to clients. None of the specific exclusions of the Alaska Wage and Hour Act provide exceptions for long-term treatment facilities to pay clients less than a minimum wage. Because Alaska has not specifically identified this area of labor law as an issue of particular state concern, it is likely that federal law, in addition to state law, will require the payment of minimum wages. I have already provided SOADA with a detailed legal analysis of this problem, and am willing to provide you with a copy if you wish.

The impact on the program and the state is significant. Even with clients working only a few hours per day, the yearly cost of the program to pay a minimum wage to clients engaged in work therapy is estimated to be in excess of $230,000 per year. This adds a substantial cost to the operation of the program on a yearly basis.

The solution to this problem may be in a legislative amendment to the Alaska Wage and Hour Act exempting patient workers in residential drug and alcoholism treatment programs from the coverage of the statute, and an amendment to the Uniform Alcoholism Intoxication and Treatment Act

which would permit the payment of a sub-minimum wage to clients who are engaged in work therapy projects. I do not know whether legislation of this nature could be accomplished this session, and we look for your direction on this issue.

All of this is to say that the program needs your continued support on alcoholism monies this session, and assistance in possible legislative solutions to some of the problems already identified. The Ranch has been receiving strong and continued support from residents and organizations in the Mat-Su Valley, and we urge your continued support also.

You are more than welcome to call or write me if you have any questions.

Sincerely,

REESE, RICE & VOLLAND, P.C.

Philip R. Volland

PRV/kkr

cc: Leonard & Henrietta Nugen

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT PALMER

MAT-SU COUNCIL ON ALCOHOLISM, ALASKA ALCOHOLISM REHABILITATION SERVICES, INC., and THE CITY OF VALDEZ, VALDEZ COUNSELING CENTER, Plaintiffs, vs. ALLEN KORHONEN, Acting Commissioner, Department of Health and Social Services, State of Alaska; and ROBERT L. COLE, Coordinator, Office of Alcoholism and Drug Abuse, State of Alaska, Defendants.	No. 3PA-82-_____ Civil

COMPLAINT

Plaintiffs, by and through counsel and for their cause of action, hereby allege:

Introduction

1. This is an action for declaratory and injunctive relief brought by three alcoholism treatment programs receiving funding from the State of Alaska, Office of Alcoholism and Drug Abuse (hereafter SOADA). The plaintiffs request relief in the form of a declaratory judgment ruling that SOADA's requirement that alcoholism programs submit the names and social security numbers of clients receiving services in state funded programs is a violation of the Alaska Constitution, and certain state and federal laws and regulations governing the disclosure of confidential information of patients receiving alcoholism and drug abuse treatment. Further, the plaintiffs request a

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declaratory ruling that the data collection system adopted by the defendants has been implemented in violation of the Alaska Administrative Procedure Act. Alternatively, plaintiffs request that this court order the defendants to promulgate appropriate regulations governing the security and confidentiality of the information they seek to collect, should the court rule that obtaining such confidential information is permissible under law.

Parties

2. Plaintiff Mat-Su Council on Alcoholism (hereafter Mat-Su Council) is a private, nonprofit corporation organized pursuant to Alaska Statutes and is engaged in alcoholism and substance abuse treatment, referral and public education. The Mat-Su Council is a recipient of state grant funds pursuant to grant No. 06-3452 to provide outpatient alcoholism treatment services to residents of the Matanuska-Susitna Borough. The Mat-Su Council provides such service to approximately 60 clients on an ongoing basis.

3. Plaintiff Alaska Alcoholism Rehabilitation Services, Inc. (hereafter AARS) is a private, nonprofit corporation organized pursuant to Alaska Statutes for the purpose of operating alcoholism treatment facilities in the state of Alaska. AARS owns and operates a long-term treatment facility known as Nugen's Ranch in Wasilla, Alaska and receives state grant funds pursuant to grant No. 06-3496 to operate the facility. Nugen s Ranch is a long-term, residential care facility with the capacity to serve 48 clients referred by other programs around the state.

4. Plaintiff City of Valdez operates a treatment facility known as the Valdez Counseling Center (hereafter Valdez Center). The Valdez Center provides a wide range of out-patient

counseling services including mental health, family, drug abuse and alcoholism counseling. The City of Valdez receives state grant funds pursuant to Grant No. 06-3471 to operate the alcoholism treatment component of its program and serves approximately 30 clients on an ongoing basis.

5. Defendant Allen Korhonen is the Acting Commissioner of the Department of Health and Social Services, State of Alaska, (hereafter the Department) following the resignation of former commissioner Helen D. Beirne. As Acting Commissioner, defendant Korhonen has the statutory obligation to supervise the administration of alcoholism programs throughout the state of Alaska pursuant to AS 47.30.470 and the provisions of state and federal law.

6. Defendant Robert L. Cole is the Coordinator of the Office of Alcoholism and Drug Abuse, State of Alaska. As coordinator of SOADA, defendant Cole has the responsibility for administering state grant funds to alcoholism and drug treatment programs within the state of Alaska pursuant to provisions of the Uniform Alcoholism and Intoxication Treatment Act, AS 47.37.010 et seq.

7. In the process of administering and supervising recipient alcoholism treatment programs, the Department and SOADA have instituted a data collection system known as the Management Information System (MIS). Under the MIS, the Department and SOADA require recipient programs such as plaintiffs' to disclose the name and social security number of each individual receiving treatment at their facilities.

8. The plaintiff programs have refused to provide the Department and SOADA with patient identifying information

required under the MIS, including names and social security numbers. The plaintiff programs feel that the disclosure of such information violates ethical responsibilites imposed on them as professionals in the field of alcoholism, that such a requirement violates their clients' rights to privacy, that such disclosure will deter individuals from seeking treatment and that such disclosure is not required pursuant to state and federal law or regulations governing the confidentiality of clients or patients receiving drug and alcoholism treatment. A copy of Resolution No. 8252 adopted by the City Council of the City of Valdez on behalf of the Valdez Counseling Center and in opposition to the MIS is attached hereto as Attachment A.

9. The defendants have informed plaintiffs that their failure and refusal to provide information required under the MIS will result in action to suspend or to terminate funding for their operations during FY'83.

10. Prior to instituting their data collection system, the Department and SOADA failed to promulgate any regulations regarding the implementation and enforcement of the MIS, or any regulations governing the security of the information collected, or the rights of clients or patients who refuse to disclose the required information.

11. The plaintiff programs are dependant in whole or in part on state funds to operate their facilities. The refusal of the Department and SOADA to continue funding during FY'83 will cause the plaintiff programs to terminate the operation of their treatment facilities, or delete alcoholism treatment from the range of services they provide.

Count I

12. Plaintiffs reallege and incorporate each allegation found in paragraphs 1 through 11 of their complaint.

13. The patients and clients treated by the plaintiff programs are protected by an explicit constitutional guarantee of privacy found in Article I, Section 22 of the Alaska Constitution.

14. Plaintiffs have standing to assert the constitutional right of privacy of their clients pursuant to Falcon v. Alaska Public Offices Commission, 570 P.2d 469 (Alaska 1977).

15. The MIS system adopted by the defendants and imposed upon the plaintiffs is in violation of the Alaska Constitution, Article 1, Section 22.

Count II

16. Plaintiffs reallege and incorporate each allegation found in paragraphs 1 through 11 of their complaint.

17. Plaintiffs are under the obligation not to disclose confidential and privileged information regarding their patients pursuant to AS 47.37.210(a).

18. Defendants are under an obligation not to disclose confidential information privileged to the patient except as authorized pursuant to AS 47.37.210(b), and may not require the disclosure of any patient's name.

19. The MIS system adopted by the defendants and imposed upon plaintiffs is in violation of AS 47.37.210.

Count III

20. Plaintiffs reallege and incorporate each allegation contained in paragraphs 1 through 11 of their complaint.

21. The plaintiffs are recipient grant-in-aid programs for alcoholism treatment within the meaning of AS 47.30.475.

22. Pursuant to AS 47.30.477, the defendants are under an obligation to adopt and implement regulations concerning any statistical reporting or record keeping system established in connection with an alcoholism grant-in-aid program.

23. The defendants have implemented MIS without adopting or implementing any regulations regarding the system, and are therefore in violation of AS 47.30.477.

Count IV

24. Plaintiffs reallege and incorporate each allegation in paragraphs 1 through 11 of their complaint.

25. The adoption and imposition of the MIS by defendants constituted a "regulation" within the meaning of AS 44.62.640(a)(2).

26. Pursuant to Alaska Administrative Procedure Act, AS 44.62.010 et seq, the defendants were under an obligation to promulgate regulations consistent with the requirements of AS 44.62.010 et seq. before implementing the MIS.

27. The defendants' failure to promulgate and adopt regulations regarding the MIS pursuant to AS 44.62.010 et seq. before imposing the MIS on plaintiffs constitutes illegal agency activity and renders the MIS void and unenforceable.

Count V.

28. Plaintiffs reallege and incorporate each allegation in paragraphs 1 through 11 and paragraph 14 of their complaint.

29. The patients and clients treated by plaintiff programs are protected by a right to privacy under the U.S. Constitution.

30. The MIS system adopted by the defendants and imposed upon the plaintiffs violates the right to privacy of their patients guaranteed by the U.S. Constitution.

Count VI

31. Plaintiffs reallege and incorporate each allegation in paragraphs 1 through 11 of their complaint.

32. Pursuant to the Drug Abuse Office and Treatment Act of 1972, 21 U.S.C. §1175, plaintiffs are under an obligation not to disclose patient identifying information except under circumstances expressly authorized pursuant to 21 U.S.C. §1175 and the regulations promulgated thereunder.

33. Defendants' authority to require disclosure of patient identifying information from plaintiffs, without patient consent, is limited by the provisions of the Drug Abuse Office and Treatment Act of 1972, 21 U.S.C. §1175, and the regulations promulgated thereunder.

34. Federal regulations adopted pursuant to the Drug Abuse Office and Treatment Act of 1972, 42 C.F.R. Part 2.1 et seq., do not authorize the defendants to require the wholesale disclosure of the name and social security number of each client served by plaintiffs, and further obligate the defendants to provide plaintiff programs with certain assurances of confidentiality of patient identifying information collected by any lawful research and audit program.

35. The MIS system adopted by defendants and imposed upon plaintiffs is in violation of 42 C.F.R. 2.51-2.56-1.

Count VII

36. Plaintiffs reallege and incorporate each and every allegation contained in paragraphs 1 through 11 of their complaint.

37. The patients and clients treated by programs receive therapeutic services provided by law under the Uniform Alcoholism and Intoxication Treatment Act and funding provided by defendants.

38. Pursuant to 5 U.S.C. §552a (note) (1976), the defendants may not require patients treated by plaintiffs to disclose their social security numbers as a condition of receiving treatment, and must inform each patient whether disclosure is mandatory or voluntary, by what statutory authority the social security number is solicited, and what uses will be made of the number.

39. The MIS system as adopted by defendants and imposed upon plaintiffs is in violation of 5 U.S.C. §552a (note) (1976).

Irreparable Injury

40. The plaintiffs face immediate and irreparable injury unless the defendants are enjoined from requiring the disclosure of patient identifying information. The disclosure of such information will violate the constitutional rights under federal and state law of the clients served by plaintiffs, and the plaintiffs' refusal to provide such information to the defendants will result in the suspension of funding necessary for programs to operate their treatment facilities.

WHEREAS, plaintiffs request relief as follows:

1. That this court issue a preliminary injunction enjoining the defendants from requiring the plaintiffs to submit information required by the Management Information System during the pendency of this litigation;

2. That this court declare that the Management Information System adopted by defendents constitute illegal agency activity in violation of the Alaska Administrative Procedure Act;

3. That this court declare that the Management Information System is in violation of patients' right to privacy under the state and federal constitutions and in violation of state and federal law regarding the confidentiality of records;

4. Alternatively, should this court rule that the defendants are lawfully permitted to require the disclosure of patient identifying information and that the Management Information System as presently constituted is not in violation of the Alaska Administrative Procedure Act, that no such disclosure be required of plaintiffs until such time as the defendants promulgate regulations regarding the confidentiality and security of the information to be collected;

5. That this court award plaintiffs full costs and attorneys' fees in bringing this action;

6. That this court issue such other and further relief as it deems just and proper.

DATED this 16th day of December, 1982.

REESE, RICE AND VOLLAND, P.C.
Attorneys for Plaintiffs

By: _____
(Philip R. Volland

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF VALDEZ, ALASKA, OPPOSING THE REPORTING OF PERSONAL IDENTIFICATION TO THE STATE OFFICE OF ALCOHOL AND DRUG ABUSE.

WHEREAS, the State Office of Alcohol and Drug Abuse has established a new Management Information System which requires funded programs to report client names and social security numbers, and

WHEREAS, the Valdez Counseling Center's Advisory Board has advised the Valdez Counseling Center not to report these personal identifying items, and

WHEREAS, the Valdez City Council feels that the reporting of names and social security numbers is an invasion of a person's rights, is unnecessary for data collection and may restrict individuals from utilizing the services of the Valdez Counseling Center.

