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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

October 17, 2002

The Honorable Mike Fair
Chairman, Corrections & Penology Committee
The Senate of South Carolina
P. O. Box 142
Columbia, South Carolina 29202

Dear Senator Fair:

You have asked us to outline the applicable federal and state law governing the payment of inmates who perform "certain service work for private sector entities at wage levels below the federal minimum wage." By way of background, you state the following:

> [c]urrently, S.C. Code 24-3-430 provides for certain service work to be performed for private sector entities if certain conditions are met. Among those conditions is the requirement that inmates be paid no less than the prevailing wage for work of a similar nature in the private sector. The language mirrors the requirements of the Prison Industries Enhancement Program pursuant to the United States Justice Assistance Act of 1984.
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> In reviewing the operations of Department of Corrections (SCDC) Prison Industries Division last year, the General Counsel for SCDC realized that the agency was operating outside the authority and requirements of S.C. Code 24-3-430 in that inmates were being paid less than the prevailing wage for work performed for private companies. Several binding contracts were in place, which would require renegotiation in order to meet the Code.
>
> So as to avoid the closure of the programs, the agency sought and was granted temporary authority though Budge Proviso 37.31 to continue the operation at a wage rate less than the prevailing.
>
> Currently, I am examining the propriety of allowing the utilization of inmate labor to perform work for private businesses at a wage rate below the prevailing or even the minimum, as established by federal law for civilian employees. Would you kindly review both state and federal laws and regulations relative to use of inmate labor and fair trade practices, and advise me as to the legality of inmates performing

work for private companies at a less than minimum wage, as established by federal laws?

Law / Analysis

Congress authorized the Prison Industry Enhancement (PIE) program through the Justice System Improvement Act of 1979. Pub. L. No. 96-157, § 827. As has been explained in a scholarly article regarding PIE,

> [t]he PIE program brings the private sector into prison industry by exempting certified correctional agencies from legislative restrictions on the transportation and sale of prison made goods in interstate commerce provided that prisoners are paid minimum wage and certain other criteria are met .... The program additionally authorizes deductions of up to eighty percent of gross wages for taxes, room and board, family support, and victim compensation ... .

Misrahi, "Factories With Fences: An Analysis of the Prison Industry Enhancement Certification Program In Historical Perspective," 33 Am.Cr.L.Rev. 411 (Winter 1996). The PIE program "provides limited deregulation of federal prohibitions affecting both the movement of state prison-made goods in interstate commerce and the ability to use prison labor in government contracts in excess of $10,000 ...." The program does not repeal the longstanding Ashurst-Sumners Act first enacted in 1935, see, 49 Stat. 494 (1935) (now codified at 18 U.S.C. § 1761, Ashurst-Sumners is the federal law which prohibits, with certain exceptions, prison-made goods being transported in interstate commerce). However, the federal law authorizing the PIE program "does negate its [Ashurst-Sumners] application to certain certified prison industries." Id. at 419. The purpose and theory of PIE

> ... is to remedy the historical concerns of free labor competition and inmate exploitation associated with private sector involvement in prison industry by treating the convict laborer the same as a free worker .... The program seeks to provide meaningful work for inmates, thereby reducing inmate idleness, increasing job skills, and providing an opportunity for rehabilitation .... As a result of the success of the program, Congress had gradually expanded the number of allowable certifications from seven to fifty .... All prison-made products of every state may now, in theory, legally enter the stream of interstate commerce ....

The PIE program was originally authorized in 1979, revised in 1984 under the Justice Assistance Act, Pub. L. No. 96-157, § 827, and amended again by the Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789. Misrahi, Id.

In order to be certified as a PIE program, a prison industry must do all of the following:

- pay offenders the prevailing wage in the free market or the minimum wage, whichever is higher;
- provide a financial contribution to victim's compensation or victim's assistance programs;
- consult with organized labor and local businesses that might be affected by the industry prior to start-up;
- provide assurance that inmate labor will not displace workers in the free society;
- provide for worker's compensation;
- provide assurance that offender participation in the program is voluntary and that the workers agree to specific deductions from wages;
- involve the private sector.

