# VA CONTRACTS WITH COMMUNITY NURSING HOMES

## COMMITTEE ON VETERANS' AFFAIRS
## HOUSE OF REPRESENTATIVES

NINETIETH CONGRESS

SECOND SESSION

ON

EFFECT OF P.L. 89-286 ON VA CONTRACTS WITH COMMUNITY NURSING HOMES FOR CARE OF VETERANS, AS AUTHORIZED BY P.L. 88-450

JUNE 19, 1968



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# VA CONTRACTS WITH COMMUNITY NURSING HOMES

**WEDNESDAY, JUNE 19, 1968**

HOUSE OF REPRESENTATIVES,

arisen with regard to Public Law 88-450 and Public Law 89-286.

By enactment of Public Law 88-450, which originated in this subcommittee, Congress created the veterans community nursing home program, which is used for veteran patients who have achieved maximum hospital benefits but who are in need of further medical attention. Six months' care is provided; however, there is a basis for extension. These homes are available in practically every community in America. The Veterans' Administration has contracts or agreements with 2,325 community nursing homes having approximately 170,000 beds in 48 States and Puerto Rico; $25 million has been spent on this program so far. There are about 3,000 veteran patients under the program at the present time. The objective of the program was to take veterans out of expensive hospital beds and place them in nursing homes near their homes. The program has been an outstanding success. In most instances a typical nursing home will have only two or three patients under the VA program.

Earlier this year in a routine examination an agent of the Wage and Hour Public Contracts Division of the Department of Labor raised the question and his Department subsequently ruled that community nursing homes having contracts with the Veterans' Adminis-

each day. Colonial Manor Nursing Home in

VA patients.

Public Law 89–286, the Service Contract Act of 1965, was enacted for the principal purpose of requiring that the minimium wage be paid to service employees hired by agencies having contracts to provide service to the Federal Government. The act defines "service employee" as guards, watchmen, and any person engaged in a recognized trade or craft, or other skill, mechanical craft, or an unskilled, semiskilled, manual labor occupation; or any other employee, including foreman or supervisor, in a position having a trade, craft, or labor experience, as a paramount requirement. The legislative history of the act indicates that it was not the intention of Congress to cover medical services. House Report No. 948 contains the following statement: "Thus, for example, contracts made by the District of Columbia government with local hospitals for the care of indigent patients would not be covered since 'service employees' as defined in the bill would be performing only incidental functions." In addition to this indication that medical services be exempt, section 4B of the bill provides authority for the Secretary of Labor to provide exemption "as he may find necessary and proper in the public interest or to avoid serious impairment of the conduct of the Government's business." The Secretary has made one such exemption relating to transportation agencies

the Secretary for his authority for the action he had taken and requested a reply at the earliest possible time. Eleven days later, on June 3, he received a brief acknowledgment, and on June 7 Chairman Teague directed another letter to the Secretary of Labor asking for a reply to the letter by the Administrator of Veterans Affairs, and asked for a prompt response. To date no response has been received. On June 11 Chairman Teague sent a telegram pointing out to the Secretary of Labor that he had not received a reply to his letters, that he was convinced the interpretation was wrong, and that failure to act would result in serious impairment to the Veterans' Administration nursing home program. This telegram requested a prompt response. On June 11 Chairman Teague directed a letter to the President of the United States calling his attention to the conflict between

On June 13, 1968, I sent a telegram to Secretary Wirtz on this same subject.

The Wage and Hour Division has not applied this same ruling in ments with the Veterans' Administration; but despite this, the Secretary of Labor has specific authority under the act to grant an exemption where necessary to prevent serious impairment of the conduct of the Government's business.

Without objection I will insert at this point in the record the legislative history of Public Law 89–286 together with correspondence on this same subject and other material pertinent to this hearing.

(The material referred to follows:)

89TH CONGRESS 1st Session } HOUSE OF REPRESENTATIVES { REPORT No. 948

# SERVICE CONTRACT ACT OF 1965

SEPTEMBER 1, 1965.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. POWELL, from the Committee on Education and Labor, submitted the following

## REPORT

as amended do pass.

The amendment is as follows:

Page 7, beginning in line 19, strike out "transportation, handling, or delivery of the mails, or".

### EXPLANATION OF COMMITTEE AMENDMENT

The committee amendment has the purpose of including under the provisions of the bill contracts with the Post Office Department for the transportation, handling, or delivery of the mails.

### EXPLANATION OF BILL

This bill is proposed to provide much needed labor standards protection for employees of contractors and subcontractors furnishing services to or performing maintenance service for Federal agencies. The service contract is now the only remaining category of Federal contracts to which no labor standards protections apply. Construction contracts, including many which are partially financed with Federal funds but to which the Federal Government is not a party, require compliance with minimum labor standards under the Davis-Bacon Act and related statutes. Supply contracts of the Federal

Concern over protection for wage standards of employees of employers having service contracts with the Federal Government has been expressed by Members of Congress for a number of years.

During the 88th Congress this committee conducted hearings on a number of bills having the same general purpose as the bill herein reported. The record included pleas for this type of legislation from labor organizations and from service contractors. Testimony was heard from Federal agencies. Reports were received from the Bureau of the Budget, General Services Administration, and the Board of Commissioners, District of Columbia.

A bill was reported (H. Rept. 1495, 88th Cong.). On January 12, 1965, H.R. 2453, a bill quite similar to the bill reported in the 88th Congress, was introduced. The bill, H.R. 10238 by Mr. O'Hara of Michigan, together with H.R. 10239 by Mr. Pelly, is a bill sponsored by the administration.

On August 5 the committee conducted a hearing. Mr. Charles Donahue, Solicitor of Labor, represented the administration. He told the committee (p. 7 hearings):

> The Budget Bureau advised us that there was no objection or opposition to this proposal and that it was consistent with [illegible]

Service employees in many instances are not covered by the Fair Labor Standards Act or State minimum wage laws. The counterpart of these employees in Federal service, blue-collar workers, are by a Presidential directive assured of at least the Fair Labor Standards Act minimum. Bureau of Labor Statistics surveys of average earnings in service occupations in selected areas in 1961 and 1962 show, however, that an extremely depressed wage level may prevail in private service employment. In contract cleaning services, for example, in some areas less than $1.05 an hour was paid. Elevator operators earned low rates, varying from $0.79 to $1.17 an hour. Service contract employees are often not members of unions. They are one of the most disadvantaged groups of our workers and little hope exists for an improvement of their position without some positive action to raise their wage levels.

The Federal Government has added responsibility in this area because of the legal requirement that contracts be awarded to the lowest responsible bidder. Since labor costs are the predominant factor in most service contracts, the odds on making a successful low bid for a contract are heavily stacked in favor of the contractor paying the lowest wage. Contractors who wish to maintain an enlightened wage policy may find it almost impossible to compete for Government to a service contractor with low wage standards, the Government is in effect subsidizing subminimum wages.

### PROVISIONS OF BILL

The bill is applicable to advertised or negotiated contracts, in excess of $2,500, the principal purpose of which is for the furnishing of services through the use of service employees, as defined in the bill. Thus, for example, contracts made by the District of Columbia
Labor to be prevailing in the locality. [illegible]

The bill also recognizes the growing importance of fringe benefits as an element of wages in today's society. It therefore requires inclusion in the contract of an agreement to provide service employees benefits determined by the Secretary to be prevailing for such employees in the locality. This obligation may be discharged by furnishing any equivalent combinations of benefits or cash payments in accordance with regulations of the Secretary.

The bill also prohibits the payment on any Government service contract of wages less than the minimum wages required under the Fair Labor Standards Act.

In addition to the wage and fringe benefits requirements of the bill, additional stipulations require that service or maintenance work shall not be performed under unsafe or unsanitary working conditions where those working conditions are under the control of the contractor or subcontractor. Contractors or subcontractors are also required to notify employees of the benefits due them under the act.

In the event of violation, the bill authorizes the withholding from the contractor of accrued payments necessary to pay covered workers the difference between the wages and benefits required by the contract and those actually paid. The Government may also bring court action against the contractor, subcontractor, or surety to recover the
The Secretary's authority to prescribe regulations includes authority to permit reasonable tolerances, variations, and exemptions from provisions of the act where they are deemed necessary and proper in the public interest or to avoid serious impairment of Government business.

The committee, however, does not expect the Secretary of Labor to be bound by past practices worked out for determinations under the

(1) A provision specifying the minimum wages to be paid service employees performing the contract as established by the Secretary in accordance with prevailing rates for such employees in the locality.

(2) A provision specifying the fringe benefits to be furnished such employees as determined by the Secretary as prevailing for such employees in the locality.

(3) A provision that no part of such contract will be performed

Act of 1938.

Section 3 provides that a violation of section 2 by failure to pay the prevailing wage or fringe benefit or the Federal minimum wage under the Fair Labor Standards Act shall render the contractor liable for a sum equal to the amount of any such underpayment and provides that the contracting agency may withhold payment to the contractor in the amount necessary to pay such employees the amounts due them. In addition, the United States is authorized to cancel contracts performed in violation of the provisions of the act.

Section 4 establishes the authority to the Secretary of Labor to enforce the act, including the promulgation of such rules and regulations, orders, et cetera, which may be necessary to do so.

Section 5 provides that the Comptroller General shall distribute to all Federal agencies a list of those contractors found to have violated the act and prohibits the awarding of further contracts to violators for a period of 3 years after such publication unless the Secretary of Labor otherwise recommends.

If the accrued payments withheld under the contract are insufficient to reimburse employees with respect to whom there has been a failure to pay the compensation required under this act, the United

# HEARING

BEFORE THE

## SUBCOMMITTEE ON LABOR

OF THE

## COMMITTEE ON

Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands, Samoa, Guam, and Wake Island.

Section 9 provides an effective date 90 days from the date of enactment.



**CLAIBORNE PELL**, Rhode Island
**EDWARD M. KENNEDY**, Massachusetts
**GAYLORD NELSON**, Wisconsin
**ROBERT F. KENNEDY**, New York

U.S. GOVERNMENT PRINTING OFFICE
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(3739)

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## SERVICE CONTRACT ACT OF 1965

THURSDAY, SEPTEMBER 23, 1965

[illegible]

[illegible] John Forsythe, general counsel; Michael Bernstein, [illegible] to Senator McNamara; Stephen Kurzman, [illegible] counsel; Frank Cummings, minority labor counsel; and Eugene Mittelman, minority professional staff member.

Senator McNamara. The subcommittee will be in order. Mr. Hackley, will you move up to the witness chair?

We are glad to have you here this morning. Naturally, since we are considering the House bill (H.R. 10238), we would like to have a statement from you answering some of the obvious questions, such as the justification for the legislation, the [illegible] [illegible] to be [illegible], the number of people involved, and the money spent and [illegible] in the area. I expect it would be helpful for you to explain to us why they should not come under some of the existing programs that deal with matters of a similar nature, such as Davis-Bacon, or Walsh-Healey. I will insert a copy of the bill in the record.

(H.R. 10238 follows:)

# SERVICE CONTRACT ACT OF 1965

**THURSDAY, SEPTEMBER 23, 1965**

U.S. SENATE,
SUBCOMMITTEE ON LABOR OF THE
COMMITTEE ON LABOR AND PUBLIC WELFARE,
*Washington, D.C.*

professional staff member.

Senator McNAMARA. The informal hearing will be in order. Mr. Donahue, will you move up to the table here, please.

We are glad to have you here this morning. Naturally, since we are considering the House bill 10238, we would like to have a statement from you answering some of the obvious questions, such as the justification for this legislation that the administration seems to be supporting, the number of people involved and the needs you find existing in the area. I expect it would be helpful for you to explain to us why they should not come under some of the existing programs that deal with matters of a similar nature, such as Davis-Bacon, or Walsh-Healey. I will insert a copy of the bill in the record.

(H.R. 10238 follows.)

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SEPTEMBER 21 (legislative day, SEPTEMBER 20), 1965
Read twice and referred to the Committee on Labor and Public Welfare

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# AN ACT

To provide labor standards for certain persons employed by Federal contractors to furnish services to Federal agencies, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Service Contract Act of 1965".

principal purpose of which is to furnish services in the

II

2

United States through the use of service employees, as defined herein, shall contain the following:

(1) A provision specifying the minimum monetary wages to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder, as determined by the Secretary, or his authorized representative, in accordance with prevailing rates for such employees in the locality, which in no case shall be lower than the minimum specified in subsection (b).

his authorized representative to be prevailing for such employees in the locality. Such fringe benefits shall include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, costs of apprenticeship or other similar programs and other bona fide fringe benefits not otherwise required by Federal, State, or local law to be provided by the contractor or subcontractor. The obligation under this subparagraph may be discharged by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash

the control or supervision of the contractor or any subcontractor, which are unsanitary or hazardous or dangerous to the health or safety of service employees engaged to furnish the services.

(4) A provision that on the date a service employee commences work on a contract to which this Act applies, the contractor or subcontractor will deliver to the employee a notice of the compensation required under paragraphs (1) and (2) of this subsection, on a form prepared by the Federal agency, or will post a notice of the required compensation in a prominent

any of his employees engaged in performing work on such contracts less than the minimum wage specified under sec-

SEC. 3. (a) Any violation of any of the contract stipulations required by section 2 (a) (1) or (2) or of section 2 (b) of this Act shall render the party responsible therefor liable for a sum equal to the amount of any deductions, rebates, refunds, or underpayment of compensation due to

fund. On order of the Secretary, any compensation which the head of the Federal agency or the Secretary has found to be due pursuant to this Act shall be paid directly to the underpaid employees from any accrued payments withheld under this Act.

(b) In accordance with regulations prescribed pursuant to section 4 of this Act, the Federal agency head or the Secretary is hereby authorized to carry out the provisions of this section.

(c) In addition, when a violation is found of any contract stipulation, the contract is subject upon written notice

stantial interest until three years have elapsed from the date of publication of the list containing the name of such hereunder.

(b) The Secretary may provide such reasonable limitations and may make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act as he may find necessary and proper in the public interest or to avoid serious impairment of the conduct of Government business.

SEC. 5. (a) The Comptroller General is directed to distribute a list to all agencies of the Government giving

or association in which such persons or firms have a sub-





including painting and decorating of public buildings or public works;

regular or basic hourly rate of pay of such an employee shall not include any fringe benefit payments computed hereunder which are excluded from the regular rate under the Fair Labor Standards Act by provisions of section 7 (d) thereof.

SEC. 7. This Act shall not apply to—

(1) any contract of the United States or District of Columbia for construction, alteration and/or repair,





or skilled manual labor occupations; and any other employee including a foreman or supervisor in a position having trade, craft, or laboring experience as the paramount requirement; and shall include all such persons regardless of any contractual relationship that may be alleged to exist between a con-

the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, Wake Island, but shall not include any other territory under the jurisdiction of the United States or any United States base or possession within a foreign country.

SEC. 9. This Act shall apply to all contracts entered the principal purpose of which is the operation of postal

or other skilled mechanical craft, or in unskilled, semiskilled,



Mr. DONAHUE. I am here to be of any help or assistance to the subcommittee that I possibly can.

This is a bill which is supported by the administration. It has the purpose of filling a gap in labor standards upon Federal Government contracts. We have the Walsh-Healey Act which covers supply contracts; we have the Davis-Bacon Act which covers construction contracts, as the Senator well knows. But we have not any standards at all which could be applied to assure that the Government is paying fair wages, prevailing wages, on service contracts of the Government.

That is a particularly unfortunate thing for those workers, mainly unskilled workers, for example, who provided janitorial and maintenance service under contracts between contractors and the Government, where the main factor of competition between the various contractors is the wage rates paid to the workers.

The result is that sometimes pitifully low wages are paid. A survey made concerning the wage rates in these service classifications show 89 cents an hour was paid to elevator operators in Atlanta; 79 cents in Memphis.

Senator PROUTY. When were those wages paid?

Mr. DONAHUE. This was made by the Bureau of Labor Statistics in 1963.

Senator PROUTY. You don't have any idea what they are currently.

Mr. DONAHUE. We find the lower wage rates primarily in the South Senator.

Senator PROUTY. Thank you.

Mr. DONAHUE. I think that it is just a matter of simple justice that this legislation should receive favorable consideration. It is a measure which the chairman has introduced in his bill in the Senate;

Now, I would be very glad to answer any questions which members of the committee or their staffs may have concerning it.

At the threshold I have been told that there is some curiosity as to why we did not simply take the Davis-Bacon Act and extend it so that it would cover service contracts as well as construction contracts.

I think perhaps that there are several answers to that question, the first of which is that at the time this bill was first being considered, that approach was thought of. In fact, there were in the House of Representatives at least several bills which took that approach to covering service contracts under the Davis-Bacon Act.

We did not take it at that time and thereafter did not take it, because, as the Senators will recall, about 1962 when this measure was first introduced, the Davis-Bacon Act was under very thorough investigation in the House of Representatives and there seemed little
intended exception was misconstrued by some as meaning that we were applying the Davis-Bacon Act.

I believe the complaint was that we were excluding maintenance and repair work from the Davis-Bacon Act and putting it under another statute. We were not doing that and we changed the language here to insure that that would not be misunderstood in any way.

I just cite that to show that there is a certain amount of real sensitivity as to any amendment which affects the scope and purpose of the Davis-Bacon Act confined as it now is to the construction industry.

Another answer to that question is, that in principle, without mentioning it, we have followed the Davis-Bacon Act. I address myself to the provisions on page 2 of the bill as it was reported in the House of Representatives, paragraph No. 2, which provides for the determination of prevailing wage rates by the Secretary of Labor on the basis of those prevailing for service employees in the locality.

Now the word "locality" is comparable to the words in the Davis-Bacon Act; city, town, village, or any other political division of the State in which the contract work is to be performed.

We have found in the administration of the Davis-Bacon Act that we cannot give a technical construction to those specific words in the act. For that reason, we have substituted the word "locality" for
been blacklisted and you cannot shorten the period.

We would provide in this bill for a flexible blacklist so that those
assume there were not.

Senator McNAMARA. Were these people in any manner temporary employees or were they what you would consider permanent employees?

Mr. DONAHUE. Well, from the categories of workers, in Atlanta, for example, wage rates for laundry and cleaning services; and in Baltimore, they give wage rates for elevator operators; I assume that that is as permanent as any other similar type of employment is. At those wage rates I would regard any employment as probably temporary in character, because each person is trying to move on as fast as he can to something that pays him a little more.

Senator McNAMARA. Senator Prouty, you apparently had some questions.

Senator PROUTY. Senator Javits is here.

Senator McNAMARA. Senator Javits?

Senator JAVITS. I just walked in, but what I have in mind may be troubling Senator Prouty, too. We are troubled, and I am briefed by the minority labor counsel, by two questions: One, why do you need a bill at all; why do you not just have a very brief amendment to the Davis-Bacon Act? And two, what is the legal and conceptual difference between the catechism proposed by this bill, to wit: "pre-
new standard by this bill, and if so, what is it?

Mr. DONAHUE. That is a good question, Senator, and I think I can explain it best this way.

In the first place, the word "locality" is not a new word, it is used in the Walsh-Healey Act and it has been accorded a very wide degree of flexibility by use of the statute in court decisions in a number of cases.

Now, the second answer is the Davis-Bacon provision: "City, town, village or other political subdivision of the State in which the contract work is to be performed," is language which cannot be literally applied. If it is, it is much too rigid to suit the needs of that statute and I think that that was recognized at the time the statute was first enacted by some of the colloquies which occurred, particularly in the House of Representatives, as I remember it.

We cannot confine ourselves under that statute to one State, for example, we even have to reach out beyond a State line in many areas of the West to find a prevailing wage rate. We cannot confine ourselves to the District of Columbia, for example, in establishing wage rates for this metropolitan area. And we do not do so; we reach out beyond the District of Columbia.

So, it is in deference to that need for flexible applications under the Davis-Bacon Act that we have used what we believe to be a more realistic word when we use the word "locality." A question might come up, how would we construe that word? We would construe it, I would believe, in terms of metropolitan areas in the first instance; I believe it would be most convenient administratively, for example, to take what they call the standard metropolitan statistical area
comparable numbers of people in the same types of jobs to which the contracts on the base relate.

Senator JAVITS. In other words, really, you are telling us that because of the nature of this business, you need a standard which is more administrable?

Mr. DONAHUE. That is correct. As a matter of fact, we ran into fairly sharp criticism in investigation a couple of years ago in the House of Representatives because we did not literally apply the Davis-Bacon Act.

One example was Quantico, Va., the Marine base there. We determined it was the equivalent of a city by itself and that there was enough construction there so that the Quantico rate was the prevailing rate. We were criticized because Quantico was not a State or a political subdivision, for example, but I think it was a realistic result we reached.