NOW, THEREFORE, BE IT RESOLVED that the State Office of Alcohol and Drug Abuse be advised that the Valdez Counseling Center will not report the personal identifying data of names and social security numbers.

BE IT FURTHER RESOLVED, that the Valdez City Council hereby requests that the Department of Alcohol and Drug Abuse rescind this reporting requirement.

PASSED AND APPROVED BY THE CITY COUNCIL OF THE CITY OF VALDEZ, ALASKA this 4th day of October 1982.

CITY OF VALDEZ, ALASKA

Stephen A. McAlpine, Mayor

ATTEST: SEAL

Jim Watson, City Manager/City Clerk

ATTACHMENT "A"

MEMORANDUM State of Alaska

TO: Robert L. Cole.
Coordinator
Office of Alcoholism/Drug Abuse

DATE: April 12, 1982

FILE NO: J66-484-82

TELEPHONE NO: 465-3603

FROM: WILSON L. CONDON
ATTORNEY GENERAL

By: LS
Linda Scoccia
Assistant Attorney General

SUBJECT: Payment of Wages in Therapeutic Work Program

You have asked several questions regarding payment of wages to clients of Nugen's Ranch, a long-term alcohol treatment facility, for work that they do while residing at the Ranch. You state that a component of the program at Nugen's Ranch is work therapy, and that the program will develop a farm, with the clients engaging in such activities as harvesting crops, tending a greenhouse, and doing general housekeeping at the Ranch, as well as assisting nearby farmers with their crops. You also state that any proceeds in food or money will go back into facility operations.

You pose a series of questions regarding coverage of the client-workers for the above-mentioned activities under state and federal law; essentially, three issues are raised by your questions: (1) are the clients employees?; (2) if yes, are they working in covered employment?; and (3) if yes, are they exempt by virtue of their disability?

The state and federal laws which cover questions of minimum wage and overtime are, respectively, the Alaska Wage and Hour Act, AS 23.10.050-.150, and the Federal Labor Standards Act (FLSA), 29 USC §§201-219, and the regulations adopted thereunder. AS 23.10.065 /1 provides in pertinent part:

> MINIMUM WAGES. An employer shall pay to each of his employees wages at a rate of not less than 50 cents an hour greater than the prevailing Federal Minimum Wage Law or $2.60 an hour, whichever is greater, for hours worked in a pay period, whether the work is measured by time, piece, commission or otherwise.

/1 The federal counterpart is 29 USC §206. Since both federal and state law seem to apply, and state law is based on the federal law, see McGinnis v. Stevens, 543 P.2d 1221 (Alaska 1975), and, for purposes of this inquiry, they are virtually interchangeable, I shall not focus exclusively on either.

Both state and federal law have provisions exempting certain categories of workers from payment of the minimum wage /2 and providing, instead, for payment of less than the minimum wage. AS 23.10.070 provides in pertinent part:

> Sec. 23.10.070. EXEMPTIONS FROM MINIMUM WAGE. To the extent necessary to prevent curtailment of opportunies of employment, the commissioner may by regulations or orders provide for the employment at wages lower than the minimum wage prescribed in AS 23.10.050--23.10.150 of
>
> (1) an individual whose earning capacity is impaired by physical or mental deficiency, age, or injury, at the wages and subject to the restrictions and for the period of time which is fixed by the commissioner . . . /3

Under state regulation, however, persons participating in alcohol rehabilitation are specifically excluded /4 from the application of this statute. /5

/2 AS 23.10.070 and 29 USC §214, respectively.

/3 The federal exemption is similar, applying to those "whose earning capacity or productive capacity is impaired by age or physical or mental deficiency or injury", 29 USC §214(c)(1).

/4 Federal regulations, 29 CFR 529.1-529.17, discussed below, exclude such persons if their earning or productive capacity is so impaired that they are not able to earn the statutory minimum wage.

/5 8 AAC 15.120 provides in part:

> MINIMUM WAGE EXEMPTION FOR HANDICAPPED PERSONS.
>
> . . .
>
> (f) Persons undergoing rehabilitation treatment or therapy relating to narcotics or alcoholism are not considered handicapped for the purposes of AS 23.10.070 and this section.

Nor is the characterization of the work as "therapeutic" determinative; the question is whether the patient/client is an employee, that is, whether he or she is employed by the program. The FLSA simply defines "employ" /6 as "to suffer or permit to work". 29 USC §203(g). The test adopted by the federal courts looks to the "economic reality" of the situation in determining the existence of an employment relationship. In Souder v. Brennan, 367 F. Supp. 808 (D.C. Cir. 1973), patient-workers in state hospitals for the mentally ill and mentally retarded sought a determination that the provisions of the FLSA applied to them. The court found in their favor, and stated:

> [T]he reality is that many of the patient-workers perform work for which they are in no way handicapped and from which the institution derives full economic benefit. So long as the institution derives any consequential economic benefit the economic reality test would indicate an employment relationship rather than mere theraputic exercise. To hold otherwise would be to make therapy the sole justification for thousands of positions as dishwashers, kitchen helpers, messengers and the like.

367 F. Supp. at 813 (footnotes omitted).

After this decision, the U.S. Department of Labor promulgated, in 1975, new regulations /7 implementing the holding of this case. The regulations expressly apply to "patient-workers" in "residential centers for drug addicts or alcoholics". /8 The regulations define "employment relationship" as follows:

. . . . . .

/6 The Alaska Wage and Hour Act does not define "employ", but AS 23.10.145 provides:

> DEFINITIONS. Terms used in AS 23.10.-050--23.10.150 shall be defined, where applicable, as they are defined in the federal Fair Labor Standards Act of 1938, as amended, or the regulations adopted under it.

/7 29 CFR 529.1-529.17

/8 29 CFR 529.2(b) and (c).

"Employment relationship" generally arises whenever a patient is suffered or permitted to work. The toal facts surrounding a given situation, other than those factors specifically excluded in this subsection, determine whether the test is satisfied. A major factor in determining whether or not an employment relationship exists under this Part is whether the work performed is of any consequential economic benefit to the institution. Generally, work shall be considered to be of consequential economic benefit if it is of the type that nonhandicapped workers normally perform, in whole or in part, in the institution or elsewhere. A patient does not, however, become an employee merely if he or she performs personal housekeeping chores, such as maintaining his or her own quarters, or receives a token remuneration for his or her services. Nor does the patient become an employee if engaged in such activities as making craft products, where the patient voluntarily engages in such activity and the products become the property of the patient making them, or the funds resulting from the sale of the products are divided among the patients participating in that program or are used for purposes of purchasing materials consumed in making the craft products. On the other hand, determination of an employment relationship does not depend on the level of performance of the patient or whether the work is of theraputic value to the patient. /9

/9 29 CFR 529.2(d). Emphasis added.

Thus, the critical factor in determining the existence of an employment relationship is whether the program derives any "consequential economic benefit" from the work done by the clients or patients. As the regulation further states, such a benefit usually is found if the work is of the type that is usually performed by nonhandicapped workers. In the context of your program and the therapeutic purpose of the activities enumerated above, this question is not quite as susceptible of an easy answer as it is in the case of an institution such as a mental hospital which employs its patient as "dishwashers, kitchen helpers, messengers and the like". It does not seem as likely that at Nugen's Ranch a client tending a garden, for example, would be displacing or impairing the employment opportunities of another potential employee that the program would otherwise hire to perform that task. However, this question need not be decided with respect to the activities you have described, because the final issue raised (I have saved the best for last) resolves the problem.

AS 23.10.055 lists employees who are exempt from the provisions of the Alaska Wage and Hour Act. Subsections (1) and (2) are dispositive. Subsection (1) provides:

> (1) an individual employed in agriculture which includes farming in all its branches and, among other things, includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities, the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including forestry and lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with the farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market;

Subsection (2) provides:

> (2) an individual employed in the catching, trapping, cultivating or farming, netting or taking of any kind of fish, shellfish, or other aquatic forms of animal and vegetable life;

Thus under Alaska law, Nugen's Ranch is not required to pay minimum wages to individuals engaged in general housekeeping /10, harvesting crops /11, tending a greenhouse, caring for animals, or fishing; nor is it required to do so under federal law. /12 It must be emphasized, however, that the inquiry is a factual one, and therefore each situation must be individually examined to determine whether the minimum wage laws apply. If clients of Nugen's Ranch were to engage in activities other than those you have described, the questions regarding applicability of the minimum wage laws would have to be looked at anew.

LS/jf

cc: Don Wilson
Wage & Hour Divison
Department of Labor

/10 See 29 CFR 2(d), quoted above.

/11 Whether they perform this activity for the Ranch or for other farmers.

/12 29 USC 213(a)(5) and (6).

..ployer and, where appropri- , the apprenticeship agency or responsible school official, setting that representative's findings of cific pertinent facts and conclu- ns and that representative's order cerning the proposed annulment or drawal. In proceedings instituted annulment, the order may provide withdrawal instead of annulment the proof warrants such withdrawal t falls to support adequately the an- ment. Such an order shall be ued issued and effective according its terms when mailed.

cretary's Order No. 16-75, dated Nov. 25, 75 (40 FR 55913); Employment Standards der No. 76-2, dated Feb. 23, 1976 (41 FR. 0)

1 FR 28469, June 30, 1976]

.6 Review.

Any employer and, when appropri- , any apprenticeship agency or re- onsible school official, who ex- ssed timely objection to the pro- sed action prior to issuance of an der of annulment or withdrawal ay obtain review, limited to the ques- on of whether the findings of fact pport the order under the regula- ons in this part. Application for such view shall be in writing addressed to e Administrator and mailed within days after the order is issued. The dministrator may affirm, modify, or verse the order, or may remand it r further proceedings. The order der review shall not be stayed in fect pending such review. Any ag- ieved person may obtain such review l an order entered in proceedings in- tuted under paragraph (c) of § 528.3,

21 FR 5310, July 17, 1956, as amended at 22 R 5683, July 18, 1957]

528.7 Effect of order of annulment or withdrawal.

Except as otherwise expressly pro- ided in such order, any order of an- ulment or withdrawal under para- raph (a) or (b) of § 528.3 shall be ef- ective to terminate all certifications n which the regulations in this part pply in effect at the establishment here the cause for withdrawal arose n where the annulled certificate had en set. After such annulment or with- drawal, such employer shall be ineligible to obtain or exercise the privileges granted in such a certificate until he satisfies the issuing officer that he will not again give cause for annulment or withdrawal if a certificate is issued.

(Secretary's Order No. 16-75, dated Nov. 25, 1975 (40 FR 55913); Employment Standards Order No 76-2, dated Feb. 23, 1976 (41 FR 9010))

[43 FR 28469, June 30, 1978]

PART 529—EMPLOYMENT OF PATIENT WORKERS IN HOSPITALS AND INSTITUTIONS AT SUBMINIMUM WAGES

Sec.

529.1 Statutory language and scope of regulations.
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529.16 Amendment of this part.
529.17 Review of regulations.

AUTHORITY: Sec. 14, 52 Stat. 1068, as amended (29 U.S.C. 214).

SOURCE: 40 FR 6776, Feb. 7, 1976, unless otherwise noted.

§ 529.1 Statutory language and scope of regulations.

(a) The Fair Labor Standards Act as amended, among other things, makes provision for the employment of handicapped persons at subminimum wages under certificate. This provision is now designated as section 14(c) of the Act. It reads as follows:

(c) (1) Except as otherwise provided in paragraphs (2) and (3) of this subsection, the Secretary of Labor, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulation or order provide for the employment under special certificates of individuals (including individuals employed in agriculture) whose earning or productive capacity is impaired by age or physical or mental deficiency or injury, at wages which are lower than the minimum wage applicable under section 6 of this Act but not less than 50 per centum of such wage and which are commensurate with those paid nonhandicapped workers in industry in the vicinity for essentially the same type, quality, and quantity of work.

(2) The Secretary, pursuant to such regulations as he shall prescribe and upon certification of the State agency administering or supervising the administration of vocational rehabilitation services, may issue special certificates for the employment of—

(A) handicapped workers engaged in work which is incidental to training or evaluation programs, and

(B) multihandicapped individuals and other individuals whose earning capacity is so severely impaired that they are unable to engage in competitive employment, at wages which are less than those required by this subsection and which are related to the worker's productivity.

(3) (A) The Secretary may by regulation or order provide for the employment of handicapped clients in work activities centers under special certificates at wages which are less than the minimum applicable under section 6 of this Act or prescribed by paragraph (1) of this subsection and which constitute equitable compensation for such clients in work activities centers.

(B) For purposes of this section, the term "work activities centers" shall mean centers planned and designed exclusively to provide therapeutic activities for handicapped clients whose physical or mental impairment is so severe as to make their productive capacity inconsequential.

(b) Authority to promulgate the regulations and issue the certificates referred to in section 14(c) has been delegated by the Secretary to the Administrator of the Wage and Hour Division (Secretary's Orders 13-71 and 15-71 (36 FR 8755 and 8756)).

