OPINION NO. 262

(On the question as to whether the family drivers may be considered house helpers within the contemplation of Article 1695 of the Civil Code.)

October 6, 1954

Mr. Ruben F. Santos
Acting Chief
Wage Administration Service
Department of Labor
Manila

S i r :

This is in reply to your request for opinion on whether family drivers may be considered house helpers within the contemplation of Article 1695 of the Civil Code which provides:

> "Article 1695. House helpers shall not be required to work more than ten hours a day. Every house helper shall be allowed four days' vacation each month, with pay."

The above-quoted article is found in the Section on "Household Service" (Section 1, Chapter 3). Commenting on this Section, the Code Commission stated: "Domestic servants in the Philippines have not, as a general rule, been fairly treated. x x x . Consequently, under the heading of 'Household Service' there are provisions to strengthen the rights of domestic servants." (Report of the Code Commission on the Civil Code, p. 15.) The term *house helper* was therefore used in said section with the same connotation as the term domestic servant.

A "domestic servant" is one who renders such services in and about the employer's home which are usually necessary or desirable for the maintenance and enjoyment thereof and ministers exclusively to the personal comfort and enjoyment of members of his employer's family. (See Anderson v. Ucland, 267 NW 517; In re Johnson, 282 NYS 806; In re Howard, 63 F 263.) It is true that, ordinarily, it is not the family driver's job to take part in the care of the employer's home. But he does usually live there or, at least, must be there to be available whenever his employer or any member of his family needs his services. His duties consist in keeping the car, and in many cases the garage, in good condition, and in driving his employer and any of the latter's family to and from work, school, business and social engagements, and other places. Not infrequently, during his stand-by periods, he is called upon to perform odd jobs or errands in or about the house.

Ministering exclusively to the personal comfort and enjoyment of the members of his employer's family, I am of the opinion that the family driver is a house helper or domestic servant within the meaning of Article 1695 of the New Civil Code. A motor vehicle driver is not unlike the family coachman of bygone days whose duty it was partly to assist in keeping the stables, horses, and carriages in good order, and principally in driving any of the carriages when the employer or any of his employer's family went out. Such coachman, it was held, was a "personal or domestic servant". (In re Howard, *supra*.)

Your query therefore should be, and is, answered in the affirmative.

Respectfully,
(Sgd.) PEDRO TUASON
Secretary of Justice

OPINION NO. 296

(On the questions as to what comprises "a day" under the Minimum Wage Law and as to whether the following workers are covered by the Minimum Wage Law: (1) Night club hostesses who do not observe fixed working hours and whose income depend solely on the tips of customers; and (2) barbers working in a barbershop operated by another who are paid on commission basis.)

October 27, 1954

The Acting Chief
Wage Administration Service
M a n i l a
S i r :

This is in reply to your letter requesting opinion on certain questions regarding the interpretation of the Minimum Wage Law (Republic Act No. 602).

Your first query has reference to the hours of work a non-agricultural worker or employee must perform daily in order to be entitled to the daily minimum wage of four pesos fixed by said law.

It appears that while the Minimum Wage Law fixes at "four pesos a day" the minimum wage for employees in non-agricultural enterprises, it is silent on the number of working hours comprising "a day". This being so, resort may be made to laws of a similar plan or purpose. For statutes which have a common purpose or the same general scheme or plan should be construed together as if they constitute but one act (50 Am. Jur., 346-347).

Under the Eight Hour Labor Law (Com. Act No. 444) — which like the Minimum Wage Law, is designed to promote the welfare of the working men — the legal working day of any person employed by another shall not be more than eight hours (sec. 1). An employee in a non-agricultural enterprise may not, therefore, be required to work for more than eight hours a day to entitle him to a day's pay of not less than four pesos under the Minimum Wage Law.

My opinion is also sought to whether the following workers are covered by the Minimum Wage Law:

(1) Night club hostesses who do not observe fixed working hours and whose income depend solely on the tips of customers; and

(2) Barbers working in a barbershop operated by another who are paid on commission basis.

Since the law under consideration requires "every employer" to pay the minimum wage "to each of his employees" (sec. 3), the question is whether an employer-employee relationship within the contemplation of said law exists between said night club operators and hostesses and between said barbershop operators and barbers.