Senator JAVITS. You do not intend to come in for changes in the Davis-Bacon Act itself, do you?

Mr. DONAHUE. Not at this time, Senator, and we did not consider it advisable to attempt to open up that statute in this way at this time. As I said to the committee before you came here, the building trades are very sensitive to any amendments which may affect that
same way as it has been defined by the courts under the Walsh-Healey Act?

rates on that basis rather than on any nationwide basis, I would believe.

Senator JAVITS. Why use the word of art, "locality," which has been construed by the courts?

Mr. DONAHUE. We have not been confined in establishing wage rates by the courts. We have not been restricted under the Walsh-Healey Act. There is authority to have multiple rates for different parts of the country under that statute.

We have that type of discretion. If the committee should think that we should not use that discretion on a nationwide basis, and may I say it is only because and in those cases where there is nationwide competition that the courts have sustained a nationwide wage rate under the word "locality." It is doubtful in my mind that they would be able to do that under this word "locality" in this statute where I think it may be found that no such nationwide competition will probably occur.

Senator JAVITS. Mr. Chairman, I ask unanimous consent that the record may be corrected by Mr. Donahue in view of the specificity which he used in defining how he would administer this law if on review he should decide something else needs to be said or added.

Senator MCNAMARA. Without objection.

Mr. DONAHUE. Thank you, sir. ... Bureau of the Budget. I do not know how the statute would be administered in the Department of Labor if passed. My own personal view of it would be that a very appropriate place for its administration would be with the Wage and Hour Act in the Wage and Hour and Public Contracts Divisions, and if so, I imagine that a fair amount of the inspection and enforcement could be reasonably absorbed by that operating arm of the Department of Labor.

Senator MCNAMARA. Well then, your guess is that it would require approximately 10?

Mr. DONAHUE. That is the estimate which has been made; yes.

Senator MCNAMARA. You mentioned the Budget Bureau. Do we understand that the Budget Bureau has approved this legislation?

Mr. DONAHUE. They have said there is no objection to it and that it is consistent with the objectives of the administration.

Senator MCNAMARA. Very well. Any other questions?

Senator JAVITS. Senator Prouty has some.

Senator MCNAMARA. Senator Prouty?

Senator PROUTY. Mr. Donahue, first, I wish you would submit for the record a memorandum indicating the differences and similarities between this proposed legislation and the Walsh-Healey and Davis-Bacon Acts. I think that would be helpful.

Mr. DONAHUE. I will be delighted to do that.

Senator JAVITS. Would the Senator yield? One other point. Are we to assume that these statutes, including this one, will now cover everybody, or do you still have any interstices?

Mr. DONAHUE. There is one group that would not be covered and in my opinion they need coverage very much, and that is part of the

Senator JAVITS. Why not [illegible] Prouty has asked, any thoughts you may have for those employees who work in the PX's. If we are going to do the job, let's do it.

Mr. DONAHUE. The principal fact of the matter is it could be done by administrative action.

Senator JAVITS. Tell us that anyway. Let us have that information.

Mr. DONAHUE. Surely.

(The memorandum and additional information referred to follow:)

MEMORANDUM ON PRINCIPAL DIFFERENCES BETWEEN THE SERVICE CONTRACT ACT PROPOSAL, S. 2369, AND THE DAVIS-BACON ACT (40 U.S.C. 276a–276a–7) AND WALSH-HEALEY PUBLIC CONTRACTS ACT (41 U.S.C. 35–45)

PURPOSE

These acts have the common purpose of requiring minimum wage standards for employees on Government contracts, as determined by the Secretary of Labor. The Davis-Bacon Act and the Service Contract Act proposal include express requirements for the payment of certain fringe benefits. The Walsh-Healey Public Contracts Act and the Service Contract Act further include health and safety requirements.

COVERAGE

The Davis-Bacon Act covers contracts of the United States exceeding $2,000 for the construction, alteration, or repair, including painting and decorating of the locality in which the contract is to be performed.

The Service Contract Act proposal covers contracts, the principal purpose of which is to furnish services through the use of service employees, as defined in the



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work performed under the Service Contract Act proposal.

### ENFORCEMENT

The two acts and the proposal all provide for contract cancellation and withholding of payments due contractors if the labor standards provisions are violated.

Similarly, they provide for debarment of violating contractors from Federal contract award. Under Davis-Bacon Act, the debarment period is 3 years. Similar language under the Davis-Bacon Act is construed as barring the debarred contractors from participating as subcontracters as well. Under Walsh-Healey and the Service Contract Act proposal the debarment period is 3 years but the Secretary of Labor has the discretion to recommend against debarment.

The Service Contract Act proposal incorporates by reference the provisions of the Walsh-Healey Public Contracts Act requiring the Secretary of Labor to hold administrative hearings subject to section 5 of the Administrative Procedure Act to determine violations.

Comparable procedures under the Davis-Bacon Act are less formal, although with respect to violations the contractor is afforded an opportunity to be heard both before the executive branch and the Comptroller General.

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## Nonappropriated Fund Activity Employees of Department of Defense

There is attached a Department of Defense directive requiring that certain of these employees receive a minimum wage.

No. 1416.6
ASD(M)

### Department of Defense Directive

Subject: Minimum wages for nonappropriated fund employees.
Reference: (a) Fair Labor Standards Act, as amended (29 U.S.C. 201 et seq.).

### I. PURPOSE

This directive establishes a Department of Defense minimum wage policy for employees of nonappropriated fund activities.

### II. APPLICABILITY

This directive is applicable to all components of the Department of Defense (military departments, defense agencies, and the Office of the Secretary of Defense), hereinafter referred to as "DOD components."

Senator McNamara. We have an amendment that is being passed out here, suggested by a member of the full committee in the House. I understand that you have seen a copy of this amendment. Did you get one now?

Mr. Donahue. I do not happen to have it now.

Senator McNamara. Bob is going to read it, as he has been there and can pronounce the names.

Mr. Perrin. I don't remember, but on page 8, line 10, after the word "Island," insert the following:

"Eniwetok Atoll, Kwajalein Atoll, Johnston Island * * *"

Mr. Donahue. I can pronounce the last one.

Senator McNamara. I understand these are included in the bill amending the Fair Labor Standards Act this year.

Mr. Donahue. This coverage was in the bill as reported by the House of Representatives this year and the bill as recommended by the request of Congressman O'Hara, we got in touch with ex-Congressman





Senator Prouty. Let me ask you this then: Would you have any objection if this finding of the wage rates were restricted to an individual State? I mean, for example, prevailing wages in New York City are not comparable with some rural community in some small State. But perhaps the average wage throughout the State might be somewhat comparable.

Mr. Donahue. That would be one basis for doing it, but I believe that the wage rates do not respect State lines. For example, I believe the State line between Indiana and Illinois out in Gary runs through a powerhouse. It divides it in half. I just give that as an extreme example.

I believe it would be realistic for us to take, if we were considering the Chicago area, the wage rates paid in Gary, for example, on one side of that State line and the wage rates paid on the other side of that State line.

under contract with the Federal Government. We would not regard those added payments as part of the regular rate of pay when made [illegible] I think you said that you could not determine the prevailing wage scales in the District of Columbia.

Why can you not do that in any metropolitan area—determine the prevailing wage scale?

Mr. DONAHUE. I tried to say that we could not realistically confine ourselves to the exact boundaries of the District of Columbia.

Senator PROUTY. Let us take any metropolitan area, New York City, for example.

Mr. DONAHUE. Well, in New York City we have authority under the statute to seek out any city, town, village, or other political subdivisions of the State which is broad enough to let us go out beyond New York City as far as we wish, or as far as we need to, in order to ascertain sufficient wage rates to determine what is prevailing.





SENATOR MCNAMARA. I think the common use of the word "scale" [illegible] torial service, including cleaning offices and similar services.

Now, what position is the building owner in under the provisions of this bill?

Mr. DONAHUE. I believe he would not be covered under the provisions of this bill, because it applies to contracts which are primarily service contracts, and I would assume that such a leasing arrangement providing janitorial services is not primarily a service contract, Senator; that it would be in effect a lease of space in a building.

Senator PROUTY. That is all I have, Mr. Chairman.

Senator MCNAMARA. Thank you very much. If there are no other questions, we appreciate your taking the time to appear here and give us this clarification.

Mr. DONAHUE. It is my own pleasure to have a chance to be of any assistance to the subcommittee.

Nonunion contractors, almost invariably from another State, paying subminimal wages, underbid area contractors who pay the going rate in the area, with the consequent displacement of workers, the destruction of decent work and salary standards, and the lowering of the quality of the cleaning work performed.

The Service Contract Act would require that contractors doing this work pay the prevailing rate for similar work in the locality and provide similar fringe benefits. The bill has the endorsement of every Government agency and department.

We are hopeful that the Senate Subcommittee on Labor will also give it unanimous support.

If you would like any further information on this please do not hesitate to call upon us.

Sincerely,

DAVID SULLIVAN, *General President.*

(Whereupon, at 10:50 a.m., the subcommittee went into executive session.)

**DEBATE IN HOUSE OF REPRESENTATIVES ON H.R. 10238, EXCERPT FROM CONGRESSIONAL RECORD, SEPT. 20, 1965**

'Service Contract Act of 1965'.

"SEC. 2. (a) Every contract (and any bid specification therefor) entered into by the United States or the District of Columbia in excess of $2,500, except as provided in section 7 of this Act, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States through the use of service employees, as defined herein, shall contain the following:

"(1) A provision specifying the minimum monetary wages to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder, as determined by the Secretary, or his authorized representative, in accordance with prevailing rates for such employees in the locality, which in no case shall be lower than the minimum specified in subsection (b).

"(2) A provision specifying the fringe benefits to be furnished the various classes of service employees, engaged in the performance of the contract or any subcontract thereunder, as determined by the Secretary or his authorized representative to be prevailing for such employees in the locality. Such fringe benefits shall include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, costs of apprenticeship or other similar programs and other bona fide fringe benefits not otherwise required by Federal, State, or local law to be provided by the contractor or subcontractor. The obligation under this subparagraph may be discharged by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash under rules and regulations established by the Secretary.

"(3) A provision that no part of the services covered [illegible] service employees as defined herein and no subcontractor thereunder shall pay any of his employees engaged in performing work on such contracts less than the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060; 29 U.S.C. 201, et seq.).

"(2) The provisions of sections 3, 4, and 5 of this Act shall be applicable to violations of this subsection.

"SEC. 3. (a) Any violation of any of the contract stipulations required by section 2(a) (1) or (2) or of section 2(b) of this Act shall render the party responsible therefor liable for a sum equal to the amount of any deductions, rebates, refunds, or underpayment of compensation due to any employee engaged in the performance of such contract. So much of the accrued payment due on the contract or any other contract between the same contractor and the Federal Government may be withheld as is necessary to pay such employees. Such withheld sums "(b) In accordance with regulations prescribed pursuant to section 4 of this Act, the Federal agency head or the Secretary is hereby authorized to carry out the provisions of this section.

"(c) In addition, when a violation is found of any contract stipulation, the contract is subject upon written notice to cancellation by the contracting agency. Whereupon, the United States may enter into other contracts or arrangements for the completion of the original contract, charging any additional cost to the original contractor.

"SEC. 4. (a) Sections 4 and 5 of the Act of June 30, 1936 (49 Stat. 2036), as amended, shall govern the Secretary's authority to enforce this Act, make rules, regulations, issue orders, hold hearings, and make decisions based upon findings of fact, and take other appropriate action hereunder.

"(b) The Secretary may provide such reasonable limitations and may make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act as he may find necessary and proper in the public interest or to avoid serious impairment of the conduct of Government business.

"SEC. 5. (a) The Comptroller General is directed to distribute a list to all agencies of the Government giving the names of persons or firms that the Federal agencies or the Secretary have found to have violated this Act. Unless the
deposit fund and shall be paid, on order of the Secretary, directly to the underpaid employee or employees. Any sum not paid to an employee because of inability to do so within three years shall be covered into the Treasury of the United States as miscellaneous receipts.

"SEC. 6. In determining any overtime pay to which such service employees are entitled under any Federal law, the regular or basic hourly rate of pay of such an employee shall not include any fringe benefit payments computed hereunder which are excluded from the regular rate under the Fair Labor Standards Act by provisions of section 7(d) thereof.

"SEC. 7. This Act shall not apply to—

"(1) any contract of the United States or District of Columbia for construction, alteration and/or repair, including painting and decorating of public buildings or public works;

"(2) any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act (49 Stat. 2036);

"(3) any contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line or oil or gas pipeline where published tariff rates are in effect;

"(4) any contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934;

"(5) any contract for public utility services, including electric light and power, water, steam, and gas;

"(6) any employment contract providing for direct services to a Federal agency by an individual or individuals; and

"(7) any contract with the Post Office Department, the principal purpose of which is transportation, handling, or delivery of the mails, or the operation of persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

"(c) The term 'compensation' means any of the payments or fringe benefits described in section 2 of this Act.

The SPEAKER. Without objection, a second will be considered as ordered.

There was no objection.

The SPEAKER. The gentleman from Michigan is recognized for 20 minutes.

Mr. O'HARA of Michigan. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, the purpose of this bill is to extend the longstanding policy of the Congress that the Federal Government shall not be a party to the depressing of labor standards in any area of the Nation.

We accomplish this by providing much-needed labor standards protection for employees of contractors and subcontractors furnishing services to or performing maintenance service for Federal agencies.

I suppose every Member who brings a bill to the House likes to claim it is bipartisan; sometimes the term may be stretched rather thin. In this particular instance, I believe this bill meets every test of bipartisanship that may be applied.

It is jointly sponsored by myself and the gentleman from Washington [Mr. Pelly].

Each of us has a history of introducing predecessor bills in prior Congresses.

There was no opposition to this bill in committee; in fact it was enthusiastically supported by both sides.

Furthermore this bill is part of the legislative program of this administration. It accepts the great principle adopted by an earlier Congress, under Republican leadership, when the Davis-Bacon Act was written into law.

The committee report contains a full and complete explanation of the bill, as well as the committee amendment.

It might be helpful, however, to develop the rationale for the amendment.

provided protection to the employees of service contractors involved a contract for the hauling of mail between Detroit and Port Huron, Mich. Truckdrivers, having been organized, were threatening to strike. A strike was averted when a wage increase to $1 per hour was agreed to. This wage rate was considerably below the prevailing wage within the area.

The committee could see no sound reason for not protecting local prevailing wages when a contract involved the transportation, handling, or delivery of the mails.

Mr. Speaker, just because the committee report and my remarks both have contained references to the Davis-Bacon and Walsh-Healey Acts it is not expected that the Secretary of Labor will be bound by past practice worked out for determinations under them. We would expect that he consult with appropriate Government agencies, including the chief procurement agencies and the Civil Service Commission with respect to the procedures.

We make this clear in the report, but it should be further emphasized here.

The bill is applicable to advertised or negotiated contracts in excess of $2,500, the principal purpose of which is for the furnishing of services through the use of service employees, as defined in the bill. Thus, for example, contracts made by the District of Columbia government with local hospitals for the care of indigent patients would not be covered, since "service employees" as defined in the bill would be performing only incidental functions. Similarly, contracts entered into by the atomic Energy Commission for the management and operation of Government-owned plants would not be service contracts within the meaning of the bill.

Provisions regarding wages and working conditions must be included in these contracts and bid specifications. Service employees must be paid no less than the rate determined by the Secretary of Labor to be prevailing in the locality.

The bill also recognizes the growing importance of fringe benefits as an element of wages in today's society. It therefore requires inclusion in the contract of an agreement to provide service employees benefits determined by the Secretary to be prevailing for such employees in the locality. This obligation may be discharged by furnishing any equivalent combinations of benefits or cash payments in accordance with regulations of the Secretary.

The bill also prohibits the payment on any Government service contract of

The Government may also bring court action against the contractor, subcontractor, or surety to recover the remaining amount of the underpayment. The contract may be terminated because of violations and the contractor held liable for any resulting cost to the Government.

The bill also provides a procedure for blacklisting, for a period up to 3 years, those who violate the act, with authority in the Secretary to recommend removal from the blacklist upon assurance of compliance. The Secretary is given the same authority to make rules, regulations, issue orders, hold hearings, and take other appropriate action to enforce the act as under sections 4 and 5 of the Walsh-Healey Act. The Secretary's authority to prescribe regulations includes authority to permit reasonable tolerances, variations, and exemptions from provisions of the act where they are deemed necessary and proper in the public interest or to avoid serious impairment of Government business.

The SPEAKER. The gentleman from New York is recognized for 20 minutes.

Mr. REID of New York. Mr. Speaker, I yield myself such time as I may consume.

The purpose of this bill is clear. The service contract is now the only remaining category of Federal contracts to which no labor standards protections apply. Construction contracts, including many which are partially financed with Federal funds but to which the Federal Government is not a party, require compliance with minimum labor standards under the Davis-Bacon Act and related statutes. Supply contracts of the Federal Government also provide labor standards protection pursuant to the Walsh-Healey Act.

The bill H.R. 10238 was reported unanimously by the committee.

Mr. Speaker, I now yield such time as he may consume to the distinguished gentleman from Washington [Mr. Pelly], who was an author of initial legislation in this field and a cosponsor of H.R. 10238.

offered which I had worked out with the chairman of our subcommittee and had hoped to offer to this legislation. The amendment which I had hoped to propose would have amended the jurisdiction of this bill with respect to the definition
tend his remarks.)

Mr. BURTON of California. Mr. Speaker, I have joined with my distinguished colleague, the gentleman from Michigan, Congressman JAMES O'HARA, in introducing a companion measure to H.R. 10238 because it provides protections to one of the last groups of workers to which no labor standards protections apply.

H.R. 10238 affords these protections to those engaged in laundry and drycleaning, custodial, janitorial, and guard service, food and miscellaneous housekeeping services.

The Federal Government has added responsibility in this area because of the legal requirement that contracts be awarded to the lowest responsible bidder. Since labor costs are the predominant factor in most service contracts, the odds on making a successful low bid for a contract are heavily stacked in favor of the contractor paying the lowest wage. Contractors who wish to maintain an enlightened wage policy may find it almost impossible to compete for Government service contracts with those who pay wages to their employees at or below the subsistence level. When a Government contract is awarded to a service contractor with low wage standards, the Government is, in effect, subsidizing subminimum wages.

The granting of protection under the Fair Labor Standards Act to employees of Federal service contractors is long overdue.

Mr. PELLY. Mr. Speaker, I rise in support of H.R. 10238, to provide much-needed labor standards protection for employees of contractors furnishing services and maintenance work for Federal agencies. In other words, this is to add so-called Davis-Bacon provisions to require compliance with minimum labor standards where work is financed with Federal funds.

As the gentleman from New York [Mr. Reed] stated. I have long been in-

Mr. O'HARA of Michigan. Mr. Speaker, I ask unanimous consent that all Members may have permission to extend their remarks at this point in the RECORD in connection with this bill.

The SPEAKER. Is there objection to the request of the gentleman from Michigan?

There was no objection.

The SPEAKER. The question is on the motion of the gentleman from Michigan [Mr. O'Hara] that the House suspend the rules and pass the bill H.R. 10238, as amended.

The question was taken; and (two-thirds having voted in favor thereof) the rules were suspended and the bill was passed.

A motion to reconsider was laid on the table.

# SERVICE CONTRACT ACT OF 1965

SEPTEMBER 30, 1965.—Ordered to be printed

The Committee on Labor and Public Welfare, to which was referred the bill (H.R. 10238) to provide labor standards for certain persons employed by Federal contractors to furnish services to Federal agencies, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill (as amended) do pass.

The amendment is as follows:

Page 8, line 14, after the word "Island," insert the following language: "Eniwetok Atoll, Kwajalein Atoll, Johnston Island,".

## EXPLANATION OF AMENDMENT

The amendment enlarges the definition of the term "United States" to extend coverage of the bill to the Eniwetok and Kwajalein Atolls and Johnston Island.

## PURPOSE OF THE BILL

The purpose of this bill is to provide labor standards for the protection of employees of contractors and subconrtactors furnishing services to or performing maintenance service for Federal agencies.



The committee strongly urges that appropriate directive issue by the Department of Defense or any other appropriate Federal agency to give to such service employees the coverage provided by this bill.

