

## Opinion No. 65-120

July 7, 1965

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

**TO:** Louis R. Lopez, Administrative Assistant, Administrative Office of the Courts, Supreme Court Building, Santa Fe, New Mexico

### QUESTION

QUESTION

May justices of the peace be classified as state employees for social security purposes?

CONCLUSION

No, but see analysis.

### OPINION

{\*204} ANALYSIS

It is first necessary to note that the basic social security agreement between the State and the Federal government contains an exclusion for persons who are compensated on a fee basis. Justices of the peace are so compensated.

In Opinion No. 61-50 this office pointed out that while a justice of the peace is a precinct officer for most purposes (**Territory v. Witt**, 16 N.M. 335, 117 Pac. 860), he is to be considered a county officer for social security purposes. This is because a precinct is not a political subdivision within the meaning of the social security law. A precinct is not a separate juristic entity; it is not self governing; it has no corporate existence. Actually precincts were created largely for election purposes.

{\*205} We still adhere to Opinion No. 61-50. We see no way that a justice of the peace could be considered a state officer. However, the 1965 Legislature did provide as follows in Chapter 116, Laws 1965, compiled as Section 36-19-20.

"B. All funds credited to

the justice court revolving fund are appropriated to the administrative office of the courts for: . . .

(5) payment of the employer's share of **any contributions** which may be required for justices of the peace under the Social Security Act, 42 U.S.C. § 401 et seq." (Emphasis added)

Thus if the Federal-State Agreement is modified to extend coverage to persons compensated on a fee basis, employer contributions would be required from the covered counties (not all are under social security). Yet under Chapter 116, Laws 1965, quoted above, there is a legislative mandate that these employer contributions be paid out of the justice court revolving fund. The actual employer, i.e., the county, would report the number of justices, their names and other data required by the Department of Health, Education and Welfare. The employer contributions would be paid directly to the Department by the Court Administrator. We realize this procedure is cumbersome but the legislature did not decree that justices of the peace are state employees for purposes of social security coverage. It decreed only that required employer contributions for justices of the peace be paid from the justice court revolving fund.

Although the procedure discussed above must be employed if the Federal-State agreement is revised to include persons compensated on a fee basis, we should not fail to note important consequences which will result therefrom. For example, as noted previously, social security coverage could be provided only for those who happened to be located in counties which have chosen to participate in the social security program, which would be, as we have been advised, approximately one-half of our thirty-two (32) counties. It would seem at least ill-advised to amend such Federal State agreement until such time as all justices of the peace (who are for all practical purposes similarly situated) could participate either by a classification of justices as state employees by the legislature or an inclusion of all counties. Secondly, the Court Administrator as Director of the Administrative Office of the Courts, a state agency, is exclusively responsible for providing supplies to justices of the peace, issuing regulations to direct the non-judicial operation of these courts, receiving and auditing their monthly reports and remittances, and, preparing vouchers for their remuneration on a per case fee basis. Needless to say, only coincidentally would any one justice of the peace receive the same amount in fees in consecutive months. This means that in order for the actual employer, i.e., the county, to prepare social security reports it must first request all pertinent information from the Administrative Office of the Courts; and further means that there would have to be a recalculation of the employer's contribution to social security monthly because of the varying amounts received by the justices.

Whether or not the above considerations are sufficient to warrant a postponement of any action is a matter to be decided by those persons capable of putting the plan into effect. Obviously, the most expedient manner of handling this problem would be to await legislative action with a view toward promoting a classification of justices of the peace as state officers for purposes of social security.