In order that there may be no misunderstanding with respect to the precise issue presented by your second question, the following is stated by way of illustration:

Assume that the assessed valuation for the county as fixed by the assessment roll for 1965 is $293,819,300.00 and that such valuation as fixed by the assessment roll for 1966 is in excess of $300,000,000.00 Assume further that at the primary election to be held on August 2, 1966, the total tax rate limitation upon county taxes is increased by two mills for this purpose for a period of years commencing in 1966, there could be levied as part of the 1966 county taxes two mills for this purpose. Under the statute, two mills may be levied in case the total assessed valuation according to the assessment roll for the last preceding year does not exceed $300,000,000.00. However, in 1967 only one mill could be levied for county road purposes as the total assessed valuation as fixed by the assessment roll of 1966 exceeding $300,000,000.00.

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FRANK J. KELLEY,
Attorney General.

WAGE DEVIATION BOARD: Minimum Wages—Migrant Labor—Sleeping Time.

Wage deviations may not be amended within 6 months of the effective date of the Wage Deviation Board's order.

The word "traditionally" as used in Sec. 14 of the Minimum Wage Law refers to those employers who in fact engage in an agricultural occupation which customarily over the years has used transient or migrant labor on a piecework basis to harvest crops and who have conformed in their own harvesting operations with these established employment practices.

The terms of the employment agreement are to be determined from the facts and the understanding between the parties, giving consideration to the practical construction placed on it by them.

No. 4432

April 13, 1966.

Mrs. Marie L. Hager, Chairman
Wage Deviation Board
Department of Labor
Lansing, Michigan

You have submitted the following questions with respect to the construction of the Minimum Wage Law, Act 154, P.A. 1964, as amended by Act 296, P.A. 1965, M.S.A. 1965 Cum. Supp. § 17.255(1), et seq.; C.L. 1948 § 408.381, et seq.:[1]

1. May the Wage Deviation Board amend deviations supposedly placed in effect at a previous date by means of the Wage Deviation

[1] Act 154, P.A. 1964 was also amended by Act 255, P.A. 1965, but such amendment is not material here.

Board order if such amendments are made within six months of the effective date of such original order?

2. What does the word "traditionally" mean in the phrase contained in section 14 of the act, which says: "other agricultural employers who traditionally contract for the harvesting on a piecework basis?"

3. Can an individual who must be available and on call at all times, such as a manager or caretaker of an apartment building who is on 24-hour call, be considered as working within the meaning of the act even though he may pursue personal projects and have normal sleeping time?

1. Section 10 of the act provides:

"At any time after a deviated wage rate has been in effect for 6 months or more, the wage deviation board may reconsider the rate."

You submitted an example with your request:

"Wage Deviation Board Order #1 was effective January 1, 1965, and provided for a credit not to exceed 25% of the minimum wage for gratuities. If subsequently the proprietor of Restaurant A appears before the Wage Deviation Board and proves to the satisfaction of the Board that a greater deviation for gratuities than that provided in Wage Order #1 is appropriate, may such increased deviation become effective at a date specified by the Wage Deviation Board even if such date occurs before June 30, 1965?"

Section 7 of the act specifically gives the Wage Deviation Board the authority to establish a reasonable deduction for gratuities from the minimum hourly wage to be paid by the employer. Once this has been determined and placed into effect, section 10 becomes effective. Since the language of section 10 is clear and unambiguous, your question must be answered in the negative.

2. Section 14 of the act provides:

"The provisions of this act shall not apply to any employer who is subject to the minimum wage provisions of the federal fair labor standards act of 1938, as amended, or to agricultural fruit growers, pickle growers and tomato growers, or other agricultural employers who traditionally contract for the harvesting on a piecework basis, as to those employees of such employers used for such harvesting until the board shall have acquired sufficient data to determine an adequate basis for the establishment of a scale of piecework and shall determine such a scale equivalent to the prevailing minimum wage for such employment, which determination shall occur no later than July 31, 1966."

