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In the Matter of :
:
ONTARIO ORCHARDS, INC. :
6184 E. Lake Road :
Olcott, New York 14126 :
.....

Case No: 82-WPA-10

DECISION AND ORDER

This is a variance proceeding under the Wagner-Peyser Act, 29 U.S.C. §49 et seq., and pertinent regulations thereunder (20 C.F.R. §654, Subpart E and §658, Subpart E).

STATEMENT OF THE CASE

The Employer above named seeks review of a determination of the Acting Regional Administrator denying Employer's request for a variance from specific housing standards for agricultural workers set forth in 20 C.F.R. §654.411(h).

A hearing having been duly requested, a Notice to Submit Legal Arguments was issued pursuant to 20 C.F.R. §658.424 on September 1, 1982. On November 10, 1982, a formal hearing was held in Buffalo, New York at which all parties had full opportunity to present evidence and argument, as provided in the Act and the Regulations issued thereunder.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Employer requested a variance from the requirements of 20 C.F.R. §654.411(h), which states that "privies shall not be located closer than 50 feet from any living unit or any facility where food is prepared or served."

The record shows that Employer's privy is located 41 feet from a building which contains twelve living units, two showers and a laundry facility. The showers and laundry facility are located in the center of the building, with six living units on each side of this center facility. The privy is located directly behind the center of the building. Employee seeks variances for the two living units closest to the privy; those on either side of the center facilities. While the privy is located 41 feet from the shower and laundry area, it is not directly behind either one of the living units in question. Therefore, the distance from the privy to either one of these units, since it must be measured on the diagonal, would be slightly more than 41 feet (ALJ Ex. 1, TR. 20).

The record also shows that it is the articulated policy of the Employment and Training Administration of the United States Department of Labor to grant a 10% leeway in ruling on variances of this type. Therefore, in order to be in compliance, Employer's privy need be only 45 feet from any living unit (TR. 48, 49).

Employer has obtained variances in past years from both the United States Department of Labor and the New York State Department of Labor (Pet. Ex. 3-5), TR. 12-14, 59). Mr. David L. Dickinson of the New York State Department of Labor made an inspection at the beginning of the 1982 picking season and recommended that the variance request be approved (ALJ Ex. 1, TR. 11).

Employer's privy is constructed of solid concrete, six to six and one-half feet deep, with a capacity of 1500 gallons. A wood-frame building is mounted securely on top. Once a year usually in the spring, the tank is pumped out. It was Employer's testimony that the greatest amount of sewage removed was 250 to 300 gallons. During the picking season when it is in use, hydrated lime is used two or three times a week, as well as a disinfectant (TR 6, 31). The facility is not in use at all during June, July and August; the picking season begins on September 1st and continues until approximately November 15th (TR. 32, 34).

In addition to the sanitation measures taken by Employer with regard to the privy itself, measures are also taken within each living unit to alleviate any problems which may be connected to the use of the privy. Each living unit has a central ventilating system and an air vent with a fan over the stove. Each unit has screens on all windows and the doors, which are inspected every year (TR 38-40). Employer testified that he has never received a complaint from residents of the two units in question with respect to odors or illness (TR 15, 42).

It was the testimony of Mr. John Castellani, Deputy Associate Regional Administrator of the Employment and Training Administration, U.S. Department of Labor, that in granting variances, he looks for a showing that health and safety concerns are being addressed. This could be accomplished either by adjustments to the privy or by adjustments within the living units (TR. 68, 69).

Based upon all of the above facts, it is found that such a showing has been made in the instant case. Precautions have been taken both in regard to the privy itself and in the living units to safeguard the health and welfare of the occupants. It is found that the 4 foot difference between the allowable standard and the actual location of the privy does not pose a danger to the occupants of the two living units in question.

ORDER

In view of the foregoing, it is

ORDERED that the Acting Regional Administrator's denial of the Employer's request for variance be, and the same hereby is, vacated and set aside, and said request is in all respects approved.


EDWARD J. MURTY, JR.
Administrative Law Judge

Dated: **29 DEC 1982**
Washington, D.C.

EJM/ebf

SERVICE SHEET

Case Name: ONTARIO ORCHARDS, INC.

Case No. 82-WPA-10

Title of document: DECISION AND ORDER

A copy of the above-named document was sent to the following on December 29, 1982.


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