

## **Opinion No. 81-03**

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**OPINION OF:** Jeff Bingaman, Attorney General

**BY:** Andrea B. McCarty, Assistant Attorney General

**TO:** Mr. Roger W. Crist, Secretary, Corrections & Criminal Rehabilitation Department, 113 Washington Avenue, Santa Fe, New Mexico 87501

### **CORRECTIONAL INSTITUTIONS PUBLIC OFFICERS AND EMPLOYEES RETIREMENT**

Correctional officers and correctional officer specialists are covered under PERA as "state police members" and are also excluded from social security coverage as "policemen."

### **QUESTIONS**

Does Section 10-11-1(J)(1) NMSA 1978 (1980 Repl.) as amended by the 1980 legislature, encompass both correctional officers and correctional officer specialists, and, if so, are these groups, as well, excluded from social security coverage?

### **CONCLUSIONS**

Yes, to both questions.

### **ANALYSIS**

Section 10-11-1(J)(1) NMSA 1978 (1980 Repl.), as amended by the 1980 legislature, states that a "state police member" means ". . . a juvenile or adult correctional officer employed by a corrections facility of the corrections division . . ." Clearly, correctional officers employed by a corrections facility are covered as "state police members" under the Public Employees' Retirement Act. Coverage as a "state police member" entitles that member to state police retirement benefits, which benefits are better than those accorded regular members.

### **OPINION**

Correctional officer specialists perform day-to-day supervision of inmates and other police-type functions which are virtually identical to those performed by correctional officers. According to several officials of the Corrections Department, as well as the State Personnel Director, who was instrumental in reclassifying certain positions to those of correctional officer specialists, correctional officer specialists perform custodial functions which are no different from and no less significant than those performed by

correctional officers. Correctional officer specialists, such as those in prison industries, may supervise 40 to 50 inmates. They perform shakedowns, counts, and are primarily responsible for maintaining security should an incident occur among the inmates when the inmates are working under the supervision of correctional officer specialists. Although it may not be a correctional officer specialist's exclusive task to provide for the security of the institution, a correctional officer specialist's job while in charge of prisoners is to maintain custody, control, and provide for the safe keeping of those prisoners. No correctional officer provides this security while the prisoners are assigned to a correctional officer specialist. Thus a correctional officer {\*208} specialist's responsibility in terms of maintaining custody of prisoners is no less significant than the responsibility to supervise the accomplishment of work by the prisoners. The responsibilities are concomitant at the present time. In **Headley v. Sharpe**, 138 So. 2D 536 (D. Ct. App. Fla. 1962), the court stated:

"The duties of the appellees, in this instance, are primarily the supervision of the city jail and the supervision of the prisoners and their activities during the terms of their confinements. There is no question that these services rendered by the appellees can be classified a police function in that they keep the public peace; that they conserve both life and property, and that their activities are vital to the public welfare of this state, pursuant to Section 185.01, Fla. Stat., F.S.A. Certainly the actual keeping and custody of prisoners confined in a jail is the performance of an inherent and naked police function. **State ex rel. Priest v. Gunn**, Mo. 1959, 326 S.W.2d 314."

According to our information, maintaining custody and control of prisoners in their charge by correctional officer specialists is an integral part of their job in lieu of any other correctional officers to perform custodial tasks. Correctional officer specialists should, therefore, be afforded the same retirement benefits as are presently afforded correctional officers.

With respect to social security coverage, that coverage does not extend to "policemen." The federal social security administration, prior to passage of the 1980 amendment, advised that the proposed amendment to the definition of "state police member" would effect the exclusion from social security coverage of correctional officers. Apparently the legislature intended, by this amendment, to effect the exclusion of correctional officers from social security coverage. The intent of one legislator is reflected in the partial transcript of the House Appropriation and Finance Committee's hearing at which Representative Autrey referred to the exclusion from social security coverage of correctional officers. The intent of the legislature is evidenced by the fact that the legislature did not fund the Corrections Department for FICA expenses attributable to the guards. This apparent statutory determination that correctional officers are "policemen" for purposes of the exclusion from social security coverage is consistent with the **Headley** decision and with Section 33-1-10 NMSA 1978, which provides, in part:

"Uniformed guards of the corrections division shall have the power of peace officers, as regards arrests and enforcement of laws, when upon the premises of a correctional facility under the control of the corrections division . . ."

Unlike positions within other state agencies which have part-time tangential peace officer duties, the correctional officer's position wholly encompasses the duties of a peace officer within the context of the penitentiary. Also, the legislature budgeted training monies which will insure that all correctional officers have comprehensive training comparable to that received by police officers at the New Mexico Law Enforcement Academy. In order to give effect to the legislative intent regarding the amendment to the definition of "state police member," we conclude that the legislature determined that correctional officers are "policemen" within the meaning of state statutes and, {\*209} therefore, intended that they be excluded from social security coverage. Likewise, correctional officer specialists, whose custodial and security duties are virtually identical to that of correctional officers and whose police-type duties are concomitant with the performance of other duties in the nature of supervising the work of prisoners, must also be considered as coming within this legislative classification of "policemen" for purposes of the exclusion from social security coverage.

#### **ATTORNEY GENERAL**

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