MASTER AND SERVANT -- CIVILIAN EMPLOYEES OF THE NATIONAL GUARD -- STATUS --MILITIA

Civilians employed by the Washington National Guard as caretakers and clerks, pursuant to 32 U.S.C.A., sec. 42, are employees of both the state and federal government and therefore are qualified to participate in the state employees' retirement fund.

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January 20, 1954

Lilburn H. Stevens
Major General, AGC, WNG
The Adjutant General
Washington State Military Dept.
Camp Murray
Fort Lewis,
Washington
Cite as: AGO 53-55 No. 193

Dear Sir:

We are now prepared to answer your letter of December 18, 1953, which was previously acknowledged by Mr. Davis. After citing pertinent provisions of the law concerning civilians employed pursuant to the provisions of 32 U.S.C.A. sections 42 and 42a, to care for National Guard property, you ask:

"(1) Are such civilians, (employed pursuant to 32 USCA sections 42 and 42a) employees of the State of Washington, or subdivision thereof, within the meaning of the State Employees' Retirement System?

"(2) If so, are such civilian employees eligible for coverage under the State Employees' Retirement System?

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"(3) If not, are such civilians employees of the Federal Government?

"(4) And if so, are such civilians entitled to participate in the Social Security Old Age and Survivors Insurance benefits?

"(5) If said employees are Federal employees, and not entitled to participate in the State Retirement System, but who are presently contributors to the State Retirement System, do these

employees lose their rights accrued by reason of such contributions during the time that such contributions have heretofore been made while in their present employment?

"(6) If said employees are not and have not been eligible to participate in the State Employees' Retirement System, what disposition should be made of funds heretofore contributed by such employees, and their employer, to the State Employees' Retirement Fund?"

We believe that the persons concerned are employees of the state within the meaning of the State Employees' Retirement Act. Questions (1) and (2) may be answered in the affirmative, thus precluding the necessity of answering the other questions.

ANALYSIS

Membership under the State Employees' Retirement Act is defined by RCW 41.40.120 to:

"* * * consist of all regularly compensated employees and appointive and elective officials of employers as defined in this chapter who have served at least six months without interruption, with the following exceptions: * * *." (Emphasis supplied.)

None of the exceptions are applicable to this case. The term "employer" is defined by the Act in RCW 41.40.010 (4) to mean:

"* * * every branch, department, agency, commission, board, and office of the state and any political subdivision of the state admitted into the retirement system."

There is no provision in the Retirement Act defining employer-employee relationship. Thus, the relationship is the same as that at common law which was known as master and servant. The phrases "employer and employee" and "master and servant" are for our purposes synonymous. Sills v. Sorenson, 192 Wash. 318, 73 P. (2d) 798.

There is a multitude of authority on the question of when one is an employee. The essential elements are set out in section 3 of the article on Master and Servant in American Jurisprudence, as quoted in Aberdeen Aerie No. 24 of Fraternal Order of Eagles v. United States, D.C. Wash., 1943, 50 F. Supp. 734:

"While it is said that at common law there are four elements which are considered upon the question whether the relationship of master and servant exists, --- namely, the selection and engagement of the servant, the payment of wages, the power of dismissal, and the power of the control of the servant's conduct --- the really essential element of the relationship is the right of control --- the

right of one person, the master, to order and control another, the servant, in the performance of work by the latter, and the right to direct the manner in which the work shall be done."

In Washington, as well as in federal courts, the usual test of the employer-employee relationship is the right of control and direction of employer over employee. McCarty v. King Co. Medical Service Corp., 26 Wn. (2d) 660, 175 P. (2d) 653;Skrivanich v. Davis, 29 Wn. (2d) 150; Commissioner of Internal Revenue v. Modjeski, 75 F. (2d) 468;Childers v. Commissioner of Internal Revenue, 80 F. (2d) 27. There are, however, other elements which indicate [[Orig. Op. Page 4]] the existence of the relationship. No one fact or circumstance is conclusive, Washko v. Stewart, 67 P. (2d) 144, 20 Cal. App. (2d) 347; and ordinarily the question is one of fact to be determined from all the circumstances of the case. National Campaign Committee v. Rogan, D.C. Cal., 69 F. (Supp.) 679.

The civilian "caretakers" in question are employed pursuant to the provisions of 32 U.S.C.A. section 42:

"Funds allotted by the Secretary of War for the support of the National Guard shall be available for the purchase and issue of forage, bedding, shoeing, and veterinary services, and supplies for the Government animals issued to any organization, and for animals owned or hired by any State, Territory, District of Columbia, or National Guard organization, not exceeding the number of animals authorized by Federal law for such organization and used solely for military purposes,and for the compensation of competent help for the care of material, animals, armament, and equipment of organizations of all kinds, under such regulations as the Secretary of War may prescribe: * * *." (Emphasis supplied)

and 32 U.S.C.A. section 42a extends this authority to allow employment of "clerical" assistants.

