New York State Department of Labor
David A. Paterson, *Governor*
M. Patricia Smith, *Commissioner*

December 11, 2009

[redacted]

Re: Request for Opinion
Frequency of Payments
RO-09-0121

Dear [redacted]

This letter is written in response to your letter of August 21, 2009 in which you request an opinion regarding the timing of payments to employees with the job titles, "Party Chief/Technician III" and "Instrument Person/Technician III". Your letter states that the "Party Chief" must have knowledge of technical standards, surveying methodologies, and standard field and office procedures and that he/she is responsible for data collection, processing field data, making survey computations, field operations, field note reduction, preparation and interpretation of plans, and the supervision of field and office tasks that are performed by other personnel, including the "Instrument Person" and "Rod Person." The "Instrument Person," on the other hand, must have knowledge of technical standards and surveying methodologies, be familiar with taking field notes, reading and preparing maps, applications of field equipment, data collection, processing field data, and computer hardware and software applications. Based on your understanding of *People by Mitchell v. Interborough Rapid Transit Co.*, 169 AD 32 (1st Dep't 1915), and *IKEA U.S. v. Industrial Bd. Of Appeals*, 241 AD2d 454 (2nd Dep't 1997), you assert that such employees are not included in the definition of "manual workers."

Section 191 of the New York State Labor Law regulates how frequently an employee must be paid. As it is relevant to your inquiry, "manual workers" must be paid on a weekly basis, while "clerical and other workers," must be paid according to the terms of their employment agreement and "not less frequently than semi-monthly on regular pay days designated in advance by the employer." Employees employed in a "bona fide executive, administrative or professional capacity whose earnings are in excess of nine hundred dollars a week" must be paid according to the terms of their employment contract. Alternatively, an employer may apply to the Department of Labor for permission to pay manual workers bi-weekly if the company had an average of one thousand employees in New York for the three years preceding the application, or if the company had an

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average of three thousand out of state employees for the three years preceding the application and an average of one thousand employees in New York for the year preceding the application.

To make a definitive determination as to whether an employee may be deemed a "manual worker" under Section 190(4), a "clerical and other worker" under Section 190(7), or an employee employed in a "bona fide executive, administrative or professional capacity," the Department would need to conduct an investigation to determine the actual duties of the employees in question and the information obtained from that investigation would then be applied to the ordinary and usual meaning of the applicable statutory terms. Nonetheless, the Department may issue a general, non-definitive opinion based on the facts as described in your inquiry.

Section 190(4) of the New York State Labor Law defines a "manual worker" as "a mechanic, workingman or laborer." It has been the longstanding interpretation of this Department that an individual who spends more than twenty-five percent of his/her working time engaged in "physical labor" fits within the meaning of the term "manual worker." Furthermore, the term "physical labor" has been interpreted broadly to include countless physical tasks performed by employees.

To be deemed a "clerical or other worker" under New York State Labor Law an employee simply must not be deemed a "manual worker" under Section 190(4), a "railroad worker" under 190(5), a "commission salesman" under 190(6), or an employee employed in a "bona fide executive, administrative or professional capacity." An employee who fits within any of those other definitions is not a "clerical or other worker."

New York State Labor Law 12 NYCRR Section 142-2.14 (4)(iii) establishes the standards used to determine whether an employee may be deemed a professional under New York State Labor Law. Under Subdivision (4)(iii)(a) a professional is defined as one "whose primary duty consists of the performance of work: requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual or physical processes; or original and creative in character in a recognized field of artistic endeavor, and the result of which depends primarily on the invention, imagination or talent of the employee; and (b) whose work requires the consistent exercise of discretion and judgment in its performance; or (c) whose work is predominantly intellectual and varied in character and is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time."

If the "Party Chief" or "Instrument Person" spends more than twenty-five percent of their time engaged in physical labor then they would be considered "manual workers." As noted above the Department interprets physical labor broadly to include many physical tasks and operating field equipment could certainly be considered a physical task. Again, to definitively determine whether twenty-five percent or more of their tasks are physical in nature, the Department would need to ascertain the full scope and extent of the actual duties of the employees in question. If the employees are deemed a "manual worker" then they would need to be paid on a weekly basis as required by Section 191(1)(a) of the New York State Labor Law.

Based upon the information provided in your inquiry, it does not appear that the "Party Chief" or "Instrument Person" must have knowledge "customarily acquired by a prolonged course of specialized intellectual instruction and study," or something similar to the same end, which generally means knowledge acquired through an advanced academic degree; thus, the "Party Chief" and "Instrument Person" would most likely not be deemed to be employed in a "bona fide professional capacity."

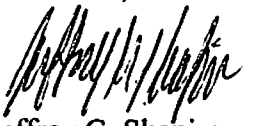
As you can see, the most apparently applicable classifications are that of "manual worker" and "clerical or other worker." A definitive determination of which classification each employee falls within depends on the extent and nature of the office and field work performed by the employees and the extent to which the work involves physical activities. If deemed a "clerical or other worker" then the employee must be paid "in accordance with the agreed terms of employment, but not less frequently than semi-monthly, on regular pay days designated in advance by the employer," and, as stated above, employees must be paid weekly if they are deemed a "manual worker."

As stated above, your letter cites to the decisions in *Mitchell v Interborough Rapid Transit Company*, 169 AD 32 (1st Dep't 1915) and *IKEA v Industrial Board of Appeals*, 241 AD2d 454 (2nd Dep't 1997) for support of your assertion that the surveying staff are not manual workers. While the decision in *Mitchell* assumes that certain types of workers as outside of the meaning of the terms "mechanic, workingman or laborer," the more recent decision in *IKEA* takes note of the fact that the application of the term "manual worker" depends on the employee's principal functions, not merely those that are incidental to their principal employment. (169 AD *supra* 32: 241 AD2d *supra* at 455.) As such, the decision in *Mitchell* - which includes similar job titles to the ones referred to here - is unpersuasive in light of the methodology discussed above since the use of such titles does not automatically place a worker within a particular classification for the purposes of Section 191. A recent decision of the Industrial Board of Appeals confirms the requirement that each employee's *duties*, rather than job title, be looked at in determining his or her classification under Article 6 of the Labor Law. (*See, In re Gary Yorke/Pristine Plumbing*, PR-07-0035 [NYS Industrial Board of Appeals, September 24, 2008], holding, after an extensive analysis, that a plumber was a "manual worker" under Section 191 of the Labor Law.)

This opinion has been provided on the basis of the facts set forth in your letter. A different opinion might result if the circumstances outlined in your letter change, if the facts provided were not accurate, or if any other relevant fact was not provided. If you have any further questions, please do not hesitate to contact me.

Very truly yours,

Maria L. Colavito, Counsel

By: 

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