Opinion No. 81-23

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OPINION OF: Jeff Bingaman, Attorney General

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TO: Thomas E. Baca, Director, Environmental Improvement Division, 725 St. Michael's Drive, Santa Fe, New Mexico 87501

LABOR LAW; HEALTH AND SAFETY; CORRECTIONAL INSTITUTIONS

Synopsis: By providing productive work activity for penitentiary inmates in accordance with the purposes defined in the Corrections Industries Act, the state is not providing employment. Inmates engaged in prison operated industries or enterprises are, therefore, not employees of the penitentiary and are not authorized to file a complaint under the Occupational Health and Safety Act.

FACTS

Under the Occupational Health and Safety Act, Sections 50-9-1 to 50-9-25 NMSA 1978, the Environmental Improvement Division of the Department of Health and Environment is designated as the agency responsible for compelling compliance with the provisions of the Act and the regulations promulgated thereunder. Any "employee" may file a written complaint with the Division alleging hazardous conditions of employment or violations of the regulations. An inmate at the state penitentiary filed such a complaint against the prison industries program which is now conducted at the state penitentiary pursuant to the Corrections Industries Act, Laws 1981, Chapter 127. That Act repealed the Prison Industries Act, Sections 33-7-1 to 33-7-12 NMSA 1978, see Laws 1981, Chapter 127, Section 20, and took effect on June 19, 1981, prior to the filing of the inmate's complaint on July 11, 1981.

Pursuant to the order entered in **Duran v. Apodaca,** U.S.D.C. 77-721-C, "[a]ll prison industries will comply with Occupational Health and Safety Administration (OSHA) or superceding New Mexico standards and will be inspected at least yearly."

QUESTIONS

Is an inmate at the state penitentiary who is "engaged in an enterprise program" other than a "private enterprise," operated pursuant to the Corrections Industry Act, an "employee" for the purposes of filing a complaint with the Environmental Improvement Division pursuant to the Occupational Health and Safety Act?

CONCLUSIONS

No.

ANALYSIS

Although the federal district court has ordered the prison industries program at the penitentiary to comply with standards imposed by the Occupational Health and Safety Act [OHSA], it does not follow that the prison industries program is itself subject to the provisions of OHSA.

OPINION

The purpose of OHSA is "to assure every workingman and woman safety and healthful working conditions." Section 50-9-2. OHSA *{*261}* requires every employer to furnish his employees employment and a place of employment which are free from recognized hazards and are in compliance with health and safety regulations. Section 50-9-5. Any "employee" may file a complaint with the Environmental Improvement Division concerning an alleged violation of regulations or a hazardous condition. Section 50-9-10.

An "employee" is defined by OHSA to mean "an individual, except a domestic employee, who is employed by a employer," and an "employer" is defined to mean "any person who has one or more employees but does not include the United States." Section 50-9-3. Statutory words are presumed to have been used in their ordinary and usual sense unless some other meaning is clearly intended. **State ex rel. Bird v. Apodaca,** 91 N.M. 279, 573 P.2d 213 (1977).

An employment relationship is characterized by four factors - the power to hire, the payment of wages, the power to discharge, and the power to control and direct the performance of the work - the last of which is generally considered to be the most significant. See, 53 Am. Jur. 2d, Master & Servant, Section 2. However, the "control" factor is usually relied upon to distinguish an employee from an independent contractor, see, **Candelaria v. Board of County Commissioners of Valencia County,** 77 N.M. 458, 423 P.2d 982 (1967), and is not determinative of an employment relationship for purposes of an occupational safety and health act, see, **Brennan v. Gilles & Cotting, Inc.,** 504 F.2d 1255 (4th Cir. 1974).

In the context of this question it is necessary to rely instead on the "hiring" factor. An employment relationship implies an agreement, "a request and a contract for compensation." **State v. Deck,** 108 Mo. App. 292, 83 S.W. 314, 315 (1904). Employment must, therefore, involve a voluntary concurrence of the parties which, for example, has been found lacking when a citizen is summoned to perform jury duty. **Lockerman v. Prince George's County,** 281 Md. 195, 377 A.2d 1177 (1977).

