OFFICE OF THE ATTORNEY GENERAL OF TEXAS

AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

May 23, 1939

Hon. Joe Kunschik, Commissioner of Labor
Bureau of Labor Statistics
Austin, Texas

Dear Sir:

Opinion No. O-671
Re: Is a night watchman included in or exempted from articles 1579 and 1580, as amended, Penal Code, Vernon's Annotated Statutes?

We are in receipt of your letters of April 24 and May 16, which request an opinion from this department, as follows:

"Reference is made to article 1580, Penal Code of Texas, as amended by the Forty-fourth Legislature, Regular Session, ch. 259, p. 644.

"Inasmuch as article 1579, Penal Code states, 'where such employment, contract or work is for the purpose of constructing * * * buildings * * *,' an opinion is respectfully requested on the following points:

"Whether a night watchman is included in or exempted from these two articles?

"If the watchman, in addition to the watching of the premises, is also required to perform duties substantially and materially involving and promoting the construction of the building, would he come within the provisions of these statutes?"

COPY

Article 1579 of the Penal Code, Vernon's Annotated Statutes, provides for an eight-hour work-day for laborers, workmen or mechanics employed by or on behalf of the state or county in certain types of work. It reads as follows:

> "Article 1579.- Eight hours a day work. Eight hours shall constitute a day's work for all laborers, workmen or mechanics who may be employed by or on behalf of the state of Texas, or by or on behalf of any county, municipality, or political subdivision of the state, county or municipality in any one calendar day, where such employment, contract or work is for the purpose of constructing, repairing or improving buildings, bridges, roads, highways, streams, levees, or other work of a similar character, requiring the service of laborers, workmen or mechanics."

Article 1580, as amended, of the Penal Code, Vernon's Annotated Statutes, provides that contracts between state, county, municipal, or other legal or political subdivisions and employers shall be on the basis of eight hours constituting a day's work; and that it shall be unlawful for the employer of laborers, workmen or mechanics to work the latter more than eight hours per calendar day. It provides:

> "All contracts made by or on behalf of the state of Texas, or by or on behalf of any county, municipality or other legal or political subdivision of the state, with any corporation, person or association of persons for performance of any work, shall be deemed and considered as made upon the basis of eight (8) hours constituting a day's work. The time consumed by the laborer in going to and returning from the place of work shall not be considered as part of the hours of work. It shall be unlawful for any corporation, person or association of persons having a contract with the state or any political subdivision thereof, to require or permit any such laborers, workmen or mechanics to work more than eight (8) hours per calendar day in

doing such work, except in cases of emergency, which may arise in time of war, or in cases where it may become necessary to work more than eight (8) hours per calendar day for the protection of property, human life or the necessity of housing inmates of public institutions in case of fire or destruction by the elements or in cases where the total number of hours per week required or permitted of any such laborer, workman or mechanic, engaged on work financed in whole or in part by the Federal Government or any agency thereof, does not exceed the number of hours per week allowed by any regulation of the Federal Government or any agency thereof. In such emergencies the laborers, workmen or mechanics so employed and working to exceed eight (8) hours per calendar day shall be paid on the basis of eight (8) hours constituting a day's work. Not less than the current rate of per hour wages for like work in the locality where the work is being performed shall be paid to the laborers, workmen, mechanics or other persons so employed by or on behalf of the state, or for any county, municipality or other legal or political subdivision of the state, county or municipality, and every contract hereafter made for the performance of work for the state, or for any county, municipality or other legal or political subdivision of the state, county or municipality, must comply with the requirements of this chapter."

Both articles 1579 and 1580, supra, refer repeatedly to "laborers, workmen or mechanics". It is plain that the Legislature means that these statutes apply to those laborers, workmen or mechanics whose employers had contracts with the state or political subdivisions of the state, or who were hired directly by the state.

It is necessary that we define our terms. A laborer, according to 35 Corpus Juris 927, is:

"One who performs manual, menial, or physical exertion, labors, or toil, not requiring special accuracy, knowledge, skill, or training,

for hire or wages, under the direction of his employer, master or superior."

Bouvier's Law Dictionary, Vol. 3, p. 3486, defines a "workman" as:

"One who labors; one who is employed to work for another."

A mechanic, accordin to Bouvier's Law Dictionary, Vol. 2, p. 2184, is:

"Any skilled worker with tools; a workman who shapes and applies material in the construction of houses; one actually engaged with his own hands in construction work."

While a night watchman is hardly a mechanic, still he is generally classed as a laborer or worker.