## BACKGROUND OF THE BILL

holding of payments due the contractor under the contract and payments to the employees of amounts due them; suit by the United States against the contractor or surety to recover the amount of underpayment; cancellation of the contract for any violation with the contractor liable for any resulting cost to the United States; authority for the Secretary to list and withhold awarding further contracts to contractors violating this bill for up to 3 years; and authority to issue regulation under sections 4 and 5 of the Walsh-Healey Public Contracts Act to enforce this bill. The authority to list contractors violating this act specified in the bill and to recommend no further contracts of the United States be awarded such violators is subject to the provision of sections 4 and 5 of the Walsh-Healey Public Contracts Act. Contractors would therefore be entitled to the notice, hearing, and other procedures provided for in said act.

appropriated funds are not covered by this bill. Mr. Donahue, in a memorandum submitted to the committee, said:

> The authority of that Department would undoubtedly also support directives requiring a minimum wage for all nonappropriated fund activity employees. Similarly, it would appear to be within existing authority to require prevailing wage rates to be paid these employees as is required for blue-collar workers of the Federal Government.
>
> The principal types of employees who would be affected are believed to be those employees for PX's, ship's stores, officers clubs, and in recreational activities for the benefit of the Armed Forces.



awarded to the lowest responsible bidder. Since labor costs are the predominant factor in most service contracts, the odds on making a successful low bid for a contract are heavily

SECTION-BY-SECTION ANALYSIS

*Section 1.* The act is cited as the "Service Contract Act of 1965."

Service employees in many instances are not covered by the Fair Labor Standards Act or State minimum wage laws. The counterpart of these employees in Federal service, blue-collar workers, are by a Presidential directive assured of at least the Fair Labor Standards Act minimum. Bureau of Labor Statistics surveys of average earnings in service occupations in selected areas in 1961 and 1962 show, however, that an extremely depressed wage level may prevail in private service employment. In coutract cleaning services,



(b) The Secretary may provide such reasonable limitations and may make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this act as he may find necessary and proper in the public interest or to avoid serious impairment of the conduct of Government business.

*Section 5.* (a) The Comptroller General is directed to distribute a list to all agencies of the Government giving the names of persons or firms that the Federal agencies or the Secretary have found to have violated this act. Unless the Secretary otherwise recommends, no contract of the United States shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have a substantial interest until 3 years have elapsed from the date of publication of the list containing the name of such persons or firms.

(b) If the accrued payments withheld under the terms of the con-

*Section 6.* In determining any overtime pay to which such service employees are entitled under any Federal law, the regular or basic hourly rate of pay of such an employee shall not include any fringe benefit payments computed hereunder which are excluded from the regular rate under the Fair Labor Standards Act by provisions of section 7(d) thereof.

*Section 7.* This Act shall not apply to—

(1) Contracts covered by Davis-Bacon Act.

(c) Upon the finding of any contract violation, the contracting agency may cancel by written notice, whereupon the United States may enter into other contracts or arrangements for completion of the original contract, charging any additional cost to the original contractor.

*Section 4.* (a). Sections 4 and 5 of the Walsh-Healey Public Contracts Act, as amended, shall govern the Secretary's authority to enforce this act.



(d) "United States" means any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, the Outer

# SERVICE CONTRACT ACT OF 1965

## HEARING

BEFORE THE

## SPECIAL SUBCOMMITTEE ON LABOR

OF THE

# H.R. 10238

A BILL TO PROVIDE LABOR STANDARDS FOR CERTAIN PERSONS EMPLOYED BY FEDERAL CONTRACTORS TO FURNISH SERVICES TO FEDERAL AGENCIES, AND FOR OTHER PURPOSES

HEARINGS HELD IN WASHINGTON, D.C., AUGUST 5, 1965

Printed for the use of the Committee on Education and Labor

ADAM C. POWELL, *Chairman*

WASHINGTON : 1965

(3775)

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[illegible], Maryland
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Robert McCord, *Director*

SPECIAL SUBCOMMITTEE ON LABOR OF THE
COMMITTEE ON EDUCATION AND LABOR,
*Washington, D.C.*

The special subcommittee met at 10:15 a.m., pursuant to call, in room 2257 of the Rayburn House Office Building, Hon. James G. O'Hara presiding.

Present: Representatives O'Hara and Sickles.

Present also: Robert McCord, professional staff member.

Mr. O'HARA. The Special Subcommittee on Labor of the Committee on Education and Labor will come to order.

The purpose of the hearing today is to gain information with respect to the bill, H.R. 10238, designated as a bill to provide labor standards for certain persons employed by Federal contractors to furnish services to Federal agencies, and for other purposes.

(The bill, H.R. 10238, is as follows:)

**[H.R. 10238, 89th Cong., 1st sess.]**

**A BILL To provide labor standards for certain persons employed by Federal contractors to furnish services to Federal agencies, and for other purposes**

***Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*** That this Act may be cited as the "Service

(2) A provision specifying the fringe benefits to be furnished the various classes of service employees, engaged in the performance of the contract or any subcontract thereunder, as determined by the Secretary or his authorized representative to be prevailing for such employees in the locality. Such fringe benefits shall include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, costs of apprenticeship or other similar programs and other bona fide fringe benefits not otherwise required by Federal, State, or local law to be provided by the contractor or subcontractor. The obligation under this subparagraph may be discharged by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash under rules and regulations established by the Secretary.

**1**

ernment the principal purpose of which is to furnish services through the use of service employees as defined herein and no subcontractor thereunder shall pay any of his employees engaged in performing work on such contracts less than the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060; 29 U.S.C. 201, et seq.).

(2) The provisions of sections 3, 4, and 5 of this Act shall be applicable to violations of this subsection.

SEC. 3. (a) Any violation of any of the contract stipulations required by section 2(a) (1) or (2) or of section 2(b) of this Act shall render the party responsible therefor liable for a sum equal to the amount of any deductions, rebates, refunds, or underpayment of compensation due to any employee engaged in the performance of such contract. So much of the accrued payment due on the contract or any other contract between the same contractor ...

for the completion of the original contract, charging any additional cost to the original contractor.

SEC. 4. (a) Sections 4 and 5 of the Act of June 30, 1936 (49 Stat. 2036), as amended, shall govern the Secretary's authority to enforce this Act, make rules, regulations, issue orders, hold hearings, and make decisions based upon findings of fact, and take other appropriate action hereunder.

(b) The Secretary may provide such reasonable limitations and may make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act as he may find necessary and proper in the public interest or to avoid serious impairment of the conduct of Government business.

SEC. 5. (a) The Comptroller General is directed to distribute a list to all agencies of the Government giving the names of persons or firms that the Federal agencies or the Secretary have found to have violated this Act. Unless the Secretary otherwise recommends, no contract of the United States shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have a substantial interest until 3 years have elapsed from the date of publication of the list containing the name of such persons or firms.

(b) If the accrued payments withheld under the terms of the contract are insufficient to reimburse all service employees with respect to whom there has been a failure to pay the compensation required pursuant to this Act, the United States may bring action against the contractor, subcontractor, or any sureties in any court of competent jurisdiction to recover the remaining amount of underpayments. Any sums thus recovered by the United States shall be held in the deposit fund and shall be paid, on order of the Secretary, directly to the underpaid

First, may I introduce those who are with me? To my right is Miss Carol Cox, of the staff of the Office of the Solicitor of the Department of Labor, and similarly of the same staff, on my left, Mr. Seth Zinman, who may, from time to time, with your permission, fill in any blank spots that I happen to have in my mind at the moment.

MR. O'HARA. Do they have permission ...

Lands Act, American Samoa, Guam, Wake Island, but shall not include any other territory under the jurisdiction of the United States or any United States base or possession within a foreign country.

Sec. 9. This Act shall apply to all contracts entered into pursuant to negotiations concluded or invitations for bids issued on or after ninety days from the

ment of Labor, to come before us today, to explain to us what this bill does, and what the differences are between this bill and the bill on which the committee held hearings and reported favorably last year.

Mr. Donahue, we are happy to have you with us.

## STATEMENT OF CHARLES DONAHUE, SOLICITOR OF LABOR; ACCOMPANIED BY CAROL COX AND SETH ZINMAN, MEMBERS OF THE STAFF OF THE OFFICE OF THE SOLICITOR, DEPARTMENT OF LABOR

Mr. Donahue. Thank you, Mr. Chairman. I am certainly going to try my best to carry out the purposes for which I am here.





The full effect of these programs will be felt only after much time has passed. In the shorter run, it is essential that the Federal Government at least seek to remedy the plight of the exploited workers who perform work financed with Federal funds.

Although Federal policies should be directed toward improving wage standards, the sad fact is, that insofar as Federal service contract employees are concerned, our contracts tend to depress wages even further. As you know, contracting agencies must, in the absence of statutory authority, award contracts to the lowest bidder who can satisfactorily complete the work. Since labor costs are the predominant factor in most service contracts, the odds on making a successful low bid for a contract are heavily stacked in favor of the contractor paying the lowest wage. Contractors who wish to maintain an enlightened wage policy may find it difficult—if not impossible—to compete for Government service contracts with those who pay wages to their employees at or below the subsistence level.

There is the possibility also that under the pressure of bid competition an ordinarily fair contractor may reduce the wages of employees in order to improve the chances that his bid will be accepted. This action, of course, would further depress wage rates. When, as at present, a low bid award policy on service contracts is coupled with a policy of no labor standards protection, the trend may well be in certain areas for wage rates to spiral downward.

Often they are not members of unions and have little prospect of bettering their condition through collective bargaining.

Comprehensive wage rate information which may be identified with Government service contracts is not available. Through Bureau of Labor Statistics surveys of average earnings in selected areas, we do gain some insight into the extremely depressed level of wages paid by some service contractors.

In contract cleaning services in 1961, less than $1.05 an hour was paid to production workers in many areas. In Atlanta, 74 percent of all production workers received less than this amount; in Dallas, the proportion was 65 percent; and in Baltimore, 45 percent.

In Atlanta in 1963, average earnings of employees in laundry and cleaning services were $0.94 an hour; in Memphis $0.83 an hour; in Baltimore $1.17 an hour.

Elevator operators in 1962 averaged $0.89 an hour in Atlanta; $0.79 in Memphis; $0.94 in Miami; and $1.17 in Baltimore.



The principle basic to the Service Contract Act is neither novel nor unique. Its rationale is simply that funds of the Federal Government shall not be used to finance contracts which undercut and depress the wage rate prevailing in a locality or upon which undesirable working conditions obtain. The Government now insists in prevailing wage standards in construction and supply contracts. Service employees hired directly by the Government are required by Presidential directive to be paid no less than the Fair Labor Standards Act minimum.

H.R. 10238 would require the inclusion of labor standards obligations as a condition of contract award. Service employees at work on service contracts in excess of $2,500 would be furnished not less than the wages and fringe benefits determined by the Secretary of Labor to be prevailing in the locality. In addition, the bill would provide that all employees of Federal service contractors be paid no less than the minimum set forth in the Fair Labor Standards Act. Employers must furnish safe and sanitary working conditions where such condition are under their control.

The Department of Labor is given primary responsibility for the administration of the act. Determinations of the required wages and fringe benefits are to be made by the Department as are regulations governing enforcement. In carrying out our responsibilities under the bill, it would be our intention to ex-
It cannot effectively inspire responsible policies by labor and management if its procurement policies tend to promote in any way the practices which it proscribes.

The Federal Government should be a pace setter in labor standards. This bill would enable it to fulfill this responsibility more adequately. I therefore urge your favorable consideration of this meritorious bill.

Mr. Donahue. Then, with your permission I would like to proceed in my own way to outline the four corners of this bill, which is, as you said, H.R. 10238, introduced by the chairman, on August 3, 1965.

There are many who think that this is a new or a novel proposal. Not included among that number is the chairman of this subcommittee.

objectives of the administration.

With that introduction, Mr. Chairman, I think that I probably should outline briefly some of the changes from prior proposals, and the reasons for them.

Before doing so, I think that I should make a brief statement of what this bill is about. This is a bill to provide prevailing wage coverage for service contracts in excess of $2,500. This fills a gap in the wage standards structure governing Federal Government procurement. We have the Walsh-Healey Act covering Federal supply contracts, and we have the Davis-Bacon Act covering Federal construction contracts, but we have not had, over all of the years, any similar and much needed protection for contracts covering service contract employees. The most typical of which may be, for example, a service contract by the General Services Administration, covering janitorial and maintenance activities, which when performed by the Federal Government is subject to what they call wage board procedure, and prevailing rates are established for that work. But when it is contracted out to some private organization on a bid basis, then there is no similar wage protection provided, although the major part of the costs are wage costs.

Now, the problem the chairman, in attempting to fill the gap with vided that the wage determination would be made by the agency head, with the concept that the agency head would use exactly the same procedures that the agency now uses for so-called wage board employees, who are direct blue-collar employees of the Federal Government. It was thought at that time that this approach might be a more acceptable one to the procurement agencies. Accordingly, we took that approach.

However, we discovered, in the course of getting their advice on this measure, that they would prefer to have this function centered in the Department of Labor. We were being very modest about it at that time. We allowed the procurement agencies to tell us that they desired to have the Department of Labor, the experts in this field administer the bill. Once they did so we said that we willingly accepted that duty and that obligation. So we have changed the bill as a result to provide for the wage determinations to be made by the Secrestead of by the procurement agencies; a change which all of the procurement agencies have approved.

The third change which we made here is in regard to what we call fringe benefits. Prior proposals had provided that the fringe benefits to which an employee would be entitled be determined by considering the cost to the Government of furnishing similar benefits to its own employees. Under H.R. 6088 in 1964, such determinations would have been made by the contracting agency.

This was questioned by many agencies as, in their opinion, an inappropriate standard, and besides, they desired to have here again the determination of it placed in the hands of the Department of Labor. Again we modestly accepted their suggestions and changed the bill to provide for those fringe benefits, which prevail generally in the local-
this bill, that it would omit from the regular rate of pay, the basic hourly wage rate, any of the fringe benefit payments of the types specified in the Fair Labor Standards Act as being omitted from the regular rate of pay for overtime purposes under the Fair Labor Standards Act.

This is for the purpose of underlining and emphasizing the need for consistency in administration and in presentation of overtime under all of these statutes in a standard way, so that it would be easier for employers to understand, and easier for agencies to know about; and easier for the Department of Labor to administer.

The actual enforcement of the statutes under the proposed bill would give the Secretary of Labor a more prominent and direct role than under the prior bill. Under this bill the Secretary would be proceeding in enforcement in precisely the same way he now proceeds under the Walsh-Healey Public Contracts Act, with investigation and enforcement through an enforcement arm.

Undoubtedly, the enforcement arm would be the Wage and Hour and Public Contracts Divisions, using their some 900 investigators, which are already on their staff, for purposes of enforcing this bill in exactly the same way that they operate today, in investigating for the enforcement of the Walsh-Healey Public Contracts Act.

After an investigation is made and violations are found, the case to workers who should have been paid it in the first place.

Second, the Government can sue, to recover amounts of money which cannot be recovered through the withholding process.

Third, there is final authority given to the Secretary of Labor to debar from contracts of the United States any violating contractor for a period, I believe, of 3 years, but which may be reduced in time in accordance with the equities of the case.

Those very briefly, are the major enforcement provisions in the bill.

Perhaps it might be helpful for the purposes of the record to emphasize those who are not covered by the bill. Generally speaking, this bill applies to what are ordinarily known as service or blue-collar employees, to janitorial services, to various kinds of maintenance services under Government service contracts.

Perhaps I should add that guards are also covered under this proposal.

Specifically exempt, I wish to underline, are any contracts for the construction, alteration and repair, including painting and decorating of public works of the United States. This insures that those who may be subject to the Davis-Bacon Act will not be subject to this particular statute. Second, the same end is accomplished, so far as the Walsh-Healey Act is concerned. Any workers or any con-
Post Office contracts for transporting and handling and deliver-ing the mails and the operation of postal contract stations are exempt.

Other than that, the classes of employees which I have referred to would be given the much needed protections of this bill, which the Secretary of Labor heartily and very enthusiastically endorses. He asked me to compliment the chairman for his very constructive endeavors in bringing this bill before the Congress.

Mr. O'Hara. I certainly thank you for your testimony and for your kind words. As you mentioned, I am indeed very pleased to have the Department appear on this bill and present such forceful and knowledgeable testimony. As you mentioned, this is a matter on which your office started working with me some 5 or 6 years ago.

Mr. Donahue. That is correct, Mr. Chairman.

Mr. O'Hara. We are happy that we are making some progress. I wish to bring up a couple of points. I notice in your statement submitted for the record, you make the point that although this bill is in its concept and in its application very similar to the Davis-Bacon

Act, the procedures you evolve for working out your determinations under this act will not necessarily be those used in the Davis-Bacon Act. The reason is because there are some differences in the types of industries covered; is that correct?

Mr. DONAHUE. That is correct; we would not consider either the Davis-Bacon Act or the Walsh-Healey Act as binding upon us in making prevailing wage determinations under this proposal. As the chairman knows, there is a vast difference between the procedures under the Walsh-Healey Act, as contrasted with the Davis-Bacon Act. Neither may be appropriate under this particular statute. I would propose, as well, that we take a good hard look at the Wage Board procedures which are followed by the various Government agencies and come up with a proposal which is geared to the needs of service employees and to the realities of the service industries.

use of janitorial services at the place at which the contract is performed. This act does not intend to apply to services incidental to a contract for another purpose.

Mr. DONAHUE. I think that is technically correct under this bill. It was a matter of some concern to me in the course of getting agency clearance on this proposal that that was true. I had in mind, for example, that the Government has any number of large operating contracts under which private companies operate Government-owned plants.

The prime example is the Atomic Energy Commission, which has very large installations operated by very large private companies. Under these, a great deal of maintenance and other related services are performed.

It has been our position under the Walsh-Healey Public Contracts Act that these companies, for example, are acting as agents of the United States and therefore the contracts that they may enter into for the performance of services of the nature covered by this bill, or comparable to those provided for by this bill, which are in the supply contract area, for example, would be covered. It is because of the agency principle.

I do think that while technically this bill does not cover those types who are directly involved in the production of those trucks.

It wouldn't apply to the fellow who is sweeping up around the area in which the production takes place. It wouldn't apply to the fellow who is the timekeeper on the job. It wouldn't apply to the guards standing at the gate of the plant. It seems to me that it ought to be broadened so that it does apply to them. Perhaps it would apply in a Government-owned plant. I believe, that is the position you are taking, where the plant itself was operated under contract. But in a privately owned facility, such as the Dodge plant in my district producing trucks for the Army, it wouldn't apply to those categories of employees.

I had not thought of taking up that question at this time. It will have to wait its turn.

Mr. DONAHUE. I think the Department would be sympathetic to any constructive proposal to try to sensibly broaden the reach of the Walsh-Healey Act.

Mr. O'HARA. I have a question which bothers me a little bit, and perhaps you and I can discuss it. I am rather naive now, but I was even more naive when I first came to Congress and realized that the prevailing wage laws with respect to Government contracts didn't apply to service contracts. It was first brought to my attention wher wage. It was then that I first realized, after checking with your Department, that these service-type contracts were not covered by the minimum wage protection.

Then of course I learned of the ramifications of that fact, in other areas. Most of these areas were much more important in terms of numbers involved and so forth than the carriage of mail. But, nevertheless, it bothers me to find that we aren't trying to cover contracts for the carriage of mail.

I wonder why we aren't doing so.

Mr. DONAHUE. To give you the most candid answer in the world, we are not doing it because we wanted to insure that we could present to the Congress a bill which was not opposed by all of the procurement agencies of the Government. Recognizing at the same time it is the prerogative and, indeed, the duty of this committee to give careful consideration to the proposal we have made and to exercise its will on the bill and use its best judgment in gearing its coverage to the consensus of the committee.



95-824 O—68——5

Mr. O'Hara. If we could run through these exemptions: Exemption No. 1, section 7, that is Davis-Bacon. No. 2 is the Walsh-Healey Act. No. 3 is contracts for the carriage of freight and personnel by vessel or airplane, or bus, truck, express, railway line, or oil or gas pipeline where published tariff rates are in effect.

I can see the rationale for that. We don't have the same competitive situation which we face in service contract areas generally.

As you pointed out in your statement, the difficulty in this service contract area, where so much of the input on the job is direct labor costs and where you have a situation in which the low bidder who gets the contract is the fellow who is paying the lowest wages and has a great competitive advantage. It wouldn't be the case here.

Mr. Donahue. I think that that is true, sir.

Mr. O'Hara. Likewise, No. 4, I would assume a similar rationale. No. 5, again we have regulated industries and utilities.

Mr. Donahue. That is correct.

Mr. O'Hara. The various procurement agencies felt, I gather, that their administrative burdens would be eased if we chose $2,500.

Mr. Donahue. I would prefer to have Mr. Zinman answer that question, if he would.