(c) Patient workers whose earning or productive capacity is not impaired shall be paid at least the statutory minimum wage. For patient workers whose earning or productive capacity is impaired to the extent that they are not able to earn the statutory minimum wage, the regulations in this Part 529 govern certificates authorizing special minimum wages for patient workers in hospitals and institutions for the sick, the aged, and the mentally ill or defective with the following exceptions which are governed by Parts 524 and 525 of this chapter, as appropriate:

(1) Patients of hospitals or institutions working for employers other than hospital or institution.

(2) Patients working in sheltered workshops, including work activities centers, as defined in Part 525, operated by the hospital or institution.

§ 529.2 Definitions.

(a) "Administrator" means the Administrator of the Wage and Hour Division, U.S. Department of Labor, or the Administrator's authorized representative.

(b) "Patient worker" or "resident worker," hereafter referred to as "patient worker," means a sick, aged or mentally ill or defective individual who receives treatment or care by a hospital or institution, whether he or she is a resident or not, and has an employment relationship with such establishment, other than in a sheltered workshop program.

(c) "Hospital or institution" hereinafter referred to as "institution," is a public or private, nonprofit or profit facility primarily engaged in (i.e., more than 50 percent of the income is attributable to) providing residential care for the sick, the aged, or the mentally ill or defective, including but not limited to nursing homes, intermediate care facilities, rest homes, convalescent homes, homes for the elderly and infirm, halfway houses, residential centers for drug addicts or alcoholics, and the like, whether licensed or not licensed.

(d) "Employment relationship" generally arises whenever a patient is suffered or permitted to work. The total facts surrounding a given situation, other than those factors specifically excluded in this subsection, determine whether the test is satisfied. A major factor in determining whether or not an employment relationship exists under this Part is whether the work performed is of any consequential economic benefit to the institution. Generally, work shall be considered to be of consequential economic benefit if it is of the type that nonhandicapped workers normally perform, in whole or

rt, in the institution or elsewhere. tment does not, however, become nployee merely if he or she per- s personal housekeeping chores, as maintaining his or her own ters, or receives a token remu- tion for his or her services. Nor the patient become an employee gaged in such activities as making products, where the patient vol- rily engages in such activity and products become the property of patient making them, or the funds ulting from the sale of the products divided among the patients particip- ng in that program or are used for poses of purchasing materials con- ed in making the craft products. the other hand, determination of employment relationship does not end on the level of performance of patient or whether the work is of apeutic value to the patient.

e) "Evaluation and training" means rogram authorized pursuant to sec- n 14(c)(2)(A) of the Act, which pro- les competent instruction and super- ion and is designed to determine a rking patient's potential and to ieve adjustment to a work environ- ent or the skills related to one or ore types of work. The duration of e evaluation and training depends n the total facts of the situation, but n no case shall exceed 12 months. ime spent in an employment rela- ionship in the institution prior to the ffective date of these regulations hall be counted in determining the uration a patient worker is in evalua- ion and training. (Any workweek uring which there was regular and re- urrent engagement in work, even though small in amount, which gave rise to an employment relationship, shall be considered as a week spent in evaluation and training.)

(f) "Group minimum wage" means the minimum wage authorized pursu- ant to section 14(c)(1) of the Act which shall apply to all patient work- ers who have completed the evalua- tion and training program, if one has been authorized for the institution under this part (where no such pro- gram has been authorized, the group minimum wage applies immediately on a patient's entering into an em- ployment relationship in the insti- tution), except for patient workers who are: Entitled to a commensurate wage higher than the group minimum wage; subject to an individual excep- tion; or subject to a work activities center certificate, as defined in this part.

(g) "Individual exception" means au- thorization, pursuant to section 14(c)(2)(B) of the Act, to pay a partic- ular patient worker whose earning or productive capacity is severely im- paired less than the group minimum wage.

(h) "Work activities center" is an ad- ministrative classification given to a facility which has an approved pro- gram (other than a work activities center program as defined in Part 525), authorized pursuant to section 14(c)(3) of the Act, which is planned and designed exclusively to provide work activities for patients whose physical or mental impairment is so severe as to render their productive ca- pacity inconsequential. The work ac- tivities shall be part of a recorded plan of therapy or care for such patients. Such activities need not, however, be restricted to a particular physical or program area of the institution, nor to a particular type of work. No program shall qualify for a work activities center certificate under this part unless the productive capacity of each individual in the program is so severe- ly impaired as to make that person in- capable of earning as commensurate pay at least 25 percent of the mini- mum wage under section 6 of the Act, and the patient workers are particip- ating in the program as a part of planned therapy.

(i) "Commensurate pay" (the term used in these regulations) is intended to have the same meaning as "equita- ble compensation" and "wages related to the worker's productivity," which terms are used in the statute, and means wages which are commensurate with those paid nonhandicapped work- ers in the institution or in industry maintaining acceptable labor stand- ards in the vicinity for essentially the same type, quality, and quantity of work. So for example, the commensu- rate pay of a patient worker who is 75 percent as productive, considering quality and quantity, as the average nonhandicapped worker performing essentially similar work in the institu- tion would be at least 75 percent of the wage paid to such nonhandicapped worker.

(j) "State agency" means the agency within the State which administers or supervises the administration of voca- tional rehabilitation services in any State of the United States, the Dis- trict of Columbia, or any territory or possession of the United States.

(k) "The Act" means the Fair Labor Standards Act of 1938, as amended.

§ 529.3 Advisory Committee on Sheltered Workshops.

(a) The Advisory Committee on Sheltered Workshops, appointed peri- odically by the Secretary of Labor, shall advise and make recommenda- tions to the Administrator concerning the administration and enforcement of this part and the need for amend- ments thereto and for such other pur- poses as may be desired by the Admin- istrator.

(b) The Administrator may consult with the Advisory Committee on Shel- tered Workshops prior to any action taken under this part and may afford the Committee 15 days, or such addi- tional time as may be allowed, to pres- ent its views. The Administrator may also afford the Committee an opportu- nity to present its views in connection with any petition for review filed, any hearing held, and any petition for amendment of these regulations, or any proposed legislation by the Secre- tary of Labor pertaining to the prob- lems dealt with in these regulations.

§ 529.4 Wage payments.

(a) A patient worker whose earning or productive capacity is not impaired shall be paid at least the statutory minimum wage. A patient worker whose earning or productive capacity is impaired to the extent that the indi- vidual is unable to earn at least the statutory minimum wage may be paid a subminimum wage but only after a certificate, authorizing payment of such lower wage has been obtained from the Wage and Hour Division.

(b) Four types of certificates author- izing subminimum wages are available for patient workers in institutions: Evaluation and training, group mini- mum wage, individual exception, and work activities center. All but the indi- vidual exception are group certificates. Under a group certificate, the program is certificated and not the individual patient worker. In the case of the indi- vidual exception, authority to pay a subminimum wage must be obtained for each individual.

(c) Evaluation and training: Patient workers subject to an evaluation and training certificate shall receive at least commensurate pay; no minimum wage guarantee is required unless the Administrator shall determine it is in the best interest of the patient work- ers that a minimum wage guarantee be set.

(d) Group minimum wage: Patient workers subject to a group minimum wage certificate shall receive at least the minimum wage authorized in the certificate or commensurate pay, whichever is higher. The group mini- mum wage shall not be less, and may be more, than 50 percent of the mini- mum wage under section 6 of the Act.

(e) Individual exception: A patient worker subject to an individual excep- tion shall receive, not less than the minimum wage authorized in the indi- vidual exception certificate issued for that patient worker or commensurate pay, whichever is higher. An individu- al exception shall not be less, and may be more, than 25 percent of the mini- mum wage under section 6 of the Act.

(f) Work activities center: Patient workers subject to a work activities center certificate shall receive at least commensurate pay; no minimum wage guarantee is required unless the Ad- ministrator shall determine it is in the best interest of the patient work- ers that a minimum wage guarantee be set.

(g) Compensable time for a patient worker starts when the individual begins to perform work involving an employment relationship.

(h) Each patient worker's work per- formance shall be reviewed by the in- stitution at three month intervals during the first 6 months in an em- ployment relationship, and at least every 6 months thereafter, and his or her wages adjusted accordingly. The review shall relate the patient work-

ilar work to that performed by the patient workers.

(d) Production standards for an average nonhandicapped worker for each job being performed by a patient worker in the institution (for use as a norm in measuring patient worker productivity.)

(e) When an evaluation and training program is authorized by certificate, records showing which patient workers are in the evaluation and training program, and the total period of time each worker has been in such a category.

(f) When an institution holds both a work activities center certificate and a group minimum wage certificate, records showing which patient workers are under each certificate.

[illegible] showing the patient [illegible] tions have been authorized.

(h) In addition, the records required under all the applicable provisions of Part 516 of this chapter.

(i) Every institution having patient workers who are entitled to benefits under the Act shall at all times display a poster, as prescribed by the Administrator, in a conspicuous place in the institution where it may be observed readily by the patient workers and other workers in the institution.

(j) Records required by this section shall be kept for the periods specified in Part 516 of this chapter.

§ 529.11 Cancellation of a certificate.

(a) The Administrator may cancel any certificate for cause. A certificate may be canceled (1) as of the date of issuance, if it is found that fraud has been utilized in obtaining the certificate or in permitting a patient worker to be employed thereunder; (2) as of the date of violation, if it is found that any of the provisions of the Act or of the terms of the certificate have been violated; or (3) as of the date of notice of cancellation, if it is found that the certificate is no longer necessary in order to prevent curtailment of opportunities for employment, or that the requirements of this part have not been complied with.

(b) If a petition for review is filed under § 529.12, the effective date of the cancellation shall be postponed until action is taken thereon: *Provided, however,* That if the conciliation order is affirmed on review, the institution shall reimburse any person covered by the certificate in an amount equal to the difference between the applicable minimum wage and any lower wage paid such person subsequent to the effective date of cancellation.

(c) Except in cases of willfulness or those in which the public interest requires otherwise, before any certificate shall be canceled, facts or conduct which may warrant such action shall be called to the attention of the institution in writing and it shall be afforded an opportunity to demonstrate or achieve compliance with all lawful requirements.

§ 529.12 [illegible]

Any person aggrieved by any action of an authorized representative of the Administrator taken pursuant to this part may, within 60 days or such additional time as the Administrator may allow, file with the Administrator a petition for review. Such review, if granted shall be made either by the Administrator or by an authorized representative who took no part in the action under review, who may, to the extent it is deemed appropriate, afford other interested persons an opportunity to present data and views.

§ 529.13 Submission of information, investigations, and hearings.

The Administrator may require at any time the submission of such information, other than that specified elsewhere in this part, as is deemed appropriate, or may conduct an investigation, which may include a hearing, prior to taking any action pursuant to this part. To the extent it is deemed appropriate, the Administrator may provide an opportunity to other interested persons to present data and views.

§ 529.14 Relation to other laws.

No provision of this part, or of any certificate issued under this part, shall excuse noncompliance with any other Federal or State law or municipal ordinance establishing higher standards

§ 529.15 Issuance of certificates for experimental purposes.

In addition to the issuance of certificates as provided in §§ 529.1 to 529.14, the Administrator may authorize the issuance of certificates to permit employment of patient workers in institutions at less than the applicable minimum wage under section 6 of the Act as part of experimental programs to increase employment opportunities for such persons. Such certificates shall be issued in such types of cases and on such terms and conditions within the scope of section 14 of the Act as the Administrator shall determine will best further any such experimental programs. Certificates issued under this section shall be limited to an effective period of not more than 1 year.

§ 529.16 Amendment of this part.

The Administrator may at any time upon his or her own motion or upon written request of any interested person setting forth reasonable grounds therefor, and after opportunity has been given to interested persons to present their views, amend or revoke any of the terms of this part.

§ 529.17 Review of regulations.

Approximately six months after the effective date of this part, the Wage and Hour Division will undertake a review of its program for administration and enforcement of this Part in cooperation with the Advisory Committee on Sheltered Workshops.

PART 530—EMPLOYMENT OF HOMEWORKERS IN CERTAIN INDUSTRIES

AUTHORITY: Sec. 11, 52 Stat. 1066; 29 U.S.C. 211, unless otherwise noted.

SOURCE: 24 FR 729, Feb. 3, 1959, unless otherwise noted.

§ 530.1 Definitions.

(a) The meaning of the terms "person," "employ," "employer," "employee," "goods," and "production," as used in this part, is the same as in the Fair Labor Standards Act of 1938, as amended.

(b) "Industrial homeworker" and "homeworker," as used in this part mean any employee employed or suffered or permitted to perform industrial homework for an employer.

(c) "Industrial homework," as used in this part, means the production by any person in or about a home, apartment, tenement, or room in a residential establishment of goods for an employer who suffers or permits such production, regardless of the source (whether obtained from an employer or elsewhere) of the materials used by the homeworker in such production.

(d) The women's apparel industry is defined as follows: The production of women's, misses' and juniors' dresses, washable service garments, blouses, and neckwear from woven or purchased knit fabric; women's, misses', children's and infants' underwear, nightwear, and negligees from woven fabrics; corsets and other body supporting garments from any material; other garments similar to the foregoing; and infants' and children's outerwear.