The term "laborer" has been held to include a night watchman. McAdams v. Ellis 5 G. A 262; 62 SE 1001.

Webster's definition of a watchman is:

"One who guards the streets of a city or building by night."

Bouvier's Law Dictionary defines a watchman as:

"An officer in many cities and towns, whose duty it is to watch during the night and take care of the property of the inhabitants. He possesses, generally, the common law authority of a constable to make arrests, where there is reasonable ground to suspect a felony, though there is no proof of a felony having been committed."

It is apparent that Bouvier is referring to a public watchman. A night watchman hired by a corporation, person or association of persons would be an employee and not an officer. He is a laborer, or at least a workman within the scope of the above definition.

The primary duty of a private night watchman

is to watch during the night and take care of the property of his employer. See Singleton v. Eureka County, 35 Pac. 833, 22 Nev. 91. The duties and responsibilities of a night watchman are limited by custom and definition. He is universally recognized as a workman. The addition to the regular duties by the employer generally of incidental and supplementary tasks sometimes determine beyond a shadow of a doubt status of the night watchman as a laborer. In the McAdams v. Ellis, supra, the night watchman had the task of firing the boiler. This job was undoubtedly one of the reasons why the jury held the night watchman to be a laborer in that instance. Furthermore, the court held that the jury was authorized to find that the night watchman held the status of a laborer.

The case of Gadd v. City of Detroit, (1906), 142 Michigan 683, 106 NW 210, involves a situation in point. But the court did not discuss directly the question of whether or not the night watchman was a laborer.

In this case the plaintiff night watchman sued the city of Detroit for overtime work. A city ordinance provided:

> "That herafter eight (8) hours shall constitute a day's work for all laborers, workman, and mechanics, who may be employed by or on behalf of the city of Detroit, or any of its authorized boards or officers, or may be employed by contractors or subcontractors, in work done or executed under contracts with the said city of Detroit or its various authorized boards or officers."

The court held that the city having created the position of night watchman in the Department of Public Works, the Commissioner of such department had power to employ a person to fill such position, and to employ a person to fill such position, and to agree with him that he should be paid for overtime without submitting the contract to the counsel for its approval, notwithstanding section 8, providing that the Commissioner of Public Works shall have no power to enter into any contract on behalf of the city without the approval of the common counsel.

The result of the Gadd v. City of Detroit case

was to bring the night watchman within the eight (8) hour day ordinance as a laborer, workman or mechanic.

While watching and guarding the property of his employer are the principal duties of the night watchman, almost invariably he has incidental tasks or functions to perform which would bring him within the "laborer" or "workman" classification even if the primary tasks of "watching and guarding" and the nature of work required in performing them did not fix his status as such.

We wish to point out that the language of article 1580, supra, in its first sentence appears to go beyong the classification "laborer, workman, mechanic". This sentence reads as follows:

> "All contracts made by or on behalf of the state of Texas, or by or on behalf of any county, municipality or other legal or political subdivision of the state, with any corporation, person or association <u>of persons</u> for performance of any work, shall be deemed and considered as made upon the basis of eight (8) hours constituting a day's work". (Underscoring ours)

The statute refers to "persons" at this point. Then it deals with "laborer" and "laborers, workmen, or mechanics". In view of our holding it is unnecessary to decide whether or not the scope of the statute is extended by the first sentence.

Your attention is called to the exceptions of article 1580, as amended. One of the exceptions is "in cases where it may become necessary to work more than eight (8) hours per calendar day for the protection of property * * * ". We do not construe this to apply to the performance of routine night watchman duty. Federal Government employment exception might apply.

Of course, there is no expressed or implied exemption of a night watchman in the wording of either article.

It is our conclusion that a night watchman is within the scope of the classification of "laborers, work-

men or mechanics", common to both articles 1579 and 1580, as amended, of the Penal Code Vernon's Annotated Statutes, and as a result is subject to the provisions of article 1580, as amended, if the other conditions of the statute are satisfied. It follows in answer to your second question, that if the night watchman, in addition to the watching or guarding of the premises, is also required to perform duties substantially and materially involving and promoting the construction of a building, he would be subject to the provisions of article 1579, as amended, if the other conditions of the statute are met.

Trusting that the above fully answers your two inquiries, we are

Yours very truly

ATTORNEY GENERAL OF TEXAS

By Dick Stout
Dick Stout
Assistant

DS:omh

APPROVED:
ATTORNEY GENERAL OF TEXAS

APPROVED
OPINION
COMMITTEE
BY
CHAIRMAN