OPINION NO. 90-098

Syllabus:

1. A qualified nonprofit agency for the severely handicapped, as defined in R.C. 4115.31(B), is required to pay its disabled or handicapped employees prevailing rates of wages for painting services that those employees perform pursuant to the terms of state use law contracts.

2. A qualified nonprofit agency for the severely handicapped, as defined in R.C. 4115.31(B), is required to pay its disabled or

handicapped employees prevailing rates of wages for printing services that those employees perform for the State of Ohio pursuant to the terms of state use law contracts.

3. Pursuant to R.C. 4115.33, the State Use Committee, in the exercise of a reasonable discretion, may determine that the cost of painting and printing services purchased by state agencies and local governments pursuant to state use law contracts when prevailing rates of wages are paid for those services makes them unsuitable for inclusion on the Committee's procurement list.

To: John M. Connelly, Chairman, State Use Committee, Rehabilitation Services Commission, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 28, 1990

You have requested my opinion regarding the application of Ohio's prevailing wage rate law, R.C. 4115.03–.16, to painting and printing contracts that are, pursuant to the state use law, R.C. 4115.31–.35, negotiated and entered into between sheltered workshops for the disabled or handicapped, and the various governmental agencies and entities that are subject to the use law's provisions. In particular, you wish to know whether prevailing rates of wages, as determined by the Department of Industrial Relations, *see* R.C. 4115.04; R.C. 4115.05, must be paid to persons who, being employed by such workshops, provide painting and printing services pursuant to the terms of state use law contracts that those workshops maintain with the foregoing governmental agencies and entities.

I commence my analysis of your question with a brief review and explanation of the state use law and its operation. The state use law, the provisions of which appear at R.C. 4115.31–.35, was enacted by the General Assembly in 1976 in order to "improve employment opportunities for blind and severely handicapped individuals." 1975–1976 Ohio Laws, Part I, 916 (Am. S.B. 430, eff. Aug. 13, 1976 (preamble)). As a general matter, that objective is accomplished by a requirement that state agencies and certain political subdivisions and instrumentalities of the state purchase products and services, whenever possible, from qualified nonprofit agencies for the severely handicapped. R.C. 4115.32 creates the State Committee for the Purchase of Products and Services of the Severely Handicapped (hereinafter State Use Committee), and R.C. 4115.33 enumerates the specific duties and responsibilities of the Committee. R.C. 4115.33(A) provides, in part, that the State Use Committee "shall determine the price of all products manufactured and services provided by the severely handicapped and offered for sale to state agencies, political subdivisions, or instrumentalities of the state that the [C]ommittee determines are suitable for use," and, further, "shall revise the prices in accordance with changing cost factors and adopt rules regarding specifications, time of delivery, authorizing a central nonprofit corporation to facilitate the distribution of orders among the participating qualified nonprofit agencies, and relevant matters of procedure necessary to carry out the purposes of [R.C. 4115.31–.35]."[1] *See* R.C. 4115.35 (the qualified nonprofit agencies for the severely handicapped that are certified by the State Use Committee shall create a nonprofit corporation to carry out the intent of R.C. 4115.31–.35, and such corporation "shall assume the responsibility for dissemination of information, preparation of reports, and the development of an approved catalogue of products and services which can be supplied by the qualified nonprofit agencies to be purchased by state agencies, political subdivisions, or instrumentalities of the state"). R.C. 4115.33(B) requires the State Use Committee to approve and distribute to all purchasing officers of state agencies, political subdivisions, and instrumentalities of the state a publication developed by the central nonprofit corporation referred to in R.C. 4115.33(A), "which shall list all products and services produced by any qualified nonprofit agency that the [C]ommittee determines are suitable for procurement" pursuant to R.C. 4115.33(A).

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1 Such rules have been adopted by the State Use Committee, and appear at 6 Ohio Admin. Code Chapters 4115–1 through 4115–7.

