

Opinion No. 80-08

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OPINION OF: Jeff Bingaman, Attorney General

BY: Anthony P. Marquez, Assistant Attorney General

TO: Bernard B. Lopez, Executive Director, New Mexico Arts Division, 113 Lincoln Avenue, Santa Fe, New Mexico 87501

UNEMPLOYMENT COMPENSATION

The New Mexico Arts Division is not liable for unemployment compensation claims by artists participating in the Artists-in-the-Schools Program.

FACTS

Each year the New Mexico arts division awards grants to qualified artists to participate in an Artists-in-the-Schools Program. The artist agrees to devote one half of his time to students in the school and the other one half of his time to the pursuit of his profession. The grants include contributions from federal, state, county or municipal funds. The New Mexico arts division does not exercise any control over the daily activities of the artist or withhold any federal and state taxes from the artist's monthly compensation. Some, but not all, of the grants are administered directly by the schools. The school provides studio space for the artists and both determine the time and place of the artist's daily activities.

QUESTIONS

Is the New Mexico arts division liable for unemployment compensation claims by artists participating in the Artists-in-the-Schools Program?

CONCLUSIONS

No.

ANALYSIS

The New Mexico arts division is established pursuant to Section 18-5-7 NMSA 1978 which states:

"The powers and duties of the arts division of the educational finance and cultural affairs department shall be:

A. to advise and assist public agencies in planning civic beautification;

B. to foster appreciation for the fine arts;

C. to make this state more appealing to the world;

D. to encourage the creative activity in the arts of residents of this state, and to attract to this state's residency additional outstanding creators in the field of fine arts through appropriate programs of publicity, education, coordination and direct activities such as sponsorship of performing and visual arts;

E. to accept on behalf of the state, such donations of money, property or memorials as, in its discretion, are suitable and shall best further the aims of Sections 18-5-1 through 18-5-6 NMSA 1978. The division shall be empowered to accept any additional gifts, contributions or bequests from private persons, corporations, foundations {^{*119}} or agencies or the federal government. Such moneys so gained may be reemployed as part of a revolving fund to be used to further the purpose of Sections 18-5-1 through 18-5-6 NMSA 1978;

F. to make, through its director, rules and regulations necessary to administer the division and as provided by law; and

G. to perform other duties as provides by law."

OPINION

Pursuant to this statutory authority, the arts division administers the Artists-in-the-School Program.

Section 51-1-43 NMSA 1978 provides that individuals in the employ of governmental entities are covered by the Unemployment Compensation Law. Under Section 51-1-44(B) NMSA 1978, the New Mexico arts division is a governmental entity. Moreover, as defined in Section 51-1-42 NMSA 1978, the arts division is an "employer" and the position of artist-in-the-school may be considered an "employment."

Nevertheless, the division is not liable to the artists for unemployment compensation because the artists are not employed by the division. Generally, an employer-employee relationship results "where there is control over physical details such as the manner and method of performance of a contract." **Roybal v. Bates Lumber Company**, 76 N.M. 127, 129, 412 P.2d 555 (1966). In an employer-employee relationship, the employer maintains the right to determine how the work is to be done. **Candelaria v. Board of County Commissioners of Valencia County**, 77 N.M. 458, 423 P.2d 982 (1967). No such relationship exists between the artists and the arts division.

The artists do not perform any services for the arts division. Rather, the division merely brings the artists and the schools together so that the artists may perform their services in the schools. The artists are engaged in professional relationships existing separate

and apart from the division. See, **Europorama, Inc. v. Employment Division**, 539 P.2d 1157 (Ore. 1975).

Under the terms of the various agreements between the arts division, the schools, and the artists, the division does not control or direct the services performed by the artist at any particular school. The artist and the school mutually agree to the time and place where the students and the artist get together. This may vary from school to school. Although the arts division may terminate the agreement on behalf of the school if the results of the artist's work are unsatisfactory, the division does not exercise any control over the manner in which the artist produces or accomplishes that work.

Accordingly, we must conclude that artists participating in the Artists-in-the-Schools Program are not employees of the New Mexico Arts Division and, therefore, are ineligible for unemployment compensation benefits through the division.

ATTORNEY GENERAL

Jeff Bingaman, Attorney General