(e) The jewelry manufacturing industry is defined as follows:

(1) (i) The manufacturing, processing, or assembling, wholly or partially from any material, of jewelry, commonly or commercially so known. Jewelry as used herein includes without limitation, religious, school, college, and fraternal insignia; articles of ornament or adornment, designed to be worn on apparel or carried on or about the person, including, without limitation, cigar and cigarette cases, holders, and lighters; watch cases, metal mesh bags and metal watch bracelets; and chain, mesh, and parts for use in the

r's quantity and quality of performance to that of nonhandicapped workers receiving the prevailing wage in the institution for similar work or work requiring similar skills. If similar work or work requiring similar skills is not performed by nonhandicapped workers in the institution the prevailing wage paid nonhandicapped workers in the vicinity in industry maintaining acceptable labor standards shall be used. The review shall be made by a staff member or members who observe the patient worker(s) being rated on a continuing basis and who are familiar with appropriate nonhandicapped production standards.

(f) No part of the minimum wage and overtime earned by a patient worker can be deducted for the cost of room, board or services. The patient worker must receive his or her wages free and clear, except for legal payroll deductions. It is not the intention of these regulations, however, to preclude the institution thereafter from assessing or collecting the reasonable cost of room, board and other services actually provided to a patient worker to the extent permitted by applicable Federal or State law and on the same basis as it assesses and collects from nonworking patients.

§ 529.5 Application for certificates.

(a) Application for a certificate for an evaluation and training program, a group minimum wage, an individual exception, or a work activities center may be filed by any institution with the Regional Office or Caribbean Director of the administrative region or area of the Wage and Hour Division, U.S. Department of Labor, in which the institution is located. Application forms may be obtained from the appropriate Office.

(b) An application for an evaluation and training certificate and for an individual exception certificate for payment of a wage below 50 percent of the minimum wage under section 6 of the Act shall also be filed with the State agency. Before the Wage and Hour Division can act on such an application, the State agency must certify that the evaluation and training standards defined in § 529.2 or, in the case of an individual exception, that the individual's earning capacity is so severely impaired that he or she is unable to earn at least 50 percent of the minimum wage under section 6 of the Act.

(c) An institution initially applying for a certificate, other than an individual exception certificate, which does not have the information called for in the application, may be issued a temporary certificate if it meets the requirements of, and provides assurance of compliance with, this Part.

(d) Application for an individual exception certificate may be filed at the time of applying for a group minimum wage certificate or during the life of the certificate. The application must show, among other things, that the patient worker is unable to earn the minimum wage authorized in the group minimum wage certificate.

(e) An application for an individual exception filed before the patient worker has completed evaluation and training shall be considered timely. In such case, if action on the application is not completed before the expiration of the evaluation and training period, the minimum wage requested in the application by the institution (not less than 25 percent of the minimum wage) shall be the interim minimum wage.

§ 529.6 Criteria for consideration in issuance of certificates.

The following criteria will be considered by the Administrator in determining the necessity of issuing a certificate or certificates and the conditions to be specified therein:

(a) The present and previous earnings of the patient workers.

(b) Whether the patient workers are receiving commensurate pay.

(c) The nature and extent of the disabilities of the patient workers and the degree to which these factors affect earning or productive capacity of the patient workers.

(d) Whether the conditions required for certification under this part have been met.

(e) Whether the certification by the State agency has been made in accordance with this part.

§ 529.7 Issuance of certificates.

(a) Upon consideration of criteria specified in § 529.6, the Administrator may issue a certificate or certificates, as appropriate.

(b) If a certificate is issued, a copy shall be sent to the institution. If denied, the institution shall be notified in writing of the denial and the reasons therefor.

(c) A group minimum wage certificate may be issued for the entire institution or a department or departments of the institution.

§ 529.8 Terms and conditions of certificates.

(a) A certificate shall specify the terms and conditions under which it is granted.

(b) A certificate shall apply to every patient worker in the program for which the certificate is granted.

(c) A certificate shall be effective for a period to be designated by the Administrator, generally for a period of 1 year. Patient workers may be paid wages lower than the statutory minimum only during the effective period of a certificate.

(d) A group minimum wage certificate shall set a special minimum wage of not less than 50 percent of the minimum wage under section 6 of the Act. An individual exception certificate shall set a special minimum wage not less than 25 percent of the minimum wage under section 6 of the Act.

(e) An evaluation and training certificate and a work activities center certificate need not set a special minimum wage other than that required by paragraph (f) of this section or provided for by § 529.4.

(f) All patient workers subject to a certificate shall be paid wages commensurate with those paid nonhandicapped workers in the institution in which they are patients or in the vicinity in industry maintaining acceptable labor standards for essentially the same type, quality, and quantity of work, but not less than the certificate rate applicable if such a rate has been authorized.

(g) Patient workers shall be paid not less than one and one-half times the regular rate for all hours worked in excess of the maximum workweek applicable under section 7 of the Act.

(h) No patient worker shall be newly-employed under a certificate issued under these regulations while abnormal labor conditions, such as a strike, a lock-out, or other similar condition, exist in the institution.

(i) Each patient worker and his or her parent or guardian shall be informed promptly orally and in writing of his or her rights under the Act.

(j) The terms of any certificate may be amended for cause, upon request of the institution, or a patient worker or his or her parent or guardian, or upon the initiative of the Administrator.

§ 529.9 Renewal of certificates.

(a) Application may be filed for renewal of any certificate.

(b) If an application for renewal has been properly and timely filed prior to the expiration date of a certificate, the certificate shall remain in effect until the application for renewal has been granted or denied.

(c) Patient workers may be paid wages less than the statutory minimum after notice that the application for renewal has been denied, if review of such denial is requested in accordance with § 529.12: *Provided, however,* That if the denial is affirmed on review, the institution shall reimburse any person covered by the certificate in an amount equal to the difference between the applicable minimum wage and any lower wage paid such person subsequent to the effective date of denial.

§ 529.10 Records to be kept.

Every institution shall maintain and have available for inspection by the Administrator records of:

(a) Disability, which show the nature of each patient worker's disability.

(b) Productivity, which show productivity of each patient on a continuing basis or at intervals as defined in §

(c) Prevailing

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February 23, 1982

Mr. George Mundell
Office of Alcoholism and
Drug Abuse
STATE OF ALASKA
Pouch H05F
Juneau, Alaska 99811

RE: Nugens Ranch

Dear George:

During our phone call two weeks ago, I requested that your office seek an Attorney General's opinion on the applicability of the Alaska Wage and Hour Act to the work therapy planned for clients at Nugens Ranch. With this letter I would like to express my thoughts about the legal aspects of the issue and the practical problems which it presents to the program. I have copied this letter to Loyd Gathman and Bruce Botelho with the hope that a sharing of ideas may expedite a resolution to the question. I have also discussed my conclusions and recommendations with the program's Board of Directors and they fully support the suggestions I make.

The Plan for the Ranch

As you know, clients at Nugens Ranch will, as part of their treatment, be engaged in the cultivation of crops, the raising of livestock, general housekeeping chores, and minor repairs and maintenance at the facility, including the future construction of sheds, fences and the like. All of this work is intended to be an integral part of the treatment for each client. At the time of admission, each client's treatment plan will involve a scheme of personal and group work therapy. All client work will occur with and under the supervision of a counselor. In fact, individual counseling is expected to occur during the work therapy. Counselors will evaluate each client's ability to perform the various assigned tasks as a measure of the client's progress in treatment and the client's employment skills. The progress of each client in the work therapy program will be recorded in the client file; and adjustments in the treatment plan made accordingly.

No client will be working full time, nor assigned to a specific and regular task. Although each client will be expected to perform general housekeeping chores, the work therapy projects will change from day to day and week to week. The tasks assigned to each client will be based on the client's ability to perform the work.

It is doubtful that any of the clients admitted to the Ranch will be considered "employable" in the job market. The years of heavy drinking and street life typical of the chronic inebriate who will be treated at the facility can be considered as much of a barrier to employment as a traditional physical or mental handicap. Many clients may also be suffering from alcohol related health problems which impair their employment potential. The work therapy at the Ranch will, in effect, provide vocational rehabilitation to clients as much as it will promote future sobriety.

For the most part, the work therapy performed by the clients will not displace employment positions at the Ranch. The cultivation of crops and the raising of livestock, for instance, are projects entirely incidential to the purpose of the facility and are designed purely for the benefit of the clients. The daily housekeeping chores expected of each client (cleaning his or her room, making the bed, sweeping, etc.) are tasks normally required of clients in residential treatment programs. The Ranch will have regular employees who will be responsible for general custodial care and minor maintenance. Also, although some clients may assist with the preparation of food, the Ranch will employ full time cooks for the operation of the kitchen.

The painting and minor renovation which clients will be performing on the main building and, later on, the construction of sheds, fences, and the like, are another matter. Although this work is also designed to be an integral part of the work therapy program, it is difficult to argue that the Ranch would not otherwise be required to contract for the completion of this work. Nonetheless, from a counselor's point of view, the work therapy involved in a group of clients painting the hallways is indistinguishable from the work therapy involved in weeding the garden.

In addition to the theraputic benefits of the work to each client, it is important to recognize the importance of the work therapy plan to the concept of the Ranch. Despite the size of the facility, every attempt is being made to preserve a "family" atmosphere at the Ranch. No one intends for the Ranch to simply "warehouse" clients while they are going through a long period of sobriety. Rather, the Nugens

plan to operate the facility in such a way that the clients feel a sense of belonging, and feel that they have a stake in the venture - that the Ranch is as much theirs as it is the Nugens. Having the clients work at the Ranch, and become part of the gradual expansion and renovation of the facility is essential to achieving this goal. That sense of family, and feeling of belonging, is virtually impossible to achieve with a client group who perceives their relationship to the program as one of employees.

The Applicable State and Federal Statutes

(a) The Alaska Wage and Hour Act. The Alaska Wage and Hour Act, A.S. 23.10.050-150, is the basic minimum wage, maximum work week, and overtime compensation law in force in the State of Alaska. The Act establishes a minimum wage at a rate not less than $.50 an hour greater than the prevailing federal minimum wage of $3.35 per hour. A.S. 22.10.065. Other provisions of the Act require the payment of overtime for work in excess of eight hours per day or 40 hours per week (A.S. 23.10.060) and establish certain penalties for employer violations (A.S. 23.10.135-140).

The Act provides exemptions for employees engaged in agriculture, fishing, domestic service, volunteer work for non-profit organizations, etc., but none of the exemptions enumerated in A.S. 23.10.055 specifically apply to patient workers in alcohol or drug treatment programs. Subsection 70 of the Act, however, permits employers to pay subminimum wages to individuals whose earning capacity is impaired by physical or mental deficiency. [See, A.S. 23.10.070(1)]. This "handicapped worker" provision is similar to Section 14 of the federal Fair Labor Standards Act, 29 U.S.C. 214. But the State regulations promulgated pursuant to A.S. 23.10.070 make it clear that the handicap exception is not intended to apply to clients in alcoholism treatment facilities. 8 AAC 15.120(f) reads as follows:

> Persons undergoing rehabilitation treatment or therapy relating to narcotics or alcoholism are not considered handicapped for the purposes of A.S. 23.10.070 and this section.

Thus, the "handicapped worker" exception to the Alaska Wage and Hour Act does not authorize the payment of sub-minimum wages to clients at the Ranch.

Reference to other state labor statutes provides little guidance to the interpretation of the Wage and Hour Act. Provisions of the Employment Services Act referring to vocational rehabilitation do not mention drug or alcohol addiction as a disability. See, e.g., A.S. 23.15.210(4);

(5), and (9). Similarly, the expansive definitions of "employer" and "employee" in the Alaska Employment Security Act, A.S. 23.20.005-535, provide little guidance for patient worker situations. A.S. 23.20.526(d)(2) does, however, exclude from the definition of "employment" services performed

> in a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury or providing remunerative work for individuals who, because of their impaired physical or mental capacity, cannot be readily absorbed in the competitive labor market by an individual receiving the rehabilitation or remunerative work.

Arguably, this exclusion can be read to cover patient workers in drug or alcoholism treatment facilities. But I doubt that any court would read A.S. 23.20.526(d)(2) as providing any broader coverage than the "handicapped worker" exemptions to the Alaska Wage and Hour Act. The provisions of the Employment Services Act [A.S. 23.15.210(4), (5) and (9)], the Employment Security Act [A.S. 23.20.526(d)(2)], and the Wage and Hour Act [A.S. 23.10.070(1)] all seem to contemplate traditional notions of physical and mental disability. For whatever reasons, the Legislature has apparently chosen not to include alcohol and drug addiction as an employment handicap for the purposes of state wage and hour law. See, 8 AAC 15.120(f).

There is some indication that the limited handicapped worker exemptions found in A.S. 23.10.070 are the only authorized exceptions for the payment of a subminimum wage. 8 AAC 15.120(e) states that as a general rule "approval for payment of a wage lower than established under A.S. 23.10.065 to persons with a temporary handicap will not be granted." So long as alcoholism and drug addiction are considered "temporary" handicaps, it seems unlikely the State Department of Labor would authorize payment of a subminimum wage to clients at the Ranch.