The obligation of state agencies, political subdivisions, and instrumentalities of the state to purchase from qualified nonprofit agencies for the severely handicapped the products and services contained in the foregoing procurement list appears in R.C. 4115.34(A) as follows:

> If any state agency, political subdivision, or instrumentality of the state intends to procure any product or service, it shall determine whether the product or service is on the procurement list published pursuant to section 4115.33 of the Revised Code; and it shall, in accordance with rules of the state committee for the purchase of products and services of the severely handicapped, procure such product or service at the price established by the committee from a qualified nonprofit agency, if the product or service is on the procurement list and is available within the period required by that agency, notwithstanding any law requiring the purchase of products and services on a competitive bid basis. Sections 4115.31 to 4115.35 of the Revised Code do not apply in any cases where the products or services are available for procurement from any state agency, political subdivision, or instrumentality of the state and procurement therefrom is required under any law in effect on the effective date upon original enactment of this section.

Pursuant to R.C. 4115.34(A), therefore, a state agency, political subdivision, or instrumentality of the state that intends to procure any product or service must first determine whether the product or service in question is on the procurement list that has been approved and distributed by the State Use Committee. If the product or service does appear on the list, and is available within the time period required by the purchaser, then it must procure the product or service from the appropriate qualified nonprofit agency for the severely handicapped. Further, purchases from the list are to be made notwithstanding any law requiring that the purchase of such products be made on a competitive bid basis. *See also* R.C. 4115.34(C) (reiterating that any competitive bidding requirements and procedures otherwise established under state law need not be utilized in the case of purchases of products and services on the procurement list from qualified nonprofit agencies for the severely handicapped).

Finally, R.C. 4115.31 defines several terms as they are used in R.C. 4115.31–.35. As pertains herein, R.C. 4115.31 states the following:

> (B) "Qualified nonprofit agency for the severely handicapped" means an agency:
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> (1) Organized under the laws of the United States or this state, operated in the interest of severely handicapped individuals, and no part of the net income of which inures to the benefit of any shareholder or other individual;
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> (2) Which is certified as a sheltered workshop or work activity center by the wage and hour division of the United States department of labor;
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> (3) Which complies with the applicable occupational health and safety standards required by the laws of the United States or of this state;
>
> (4) Which in the manufacture of products and in the provision of services, whether or not procured under sections 4115.31 to 4115.35 of the Revised Code, the qualified work shop must employ, during the fiscal year of commodity production or service provision, the severely handicapped at a quota not less than seventy-five per cent of the total man hours of direct labor on all production, whether or not government-related.
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> ....
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> (D) "Political subdivision" means a county, township, village, school district, or special purpose district.
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> (E) "Instrumentality of the state" means any board, commission, authority, public corporation, college, university, or other educational

> institution, or any other entity supported in whole or in part by funds appropriated by the general assembly.[2] (Footnote added.)

See also 1985 Op. Att'y Gen. No. 85-089 at 2-368 (the term "state agency," as used in R.C. 4115.34(A), is appropriately understood as designating a "governmental body or unit that exercises a function of state government on behalf of the state"). *Cf.* R.C. 1.60 (as used in R.C. Title I (state government), "state agency," except as otherwise provided in such title, means "every organized body, office, or agency established by the laws of the state for the exercise of any function of state government").

According to your letter, Ohio Industries for the Handicapped, the central nonprofit corporation that has been organized pursuant to R.C. 4115.35 to facilitate and implement the purposes of the state use law, has been working with both the State Use Committee and sheltered workshops operated by qualified nonprofit agencies for the severely handicapped "to develop new employment training opportunities for persons with disabilities." As a result of those efforts, sheltered workshops are now employing and training disabled persons in many different occupations or areas of work, two of which are the fields of painting and printing. Pursuant to R.C. 4115.34(A), those sheltered workshops are also entering into contracts to perform painting services for various state agencies, and the other units of state and local government that are enumerated in R.C. 4115.31(D) and (E). Those workshops are also entering into contracts, again, pursuant to R.C. 4115.34(A), to furnish printing services to the State of Ohio. To the extent that the work performed by sheltered workshop employees in accordance with the terms of the foregoing painting contracts may constitute the construction of a public improvement for purposes of R.C. 4115.10, you wish to know whether such employees must be paid prevailing rates of wages for such work as is determined by the Department of Industrial Relations under R.C. 4115.04 and R.C. 4115.05. You also wish to know whether prevailing rates of wages must be paid to sheltered workshop employees who are engaged in performing printing services for the State of Ohio insofar as R.C. 125.48 provides that the prevailing wage rate law is applicable to all state printing contracts that are entered into under R.C. Chapter 125. R.C. 125.48(B).

