

Opinion No. 65-111

June 24, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General Oliver E. Payne, Deputy Attorney General

TO: Senator R. C. Morgan, 223 South Main, Portales, New Mexico

QUESTION

FACTS

The owner of a barber shop leases a barber chair to another barber for a fixed amount weekly. The owner gives no orders and exercises no control over the lessee barber. Customers are not directed to certain barbers. The lessee barber keeps all moneys which he receives from the customers and pays therefrom his own social security taxes and occupation tax. In addition, the lessee barber pays school taxes on his own gross receipts.

QUESTION

Under these facts is the owner of the barber shop the "employer" of the lessee barber for purposes of employer contributions under the Unemployment Compensation Act?

CONCLUSION

Not under the facts as stated.

OPINION

{*189} ANALYSIS

Section 59-9-22 (f), N.M.S.A., 1953 Compilation, the definition section of the Unemployment Compensation Law, defines "Employer" in terms of "employing unit." Then turning to the definition of "employing unit" in paragraph (e) of the same section, the statute speaks in terms of persons or entities who have had {*190} individuals in their "employ." Paragraph g (6) states that "**Services** performed by an individual **for wages** shall be deemed to be employment subject to the act unless . . ." "Wages" are defined as "all remuneration for services, including commissions and bonuses and the cash value of all remuneration in any medium other than cash."

It is true as stated by our Supreme Court in **Graham v. Miera**, 59 N.M. 379, 285 P.2d 493, that unemployment security acts are remedial legislation and should be liberally interpreted and that "statutory definitions modify the common law definitions of master

and servant." Nonetheless, statutory definitions are not to be stretched to include as employers those whom the legislature did not decree to be such.

The key phrase in the Act, insofar as an answer to your question is concerned, is "services performed for wages." Under the facts as related to us the lessee barber performs no services for the shop owner; neither does he receive any wages from him. He is an independent contractor acting on his own.

There were two companion Ohio cases decided in 1963 on this same question. The first of these cases (Bailey v. Leach, Ohio, 193 N.E. 2d 165) dealt with a situation where the barbers shared their income with the shop owner. Thus their earnings were dependent upon the amount of work performed by them. The shop owner retained certain control over the barbers in regard to the manner and means of performing the work. Based on these facts the court concluded that the shop owner was an employer under the Unemployment Compensation Act.

The second Ohio case (Bailey v. Leach, Ohio, 193 N.E. 2d 166) dealt with a fact situation where the shop owner exercised no control over the lessee barber, where the rental was a fixed amount and where the lessee barber performed no services directly for the shop owner. Under this set of facts the court concluded that the shop owner was not an employer under the Unemployment Compensation act.

Similar cases have dealt with persons who are in orchestras. Questions have arisen as to whether the hotel or the orchestra leader is the employer. The latter has been held to be the employer because the services are performed for him, are paid for by him and the methods that are to be used in performing the services are controlled by him. **Mowry v. Board of Review of Department of Labor**, Ill., 104 N.E. 2d 280; **In re Jermyn Hotel Co.**, Pa. 58 Dauph 10.

Basing our conclusion solely on the statutory definitions contained in the Unemployment Compensation Act, as **Graham v. Miera**, supra, indicates should be done, we do not believe barbers operating under the plan set forth in the facts perform any services for the shop owner or receive any wages from him. Under such circumstances the shop owner is not an employer of the lessee barber for purposes of the Unemployment Compensation Act.

Re: 63-112

June 24, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General Oliver E. Payne

TO: Office of the Attorney General of New Mexico

{*181} MEMORANDUM OPINION

Acequia and Community Ditch Associations are public corporations (**Candelaria v. Vallejos**, 13 N.M. 146, 81 Pac. 589) and political subdivisions. Attorney General Opinion No. 63-112. Chapter 145, Laws 1965, compiled as Section 75-14-25.1 provides as follows:

"Acequia and community ditch associations are hereby declared to be political subdivisions of this state."

This enactment was simply a legislative declaration of a fact long recognized by the executive branch of state government.

The following list encompasses the actual and de facto community ditch associations in Mora, San Miguel, Colfax and Lincoln Counties:

Coyote River and tributaries

Theodore y Eusibio Romero

Santo Thomas No. 1

Santo Thomas No. 2

Santo Thomas No. 3

R. Torres

Las Cocas

Santa Rita

Montoya

Rainsville

Los Griegos Cr.