The definitions in the Minimum Wage Law of the terms "employee" ("any individual employed by an employer", sec. 2-c) and "employ" ("to suffer or permit to work", sec. 2-i) do not shed much light on the matter. However, courts usually consider four elements present in the relationship of employer and employee — namely, selection and engagement of the employee, payment of wages, power of dismissal and power to control the employee's conduct. And the weight of authority holds that, of these four, the really essential factor is the power to control and direct the details of the work, not only as to the result but also to the means to be used. This is the ultimate test of the existence of the employer-employee relationship. (Sec. 35 Am. Jur., 445-447.)

It is apparent that the night club operators neither control nor direct the hostesses on the details and manner of their work in the entertainment of night club patrons and that, having no fixed hours of work, said hostesses may come and go as they please. They are, therefore, not employees of the night club operators. This conclusion is bolstered by the fact that the hostesses do not receive any wages from the nightclub operators, their income proceeding exclusively from customer's tips.

With respect to barbers, we have observed from actual practice that they are free from the supervision and direction of the barbershop operators on the manner and results of their work.

The participation of the operators in the business consists merely in furnishing the shop, the chair, etc., in consideration of which they receive a fixed percentage of the income of each barber. My view, therefore, is that those barbers are not employees of the barbershop operators within the contemplation of the Minimum Wage Law

Respectfully,
PEDRO TUASON
Secretary of Justice

OPINION NO. 298

(On the question as to whether the Director of Prisons, in compliance with the order of the Court of First Instance of Manila in Criminal Case No. 28055, entitled, "People of the Philippines vs. Alfonso Tulauan alias Camilo Patakail y Mujergas" may transfer said Alfonso Tulauan to the National Mental Hospital in Mandaluyong, Rizal, in spite of the fact that he is at present in the New Bilibid Prison, Muntinlupa, Rizal, serving a final judgment)

2nd Indorsement
October 28, 1954

Respectfully returned to the Director, Bureau of Prisons Muntinlupa, Rizal.

Opinion is requested "whether the Director of Prisons, in compliance with the order of the Court of First Instance of Manila in Criminal Case No. 28055, entitled, 'People of the Philippines vs. Alfonso Tulauan alias Camilo Patakail y Mujergas' may transfer said Alfonso Tulauan to the National Mental Hospital in Mandaluyong, Rizal, in spite of the fact that he is at present in this Prison serving a final judgment imposed by the Court of First Instance of Cagayan in another case, the penalty of which is from 5 years to 10 years and 1 day imprisonment."

"The consulta," it is said, "is being made having in mind Section 1722 of the Revised Administrative Code, whereby the President is the only official who may authorize the transfer of a National prisoner from the National Prison to any other place of confinement."

Section 1722 of the Revised Administrative Code provides that the President of the Philippines shall "have the power to direct, as occasion may require, the transfer of national prisoners between national penal institutions, or from a national penal institution to a provincial prison or vice versa."

But this provision does not apply. The applicable provision with respect to prisoners serving sentences is Article 79 of the Revised Penal Code, and the case of U. S. vs. Guendia, 37 Phil 336, should govern cases of detention prisoners.

Article 79 of the Revised Penal Code provides that if sanity occurs while a convict is serving his sentence, the execution of the sentence shall be suspended and the convict committed to a mental hospital. In U.S. vs. Guendia, supra, it was held that it is the duty of the court to suspend proceedings and commit the accused to an asylum for the insane until his sanity is restored.

Prisoner Alfonso Tulauan falls under both situations; he is undergoing trial for one crime and serving sentence for another.

The order of Judge Ibañez, therefore, committing this prisoner to the National Mental Hospital is legal and proper and should be complied with.

(Sgd.) PEDRO TUASON
Secretary of Justice

OPINION NO. 316

(On the question of the "existence of reciprocity" in the practice of engineering between the Philippines and Spain.)

4th Indorsement
November 20, 1954

Respectfully returned to the Honorable, the Under Secretary of Foreign Affairs, Manila.

Opinion is requested on the question of the "existence of reciprocity" in the practice of engineering between the Philippines and Spain. More concretely, the question concerns the admission to examination and the practice of engineering of certain Spanish nationals, named below, in the Philippines.

The Board of Examiners for Chemical Engineers witheld the ratings of Mr. Pedro Picornell, a Spanish national, who took the chemical engineer examination in July, 1949, pending submission of evidence that the requirements of section 26 of Republic Act No. 318 have been satisfied. The Board also disapproved the application of Mr. Manuel Igual, another national of Spain, for permission to take the chemical engineer examination in July, 1951 upon his failure to submit such evidence.