I shall consider first whether prevailing rates of wages must be paid to sheltered workshop employees who perform painting services pursuant to the terms of state use law contracts. Resolution of that question requires that I address, *inter alia*, the specific terms of several provisions of Ohio's prevailing wage rate law, which comprises R.C. 4115.03-.16. R.C. 4115.10 generally prohibits payment of less than the prevailing rate of wages to employees on certain public improvement projects. Thus, R.C. 4115.10(A) reads, in pertinent part, as follows:

> No person, firm, corporation, or public authority that constructs a public improvement with its own forces the total overall project cost of which is fairly estimated to be more than four thousand dollars shall violate the wage provisions of sections 4115.03 to 4115.16 of the Revised Code, or suffer, permit, or require any employee to work for less than the rate of wages so fixed, or violate the provisions of section 4115.07 of the Revised Code.

In turn, R.C. 4115.05 states that the prevailing rate of wages paid to laborers, workmen, or mechanics upon public works "shall not be less at any time during the life of a contract for the public work than the prevailing rate of wages then payable in the same trade or occupation in the locality where such public work is being performed," and that every such contract "shall contain a provision that each laborer, workman, or mechanic, employed by such contractor, subcontractor, or other person about or upon such public work, shall be paid the prevailing rate of

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[2] The Ohio state use law is modeled, in part, upon its federal law analogue, popularly known as the Wagner-O'Day Act, 52 Stat. 1196 (1938), 41 U.S.C.A. §§46-48(c) (1987), as amended. *See* R.C. 4115.33(C).

wages provided [herein]." R.C. 4115.04 further directs the Department of Industrial Relations to determine, in accordance with the terms of R.C. 4115.05, the prevailing rate of wages to be paid to each class of employees that is engaged in constructing a particular public improvement.

By their express terms, therefore, R.C. 4115.04, R.C. 4115.05, and R.C. 4115.10 require payment of prevailing rates of wages to every individual employed by any person, firm, corporation, or public authority that undertakes the construction of a public improvement the total overall project cost of which is fairly estimated to be more than four thousand dollars. Definitional provisions that appear in R.C. 4115.03 provide further guidance with respect to what constitutes construction of a public improvement for purposes of that requirement. R.C. 4115.03 thus states, in pertinent part, as follows:

> (B) *"Construction" means any* construction, reconstruction, improvement, enlargement, alteration, repair, *painting*, or decorating, *of any public improvement* the total overall project cost of which is fairly estimated to be more than four thousand dollars and performed by other than full-time employees who have completed their probationary periods in the classified service of a public authority.
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> (C) *"Public improvement" includes all* buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants, water works, and all other *structures or works constructed* by a public authority of the state or any political subdivision thereof or *by any person who, pursuant to a contract with a public authority, constructs any structure for a public authority of the state or a political subdivision thereof.* (Emphasis added.)

Finally, R.C. 4115.03(A) states, in part, that the term "[p]ublic authority" means any "officer, board, or commission of the state, or any political subdivision of the state, authorized to enter into a contract for the construction of a public improvement or to construct the same by the direct employment of labor, or any institution supported in whole or in part by public funds."[3]

In this instance, therefore, whether prevailing rates of wages shall be paid to sheltered workshop employees will depend, in part, upon whether the painting services those employees perform constitute "construction" of a "public improvement," as those terms are defined in R.C. 4115.03(B) and (C). R.C. 4115.03(B) includes within its definition of "[c]onstruction" not only the initial construction of a public improvement, but also any "painting" thereof. Thus, painting services that are performed by sheltered workshop employees qualify thereunder as "construction." R.C. 4115.03(C) further defines a "[p]ublic improvement" as any such construction that occurs "pursuant to a contract with a public authority," and that is undertaken "for a public authority." Such painting services are, in fact, the subject of contracts that, pursuant to R.C. 4115.34(A), have been negotiated between qualified nonprofit agencies for the severely handicapped and state agencies, political subdivisions, and other instrumentalities of the state. Clearly, the foregoing governmental bodies are "[p]ublic authorit[ies]," as defined in R.C. 4115.03(A), and it is further undisputed that it is for their benefit, and on their behalf, that those painting services are being performed. *See generally* 1987 Op. Att'y Gen. No. 87-007 at 2-34 and 2-35 (discussing several factors that, *inter alia*, may be considered in determining whether particular construction is, for purposes of R.C. 4115.03(C), undertaken "for a public authority").

