Opinion No. 63-09

February 11, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: TO: Mr. Gene W. Harrell Business Manager Eastern New Mexico University Portales, New Mexico

QUESTION

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1. May an organization which is hired by a public university to manage its student dining halls claim the university's exemption from the Unemployment Compensation Act (N..M S.A. 59-9-1 to 59-9-29 (1953)?

2. If the management organization is not exempted from the operation of the Unemployment Compensation Act are the part-time student employees hired by the organization covered by the Act?

CONCLUSION

1. No, but see Analysis.

2. Yes, but see Analysis.

OPINION

*{*22}* **ANALYSIS**

Eastern New Mexico University has entered into a contract with an organization which is to manage all of the E.N.M.U. dining halls. By the terms of the contract the management organization is to furnish all of management, personnel, food, and drink for the operation of the dining hall. The management organization is also required to provide, among other types of insurance, workmen's compensation insurance for what the contract terms "Associated Food Service's employees." At the end of each month the management organization furnishes E.N.M.U with an itemized account of all of its expenditures for the month. E.N.M. U. then reimburses the organization for its expenditures and pays it a fee for management services.

We also understand that the management organization has some full time employees and some student employees. The students are allowed to work in the dining halls whenever their work will impose no burden on their academic endeavors.

At the present time the Employment Security Commission as administrator of the Unemployment Compensation Act is attempting to levy an unemployment compensation tax upon the management organization as an employer. An examination of the applicable statutes and cases indicates that the management organization under certain circumstances is liable for the taxes even though they pass the cost on to E.N.M.U.

N.M.S.A., 59-9-22 (F-1) (1953) defines an employer as:

Any employing unit which within either the current or preceeding calendar year has wages in the amount of $ 450 or more payable for employment during a calendar quarter prior to July 1, 1941, or has paid during a calendar quarter for employment after June 30, 1941, wages in the amount of $ 450 or more; or any employing unit which in each of thirteen (13) different weeks within the current or preceeding calendar year (whether or not such weeks are consecutive) has in employment two (2) or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week);. . .

An employing unit is defined by section 59-9-22(e):

*{*23}* "Employing Unit" means any individual or type of organization, including any partnership, association, trust, estate, jointstock company, insurance company or corporation, whether domestic or foreign. . . which has or subsequent to January 1, 1935 had in its employ one (1) or more individuals performing services for it within this state. . .

It is apparent that the definition of employer, supra, includes the management organization.

Section 59-9-22 (g-7,E&F), however, excludes from the operation of the Unemployment Compensation Act institutions such as E.N.M.U. If E.N.M.U. were to manage its own dining halls, it would not be liable for any unemployment compensation taxes. It may not, however, pass its exemption on to a private management organization which operates the dining halls.

In **Peisker v. Unemployment Compensation Commission,** 45 N.M. 307, 115 P. 2d 62 (1941) the appellant leased lands belonging to the federal government for the purpose of conducting a coal mining operation. Appellant had a contract with the federal government whereby the government would buy all of the coal that he produced. In a declaratory judgment action he sought to recover taxes paid by him to the Unemployment Compensation Commission and to enjoin the Commission from collecting any further taxes from him. Appellant argued that since he mined on federal land and sold all of his products to the federal government he was clothed with the character of a federal instrumentality and therefore exempt from the operation of the Unemployment Compensation Act. The Court rejected his argument.

Clearly appellant conducts a business of his own, in no sense connected with the government, excepting as he, by contract, undertakes to sell his products. It cannot be said that his business is an instrument either created or owned by the government; and this status is not altered by the fact that the coalmining operation is upon lands of the public domain which appellant leases. Appellant is at liberty to sell coal to whomever he pleases if that could make any difference. The fact that his total output is required to supply the government under his contract to sell does not alter the situation. It is also clear that all labor is employed by appellant from the free and open market, and that none of the workers are employees of the government; and that all machinery and equipment used in the business belong to appellant. (311)

The fact that E.N.M.U. is a recipient of the efforts of the management organization and will have to ultimately bear the burden of the tax is not determinative here. Nor does the fact that a service rather than a product is being furnished E.N.M.U. affect the conclusion that the management organization is liable for the tax. In **Buckstaff Bath House Co. v. McKinley,** 358 U.S. 359 (1938), the plaintiff operated a bath house in a federal park under a long term lease from the government. The government supervised very closely the operation of the bath house. When the Arkansas equivalent of the Employment Security Commission attempted to tax the plaintiff he asserted that he was an instrumentality of the federal government and exempt from the tax. The court held him libel for the tax. Mr. Justice Douglas said that this was a private business operated for profit. The mere fact that it operated under a lease with the government did not make it an instrumentality of the government.

We understand that Eastern *{*24}* New Mexico has at times in the past employed part of the personnel to work in the university's dining hall. If Eastern New Mexico University hires the employees who work under the supervision of the management organization, prescribes their hours of work and duties, and pay the employees, then the employees are employees of E.N.M.U. and are exempt from the operation of the Unemployment Compensation Act.

If, however, the management organization is free to hire or discharge the employees, prescribe their hours of work and duties, and pays the employees, subject only to the general supervision of Eastern New Mexico it is liable for unemployment compensation taxes under the principles set forth in **Peisker** and **Buckstaff** cases, supra. The management organization is merely a private business concern which sells a service which benefits the University.

N.M.S.A. 59-9-24 (1953) provides that a part time worker is an individual whose normal work is in an occupation in which his services are not required for the customary scheduled full time hours prevailing in the establishment in which he is employed, or who, owing to personal circumstances, does not customarily work the customary, scheduled full time hours prevailing in the establishment in which he is employed. Subsection B of Section 59-9-24 allows the Employment Security Commission to promulgate rules applicable to part-time workers. In some states part-time student employees are considered to be outside the scope of the unemployment compensation

laws. See Annotation 31 A.L.R. 2d 491. While New Mexico has no legislation which either excludes or includes part-time student employees within the operation of the Act, the Employment Security Commission has for many years administratively included them within the Act under the authority granted them by Section 59-9-24. It therefore appears part-time student employees are included in the operation of the Unemployment Compensation Act.

In summary we must conclude that if the management organization employed by eastern New Mexico University to operate its student dining halls is found to be the employer of the personnel who work in the dining halls, it must pay the unemployment compensation tax levied against it for all the employees which it hires, whether part-time student workers or full time employees. This is true even though E.N.M.U. is the recipient of the services and must ultimately bear the burden of the taxes.

If, however, it is found that the employees who work in the dining halls are employed, discharged, paid, and subject to the control of E.N.M.U. then the employees are employees of E.N.M.U., an organization which is exempt from the Unemployment Compensation Act. Under these circumstances the management organization is not liable for their unemployment compensation taxes. This is true even though the management organization exercises general supervision over the employees as manager of the E.N.M.U. dining halls.

By: Joel M. Carson

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