

March 1-31, 2010

© 2016 Nonprofit Issues, Inc.  
Donald W. Kramer  
Editor and Publisher  
Lisa T. Chatburn  
Managing Editor  
Virginia P. Sikes  
Tax Editor

None of the materials included in *Nonprofit Issues*® should be deemed legal advice or should be acted upon without prior consultation with appropriate professional advisors. Kramer and Sikes are attorneys with the Philadelphia, PA law firm of Montgomery, McCracken, Walker & Rhoads, LLP. Neither receipt of *Nonprofit Issues*® nor discussion of any article with its author or anyone associated with *Nonprofit Issues*® creates an attorney-client relationship between the recipient and any such person or Montgomery, McCracken, Walker & Rhoads, LLP. *Nonprofit Issues*® is published regularly by Nonprofit Issues, Inc. It is available (in electronic format) by subscription for \$129 per year for nonprofit organizations, and \$164 per year for others. Multi-year, group discounts and site licenses are also available.

*Nonprofit Issues*®  
P.O. Box 482  
Dresher, PA 19025-0482  
Phone (215) 542-7547  
1-888-NP-Issue  
Fax (215) 542-7548  
E-mail  
[info@nonprofitissues.com](mailto:info@nonprofitissues.com)  
[www.nonprofitissues.com](http://www.nonprofitissues.com)

## Church custodian not covered by FLSA

The custodian of an Episcopal Church in Brooklyn, NY is not covered by the Fair Labor Standards Act, a federal District court has held, because the church is not an "enterprise" engaged in commerce and the custodian is not an individual engaged in commerce.

The custodian, who was originally hired in 1982, worked seven days a week cleaning up the premises, and turning off the alarm daily and setting it again after the last event. He lived in an apartment on the premises and was paid a set salary every other week. After he had been ill an unable to perform all of his tasks, the Church terminated his employment. He refused several offers of severance pay and filed for back wages under the FLSA.

The FLSA covers an enterprise engaged in commerce or in the production of goods for commerce where goods move in interstate commerce and the enterprise has at least \$500,000 in sales or business. The custodian did not contend that the parish alone was an enterprise, but claimed that it was working in a common business purpose with the Diocese. The Court rejected the claim, however, because the Diocese was not joined as a party in the case. It said it could not consider the Diocese in determining whether the parish was an enterprise because the Diocese was not before it.

The Court also held that the Department of Labor has provided a regulatory exemption for nonprofit organizations that perform religious, educational or charitable activities, saying that such activities are not for a "business purpose" unless its activities compete with ordinary commercial enterprises. The Court looked at the church's rental of space for social events, the apartment to the custodian, and an office for an insurance company. It found that the Church rented for social events only 10 or 11 times a year, rental of the apartment to the custodian was in connection with his employment, and that the custodian did not claim that rental of the office was for a business purpose.

The Court found that the custodian handled goods moving in interstate commerce, but that the enterprise did not have more than \$500,000 in business. It said that charitable contributions were included in the calculation.

On the question of individual coverage, the Court said the individual had to be personally engaged in interstate commerce as a "substantial part" of his activities. It said that the Department of Labor had provided a specific ground for individual coverage for custodial

employees where the employee performs maintenance and custodial work on the machinery, equipment, or premises where goods regularly are produced for commerce or from which goods are regularly shipped in interstate commerce. It found that **the** employee in this case did not fit that description. (*Locke v. St. Augustine Episcopal Church*, E.D. NY, No. 07-CV-3226, 3/3/10.)