The fact that there is no specific procedure authorizing the program to seek an exemption from the payment of minimum wages does not absolve the Ranch of future liability. In State Ex Rel State Labor Commissioner vs. Goodwill Industries, 478 P.2d 543 (N. Mex. 1970) the New Mexico Supreme Court held that the absence of a specific regulatory scheme regarding the payment of subminimum wages to patient workers did not relieve a program from liability when it employed an alcoholic in a driver position arguing that the work was "therapy".

The absence of any specific regulations or case law regarding patient worker payments under the Alaska Wage and Hour Act does not leave the program without any interpretative guidelines. The Alaska Act was modeled after the Fair Labor Standards Act, 29 U.S.C. 201 et. seq. (hereinafter "the FLSA"). The Alaska Supreme Court has held that questions of interpretation regarding the intent of the Alaska Wage and Hour Act are to be based upon federal law. McGinnis vs. Stevens, 543 P.2d 1221 (Alas. 1975). The Alaska Act itself refers to the FLSA as a guide to defining terms. A.S. 23.10.145. Thus, it is fair to say that the record of how federal courts have applied the FLSA to patient worker situations will predict an Alaska court's interpretation of the issue.

(b) The Fair Labor Standards Act. As mentioned, the Alaska Act was based on the Fair Labor Standards Act of 1938 as amended. With some differences, the FLSA includes provisions similar to Alaska's law for the payment of minimum wages, overtime compensation, etc.

Amendments to the Fair Labor Standards Act in 1966 specifically included hospitals or institutions "primarily engaged in the care of the sick, the aged, the mentally ill or defective" within the Act's coverage. Section 14 of the FLSA, the federal counterpart to the "handicapped worker" provisions under State law, permits the payment of subminimum wages to handicapped workers engaged in training or evaluation programs, and work activity centers. The Act authorizes the Secretary of Labor to grant a certificate of exemption for handicap workers in a number of different situations, and at a wage rate not less than 50 per cent of the prevailing minimum wage. Regulations promulgated pursuant to Section 14 can be found in 29 C.F.R., parts 524, 525 and 529.

The application of the Fair Labor Standards Act to patient workers has been the subject of some litigation. In Souder v. Brennan, 367 F. Supp. 808 (D.D.C. 1973), the Act was held to apply to patient workers in non-federal hospitals, homes and institutions for the mentally retarded and mentally ill. Similarly, Weidenfeller v. Kidulis, 380 F. Supp. 445 (E.D. Wis. 1974) applied the Fair Labor Standards Act minimum wage provisions to mentally handicapped persons in private boarding homes who had been released to those homes from the State Department of Public Welfare. King v. Carey, 405 F. Supp. 41 (W.D.N.Y. 1975) held the FLSA applicable to minors who were civilly committed to state camps after being adjudicated delinquent and in need of supervision. Of significant importance is Wyatt v. Stickney, 344 F. Supp. 373, 387 (M.D. Ala. 1972) affirmed sub nom Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

Wyatt held the Act applicable to Alabama state schools designed to habilitate the mentally retarded, and to patients involuntarily committed to Alabama mental institutions. Wyatt adopted minimum constitutional standards for the adequate treatment of the mentally ill.

In establishing standards for theraputic work programs for the severely retarded, the Wyatt court held:

> (1) Patients may be required to perform therapeutic tasks which do not involve the operation and maintenance of the hospital, provided the specific task or any change in assignment is:
>
> (a) an integrated part of the patient's treatment plan and approved as a therapeutic activity by a qualified mental health professional responsible for supervising the patient's treatment; and
>
> (b) supervised by a staff member to oversee the therapeutic aspects of the activity.
>
> (2) Patients may voluntarily engage in therapeutic labor for which the hospital would otherwise have to pay an employee, provided the specific labor or any change in labor assignment is:
>
> (a) an integrated part of the patient's treatment plan and approved as a therapeutic activity by a qualified mental health professional responsible supervising the patient's treatment; a
>
> (b) supervised by a staff member to oversee the therapeutic aspects of the activity; and
>
> (c) compensated in accordance with the minimum wage laws of the Fair Labor Standards Act, 29 U.S.C. 206 as amended 1966.

Id. at 381.

Wyatt also established similar standards for the mentally ill. See, 344 F. Supp. 402.

The argument that patient work is therapeutic for the patient, and therefore not traditional "employment", seems to have had little persuasive value with the courts. In Souder v. Brennan, supra, Judge Robinson noted that:

> The fallacy of the argument that the work of the patient-worker is therapeutic can be seem in extension to its logical extreme, for the work of most people, inside and out of institutions, is therapeutic in the sense that it provides a sense of accomplishment, something to occupy the time, and a means to earn one's way. Yet that hardly mean that employers should pay workers less for what they produce for them. Id. at 813, n. 21.

In interpreting the FLSA, the courts viewed the "economic reality test", and not the counselor/patient relationship, as the key to the applicability of the law. This test holds that so long as an institution derives any consequential economic benefit from the activity, an employer/employee relationship exists rather than a therapeutic one. Thus, if a patient performs work for which he or she is in no way handicapped, and from which the institution derives any economic benefit, the economic reality test is met and minimum wages must be paid.

One can argue that Souder, Weindefeller, Wyatt, et al. are distinguishable because those cases primarily involved individuals who had been involuntarily committed to state or private institutions. With the exception of King v. Carey, each case involved long-term placement of physically or mentally disabled patients who were required to perform tasks of questionable therapeutic value. Although the 1966 amendments to the FLSA specifically extended the coverage of the Act to hospitals and mental institutions, nothing in the legislative history suggests that Congress also intended to cover half-way houses and residential treatment centers. It is certainly true that the services provided by drug and alcohol programs are distinctly different than those provided by large institutions for the mentally retarded.

But these technical arguments may be of little value in avoiding the applicability of the federal Act. Without question the Fair Labor Standards Act has been broadly construed in favor of the employee, Gulf King Shrimp Company vs. Wirtz, 407 F.2d 508 (5th Cir. 1969) and exceptions to the Act are to be strictly and narrowly construed. Brennan vs. Great American Discount and Credit Company, Inc., 477 F.2d 292, cert. denied, Walker vs. Brennan, 414 U.S. 856. Questions of treatment modality aside, I would be hardpressed to argue that the basic policy considerations inherent in the Souder and Wyatt decisions are not also applicable to clients in long-term residential treatment programs such as the Ranch. And too, the regulations adopted as a result of Souder v. Brennan, supra, suggest that clients at the Ranch will be covered by the patient-worker provisions of the FLSA.

Following the court's ruling in Souder vs. Brennan, the United States Department of Labor adopted specific regulations governing the employment of patient workers in hospitals and institutions at some subminimum wages. See, 29 C.F.R. Parts 524, 525 and 529. These regulations have led to greater clarity on the issue, and are of some help in determining the applicability of minimum wage provisions to clients at Nugens Ranch.

29 C.F.R. 529 now provides a procedure for the application of a certificate to employ patient workers in hospital and institutions at subminimum wages. Unlike Alaska's parallel provision, however, the federal regulations interpret the handicapped worker provisions to include patients at "intermediate care facilities...half-way houses, residential centers for drug addicts or alcoholics, and the like whether licensed or not licensed." 29 C.F.R. 529.2(c). 1/

The regulations embody the "economic reality test" and include many of those factors articulated in Wyatt and Souder. Patient workers whose earning capacity is not impaired must be paid the statutory minimum wage. 29 C.F.R. 529.4(a). Patients whose earning capacity or productive capacity is impaired may be paid a subminimum wage, but only after one of four types of certificates are issued to the facility by the Secretary of Labor. Although a program can assess the cost of room and board against the patient, this assessment cannot come in the form of a deduction from the pay otherwise to be made to the patient. 29 C.F.R. 529.4(i).

1/ This difference in coverage between the "handicapped worker" provisions of federal and state law presents an interesting legal question. Because federal regulations include residential care centers for drug addicts and alcoholics within the definition of "hospitals and institutions", one can presume that Section 14 of the FLSA was meant to cover alcoholics within the meaning of "handicapped worker". The State regulations, however, specifically exclude alcoholics and drug addicts from the coverage of Alaska's "handicapped worker" provision. This presents a conflict with A.S. 23.10.145 which reads that "terms used in [the Alaska Wage and Hour Act] shall be defined, where applicable, as they are defined in the federal Fair Labor Standards Act of 1938, as amended, or the regulations adopted under it." The Alaska Supreme Court's application of the preemption principle to labor laws, however, suggests that the State law will apply. Webster vs. Bechtel, 621 P.2d 890 (Alas. 1980).

The Federal Department of Labor will treat patient worker situations on a case by case basis. Coverage of the Fair Labor Standards Act to patient worker situations has been asserted by the Wage and Hour administrator in the following situations: a home for emotionally disturbed children (WH Adm Op, June 7, 1967); a school for the mentally retarded (WH Adm Op, July 11, 1967); a home for the blind (WH Adm Op, June 16, 1967); a home for the aged (WH Adm Op, July 18, 1967); a nursing home (WH-286, August 27, 1974); a residential rehabilitation center (WH Adm Op, October 20, 1967); and a community health center operating a drug abuse detoxication unit, a residential care facility and three half-way houses (WH-256, February 27, 1974). However, the courts and the Wage and Hour Division have found the Act not applicable to the following institutions: a children's home (Critchlow vs. Children's Home Association, 22 WH Cases 203, (D.C. Ohio)); a poor house where no medical services were rendered (Hodgson vs. Harrison County, 22 WH Cases 76, (5th Cir. 1976)); a home for neglected children (WH Adm Op, June 7, 1967); a home for unmarried mothers (WH Adm Op, June 7, 1967); a retirement home (WH Adm Op, December 6, 1968, WH-216, April 30, 1973); and a religious orphanage (WH Adm Op, February, 1968).

Administrative interpretations by the Wage and Hour Division have consistently applied the economic reality test to the determination of whether or not an employer/employee relationship exists in a work therapy program. Accordingly, a patient enters into an employment relationship when engaged in the ordinary maintenance, patient care, office work and other activities that are performed in the operation of an institution, but does not become an employee when performing personal housekeeping chores in his or her immediate living quarters. However, the cleaning of common hallways, kitchen or diningroom detail, garbage detail, etc., fall within the ordinary maintenance of a facility and therefore involve an employment relationship. (Opinion WH-375, signed by Wage Hour Administrator Ronald J. James, March 1, 1976.)

The development of individual rehabilitation plans, and an intention to rehabilitate clients for the ultimate purpose of entering the competitive labor market, does not of itself make a patient engaged in work a non-employee under the Act. The critical factor in determining the employment relationship is the consequential economic benefit to the institution. (Opinion WH-334, signed by Acting Wage Hour Administrator Warren D. Landis, April 18, 1975.)

Of significant importance is an administrative opinion on the Act's applicability to a residential drug abuse treatment program. The Wage and Hour Division held that a residential care program which seeks to establish a "family setting" for treatment of persons with drug problems would not be considered to involve an employment relationship under the Act between the residents and the institution where:

> (1) the work performed by the resident is that which is ordinarily carried on on a daily basis in a private home and is not for the economic benefit of the state or local government entity, but solely for the mutual benefit of the occupants of the home (institution);
>
> (2) residents do not perform work activities which would ordinarily be performed by full time employees of the institution so that there is no displacement of regular full time employees through substitution of resident workers;
>
> (3) residence in the institution and performance of activities by the occupants is short term (usually no more than a year) as opposed to generally long term occupancy in such institutions as those concerned with the mentally ill, the mentally retarded, the aged, or the terminally ill;
>
> (4) the institution is relatively small, houses a limited number of residents and has no paid staff other than counselors.

Opinion WH-317, signed by Acting Wage Hour Administrator Warren D. Landis, March 28, 1975.

In that Opinion, the Wage and Hour Division determined that many of the institutions involved in drug abuse treatment may well be outside the purview of the Fair Labor Standards Act in so far as application of the law to patient workers is concerned. However, the Division reaffirmed its principle of deciding each case on a case by case basis.

In light of these standards, particularly those discussed in WH Adm Op-317, I do not believe the Ranch is under any obligation to pay clients for general housekeeping chores, provided that the work does not displace regular custodial employees. Both the federal regulations, and the interpretative opinions of the Wages and Hour Division, indicate that personal housekeeping chores are not covered by the Act. See, e.g., 29 C.F.R. 529.2(d).

Whether or not the farming activities performed by clients at the Ranch meets the "economic reality test" is an open question. A presuasive argument can be made that this work does not result in any economic benefit to the program. Leonard would undoubtedly weed the garden and feed the hogs regardless of whether or not clients assist in those efforts. The program has no intention of either raising crops or livestock for profit, and the impact to the program of a reduced food budget will be minimal at best. It is probably true that the costs of raising fresh produce is greater than any expense to the program for the purchase of such foods, considering their wholesale price, and the large volume of foodstuffs which will be donated to the Ranch. Nonetheless, there may be a real savings to the program with the raising of livestock. The number of hogs raised and slaughtered at the Ranch may well be cheaper than the cost of purchasing pork wholesale.