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[3] The Davis-Bacon Act, 46 Stat. 1494 (1931), 40 U.S.C.A. §§276a-276a-7 (1986 and Supp. 1989), as amended, similarly requires payment of prevailing rates of wages to laborers and mechanics employed in the construction, repair, or alteration of public buildings or public works of the United States or the District of Columbia pursuant to a contract in excess of two thousand dollars. *See* 40 U.S.C.A. §276a(a).

It follows, therefore, that painting services performed by sheltered workshop employees pursuant to the terms of state use law contracts constitute "construction" of a "public improvement" as understood by R.C. 4115.03(B) and R.C. 4115.03(C) respectively. Accordingly, I conclude that such employees are to be paid prevailing rates of wages for such work as is determined by the Department of Industrial Relations under R.C. 4115.04 and R.C. 4115.05. *See generally State ex rel. Celebrezze v. Board of County Commissioners of Allen County*, 32 Ohio St. 3d 24, 27, 512 N.E.2d 332, 335 (1987) ("it is a cardinal rule of construction that where a statute is clear and unambiguous, there is 'no occasion to resort to the other means of interpretation,'" quoting from *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N.E. 574 (1902) (syllabus, paragraph two)).

A similar conclusion follows with respect to your question about state use law contracts for printing services that are to be furnished to the State of Ohio. You have asked whether prevailing rates of wages must be paid by a qualified nonprofit agency for the severely handicapped to its disabled or handicapped employees that perform those printing services, insofar as R.C. 125.48 states that the prevailing wage rate provisions that appear in R.C. 4115.03-.99 are applicable to all printing contracts entered into under R.C. Chapter 125. R.C. 125.48(B). In that regard, R.C. 125.31-.76 address the awarding of contracts by the Department of Administrative Services (DAS) for most public printing that is performed for the State of Ohio. Thus, R.C. 125.31 states that, except for printing for the General Assembly and state-supported institutions of higher education, DAS "shall have supervision of all public printing." R.C. 125.47 further segregates all public printing for the State of Ohio into four classes, and provides that each such class "shall be let in separate contracts" as thereafter delineated in R.C. 125.47(A)-(D). R.C. 125.48 imposes a requirement upon DAS to solicit bid proposals for all such printing contracts, R.C. 125.48(A), and further makes the prevailing wage rate law applicable to those contracts, R.C. 125.48(B). R.C. 125.48 thus reads as follows:

> (A) Biennially, between the first day of June and the first day of August, the department of administrative services shall give notice pursuant to sections 125.07 and 125.08 of the Revised Code that sealed proposals will be received at its office for executing the several classes of public printing, including the necessary binding for the term of two years from the first Monday of October next ensuing for classes one and two printing, and terms not to exceed two years for classes three and four.
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> (B) The department of administrative services, before giving notice that sealed proposals for executing the several classes of public printing will be received, shall have the department of industrial relations determine the prevailing rate of wages of printing tradesmen in the state by locality. Such schedule of wages shall be attached to and made a part of the specifications for such printing and shall be printed upon the bidding blanks. *Sections 4115.03 to 4115.99 of the Revised Code are applicable to all printing contracts entered into under Chapter 125. of the Revised Code.* (Emphasis added.)

R.C. 125.07, to which R.C. 125.48(A) refers, provides, in pertinent part, that all equipment, materials, supplies, and services purchased by DAS shall be purchased through competitive bidding, "except where such equipment, materials, supplies, or services are purchased pursuant to [R.C. 4115.31-.35] or where the amount of such purchase is five thousand dollars or less." Thus, although state use law contracts for public printing for the State of Ohio come under the supervision of and are to be awarded through DAS in accordance with the provisions of R.C. 125.31-.76, such contracts are, pursuant to the foregoing language of R.C. 125.07(A), specifically exempt from the competitive bidding procedures of R.C. Chapter 125 that would otherwise apply thereto. *See also* R.C. 4115.34(A); R.C. 4115.34(C).