Id. The program is intended to provide a strong financial incentive for the State. The goals are to seek to generate goods and services that produce income so that offenders can make a contribution to society, defray their own costs, support their families and aid crime victims. Id.

In 1995, the General Assembly enacted legislation, now codified in § 24-3-430, which authorizes South Carolina's participation in the federal PIE program. As you note, the State legislation closely parallels the federal enabling statute governing PIE. Section 24-3-430 provides as follows:

> (A) The Director of the Department of Corrections may establish a program involving the use of inmate labor by a nonprofit organization or in private industry for the manufacturing and processing of goods, wares, or merchandise or the provision of services or another business or commercial enterprise considered by the director to enhance the general welfare of South Carolina. No violent offender shall be afforded the opportunity to perform labor for nonprofit organizations if such labor is outside the confines of a correctional institution. Inmates participating in such labor shall not benefit in any manner contradictory to existing statutes.
>
> (B) The director may enter into contracts necessary to implement this program. The contractual agreements may include rental or lease agreements for state buildings or portions of them on the grounds of an institution or a facility of the Department of Corrections and provide for reasonable access to and egress from the building to establish and operate a facility.

> (C) An inmate may participate in the program established pursuant to this section only on a voluntary basis and only after he has been informed of the conditions of his employment.
>
> (D) No inmate participating in the program may earn less than the prevailing wage for work of similar nature in the private sector.
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> (E) Inmate participation in the program may not result in the displacement of employed workers in the State of South Carolina and may not impair existing contracts for services.
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> (F) Nothing contained in this section restores, in whole or in part, the civil rights of an inmate. No inmate compensated for participation in the program is considered an employee of the State.
>
> (G) No inmate who participates in a project designated by the Director of the Bureau of Justice Assistance pursuant to Public Law 90-351 is eligible for unemployment compensation upon termination from the program.
>
> (H) The earnings of an inmate authorized to work at paid employment pursuant to this section must be paid directly to the Department of Corrections and applied as provided under Section 24-3-40. (emphasis added).

It is evident that the touchstone of the PIE program is that inmates participating therein must be paid the prevailing wage. Courts have interpreted the Congressional legislation authorizing the Prison Industries Enhancement program (PIE) as requiring those projects certified thereunder by the Bureau of Justice to insure that inmates are paid either minimum wage or the prevailing local rate for their work. In this regard, for example, the Court in McMaster v. State of Minn., 30 F.3d 976 (8th Cir. 1994) concluded that, pursuant to the Fair Labor Standards Act (FSLA), 29 U.S.C. §§ 201-219, prison inmates are generally not required to be paid minimum wage because they are not "employees" of the state or prison within the meaning of the FSLA. In addition, the Court held that inmates do not possess a private right of action to enforce the Ashurst-Sumners Act. One of the purposes of the FSLA, concluded the Court, is the protection of competition. Thus, Congress has enacted Ashurst-Sumners Act, 18 U.S.C. § 1761-1762 (which prohibits shipping prison-made goods in interstate commerce) to effectuate this important purpose. To that end, noted the Court, only in very limited circumstances are there exceptions to Ashurst-Sumners. One of these exceptions is the PIE program. The Court described how PIE represents an exception to Ashurst-Sumners:

> Ashurst-Sumners prevents the shipment of prison-made goods in interstate commerce, thus avoiding the problem of unfair competition based on cheap labor. However, Ashurst-Sumners provides two exceptions to its prohibitions: (1) any goods which are produced for use by federal or state governments; and (2) goods

> produced as part of a designated pilot project in which inmate workers are paid prevailing wages. § 1761(b)-(c). The government exception was part of the original enactment in 1935; the prevailing wage exception, known as the Justice System Improvement Act, was added in 1979.
>
> The very existence of these exceptions indicates that Congress did not intend for inmates to be covered by the FSLA. If Congress intended for prisoners to be covered by the FSLA, then the entire Ashurst-Sumners Act would be unnecessary; if all inmate workers made minimum wage, there would be no need to protect private businesses from unfair competition.