I am troubled though by the maintenance, renovation and construction work which clients at Nugens Ranch will be performing this year, and in coming years. Although this work is no different in kind to the housekeeping chores and the garden chores that clients and staff will be performing, it does provide an economic benefit to the program. If clients at Nugens Ranch paint the exterior of the main building during the summer, this will result in a substantial savings to the program compared to the costs of contractual labor. The same can be said for minor renovations in the interior of the building, and the construction of fences, sheds, etc., on the land surrounding the building. I believe that, on its face, this type of work therapy meets the "economic reality test" and therefore requires the payment of wages.

Arguably, the program's entire work-therapy plan could slip past federal coverage under the "family setting" exception outlined in WH Adm Op-317. The Ranch certainly seeks to establish a family atmosphere, and has designed its work programs solely for the mutual benefit of its clients. But three problems may preclude the program from obtaining the protection of WH Adm Op-317: (1) some of the work (e.g., the renovation and maintenance) will displace outside contractors who would otherwise be hired to perform the work; (2) some clients will reside at the Ranch on a "long-term" basis, that is, more than one year; and (3) the facility's capacity to treat 48 clients, and its employment of a paid staff other than counselors may well mean that it is not a "relatively small" institution as envisioned by that Opinion.

I have discussed this specific matter with Ms. Kathy Maloney, a patient-worker specialist for the Regional Office of the Wage and Hour Division of the Department of Labor in Seattle. It is her opinion that the Ranch is simply too large of an operation -- measured by the size of its budget, number of clients, and number of fulltime staff -- to be considered a "family" type program. She did recommend, however, that the Ranch apply for a certificate to pay subminimum wages to clients engaged in work therapy, depending on the results of the application of state law.

This leads me to a discussion of the final issue, that is, the problems of dual coverage under State and Federal law.

(c) The Dual Application of State and Federal Law to the Program. Nugens Ranch, as an employer in the State, is clearly obligated by the Alaska Wage and Hour Act to pay its employees a wage at least $.50 an hour higher than the federal minimum wage. As I have discussed, however, the State Act does not tell us whether patient-workers are "employees" under the Act. All the Act does is exclude from the definition of "handicapped worker" those individuals undergoing treatment in alcoholism rehabilitation programs, thus precluding the Ranch from paying a subminimum wage to its clients, if those clients are deemed to be "employees" by virtue of their work therapy.

Federal law has a different scheme, however. Patient workers have been deemed to be "employees" under the Fair Labor Standards Act when and if the work therapy they are engaged in meets the "economic reality test". Under certain circumstances and with proper authorization, patient-workers may be paid a subminimum wage pursuant to Section 14 of the FLSA, 29 U.S.C. 214 -- the "handicapped worker" provision of the Act.

Thus, if Nugens Ranch is covered by the FLSA, there are, at least, specific guidelines for the application of the Act to patient-workers, and procedures for the authorization of the payment of subminimum wages to clients. But the specific application of federal law will depend on three factors: (1) whether or not state law imposes a higher standard; (2) whether or not Nugens Ranch is actually covered by the FLSA and; (3) whether or not FLSA coverage can be asserted given the constitutional limitations imposed by National League of Cities v. Usery, 436 U.S. 833 (1976).

If the Alaska Wage and Hour Act is held to apply to the work therapy program at the Ranch, and if 8 AAC 15.120(e) and (f) are interpreted to prohibit the payment of subminimum wages to clients, then the Ranch will be obligated to pay the statutory minimum wage to clients ($3.85/hour) regardless of the more relaxed provisions of federal law. Webster v. Bechtel, supra.

On the other hand, it is possible (but extremely unlikely) that the "handicap worker" provisions of the Alaska Act are interpreted to include patient workers at residential treatment facilities, notwithstanding the language in 8 AAC 15.120(f). If that were to happen, the federal regulations issued pursuant to Section 14 of the Fair Labor Standards Act will probably apply to obtaining the subminimum wage certificate from the State Department of Labor. The State regulations, 8 AAC 15.120, refer to the federal regulations, 29 C.F.R. Part 525, for securing an application to employ a person at less than the minimum wage.

If it is determined, however, that neither the minimum wage provisions of State law, nor the handicap worker provisions of State law, apply to work therapy programs at Nugens Ranch, one must then answer the question of whether the FLSA covers the Ranch.

For the program to be covered under the Fair Labor Standards Act, Nugens Ranch must be deemed to be a "enterprise" which is "engaged in commerce". With the 1966 amendments to the Act, Congress expanded the definition of "enterprise" to include hospitals, and other health care facilities. 29 C.F.R. 529 clarifies the definition of hospitals and institutions to include half-way houses and residential alcoholism and drug treatment programs. But coverage under the "enterprise" definition is not sufficient, since the program must also be considered an enterprise "engaged in commerce".

Although activities at the Ranch will not involve traditional notions of interstate commerce, i.e., the interstate transfer of clients and goods, the term "commerce" as defined in the FLSA is broad enough to include even the most minimal activities that might cross state lines. In Adm Op-256 (signed by Warren D. Landis, Acting Administrator, Wage and Hour Division, February 27, 1974), the Wage and Hour Division indicated that the use of interstate mails, telephone, and other instrumentalities of commerce by a community health center for the purpose of obtaining information about clients was sufficient to trigger coverage under the Act. In Marshal v. Sunshine and Leisure, Inc., 25 WH Cases 80 (M.D. Fla. 1980), a resthome

for the aged was deemed to be a "enterprise engaged in commerce" simply by virtue of the staff's use and purchase of foodstuffs which had crossed interstate lines. Thus, even though the program is comparatively small, and will be working and referring with clients entirely within the State of Alaska, the definition of "commerce" is so broad that it brings the program within the ambit of the Fair Labor Standards Act.

But the authority of Congress to pass remedial legislation based on the commerce clause of the Constitution which has the effect of infringing on responsibilities traditionally delegated to the states is now in question. The passage of the 1966 and 1974 amendments to the Fair Labor Standards Act, which included state government employees within the coverage of the Act (as well as hospitals and other institutions) triggered two significant cases. In the first case, Maryland vs. Wirtz, 398 U.S. 183 (1968) the United States Supreme Court upheld the extension of the Act to employees of state schools, hospitals and public institutions. In 1976, however, the Supreme Court reversed its position in Wirtz, finding that the 1974 amendments to the Fair Labor Standards Act violated the 10th Amendment. National League of Cities vs. Usery, 426 U.S. 833 (1976) held that wage and hour determinations with respect to

> functions...which state and local governments are created to provide, (including) services...which the states have traditionally afforded to their citizens.

were matters essential to the separate and independent existence of these governments and therefore beyond the reach of Congressional power under the commerce clause. National League, supra at 851. By overruling Wirtz, the Court implicitly included the operation of public schools, hospitals and health care institutions within the category of traditional governmental functions. National League therefore suggests that it is impermissible for the federal government to pass wage and hour legislation affecting a local health care program such as Nugens Ranch which is funded by the state and serves an important state function.

The only two courts which have addressed the applicability of National League to local health care programs are divided on the issue. In Williams vs. Eastside Mental Health Center, 25 WH Cases 119 (N.D. Ala.) the Court held that the National League decision prohibited the application of the Fair Labor Standards Act to a community mental health center, finding that the care of mental patients was a power traditionally delegated to the states

within the meaning of National League. In Richland County Association vs. Marshal, 25 W.H. Cases 142 (9th Cir. 1981) the Court reached a different conclusion, finding that the National League decision did not prohibit the application of the Fair Labor Standards Act to a private, non-profit corporation which operated a residential home for mentally retarded adults. The 9th Circuit based its decision on the fact that the group home in question was private, and although funded by the state, operated its program independent of state control.

The description of the program involved in the Richland case seems more similar to the actual operation of the Ranch than the mental health facility in Alabama involved in the Williams case. One difference, however, which may be significant, is the fact that A.S. 47.37.010 et. seq. establishes a scheme of significant state control over the operation and approval of local alcoholism programs. This extent of state regulation appeared to be a persuasive factor for the Williams court in ruling that the operation of a mental health center by a private non-profit corporation served an integral governmental function and was therefore immune from FLSA coverage by virtue of National League. This jurisdiction, however, will be bound by the holding in Richland, notwithstanding Judge Frye's well reasoned dissent in that case, and the contrary holding in Williams v. Eastside Mental Health Center, supra.

The Impact on the Program and the State

Any requirement that a minimum wage, or subminimum wage must be paid by the Ranch to clients engaged in the work therapy opens a Pandora's box for the program. The creation of an "employment" relationship with 48 clients presents a significant administrative burden with respect to payroll taxes, worker's compensation, unemployment insurance and the like. Its likely that a new employee position would need to be added to handle accounting and administrative work related to the payroll. The Ranch will also face an annual administrative review and application process to pay subminimum wages under the FLSA and this process requires an evaluation of the earning and productive capacity of clients at three and six month intervals. More importantly, the development of an employer/employee relationship with the clients and the program seriously affects the counselor/client relationship. This will be particularly true if the law requires the payment of wages for some work (e.g., the maintenance and renovation), but not other work, such as gardening.

From a counselor's point of view, the gardening work requested of clients is no different a form of therapy than renovation work which clients would be asked to perform. Nonetheless, if clients know they will be paid a minimum wage for one form of work, but not the other, the counselor's ability to engage the clients in the various forms of therapy will be jeopardized.

There is also the problem of maintaining client sobriety if the payment of wages results in an increased amount of cash available to each client on a weekly basis. The Ranch is not designed as a lock-in facility, and clients will always be free to leave the building. As presently structured, however, clients will only be allocated a minimal amount of cash per month for the purchase of necessary incidentals, and therefore, the temptation to run into town with a pocket full of cash for a "binge" is reduced. But if federal or state regulations require the program to hand each client a paycheck at the end of each pay period this element of control is eroded.

The most serious consequences may well be a dramatic change in the spirit and philosophy of the Ranch. The Nugens have always been adept at creating a sense of family and personal belonging with their clients, and this has been the essence of their success in treatment. If this atmosphere is lost -- and it may well be lost by the creation of an employment relationship with clients -- then the program may be doomed to failure from the start.

The burden on your office is no less significant. Noni Butts, the accountant for the program, has estimated that if the Ranch is required to pay a minimum wage to 48 residents at the facility, assuming that clients work for 14 hours per week, that it will mean an increase in the operational budget of the Ranch of some $230,000.00 next fiscal year. This is a particularly troublesome financial burden for SOADA when you consider what it will mean for the expansion of long-term care programs in other areas of the state.

I have spoken to Judy Madsen of the Cedar Hills facility in Washington to determine how that program has avoided the application of minimum wage laws to patient work. The Nugens Ranch model is similar to that which is now in operation at Cedar Hills, and according to Ms. Madsen, Cedar Hills has not run into any problem with either state or federal law. I don't know, however, how Washington state law may differ from Alaska law. It is also my understanding that Cedar Hills has not applied to Wage and Hour for a subminimum wage certificate pursuant to the FLSA. I suspect this simply means that neither Wage and Hour, nor Cedar Hills, have investigated the program's probable coverage under the federal Act.

Conclusions

The legal opinions and policy considerations which I have discussed above lead me to the following conclusions:

1. The Alaska Wage and Hour Act, as presently written, will require the Ranch to pay the statutory minimum wage to clients engaged in work therapy which results in any economic benefit to the facility. This conclusion is based on my presumption that the Alaska Act will be interpreted according to principles established under the FLSA, and my presumption that 8 AAC 15.120(f) will be viewed as a prohibition against paying less than a minimum wage to alcoholics engaged in work therapy at a residential treatment center. As a practical matter, this will mean that the Ranch will have to pay clients for any work therapy that involves repair or renovation on the building, farming activities, and any other work at the facility that has the effect of displacing an employment position, but will not require the Ranch to pay clients for general housekeeping chores.

2. The Ranch is covered by the provisions of the Fair Labor Standards Act, as amended. Therefore, unless the Ranch is held to be exempt under the "family setting" guidelines, it will be required to pay the statutory minimum wage to clients engaged in work therapy which results in any economic benefit to the facility, unless a certificate to pay a subminimum wage is issued to the Ranch pursuant to 29 C.F.R. 529.

Possible Solutions

As a first step, I believe that your request for an Attorney General's opinion on the issue is appropriate. At the very least, this will give your office and the program some idea of how the State Department of Labor will react to the problem. I am also anxious to see if an Attorney General more familiar with labor law than myself reaches the same conclusions.

Secondly, I believe we should begin an immediate planning process for legislative or other programatic solutions to the problem on the assumption that either State or federal law, or both, will require some form of payment for the work therapy. I use the pronoun "we" for two reasons: (1) I believe that this is an issue which affects both SOADA and the program equally and, (2) I also believe that a solution can be better achieved if we work jointly toward a resolution. I also don't feel it is appropriate to scrap the work therapy concept just because of the wage

problem. At its most recent Board meeting, the Board of Directors of ASHS (now Alaska Alcoholism Rehabilitation Services, Inc.) unanimously reaffirmed the importance of the work therapy program to the concept of and future success of Nugens Ranch. We must at least attempt some legislative solution to lessen the impact on the program before we decide to discard a concept so central to the theme of the Ranch.