Given the language of R.C. 125.48(B) that the prevailing wage rate provisions of R.C. 4115.03-.99 are applicable to all printing contracts entered into under R.C. Chapter 125, it follows that prevailing rates of wages must be paid to disabled or handicapped employees of qualified nonprofit agencies for the severely handicapped that supply printing services to the State of Ohio pursuant to the terms

of state use law contracts. Accordingly, I conclude that a qualified nonprofit agency for the severely handicapped, as defined in R.C. 4115.31(B), is required to pay its disabled or handicapped employees prevailing rates of wages for printing services that those employees perform for the State of Ohio pursuant to the terms of state use law contracts.[4]

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[4] In your request letter and subsequent correspondence you question whether 1978 Op. Att'y Gen. No. 78-033 and 1977 Op. Att'y Gen. No. 77-076 might nonetheless support the opposite conclusion that a qualified nonprofit agency for the severely handicapped is not required to pay its disabled or handicapped employees prevailing rates of wages for painting and printing services that those employees perform pursuant to the terms of state use law contracts. In Op. No. 78-033 my predecessor determined, *inter alia*, that a board of education is not required to pay prevailing rates of wages to vocational education students who, as part of the approved vocational education curriculum, work on construction projects for the benefit of the school district or private third parties. In reaching that conclusion my predecessor stated that the prevailing rates of wages requirement of R.C. 4115.04 and R.C. 4115.05 applied only to employees who could be classified as "mechanics" or "laborers" insofar as the two latter terms specifically appear in both R.C. 4115.04 and R.C. 4115.05. Relying upon his previous statements on this point in Op. No. 77-076, he then reasoned as follows:

> In 1977 Op. Att'y Gen. No. 77-076, I concluded that "[a]n individual practicing a particular trade or occupation qualifies as a laborer, workman or mechanic, as those terms are used in R.C. 4115.04 and R.C. 4115.05, if members of the same trade or occupation are paid wages pursuant to the terms of a collective bargaining agreement or an understanding between employers and bona fide labor organizations." It is my opinion that a vocational education student does not qualify as a mechanic or laborer under this definition. A vocational education student is not practicing a particular trade or occupation other than that of student. While the student does perform many of the functions of the workman or laborer, the scope of his performance is limited to the approved curriculum and the duration of the course.

Op. No. 78-033 at 2-82 and 2-83.

Similarly, you suggest that because they are often being trained in the work they are performing, or are otherwise learning new skills that will eventually lead to more gainful employment, disabled or handicapped workshop employees should be viewed in the same sense as were the vocational education students in Op. No. 78-033, and not as "mechanics" or "laborers," for purposes of applying the prevailing rates of wages requirements of R.C. Chapter 4115. I must, however, respectfully decline the opportunity to extend and apply the reasoning and conclusions of Op. No. 78-033 and Op. No. 77-076 to the present situation. In that regard I am not persuaded that a reasonable statutory basis exists for recognizing a general exception to R.C. Chapter 4115's prevailing rates of wages requirements in the case of employees who are engaged in the construction of a public improvement for a public authority as part of a larger skills training program and who, unlike the vocational education students in Op. No. 78-033, expect, and are entitled to receive, recompense for whatever work they perform. First, no such exception is to be found in the express language of any of the individual provisions of R.C. Chapter 4115. I also find it difficult to infer such an exception from either the references in R.C. 4115.04 and R.C. 4115.05 to "mechanics" and "laborers," or the statements in Op. No. 77-076 regarding the meaning to be accorded those two terms in the case of employees who perform work of a professional or technical nature.

In reaching the foregoing conclusions, I am aware that legislation at both the federal and state level generally authorizes, in the appropriate circumstances, payment of less than the statutorily-prescribed minimum wage to disabled or handicapped employees. The Fair Labor Standards Act of 1938, 52 Stat. 1060 (1938), 29 U.S.C.A. §§201-219 (1978 and Supp. 1990), as amended, establishes minimum wage levels and maximum hour limits for employees in a wide range of industries and occupations. 29 U.S.C.A. §206 (minimum wage); 29 U.S.C.A. §207 (maximum hours). Certain exemptions from compliance with the minimum wage directives of §206 are found in 29 U.S.C.A. §§213 and 214. As pertains herein, 29 U.S.C.A. §214 (Supp. 1990) permits payment of less than the minimum wage, *inter alia*, to handicapped workers, §214(c). Further, pursuant to 29 U.S.C.A. §214(c), the Secretary of Labor has recently adopted new regulations that authorize payment of less than the statutorily-prescribed minimum wage to individuals whose earning or productive capacity is impaired by physical or mental disabilities. Those regulations appear at Title 29 of the Code of Federal Regulations, Part 525 (employment of workers with disabilities under special certificates).

