Opinion No. 64-97

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BY: OPINION OF EARL E. HARTLEY, Attorney General Thomas A Donnelly, Assistant Attorney General

TO: Col. Harold S. Bibo, State Personnel Director, Santa Fe, New Mexico

QUESTION

FACTS

The office of the Adjutant General of New Mexico employs approximately four hundred personnel in maintenance, technical, clerical and fiscal positions throughout the State of New Mexico. These personnel are paid by the Federal Government. Moreover, these personnel are participants in the state Public Employees' Retirement Association program.

QUESTIONS

(1) In view of these employees' eligibility to participate in our State retirement program with Public Employees' Retirement Association, would such personnel likewise be eligible for participation in our State group insurance program?

(2) If it is resolved that these employees are eligible for participation in our State group insurance program, can the state provide the allowed contribution to the total cost of such insurance?

CONCLUSIONS

(1) Such employees are not strictly speaking state employees so as to be eligible to receive contributions from the state for group insurance and may not receive the same, in the absence of express statutory authority so providing.

(2) No.

OPINION

ANALYSIS

The basic question to be resolved is whether or not civilian employees of the Adjutant General paid through funds appropriated by the United States of America and assigned to tasks involving the National Guard of New Mexico, are "eligible employees" to receive contributions from state funds for group insurance participation within the provisions of Section 5-4-12, N.M.S.A., 1953 Compilation. This section sets out in full as follows:

"5-4-12. Group insurance -- Contributions from public funds limited. -- All state departments and institutions and all political subdivisions of the state of New Mexico are hereby authorized to cooperate in providing group or other forms of insurance for the benefit of eligible employees of the respective departments, institutions and subdivisions; provided that the contributions of the state of New Mexico or any of its departments or the political subdivisions of the state shall not exceed twenty per centum (20%) of the cost of such insurance."

Section 5-4-13, N.M.S.A., 1953 Compilation, also provides that the various departments and institutions or political subdivisions of the state are authorized to deduct from such employees' salaries, for the payment of premiums on policies of group insurance.

In our opinion, the authority to make contributions from public moneys of the State of New Mexico for group insurance premiums up to a maximum amount of 20% of the premium cost is limited exclusively to public employees of the state of New Mexico or subdivisions of the state. With this limitation, we must now inquire whether the personnel here in question are in fact public employees of the state or subdivisions of the state, within the contemplation of such statutes.

As indicated in the facts submitted hereinabove, the salaries of such personnel are entirely paid by the federal government. The employees are hired and dismissed by the State Adjutant General subject to regulations and controls imposed by the federal government.

As stated in 32 U.S.C., Section 709, the Secretary of the Army, or the Secretary of the Air Force may promulgate rules and regulations governing the manner by which funds allotted to the Army National Guard or Air National Guard shall be expended, and the amount of compensation which may be expended for employing caretakers and clerical employees serving the various state guard units. Sub-paragraph (f) of this section provides:

"(f) The Secretary concerned shall fix the salaries of clerks and caretakers authorized to be employed under this section, and shall designate the person to employ them. Compensation authorized under this section may include the amounts of the employer's contributions to the retirement systems. Such contributions shall not exceed 6 1/2 per centum of the compensation on which such contributions are based."

Such paragraph authorizes the Secretary to delegate the right to employ and dismiss employees, and we think a plain reading of such section results in the conclusion that the employees are in actuality employees of the federal government, and the right of the federal government to employ such personnel is stated in subsection (f) above. In matter of practice the secretary has delegated this right to hire and discharge to the adjutant general in each state, but this delegation of such authority to a state officer does not divest the federal government from the right to change such authority at any time.

Ordinarily, the controlling criteria for determination of whether or not a person is employed by a particular agency or individual is to ascertain which agency or individual controls the incidents of employment such as hiring and discharging the employee and whether or not the person's salary is paid by the agency or individual in question. Applying these tests to the personnel in question, it is apparent that the federal government is the employer of such personnel, not the state of New Mexico. This is true even though the state receives a direct as well as incidental benefit from the employment of such persons.