In the absence of a statutory definition of the word "traditionally," it is necessary to look to the commonly adopted definition which is found in Webster's International Dictionary, Third Edition, as follows:

"In a traditional manner; by tradition; customarily; according to traditional belief."

"Tradition" is defined, ibid:

"A practice or pattern of events of long standing; custom."

I interpret the word "traditionally," as used in foregoing Section 14, as referring to those employers who in fact engage in an agricultural occupation which customarily over the years has used transient or migrant labor on a piecework basis to harvest crops and who have conformed in their own harvesting operations with these established employment practices.

3. Some guidance in answering your third question is found in the definition of "employee" appearing in Section 2(b) of Act 154, P.A. 1964, which states:

> " 'Employee' means an individual between the ages of 18 and 65 years employed by an employer on the premises of the employer or at a fixed site designated by the employer."

Further enlightment is found in Section 2(d), which defines "employ" as meaning "to engage, suffer or permit to work."

No all-inclusive statement has been announced in any court decision which will dispose of the issues raised by your third question. The inability of the courts to apply a definitional rule is brought about by the necessity of determining the employment status under the facts of each separate case. The attitude of the courts in this regard has been made clear in two cases before the Supreme Court of the United States involving a construction of the Fair Labor Standards Act. While that act is not identical with the Michigan Minimum Wage Law of 1964, the Federal act does provide for a maximum 40 hour week at the minimum wage with time and a half for hours worked over 40. 29 U.S.C.A. § 207.

The first case, *Armour & Company v. Wantock* (1944), 323 U.S. 126, 89 L. ed. 118, involved private fire guards employed as a part of the company's auxiliary fire-fighting service and required to remain in the employer's fire hall until the next morning after completing their regular day shift. In the course of its opinion the Supreme Court said:

> "Of course an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer. Whether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case."

In the second case of *Skidmore, et al. v. Swift & Company* (1944), 323 U.S. 134, 89 L. ed. 124, the employees there involved had agreed to stay in the fire hall or within hailing distance three or four nights a week after completing their day shift with no assigned task except to answer alarms. In its opinion in this case the Supreme Court said:

> "This [findings of fact] involves scrutiny and construction of the

> agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the surrounding circumstances. Facts may show that the employee was engaged to wait, or they may show that he waited to be engaged. His compensation may cover both waiting and task, or only performance of the task itself. Living quarters may in some situations be furnished as a facility of the task and in another as a part of its compensation. The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was."

In *Bowers, et al v. Remington Rand, Inc.* (1946), 159 F. 2d 114 (certiorari denied 330 U.S. 843, 91 L. ed. 1288; rehearing denied 331 U.S. 864, 91 L. ed. 1869), the Circuit Court of Appeals for the Seventh Circuit had under consideration an appeal where the facts disclosed that appellants were employed in the fire department maintained by the company in the operation of the Sangamon Ordnance Plant. The lower court found that under the employment contract the employees were required to remain within the plant area for 24 consecutive hours on alternate days. They were to be paid for 16 hours and during the remaining 8 consecutive hours they were free to sleep in facilities provided for that purpose by the company. If called to work during these 8 hours, they were to be paid at the rate of time and one-half the basic hourly rate. The trial court found that the appellants had entered into a contract of employment under which they agreed to sleep at the plant subject to call, and that the sleeping period did not constitute working time. The Circuit Court of Appeals affirmed. It approved the following statement by the trial judge:

> "Whether time may be compensable depends on circumstances of the case and the mere fact that the employee was in some small degree deprived of some freedom of action doesn't alone determine the question."

After approval of the trial judge's statement the Court of Appeals added as its own conclusion that the facts showed the appellants agreed to wait to be engaged and hence the time spent in sleeping was not compensable.

Your Wage Deviation Board is confronted with much the same problem as confronted the Court in the foregoing cases. It will be incumbent on your Board to ferret out from the facts presented to you the true agreement and understanding between the employer and the employee, giving consideration to the practical construction placed upon it by them and thereby fix the on-duty time and the off-duty time as near as these periods can be established from the arrangement between the parties and under the working conditions.

FRANK J. KELLEY,
Attorney General.