The Ohio General Assembly has similarly enacted legislation, the provisions of which appear in R.C. Chapter 4111, that establishes minimum wage rates for certain Ohio employers and employees. R.C. 4111.02. Ohio law also authorizes payment of less than the minimum wage, as required by R.C. 4111.02, to handicapped or disabled employees. R.C. 4111.06. *See also* 5 Ohio Admin. Code Chapter 4101:9-1.

According to your letter, sheltered workshops in Ohio that participate in the state use law program, in accordance with the directive that appears in R.C. 4115.31(B)(2), have been certified by the Wage and Hour Division of the United States Department of Labor pursuant to 29 U.S.C.A. §214(c) to pay less than the minimum wage to their disabled and handicapped employees. *See also* 5 Ohio Admin. Code 4101:9-1-01(B) ("[a] special license is required to employ handicapped individuals at less than the state minimum wage and until a state license is issued or a federal certificate is obtained a workshop or individual employer has no authority to pay its covered handicapped employees less than the minimum wage"). That a qualified nonprofit agency for the severely handicapped may be certified by the appropriate federal and state authorities to pay its employees less than the minimum wage does not, however, alter the fact that the Ohio prevailing wage rate law is, by its express terms, and without qualification, applicable to the services performed pursuant to the state use law contracts at issue here. Indeed, the single compliance exception explicitly set forth within the state use law itself is that pertaining to the competitive bidding requirements and procedures that otherwise apply to contracts for the purchase of goods and services by state governmental entities. *See* R.C. 4115.34(A); R.C. 4115.34(C). The state use law does not further except the parties to state use law contracts from complying with the terms of Ohio's prevailing wage rate law. Had the General Assembly intended to permit payment of less than prevailing rates of wages to disabled or handicapped employees who furnish labor and other services pursuant to the terms of state use law contracts, it could have made an express statement addressed thereto within the Revised Code, as it has already done in the case of the minimum wage exemption that appears in R.C. 4111.06. Absent a specific directive to that effect from the General Assembly, I cannot, on the basis of the general minimum wage exemptions described in 29 U.S.C.A. §214(c) and R.C. 4111.06, read such an exception into either the state use law or the prevailing wage rate law.

You have also asked whether a conflict may be presented by a requirement that qualified nonprofit agencies for the severely handicapped pay these particular employees prevailing rates of wages pursuant to state law when those agencies have already been certified by the Wage and Hour Division of the United States Department of Labor to pay their employees less than the federal minimum wage; and, if so, which level of pay should be considered controlling. The existence of an actual conflict between the prevailing rates of wages requirements of R.C. Chapter 4115 and the minimum wage exemptions of 29 U.S.C.A. §214(c) would appear to raise the issue of whether the state law requirements are preempted by the federal law authorizations. In that regard, the United States Constitution, art. VI, cl. 2, provides

in part that, "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." Thus, it has been a longstanding principle of law that when state and federal law, and administrative rules and regulations promulgated pursuant thereto, address similar areas of concern, and are found to conflict in their particular pronouncements, the state law provisions are superseded by the federal enactments. *See, e.g., Jones v. Rath Packing Co.*, 430 U.S. 519 (1977) (a state may not enact food labelling requirements that do not permit reasonable weight variations in accuracy resulting from moisture loss during distribution because the state law conflicts with the goal of the federal law to facilitate value comparisons); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) (local government may not regulate aviation in a manner contrary to the national scheme of regulation simply in order to comport with local preferences); *Campbell v. Hussey*, 368 U.S. 297 (1961) (Georgia law that had superseded federal requirements pertaining to the labelling of tobacco products invalidated); 1973 Op. Att'y Gen. No. 73-117 at 2-447 ("[f]ormer Attorneys General have advised that certain [state] statutes conflicted with federal enactments, and therefore were superseded to the extent they were inconsistent"). Whether the enforcement of a state or local law is precluded by a federal enactment on the same subject turns on "[t]he nature of the power exerted by Congress, the object sought to be attained, and the character of the obligations imposed by the law," and whether, under the circumstances of the particular case, the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 70 (1941). State law is preempted by federal law whenever the two schemes inevitably conflict so as to make compliance with both federal and state regulations a physical impossibility or whenever Congress has manifested an intent, express or implied, to displace state regulation in a specific area. *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Northern States Power Co. v. State of Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972). *See also Hayfield Northern Railroad Company, Inc. v. Chicago and North Western Transportation Company*, 467 U.S. 622 (1984); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984).

