STATE OF CALIFORNIA GRAY DAVIS, Governor

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May 17, 2000

David Avalos, CCE
President
Golden State Culinary Institute
333 Sunrise Avenue, Suite 400
Roseville, California 95661

Re: Employment Status of Culinary Externs

Dear Mr. Avalos:

This letter is in response to your request for a "formal ruling" with regard to the externship program of the Golden Gate Culinary Institute (hereinafter "GSCI".), and particularly, whether food service operators (restaurants, country clubs, hotels, etc.) that provide externship placements for GSCI students, are required to pay wages to the students during their externship. For clarification, the Division of Labor Standards Enforcement ("DLSE") does not provide "formal rulings" based on written requests. Such rulings or decisions are issued only after a factual hearing on the merits of a particular case. However, DLSE can provide you with a written legal opinion based on the facts presented in an effort to assist you in understanding and applying the current labor laws to your particular inquiry. In that regard, our legal opinion with respect to the employment status of externs is as follows.

You state that as part of the 16 month Associates Occupational Studies in Culinary Arts Program, students spend 18 weeks at selected restaurants, hotels and country clubs in training with these food service operators. The purpose of the 18-week externship is to provide the students an opportunity to acquire practical experience as part of a continuation of their formal education. The supervising chef monitors and evaluates the

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student's training, which evaluations are recorded in the Student's Weekly Training Ledger. We note that under the "Externship" section of GSCI's catalogue, the externship program is described as "Students spend 20 weeks on-the-job in a paid externship in the kitchens of restaurants, hotels, and clubs."

You emphasize that the student does not displace employees of the food service operator. The student returns to GSCI for an additional two terms of classes after completion of the externship. Thereafter, the student receives his or her degree upon successful completion of comprehensive written and practical exams.

Industrial Welfare Commission Order 5, which governs wages and hours worked for restaurant establishments, defines "employ" to mean "to engage, suffer, or permit to work." However, the definition of "suffer or permit" to work was not intended to stamp all persons as employees who, for their own advantage, work without an express or implied compensation agreement. *Walling v. Portland Terminal Company* 330 U.S. 148, 152, 67 S.Ct. 639, 641, 91 L.Ed. 809 (1947)[1].

Economic reality is the test to determine an employment relationship. Factors to be considered in analyzing whether an employment relationship exists under the economic reality test include: (1) whether the student is closely supervised during his or her externship experience; (2) whether records are maintained with respect to the on-hands training received; (3) whether the student's on-hands training activities are directly related to the educational goals; (4) whether the student replaces regular workers; (5) whether or not the student becomes an integral part of the principal activity of the business in which the student extern was placed; and (6) whether the business entity derives any consequential economic benefit from work performed by an individual. *Marshall v. Baptist Hospital, Inc.* (D.C.M.D. 1979) 473 F.Supp. 465 (overruled on other grounds 668 F.2d 234); *Souder v. Brennan* (D.D.C. 1973) 367 F.Supp. 808, 813.

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[1] DLSE adopts federal case law and its interpretation of the Fair Labor Standards Act of 1938, 29 U.S.C.A. § 201, *et seq.*, where such interpretation is not inconsistent with state law.

As an example, in *Marshall, supra,* X-ray students were found to be employees of the hospital and entitled to be paid wages because the students performed administrative and clerical work in addition to their X-ray training, received little or no supervision, displaced regular workers, and functioned as an integral part of the operation of the hospital. Thus, the students' work went beyond a mere training experience which resulted in economic benefit to the hospital. *Marshall, Id.* 473 F.Supp. 471-778.[2] On the other hand, an undergraduate pharmacy program that provides as part of its curriculum a clinical externship program in a hospital or community pharmacy has been construed as not to create an employment relationship for wage and hour purposes due to the educational opportunities the externship program provided to the students. DOL, WH-423 (1997)

Whether an employment relationship exists between a student extern and a business requires a factual analysis on a case-by-case basis. The externship program offered by GSCI entails placement of student externs in a variety of type of restaurant settings, each of which may require different tasks to be undertaken by the externs. For example, if a GSCI student extern in one restaurant performs culinary tasks directly pertinent to his or her education only, is closely supervised, does not displace regular workers, and records are maintained with respect to the extern's work, DLSE would most likely conclude that an employment relationship does not exist and that no wages need to be paid to the extern. Conversely, if another GSCI student extern is placed in a different restaurant establishment where he or she is required to bus tables or wash dishes, DLSE most

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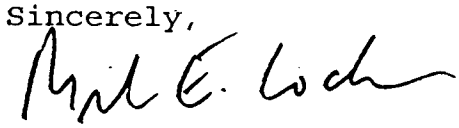
[2] For purposes of workers' compensation insurance, a student medical assistant performing services at a hospital as part of an externship program has been found to be an employee of the hospital. *Barragan v. Workers' Compensation Appeals Board* (1987) 195 Cal.App.3d 637. Based on the *Barragan* case, DLSE would strongly recommend that GSCI confirm that the restaurant establishments at which its externs are placed have in effect valid workers' compensation insurance and that the externs are covered under the restaurants' workers' compensation insurance policies.

probably would conclude that the economic reality of the relationship is that of an employer-employee relationship because the extern's services are not directly related to educational goals but instead, have become an integral part of the restaurant's activities from which the restaurant derives a substantial economic benefit.

Unfortunately, because a separate factual analysis of the nature of the work performed by an extern is required for each restaurant establishment, DLSE cannot provide GSCI with a blanket legal opinion that would encompass each and every externship environment GSCI's externs may encounter. However, DLSE does conclude that current GSCI students would have a reasonable and justifiable expectation that they would be paid for their externship work based on the express provision contained in the GSCI catalogue that the externship is paid.

I trust this letter adequately responds to your inquiry. Thank you for your interest in California labor laws.

Sincerely,



Miles E. Locker
Chief Counsel

MEL:bf
cc: Art Lujan, State Labor Commissioner
Rich Clark, Chief Deputy Labor Commissioner
Tom Grogan, Assistant Chief
Roger Miller, Assistant Chief
Greg Rupp, Assistant Chief
Nance Steffen, Assistant Chief
Andrew Baron, Industrial Welfare Commission