The Board of Electrical Engineering Examiners nullified the examination for assistant electrical engineer taken by still another Spanish national, Mr. Jose S. Picornell, in February, 1951 and debarred him from admission to future examinations, until the provisions of section 42 of Republic Act No. 184 were complied with.

The Board of Mechanical Engineering Examiners withheld the ratings of a fourth Spanish national, Mr. Antonio R. Esteban, obtained in the junior mechanical engineering examination of August 1953, pending the clarification of the provisions of section 42 of Commonwealth Act No. 294, and generally, of the question here under consideration.

The actions of the several Boards in all the above cases were based on their view that no "real reciprocity" exists between the Philippines and Spain in the matter of the practice of engineering. The Boards declared that there is disparity or inequality between the treatment accorded in the Philippines to Spanish engineers and that meted out in Spain to Filipino engineers. The inequality in the Board's view, consists in the subjection of Filipino engineers in Spain to the regulations of the Spanish Ministry of Labor governing alien labor, while Spanish engineers in the Philippines who have qualified under our laws are treated as if they were Filipinos. The Boards further specified that:

1. Philippine law does not require the "commutation" of engineering degrees obtained abroad into their Philippine equivalents. Under Spanish law, a degree secured abroad must first be "commuted" by the Spanish Ministry of National Education into its Spanish equivalent.

2. The registration certificate issued by the Boards in the Philippines is "general", "irrevocable," and "permanent" in character, being revocable only on grounds provided by law. The "letter of professional identity" or authorization to practice issued by the Spanish Ministry of Labor is of an "exceptional", "revocable," and "temporary character", and may be revoked "in the discretion of Spanish administrative officers."

3. Spanish subjects in the Philippines, who have qualified, are "by law" entitled to a registration certificate and can always invoke the law to support their "right" to practice in the Philippines. Filipinos may practice their professions in Spain only as a "privilege", in case of denial of which, they can invoke no law to sustain their "right" to practice there. (See the joint memorandum of the Boards, date 1 March 1954, date 1 March 1954, p. 4, attached hereto).

Section 26 of Republic Act No. 318 (the "Chemical Engineering Law") approved 19 June 1948, section 42 of Republic Act No. 184 (the "Electrical Engineering Law") approved 21 June 1947, and section 42 of Commonwealth Act No. 294 (the "Mechanical Engineer may be admitted to examination, or granted a certificate of registration or any of the rights or privileges under the several Acts, unless

"the country of which he is a subject or citizen permits Filipino engineers to practice within its territorial limits *on the same basis as the subjects or citizens of such country.*"

It will be seen that the cited statutes do not require "reciprocity" or 'parity" or "equality" in the sense that Filipino engineers in Spain must be accorded exactly the same treatment that Spanish engineers are given in the Philippines. What the statutes do require is that Filipino engineers in Spain be treated in exactly the same way as Spanish engineers in Spain are, that is to say, that no requisites be imposed on Spanish engineers. The statutory standard is satisfied so long as Filipino engineers in Spain are treated as if they were Spanish subjects. The equality that must be shown is not between Filipino engineers in Spain and Spanish engineers in the Philippines, but between Filipino and Spanish engineers in Spain. Under the above statutes, therefore, the moment it is shown that the Spanish government exacts from Filipino engineers in Spain compliance with conditions and requirements not simultaneously required from Spanish engineers, Spanish engineers must be regarded as disentitled to practice in the Philippines.

Account, however, must be taken of a factor which has altered significantly the legal situation above indicated. On March 4, 1949, the Treaty on Academic Degrees and the Exercise of Professions between the Philippines and Spain (Philippines Treaty Series, Vol. 1, No. IV, p. 13) was signed. The exchange of ratifications took place with article VI thereof, came into effect. Article III of the Treaty provides thus:

"The Nationals of each of the two countries, who shall have obtained recognition of the validity of their academic degrees by virtue of the stipulations of this Treaty, can practice their professions within the territory of the other, by applying for the necessary authority to this effect from the Spanish Ministry of Labor or from the competent body or authority in the Philippines, as the case may be, which authorities shall grant always the application, *subject to the provisions of applicable laws and regulations governing alien labor* and the practice of each profession, under a revocable permit, and the application shall be denied only in exceptional cases for justifiable cause that affects personally the petitioner. *The persons thus authorized to practice their professions shall be subject to all the regulations, laws, taxes and fees imposed by the state upon its nationals.*"

The underscored clauses of the quoted article, interpreted conjointly, result in this: that the Philippine government may subject Spanish engineers in the Philippines not only to such laws and regulations as are applicable to Filipino citizens, but also, and additionally, to laws and regulations that apply only to aliens. The spanish government is of course entitled to do the very same thing. Under the Treaty, each Contracting Party may treat the nationals of the other Party differently from its own nationals. The fact that one of the Contracting Parties refrains from exercising its treaty right to mete out differential treatment to nationals of the other Party in no way diminishes the right of the other Party to do so.

