Opinion No. 58-100

May 17, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Robert F. Pyatt, Assistant Attorney General

TO: Mr. John C. Hays, Executive Secretary, Public Employees Retirement Board, P. O. Box 2237, Santa Fe, New Mexico

QUESTION

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Is employment under the co-operative agreement of July 1, 1923, between the State and the United States, for rodent and predator control, to be credited toward public employees retirement?

CONCLUSION

Yes, under the facts given in the analysis.

OPINION

ANALYSIS

The above agreement, taken in its entirety, constitutes a cooperative venture by the State of New Mexico, through New Mexico College of Agriculture and Mechanics, and the United States Bureau of Biological Survey. By and large, it contemplated a concerted effort to eradicate noxious rodents and predatory beasts. Five project leaders were chosen - three from New Mexico and two from the government. General plans of operation were subject to approval by the college president and bureau chief. Any skins or furs taken by hunters or trappers paid by state funds were to be disposed of in accordance with the agreement, and the proceeds were to be deposited in the state treasury. The party in question, employed in the above project from October 1, 1927 to December 31, 1931, was paid by state warrants. Also, the agreement specifically recognized that **state employees** were working on the project. The State Rodent Inspector was responsible for collection of certain state accounts. Publicity matter in connection with the project was required by the agreement to disclose the cooperative nature of the work. The college president had certain duties of a fiscal nature to perform relative to state funds. The party in question was hired by and was subject to dismissal by the bureau; however, he was not given civil service status, advantages or remedies. Indeed, the bureau did not consider him to be a federal employee.

To summarize, we have a cooperative contract recognizing a large measure of state control. The contract was entered into pursuant to law, to which we now turn.

Secs. 47-16-1, et seq., N.M.S.A., 1953 Comp., authorize the agreement. Sec. 1 made an appropriation to carry out the **state's** share of the project costs, but such was not made directly to the bureau. (Compare Laws 1957, Ch. 235, Sec. 1, p. 538, appropriating $ 75,000.00 **directly** to the U.S. Fish and Wildlife Service for each of the 46th and 47th fiscal years). True, the work of the project was to be carried on under direction of the bureau, Sec. 47-16-1, and the rodent inspector was to work under supervision of the bureau, Sec. 47-16-5. But continuing in the latter section, we find that the inspector, in eradicating rodents, could charge certain landowners with the costs thereof, not exceeding $ .10 per acre, and that such charges could through subsequent action by the county commissioners, become a special levy upon the lands. Obviously, the whole project contemplated by state law recognized a large degree of state activity, and presumably, the activities of state employees.

In Opinion of the Attorney General No. 57-231, we held that payment for one's services by state warrant alone did not make the payee a state employee. We also employed the analogy of employees of independent contractors, and that under the **facts there present,** the employees were not state employees because of supervision by a federal agency. In Opinion of the Attorney General No. 57-291, we held, under the **facts there present,** that authority in a state agency to hire and fire pointed toward state employee status.

Here, however, we are faced with a unique situation of where control and supervision can't be said to rest solely with the United States on the one hand, or New Mexico on the other hand. True, immediate supervision was under a federal agency, and yet policy determination was by a board or group of five leaders, the majority of which were representing the state. State funds were disbursed and deposited by state employees. State funds were appropriated. State taxes were imposed by state officers. To blindly carry the independent contractor analogy forward here, and give a negative conclusion, would not only disregard the law, but would ignore facts, practicalities, and the contract.

Yet another word should be said of the independent contractor analogy. It, of course, rests historically upon a doctrine slowly evolved by the English common law courts to fix certain tort responsibilities. We wonder how far it can be used in a field of modern social legislation such as public employee retirement. For us to give a negative answer means the party in question, for the period of time in question, had no employment which could be credited toward retirement. The federal government did not consider him a federal employee. This office has no power to rule to the contrary. Bearing in mind that most governments of today have retirement plans for public employees, and that statutes dealing with public employee retirement are to be liberally construed, **Jackson** v. **Otis,** 66 Cal. App. 357, 225 P. 890; **Mattson** v. **Flynn,** 216 Minn. 354, 13 N.W. 2d 11, we are very hesitant to hold that the instant situation was not one of state employment. While supervision was, initially, under the bureau, that is but one factor to consider. In our opinion, it is outweighed by other factors reviewed above.

Our opinion rests solely on the instant facts. The two former opinions, cited above, are in no sense overruled.