

OPINION NO. 78-031**Syllabus:**

1. A township police trainee who receives no compensation for his services, who has no regular duty schedule, and who is not a "regular member of a lawfully constituted police force," is not an "employee" for purposes of Worker's Compensation under R.C. 4123.01 (A) (1).
2. A township police trainee who does not qualify as an "employee" under R.C. 4123.01 (A) (1) may nonetheless be covered by the Worker's Compensation system if the township enters into a special contract for such coverage under R.C. 4123.03.
3. Members of a township zoning commission appointed by a board of township trustees under R.C. 519.04, who receive compensation from the township for services actually performed, are "employees" for purposes of the Worker's Compensation system under R.C. 4123.01 (A) (1).
4. Members of a township board of zoning appeals, appointed by the board of township trustees pursuant to R.C. 519.13, who receive compensation from the township for services actually performed, are "employees" for purposes of the Worker's Compensation system under R.C. 4123.01 (A) (1).
5. Where a board of township trustees creates an advisory panel known as a township planning commission, and the formation of such a commission is not authorized by statute, and the members of that commission receive no compensation, then the members are not "employees" for purposes of the Worker's Compensation system under R.C. 4123.01 (A) (1). Coverage for such members may not be obtained by contract under R.C. 4123.03 since the township would not be authorized to expend funds for such a purpose.

To: Stephan M. Gabalac, Summit County Pros. Atty., Akron, Ohio
By: William J. Brown, Attorney General, May 9, 1978

I have before me your request for my opinion which reads, in part, as follows:

A township police district has appointed an individual as an auxiliary officer. Such person receives no salary. Until such time as the individual completes certain specified law enforcement training he remains in such status. Upon successful completion of the required training, he will be appointed a regular officer and will receive a salary. During the period of his auxiliary training, it is desired that he accompany township police officers on routine patrol in order to assist in his familiarization with police duties and his assimilation into the township police force. Is such individual, while

serving in such auxiliary status, covered by Worker's Compensation, Revised Code chapter 4123, for an injury which might befall him while so accompanying regular members of the township police force in the performance of their duties? If such individual is not covered, may the township contract with the Bureau of Worker's Compensation for coverage pursuant to Revised Code section 4123.03?

A second question for resolution is as follows: Are members of a township zoning commission and board of zoning appeals, appointed pursuant to Revised Code sections 519.04 and 519.13, respectively, "persons in the service of the state," as provided in Revised Code section 4123.01 (A) (1), and, therefore, covered by Worker's Compensation? If they are not, may the township contract with the Bureau of Worker's Compensation for such coverage pursuant to Revised Code section 4123.03?

Your opinion is also requested regarding the following question: A township board of trustees has appointed an advisory body known as a planning commission. Such body is distinct and separate from the aforementioned township zoning commission. No statutory authority exists for the creation of such an advisory commission. The members of such body receive no compensation. Are such members covered by Worker's Compensation, and, if not, may the township contract for coverage pursuant to Revised Code section 4123.03?

Before addressing your specific questions, it is necessary to point out the general principles governing the Ohio Worker's Compensation system. R.C. 4123.54 provides, in pertinent part, that:

Every employee, who is injured . . . is entitled to receive . . . compensation for loss sustained on account of such injury . . . as provided by sections 4123.01 to 4123.94 of the Revised Code . . . (Emphasis added.)

"Injury" is defined in R.C. 4123.01 (C) as:

[A]ny injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee's employment. (Emphasis added.)

As you suggest, therefore, the determinative issue is whether the various individuals you describe in your request are "employees" as that word is defined in R.C. 4123.01.

The statutory definition of "employee" set forth in R.C. 4123.01 (A) (1) includes:

(1) Every person in the service of the state, or of any county, municipal corporation, township, or school district therein, including regular members of lawfully constituted police and fire departments of municipal corporations and townships, whether paid or volunteer, and wherever serving within the state or on temporary assignment outside thereof, and executive officers of boards of education, under any appointment or contract of hire express or implied, oral or written, including any elected official of the state, or of any county, municipal

corporation, or township, or members of boards of education; (Emphasis added.)

As with all provisions in the Worker's Compensation laws, this section must be "liberally construed in favor of employees." R.C. 4123.95.