Some suggestions are as follows:

1. Seek legislation which would amend the Alaska Wage and Hour Act to provide a specific exemption for work therapy programs at residential drug and alcoholism centers. Ideally, this legislation would affirm that the operation of drug and alcohol treatment centers by non-profit organizations serves an "integral governmental function", thus also giving the Ranch protection from the application of the FLSA by virtue of the ruling in National League of Cities v. Usery.

2. Seek a revision of 8 AAC 15.120(f) so that drug and alcoholism treatment facilities can pay a subminimum wage to patient-workers pursuant to A.S. 23.10.070.

3. Seek a formal Administrative Opinion from the Wage and Hour Division, U.S. Department of Labor in an attempt to get a ruling that the Ranch is exempt from FLSA coverage under the "family setting" principles of WH Adm Op-317.

4. Restructure the work therapy program to exclude the repair and renovation work on the facility and minimize the economic impact of the farming activity. Add new forms of "work therapy" that can occur during the winter months to replace the renovation activities. Torrence, Inc., the architects drafting the current renovation plans have already been asked to estimate the additional costs attributable to complete renovation of the building by outside contractors.

5. Retain the work therapy plan as drafted, obtain the necessary funds to pay the clients for the farming and renovation activities, but draft appropriate procedures which permit the program to retain the clients' wages in trust until their release from treatment. At that time, the clients can be billed a cost of care based on their increased earnings during treatment. This plan might eliminate some of the accounting and payroll problems, and ease the economic impact on the program. It does, however, present a new problem of collecting the fee charged from the client.

Finally, I anticipate that this problem will not be resolved prior to the time that the program is required to submit a final budget for FY '83, and possibly even not resolved before the program opens it doors to clients. I ask that you and Loyd give us some direction on how to approach the budget planning with this issue unresolved.

Feel free to call me if you have any questions.

Sincerely,

Philip R. Volland

PHILIP R. VOLLAND

PRV:mjm

cc: Leonard Nugen
Henritta Nugen
Ruth Eilen Anderson
Loyd Gathman
Bruce Botelho
Board of Directors

POSITION PAPER/Department of Health & Social Services

POSITION PAPER

CS FOR HOUSE BILL 182 (L&C)

"An Act exempting participants in residential drug abuse and alcoholism treatment programs from Alaska's minimum wage provisions, and providing a wage scale."

The Department of Health and Social Services is supportive of this legislation.

The issues and remedies surrounding this proposed legislation arose with the advent of a long term care program for the chronic and significantly debilitated alcoholic. The individuals to be served by these programs have long histories of unemployment, skill depreciation, loss of positive employment experiences and loss of positive life experiences. Long term care is defined as treatment lasting from a minimum 120 days to a maximum of 2 years with an average length of 1 year.

One of the intents of long term care treatment program is to have clients engage in a form of work therapy as part of their overall treatment regime. Such work therapy will be designed to help the client re-establish or re-learn basic learning, life and employment skills. It is the intent of the long term care treatment program to be more than a warehouse for the most severely afflicted casualties of the disease alcoholism.

This legislation will permit eligible programs to apply for exemption from the minimum wage while protecting the clients rights.

Recommended by: George E. Mundell

George E. Mundell
Acting Coordinator
Office of Alcoholism/
Drug Abuse

Date: 5/12/83

Approved by: Robert London Smith

Robert London Smith, Ph.D.
Commissioner
Dept. of Health &
Social Services

Date: 5/16/83

AKEE/A HOUSE RANCH NUGENT

STATE OF ALASKA
FISCAL NOTE

Revision Date 5/12 , 1983

I. REQUEST

Bill/Resolution No.: CS FOR HOUSE BILL 182(L&C)
Title: "An Act exempting participants in
Sponsor: Barnes, Clocksin, Bussell, Liska, Larson
Requestor:
residential drug abuse and alcoholism treatment

II. FISCAL DETAIL

Agency Affected:
Program Category Affected:
BRU, Program of Subprogram(s) Affected:

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC						
TOTAL OPERATING						
CAPITAL						
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

IV. ANALYSIS: Attach a separate page for any Analysis

George E. Mundell

Prepared By: George E. Mundell, Acting Coordinator Phone: 586-6201
Division: Office of Alcoholism/Drug Abuse Date: 5/2/83

Approved by Commissioner: [illegible] Date: 5/11/83
Department: [illegible]

Distribution:
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Copy to Requestor (if different from sponsor)

STATE OF ALASKA
FISCAL NOTE

Revision Date 5/12 , 1983

I. REQUEST

Bill/Resolution No.: CS FOR HOUSE BILL 182(L&C)
Title: "An Act exempting participants in residential drug abuse and alcoholism treatment
Sponsor: Barnes, Clocksin, Russell, Liska, Larson
Requestor:

II. FISCAL DETAIL

Agency Affected:
Program Category Affected:
BRU, Program of Subprogram(s) Affected:

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC						
TOTAL OPERATING						
CAPITAL						
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

IV. ANALYSIS: Attach a separate page for any Analysis

George E. Mundell

Prepared By: George E. Mundell, Acting Coordinator Phone: 586-6201
Division: Office of Alcoholism/Drug Abuse Date: 5/12/83

Approved by Commissioner: Robert Loutan Smith, M.D. Date: 5/16/83
Department: Dept. of H & SS

STATE OF ALASKA
FISCAL NOTE

Revision Date May 10, 1983

(Page 1 of 3)

I. REQUEST

Bill/Resolution No.: CS for HB 182 (L&C)
Title: "...residential drug abuse..."
Sponsor: House Labor & Commerce
Requestor: House Labor & Commerce

II. FISCAL DETAIL

Agency Affected: Labor
Program Category Affected: Worker Protection
BRU, Program of Subprogram(s) Affected: Labor Standards & Safety, Wage and Hour

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
OPERATING						
100 PERSONAL SERVICES		26.3	27.9	29.6	31.4	33.3
200 TRAVEL		0				
300 CONTRACTUAL		10.9	11.6	12.3	13.0	13.8
400 COMMODITIES		1.5	1.6	1.7	1.8	1.9
500 EQUIPMENT		2.5	0	0	0	0
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC						
TOTAL OPERATING		41.2	41.1	43.6	46.2	49.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		41.2	41.1	43.6	46.2	49.0
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS:

FULL-TIME		1	1	1	1	1
PART-TIME						
TEMPORARY						

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

N/A

IV. ANALYSIS: Attach a separate page for any Analysis

Prepared By: Robert J. Bacolas, Sr. Phone: 465-4870
Division: Labor Standards and Safety Date: May 10, 1983

Approved by Commissioner: Jim Robison Date: May 10, 1983
Department: Labor

LEG:A:50

Distribution:
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Copy to Department (for Governor introduced bills)
Copy to Sponsor
Copy to Requestor (if different from Sponsor)

3/8/83

FISCAL NOTE

THE LEGISLATURE OF THE STATE OF ALASKA
THIRTEENTH LEGISLATURE
TITLE: "An Act relating to residential drug abuse..."
AGENCY AFFECTED: Department of Labor

CSHB 182(L&C) (Page 2 of 3)

Under this Bill participants in work therapy in long term residential drug abuse or alcoholism treatment programs may be paid less than the minimum wage prescribed in AS 23.10.050 - 23.10.150, if the rate has been approved by the Commissioner and is in compliance with Federal Law.

The Department will require a Clerk Typist III to provide a focal point between the treatment agency and the Department to insure processing of applications for waiver; routing and clerical assistance for approvals and denials; maintenance of central records system to insure monitoring and periodic review of program residents; answer and route inquiries and complaints for review, and provide clerical support to professional staff. Currently, only two programs - Akeela House and Nugent's Ranch provide long term residential programs.

Assumptions:

Effective date of July 1, 1983
6% per annum inflation rate.
Equipment costs in FY '84 is a one time item.
Limited to long term residential treatment for not more than 180 participants over a two year period.

LEG:A:52

1.	POSITION TITLE: Clerk Typist III			RANGE/STEP: 8B	BARG. UNIT: G	FORM 12 PAGE/LINE	GOV.	APPROV. / DISAP
2.	TYPE OF POSITION: PFT	STAFF MONTHS: 12	RP NUMBER: CS HB 182	PCN NUMBER	BRU PRIORITY	LOCATION: Anchorage	ELECTION DISTRICT	LEG.

3.	CONTINUATION LEVEL		ADDITION	X
4.	TYPE OF EXPENDITURE			AMOUNT
	1	2		3
	PERSONAL SERVICES			
5.	Salary	19,188		
6.	Benefits	3,045		
7.	Supplemental Benefits	1,176		
8.	Fixed Benefits	2,880		
9.	TOTAL PERSONAL SERVICES	01		26,286
10.	Travel	02		0
11.	Contractual	03		10,927
12.	Commodities	04		1,500
13.	Equipment	05		2,500
14.	Other			
15.	TOTAL COST			41,216

	RECEIPT CODE	FUNDING SOURCE		
16.		Federal Receipts	1002	
17.		G.F. Match	1003	
18.	100	General Funds	1004	41,216
19.		I-A Receipts	1005	
20.		Program Receipts	1028	
21.		Other		

FOR B&N USE ONLY
4A KEY NUMBER — — - — — - — — - — — - — —

JUSTIFICATION

This position will provide a focal point (liason) between alcohol and drug abuse treatment agencies and the department: Duties will include processing applications for waivers; routing and clerical assistance for approvals and denials; maintenance of central records system for monitoring, and review of program residents; answer and route inquiries and complaints for review; and provide clerical support to professional staff.

Contractual Services includes $3,400 in rent, $2,527 for indirect support services, and $5,000 for other normal operating costs.

The equipment line item consist of $2,500 to purchase basic office equipment for this position.

13 REQUEST FOR NEW POSITION

AGENCY Labor

PROGRAM Worker Protection

BRU Labor Standards & Safety

CSHB 182(L&C)

FY 84

LAW OFFICES OF
REESE, RICE AND VOLLAND
A PROFESSIONAL CORPORATION

JOHN REESE
WILSON A. RICE
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VIRGINIA BONNIE LEMBO

211 H STREET
ANCHORAGE, ALASKA 99501
(907) 276-5231

February 18, 1983

Representative Barbara Lacher
House of Representatives
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Re: House Bill 182

Dear Representative Lacher:

I would like to take this opportunity to comment on H.B. 182 and, in particular, address the issue of possible conflict between the proposed legislation and the federal Fair Labor Standards Act.

As you may recall, I represent Alaska Alcoholism Rehabilitation Services, Inc., the nonprofit corporation which owns and operates a long-term residential treatment center for alcoholics in Wasilla, Alaska. Last year, on behalf of my client, I advised the State Office of Alcoholism and Drug Abuse of my opinion that state and federal law required the payment of a minimum wage to patients at residential treatment centers who are engaged in work therapy. I suggested that legislation be adopted to lessen the economic impact of this problem, and sought the assistance of various legislators last year; however, the session was too far along to yield results. I presume that you have copies of my original opinion letter to SOADA, dated February 23, 1982, and my letters to Representatives Donald E. Clocksin, Patrick J. Carney, and Senator Jalmar Kerttula, dated April 2, 1982.

Since the session began this year, I have been in frequent contact with Russ Josephson of the Law Division, and this week with your aide, Joan Matthews. I am aware of your concern about possible conflict between H.B. 182 and the Fair Labor Standards Act and hope that my comments may assist you in evaluating the proposed legislation. You may feel free to share this letter with the named sponsors of the bill.

Let me begin by saying there are certain defects in H.B. 182 that I feel need correction, and that my opinion about possible solutions has changed since last year as a result of recent developments in case law. I have also proposed changes in H.B. 182 to address some problems which are not covered by the bill. Before explaining these issues in detail, let me first discuss my prior recommendations and the somewhat confusing legal principles that are involved in the state law/federal law conflict.

In my letter to SOADA of last year, I suggested that the application of the Fair Labor Standards Act (hereafter F.L.S.A.) to state-funded residential treatment centers could be avoided by adding language to state legislation which was keyed to the decision of the U.S. Supreme Court in National League of Cities v. Usery, 426 U.S. 833 (1976) (hereafter National League). This was because the National League decision held that the F.L.S.A. did not apply to wage and hour determinations which involve functions which state and local governments are created to provide, including those services which the states have traditionally afforded to their citizens. Among the services enumerated by the Supreme Court in National League was the field of "health care." The holding in National League was based on the application of the Tenth Amendment to the Constitution -- the constitutional provision which prohibits federal control over functions traditionally reserved to the states. Although the decision in National League was limited to states and their political subdivisions, the broad language used by the court suggested that the decision might also apply to state-funded, private organizations which deliver state services such as health care, and which are heavily regulated by the state.

Subsequent to the decision in National League, two federal courts specifically addressed the applicability of the holding in National League to local health care programs involving private nonprofit residential treatment centers funded by states. These two cases, Williams v. Eastside Mental Health Center, Inc., 509 F.Supp. 579 (N.D. Ala., S.D., 1980), and Richland County Assn. for Retarded Citizens v. Marshall, 660 F.2d 388 (9th Cir. 1981), were divided on the issue. Although the Richland County decision held that National League did not prohibit the application

of the Fair Labor Standards Act to a private nonprofit corporation which operated a residential home for mentally retarded adults, the Williams case reached the opposite conclusion under nearly identical circumstances. When I originally wrote my opinion letter, it appeared possible that well drafted legislation, which recognized the state's interest in treating drug addicts and alcoholics as an essential state function and which met this function through the provision of funding to private nonprofit corporations, could provide the necessary protection established under the National League decision, and therefore render such treatment centers exempt from the minimum wage requirement of the F.L.S.A.