Mr. Zinman. Well, there are procedures available under the procurement statutes which permit both civilian and defense agencies to negotiate contracts which are less than $2,500. Such contracts need not be submitted for formal advertising. It was felt by the agencies that in view of the expedited procedures for these lesser contracts, they didn't want to add complications.

Mr. O'Hara. I think that is a very good reason.

Finally, I would like to compliment our witness and his colleagues on the work they have done. I wouldn't have believed, and didn't believe, as a matter of fact, in January when this Congress convened, it would have been possible to come up with a bill that was not objectionable to any of the Government's procurement agencies or to the Bureau of the Budget.

Mr. Donahue. I would have shared that view. I think that they have done an excellent job.

Mr. O'Hara. I think it is more than excellent. It is miraculous.

If not, we shall now hear our colleague from Minnesota, Mr. Karth.

## STATEMENT OF HON. JOSEPH E. KARTH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MINNESOTA

Mr. KARTH. Mr. Chairman, I would like to add my thanks to the appreciation you have already expressed to Mr. Donahue and his associates for their fine work in bringing the executive departments

These islands are inhabited by some of the lowest paid individuals in our country. Just think about this personally for a moment: how would any one of us cope with the problem of raising a family on 75 cents per hour—$30 per week—about $130 per month. It is my firm belief that we cannot in good conscience tolerate the continuation of these dismal conditions that are so prevalent under Government services contracts.

As one part of the study I mentioned a moment ago, I examined the situation at one large Air Force base. As early as 1962 the Department of Labor began court action against a contractor at this base in an attempt to require compliance with the minimum wage provisions of the Fair Labor Standards Act. Mr. Donahue has already described the basis for their court action: attempting to consider military installations as instruments of interstate commerce. But this issue remains unresolved. Similar actions have been taken against two subsequent contractors at the same base; again, the issue is still up in the air—with no prospect of an early decision. In fact, a good guess is that final determination by the courts may well be 2 years off.



Although I have related a sequence of events that demonstrates confusion, despair, and hardship at one base, the pattern is nationwide. This we cannot accept; rather, we in the Congress must accept the responsibility to destroy the inequities so widespread in Government services contracts by enactment of this legislation at the earliest possible date.

Mr. O'HARA. Thank you, Mr. Karth, for a very fine statement.

The Special Subcommittee on Labor of the House Committee on Education and Labor will now stand adjourned until the call of the Chair.

on strike in an attempt to force the contractor to bargain with them. The day after the strike began, the contractor notified the Air Force that he was unable to carry out the terms of his contract. The Air Force then declared him in default and canceled the contract.

As a temporary measure, airmen were flown in from other bases to take over the jobs. From the point of view of the Air Force, they were manning essential functions. From the viewpoint of the employees, their attempt to resist the lowering of wages—wages that already were very low—resulted in the loss of their jobs. After a period of confusion, the Air Force allocated some temporary civil service positions to the base, but only about 60 percent of the former employees were hired. This came about because fewer civil service positions were authorized than had been used under contract, and because it was necessary to use the Veterans' Preference Act in hiring. For the latter reason, 44 veterans who had not formerly worked at the

There is no assurance that these temporary civil service appointments will be made permanent; for that matter, there is no informa-





DEBATE IN SENATE ON H.R. 10238, EXCERPT FROM CONGRESSIONAL RECORD, OCT. 1, 1965

SERVICE CONTRACT ACT OF 1965

The Senate proceeded to consider the bill (H.R. 10238) to provide labor standards for certain persons employed by Federal contractors to furnish services to Federal agencies, and for other purposes which had been reported from the Committee on Labor and Public Welfare, with an amendment, on page 8, line 14, after the word "Island", to insert "Eniwetok Atoll, Kwajalein Atoll, Johnston Island,".

The amendment was agreed to.

The amendment was ordered to be engrossed and the bill to be read a third time.

The bill was read the third time, and passed.

"The bill is applicable to advertised or negotiated contracts in excess of $2,500, the principal purpose of which is to furnish services through the use of service employees. Service employees are defined in the bill as guards, watchmen, and any person in a recognized trade or craft, or other skilled mechanical craft, or in unskilled, semiskilled, or skilled manual labor occupations. Typical services prevailing wage rates to be paid these employees as is required for blue-collar workers of the Federal Government.

" 'The principal types of employees who would be affected are believed to be those employees for PX's, ship's stores, officers clubs, and in recreational activities for the benefit of the Armed Forces.'

"The committee strongly urges that appropriate directive issue by the Department of Defense or any other appropriate Federal agency to give to such service employees the coverage provided by this bill.

"BACKGROUND OF THE BILL

"A number of bills having the same general purpose of this bill have been introduced in the past. Hearings were held by the House Select Subcommittee on Labor in the 88th Congress. The record included pleas for this type legislation from labor organizations and from service contractors. Testimony was heard from Federal agencies and reports were received from the Bureau of the Budget, General Services Administration, etc. A bill was reported (H. Rept. No. 1495, 88th Cong.).

"The need for this legislation is well stated in the report issued by the House Education and Labor Committee on September 1, 1965 (H. Rept. No. 948), as follows:

" 'Many of the employees performing work on Federal service contracts are poorly paid. The work is generally manual work and in addition to craftwork, may be semiskilled or unskilled. Types of service contracts which the bill covers are varied and include laundry and drycleaning, custodial and janitorial, guard service, packing and crating, food service, and miscellaneous housekeeping services.

" 'Service employees in many instances are not covered by the Fair Labor Standards Act or State minimum wage laws. The counterpart of these employees in Federal service, blue-collar workers, are by a Presidential directive assured of at least the Fair Labor Standards Act minimum. Bureau of Labor Statistics surveys of average earnings in service occupations in selected areas in 1961 and 1962 show, however, that an extremely depressed wage level may prevail in private service employment. In contract cleaning services, for example, in some areas less than $1.05 an hour was paid. Elevator operators earned low rates, varying from $0.79 to $1.17 an hour. Service contract employees are often not members of unions. They are one of the most disadvantaged groups of our workers and little hope exists for an improvement of their position without some positive action to raise their wage levels.

" 'The Federal Government has added responsibility in this area because of the legal requirement that contracts be awarded to the lowest responsible bidder.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Service Contract Act of 1965".

Service Contract Act of 1965.

Required contract provisions.

SEC. 2. (a) Every contract (and any bid specification therefor) entered into by the United States or the District of Columbia in excess of $2,500, except as provided in section 7 of this Act, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States through the use of service employees, as defined herein, shall contain the following:

Minimum wages.

(1) A provision specifying the minimum monetary wages to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder, as determined by the Secretary, or his authorized representative, in accordance with prevailing rates for such employees in the locality, which in no case shall be lower than the minimum specified in subsection (b).

Fringe benefits.

(2) A provision specifying the fringe benefits to be furnished the various classes of service employees, engaged in the performance of the contract or any subcontract thereunder, as determined by the Secretary or his authorized representative to be prevailing for such employees in the locality. Such fringe benefits shall include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemploy-
conditions, provided by or under the control or supervision of the contractor or any subcontractor, which are unsanitary or hazardous or dangerous to the health or safety of service employees engaged to furnish the services.

Notice of compensation to employees.

(4) A provision that on the date a service employee commences work on a contract to which this Act applies, the contractor or subcontractor will deliver to the employee a notice of the compensation required under paragraphs (1) and (2) of this subsection, on a form prepared by the Federal agency, or will post a notice of the required compensation in a prominent place at the worksite.

Wage specifications.

(b)(1) No contractor who enters into any contract with the Federal Government the principal purpose of which is to furnish services through the use of service employees as defined herein and no subcontractor thereunder shall pay any of his employees engaged in

Violations, penalties.

SEC. 3. (a) Any violation of any of the contract stipulations required by section 2(a) (1) or (2) or of section 2(b) of this Act shall render the party responsible therefor liable for a sum equal to the amount of any deductions, rebates, refunds, or underpayment of compensation due to any employee engaged in the performance of such contract. So much of the accrued payment due on the contract or any other contract between the same contractor and the Federal Government may be withheld as is necessary to pay such employees. Such withheld sums shall be held in a deposit fund. On order of the Secretary, any compensation which the head of the Federal agency or the Secretary has found to be due pursuant to this Act shall be paid directly to the underpaid employees from any accrued payments withheld under this Act.

(b) In accordance with regulations prescribed pursuant to section 4 of this Act the Federal agency head or the Secretary is hereby

(b) The Secretary may provide such reasonable limitations and may make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act as he may find necessary and proper in the public interest or to avoid serious impairment of the conduct of Government business.

List of violators.

SEC. 5. (a) The Comptroller General is directed to distribute a list to all agencies of the Government giving the names of persons or firms that the Federal agencies or the Secretary have found to have violated this Act. Unless the Secretary otherwise recommends, no contract of the United States shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have a substantial interest until three years have elapsed from the date of publication of the list containing the name of such persons or firms.

Legal action.

(b) If the accrued payments withheld under the terms of the contract are insufficient to reimburse all service employees with respect to whom there has been a failure to pay the compensation required pursuant to this Act, the United States may bring action against the contractor, subcontractor, or any sureties in any court of competent jurisdiction to recover the remaining amount of underpayments. Any sums thus recovered by the United States shall be held in the deposit fund and shall be paid, on order of the Secretary, directly to the underpaid employee or employees. Any sum not paid to an employee because of inability to do so within three years shall be covered into the Treasury of the United States as miscellaneous receipts.

telephone, telegraph, or cable companies, subject to the Communications Act of 1934; 48 Stat. 1064. 47 USC 609 and note.

(5) any contract for public utility services, including electric light and power, water, steam, and gas;

(6) any employment contract providing for direct services to a Federal agency by an individual or individuals; and

(7) any contract with the Post Office Department, the principal purpose of which is the operation of postal contract stations.

SEC. 8. For the purposes of this Act— Definitions.

(a) "Secretary" means Secretary of Labor.

(b) The term "service employee" means guards, watchmen, and any person engaged in a recognized trade or craft, or other skilled mechanical craft, or in unskilled, semiskilled, or skilled manual labor occupations; and any other employee including a foreman or supervisor in a position having trade, craft, or laboring experience as the paramount requirement; and shall include all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

(c) The term "compensation" means any of the payments or fringe benefits described in section 2 of this Act.

(d) The term "United States" when used in a geographical sense shall include any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, Wake Island, Eniwetok Atoll, Kwajalein Atoll, Johnston 67 Stat. 462. 43 USC 1331

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LEGISLATIVE HISTORY:

HOUSE REPORT No. 948 (Comm. on Education & Labor).
SENATE REPORT No. 798 (Comm. on Labor & Public Welfare).
CONGRESSIONAL RECORD, Vol. 111 (1965):
Sept. 20: Considered and passed House.
Oct. 1: Considered and passed Senate, amended.
Oct. 6: House concurred in Senate amendment.

U.S. DEPARTMENT OF LABOR,
WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS,
*Washington, D.C., June 22, 1966.*

GILLARDO HOSPITAL,
*Puerto Rico:*

This is in reply to your letter of May 18, 1966, addressed to Secretary of Labor Wirtz, in which you ask whether Federal wage rates must be paid to employees of your hospital in the event that you sign with the Social Security Administration for the rendering of medical services under the Medicare program.

It is assumed that your question concerns the McNamara-O'Hara Service Contract Act. That act applies generally to contracts entered into by the United States or the District of Columbia the principal purpose of which is the furnishing of services through the use of service employees. However, the legislative history of the act indicates that contracts with hospitals for the care of patients

HOUSE OF REPRESENTATIVES,
COMMITTEE ON VETERANS' AFFAIRS,
*Washington, D.C., May 22, 1968.*

Hon. W. WILLARD WIRTZ,
*Secretary of Labor, Department of Labor,*
*Washington, D.C.*

DEAR MR. SECRETARY: I am familiar with the recent ruling of the Wage and Hour and Public Contracts Division to the effect that contracts between the Veterans Administration and community nursing homes, pursuant to Public Law 88–450 are subject to the provisions of Public Law 89–286.

I am thoroughly familiar with the legislative history of the bill which became Public Law 88–450 and have read the House and Senate reports on H.R. 10238 as well as the debate which took place on this bill in the House on September 20 and in the Senate on October 1, 1965.

It will be appreciated if you will advise me in detail as to the language in the reports of the two laws, the legislative reports, and/or the Congressional debate which gives the authority to make the ruling which has been made.

I shall appreciate receiving a detailed reply from you at the earliest possible time.

Sincerely,

OLIN E. TEAGUE, *Chairman.*

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VETERANS' ADMINISTRATION,
OFFICE OF THE ADMINISTRATOR OF VETERANS AFFAIRS,
*Washington, D.C., June 3, 1968.*

I am in accord with the high purpose and desirable aims sought to be achieved through minimum wage legislation but I must point out that under this decision the Veterans Administration will be unable to provide the community nursing home care inaugurated by the Congress with the enactment of Public Law 88–450 to a large segment of our veteran population. Termination of our contracts will require transfer of large numbers of sick veterans away from the beneficial com-

Subsequently, on April 2, 1968, the Associate Solicitor for Interpretations and Opinions in a memorandum to your Regional Attorney in Dallas concluded after a review of our contracts that "the services are mainly custodial and little in the nature of medical services is envisioned". I cannot agree with the constructions or the categorical classification of the type of care given in our community nursing home program.

The approaches and the conclusions reached seem to have stemmed from examination of only selected language from our contracts in the light of an earlier ruling by the Administrator of June 22, 1966, addressed to the Gillardo Hospital in Puerto Rico. That interpretive decision is to the effect that Federal contracts with hospitals for the care of patients are not within the scope of the Service Contract Act. The ruling reads as follows:

"It is assumed that your question concerns the McNamara-O'Hara Service Contract Act. That act applies generally to contracts entered into by the United States or the District of Columbia the principal purpose of which is the furnishing of services through the use of service employees. However, the legislative history of the act indicates that contracts with hospitals for the care of patients are not within the scope of this law. The services of service employees under such contracts are considered only incidental to the purpose of such contracts to provide patient care under the continuing supervision of professional medical personnel. Since the principal purpose is to provide medically-supervised care, such contracts are not within the purview of the act. Thus, the act would be inapplicable to an agreement with the Social Security Administration for Medicare services."

The last sentence suggests that the Service Contract Act is inapplicable to all Medicare services. As you may know, these include substantial periods of nursing [illegible] nursing home a similar type of professional medical care to that provided in VA hospitals. This program has never contemplated mere custodial or domiciliary care, which is elsewhere provided in our system for a different class of patient.

From its inception we established rigid standards for our program both as to the physical facilities and the professional services to be provided under our contracts. Skilled nursing homes must be licensed by the State in which located, must be accredited by the Joint Commission on Accreditation of Hospitals or approved by the VA through inspection, and must comply with local Government regulations. Our contracts specifically include the following requirements which reflect a maximum of professional supervision at both physician and registered nurse levels:

(a) The skilled nursing home must have a physician to advise the facility on general matters of care and administration. *A physician must provide general supervision of the clinical work and a registered professional nurse must be on duty 40 hours or more per week.*

(b) Medical records in a skilled nursing home must be maintained for each patient and include: (1) *physician's orders;* (2) *physician's admitting evaluation* (*including diagnosis*); (3) VA Form 10–1204, Referral for Community Nursing Home Care; (4) *physician's progress notes* (notes of all professional following facts. Currently we have agreements for the furnishing of skilled nursing home care with 2,325 community nursing homes having approximately 170,000 beds in 48 States and Puerto Rico. These nursing homes have been paid over $25 million for the care of veteran-patients. Numerous inquiries have already been received from VA field stations concerning the applicability of the Service Contract Act to VA agreements. Application of the provisions of the Act will have an adverse impact in many other States, with the cumulative result of an effective curtailment of our program.

I ask your early and favorable consideration of this matter.

Sincerely,

W. J. DRIVER, *Administrator.*

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U.S. DEPARTMENT OF LABOR,
OFFICE OF THE SECRETARY,
*Washington, June 3, 1968.*

Hon. OLIN E. TEAGUE,
*Chairman, Committee on Veterans' Affairs,*
*House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: Thank you for your letter of May 22, 1968, concerning the application of the McNamara-O'Hara Service Contract Act to contracts between the Veterans Administration and community nursing homes.

I am asking for a report on this matter and will send a reply to you as soon as possible.

Sincerely,

WILLIARD WIRTZ, *Secretary of Labor.*

our letter of March 25, 1968, to Mr. John K. Pickens, General Counsel of the American Nursing Home Association. In that letter we held that contracts for the care of veterans entered into between the Veterans Administration and nursing homes are subject to the McNamara-O'Hara Service Contract Act.

We carefully considered the very informative descriptions of the various types of nursing homes submitted by Mr. Pickens. Since coverage under the



1968, at which time I received a brief acknowledgement. To date I have not had a reply, although I have written him the second letter. This matter has also been brought to the attention of members of your staff through Congressman Pickle, and I understand your staff members have contacted the Labor Department.

Briefly, the problem is this. Purporting to act under the Service Contract Act of 1965 (P.L. 89-286) the Wage Hour Division has ruled that the Veterans Administration is obtaining service within

However, as stated in section 4(b) of the Service ... 4.123 of the enclosed bulletin, the Secretary of Labor may by administrative action establish reasonable limitations on the application of the act's provisions or grant reasonable variations, tolerances, or exemption therefrom which he finds to be "necessary and proper in the public interest or to avoid serious impairment of the conduct of Government business." Petitions for exemption under section 4(b) of the Service Contract Act should be submitted through the headquarters office of the contracting agency.

Sincerely yours,

BEN P. ROBERTSON, *Deputy Administrator.*

I have your acknowledgement of my letter and in view of the fact that the ruling of the Department of Labor is already having an adverse effect on the community nursing home program, may I urge you again to give me a reply on this matter at the earliest possible time.

I have been furnished with a copy of the letter to you from the Administrator of Veterans Affairs on this same general subject, and would appreciate being furnished with a copy of your reply to Administrator Driver.

I look forward to hearing from you at the earliest possible date.

Sincerely yours,

OLIN E. TEAGUE, *Chairman.*

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COMMITTEE ON VETERANS' AFFAIRS,
*Washington, D.C., June 11, 1968.*

Hon. LYNDON B. JOHNSON,
*President of the United States,*
*Washington, D.C.*

DEAR MR. PRESIDENT: I am greatly concerned about a recent ruling by the Administrator of the Wage and Hour and Public Contracts Division, Department of Labor, which is in the process of wrecking the Veterans Administration hometown nursing care program. I brought this matter to the attention of the Secretary of Labor on May 22, 1968, and heard nothing from him until June 3,

*Chairman, Subcommittee on Intermediate Care Committee on Veterans Affairs.*

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[Telegram]

VETERANS OF FOREIGN WARS
OF THE UNITED STATES,
*June 13, 1698.*

Hon. W. WILLARD WIRTZ,
*Secretary of Labor,*
*Washington, D.C.:*

The Veterans of Foreign Wars was the chief proponent of the Veterans Nursing Care Act of 1964, which authorizes the Veterans Administration to take care of veterans in community nursing homes. It is shocking to learn that nursing homes ... from this veterans program because of an interpretation by the ... Public Contracts Division of your

*Secretary of Labor, Department of Labor,*
*Washington, D.C.:*

In the 88th Congress I had the honor to serve as chairman of the subcommittee which led to the enactment of Public Law 88–450, the so-called nursing home care law, and have been constantly concerned with the implementation and utilization of this law from its effective date to the present. The community nursing home program has been particularly vital to the Veterans' Administration medical program, and I want to join with other Members of Congress in protesting the unwarranted ruling of the wage and hour and public contracts division of your department in applying Public Law 89–286 to the community nursing home contracts administered by the Veterans' Administration. This



The fact that the contract itself provides for readmission to a hospital when more than minimal medical care is required makes it clear that the Veterans Administration is not here contracting primarily for professional medical services of the type found exempt under the Service Contract Act. The Veterans Administration appears to be contracting primarily for convalescent care services which are furnished through the use of service employees. While there may be a degree of similarity between professional medical care furnished in hos-

Should the Veterans Administration decide to pursue this request, there would be a public hearing on the request with full opportunity for all interested parties to appear. A decision then would be made based on the record of the hearing.

Sincerely,

W. WILLARD WIRTZ,
*Secretary of Labor.*

Mr. EVERETT. We have a very distinguished colleague with us, Congressman Pickle from Austin, Tex. Congressman Pickle, will you go right ahead?

## STATEMENT OF HON. J. J. PICKLE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. PICKLE. Thank you, Mr. Chairman. I want to express my appreciation to you and to the members of the committee for the privilege of being here with you this morning, and I would like permission to revise and extend my remarks.