In this instance, I do not perceive a conflict between a requirement that qualified nonprofit agencies for the severely handicapped pay these employees prevailing rates of wages under Ohio law and the fact that those agencies are also certified by the federal government pursuant to 29 U.S.C.A. §214(c) to pay their employees less than the federal minimum wage. Certainly, the authorizations that appear in 29 U.S.C.A. §214(c)[5] with respect to individuals whose earning or productive capacity is impaired by physical or mental deficiencies permit a qualified nonprofit agency for the severely handicapped to pay its disabled employees less than the federal minimum wage. It does not follow, however, that an agency that is granted such an authorization under §214(c) is thereby mandatorily obligated to pay its disabled or handicapped employees less than the minimum wage in all circumstances, and without regard to higher wage rates that may be prescribed by

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5 29 U.S.C.A. §214(c) reads, in pertinent part, as follows:

> (1) The Secretary, to the extent necessary to prevent curtailment of opportunities for employment, shall by regulation or order provide for the employment, under special certificates, of individuals (including individuals employed in agriculture) whose earning or productive capacity is impaired by age, physical or
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> mental deficiency, or injury, at wages which are—
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> (A) lower than the minimum wage applicable under section 206 of this title,
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> (B) commensurate with those paid to nonhandicapped workers, employed in the vicinity in which the individuals under the certificates are employed, for essentially the same type, quality, and quantity of work, and

other state or federal legislation. Rather, the authorizations set forth in §214(c) simply make available to qualifying employers an exemption from compliance with the federal minimum wage requirements in order to enhance the financial feasibility of hiring disabled workers. Whether a qualifying employer that has availed himself of that exemption actually pays some or all of his disabled employees less than the minimum wage is ultimately left to the employer's discretion. Accordingly, the permissive and discretionary character of the authorizations provided by 29 U.S.C.A. §214(c) tends to refute the notion that there is a conflict between those authorizations and the requirements of Ohio's prevailing wage rate law sufficient to warrant preemption of the Ohio law's application in this particular situation. Additionally, my examination of the minimum wage provisions of the Fair Labor Standards Act of 1938 discloses nothing therein that evidences an unmistakable intent on the part of Congress to displace application of a state law that, in the appropriate circumstances, requires payment of prevailing rates of wages to disabled or handicapped individuals by an employer that has been authorized under 29 U.S.C.A. §214(c) to pay its employees less than the federal minimum wage. *Cf.* 29 U.S.C.A. §218(a) ("[n]o provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter"); *Cosme Nieves v. Deshler*, 786 F.2d 445, 452 (1st Cir. 1986), *cert. denied*, 479 U.S. 824 (1986) ("Section 218(a) simply makes clear that the FLSA does not preempt any existing state law that establishes a higher minimum wage...than the federal statute"). *See generally Siuslaw Concrete Const. v. Washington Department of Transportation*, 784 F.2d 952 (9th Cir. 1986) (holding that a contractor who was required by state statute to pay a minimum wage rate for nonapprentice trainees on federally funded highway construction project higher than that allowed under federal statutes and regulations failed to establish federal intent to occupy the field to the exclusion of any state regulation, or that the state statute was an obstacle to the accomplishment of federal purposes so as to render the state statute preempted by the federal law and regulations). Absent clear and unambiguous evidence to that effect, I must conclude that application of the prevailing rates of wages requirements of R.C. 4115.03-.16 to qualified nonprofit agencies for the severely handicapped that employ disabled or handicapped individuals who perform painting or printing services pursuant to the terms of state use law contracts is not foreclosed or otherwise preempted by the fact that such agencies have been authorized by the Wage and Hour Division of the United States Department of Labor, pursuant to 29 U.S.C.A. §214(c), to pay their employees less than the federal minimum wage prescribed by 29 U.S.C.A. §206.