30 F.3d at 979. Therefore, the Court held, the prevailing wage need not be paid to all inmates. However, as the Court recognized, federal law mandates that the prevailing wage must be paid to inmates who participate in the PIE program.

Likewise, in Harker v. State Use Industries, 990 F.2d 131 (4th Cir. 1993), the Fourth Circuit, ruled that inmates are not covered "employees" under the FSLA and thus are not entitled to minimum wage under that Act. The Court, however, further commented that the Ashurst-Sumners Act provides for the PIE program exception to its requirement that inmate-made goods not be placed in interstate commerce. Noting that the Ashurst-Sumners Act "criminalizes the transport of prison-made goods in interstate competition in ... those situations in which prison labor threatens competition," 990 F.2d at 133, the Fourth Circuit observed that there are certain exceptions to this prohibition because these situations "pose no threat to fair competition." Id. at 134. In addition to prison-made goods for use by federal, state and local governments, the Harker Court described the PIE exception to Ashurst-Sumners this way:

> ... Ashurst-Sumners exempts the transport of goods produced under the Bureau of Justice Assistance's Private Sector/Prison Industry Enhancement Certification Program. 18 U.S.C. § 1761(c)(1). The Program requires that inmates be paid at least the prevailing local rate for their work, with the FSLA minimum wage as a floor. Id. at § 1761(c)(2); see also 50 Fed. Reg. 12661 (March 29, 1985). This exemption creates a quid pro quo that allows prison-made goods to enter the open market when manufacturers have paid inmates at least the minimum wage to ensure that no unfair competition occurs. Under Harker's interpretation of the FSLA, this Program would be altogether superfluous because the minimum wage already would be paid to inmates, thus eliminating any need for Congress to have ever offered a quid pro quo to manufacturers to avoid unfair competition.

990 F.2d at 134. Thus, federal case law recognizes that Congress intended to provide the PIE program as a clear exception to federal law which provides that prison inmates need not be paid the minimum wage.

In 1999, the Bureau of Justice issued Guidelines for State participation in the PIE program. Under the heading "Mandatory Program Criteria for PIECP Participation," the Guidelines discuss at length the wage which must be paid inmates as part of the federal PIE criteria. There, it is stated:

> (A) Section 1761(c) requires that the PIECP wage amount be set exclusively in relation to the amount of pay received by similarly situated non-inmate workers. In deriving the appropriate PIECP wage 18 U.S.C. 1761(c)(2) does not allow other cost variables to be taken into consideration, such as unique expenses incurred as a result of undertaking production within the prison environment. (emphasis added).

Federal Register: April 7, 1999 (Volume 69, Number 66), pages 17000-17014, 17009-10.

Thus, it is quite evident that the relevant federal statutes, the case law interpreting those statutes, as well as Bureau of Justice Guidelines issued pursuant to those enactments mandate that inmates participating in the PIE program must be paid at least the prevailing wage. As the Bureau of Justice's most recent Guidelines emphasize, "PIECP inmate workers must receive wages at a rate which is not less than that paid for work of a similar nature in the locality in which the work is to be performed." Guidelines, supra at p. 17009. Section 24-3-430 (D) likewise requires that "[n]o inmate participating in the program may earn less than the prevailing wage for work of a similar nature in the private sector." Accordingly, both federal and state law make this wage requirement mandatory.

On its face, the federal statute authorizing the PIE program applies to "goods, wares, or merchandise manufactured, produced or mined by convicts or prisoners ...." See, 18 U.S.C.A. § 1761 (c). As noted above, this provision constitutes an exception to the Ashurst-Sumners Act. You have advised that Subsection (c) of § 1761 is being interpreted in South Carolina as inapplicable to so-called "service contracts." Pursuant to such interpretation, you note that the requirement that inmates performing work on such "services contracts" need not be paid the prevailing wage. Your concern is that, as a result of this interpretation, the PIE program is being severely undermined by this so-called "loophole."