Mr. EVERETT. Without objection it is so ordered.

other special services." Also, "* * * patients receiving care under this agreement who begin to require more than occasional visits by physicians or more than minimal laboratory, X-ray and other special services will be promptly readmitted to an appropriate Veterans' Administration facility."

This type of contract is differentiated from the exclusion mentioned on page 3 of House Report No. 948 accompanying H.R. 10238 pertaining to contracts with local hospitals for the care of indigent patients. The principal purpose of the Veterans Administration contracts under discussion is for the rendering of service through the use of service employees unlike the hospital contract referred

and put them in nursing homes near their own homes. These nursing homes are largely an accommodation to the Veterans' Administration. There are very few veterans in these nursing homes; not more than 3 or 5 percent of the patients in a nursing home are veterans. And now they say legalistically that, because the act did not clearly say it was hospital care, it is therefore custodial care and all these employees would be subject to the maximum wage rate. That was not the intent of the Congress and certainly it is not the purpose of the Veterans' Administration, because I think this would wreck the program of the Veterans' Administration in nursing homes.

I submit commonsense would not have permitted the Department of Labor to hold that these provisions would be extended to nursing homes, particularly since the nursing homes are willing to amend the wording of their contract so the wording would more specifically describe the services they are rendering. I would hope the letter of Mr. Driver, the very able Administrator of the Veterans' Administration, to Secretary Wirtz would have been sufficient in itself for Secretary Wirtz to grant this exemption, particularly since the nursing homes were willing to renegotiate their contracts and comply with the legal requirements. Their intent is wholesome and they have bent over backings; that is, the nursing homes, perhaps the Solicitor of the Department of Labor, and the Veterans' Administration, and any others wishing to be heard. I would hope, however, that we would have the hearings today or tomorrow, because many of these people will be in Washington. I urge that the hearings not be held 30 or 60 days from now, because if this happens I prophesy the nursing homes will get out of this program as rapidly as they can, because they would be ruined otherwise. The nursing homes have extended a helping hand to the Veterans' Administration, but if you were in this business and, because of a tight ruling by the Department of Labor, since you had two veterans in your nursing home, 50 of your employees would be covered

Mr. PICKLE. It will cost a lot more money.

Mr. EVERETT. And we will have to build a lot more VA hospitals, will we not?

construction work or other types of more demanding employment. Would you say so, Mr. Pickle?

Mr. PICKLE. That is correct. They would lose their jobs and the veterans would not have the treatment they are entitled to near their own homes, and in addition it will cost the Government more money.

I introduced two companion bills to bills Congressman Teague has already introduced, simply exempting the nursing homes from the provisions of the Service Contract Act. I have visited with the president of the Nursing Home Association and the legal counsel in Texas who works in this field, and I have been convinced of their sincerity and willingness to cooperate, but they cannot be silent when their program is threatened and the program of the Veterans' Administration.

Mr. DUNCAN. The act itself says the Secretary of Labor may make such rules and regulations and grant exemptions from any and all provisions of the act as he may find necessary and proper in the public interest, or to avoid serious impairment of the conduct of the Government's business, so he clearly has authority to do it.

Mr. PICKLE. This is one aspect of the ruling which I understand will be coming out today which I deplore. The Secretary is given the authority to make this exemption and I had felt he would do so, but hearings we would know where we are, but all these nursing homes are operating under a cloud.

Mr. PICKLE. Not only are they working under a cloud but, as you said, Mr. Chairman, the Veterans' Administration has contracts with 2,325 nursing homes having approximately 170,000 beds, and if they are covered under the Service Contract Act I say the nursing homes will get out of this business as quickly as they can. The Department of Labor can stand on a pinnacle and say the law says this, but there is good and sufficient reason to say they could rule differently, and the veterans are the ones who will be hurt.

Mr. EVERETT. Mr. Satterfield.

Mr. SATTERFIELD. I want to join the other members of the committee in complimenting Mr. Pickle for a fine statement.

Mr. EVERETT. Mr. Meadows, do you have any questions?

STAFF DIRECTOR. No.

Mr. EVERETT. Mr. Patterson?

COUNSEL. No.

Mr. EVERETT. Thank you, Mr. Pickle. We will see what we can do.

Mr. PICKLE. Thank you, Mr. Chairman.

Mr. EVERETT. Mr. Stratton, we will be glad to hear from you at this time and you may identify those with you.

## STATEMENT OF A. W. STRATTON, DEPUTY ADMINISTRATOR, VETERANS' ADMINISTRATION; ACCOMPANIED BY DR. PAUL A. L. HABER, DIRECTOR, EXTENDED CARE SERVICE, DEPARTMENT OF MEDICINE AND SURGERY, AND ROBERT B. WHITE, DEPUTY ASSISTANT GENERAL COUNSEL, VETERANS' ADMINISTRATION

Mr. STRATTON. I have with me Dr. Paul Haber, who is the Director 3,000 nursing home beds for our veterans in community nursing homes. When you consider that 4,000 are in VA hospitals and about 1,500 in State nursing homes, you can see this constitutes a large portion of the entire program. We do have 3,000 veterans in 900 different homes, although we have contracts with 2,325 community nursing homes, as you said, Mr. Chairman, and since April 1965 when we implemented the law passed in 1964 we have provided this type of care for 22,000 veterans, or 2.3 million days at a cost of $25 million.

Now, I don't appear here today as a representative of the Veterans' Administration to debate with my colleagues the recent ruling, but I lose the continuity if I don't speak briefly to this Service Contract Act of 1965. As we understand it, it provides minimum wages for service employees in establishments under Government contract, and hospitals have been exempt from this requirement.

Mr. EVERETT. You mean ordinary hospitals?

Mr. STRATTON. Yes, sir. We went from 1965 to 1968 with, I am sure, the nursing homes that we contracted with completely confident they were not under this act. Then in March 1968 one of the officials in Oklahoma from the Department of Labor's Wage and Hour Division made the ruling that they were not exempt.

Mr. EVERETT. When was that?

To tell you what it did to us immediately I think is the next order
As to what we think it would do to us, I have different estimates of this. Of course, it would depend on where you have the lower wage scales, but I have estimates that from 50 to 90 percent of these men would probably end in having to come back in VA hospitals because they need medical care, and if we take this remuneration from the nursing homes there is no other place for them to go.

Mr. EVERETT. What would that cost the Government?

Mr. STRATTON. Since our current rate is restricted to one-third of the per diem cost in a VA hospital, I think quick mathematics would indicate it would double our expenses.

Under Mr. Driver's signature we requested reconsideration by the Department of Labor on June 3, and based our request on two bases: First, that we felt that the service contract employees that were referred to under this legislation are receiving a degree of medical supervision in these community nursing homes which should make them as exempt as employees in private hospitals; and secondly, we referred to the comment by Congressman Duncan, to the broad flexibility given to the Secretary of Labor to make exemptions if he feels it necessary to conduct the business of the Government.

I can say this morning that we did receive a reply to this request this morning and they have affirmed their decision on both counts and have
Mr. STRATTON. This I do not know, but, of course, the end result at this point in time is that the veterans are the ones that are to be affected immediately.

Mr. EVERETT. Mr. Satterfield.

Mr. SATTERFIELD. No questions.

Mr. EVERETT. Mr. Roberts.

Mr. ROBERTS. No questions.

Mr. EVERETT. Mr. Duncan.

Mr. DUNCAN. No questions.

Mr. EVERETT. Mr Meadows?

STAFF DIRECTOR. Mr. Stratton, do you have reason to believe you are buying lesser care for veterans in these nursing homes than that provided medicare patients?

Mr. STRATTON. No. My figures are that 85 percent of the patients in nursing homes today are receiving some sort of Federal help and they are in beds next to each other.

STAFF DIRECTOR. The response we received from the Department of Labor this morning indicates they made their ruling based on the wording of the contract, and that is that the contract says they shall receive minimal treatment, and that is less than others get. Can you explain the type of medical services you buy with your fee?

Mr. STRATTON. Yes. I will ask Dr. Haber to speak more precisely to this, but this was the thrust of our request to the Department of Labor for a ruling.

Dr. HABER. Mr. Chairman and Mr. Counsel, much has been made of the fact there were only intermittent medical needs required by these patients expressed in our contract, but we feel, we hope with justification, that there is a great deal of material we insist on relating to the quality of care under medical supervision which would seem to put this out of the range of the Service Contract Act in that it does not relate to custodial care. For one thing, we require of nursing nurse supervise the nursing staff of the patients. We require that medications and narcotics shall be properly stored and controlled, and locked and registered. We require that, although the nursing home may not in every instance supply X-ray and diagnostic services, that those services be available and that the nursing home have access to them in the community.

All of this seems to refute the idea that we are interested in custodial-type services. Custodial-type services would not have these various elements under medical supervision.

What we are trying to express is the fact that although this requires medical supervision it is probably less than is required in some hospitals. However, I submit the requirements we make here would suffice for many chronic-disease hospitals, and they would be the same as in many tuberculosis hospitals in which a physician did not see the patient every day nor did the hospitals have immediate access to some of the refinements of diagnostic equipment that we require. So this seems to refute the idea we are contracting for purely custodial care.

STAFF DIRECTOR. Do you have any idea that you are contracting for lesser care than medicare patients require?

Dr. HABER. No, I do not.

Dr. Haber. He would go into what we call a board-and-care home, where medical supervision is minimal. Such care is provided by many denominational homes and by VA domiciliary facilities.

Staff Director. How many domiciliary patients do you have?

Dr. Haber. 13,000.

Staff Director. What is the cost of care for those patients?

Dr. Haber. About $6 a day.

Staff Director. How does this compare to the cost in a nursing home?

Dr. Haber. A little less than half.

Staff Director. Then you pay $5 or $6 a day for 13,000 veterans receiving custodial care and double that for higher quality medical care in nursing homes?

Dr. Haber. That is right.

Staff Director. And in the custodial homes or domiciliaries is it not true the patient has to be able to dress himself, go to meals, and

Mr. Duncan. No.

Mr. Everett. Mr. Satterfield?

Mr. Satterfield. No.

Mr. Everett. Mr. Roberts?

Mr. Roberts. No.

Mr. Everett. Mr. Patterson?

Counsel. Mr. Stratton, I believe you stated that the first notice you had of this decision on the part of the Department of Labor came when you were advised of some activity in the State of Oklahoma?

Mr. Stratton. Yes.

Counsel. Did the Department of Labor, any time prior to the present discussion, advise you that they had found officially that the Service Contract Act applied to this kind of contract?

Mr. Stratton. Not within my knowledge.

Counsel. Thank you.

Mr. Everett. Mr. Stratton, will you ask the Department of Labor to have a hearing on this right away and see if we can't resolve this situation? As you know, we vote on the tax bill tomorrow and money is pretty tight, and I think the sooner we get rid of this thing the better.

As the committee knows, the American Legion has supported the record be filed with the Department of Labor.

Mr. EVERETT. Without objection, it will certainly be filed with the Department of Labor.

Mr. MATTINGLY. Mr. Chairman, I do not wish to testify at this point. Mr. E. H. Golembieski, director of our national rehabilitation commission, has prepared a statement I would like to submit for the record. I would like to add that the American Legion is very seriously concerned with this situation on the basis of the information filtering back to our office and being evaluated. We feel the ruling of the Department of Labor would completely destroy the VA nursing home program, and we hope something can be worked out to settle this problem.

Mr. EVERETT. Has your national convention gone on record as approving the nursing home program?

Mr. MATTINGLY. Yes.

Mr. EVERETT. Without objection, the statement of Mr. E. H. Golembieski, director, national rehabilitation commission, the American Legion, will be filed and made a part of the record.

## STATEMENT OF E. H. GOLEMBIESKI, DIRECTOR, NATIONAL REHABILITATION COMMISSION, THE AMERICAN LEGION

Mr. GOLEMBIESKI. Mr. Chairman and members of the subcommittee, the American Legion appreciates the privilege of presenting its comments and recommendations on those bills which would exempt nurs-
In discussing the purpose and application of the act, Congress specifically exempted certain contracts. Among these were contracts by the



alertness and competence. There is no basis for the supposition that nursing home patients are inherently apathetic or lacking in motivation. The traditional custodial facility, lacking a realistic philosophy of therapy, and lacking even a semblance of program, contributed to the pessimistic attitude toward institutions as well as the conviction of hopelessness relative to the recuperative powers of older persons. The Nursing Home Care Unit of the VA, existing by design, can have no such conviction. It is not a custodial care program.

outside the purview of the Service Contract Act of 1965.

We urge your intervention to the end that the ruling of the Administrator of the Wage and Hour and Public Contractors Division is rescinded. Unless this is done, the net result of his ruling will be the disintegration of the Veterans Administration home-town nursing bed care program, increased cost of VA hospital patient care, and a decrease in VA hospital patient turn-over due to the maintenance of chronic care patients in beds that would otherwise be used for acute and intensive care.

Although the language of the VA contract may well lead to the conclusion that the care contracted for with community nursing homes is custodial, with incidental medical services, a review of the regulations, manual provisions, and VA nursing bed care philosophy, will negate it. In describing the mission of the nursing home care program, the Veterans' Administration enunciated the following philosophy:

Well-equipped facilities that are properly and adequately staffed with qualified personnel are an important part of the provisions for meeting the total needs of these patients. However, nursing home care involves more than keeping patients clean and comfortable. It is expected that patients in these units will extend over a continuum of levels of ambulation, type, and degree of disability, mental



Thank you, Mr. Stover. We are always glad to have you appear before our committee.

Without objection, your letter of June 18, 1968, addressed to the chairman of the full committee, will be made a part of your remarks and a part of the record at this point.

(The letter follows:)

VETERANS OF FOREIGN WARS OF THE UNITED STATES,
*Washington, D.C., June 18, 1968.*

Hon. OLIN E. TEAGUE,
*Chairman, House Committee on Veterans' Affairs,*
*Washington, D.C.*

DEAR CONGRESSMAN TEAGUE: This is in reference to the application of Public Law 89–286 to community nursing homes with respect to contracts between the Veterans Administration and such homes which provide nursing care for veterans.

It has come as a considerable shock to the Veterans of Foreign Wars to learn [illegible] located in 48 states and Puerto Rico. Probably there are no more than two or three veterans in one of these homes at a given time. The key to the veteran being in one of these homes is that he is in or near his hometown and, consequently, has the advantage of being near his family and friends.

As you know, there is a maximum of 3000 veterans who can be cared for in these community nursing homes under the present regulations carrying out Public Law 88–450.

Now we find that the Service Contract Act of 1965 (Public Law 89–286) has been interpreted as being applicable to these nursing homes which have contracts with the Veterans Administration to provide nursing care and service to veterans.

homes and see the program in operation at the present time?

Mr. STOVER. I have seen a couple of them and have been very impressed with the type of service they are providing. The service is far above the level of custodial care which one would find in a VA domiciliary.

was authorized.

Mr. EVERETT. Any questions?



veterans in local communities. It is understood the Veterans Administrator has requested such an exemption.

the Service Contract Act.

In summary, the Veterans of Foreign Wars is deeply appreciative that your Committee is looking into this matter, which could cause the nursing care program to be seriously impaired or even wrecked. By bringing the facts out in the open and developing the history and intent of the Veterans Nursing Care Act of 1964, it would seem a certainty that the evidence will be so overwhelming as to lead to but one conclusion, namely, that this retroactive ruling concerning the Veterans Administration contracts is in error and should be reversed.

In any event, this ruling is serving to so seriously curtail the community nursing home care for veterans that it may well serve to wreck the program in large areas of the Nation.

With kind personal regards, I am

Sincerely,

FRANCIS W. STOVER,
*Director, National Legislative Service.*

Mr. EVERETT. Our next witness will be Mr. William Gardiner from the Disabled American Veterans.

## STATEMENT OF WILLIAM B. GARDINER, ASSISTANT NATIONAL DIRECTOR FOR RESEARCH, DISABLED AMERICAN VETERANS

Mr. GARDINER. Thank you, Mr. Chairman and members of the committee.

and women who have become disabled as the result of the performance of active wartime military service, the DAV, by its very nature, We believe this ruling to be erroneous, as the legislative history of the act indicates that medical services are to be exempt and such an exemption has in fact been granted insofar as medicare patients in these same nursing homes are concerned.

In a June 22, 1966, decision regarding agreements with the Social and there was no expression as to its definition until the enactment of Public Law 88–450 on August 19, 1964. It was then defined by subsection 28, of section 101, title 38, United States Code, as follows:

> The term "nursing home care" means the accommodation of convalscents or other persons who are not actuely ill or not in need of hospital care, but who require skilled nursing care or related medical services, if such nursing and medical services are prescribed by, or are performed under the general direction of, persons duly licensed to provide such care. The term includes intensive care where the nursing service is under the supervision of a registered professional nurse.

In light of the legal definition quoted above, it is difficult for us to understand how the Department of Labor can seriously contend that veteran-patients are receiving domiciliary care rather than medical service.

The Department of Labor's retroactive application of the minimum-wage requirements is in the process of wrecking the Veterans' Administration hometown nursing care program. Nursing homes are withdrawing in increasing numbers from the VA program and community nursing home care may soon be unavailable to a large segment of our veteran population.

In view of the critical need for the protection of these essential medical programs, we urge the Committee on Veterans' Affairs to take

Mr. EVERETT. You have heard the other witnesses testify. Do you agree with their observations on the nursing home program?

Mr. GARDINER. Absolutely.

Mr. EVERETT. Any questions?

Thank you, Mr. Gardiner. We are always happy to hear from you.

Mr. GARDINER. Thank you.

Mr. EVERETT. We will now hear from Mr. Pickens of the American Nursing Home Association. We are happy to have you, Mr. Pickens.

## WALKER, PRESIDENT; AND ALFRED S. ERCOLANO, EXECUTIVE DIRECTOR, AMERICAN NURSING HOME ASSOCIATION

Mr. PICKENS. Thank you, Mr. Chairman. I have with me Mr. Ed Walker, the president of the American Nursing Home Association, who will bear the most of the burden of the testimony.

Mr. EVERETT. Where are you from, Mr. Walker?

Mr. WALKER. Miami, Okla.

Mr. PICKENS. And Mr. Alfred Ercolano, executive director of the association.

Before Mr. Walker testifies, I wish to say that I agree with these other gentlemen that this is an urgent problem. The American Nursing Home Association has contacted every State association in an attempt not to have them cancel their contracts; those that have canceled, of course, canceled before we were able to get to them, and we have asked them to hold off canceling for the next 30 days to see if we cannot get this situation resolved.

Mr. EVERETT. You have statements to file for the record?

Mr. PICKENS. I have correspondence.

Mr. EVERETT. You want to file that for the record?

Mr. PICKENS. Yes, I do ... Haven, Inc. (Bay St. Louis, Miss.) re VA patients plus invoice for Medical & Hospital services and their dispute.

4. Letter from Mr. Cobb (Yukon, Okla.) covering investigation made by Dept. of Labor (Wage & Labor Div. of Okla.) re VA and the Act.

5. Congressman Steed's letter to Mr. Pickens about the letter he received from Ben Robertson (NLRB).

6. Mr. Driver's letter (Veterans Administration) to Mr. Pickens acknowledging receipt of April 26 letter.

7. Mr. Lundquist's letter acknowledging receipt of Congressman Steed's letter of April 25.

8. Letter to Mr. Lundquist from Congressman Steed (April 25).

9. Letter to Mr. Pickens from Mr. Lundquist (March 25).

10. Letter to Mr. Driver (Veterans Administration) from Mr. Pickens (Feb. 6).

11. Letter to Mr. Lundquist from Mr. Pickens (January 29, 1968).

MISCELLANEOUS MATERIAL

Memorandum.
Question and answer.
Testimony submitted August 25, 1967.

WOODY'S SENIOR CITIZEN HOME,
*Guthrie, Okla., June 12, 1968.*

Mr. ALFRED S. ERCOLANO,
*1101 Seventeenth Street,*
*Washington, D.C.*

DEAR SIR: Mr. Abbott of the Dept. of Labor visited my facility on January he first checked my facility which was January 10, 1968. He then stated that I owed for 104 weeks and after allowing for 2 weeks vacations I would owe for 100 weeks at $330.00 a week which would make a grand total of $33,300.00. He arrived at this figure by figuring I had at least one VA patient for every day of the year. It seemed to me his biggest concern was whether I would pay it or not.

Enclosed is a complete list of all the VA patients I have cared for up to April 16, 1968 when a tornado struck my facility.

