Opinion No. 57-291

November 12, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Robert F. Pyatt, Assistant Attorney General

TO: Mr. John C. Hays, Executive Secretary, Public Employees Retirement Board, Santa Fe, New Mexico

QUESTION

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Certain parties were employed by the Department of Game and Fish, and were subject, at all material times, to being discharged by the Director of said Department. Salaries were paid by state warrant. On occasion, these employees were placed under the direction of the United States Fish and Wildlife Service, from time to time, for purposes of eradicating predators. Both the state and federal agencies considered these parties as employees of the Department of Game and Fish. Are they required to comply with the requirements of the Public Employees Retirement Act, and are they entitled to the benefits thereof?

CONCLUSION

Yes, if the employment is under control of the state agency and the payment to the payment to the employee the employee is a state warrant and not a federal warrant.

OPINION

ANALYSIS

Our statement of facts has been gleaned from correspondence from you, the Director of the Department of Game and Fish, and the District Agent of the United States Fish and Wildlife Service, as well as through conferences with you and the Director of the Department of Game and Fish. This opinion assumes the existence of such facts, is conditioned accordingly, and is limited in scope to the foregoing factual situation.

In Opinion of the Attorney General No. 57-231, dated September 13, 1957, this office gave what might appear to be a contrary conclusion than the one herein reached, employing the analogy (and we think correctly so) of employees of an independent contractor and a party for whom the independent contractor undertakes to perform services. Continuing, it was held that the employees are those of the contractor, with the end result that the employees were those of the United States Fish and Wildlife Service, and hence not within the purview of the Public Employees Retirement Act.

Said Opinion No. 57-231 is correct, insofar as it goes, but it should be remembered that the Attorney General there was confronted with the situation of where the parties were employed by the United States Fish and Wildlife Service, and were subject to dismissal by that agency. No. 57-231 must, we now rule, be confined to that situation.

Nonetheless, we believe the independent contractor analogy is employable here. Under these present circumstances, the authority in a state agency to hire and fire removes much of the right of control in the Fish and Wildlife Service (contractor) which seemed to weight heavily in 57-231. Indeed, as we view the facts, we are here confronted with temporary instances of "borrowed" employees, i.e., a "loan" of state employees to the federal agency from time to time, for the purpose above disclosed. While this is admittedly a close case, bearing in mind that the state agency retained the sole right to hire and fire (which necessarily means some control in the state agency), see 35 A.M. Jur., Master and Servant § 541, and equally important the fact that both federal and state agencies considered the parties to be state and not federal employees, we believe an affirmative answer is demanded. We hasten to add, however, that Opinion No. 57-231 of the Attorney General, while limited, and distinguished is certainly not overruled.

The analogies drawn from the general law on master and servant, and independent contractor, while helpful to a certain extent, cannot be said to be controlling here. Close regard must be given to the nature of the statute involved, for basically your query calls for an interpretation of the terms "Public employer" and "Employee" as used in Section 5-5-1, N.M.S.A., 1953 Compilation. Statutes involving retirement of public employees are to be liberally construed, Jackson vs. Otis, 66 Cal. App., 357, 225 P. 890, since they are enacted for the benefit of the public interest, Mattson vs. Flynn, 216 Minn. 354, 13 N.W. 2d 11. Hence, it is not for this office to engraft a limitation upon Section 5-5-1, supra, which the language thereof does not clearly contain.