We agree with your concerns. It is clear that there is no prohibition in the federal PIE program for service industries' participation therein. Indeed, the Bureau of Justice Guidelines note that while service industries "were not a threat to the private sector in 1935 and thus, were not included within the scope of the Ashurst-Sumners prohibition, a number of service industries have elected to comply with the PIECP requirements." Guidelines, supra at 17002.

More significantly, and unrelated to federal PIE requirements, state law makes it clear that there is no such legal "loophole" in South Carolina. Section 24-3-430(A) provides that "[t]he Director of the Department of Corrections may establish a program involving the use of inmate labor by a nonprofit organization or in private industry for the manufacturing and processing of goods, wares or merchandise or the provision of services or another business or commercial enterprise

considered by the director to enhance the general welfare of South Carolina." (emphasis added). Moreover, Subsection (D) of § 24-3-430 requires that "[n]o inmate participating in the program may earn less than the prevailing wage for work of similar nature in the private sector."

Thus, state law requires that "the provision of services" by inmates who otherwise meet the requirements of § 24-3-430 must be paid the prevailing wage. As I understand it, "service" work is work which does not result in the manufacture or production of an item that is sold on the open market by the South Carolina Department of Corrections and does not involve work done for the benefit of other public sector entities.

Of course, as with the interpretation of any statute, the primary purpose is to ascertain the intent of the General Assembly. State v. Martin, 253 S.C. 46, 358 S.E.2d 697 (1987). An enactment should be given a reasonable and practical construction, consistent with the purpose and policy expressed in the statute. Hay v. S.C. Tax Comm., 273 S.C. 269, 255 S.E.2d 837 (1979). Words used therein should be given their plain and ordinary meaning. First South Sav. Bank, Inc. v. Gold Coast Associates, 301 S.C. 158, 390 S.E.2d 486 (Ct. App. 1990).

Moreover, the full effect must be given to each part of the statute, and in the absence of ambiguity, words must not be added or taken from the statute. Home Bldg. & Loan Assn. v. City of Sptg., 185 S.C. 313, 194 S.E. 139 (1938). Any interpretation which would render parts of the statute as mere surplusage is to be avoided. Bruner v. Smith, 188 S.C. 75, 198 S.E. 184 (1938).

It should be noted that § 24-3-430 was enacted in 1995, while the Ashurst-Sumners Act, which contains the phrase "goods, wares, or merchandise," was a product of the 1930s. At the time the Legislature enacted § 24-3-430, the service industry in this country had become just as important to the American economy as manufacturing or production. Recognition of that fact is obviously one reason the General Assembly included the broad language "the provision of services" in § 24-3-430. To read that provision out of state law is, in our view, simply incorrect. It is clear that, provided the other requirements of § 24-3-430 are met, the Legislature intended "service contracts" to be so included. Inmates participating in the performance of service contracts for private industry as provided in § 24-3-430 thus must be paid the prevailing wage.

This conclusion is in accord with a Memorandum by the Department of Corrections' General Counsel (dated March 23, 2001) which you have provided. In that detailed and very helpful Memorandum, the General Counsel advises as follows:

> 1. The advice that you or your staff may have previously received from my Office concerning prison industry service work was substantially effected by numerous statutory changes in this area in 1993, and by the passage of Section 24-3-430 of the S.C. Code on Laws of July 1, 1995.

2. SCDC may operate a prison industry service program, but inmates who work in such programs must do so voluntarily, must be paid the prevailing wage for their work, and the work may not result in the displacement of employed workers in the State nor impair existing contracts for services. In other words, if we chose to operate a prison industry service program, we must do so in conformance with Section 24-3-430 of the S.C. Code of Laws.

3. Inmates who work in prison industry service programs must have their wages received by SCDC, with such wages affected and distributed in accordance with Section 24-3-40 of the S.C. Code of Laws. This means that inmate wages for prison industry service work must be handled as other prison industry wages are handled and distributed.

4. Where existing prison industry service programs are in place, SCDC should begin to comply with the above provisions immediately.

I agree that Section 24-3-430 is mandatory and must be followed.

Sincerely,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an