Yours truly,

Charlie Woody, *Administrator.*

Woody's Senior Citizen Home,
*Guthrie, Okla., June 11, 1968.*

The following list of veterans includes all veterans beginning with the first one admitted on January 20, 1966 to the dismissal of all veterans on April 16, 1968 when a tornado struck this facility.

| Name | Veteran's identification No. | Date admitted | Date dismissed | Total days care |
|---|---|---|---|---|
| 1966 | | | | |
| Davis, Charles A | C–283 39 26 | Jan. 19, 1966 | Jul. 19, 1966 | 180 |
| Fitzpatrick, Ralph J | C–1874 83 36 | Feb. 25, 1966 | Mar. 8, 1966 | 11 |
| Wiggins, James R | C–2179 15 61 | Dec. 2, 1966 | Dec. 11, 1966 | 10 |
| Total | | | | 201 |
| 1968 | | | | |
| Baldwin, Elmer Z | C–385 72 64 | Jan. 10, 1968 | Apr. 16, 1968 | 98 |
| Brown, Wallace | C–166 77 78 | Feb. 9, 1968 | Feb. 22, 1968 | 13 |
| Hathway, Claude W | C–1421 00 25 | Feb. 16, 1968 | Feb. 19, 1968 | 3 |
| White, Clarence A | C–1918 50 98 | Mar. 22, 1968 | Apr. 16, 1968 | 26 |
| Total | | | | 140 |

Form Approved
Budget Bureau No. 76-R0559

# APPLICATION AND AGREEMENT TO FURNISH NURSING HOME CARE TO PATIENTS OF THE VETERANS ADMINISTRATION

NURSING HOME NUMBER (CC 5-10)

## PART I - APPLICATION

| | | |
|---|---|---|
| 1. NAME OF NURSING HOME | 2. ADDRESS (City, County, State and Zip Code) | 3. TELEPHONE NO. |
| 1A. NAME OF ADMINISTRATOR | | |
| 4. IS NURSING HOME LICENSED OR APPROVED BY STATE IN WHICH LOCATED? ☐ YES ☐ NO. | 5. IS NURSING HOME ACCREDITED BY THE JOINT COMMISSION ON ACCREDITATION OF HOSPITALS? *(If "Yes," insert date)* ☐ YES ☐ NO | 6. HAS NURSING HOME BEEN CERTIFIED FOR PARTICIPATION UNDER TITLE XVIII, SOCIAL SECURITY ACT? *(Medicare)* ☐ YES ☐ NO |
| 7. LICENSED BED CAPACITY | 8. NUMBER OF BEDS OCCUPIED ON FILING DATE | 9. OWNERSHIP ☐ PROPRIETARY ☐ NON-PROFIT ORGANIZATION |

10. TYPE OF PATIENTS ACCEPTED *(Check all applicable categories)*

| | | | | | | |
|---|---|---|---|---|---|---|
| A. MALE | | E. WHEELCHAIR | | I. PSYCHIATRIC | | M. ASSISTANCE IN FEEDING |
| B. FEMALE | | F. NON-AMBULATORY | | J. TERMINAL | | N. OTHER *(Specify)* |
| C. DIABETIC | | G. PARAPLEGIC | | K. CONFUSED | | |

| | | | | | |
|---|---|---|---|---|---|
| A. ADMINIS-TRATION | ASSISTANT ADMINISTRATOR | | | | |
| | ACCOUNTANT | *15* | | *16* | |
| | OTHER *(Specify)* | *17* | | *18* | |
| B. NURSING | REGISTERED NURSES | *19-20* | | *21-22* | |
| | LICENSED VOCATIONAL/PRACTICAL NURSES | *23-24* | | *25-26* | |
| | NURSING ASSISTANTS/AIDES | *27-28* | | *29-30* | |
| C. DIETARY STAFF | DIETITIAN-AMERICAN DIETETIC ASSN. *(Note if consultant only)* | *31* | | *32* | |
| | COOK | *33* | | *34* | |
| | ALL OTHER KITCHEN HELP | *35-36* | | *37-38* | |
| D. DIRECT CARE STAFF *(Exclusive of Nursing)* | PHYSICAL/CORRECTIVE THERAPIST | *39* | | *40* | |
| | OCCUPATIONAL/MANUAL ARTS THERAPIST | *41* | | *42* | |
| | SOCIAL WORKER | *43* | | *44* | |
| | RECREATIONAL/ACTIVITIES DIRECTOR | *45* | | *46* | |
| | BEAUTICIANS/BARBERS | *47* | | *48* | |
| | PHARMACIST | *49* | | *50* | |
| | VOLUNTEERS *(Including clergymen)* | *51-52* | | *53-54* | |
| E. HOUSE-KEEPING STAFF | HOUSEKEEPING STAFF | *55-56* | | *57-58* | |
| | JANITORS/MAINTENANCE STAFF | *59-60* | | *61-62* | |
| | LAUNDRY | *63-64* | | *65-66* | |
| | ENGINEERING | *67* | | *68* | |
| | OTHER *(Specify)* | *69-70* | | *71-72* | |

| | | | | |
|---|---|---|---|---|
| 14. PHYSICAL FACILITIES | A. DATE FACILITY BUILT | B. DATES OF EXPANSION OR MAJOR REMODELING | | C. NUMBER OF BEDS AFFECTED |
| | BUILDING CONSTRUCTION *(Type, e.g., veneer, masonry, concrete, etc.)* D. OUTSIDE WALLS | E. ROOF | F. IS THERE A BASEMENT OR CELLAR? ☐ YES ☐ NO | G. IS THERE MORE THAN ONE STORY EXCLUSIVE OF BASEMENT? ☐ YES ☐ NO |
| | H. ARE EXTERIOR WALLS AT LEAST ONE HOUR FIRE RESISTANT? ☐ YES ☐ NO | I. IS THERE AN AUTOMATIC FIRE SPRINKLER SYSTEM THROUGHOUT THE FACILITY? | J. IS PUBLIC TRANSPORTATION AVAILABLE TO NURSING HOME? ☐ WITHIN ½ MILE | ☐ MORE THAN ½ MILE |

VA FORM 10-1170

SUPERSEDES VA FORM 10-1170, AUG 1966, WHICH WILL NOT BE USED.

446682

2. Nursing home care will be furnished to veterans for whom such care is specifically authorized by the Veterans Administration. It is understood that the type of patient to be cared for under this agreement will normally not require more than occasional visits by physicians or more than minimal laboratory, X-ray and other special services. The care provided will include room, meals, nursing care and any other services or supplies normally provided other patients in the nursing home without extra charge. In addition, the per diem rate established in this agreement will include the cost of medical care, emergency dental care, drugs, laboratory, X-ray and other necessary services, unless specifically excepted in paragraph 9 of this Agreement. It is further agreed that patients receiving care under this agreement who begin to require more than occasional erty of the United States in trust. In these cases the nursing home will forward an inventory of any such property and funds in its possession to the appropriate Veterans Administration office and will hold them (except articles of clothing necessary for proper burial) under safeguard until instructions are received from the Veterans Administration concerning disposition.

5. It is agreed that the Veterans Administration will have the right to inspection of the nursing home and all appurtenances by an authorized representative(s) designated by the Veterans Administration, to determine whether acceptable standards are maintained and that adequate care is being rendered. Minimum standards for nursing home care are listed in Appendix "A" hereof, and become a part of this agreement.

6. It is impossible to determine the exact or estimated amount which will be expended under this agreement. It is understood that no obligation will be incurred by the Veterans Administration under this agreement until authorizations are issued for nursing home care of specific veterans. The Veterans Administration agrees to make payment on a timely basis for services rendered in accordance with such authorizations upon receipt of billings submitted by the nursing home at the completion of each month's service. The per diem rate will be paid for either the first or last day of nursing home care, but not both. If a veteran is admitted to and discharged from the nursing home on the same calendar day, payment will be made for one day.

7. It is agreed that the Veterans Administration may readily have access to all medical records concerning the veteran's care in the nursing home.

8. It is understood that the veteran may be provided nursing home care at the expense of the Veterans Administration for a period not in excess of that stated in the nursing care and treatment plan received from the Veterans Administration, unless an extension of the authorization is provided in writing by the appropriate Veterans Administration station.





APPENDIX A

MINIMUM STANDARDS FOR NURSING HOME CARE FOR VETERANS ADMINISTRATION PATIENTS

1. A nursing home is defined as a facility or unit operated for the accommodation of convalescents or other persons who are not acutely ill and not in need of hospital care but who require skilled nursing care and related medical services, if such nursing care and medical services are prescribed by, or are performed under the general direction of, persons duly licensed to provide such care.

for whom such services are ordered. In addition the nursing home **warrants that subcontracting will not be** resorted to as a means of complying with this provision. **The nursing home further agrees it will comply with** the "nondiscrimination in employment" clause **printed on VA Form 07-2135, attached hereto as Appendix "B"** and which becomes a part of this agreement.

14. This agreement shall continue **in effect until terminated by mutual consent or until terminated by either** party by giving written notice 30 days **in advance of the proposed termination date. In the event of such termi**nation, the nursing home agrees to continue **furnishing nursing home care to the VA patients remaining in the** nursing home on the termination date **for a reasonable additional period of time necessary for suitable arrange**ments to be made for their discharge **or transfer at the same rates and under the same conditions provided for** in this agreement.

______________________________ **By**______________________________
*(Official Name of Nursing Home)*

**Title**______________________________

**Date Signed**__________________, 19____



GULFVIEW HAVEN, INC.,
*Bay St. Louis, Miss., June 12, 1968.*

We received our first patient on September 28, 1965, Mr. Melmoth H. Atwood, at $10.50 per day and we furnish all medicine. I am enclosing a copy of the "Authorization and Invoice for Medical and Hospital Services." Attached will be a copy of a letter dated October 5, 1965 from Mr. William R. Ewing, Chief Registrar Division, Veterans Administration Hospital, Jackson, Mississippi.

(For this purpose a basement is considered a separate story.) Buildings which do not meet the above construction standards may be approved if completely protected by an automatic fire sprinkler system approved by the authority having jurisdiction. In the absence of such an authority, a certificate by the installer that the system protects the entire structure and was designed and installed in accordance with National Fire Protection Association Standard No. 13, Standard for the Installation of Sprinkler Systems, may be substituted for such approval.

j. There shall be a cheerful, homelike atmosphere in which full attention is paid to diversional and social needs. Every effort shall be made to keep patients ambulatory.

PAGE 4



Under the terms of your agreement, you should bill us on your letterhead at the completion of each months service. I would suggest that you bill us on October 31 for the month of October and the first few days of September. After that, you should bill us on the last day of each month.

Please enclose with your bill a concise report on the veteran's general condi-

VETERANS ADMINISTRATION

AUTHORIZATION AND INVOICE FOR MEDICAL AND HOSPITAL SERVICES

| ISSUING OFFICE | 1. DATE OF ISSUE (Month, day, year) |
|---|---|
| VETERANS ADMINISTRATION CENTER<br>JACKSON, MISSISSIPPI | September 28, 1965 |
| | 2. VETERAN'S FIRST NAME - MIDDLE INITIAL - LAST NAME<br>Melmoth H. ATWOOD |
| TO — Gulfview Haven, Incorporated<br>400 North Beach<br>Bay St. Louis, Mississippi | 3. ADDRESS<br>White House Hotel<br>Biloxi, Mississippi |
| | 4. VETERAN'S CLAIM NO.<br>C- 495 930 |
| | 5. AUTHORIZATION VALID<br>FROM September 28, 1965 TO Disposition, but not later than March 27, 1966 |

PART I — SERVICES AUTHORIZED

| 6. SERVICES SHOWN BELOW ARE AUTHORIZED FOR THE PERIOD INDICATED IN 5 ABOVE. SEE SPECIAL PROVISIONS ON REVERSE SIDE. | 7. FEE |
|---|---|
| Skilled Nursing Home Care in Community Nursing Home.<br>180 days @ $10.50 per diem | $ 1890.00 |

| FEE SCHEDULE OR CONTRACT | 9. AUTHORITY | 9A. | 10. ESTIMATED AMOUNT |
|---|---|---|---|
| Local agreement<br>Dated September 9, 1965 | VAR 6050(J) | | $ 1890.00 |

OCTOBER 5, 1965.

MRS. MYRTLE R. SMALLWOOD,
*Gulfview Haven, Inc.,*
*Bay St. Louis, Miss.*

DEAR MRS. SMALLWOOD: Attached is our authorization to cover nursing home care for Mr. Malmoth H. Atwood. This authorization is effective September 28 and continues for a period of 6 months.

U.S. DEPARTMENT OF LABOR,
WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS,
*Oklahoma City, Okla., April 30, 1968.*

Mr. A. R. COBB,
*Administrator, Cottonwood Manor Nursing Home,*
*Yukon, Okla.*

DEAR MR. COBB: I am writing with reference to our recent investigation of your compliance status under the Fair Labor Standards Act (FLSA) of 1938 and the McNamara-O'Hara Service Contract Act (MOSCA), which was conducted by Investigators Leonard L. Brown, Jr. and Delma O. Clemons.

Your operations are subject to the 1966 enterprise coverage standards of the FLSA which currently provide a minimum wage of $1.15 per hour and an overtime standard requiring time and one-half for any hours worked in excess of 48 per week. The uniform allowances granted since February 1, 1968, were found to be insufficient to avoid a reduction of the applicable minimum wage to your employees except those employed in the food service department. The investigators reported that you promptly agreed to correct this deficiency in your compliance program under FLSA.

You were advised of the applicability of MOSCA, pursuant to a legal opinion rendered by U. S. Department of Labor Associate Solicitor Harold C. Nystrom on April 2, 1968, holding that the contracts in effect between the Veterans' Administration Hospital, Muskogee, Oklahoma, and various nursing homes are covered by this Act. As the investigators pointed out to you, the applicable minimum wage under MOSCA is currently $1.60 per hour. It is applicable to all of your employees who have any duties in connection with the performance of the

I shall refer the file to the Regional Attorney for consideration of enforcement action.

Very truly yours,

SHIRLEY C. THORNE, *District Director.*

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HOUSE OF REPRESENTATIVES,
*Washington, D.C., June 7, 1968.*

MR. JACK PICKENS,
*Attorney at Law, Alexandria, Va.*

DEAR JACK: Attached herewith is a further reply I have received from the Department of Labor regarding the Nursing Home problem. After you have had a chance to study this I would appreciate having your reaction.

With kindest personal regards, I am

Sincerly yours,

TOM STEED, *Member of Congress.*

than minimal laboratory, x-ray [illegible] descriptions of the various readmitted to an appropriate Veterans Administration facility".

The fact that the contract itself provides for readmission to a hospital when more than minimal medical care is required makes it clear that the Veterans Administration is not here contracting primarily for professional medical services of the type found exempt under the Service Contract Act. Instead it appears to be contracting primarily for convalescent care services which are furnished through the use of service employees. While there may be a degree of similarity between professional medical care furnished in hospitals and the extended care and skilled nursing home services about which Mr. Pickens wrote, it seems clear that on the basis of the contract the services called for here are within the scope of the act.

On re-examination, we find that we must affirm the conclusion stated in our letter of March 25, to Mr. Pickens.

However, as stated in section 4(b) of the Service Contract Act and section 4.123 of the enclosed bulletin, the Secretary of Labor may by administrative action establish reasonable limitations on the application of the act's provisions or grant reasonable variations, tolerances, or exemption therefrom which he finds to be "necessary and proper in the public interest or to avoid serious impairment of the conduct of Government business." Petitions for exemption under section 4(b) of the Service Contract Act should be submitted through the headquarters office of the contracting agency.

Sincerely yours,

BEN P. ROBERTSON,
*Deputy Administrator.*

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We are, of course, interested in decisions which may [illegible] with nursing homes for care of veterans.

I will appreciate it if you will keep me informed about any new developments.

Sincerely,

W. J. DRIVER, *Administrator.*

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HOUSE OF REPRESENTATIVES,
*Washington, D.C., April 25, 1968.*

Mr. CLARENCE T. LUNDQUIST,
*Administrator, Wage and Hour and Public Contracts Divisions,*
*Department of Labor,*
*Washington, D.C.*

DEAR MR. LUNDQUIST: The General Counsel of the American Nursing Home Association, Mr. John K. Pickens, has forwarded me a copy of your letter to him dated March 25, 1968, in which you purport to rule that the Service Contract Act of 1965 covers contracts between the Veterans Administration and nursing homes for the care of veterans in nursing homes up to six months.

Mr. Pickens' letter sought a ruling only on the care rendered in extended care facilities and skilled nursing homes as those terms are defined in Titles XVIII and XIX respectively of the Social Security Act.

You have already exempted hospitals. It is my understanding that the professional medical and nursing care rendered in extended care facilities and skilled nursing homes is very similar to that rendered in hospitals.

The statement in your letter quoted below is contrary to the facts:

"On the basis of all the facts available to us, it seems clear that contracts for convalescent care cannot be deemed contracts for hospital care, i.e. for professional medical services. They do not provide for the type of diagnostic or corrective care normally associated with hospital services and require only occasional visits by physicians and only the incidental use of other professional medical personnel, in contrast with the type of services normally provided in hospitals."

Mr. Pickens supplied you with much information in his letter of January 29, 1968, all of which you have disregarded.

I have a great deal of contact with the Fair Labor Standards Act. I am well aware of its provisions and the public policy behind it. I am also familiar with the legislative history of the Service Contract Act.

The nursing home program of the Veterans Administration is an excellent one. It should not be ruined by the hasty judgment of one of your advisors

Hon. TOM STEED,
*House of Representatives,*
*Washington, D.C.*

DEAR CONGRESSMAN STEED: This will acknowledge receipt of your letter of April 25, 1968, in which you requested that we re-examine the position set forth in our letter of March 25, 1968 to Mr. John K. Pickens, General Counsel of the American Nursing Home Association. In that letter we stated that contracts for the care of veterans entered into between the Veterans Administration and nursing homes are subject to the McNamara-O'Hara Service Contract Act.

This matter is being given consideration and a reply will be sent to you as soon as possible.

Sincerely yours,

CLARENCE T. LUNDQUIST, *Administrator.*

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U.S. DEPARTMENT OF LABOR,
WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS,
OFFICE OF THE ADMINISTRATOR,
*Washington, D.C., March 25, 1968.*

Mr. JOHN K. PICKENS,
*General Counsel, American Nursing Home Association,*
*Washington, D.C.*

DEAR MR. PICKENS: This is in further reference to your letter of January 29, 1968, concerning the applicability of the McNamara-O'Hara Service Contract Act to contracts entered into by members of your association with the Veterans i.e. for professional medical services. They do not provide for the type of diagnostic or corrective care normally associated with hospital services and require only occasional visits by physicians and only the incidental use of other professional medical personnel, in contrast with the type of services normally provided in hospitals.

This being the case, it would appear that the principal purpose of these veteran care contracts is the furnishing of services through the use of service employees, rather than the furnishing of services by professional medical personnel. As such, these contracts would be within the purview of the Service Contract Act.

Sincerely yours,

CLARENCE T. LUNDQUIST, *Administrator.*

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AMERICAN NURSING HOME ASSOCIATION,
*Washington, D.C., February 6, 1968.*

Mr. WILLIAM J. DRIVER,
*Administrator of Veterans' Affairs,*
*Veterans Administration, Washington, D.C.*

DEAR MR. DRIVER: Enclosed herewith is a copy of a letter which I have written to Mr. Clarence Lundquist, Administrator of the Wage and Hour Division of the Department of Labor, asking for a ruling that Extended Care Facilities under Public Law 89–97 and Skilled Nursing Homes under Public Law 90–248 having contracts with the Veterans Administration are exempt from the provisions of the Service Contract Act of 1965.

It is conceded that such act does not apply, for example, to the District of
home, provided for other levels of care under skilled nursing homes, in "intermediate care facilities" whose definition has been left to the states, which have not as yet acted, I asked for a ruling covering solely ECF's and Skilled Nursing Homes.

If ECF's and Skilled Nursing Homes are held to be covered by the Services Contract Act, the recently enacted minimum wage (and effective February 1, 1967) amendments which provide that nursing homes shall pay $1.00 an hour and time and one-half over 48 hours will not apply. Rather these facilities will be subject to a minimum wage of $1.60 an hour and time and a half over 8 hours in any one day and 40 hours in any one week.

In some areas of the country, where the present rate of $1.60 an hour is being paid for aides and orderlies, theh ardship from this bill will not be too disruptive. However, as you know, the great majority of the states do not have minimum wage rates about the $1.00 to $1.25 an hour range. Above and beyond this, since only employees who cared for veteran patients would be covered, a nursing home administrator would have to keep two sets of books on these employees in regard to maximum hours as well as minimum wages.

Many of our member nursing homes have raised the question that if they are held not to be exempt from the Services Contract Act whether they will be able to continue to participate in the Veterans Adminisration program because of the financial hardship that would ensue. The Association and its members has enjoyed the extremely good relationship which we have had with the Veterans Administration.

