

OP. NO. 03-042

**PRISONS AND OTHER METHODS OF CORRECTION: STATE
CORRECTIONAL FACILITIES.**

Director of Department of Corrections may permit prisoners to be trained, housed and paid by private ship-disposal firm to dismantle ships at James River Reserve Fleet site, provided Director receives Governor's prior approval and properly designates site as state correctional facility.

The Honorable David B. Albo
Member, House of Delegates
September 30, 2003

Issue Presented

You ask whether Virginia law authorizes the Department of Corrections to agree to permit convicted persons committed to the custody of the Director of the Department ("prisoner(s)") to be trained, housed and paid by a private ship-disposal firm to disassemble certain obsolete James River Reserve Fleet ships maintained by the Maritime Administration of the United States Department of Transportation.¹

Response

It is my opinion that § 53.1-45.1(A) authorizes the Director of the Department of Corrections to permit prisoners to be trained, housed and paid by a private ship-disposal firm to dismantle the ships at the James River Reserve Fleet site, provided that the Director receives prior approval of the Governor and the Director properly designates the site as a state correctional facility pursuant to § 53.1-19.

Background

You state that the Maritime Administration maintains ships in the James River that are slated for disposal. You also state that a private ship-disposal firm has proposed to enter into an agreement with the Department of Corrections to use prisoners as a major part of the workforce. The private ship-disposal firm will train, house, and pay the prisoners to dispose of the ships at the site of the

James River Reserve Fleet; however, the Department will maintain control and authority over the prisoners.

It is my understanding that the Department of Corrections would require by contract, that procedures consistent with applicable Occupational Safety and Health standards be in place to protect the workers. Moreover, training approved by the Environmental Protection Agency and/or the Virginia Department of Environmental Quality must be conducted prior to commencement of the project so that workers will handle hazardous materials in a safe manner.²

Applicable Law and Discussion

Section 53.1-45.1(A) authorizes the Director of the Department of Corrections to enter into agreements to provide prisoner workers to entities, such as the private ship-disposal firm, to produce goods or services.³ Specifically, § 53.1-45.1(A) provides that "[t]he Director, with the prior approval of the Governor, may enter into an agreement with a public or private entity to operate a work program in a state correctional facility for prisoners confined therein."⁴

Section 53.1-45.1(A) limits the Director's authority with respect to prisoner work agreements by requiring (1) that the Director obtain the Governor's approval to enter into such agreements, and (2) that the work program be operated in a state correctional facility.

The agreement contemplates that the prisoners will be housed and work on site at the James River Reserve Fleet and not in a correctional facility. Operating the work program at the James River Reserve Fleet site would not meet the second requirement that the work program be operated in a state correctional facility. Operating the work program on site would not be fatal to the authority of the Director to enter into the agreement, however, if the James River Reserve Fleet site were designated as a correctional facility. The Director has authority to establish correctional institutions. Section 53.1-19 provides that "[t]he Director, subject to the approval of the Board [of Corrections] and the Governor, shall determine the necessity for and select the site of any new state correctional facility." Thus, if the Director obtains the necessary approvals from the Board of Corrections and the Governor and designates the James River Reserve Fleet site as a correctional facility, the second requirement of § 53.1-45.1(A) can be met.

Conclusion

Accordingly, it is my opinion that § 53.1-45.1(A) authorizes the Director of the Department of Corrections to permit prisoners to be

trained, housed and paid⁵ by a private ship-disposal firm to dismantle the ships at the James River Reserve Fleet site, provided that the Director receives prior approval of the Governor and the Director properly designates the site as a state correctional facility pursuant to § 53.1-19.

¹You also inquire whether, if the private ship-disposal firm houses the prisoners, there are legal restrictions on the Department of Corrections with respect to either direct or contractual operation of the firm as a private correctional facility. Based on supplemental information provided to this Office, it appears that operation by a private prison company of the James River Reserve Fleet project is not an option and that the Department of Corrections would maintain direct authority over the prisoners. Consequently, this question is not addressed.

²Section 53.1-33 requires that a licensed physician determine whether a prisoner engaged in a work assignment has the physical and mental capacity to do the required work.

³See *also* Va. Code Ann. § 53.1-45.1(B) (LexisNexis Supp. 2003) ("Articles produced or manufactured and services provided by prisoners participating in such a program may be purchased as provided in § 53.1-47 and may be bought, sold or acquired by exchange on the open market through the participating public or private entity.").

⁴The ship-disposal process will result in scrap metal that will be sold on the open market. Section 53.1-45.1(B) authorizes the sale of the scrap metal, provided that "[a]rticles produced or manufactured and services provided by prisoners participating in such a program may be ... bought, sold or acquired by exchange on the open market through the participating public or private entity." The agreement also may be subject to federal restrictions on the marketability of prison-made goods, which are designed to protect private business from competition from goods produced by prison labor. The federal restrictions prohibit transportation in interstate commerce of "goods, wares, or merchandise manufactured, produced, or mined ... by ... prisoners." 18 U.S.C.A. § 1761(a) (West 2000). A project may be exempt from these restrictions if, for example, the prisoner workers are paid the prevailing wage for such work, or they participate in benefits, such as workers' compensation, that are available to federal or state government workers. See *id.* § 1761(c)(2), (3) (West 2000).

⁵Wages are not paid directly to the prisoners. Section 53.1-45.1(C) provides:

"The Director shall arrange for compensation for such employment. Wages earned by prisoners shall be paid to the Director who shall deduct from such wages, in the following order of priority, an amount to:

"1. Meet the obligation of any judicial or administrative order to provide support and such funds shall be disbursed according to the terms of such order;

"2. Pay any fines, restitution or costs as ordered by the court; and

"3. Defray a portion of the prisoner's keep.

"The balance shall be credited to the prisoner's account in accordance with § 53.1-42."

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