Under the authority of these statutes, National Guard Regulation 75-16 was promulgated on January 7, 1953. Section 2 of this regulation provides:

"National Guard civilian personnel referred to in these regulations are employees authorized under the provisions of Section 90, National Defense Act, for administrative and accounting duties, maintenance, repair and inspection of material, armament, vehicles, and equipment provided for the National Guard and used solely for military purposes. The Secretary of the Army has delegated to the adjutants general of the several States, Territories, Puerto Rico, and the District of Columbia, the authority to [[Orig. Op. Page 5]] employ, fix rates of pay, establish duties and work hours (a minimum of 40 hours per week), supervise, and discharge employees within the purview of these regulations; subject to the provisions of law and such instructions as may from time to time be issued by the Chief, National Guard Bureau."

The regulations further define various classes of workers, establish the number to be employed, set qualifications for the various classes, provide for appointment of workers and the place of their employment, set pay scales and provide other working conditions. These civilians, when employed, are required to execute the standard federal "loyalty oath." They are paid from federal funds budgeted for aid to the National Guard, by warrants drawn upon the Treasury of the United States. Their services consist of caring for the property used by the National Guard. This property is assigned to the Guard, but remains the property of the United States, (32 U.S.C.A. section 32); with accountability on the part of the states (32 U.S.C.A. 47).

These employees seem to fulfill all conditions of being employees of the federal government. The ultimate power to direct and control rests with the Secretary of the Army; true, this power of control is delegated, but the test is the right to exercise the control, rather than actual exercise of it; Bill v. Gattavara, 24 Wn. (2d) 819, 167 P. (2d) 434. The services performed are upon federally owned property, and it is to be presumed that the owner of the property benefits from such services. The ultimate right to hire and fire rests with the Secretary of the Army, and compensation is paid from federal funds. All elements of the employer-employee relationship are present. The Circuit Courts of Appeal have, on two occasions at least, considered the status of these civilian employees and have held them to be federal employees within the purview of the Federal Tort Claims Act, (28 U.S.C.A. 1291 et seq.) U.S. v. Holly, 192 F. (2d) 221; U.S. v. Duncan, 197 F. (2d) 233. However, the Comptroller General has held them to be employees of the several states, with regard to certain provisions for leave accorded federal employees; 12 Decisions of Comptroller General of U.S. 326 (B-1167); 21 Decisions of Comptroller General of U.S. 305 (B-20748).

The National Guard, however, through its officers, also exercises the functions of an employer, so it seems that these persons must not only be employees of [[Orig. Op. Page 6]] the federal government, but also of the state. The National Guard is but that part of the organized state militia that is aided by federal funds, RCW 38.04.010. There can be no doubt that it is an agency of the state, and its officers are officers of the state, so long as the Guard is not in federal service; State v. Johnson, Wisc. 1925, 202 N.W. 191; RCW ch. 38 [[Title 38 RCW]]; 57 C.J.S. 1086.

Ordinarily a servant serves only one master, but his service is not necessarily limited to one master. In the case ofKoontz v. Messer, et al, 181 A. 792, 320 Pa. 487, it was said:

"That a servant of two masters may be acting within the scope of his employment by each at the same instant and in the performance of the same act, and may thereby make both liable, is clear, where both have a right of control over the servant, even though the masters are not joint employers and their purposes do not coincide."

and in the Restatement of Agency, section 226, it is said:

"A person may be the servant of two masters, not joint employers, at one time as to one act, provided that the service to one does not involve abandonment of the service to the other."

It seems that to constitute one a servant of two masters, the same requirements must be fulfilled that would make him a servant of each master. Atlantic Coast Lines Ry. Co. v. Fredway's Adm'x., 120 Va. 735, 93 S.E. 560. In the case of these employees, the state, acting through its adjutant general, possesses a full measure of control over their work, so long as it pertains to property of the National Guard. In any event, the employer-employee relation may be assumed by one who employs another, even though he is an intermediary merely for the purpose of supervising the work,Wyckoff v. Wunder, 119 N.W. 655, 107 Minn. 119, so long as the other elements are present. The adjutant general selects the particular persons to be employed from those classes which possess the necessary qualifications, and he has the power to discharge these employees, a strong indicia of the right of control, Jones v. Goodron, C.C.A., Okla., 121 F. (2d) 176. The actual payment received by these employees is from federal funds, but this does not preclude state employment.

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The relationship of master and servant may exist even though the servant neither expects nor is entitled to any compensation, John Hancock Mutual Life Insurance Co. v. Dorman, C.C.A. Cal., 108 F. (2d) 220; and it may exist between two persons even though the servant's compensation is paid by a third person, Jones v. Goodron, supra. The state remains accountable for the federally owned National Guard property assigned to it, as noted above, so it is benefited to a great extent by the services of these custodial and clerical employees; if it were not for their services, the state would be required to provide its own caretakers at its own expense, as was formerly done. State v. Johnson, supra. It should be noted that the reasoning contained herein seems to be in accord with that of the state legislature. In 1953 it appropriated over $140,000.00 to the Adjutant General's Budget for the employer's contribution to the State Employees' Retirement System because of the employment of the persons here considered.

Thus it seems that these caretakers and clerical employees occupy the rather unusual position of having two employers. They are state employees, and as such, are eligible for membership under the State Employees' Retirement System. From the language of RCW 41.40.120, it is compulsory that they be covered by the System.

Very truly yours,

DON EASTVOLD
Attorney General

KEITH S. BERGMAN
Assistant Attorney General