I followed the legislative history of the Service Contract Act closely. I am certain, for the reasons set forth in my letter of January 29, 1968, to Mr. Lundquist, among others, that Congress never intended that agreements between the Veterans Administration and ECF's and Skilled Nursing Homes should be cov-

Perhaps you have already heard of the action of one or two Field Examiners in the Wage and Hour Administration. However, I believe it necessary that I inform you of our request for a ruling.

Respectfully yours,

JOHN K. PICKENS, *General Counsel.*

AMERICAN NURSING HOME ASSOCIATION,
*Washington, D.C., January 29, 1968.*

Mr. CLARENCE LUNDQUIST,

"guard, watchman, and any person engaged in a recognized trade or craft, or other skilled mechanical craft, or in unskilled, semi-skilled manual labor occupations." The legislative history shows that "Included in coverage under the bill would be janitorial, custodial, maintenance, laundry, dry cleaning, hauling, pest extermination, clothing and equipment repair and cleaning service employees." The legislative history also shows that the Act was not intended to cover a contract by the D.C. General Hospital with the Federal Government to care for welfare patients (Title XIX patients) (Hearing before Special Subcommittee of Committee on Education and Labor on August 5, 1965 on H.R. 10238, 1st Sess. 89th Cong.).

II. VETERANS' ADMINISTRATION PROGRAM

The VA Program initiated 3 years ago authorizes the administrator to transfer veteran patients from veterans hospitals to skilled nursing homes. Recent statistics show that approximately ⅓ of those transferred were rehabilitated and sent back to the community, approximately ⅓ had to be sent back to the hospital and approximately ⅓ expired. In most instances these last cases were terminal cases at the time of their transfer. Under the Veterans Administration Program the Administrator is limited by law and cannot place a veteran patient in a nursing home for more than 6 months. So it can readily be seen that the program is intended only for the chronically ill or convalescing veteran and is not intended to be for custodial or personal care.

Initially, the Veterans Administration selected those nursing homes which had been accredited by the National Council on Accreditation of Nursing Homes (merged with the Joint Commission on Acceditation of Hospitals (JCAH) on January 1, 1966) or approved under the Approval Program of the American

(1) primarily provides skilled nursing services for persons requiring medical or nursing care or rehabilitation services;

(2) has policies which are developed with advice of and periodically reviewed by professional group (including at least one physician and at least one registered professional nurse to govern services provided;

(3) has physician, registered professional nurse or medical staff responsible for execution of such policies;

(10) meets other necessary conditions relating to health, safety or physical facilities.

The Secretary issued further regulations regarding such facilities on June 1, 1966 which covered the following:

| | |
|---|---|
| (1) Compliance with state and local laws | (9) Laboratories |
| (2) Governing body | (10) Radiology |
| (3) Physical environment | (11) Medical library |
| (4) Medical Staff | (12) Complementary department |
| | (13) Out-patient |
| | (14) Emergency service |

In Public Law 90–248 Congress has established minimum standards for skilled nursing homes. Section 1902(a)26(A) provides for a regular program of medical review which would do the following:

(1) Make a medical evaluation of each patient's *need for skilled nursing home care;*

(2) Prepare a *written plan for care for each patient;* and

(3) A *plan of rehabilitation for each patient.*

Section 1902(a)26(B) requires the state to have one or more medical review teams make periodic inspections in all skilled nursing homes within the State. These medical review teams are to be composed of physicians and other appropriate health and social service personnel. Section 1902(a)(28)(B) requires the skilled nursing home participating in a State's Title XIX program to:

(1) Have and maintain an *organized nursing* service;

(2) To have a *professional Registered Nurse* employed full time as the director of the nursing service; and

(3) To have *sufficient nursing and auxiliary personnel* at all times to provide adequate and properly supervised nursing services for the skilled nursing home's Title XIX patients at all times.

Section 1902(a)(28)(D) requires the skilled nursing home to:

(1) Have satisfactory policies and procedures relating to the *maintenance of medical records* on each patient of the nursing home;

(2) Have satisfactory *policies and procedures* relating to the *dispensing and administering of drugs and biologicals;*

(3) Have satisfactory policies and procedures *assuring that each patient is under the care of a physician;* and

(4) Have satisfactory policies and procedures assuring that adequate



ary hospitals) have a jurisdictional amount of $250,000 whereas all nursing homes a jurisdictional amount of only $100,000.

The requirements of Public Law 89–97 and Public Law 90–238 compose total regulations of nursing home staffing and require minimum medical (physicians) and nursing personnel. Public Law 90–248 also requires licensure of all nursing home administrators.

nurses on all shifts.

So that it would seem that until the State agencies further define the staffing and types and levels of care to be provided under Title XIX (which most states are already in the process of doing) it will be impossible to determine how Intermediate Care Facilities should be treated.

However, it is abundantly clear from the above that the staffing, medical and nursing, and the care given in extended care facilities (under Title XIX) and skilled nursing homes (under Title XIX) is very similar and in most instances substantially the same as that rendered in hospitals.

## IV. NURSING HOMES SUBJECT TO NATIONAL LABOR RELATIONS ACT AND FAIR LABOR STANDARDS ACT

Although non-profit hospitals (95% of all hospitals are non-profit) are exempt from the provisions of the National Labor Relations Act, as amended, nursing homes, whether profit or non-profit are not exempt. In fact, on November 16, 1967 in the *University Nursing Home Case*, 168 NLRB No. 53, the National Labor Relations Board asserted jurisdiction over all nursing homes having annual gross receipts of $100,000 or more. This would take in all nursing homes with 20 beds or more. Proprietary hospitals (5% of the total) have a jurisdictional amount of

It is clear that nursing homes were intended by Congress not to be covered by the provisions of the Service Contract Act of 1965. It is conceded that hospital care supplied to government agencies was to be excluded.

Extended Care Facilities and skilled nursing homes offer substantially similar care by almost identical staffing patterns, namely, physicians, registered professional nurses, licensed practical nurses aide and orderlies as do hospitals.

The care contracted for by the Veterans Administration is short term chronic or convalescing care—not of a custodial type—similar to that rendered by hospitals.

Nursing homes are subject to the Fair Labor Standard Act. They are also subject to the jurisdiction of the National Labor Relations Board (NLRB). Ninety-five percent of the hospitals are not subject to the NLRB. The other 5% (proprie-

cate that only about 50% of the cases which met all other criteria for inclusion in the program, were classified into one of the six disease groups. It is apparent that classification of individual diagnoses into the six groups has not been done uniformly at all stations. We intend to study this problem and take prompt action to insure a more uniform interpretation of the law by all stations.

Inclusion of disease groups apparently has had a limiting effect on the program.

and

(3) Suffering from a disease which is included in one of the six specific groups named in Section 612(g)(2).

Of these, 559 have completed one year on post-hospital care status and thus become eligible for further care as reasonably necessary, for such disease or disorder. Of the remaining 966, there are 683 still undergoing active treatment on a post-hospital care status.

House Report No. 680, 88th Congress, 1st session, includes a table showing an analysis of aid and attendance pension cases on the rolls June 10, 1963 by major diagnosis. This table appears below. Using a most liberal interpretation, ap-



S ON THE ROLLS JUNE 10, 1963, BY MAJOR DIAGNOSIS, WITH WAR I

| Specific diagnosis | Total | Protectw 86–211 World War I | Wrld Wr II | Korean conflict |
|---|---|---|---|---|
| | | 1,369 | 200 | 9 |
| thritis | 954 | 506 | 111 | 5 |
| rthritis | 1,147 | 686 | 35 | 1 |
| | | 860 | 531 | 145 |
| s of both feet | 405 | 224 | 47 | 1 |
| both feet | 155 | 60 | 34 | 8 |
| one hand and one foot | 109 | 64 | 17 | 1 |
| er third thigh amputation | 97 | 66 | 2 | 0 |
| ip | 40 | 26 | 4 | 0 |
| femur | 54 | 31 | 6 | 1 |
| ired | 81 | 30 | 16 | 9 |
| rtebra | 1,213 | 88 | 289 | 116 |
| | | 83 | 18 | 0 |
| | | 450 | 74 | 13 |
| | 95 | 42 | 12 | 3 |
| inflammatory glaucoma | 205 | 111 | 18 | 1 |
| ma | 201 | 127 | 15 | 1 |
| | 102 | 56 | 4 | 1 |
| | | 450 | 74 | 13 |
| oth eyes, having only light perception | 1,149 | 570 | 118 | 17 |
| s of 1 eye; other eye, 5/200 | 388 | 189 | 52 | 3 |
| on only in 1 eye; other eye, 5/200 | 1,682 | 833 | 212 | 10 |
| on only in 1 eye; other eye, 10/200, 15/200, or | 102 | 60 | 3 | 0 |
| /200; other eye, 5/200 | 355 | 195 | 38 | 2 |
| | | 77 | 35 | 3 |
| field of vision | 159 | 63 | 27 | 1 |
| | | 92 | 11 | 1 |
| | | 10 | 6 | 0 |
| | | 33 | 9 | 0 |
| | 32 | 20 | 3 | 0 |
| | | 302 | 29 | 0 |
| itis | 226 | 144 | 6 | 0 |
| | 54 | 32 | 7 | 0 |
| ma | 227 | 125 | 15 | 0 |
| | | 162 | 32 | 0 |
| tuberculosis | .88 | 35 | 17 | 0 |
| vanced tuberculosis | 51 | 27 | 3 | 0 |
| erately advanced tuberculosis | 49 | 24 | 1 | 0 |
| culosis, advancement unspecified | 53 | 31 | 0 | 0 |

TTENDANCE PENSION CASES ON THE ROLLS ... NOSIS, WITH WAR PERIOD AND ENTITLING LAW—Continued

| | Total | Spe[c] | Total | Protected pension | | | Public Law 86–211 | | |
|---|---|---|---|---|---|---|---|---|---|
| | | | | World War I | World War II | Korean conflict | World War I | World War II | Korean conflict |
| | 408 | | | 183 | 32 | 0 | 125 | 65 | |
| | | Unspecified pneumoconios- | 127 | 65 | 8 | 0 | 46 | 8 | |
| | | Malignant new growths wi- | 166 | 54 | 12 | 0 | 50 | 47 | |
| | 3,023 | | | 1,967 | 99 | 2 | 821 | 134 | |
| | | Rheumatic heart disease | 117 | 51 | 18 | 2 | 26 | 20 | |
| | | Arteriosclerotic heart dise- | 2,034 | 1,374 | 55 | 0 | 538 | 67 | |
| | | Hypertensive heart diseas- | 777 | 585 | 23 | 0 | 227 | 42 | |
| | 928 | | | 560 | 94 | 3 | 224 | 47 | |
| | | General arteriosclerosis | 228 | 164 | 4 | 0 | 59 | 1 | |
| | | Hypertensive vascular dis- | 125 | 83 | 4 | 0 | 38 | 0 | |
| | | Aneurysm of aorta or bra- | 43 | 17 | 12 | 0 | 8 | 6 | |
| | | Arteriosclerosis obliterans- | 263 | 151 | 23 | 1 | 73 | 15 | |
| | | Buerger's disease (thromb- | 102 | 51 | 13 | 0 | 20 | 18 | |
| | | Varicose veins | 72 | 41 | 16 | 0 | 13 | 2 | |
| | 624 | | | 289 | 66 | 4 | 162 | 98 | |
| | | Duodenal ulcer | 59 | 20 | 11 | 2 | 10 | 16 | |
| | | Stricture of rectum and a- | 60 | 37 | 1 | 0 | 15 | 6 | |
| | | Malignant new growths wi- | 264 | 119 | 12 | 0 | 74 | 56 | |
| | 480 | | | 293 | 18 | 1 | 137 | 27 | |
| | | Chronic nephritis | 35 | 19 | 3 | 1 | 8 | 3 | |
| | | Malignant new growths wi- | 307 | 194 | 4 | 0 | 91 | 16 | |
| | 16 | | | 7 | 2 | 0 | 2 | 5 | |
| | 87 | | | 44 | 3 | 0 | 24 | 13 | |
| | | Pernicious anemia | 32 | 20 | 1 | 0 | 11 | 0 | |
| | 208 | | | 86 | 59 | 8 | 26 | 26 | |
| | | Painful superficial scars | 35 | 16 | 9 | 0 | 7 | 2 | |
| | | Scars, limiting function of- | 41 | 13 | 6 | 4 | 8 | 9 | |
| | 572 | | | 339 | 35 | 2 | 135 | 60 | |
| | | Diabetes mellitus | 529 | 320 | 30 | 1 | 130 | 47 | |
| ystem | 16,249 | | | 7,120 | 3,221 | 360 | 3,117 | 2,200 | 23 |
| | | Epidemic encephalitis | 168 | 67 | 25 | 2 | 40 | 28 | |
| | | Traumatic encephalopathy- | 374 | 75 | 148 | 44 | 30 | 57 | 2 |
| | | Malignant new growth of- | 165 | 18 | 43 | 3 | 11 | 80 | 1 |
| | | Benign new growth of bra- | 109 | 28 | 33 | 3 | 9 | 31 | |
| | | Parkinson's disease (para- | 1,224 | 743 | 114 | 0 | 267 | 97 | |
| | | Embolism of brain vessels- | 175 | 85 | 29 | 0 | 31 | 30 | |
| | | Thrombosis of brain vess- | 3,984 | 2,114 | 355 | 6 | 1,018 | 486 | |
| | | Hemorrhage from brain v- | 3,160 | 1,782 | 286 | 9 | 760 | 307 | 1 |
| | | Myelitis | 1,654 | 146 | 901 | 163 | 46 | 323 | 7 |
| | | Poliomyelitis | 727 | 20 | 483 | 85 | 12 | 92 | 3 |
| | | Amyotrophic lateral scler- | 250 | 99 | 42 | 1 | 34 | 65 | |
| | | Multiple sclerosis | 907 | 226 | 359 | 10 | 73 | 224 | 1 |
| | | Cerebro spinal meningitis- | 56 | 12 | 18 | 4 | 1 | 20 | |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | | Abscess of brain | 51 | 9 | 21 | 1 | 7 | 11 |
| | | Malignant new grc | 59 | 13 | 14 | 4 | 6 | 17 |
| | | Benign new growt | 73 | 16 | 34 | 2 | 6 | 14 |
| | | Progressive muscu | 163 | 55 | 37 | 0 | 25 | 45 |
| | | Syringomyelia | 58 | 15 | 14 | 1 | 8 | 19 |
| | | Cerebral arterioscl | 1,831 | 1,150 | 90 | 1 | 525 | 64 |
| | | Brain disease due | 57 | 14 | 7 | 2 | 5 | 21 |
| | | Cerebral arterioscl | 452 | 266 | 11 | 6 | 140 | 35 |
| iscellaneous nervous diseases | 87 | | | 15 | 27 | 1 | 5 | 37 |
| | | Huntington's chor | 58 | 11 | 18 | 1 | 1 | 26 |
| seases of the cranial nerves | 11 | | | 5 | 3 | 1 | 1 | 1 |
| seases of the peripheral nerves | 160 | | | 72 | 32 | 2 | 31 | 18 |
| | | Paralysis of sciatic | 34 | 15 | 8 | 0 | 6 | 3 |
| e epilepsies | 762 | | | 283 | 152 | 13 | 206 | 101 |
| | | Grand epilepsy | 47 | 16 | 8 | 0 | 15 | 8 |
| | | Dementia praecox, | 36 | 9 | 9 | 1 | 16 | 1 |
| | | Demantia praecox, | 35 | 19 | 3 | 2 | 8 | 3 |
| | | Dementia praecox, | 52 | 17 | 9 | 1 | 12 | 11 |
| | | Posttraumatic per | 37 | 9 | 11 | 1 | 7 | 8 |
| | | Psychoses with ce | 51 | 32 | 2 | 0 | 16 | 1 |
| | | Hysteria, conversi | 43 | 13 | 9 | 0 | 16 | 5 |
| | | Neurasthenia | 56 | 30 | 4 | 1 | 17 | 3 |
| | | Anxiety state | 91 | 19 | 40 | 1 | 11 | 20 |
| sychotic disorders | 244 | | | 98 | 30 | 3 | 80 | 30 |
| | | Schizophrenic reac | 35 | 13 | 5 | 0 | 14 | 3 |
| | | Schizophrenic reac | 62 | 24 | 9 | 1 | 21 | 7 |
| | | Schizophrenic reac | 41 | 9 | 8 | 2 | 11 | 9 |
| | | Miscellaneous psy | 35 | 22 | 2 | 0 | 9 | 2 |
| rganic brainl disorders | 2,530 | | | 1,386 | 100 | 5 | 776 | 243 |
| | | Chrobic brain syn | 155 | 23 | 26 | 4 | 27 | 56 |
| | | Chronic brain syn | 1,920 | 1,168 | 37 | 0 | 645 | 70 |
| | | Chronic brain syncurbance | 196 | 95 | 11 | 0 | 46 | 43 |
| | | Chronic brain synuse | 60 | 22 | 8 | 0 | 12 | 18 |
| | | Chronic brain syn | 97 | 40 | 7 | 0 | 30 | 19 |
| ychoneurotic disorders | 27 | | | 9 | 6 | 0 | 7 | 4 |
| ychophysiologic disorder | 3 | | | 0 | 0 | 0 | 2 | 1 |
| al conditions | 5 | | | 3 | 0 | 0 | 2 | 0 |
| | 38,161 | Grand total | | | | | | |
| | 24,865 | Total, prote | | | | | | |
| | 18,236 | World War I | | | | | | |
| | 5,952 | World War II | | | | | | |
| | 677 | Korean conflict | | | | | | |
| | 13,296 | Total, Publ | | | | | | |
| | 8,305 | World War I | | | | | | |
| | 4,502 | World War II | | | | | | |
| | 489 | Korean conflict | | | | | | |

STATEMENT OF THE AMERICAN NURSING HOME ASSOCIATION BEFORE THE SUBCOMMITTEE ON INTERMEDIATE CARE OF THE VETERANS' AFFAIRS COMMITTEE, HOUSE OF REPRESENTATIVES, AUGUST 25, 1967

The American Nursing Home Association appreciates this opportunity to present testimony to the Subcommittee on Intermediate Care of the House Veterans Affairs Committee.

The American Nursing Home Association is a non-profit organization serving the Nation's nursing homes and their patients through educational and research services. It represents 6,300 nursing homes with more than 320,000 beds in 49 of the 50 states. Many of its members are participating in the nursing home program inaugurated by the Veterans Administration under authority granted it

The Veterans Administration has been careful in its selection of nursing homes with which it has signed contracts for the program. Its recognition of the accreditation programs of the National Council for the Accreditation of Nursing Homes and the program formerly operated by the American Hospital Association—both of which have been merged into a new program administered by the Joint Commission on Accreditation of Hospitals, has accomplished much in encouraging all nursing homes to raise their sights with regard to professional care. Such recognition of accrediting programs helps lead the way for all nursing homes toward levels of attainment well beyond mere licensing standards.

In checking with some of our members and our affiliate state associations, we have found that those in the field feel that Veterans Administration program is working well—that participating nursing homes get good cooperation and counseling when needed from the VA. We are told the Veterans Administration hospital authorities placing patients have been extremely cooperative in re-admitting patients to the hospital when their doctors and nursing homes recommend such a transfer. We are told that one distinction of the VA nursing home patient is that he requires a good deal more case work from the nursing home's social worker than does the average patient in the home. We are also told that the VA authorities have been cooperative in working with the social workers in the nursing home in assisting the veteran in his social and economic adjustments.

The present authorization which enables the VA to reimburse nursing home care up to one-third the cost of the patient day in a hospital has heretofore worked well in many areas.

However, as you well know, costs have risen and particularly the costs of delivering health care. In fact, these rising costs were the subject of a recent

Whether we like it or not, there is a competition for health care beds. A host of factors produces this situation and others compound it. The ANHA affirms that the enactment of H.R. 7481 will make the veteran more competitive in his quest for a bed. It will give the placing VA hospital more latitude in selecting his bed. This is the minimum that our honored veterans deserve.

Therefore, we urge that Section 620, Title 38, United States Code, be amended to authorize payments up to 45 per centum of hospital costs in establishing amounts that the VA may pay for nursing home care of those veterans requiring such care.

It is perhaps pertinent at this juncture to point out that the provision of 45 per centum is consonant with a recent agreement entered into by the United Automobile Workers Union and nursing homes in the Detroit area. In that agreement, the Union agrees to reimburse nursing homes up to 50 per centum of the area's hospital day.

In summary then, the ANHA makes these comments:

(1) The Veterans Administration is to be complimented on the soundness of the operation of its program at this time.