Ordinarily, there is no hiring or voluntary agreement when prisoners perform labor at a penitentiary. See, **Watson v. Industrial Commission,** 100 Ariz. 327, 414 P.2d 144 (1966). Indeed, prison inmates can be required by law to work. **Draper v. Rhay,** 315

F.2d 193 (9th Cir. 1963), **cert. denied,** 375 U.S. 915 (1963), **rehearing denied,** 375 U.S. 982 (1964). Thus, the New Mexico Constitution provides at Article XX, Section 15 that

"The penitentiary is a reformatory and an industrial school, and all persons confined therein **shall,** so far as consistent with discipline and public interest, **be employed** in some beneficial industry; and where a convict has a dependent family, his net earnings shall be paid to said family if necessary for their support." [emphasis added]

Similarly Section 4 of the Corrections Industries Act, Laws 1981, Chapter, 127, provides that

"All persons convicted of crime and confined in a facility under the laws of the state except such as are precluded by the terms of the judgment and sentence under which they may be imprisoned **shall perform labor** under such rules and regulations as have been or may hereafter be prescribed by the department." [emphasis added]

Moreover, a prison inmate has no constitutional right to be paid for his labor and such compensation, *{*262}* when given, is provided by grace of the state. **Sigler v. Lowrie,** 404 F.2d 659 (8th Cir. 1968), **cert. denied,** 395 U.S. 940 (1969). Nor does an inmate have a constitutionally protected right to choose his work assignment. **Sowell v. Israel,** 500 F. Supp. 209 (E.D. Wis. 1980).

The fact that inmates are not "hired" to perform labor at a penitentiary has been used to exclude inmates from the benefits afforded "employees" under such laws as workman's compensation. See, **Watson v. Industrial Commission, supra,** and cases cited therein. In **Scott v. City of Hobbs,** 69 N.M. 330, 331, 366 P.2d 854 (1961), the New Mexico Supreme Court explained that so long as the plaintiff's status was "that of a prisoner, there could not exist the employer-employee relationship resulting from a contract of hire as contemplated by the [Workman's Compensation] Act."

The essentially involuntary nature of inmate labor at the penitentiary is not altered by the Corrections Industries Act, which is not intended to create an employment relationship between inmates and the penitentiary. Rather, Section 3 of the Act states that its purpose

". . . is to enhance the rehabilitation, education and vocational skills of inmates through productive involvement in enterprise and public works of benefit to state agencies and local public bodies and to minimize inmate idleness."

The productive work activity fostered by the Act is central to inmates' rehabilitation and plays an important role in preventing idleness, boosting morale, easing tension, reducing discipline problems and effecting an economical prison administration. **Minimum Wages for Prisoners,** 7 Journal of Law Reform 193, Fall 1973.

"Enterprises" established and operated by the penitentiary pursuant to the Corrections Industries Act are thus one means of providing the required productive labor activity for inmates. The Act provides for compensation, working hours and industrial good time deductions for "inmates engaged in enterprise programs," see Sections 8, 9 and 14, but it does not designate the inmates as employees of the state penitentiary. Although Section 13 of the Act provides for the lease of penitentiary property to a "private commercial industry" to establish and operate a "private business enterprise" at which inmates who volunteer for such "employment" may be "employed," these private enterprise provisions do not apply to inmates engaged in state established and operated enterprises at the penitentiary.

In short, by providing productive work activity for penitentiary inmates in accordance with the purposes defined in the Corrections Industries Act, the state is **not** providing employment. See, **Sprouse v. Federal Prison Industries, Inc.,** 480 F.2d 1 (5th Cir. 1973). Therefore, notwithstanding the fact that prison industries, must comply with OHSA standards, inmates engaged in prison operated industries or enterprises are not "employees" of the penitentiary for purposes of filing an OHSA complaint with the Environmental Improvement Division.

ATTORNEY GENERAL

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