In the case of **Washington State National Guard v. Washington Personnel Board** (1963), 379 P. 2d 1002, the issue was litigated to determine whether the state personnel board possessed the authority to review or control the dismissal of air national guard personnel who were technical employees and had civilian status. The Supreme Court of Washington, held that the board lacked such power, stating:

"The federal statutes and regulations which govern the employment of Air Defense Technicians (National Guard), the control of their activities, their transfer and dismissal are completely antithetical to the exercise of any control in those areas by the Washington State Personnel Board."

The court quoted with approval from the case of **United States v. Holly** (C.A. 10th 1951), 192 F.2d 221, where it was held:

"* * * the employment of caretakers for the care and maintenance of material, animals, armament and equipment belonging to the United States and assigned to National Guard organizations. The compensation for these services is paid from funds allotted by the Secretary of the Army for the support of the National Guard under such regulations as the Secretary of the Army may prescribe. The compensation paid to caretakers who belong to the National Guard is in addition to any pay authorized for the members of the National Guard * * *"

The **United States v. Holly** case also held:

"Compensation for overtime work may not be paid from Federal funds. Payment is made on standard forms provided for by the United States. The regulations provide in detail the right of caretakers to annual leave, sick leave and military leave including accumulation of annual and sick leave.

Thus the Federal statute creates the position . . . and generally outlines the duties. The pay for these services is wholly from Federal funds. The regulations define the duties and responsibilities in detail. . . . . Through the State Adjutant General, the Secretary of the Army and the Chief of the National Guard Bureau have complete control over the work of the caretaker, including his employment and discharge. The federal government maintains a reasonable measure of direction and control over the method and means of a caretaker's performing his service. * * *"

The Supreme Court of Washington, in the **Washington State National Guard v. Washington Personnel Board** case concluded that:

"The fact that these Air Defense Technicians were appointed and dismissed by the Adjutant General of the State of Washington, who is a state employee, is beside the point. **In employing and dismissing of technicians, he is acting as an agent of the federal government in a direct line of delegated authority from the Secretary of the Army.** It is an authority an agency with which the Washington State Personnel Board cannot interfere." (Emphasis added)

In line with the above authorities we conclude that the employees under inquiry in fact are federal employees, are hired and dismissed subject to federal law and regulations, and are paid solely through federal funds. This being the case, it is our opinion that they are not "eligible employees" for group insurance premium benefits as provided in Section 5-4-12, supra. See also, Attorney General's Opinion No. 63-109, dated August 23, 1963.

It has been stated that such employees are permitted to enjoy retirement benefits under the Public Employees' Retirement Act of New Mexico. Such authority stems from both express legislation enacted by the state and the federal government. Section 5-5-1, N.M.S.A., 1953 Compilation, of the laws relating to state retirement, sets out that:

". . . 'Employee' means any person, including . . . full time civilian employees employed through direct appointment or designation by the governor as commander-in-chief of the national guard or by the adjutant general, and whose salaries are paid by the United States from funds allocated to the national guard of this state."

32 U.S.C., Section 714 (f) empowers the federal government to pay up to 6 1/2 percent of the salary of personnel for contributions to state retirement programs. This act is further implemented by a Presidential Executive Order, No. 10996, issued by President John F. Kennedy, February 19, 1962. Such executive order expressly retained control over such personnel by the federal government and precluded any state regulations which might unduly burden the administration over or control of such personnel.

Thus, by both federal and state law, civilian personnel paid from federal funds and employed by the National Guard of New Mexico through the authority of the federal government, are permitted to participate in the New Mexico Public Employees' Retirement Law. This precedent, in the absence of express state law so providing, would not, however, be herein controlling or permit such federal employees to obtain insurance benefits under the provisions of Section 5-4-12, N.M.S.A., 1953 Compilation.

Our answer to the first question is also dispositive of the second question presented.