(2) The program—very limited in scope now—should be expanded along with the VAs other programs to alleviate the long term use of acute hospital beds.

(3) The program finds itself in difficulty as the impact of Medicare on the total health care community forces up the cost of all medical, nursing and hospital services.

(4) The Committee should report favorably on H.R. 7481 as introduced by Representative Teague.

(5) The Committee should press the passage of H.R. 7481 in both the House and the Senate.

Respectfully submitted,

ALFRED S. ERCOLANO, *Executive Director*.

Mr. PICKENS. Mr. Walker has been president of the American Nursing Home Association for 2 years. He owns and administers three nurs-

Mr. EVERETT. Without objection, it will be entered in the record with your testimony when it is received.

Mr. WALKER. I would like to speak to the effect that this ruling would have in three areas. One is the effect upon the veterans and their families, which has to be the prime consideration here. I am thinking of the last three veteran patients we have cared for. They are the ones whose names and medical records, diagnoses, and medical treatment I am going to supply to the committee.

I am thinking of a man named Forest Johnson, who gave the very best he had for this country and is taking advantage of this program. He lives about 100 miles from a VA hospital. When Mr. Johnson was in the hospital his little wife, with her very limited budget, had to traverse the 100 miles from Miami, Okla., to the VA hospital by bus or get somebody to take her there, and she perhaps had to stay in a motel. Each visit would cost about $25 or $30 and she could only go every 30 or 60 days. At the present time Mr. Johnson is in Miami and his family is near him and can visit him daily. He has been very ill. For a while we thought he wasn't going to make it. He has to have standby oxygen and he requires skilled medical care. At the present time his family is with him and he is getting along well and we hope he will be able to return to his home with the nursing care we are giving him.

These patients require essentially the same care as a medicare patient.

Mr. EVERETT. Do medicare patients come under this ruling?

Mr. WALKER. No, we understand they do not. This is such a minute part of the total patient load that, while it is everything to the veteran, actually the average nursing home in the country—for example, my 60-bed nursing care unit in Miami has the largest caseload of veterans it has ever had [illegible]. My 100-unit [illegible] House in Miami has [illegible] patients pay $16 a day.

The effect on the patient for this program to be hampered in any way would be very serious. The effect on the nursing home financially would be very little, if anything. We went along with the program and offered our suggestions. The effect on the cost of the total medicare and medicaid program—and, for the record, I am a member of the new advisory council that will advise Secretary Cohen on the medicaid program. If this ruling is allowed to stand and the program continues, then it will mean a multimillion-dollar increase in cost to carry the program.

Mr. EVERETT. In other words, you will either have to kick Mr. Johnson out or——

Mr. WALKER. Or Mr. Johnson will have to go back to the VA Hospital, where it will cost $35 to $40 a day.

Mr. EVERETT. Do you have any trouble getting employees at the wages you pay now?

Mr. WALKER. No, sir. We have always paid a little above the minimum. However, I will be frank to say that most of the States in this country are in serious trouble financially, just as the Federal Government is. For example, the nursing homes of Oklahoma have absorbed a $3 million a year minimum wage increase since last February and what the nursing home is facing in this situation.

Mr. EVERETT. How far back does that go?

Mr. ERCOLANO. That goes back to 1966 at the time the Service Contract Act was initiated. This is a letter from one of our members in Guthrie, Okla. It says:

> Mr. Abbott of the Department of Labor visited my facility on January 10, 1968. He checked my records and found that I was in compliance with the minimum wage law. He then asked if I had a contract with the Veterans' Administration

question of whether these nursing homes will pay minimum wages, be-
cause they are complying with the minimum wage requirements—what we are talking about is this punitive retroactive application?

Mr. WALKER. We are talking about two things. At this point the minimum wage is $1.15. A year ago it was $1. In February it was $1.15. Next February it will be $1.30. The next February it will be $1.45, until it reaches a maximum of $1.60 under the law.

STAFF DIRECTOR. In other words, Congress has put the nursing homes under an escalating minimum wage program so we are not talking about your business being under a minimum wage, but we are talking about the retroactive application of the law?

Mr. ERCOLANO. And also if there is room for an exemption in the nursing home field under the Service Contract Act.

STAFF DIRECTOR. Mr. Walker, have you tallied what you would owe?

Mr. WALKER. It would run about $100,000.

STAFF DIRECTOR. In your three homes?

Mr. WALKER. Yes.

STAFF DIRECTOR. And you have never had over 10 veteran patients?

Mr. WALKER. I have never had over 12 veterans in the three homes in the whole program. We have not canceled the contracts, inciden-
ment, his records are kept the same way, and all the same equipment and everything is not only there but is utilized as needed.

STAFF DIRECTOR. And there is no special arrangement that results in medicare patients having a different relationship with the doctor?

Mr. WALKER. Not one bit.





tients or just veteran patients?

Mr. ERCOLANO. Just veteran patients. As far as I know they have never contended that either medicare or title 19 of the Federal Public Assistance patients came under the Services Contract Act. They never contended that.

Mr. EVERETT. They are liable to do it, aren't they?

Mr. ERCOLANO. I hate to say "Yes" but I guess it certainly is possible.

like sick care to me.

Mr. WALKER. They are ill. It is like any other piece of equipment. Mr. Johnson came back and he got along fine for a while but suddenly he developed congestion in his lungs caused by poor circulation, a bad heart condition, and he suddenly degenerated. Many times you have your cerebral vascular accidents suddenly. We are dealing with 65- or 70- or even 90-year-old pieces of equipment called the human

We have not had any general notice nor have we been notified, nor have I been notified, as an individual.

STAFF DIRECTOR. Are you saying that the notice you have is in the nature of conversation with the enforcement officer?

Mr. WALKER. The notice we have had has been through the nursing homes that have been served notice.

Mr. ERCOLANO. By a field agent.

Mr. WALKER. We have originated an inquiry ourselves, and it has been made part of the record.

To answer the question precisely, to my knowledge, and I think I would know, we have not had an official notice to all the nursing homes of this country putting us on notice to this effect.

Mr. PICKENS. Mr. Meadows, the first rumblings we had were last October and November from Oklahoma and Texas and then some from Colorado and other States. This was the reason that on January 29 we had accumulated so many of these that I wrote this letter that was just put in the record, on January 29, to the Administrator, requesting a ruling on extended-care facilities and skilled nursing homes.



Had a cold and flu. Medications given: Lincocin (antibiotic), 2cc's IM BID until temperature subsides; reticulogen, 1/2 cc daily for 2 weeks, then two times per week; allergic to penicillin.

Current medication: Librium, 5 mg, capsule 1 QID; Serutan, 1 gram with juice TID; Merazine, 50 mg, tablets 1 daily; Entozyme, tablets 1 p.c. QID; Maalox, 2 grams for gastric distress; Nembutal, 1½ grams h.s. for rest; Reticulogen 2 times per week; laxative as needed.

General comments by Mrs. Blandin: RN on duty 7–3, and on call at all times. LPN's or RN's are on duty from 3–11 and from 11–3.

Re special care of patients. Some hospital procedures are undertaken, such as oxygen given to Mr. Carroll and the reinsertion of the foley catheter. Consultants are called in when necessary, again as in the case of Mr. Carroll when an eye specialist was called in.

All patients are admitted only on orders of a physician and are under the continuing supervision of a physican at all times.

Mr. EVERETT. Have you anything else to say?

Mr. WALKER. I want to simply say this, sir.

I appreciate the interest of the committee. We all appreciate the

Age: 74.
Admitted: 7.7.67 from VA Hospital
Diagnosis: generalized arteriosclerosis, arthritis, emphysema.

Admitted with influenza. Heart enlarged—limited expansion and excursion of lungs. Ambulatory with help on admittance. Forgetful and confused mental condition.

Went to clinic 10.20.67 with gastric distress. Had gallbladder series at hospital. Medication given for gastric distress: Acidulin, tablet 1; pathibamate tablets 1 AC and TID; Compazine; Donnazyme, 1 before breakfast daily.



Mr. EVERETT. We appreciate your testimony.

Thank you.

Now we will hear from the Department of Labor, Mr. Ben Robertson and Mr. Friedman.

PARTMENT OF LABOR; ACCOMPANIED BY EDWARD D. FRIED-
**WAGE AND HOUR AND PUBLIC CONTRACTS DIVISION, U.S. DEPARTMENT OF LABOR, ACCOMPANIED BY EDWARD D. FRIEDMAN, DEPUTY SOLICITOR, U.S. DEPARTMENT OF LABOR, AND ROBERT GUTTMAN, DEPUTY ASSOCIATE SOLICITOR, U.S. DEPARTMENT OF LABOR**

Mr. EVERETT. Mr. Robertson, will you be the speaker for your group?

Mr. ROBERTSON. Yes, sir.

Mr. EVERETT. Have you a prepared statement?

Mr. ROBERTSON. No, sir. I would like to make some remarks, however.

To relate the history a little more precisely than it has been presented, the Administrator of the Veterans' Administration, several veterans' organizations, and a number of Congressmen and Senators have requested review and reconsideration of the opinion of Mr. Clarence T. Lundquist, Administrator of the Wage and Hour and Public Contracts Division in a letter dated March 25, 1968, to Mr. John K. Pickens, general counsel of the American Nursing Home Association, stating the position of the Department of Labor that the McNamara-O'Hara Service Contract Act is applicable to Veterans' Administration contracts with nursing homes for the care of convalescent veterans.

The Service Contract Act applies to contracts the principal purpose of which is to furnish services to the Federal Government through the use of service employees. In determining questions of

A similar understanding of contracts principally for "services" as embracing contracts other than those for construction or supplies is reflected in the statement of President Johnson upon signing the act.

In determining whether or not any of the contract services will be that contracts for nursing home care, the principal purpose of which is to furnish services through the use of nurses' aides, orderlies, food service and custodial employees, clearly fall within the type of contracts covered under the Service Contract Act.

In the letters received by the Department of Labor, it is correctly stated that the Department does not assert coverage with respect to contracts for hospital care. This position is based upon a specific statement on page 3 of House Report 948 accompanying H.R. 10238 pertaining to contracts with local hospitals for the care of indigent patients.

Mr. EVERETT. Why don't they change the name from "nursing homes" to "hospitals"?

Mr. ROBERTSON. This is the next point I would like to cover, Mr. Chairman.

Mr. SATTERFIELD. Is this your statement or are you reading from somebody else's prepared statement?

Mr. ROBERTSON. No, sir; this is my statement. I prepared it.

Mr. SATTERFIELD. I understand you did not have a prepared statement. That is why I asked the question.

Mr. ROBERTSON. It was not prepared in form to submit to the committee. It is cut and pasted.

House debate: "The bill is applicable to advertised or negotiated contracts."

Mr. O'Hara, who presented the legislation:

> The bill is applicable to advertised or negotiated contracts in excess of $2,500, the principal purpose of which is for the furnishing of services through the use of service employees, as defined in the bill. Thus, for example, contracts made by the District of Columbia government with local hospitals for the care

It seems there must be some significance to the use of this term "would not be covered, since 'service employees' as defined in the bill would be performing only incidental functions."

It seems to me that when you deal with the legislative history of the act that the act is totally silent on this subject of medical care with one exception, and that one exception tends to exempt medical patients. Am I in error?

Mr. ROBERTSON. Only that the statement is limited to hospitals.

STAFF DIRECTOR. What do you think the meaning of the word "indigent" is here?

Mr. ROBERTSON. I assume these are people who are public charges.

STAFF DIRECTOR. Then you reason that nursing homes are not in the same sense as Blue Cross or Blue Shield which would bear the expenses if one of their covered policyholders were institutionalized.

STAFF DIRECTOR. How about the medicaid program?

Mr. ROBERTSON. The medicaid program would fall in the same category and the same problem as to whether or not there is a contract with HEW and the institution where the person is housed. We are in the process of exploring this with them, but we have reached no conclusion.

STAFF DIRECTOR. Go ahead. I wanted to interrupt on this point of the legislative history.

Mr. ROBERTSON. In the licensing requirements of the various States and in the Fair Labor Standards Act Amendments of 1966 a clear distinction is made between hospitals and nursing homes. The VA itself recognizes this distinction.

Appendix A, "Minimum Standards for Nursing Home Care for Veterans' Administration Patients," which is incorporated in the Veterans' Administration standard contract for this type of service, contains the following:

> A nursing home is defined as a facility or unit operated for accommodation of convalescents or other persons who are not acutely ill and not in need of hospital care but who require skilled nursing care and related medical services, if such nursing care and medical services are prescribed by, or are performed under
> Administration facility.

that the Veterans' Administration is not here contracting primarily for professional medical services of the type found exempt under the Service Contract Act. The Veterans' Administration appears to be contracting primarily for convalescent care services which are furnished through the use of service employees.

While there may be a degree of similarity between professional medical care furnished in hospitals and the extended care and skilled nursing home services, it seems clear that on the basis of the contract the services called for here are within the scope of the act.

In the communications received by the Department, it has been requested that if the opinion of March 25, 1968, cannot be reversed that action be taken under section 4(b) of the Service Contract Act to exempt contracts of this type.

We are unable to find on the basis of material submitted that there is sufficient justification before us at present for the granting of the exemption requested. If further data are made available the Department will be pleased to give the matter of exemption further consideration. However, there would be a public hearing on the request for exemption with full opportunity for all interested parties to appear.

A decision then would be made based on the record of the hearing. heard.

Mr. EVERETT. I am talking about the nursing home people. That is the group I want to hear first.

All of these people who appear from the service organizations maintain offices here; but these other people have come from Oklahoma and all these other places. It just means another trip back down here for them.

You follow what I am talking about?

Mr. ROBERTSON. Yes, sir.

Mr. DUNCAN. I cannot find anywhere in the act that it says there must be a public hearing. I cannot see why you cannot accept the testimony here as part of the record.

It is very clear that the Secretary can make this decision. To me this would be a waste of time and everything else to even try to hold a hearing because the Secretary certainly does not have to hold one.

Mr. ROBERTSON. No; but apparently he has made a decision in this

I think anyone who has been here today would say you are impair-
ing the conduct of Government business. I think you are duty bound to give some cooperation in this matter.

Mr. EVERETT. You do have the right to exempt these people if you so desire, do you not?

Mr. ROBERTSON. The Secretary of Labor has that right.

Mr. EVERETT. Suppose we change the names of these nursing homes to "hospitals." Would they be covered then?

Mr. ROBERTSON. Sir, I think they would have to do more than change the names to qualify as hospitals under the laws of the various States.

Mr. EVERETT. Such as what?

Mr. ROBERTSON. Provide resident physicians, operating rooms, various technical requirements of the various States.

Mr. ROBERTS. If these people do not comply, it is the fault of the committee, Congress, or the Veterans' Administration. Certainly they are not at fault. They were not attempting to make more money because they can fill the same bed with patients from the medicaid program.

It is obvious that the assumption of custodial care has to be in error because, if he is a custodial patient, he would be in a VA cus-

Mr. ROBERTSON. There is the continuing discrepancy in rate.

Mr. ROBERTS. Yes; that we can worry about later. How are we going back to correct this letter of March 25 or this ruling as it affects these people who are trying to perform a service and trying to save the Government some money? How are we going to get them out of this mess?

You all are technicians in this field. How are we going to get them out of it? If it takes an act, the Veterans' Affairs Committee passes many of the bills through this Congress, most of them by 400 votes. We should not try to spank somebody. I think it would be wrong on our part and I think it would be bad business on everybody's part. How are we going to remedy this?

Mr. ROBERTS. I think they can work it out. If they tell us we have

Mr. ROBERTSON. I would suggest this: That we meet with Mr. Pickens, representing the association, and a representative of the Veterans' Administration to explore means of accomplishing the end that you have just suggested.

Mr. ROBERTS. It is too late for us now to change the contract made in the past. Would you suggest a change in the contractual procedure for the future? Would that make any difference now? Would that be helpful?

Mr. ROBERTSON. I would have to see the proposal. I do not know whether a simple modification of the terms of the contract would in any way change the legal position with respect to application of the act.

Mr. ROBERTS. If there are such suggestions which should be made would you make those suggestions either to us or to the VA? If we can do it without all this hullabaloo we would all be better off.

Thank you.

One more thing. It is just a matter of how you tell us to do it. If we have to do it [illegible] all of [illegible]. Why did it take so long?

Mr. ROBERTSON. I would assume we didn't have the question brought to our attention until we receive Mr. Pickens' letter representing the association in January.

Mr. SATTERFIELD. I notice you say you have not ruled on medicare, either.

Mr. ROBERTSON. That is correct.

Mr. SATTERFIELD. Do you have any idea how long it will take before you get to that?

Mr. ROBERTSON. We are hoping to obtain enough information from HEW to permit a decision.

Mr. SATTERFIELD. I would certainly think we should have retroactive liability when they are in a position of possibly getting socked with this thing. I have had serious misgivings about continuing with this program.

Mr. ROBERTSON. If I may clarify this in relation to Mr. Roberts' remarks. What I suggest might be accomplished through a meeting by representatives of the association, the VA, and the Labor Department. This would relate to this retroactivity question and not the solution of whether or not the exemption will be granted. This would be contingent on the record of the hearings.

Mr. STEED. Very briefly, Mr. Chairman. I am more interested in hope that something that is fair and reasonable that something we can all live with will come out of it.

Mr. EVERETT. Talking about getting something unsatisfactory, have you ever gotten anything satisfactory out of them?

Mr. STEED. In other areas and in years gone by I have been able to work with them where it has turned out quite satisfactorily. I hope perhaps we can do so this time.

Mr. ROBERTS. I just believe these guys can work it out if they want to without our having to get as rough as we might.

Mr. EVERETT. Mr. Meadows?

STAFF DIRECTOR. I have no questions.

Mr. EVERETT. Thank you, Mr. Steed. You always make a wonderful contribution and we appreciate your coming by and letting us have the benefit of your views.

Mr. STEED. I really believe this is a serious matter. I think you are to be highly commended for trying to get this worked out.

Mr. EVERETT. Don't you think this act was passed 2 or 3 years ago when they just called it to their attention and don't you think it is highly irregular to assess them with all these back payments?

Mr. STEED. I think in a situation like this that instead of following the hairsplitting letter of the law it is much wiser to use plain commonsense. I think we are more interested in what happens from here



them under medicare and minimum wage, people keeping medicare patients will jump on Members of Congress and we will be right on your backs. What are you going to do about that? Don't you think you should make some kind of decision?

Mr. ROBERTSON. We will make a decision on the medicare problem as soon as we can. I would rather not prejudge the decision.

Mr. EVERETT. I don't want you to. The Medicare Act has been in effect for some time now. These people out here are barely making ends meet with these nursing homes. I certainly think we owe it to them to let them know where they are.

Mr. EVERETT. Would you be available to work with our staff here later on, and with Mr. Stratton of VA, Mr. Walker and Mr. Pickens of the Nursing Home Association, to see whether we can resolve this while these gentlemen are in town? Could you meet with them in the morning at 10 o'clock?

Mr. ROBERTSON. Yes, sir.

Maybe we have to have extensive hearings and an extensive record to prove that is disruptive so the Secretary can act, but it seems to me that it almost speaks for itself and stands on its own bottom.

In this connection, Mr. Teague will not be here but he asked me to be sure certain letters were made part of the record, and Mr. Chairman, the correspondence I refer to was, I believe, inserted in the record with other material relative to the legislative history of Public Law 89–286.

Mr. EVERETT. Yes.

STAFF DIRECTOR. One brief comment. We have been trying for some these letters in the record and express his disappointment about that sort of handling of his correspondence.

(Letters and other information referred to appear on pages 3799 throuh 3805.)

Mr. EVERETT. Mr. Robertson, do you realize that you are fixing to have all of these veterans out of these nursing homes? Word will get around to all these nursing homes about this medicare. If you put

COUNSEL. The Service Contract Act was signed and made public law on October 22, 1965, with the provision that it would be effective 90 days thereafter as far as contracts are concerned.

As of this date have you told the various community nursing homes around the country, as a general proposition, by notice from your office, that they are covered?

Mr. ROBERTSON. Not directly. We wrote Mr. Pickens, general counsel for the association.

COUNSEL. You have not taken any action on your own responsibility to indicate to the individual nursing homes that they are covered?

Mr. ROBERTSON. No, sir.

COUNSEL. And if a community nursing home were not a member of the American Nursing Home Association it would have no official notice?

Mr. ROBERTSON. That is correct.

COUNSEL. With regard to the application of this act?

Mr. ROBERTSON. That is right.

COUNSEL. Do you plan to continue to proceed this way?

Mr. ROBERTSON. I would believe that we have no choice, sir. We