Opinion No. 55-6309

October 28, 1955

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. Richard F. Rowley, District Attorney, Ninth Judicial District, Clovis, New Mexico

On the 18th day of August, 1955, this office rendered Opinion No. 6258 as to whether Chapter 200 of the 1955 New Mexico Session Laws applies to a certain bell-hop working in a Clovis hotel and other bell-hops in the State similarly situated. The last sentence in our opinion that gratuities or tips should be included in the 50c per hour minimum, seems to us, after more thorough research, to have been wrong and we are therefore reconsidering Opinion No. 6258.

The pertinent parts of Chapter 200 of the 1955 New Mexico Session Laws read as follows:

"(a) 'Employ' includes suffer or permit to work.

(b) 'Employer' includes any individual, partnership association, corporation, business trust, legal representative or any organized group of persons employing four or more employees at any one time, acting directly or indirectly in the interest of an employer in relation to an employee, but shall not include the United States, the state or any political subdivision thereof.

(c) 'Service Employees' shall be interpreted to mean persons employed in the following establishments and occupations:

. . . .

(3) **hotels,** motels, tourist courts and other establishments furnishing lodging for hire to the public; and . . ." (Emphasis ours.).

It is evident that it is the intention of the Legislature from the language of the whole statute that a minimum of 50c per hour is to be paid each service employee by the owners of hotels, motels, etc., furnishing lodging for hire to the public.

In this particular case of yours, you state that prior to enactment of Chapter 200 of 1955 New Mexico Session Laws, this bell-hop was not getting a salary but merely was paid what he received as tips.

It is to be noted that Chapter 200 of the 1955 New Mexico Session Laws, makes no mention of exceptions in case of agreements to retain or report tips or gratuities prior to employment. In your case there is no agreement as to whether bell-hop has agreed to retain tips or report them to employer in arriving at his monthly salary.

The following Federal and State cases hold that in the absence of any employment contract between employer and employee tips given an employee are not part of the minimum wage employer has to pay, either under the Fair Labor Standard Act or under statutory restriction in the State.

In the case of C. W. Williams, individually and as appointed and authorized agent and representative of Herbert Aiken, et al., vs. Jacksonville Terminal Company and A. J. Pickett, General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, etc., vs. Union Terminal Co., 315 U.S., 386-411, 86 Law Ed., 914, concerning tips, the Supreme Court of the United States in affirming the United States Circuit Court of Appeals for the Fifth Circuit, in action to recover wages and damages under the Fair Labor Standards Act, 129 U.S.C., Sec. 201, et seq. said:

"In determining whether tips received by redcaps employed by terminal companies could be counted as wages within minimum wage requirements of this section, the words 'In businesses where tipping is customary,' the tips, in absence of an explicit understanding belong to the recipient, but where an arrangement is made by which employee agrees to turn over the tips to the employer, in absence of statutory interference, such arrangement is valid."

In the case of Anderson vs. Horling, et al., 211 N.Y.S. page 487, the State Industrial Board had erroneously included in the weekly wage the amounts received by the claimant for tips, it not appearing that the same was taken into consideration by the parties in making the contract of employment. The Supreme Court in reversing award, held that inclusion in weekly wage of amounts received by employees as tips not contemplated by parties in making contract of employment, necessitated reversal of award.

For other cases see Annotation in 75 A.L.R., 11 (Tips) on page 1224.

Attorney General's Opinion No. 6258 dated August 18, 1955, is withdrawn and substituted and in view with authorities herein before cited, it is the opinion of this office that the bell-hop you refer to in your letter of August 2, 1955, as well as others similarly situated, come under the provisions of Chapter 200, New Mexico Session Laws of 1955, as a service employee, as defined by the Act and entitled to 50c per hour as a minimum wage, but in the absence of an explicit understanding between parties, tips belong to the bellhop and cannot be included in determining minimum wage.

By: Hilario Rubio

Assistant Attorney General