However, after speaking with Russ Josephson last month, I updated my research on the subject. Decisions issued during the last year in federal district courts as well as the United States Supreme Court now indicate that the protection originally thought available under the National League decision is no longer applicable to private nonprofit organizations which receive state funding, regardless of whether or not they are involved in administering services otherwise provided by the state.

Since my original letter to SOADA last February, two decisions were rendered by the United States Supreme Court which involved the application of National League. These cases, Hodel v. Virginia Surface Mining and Reclamation Association, ____ U.S. ____, 101 S.Ct. 2352 (1981), and United Transportation Union v. Long Island Railroad Company, ____ U.S. ____, 102 S.Ct. 1349 (1982), set out a three-pronged test to be applied in evaluating the Tenth Amendment protection announced in National League. To claim that a federal statute would not apply under the National League principle, the challenging party would have to establish that: (1) the challenged statute regulates the "states as states"; (2) the federal regulation addresses matters that are indisputably "attributes of state sovereignty"; and (3) the states' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions."

Although in National League the Supreme Court first cited fire protection, police protection, sanitation, public health, and parks and recreation as examples of services that are within the area of traditional operations of state and local governments, subsequent decisions of the U.S. district courts have refined these areas in far greater detail. See, e.g., N.L.R.B. v. Highview, Inc., 590 F.2d 174 (5th Cir. 1979) enforcement modified, 595 F.2d 339 (1979) (the care of the aged, sick and indigent); Enrique Molina-Estrada v. Puerto Rico Hwy. Auth., 680 F.2d 841 (1st Cir. 1982) (highway construction); Bonnette v. California Health & Welfare Agency, 525 F.Supp. 128 (N.D. Cal. 1981) (in-home support services for the blind, aged and disabled); Amersbach v. City of Cleveland, 598 F.2d 1033 (6th Cir. 1979) (operation of a municipal airport); and Alewine v. City Council of Augusta, 505 F.Supp. 880 (S.D. Georgia 1981) (operation of a municipal transit system). The most significant development, however, has been the result of appeals in Williams v. Eastside Mental Health Center, supra, and Richland County Assn. for Retarded Citizens v. Marshall, supra, the two cases on which I based my earlier opinion.

The original Ninth Circuit decision in Richland County, which held that the Fair Labor Standards Act was applicable to private nonprofit residential treatment centers, was vacated by the Supreme Court on jurisdictional grounds in January of 1982, sub nom. Donovan v. Richland County Assn. for Retarded Citizens, ____ U.S. ____, 102 S.Ct. 713 (1982). Although the practical effect of the vacated judgment was to restore the district court's decision apparently holding the F.L.S.A. inapplicable to the treatment center, that opinion is unpublished and has little legal significance.

Of importance, however, is the chain of appeals on Williams. As you will recall, that decision held that the Fair Labor Standards Act was not applicable to a nonprofit treatment center because of its close relationship to the state via funding and regulations, and because the center served an essential state function in providing health care to citizens. The district court decision was reversed by the Eleventh Circuit on March 5, 1982 in a well-reasoned

decision. Williams v. Eastside Mental Health Center, 669 F.2d 671 (1982) (copy enclosed). The court held that the protection accorded by National League was not available to nonprofit corporations receiving funding from the state, even though they may provide health care services on behalf of the state. I encourage you to read this decision thoroughly because of the very close analogy it presents to nonprofit corporations in Alaska which provide services through state funding in the health care, drug abuse, and alcoholism fields. In August of 1982 the decision was appealed to the United States Supreme Court, and on November 2, 1982 the petition for certiorari was denied by the Supreme Court, Eastside Mental Health Center v. Williams, ____ U.S. ____, 51 U.S.L.W. 3340. The effect of the denial of certiorari is to uphold the Eleventh Circuit's decision. It is therefore clear that the Fair Labor Standards Act does apply to private nonprofit residential treatment centers in Alaska, even though those programs receive state funding, are regulated by the state and deliver services the state might otherwise choose to provide on its own. Thus, I recommend that it is futile to try to adopt legislation stating that the treatment of alcoholics and drug addicts through private nonprofit corporations serves an important state function in an attempt to pass valid legislation that will enable those programs to pay a minimum wage less than that provided under the F.L.S.A. Because it is now clear that federal law will apply to residential treatment centers, H.B. 182 must be drafted in such a way that it is consistent with the Fair Labor Standards Act.

To fully understand the issue of conflict between state and federal law, let me briefly explain two legal doctrines that come into play in this area -- "supremacy" and "preemption."

Supremacy is a constitutional principle, based on Article IV of the U.S. Constitution, that state laws are void to the extent that they actually conflict with a valid federal statute, that is, they present an obstacle to the purposes and objectives of the federal statute. It is a doctrine often confused with a similar principle based on the supremacy clause, the doctrine of preemption.

Preemption is a legal doctrine that prohibits the application of state statutes (whether in conflict with or consistent with federal statutes), if the federal legislative scheme evidences a congressional purpose to "occupy the field." Supremacy and preemption should not be confused. The preemption principle prohibits the states from legislating in a particular area; the principle of supremacy only prohibits the states from adopting legislation in conflict with federal legislation.

In the labor law area, the distinction between these two doctrines can be easily understood. The Fair Labor Standards Act did not preempt the field of labor law, Webster v. Bechtel, 621 P.2d 890 (Alaska 1980); see also 29 U.S.C. §218(a) (1975). Thus Alaska can adopt (and has adopted) its own laws governing the rates of pay for workers in the state. Nonetheless, the doctrine of supremacy prohibits this legislation from being in conflict with the Fair Labor Standards Act. Thus, Alaska cannot adopt a law that sets a lower rate of pay for workers in the state than is established under federal law. Therefore, the provisions of H.B. 182 cannot conflict with analagous provisions of the Fair Labor Standards Act.

This brings me to my analysis of H.B. 182 as presently drafted.

I have no problems with Section 1 insofar as it amends AS 23.10.070. The effect of the proposed amendment is to invalidate 8 AAC 15.120(f) which presently states that drug addicts and alcoholics are not handicapped workers with respect to AS 23.10.070. Because of problems with Section 2 of H.B. 182, however, and because of the need to address problems not covered by the proposed legislation, I have suggested some major additions to Section 1 of H.B. 182 (see discussion below).

AS 23.10.070 is analogous to Section 14 of the Fair Labor Standards Act, 29 U.S.C. 214, the "handicapped worker" provisions of the act. Thus it will be interpreted consistent with the F.L.S.A. and the regulations adopted thereunder. These regulations, codified at 29 C.F.R. 529 (copy enclosed), already provide a mechanism for the approval of the payment of subminimum wages to patient workers at "intermediate care facilities ... halfway houses, residential centers for drug addicts or alcoholics and the like whether licensed or not licensed." The practical effect

of amending AS 23.10.070 will be that affected treatment programs will have to apply for and obtain a certificate authorizing the payment of subminimum wages pursuant to the procedure set forth in 29 CFR 529.

Section 14 of the F.L.S.A. only permits the payment of subminimum wages, upon application and approval by the Department of labor, of not less than 50 percent of the prevailing minimum wage. In other words, the provision of federal law analogous to the amendment to AS 23.10.070 proposed by H.B. 182 does not allow the payment of any wage less than 50 percent of the prevailing minimum wage in Alaska, which is now $3.85 per hour.

Because of this fact, there is a conflict between H.B. 182 and the F.L.S.A. Section 2 of H.B. 182 sets the wages for work therapy "at the rates established under AS 33.32.050." If you refer to AS 33.32.050 you will note that the wage rate authorized therein may not exceed 50 percent of the minimum wage established under AS 23.10.065. In other words the bill, as presently written, authorizes the payment of wages less than what is required by federal law. This difference is fatal to the proposed legislation; if passed as presently written it will not survive a legal challenge based on the conflict with Section 14 of the Fair Labor Standards Act.

Another problem created by tying the wage rate to AS 33.32.050 is that AS 33.32.050 will automatically repeal in 1987. I suggest that it is imprudent to tie H.B. 182 to a law that will automatically expire four years from now. This will only mean that AS 47.37.245 would have to be amended again in 1987.

I have suggested additional amendments to Section 2 regarding the assessment of treatment fees to patient workers. My proposed subsection (b) is consistent with 29 C.F.R. 529.4(i). I have also added as subsection (c), somewhat similar to AS 33.83.50(c), clarifying a program's authority to hold wages in trust and disburse funds for appropriate purposes. As a practical matter, most residential treatment programs must hold money in trust in order to control the likelihood of intra-institutional

theft, and allocate money to the client consistent with his or her financial needs and other obligations.

I have no major problems with the definition of work therapy as defined in Section 3 of H.B. 182. I feel, however, that the present definition implies that work therapy will involve more formal "training" than actually occurs. I have suggested some minor changes in language which, I believe, more accurately reflect the concept of work therapy.

Any statutory definition of work therapy will, however, be incomplete. Litigation about this issue over the years, as well as opinions generated by the Wage and Hour Division of the Department of Labor, have only indicated the complexity of the concept. [See, e.g., Wyatt v. Stickney, 344 F.Supp. 373 (M.D. Ala. 1972), aff'd sub nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Opinion WH-375, signed by Wage Hour Administrator Ronald J. Jones, March 1, 1976; Opinion WH-334, signed by Acting Wage Hour Administrator Warren D. Landes, April 18, 1975. For instance, personal housekeeping chores are not considered work therapy under any definition, but regular building maintenance responsibilities would be considered work requiring compensation. There remains a question of whether wages need be paid for work therapy which produces saleable items from which the patients themselves profit.] Lest AS 47.37.270(14) itself be subject to future litigation, I suggest that H.B. 182 mandate the Department of Labor to adopt regulations implementing H.B. 182. Presumably, these regulations will be consistent with 29 C.F.R. 529, and reflect input from programs utilizing work therapy concepts for their clients. The end result will give programs better guidance on when wages are required to be paid.

My proposed changes in Section 1 of H.B. 182 include a mandate for the development of regulations. The guidelines I have suggested are consistent with case law as it has developed under Section 14 of the F.L.S.A.

Finally, the impact of having to pay patients engaged in work therapy at least 50 percent of the minimum wage will be a slightly higher cost to the state than presently exists under the proposed terms of H.B. 182. Although it is now clear that the law requires the payment of wages, I am not convinced that influential members of SOADA and the legislature will meet this responsibility by budgeting sufficient funds for programs to meet this obligation without curtailing services. Last year, for instance, the Governor's Review Board on Alcoholism -- fully aware that clients would have to be paid wages for work therapy -- recommended a cut in the Nugen's Ranch budget exactly equivalent to the funds budgeted for client wages. It would be anomalous if the Legislature adopted H.B. 182, but residential treatment programs were not awarded sufficient increases in grant funds to pay even the subminimum wage. I have therefore proposed amendments in Section 2 to meet this concern.

In summary, I therefore make the following recommendations:

1. There is no need to add a purpose clause to H.B. 182, as I originally suggested, since it is now clear that the Fair Labor Standards Act, as amended, 29 U.S.C. 201, et seq., will apply to residential drug and alcohol treatment programs in light of the U.S. Supreme Court's denial of certiorari in Williams v. Eastside Mental Health Center, 669 F.2d 671 (11th Cir. 1982), cert. den., ____ U.S. ____, 51 U.S.L.W. 3340 (Nov. 2, 1982).

2. Amend Section 1 of H.B. 182 to read as follows:

> (b) (1) Participants in residential drug and alcoholism treatment programs may be paid less than the minimum wage prescribed in AS 23.10.050 - 23.10.150 for work therapy, as defined in AS 47.37.270, and at rates approved by the commission pursuant to this section.

(2) The commissioner shall promulgate relgulations regarding the payment of wages for work therapy. In establishing these regulations, the commissioner shall be guided by the following standards:

(A) Whether the work performed by the patient is that which is ordinarily carried on by patients in a residential treatment program and is not for the economic benefit of the program, but solely for the mutual benefit of the participants;

(B) Whether the work performed by the patient would ordinarily be performed by full-time employees of the program;

(C) Whether the work performed by the patient is work which may produce income to the patient, other than wages;

(D) The therapeutic benefit of the work to the patient, the skill required to perform the work, and the role work therapy plays in the patient's treatment plan;

(E) The impact of the wage scale on the program, considering its size, level of funding, and the therapeutic treatment services to be provided.

3. Amend Section 2 of H.B. 182 so that it reads:

Sec. 47.37.245 WAGES OF PATIENTS.

(a) Participants in residential drug abuse and alcoholism treatment programs shall be paid wages for work therapy, as defined in AS 47.37.270. The coordinator shall make sufficient grant-in-aid funds available to programs for this purpose.