It need hardly be mentioned that the "applicable laws and regulations governing alien labor" observance of which each Contracting Party can require from nationals of the Other are not to be so unreasonable and oppressive as, in effect, to destroy the reciprocal right to practice granted by the Treaty. The Treaty does envisage reciprocity and mutuality in the sense that it entitles the nationals of each Contracting Party to practice their professions in the territory of the Other, subject only to such reasonable regulations and limitations as are authorized by the Treaty itself.

That the Treaty is inconsistent with those earlier statutory provisions appears evident. It is thereunder no longer necessary, as it was under the aforementioned statutory provisions, for a Spanish national to be entitled to take an examination or to practice engineering in the Philippines to show that the Spanish government permits Filipino engineers to practice in Spain on equal terms with Spanish subjects. To that extent, the Treaty, being later in point of time, is to be regarded as having modified the internal legislative acts. (Singh v. Collector of Customs 38 Phil. 867; Whitney v. Robertson 124 U.S. 190, 31 L. ed. 368; Cook v. U.S. 288 U.S. 102, 77 L. ed. 641; United Shoe Machinery Co. v. Duplessis Shoe Machinery Co. 155 F. 842. See also 2 Hyde, International Law [2nd rev. ed. 1945] 1463-1466).

It cannot rationally be maintained that compliance with the sections of the laws on engineering requiring that the country of a foreign applicant treat Filipino engineers on the same basis as its own nationals may still be exacted on the theory that those sections form part of the "applicable laws and regulations governing — the practice of each profession" to which the Treaty subjects applications to practice in the territory of each Contracting Party. The hypothetical construction would render the Treaty an entirely idle and pointless act. For the Treaty covers precisely the same field as those mentioned sections of the engineering statutes and is inconsistent therewith.

Examination of the Treaty reveals that the enforcement by Spain of the regulations complained of by the Board of Examiners is authorized by the terms of Treaty itself. The Treaty clause on "laws and regulations governing alien labor" has been mentioned above. As to the requirements of the Spanish Ministry of Education concerning the "commutation" of foreign degrees into their Spanish equivalents, article III of the Treaty requires that before nationals of each of the Contracting Parties can practice their professions in the territory of the other Party, they must have "obtained recognition of the validity of their academic degrees by virtue of the stipulations of this Treaty." Article I provides in part:

"The nationals of both countries who shall have obtained degrees or diplomas to practice the liberal professions in either of the Contracting States, issued by competent national authorities, shall be deemed competent to exercise said professions in the territory of the Other, subject to the laws and regulations of the latter.—"

Article II declares, *inter alia*, that

"In order that the degree or diploma referred to in the preceding article shall produce the effects mentioned therein, it is hereby agreed:

"1st. That it be issued or confirmed and duly legalized by the competent authorities *in conformity with the applicable laws and regulations of the other Party where it is to be recognized.*

......"

(Italics supplied)

As to the other points of "inequality" raised by the Boards, that the authorization to practice given by Spanish authorities to Filipinos is "exceptional", "temporary" and "revocable" — it suffices to note that, by the Treaty, the Contracting Parties expressly agreed that their respective authorities "shall grant always the application," which application may be denied "only in exceptional cases for justifiable cause that affects personally the petitioner", but that the premission to practice shall be a "revocable" one. And as to the last point that Filipino engineers desiring to practice in Spain can invoke no law to support their claim, it need only be observed that there is the Treaty itself which, as a binding international agreement, lays down the legal rights and obligations of the Contracting Parties. (See Briggs, The Law of Nations [2nd ed., 1952] 868-869).

It may be noted that the Boards concede the right of Spain under the terms of the Treaty to require compliance with the regulations above mentioned. (See the joint memorandum, p. 3) What the Boards do object to is the inequality that results from the fact that the Philippines does not impose similar requirements on Spanish engineers here. It bears emphatic reiteration

(*Continued on page* 632)