Given the conclusion that a qualified nonprofit agency for the severely handicapped is required to pay its disabled or handicapped employees prevailing rates of wages for painting or printing services that those employees perform pursuant to the terms of state use law contracts, you have further asked whether the agency must pay those employees the f··ll amount of such wage rates as determined and

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> (C) related to the individual's productivity.
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> (2) The Secretary shall not issue a certificate under paragraph (1) unless the employer provides written assurances to the Secretary that—
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> (A) in the case of individuals paid on an hourly rate basis, wages paid in accordance with paragraph (1) will be reviewed by the employer at periodic intervals at least once every six months, and
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> (B) wages paid in accordance with paragraph (1) will be adjusted by the employer at periodic intervals, at least once each year, to reflect changes in the prevailing wage paid to experienced nonhandicapped individuals employed in the locality for essentially the same type of work.

The language of R.C. 4111.06, which authorizes payment of less than the state minimum wage to disabled employees, is similar to that of 29 U.S.C.A. §214(c).

fixed by the Department of Industrial Relations under R.C. 4115.04, or whether the agency may pay those employees a lesser, proportionate amount of those specific wage rates, which will be calculated to correspond to the diminished productive capacities of those employees. Your question is prompted by the fact that the productive capacities of disabled or handicapped employees, particularly while they are still in training, are usually less than those of able-bodied individuals who are engaged in the same type of work. While I recognize the practical logic inherent in the latter approach, I am constrained to advise you that an employing agency may not elect to pay those employees rates of wages that are less than the prevailing rates established by the Department of Industrial Relations under R.C. 4115.04. Again, I discern nothing within the provisions of either the prevailing wage rate law or the state use law that grants such an option, either expressly or by implication, to an employer of handicapped or disabled individuals.

Finally, I consider it important to reiterate the particular responsibilities conferred upon the State Use Committee by R.C. 4115.33 with respect to the pricing of services rendered by qualified nonprofit agencies for the severely handicapped for purposes of including those services on the Committee's procurement list. R.C. 4115.33(A) provides that the State Use Committee shall determine the price of all products manufactured and services provided by the severely handicapped and offered for sale to state agencies, political subdivisions, or instrumentalities of the state that the Committee determines are suitable for use thereby. The price of a particular product or service is, accordingly, an essential factor that must be examined and evaluated by the State Use Committee in deciding whether such product or service shall be included on the procurement list. The language of R.C. 4115.33 also makes it clear that whether a particular product or service is included on that list is left to the discretion of the State Use Committee. In the exercise of that discretion, however, the Committee must act reasonably lest the Committee's decisions in that regard be susceptible to the charge that they reflect an abuse of discretion and are unlawful. *See generally Jewett v. Valley Railway Co.*, 34 Ohio St. 601, 608 (1878) (where statutory authority to perform an act is granted, and there is no provision governing the manner in which the act is to be performed, the act may be performed in any reasonable manner). The payment of prevailing rates of wages to the disabled or handicapped employees who perform the painting and printing services at issue here will certainly have a significant bearing upon the actual price that state and local government entities will have to pay for those services under state use law contracts. Mindful of the budget constraints that daily confront state and local governments, the State Use Committee may be compelled to conclude that the price of those services when prevailing rates of wages are paid cannot be reasonably accommodated within the budgets of most state agencies and political subdivisions, thus rendering those services unsuitable for inclusion on the Committee's procurement list.

It is, therefore, my opinion, and you are advised that:

1. A qualified nonprofit agency for the severely handicapped, as defined in R.C. 4115.31(B), is required to pay its disabled or handicapped employees prevailing rates of wages for painting services that those employees perform pursuant to the terms of state use law contracts.

2. A qualified nonprofit agency for the severely handicapped, as defined in R.C. 4115.31(B), is required to pay its disabled or handicapped employees prevailing rates of wages for printing services that those employees perform for the State of Ohio pursuant to the terms of state use law contracts.

3. Pursuant to R.C. 4115.33, the State Use Committee, in the exercise of a reasonable discretion, may determine that the cost of painting and printing services purchased by state agencies and local governments pursuant to state use law contracts when prevailing rates of wages are paid for those services makes them unsuitable for inclusion on the Committee's procurement list.