Under the terms of R.C. 4123.01 (A) (1), an individual in the service of the State or the political subdivisions enumerated therein must serve pursuant to an appointment or contract of hire. The Ohio Supreme Court in Coviello v. Industrial Commission, 129 Ohio St. 589 (1935), held that there must be an express or implied contract of hire in order for the relationship of employer and employee to exist under this statutory language. The Court, moreover, in construing the statutory provision then in effect, held that it was impossible for a contract for hire to exist in the absence of an obligation on the part of the employer to pay the employee.

While the tests set forth in Coviello, *supra*, are instructive and vital in determining whether an employer-employee relationship exists under the current provisions of R.C. 4123.01(A)(1), it should be noted that the necessity of payment to the existence of such a relationship has been subsequently limited by the General Assembly. Under the provisions of Am. Sub. H.B. No. 1066, 129 Laws of Ohio 1801, 1961, the definition of employee set forth in R.C. 4123.01(A)(1) was expanded to include regular members of lawfully constituted township police and fire departments, whether paid or volunteer.

Consequently, the fact that township police department members serve as volunteers does not, in itself, prevent otherwise qualified personnel from meeting the definition of "employee" set forth therein. From information you have supplied, however, it is my understanding that the auxiliary trainees in question are not required to adhere to any schedule for performance of their duties, but need only assist officers for a specified number of hours per month. The trainee's function is totally subordinate to those of regular officers and it is my understanding that the trainees function essentially as observers. For these reasons, under even the most liberal imaginable construction of the term "regular member" of a township police department, I must conclude that an auxiliary trainee described in your first question does not qualify as an "employee" under the terms of R.C. 4123.01(A)(1).

It is, however, significant that R.C. 4123.03, the statutory provision which allows the state or one of its political subdivisions to contract for coverage on persons in its service who do not qualify as employees under R.C. 4123.01 (A) (1), specifically includes "volunteer firemen, and auxiliary policemen" among those who will need special coverage. By so providing in this statute, the General Assembly recognized that persons rendering auxiliary services are among those in public service who are not included as "employees." You have asked in your first question whether an auxiliary trainee who is not eligible for coverage under R.C. 4123.01(A)(1) may be covered under R.C. 4123.03, which provides as follows:

If the state or any political subdivision thereof, including any county, township, municipal corporation, school district, and any institution or agency of the state, employs, enlists, recruits, solicits, or otherwise secures the services of any organization, association, or group of persons and the members thereof, including volunteer firemen, and auxiliary policemen and patrolmen, the individual members of which are not, by reason of such service, employees as defined in division (A) (1) of section 4123.01 of the Revised Code, or if the state or any political subdivision thereof desires to secure workers' compensation in respect of any volunteer fireman, policeman, deputy sheriff, marshal or deputy marshal, constable, or other person in its service in the event of the injury, disease, or death of such person while engaged in activities called for by his position but not such as would entitle such person to compensation as an employee

as so defined, subject of the limitations contained in section 4123.02 of the Revised Code, the state or such political subdivision may contract with the industrial commission for coverage of such persons under sections 4123.01 to 4123.94 of the Revised Code, while in the performance of such service. (Emphasis added.)

From this section, it is clear that a person in the service of the state or any of its subdivisions who does not qualify as an employee under R.C. 4123.01 (A) (1) may still participate in the Worker's Compensation system if the subdivision contracts for coverage with the Industrial Commission. In fact, this section specifically contemplates coverage for "volunteer . . . policemen . . ." Therefore, in answer to the second part of your first question, a township police district may obtain coverage for a police trainee ineligible for coverage under R.C. 4123.01(A)(1) by contract with the Industrial Commission under R.C. 4123.03.

Your second question raises a somewhat different problem, for it is my understanding that the officials mentioned in that question do receive compensation from the township for each meeting attended. Under R.C. 4123.01(A)(1), *supra*, it thus appears that members of the township zoning commission and the board of zoning appeals are persons in the service of a township under an appointment or contract of hire, and are thereby "employees."

