Opinion No. 61-08

January 20, 1961

BY: OPINION OF EARL E. HARTLEY, Attorney General Norman S. Thayer, Assistant Attorney General

TO: Mr. Paul W. Masters, State Department of Public Health, Santa Fe, New Mexico

QUESTION

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May municipal public health and sanitation personnel, school health personnel, sub-registrars, and county health personnel employed pursuant to Sections 12-2-9 and 12-2-11, N.M.S.A., 1953 Comp., be considered employees of the State Department of Public Health for the purpose of qualifying for Social Security benefits?

CONCLUSION

Yes.

OPINION

ANALYSIS

This opinion is intended to supplement Attorney General's Opinion No. 60-238, December 28, 1960, which held that persons employed pursuant to Section 12-2-11, N.M.S.A., 1953 Comp., are county employees. That opinion dealt only with the status of such persons for purposes of hiring and firing. The case relied on to categorize them as county employees dealt only with the question of who had the power to discharge them. Neither that case nor our opinion was concerned with the status of such employees for purposes of qualifying for Social Security benefits. The concept of employment is variable, and must be considered in its context. For example, the same set of facts could lead to entirely different conclusions if we were considering employment for purposes of workmen's compensation coverage, breach of contract, right to hire and fire, agency and the doctrine of "respondeat superior", jurisdiction and amenability to suit, conspiracy, anti-trust, and criminal laws, or applicability of the National Labor Relations Act. Therefore, this opinion will deal specifically with the status of the named employees for the purpose of qualifying for Social Security benefits as employees of the State Department of Public Health.

Circular E, (Rev. January, 1957) of the Internal Revenue Service, U.S. Treasury Department, includes a discussion of the term "employee" under the Federal Insurance Contributions Act (Social Security), as follows:

"Every individual who performs services subject to the will and control of an employer, **both** as to what shall be done and how it shall be done, is an employee for purposes of these taxes. It does not matter that the employer permits the employee considerable discretion and freedom of action, so long as the employer has the legal right to control both the method and the result of the services.

While not always applicable, some of the usual characteristics of an employee are that the employer has the right to discharge him and that the employer furnishes tools and a place to work.

If the relationship of employer and employee exists, the description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, it is of no consequence that the employee is designated as a partner, coadventurer, agent, or independent contractor. The measurement, method, or designation of compensation is also immaterial. Also, it does not matter whether the individual is employed full or part time. Whether the relationship of employer and employee exists under the usual common law rules will be determined in doubtful cases upon an examination of the particular facts of each case."

With the foregoing quotation as a guide, we will now examine the status and functions of the named employees.

Section 12-2-9, N.M.S.A., 1953 Compilation, authorizes counties to employ Assistant District Health Officers, and authorizes all incorporated municipalities to employ city health officers. All such employment is subject to the approval of the State Board of Public Health. Under Section 12-2-10, N.M.S.A., 1953 Compilation, the authority of the District Health Officers extends to all incorporated and unincorporated areas of their districts, and the enforcement of the state's health laws within the health district is, therefore, subject to the supervision and control of the district health officer. Section 12-2-10, supra, expressly provides that all municipal public health and sanitation personnel, and all school health personnel shall work under the direct supervision and control of the district health officer. Under these statutes, the power to hire and fire, and the duty to pay salaries, still rests with the Board of County Commissioners, the governing body of the municipality, and local board of education, as the case may be. But the duties of such employees are prescribed by the district health officer, who is, in turn, subject to the State Department of Public Health. We feel that this supervision and control, which extends both to what shall be done and how it shall be done, brings these persons within the term "employee" as that term is used in Circular E. In this respect, the local political bodies that actually do the hiring and firing are little more than employment agencies for the State Department of Public Health; once the employment is accomplished, the political bodies have no further power to prescribe the duties and activities of the employees. Therefore, it is our opinion that municipal public health and sanitation personnel, school health personnel, and county health personnel employed under Section 12-2-9, supra, may be considered employees of the State Department of Public Health for purposes of Social Security eligibility.

Section 12-2-11, N.M.S.A., 1953 Compilation (P.S.), authorizes counties to employ additional health officers when the director of public health determines the necessity. Appointment and dismissal of such employees is subject to the approval of the director of public health, and is governed by the merit system rules adopted by the State Board of Public Health. Again, the board of county commissioners is in the position of an employment agency, and can only employ such persons as are designated by the director of public health. While the power to accomplish the formal acts of employment and discharge is unquestionably vested in the respective boards of county commissioners, such boards have no power to determine when they will employ, whom they will employ, or the conditions of employment. Therefore, we are of the opinion that persons employed under Section 12-2-11, supra, may be considered employees of the State Department of Public Health for purposes of Social Security eligibility.

Sub-registrars are appointed by the District Health Officer under the provisions of Section 12-4-1, N.M.S.A., 1953 Compilation. Such appointments are subject to the approval of the State Board of Public Health, their powers and duties are prescribed by the State Board of Public Health, and they hold office at the pleasure of the appointing power. Sub-registrars are compensated on the basis of the number of birth and death certificates received and filed by them. Under Sections 12-4-17, 12-4-18, 12-4-19, 12-4-20, and 12-4-21, N.M.S.A., 1953 Compilation, sub-registrars are paid from county funds, although these funds are required to be deposited with the State Treasurer. Since the power to hire and fire sub-registrars is vested in the District Health Officers and the State Board of Public Health, and sub-registrars are subject to the supervision and control of the State Board of Public Health, it is our opinion that sub-registrars are employees of the State Department of Public Health for all purposes, except that the burden of compensating them is placed on the respective counties.

Because your questions are of such vital importance to so many public employees, and because our opinion does not control the social security administration, we advise that you seek an administrative determination of the status of these employees from the federal Social Security Administration.