Opinion No. 70-86

November 9, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: Mr. Leonard T. Valdes Administrator Social Security Division P.E.R.A. Building Santa Fe, New Mexico 87501

QUESTIONS

QUESTION

Are county health personnel employed pursuant to Section 12-2-11, N.M.S.A., 1953 Comp., county employees or state employees for the purposes of coverage under the Social Security Act?

CONCLUSION

They are county employees for such purposes.

OPINION

*{*147}* **ANALYSIS**

Several opinions from this office have dealt with the general question of whether county health personnel employed pursuant to Section 12-2-11, N.M.S.A., 1953 Comp., are county employees or state employees. Opinion of the Attorney General No. 60-238, issued December 28, 1960, classified such employees as county employees for the purposes of hiring and firing. Opinion of the Attorney General No. 61-8, issued January 20, 1961, then said that such employees **may,** under certain circumstances, be considered state employees for the purposes of Social Security coverage. Opinion of the Attorney General No. 61-124, issued December 4, 1961, substituted the word "are" for the word "may" in a subsequent discussion of Opinion of the Attorney General 61-8, **supra,** but found that the same employees are county employees for purposes of administering the Vital Statistics Act.

Under the Social Security Act, the term "employee" includes an individual who under the usual common-law rules *{*148}* applicable in determining an employer-employee relationship, has the status of an employee. 42 U.S.C.A. **§** 410 (J). The Social Security Administration has promulgated the following regulation pertinent to the resolution of the status of the county health personnel:

(1) Every individual is an employee if under the usual commonlaw rules the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

(2) Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of an employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing the right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services.

20 C.F.R. **§** 404.1004 (C) (1970). From the above, it is apparent that the employer of the county health personnel is the political entity having final authority to control those individuals in the performance of their work or reserving the right to do so. In reaching this determination, it should be noted that the concept of employment is variable and must be considered in each context. **Flemming v. Huycke,** 284 F.2d 546 (9th Cir. 1960).

This office concluded earlier that under certain circumstances county health personnel may be considered state employees for the purposes of social security coverage. Opinion of the Attorney General No. 61-8, **supra.** That conclusion was based upon two assumptions: first, that the board of county commissioners lacked control over the activities of such individuals, and second, that the board of county commissioners was little more than an employment agency for the State Department of Public Health.

This apparent lack of the element of control by the board of county commissioners over the activities of these individuals is more fanciful than real. Compare **Ringling Bros.-Barnum & Bailey Com. Shows v. Higgins,** 189 F.2d 865 (2nd Cir. 1951), where circus performers were held to be employees of the circus because, although the circus exercised little control over the details of the acts the performers presented, nevertheless, the circus had the power to discharge those performers and, therefore, had the ultimate power of discretion and control over the performers; **Carroll v. Social Security Bd.,** 128 F.2d 876 (7th Cir. 1942), where that court concluded that a receiver appointed by the State Auditor of public accounts and under the State Auditor's discretion as to the details of his work was, for social security purposes in reality an employee of the bank where he performed his services; **State v. Housing Authority,** 254 A.2d 876 (Conn. 1969), where policemen assigned by the city police department to patrol and safeguard city housing authority projects were held to be employees of the housing authority for social security purposes.

The second assumption of Opinion of the Attorney General No. 61-8, **supra,** that the board of county commissioners was little more than an employment agency for the state, is similar to the notion that the board of county commissioners is merely the paymaster of the county health personnel. This contention has been expressly rejected

by the New Mexico Supreme Court. **Board of County Comm'rs v. Department of Pub. Health,** 44 N.M. 189, 100 P.2d 222 (1940).

Section 12-2-11, **supra,** authorizes a board of county commissioners to employ persons in addition to the district health officer to execute properly the health laws. The word "employ" in this section is synonymous with the words "hire" and "appoint" and does not mean "to make use of." *{*149}* **Board of County Comm'rs v. Department of Pub. Health, supra.** Such employment is subject to the approval of the State Director of Public Health, Section 12-2-11, **supra,** but the county health personnel are employed by the board of county commissioners under the express authority of Section 12-2-11, **supra,** and are not, therefore, employed by the state. The salary of these individuals is paid by the county health fund, which is raised at the county level through the levy of a property tax. Section 12-3-35, N.M.S.A., 1953 Comp. The power to employ and to discharge such persons is vested solely in the board of county commissioners. **Board of County Comm'rs v. Department of Pub. Health, supra.** Furthermore, the board of county commissioners has the obligation to provide suitable office space for such persons and to provide for all office and other expenses incurred in enforcing the health laws. Section 12-2-7, N.M.S.A., 1953 Comp. Since the board of county commissioners retains the power to fire, it is equally obvious that they are in a position to control the result of the services rendered.

We now conclude that such county health personnel are employees of the county for purposes of coverage under the Social Security Act. The county has the final authority to control these personnel in the performance of their work. Those portions of Opinion of the Attorney General No. 61-8, **supra,** that are inconsistent with the above discussion are overruled.

By: James C. Compton, Jr.

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