While normally the relationship of employer and employee for purposes of the Worker's Compensation law requires some control over the manner in which an "employee" performs his duties, 1976 Op. Att'y Gen. No. 76-040, I am convinced that requirement is unnecessary in this particular instance. I reach that result on the basis of R.C. 4123.01(A)(1) itself. The section specifically includes elected officials, and, although the persons on the zoning commission and board of zoning appeals must have autonomy, the township would have no less control over them than over elected officials in performance of their duties. Moreover, under R.C. 519.04 and R.C. 519.13, the statutes under which such commissions and boards are established, the township trustees retain the authority to remove members for cause. Thus, even under a direct control test the members in question are subject to some limited control by the township. Accordingly, I must conclude that members of a township zoning commission, appointed pursuant to R.C. 519.04, and members of a township board of zoning appeals, appointed pursuant to R.C. 519.13, are persons in the service of the township under an "appointment or contract of hire," and are therefore "employees" for purposes of Worker's Compensation under R.C. 4123.01 (A) (1).

Your final question concerns members of a township planning commission. Significantly, the planning commission is strictly advisory, and in fact, no statutory authority exists for the establishment of such a commission. The members receive no compensation. As discussed above, the terms of R.C. 4123.01(A)(1) include even volunteer regular members of township police and fire departments within the definition of "employees." Under the reasoning of *Coviello, supra*, however, the existence of an obligation to pay for services rendered remains a vital element in the existence of an appointment or contract of hire. For this reason, I am constrained to conclude that the members of the township planning commission described in your third question are not employees within the meaning of R.C. 4123.01(A)(1).

You have, however, inquired as to whether such members may be provided coverage under R.C. 4123.03. Members of the planning commission are certainly persons in the service of the township, and under the terms of R.C. 4123.03, *supra*, the members could conceivably obtain coverage through a contract between the township and the Industrial Commission. There is, however, one major obstacle to such a contract. Townships are creatures of statute, and as such they have very limited powers. The limited authority of townships is particularly clear with regard to spending powers. *Yorkavitz v. Board of Township Trustees*, 166 Ohio St. 346 (1957). Whenever there is any doubt as to the township's authority to expend funds, all doubts must be resolved against such an expenditure.

As you indicate, the planning commission is an advisory body whose members receive no compensation. Further, no statutory authority exists for the creation of such a body, and therefore, under the doctrine of limited powers, expressed in Yorkavitz, supra, the township would have no authority to compensate the members of the commission in any way. The problem thus presented is whether the township has the authority to contract for Worker's Compensation for the members, and thereby compensate them indirectly. I am unable to find any authority in support of such a contract, and, keeping in mind the very limited authority of the township trustees to expend township funds, I must conclude that such a contract would be inappropriate. It appears self evident that the township trustees lack the authority to contract for Worker's Compensation for persons whom they would be unable to compensate directly. Therefore, in answer to the second branch of your third question, the township trustees may not contract for Worker's Compensation coverage under R.C. 4123.03 for members of a township planning commission. The situation is distinguishable from the situation of the police trainee in your first question since a township police district could, if it chose to do so, compensate the trainee directly. R.C. 505.49. With a planning commission, no such option exists.

Accordingly, it is my opinion, and you are so advised that:

1. A township police trainee who receives no compensation for his services, who has no regular duty schedule, and who is not a "regular member of a lawfully constituted police force," is not an "employee" for purposes of Worker's Compensation under R.C. 4123.01 (A) (1).
2. A township police trainee who does not qualify as an "employee" under R.C. 4123.01 (A) (1) may nonetheless be covered by the Worker's Compensation system if the township enters into a special contract for such coverage under R.C. 4123.03.
3. Members of a township zoning commission appointed by a board of township trustees under R.C. 519.04, who receive compensation from the township for services actually performed, are "employees" for purposes of the Worker's Compensation system under R.C. 4123.01 (A) (1).
4. Members of a township board of zoning appeals, appointed by the board of township trustees pursuant to R.C. 519.13, who receive compensation from the township for services actually performed, are "employees" for purposes of the Worker's Compensation system under R.C. 4123.01 (A) (1).
5. Where a board of township trustees creates an advisory panel known as a township planning commission, and the formation of such a commission is not authorized by statute, and the members of that commission receive no compensation, then the members are not "employees" for purposes of the Worker's Compensation system under R.C. 4123.01 (A) (1). Coverage for such members may not be obtained by contract under R.C. 4123.03 since the township would not be authorized to expend funds for such a purpose.