Upper Mora River

Los Cruces

Lunas

Las Colonias

Gallina

Leyba

La Jolla

El Rito

Romero

Lovatos y Romero

Lovatos y Raton

Acequia del Media

Romero

Acequia Madre de Holman

Los Martinez

La Morada

Trampero Abajo

Tranpero del Media

La Acequia de Arriba y Sierra de Holman

Canoncito

Encinol

Vallecitos

Cassidy

Encinol

El Alto South

Alto del Talco

Maes y Romero

Martinez

Lucero

Cassidy Mill

El Alto North -- El Medio -- Edge or River

Alto de los Chupaderos

En Medio

Trambley Mill

Navarro

Lower Mora River

Canoncito de la Cueva

La Cueva ditch & storage

Buena Vista

South Golondrinas

North Golondrinas

Sandoval y Weathen

Upper Clyde

Loma Parda

Phoenix

Larrazola

Crowley

Tipton

North Side

Cherry Valley

{*182} **Rio Cebolla**

La Canada y La Aguila

La Bandito-Monte Aplanado

Los Quintanas

La Canada Scca

Murphy Lake

La Isla

San Jose

El Carmen

San Jose Abajo

Sapello-Manuelita Creeks

Acequia del Sombrilla

Rociada Puniente

Ramirez

Rociada Oriente

Jose Doloros Maestos

Paiz Maestas

Acequia de los Martinez

Canancito de la Manuelita

Alcanter

Los Martinez

La Tequa

Manuelita

Rackley

San Ignacio

Acequia del Ojo

Rito Colorado

Acequia de las Tusas

Acequia de los Chimayosas

Davis y Pena

Acequia de Llano

Shallaberger-Placita

La Molina

Wheaton Creek

Piedra Colorada

Manueles Creek

Upper Ditch

Crtiz

South Ditch

Community Ditch

Ocate Creek

Lopez Ditch

Los Le Febres Creek

Sandoval Ditch

Upper and lower Trujillo Ditches

Le Febre

Las Hueras Creek

Upper Ditch

Lower Ditch

Vanderitas Creek

Upper and Middle Garcia

Ditches

Naranjos Community Ditch

Hern Ditch

Rio Ruidoso -- Community Ditches

1. F. Herrera Ditch -- S -- Near Ruidoso
2. Hale Ditch -- S -- Near Ruidoso Downs
3. F. Herrera Ditch -- N -- Near Ruidoso Downs
4. A. Herrera Ditch
5. Avent Ditch
6. Bracken Ditch
7. Maxwell-Hewett Ditch
8. Pope Ditch
9. Allison Ditch
10. F. Sanchez Ditch -- N --
11. F. Sanchez Ditch -- S --
12. M. Sanchez Ditch
13. Mirabal Norman Ditch
14. F. Silva Ditch
15. P. Gonzales Ditch

16. A. Sanchez Ditch (J. Tully)
17. J. Tully Ditch
18. G. Coe Ditch
19. R. Coe Ditch
20. F. Coe Ditch
21. L. Gallegas Ditch
22. Barragan and West Ditch
23. Analla and Barragan Ditch
24. Ambrocio Chaves Ditch
25. Leopoldo Gonzales Ditch
26. Chasas Ditch -- N --
27. Chasas Ditch -- S --
28. F. Sanchez Ditch
29. D. Gallegas Ditch
30. San Patricio Ditch -- Community
31. Mes Ditch
32. F. Hilbern Ditch
- {*183} 33. C. Hilbern Ditch
34. Storm Ditch
35. Ambrocio Chaves Ditch
36. Kirkland Ruidoso Ditch

Rio Hondo

1. P. Chaves Spring Ditch

2. J. and P. Analla Ditch
3. F. and M. Analla Ditch
4. Pas Torres Ditch
5. Analla Spring Ditch
6. Serrano Ditch
7. Josefa Vigil Ditch
8. Casey and Ramon Vigil Ditch
9. Buck Guys Ditch
10. Casey Ditch
11. Picacho Ditch
12. Kline Ditch
13. Montano Ditch
14. Michaelis Ditch
15. Antelope Valley Irrigation District (Springer)
16. Vermejo Conservancy District (Maxwell)