OPINION NO. 76-040

Syllabus:

1. Individuals rendering services pursuant to a personal services contract are not "employees" as that term is used in R.C. 124.01(F), and are, therefore, not employees for purposes of sick leave, military leave, leaves of absence, and vacation, all of which are incidents of public employment subject to the civil service laws (R.C. Chapter 124).

2. In the absence of specific provisions in the contract for such benefits, the State has no duty to compensate an individual rendering services under a personal services contract for time served on jury duty, or to pay the cost of hospitalization or health insurance for such individual.

3. The State's responsibility as an employer for purposes of workmen's compensation, unemployment compensation and the withholding of income taxes is based on the existence of an employer-employee relationship, which must be determined on a case to case basis using the common law direct control test.

To: Ned E. Williams, P.E., Director, Ohio Environmental Protection Agency, Columbus, Ohio

By: William J. Brown, Attorney General, May 21, 1976

I have before me your request for my opinion as to whether individuals rendering services to the Environmental Protection Agency pursuant to a personal services contract are entitled, by virtue of the contract, to the following benefits generally associated with state service:

- sick leave
- military leave
- leave of absence
- vacation leave
- jury duty
- hospitalization
- health insurance
- unemployment compensation
- workmen's compensation
- federal tax withholding
- state tax withholding
- city tax withholding

R.C. 124.01(F) defines "employee" for purposes of R.C. Chapter 124 as "any person holding a position subject to appointment, removal, promotion, or reduction by an appointing officer." Individuals rendering services pursuant to a contract are not appointed, removed, promoted or reduced by an appointing officer pursuant to R.C. Chapter 124. Rather, such terms of service are provided by contract. It follows, therefore, that they are not employees under civil service law (R.C. Chapter 124)

With respect to the various benefits itemized in your

request letter it may be noted initially that sick leave, military leave, and leaves of absence are provided for by R.C. Chapter 124, or pursuant to authority granted in that chapter. R.C. 124.38 authorizes sick leave for employees of the state and the political subdivisions. This provision is not applicable to individuals rendering contract services, because such individuals are not employees as defined by R.C. 124.01(E). Similarly, military leave is authorized by R.C. 124.29 which by its terms applies only to certain officers and employees in the civil service under R.C. Chapter 124.

Leaves of absence are provided for in P.L. 21-03, Rules of the Director of Administrative Services, which are adopted pursuant to R.C. 124.09. They may be granted to employees in the classified and unclassified service in accordance with guidelines set out in that rule. Such provisions are, therefore, not applicable to individuals, who are not employees as that term is used in R.C. Chapter 124.

With respect to vacation leave R.C. 121.16 provides such leave for full time state employees. In determining who is a state employee for purposes of R.C. 121.161, it is necessary to consider R.C. 121.14, which authorizes the appointment of such employees "subject to the civil service laws." As discussed above, the definition of "employee" as used in R. C. Chapter 124 (the civil service laws) is stated in R.C. 124.01(F) and does not include individuals rendering services pursuant to a personal services contract. Therefore, such persons are not eligible for vacation leave under R.C. 121.16.

Although the General Assembly has in R.C. 3313.211 granted boards of education specific authority to pay employees compensation for that time when they respond to a summons for jury duty, I find no such provision with regard to the State and its employees.

One of my predecessors, noting that there was no statute in point, nevertheless concluded that the State, as an employer, could not deduct from an employee's regular salary for time spent on jury duty, though a deduction could be made in the amount of any compensation received as a juror. See 1958 Op. Att'y Gen. No. 2512, p. 490. This conclusion was based on a determination that it was the long established administrative practice, and on the rationale that the State, as both employer and summoner, could not treat leaves for jury duty as unauthorized absences, for which deductions from regular compensation could be made.

For authority the opinion relied on R.C. 121.07, which provided in pertinent part that:

> "The director of each department may prescribe regulations for the government of his department, the conduct of its employees, the performance of its business. . . ."

As noted previously, because R.C. 121.14 provides that employment pursuant to R.C. Chapter 121 is to be subject to the civil service laws, the definition of "employee" in R.C. 124.01(F) must be applied in construing the provisions of R.C. Chapter 121 concerning state employees. Because an individual rendering services pursuant to contract is not an employee as defined by R.C. 124.01(F), the reasoning of Opinion No. 2512 is, therefore,

not applicable to such an individual. It is the contract which specifies consideration for services rendered, and, in the absence of a specific statutory provision to the contrary, there is no duty to make payments to an individual rendering contract services for periods when he responds to a summons for jury duty.

Hospitalization and health insurance are fringe benefits, the payment of which on behalf of public officers and employees have long been recognized as compensation. See my discussion of this in 1975 Op. Att'y Gen. No. 75-084, 1975 Op. Att'y Gen. No. 75-014 and 1972 Op. Att'y Gen. No. 72-059. When an individual renders service to the state pursuant to a contract "compensation" is a part of the consideration, which is fixed by the terms of the contract. Therefore, absent a specific statutory provision which requires the payment of such compensation, there is no duty on the part of the state to pay for such benefits, or even to provide for them in the terms of the personal services contract.

The definition of "public employee" provided by R.C. 124.01(F) for civil service purposes does not, of course, control all programs related to public employment. As I noted in 1975 Op. Att'y Gen. No. 75-075, the definition in R.C. 145.01(A) of "public employee" for purposes of inclusion in the Public Employees Retirement System is much broader and includes persons performing services under the direction of an employer. R.C. Chapter 145 reflects the traditional common law test of direct control as the criteria to be used in determining whether a worker is an employee or an independent contractor.

Similarly the direct control test has been used in one form or another to determine who is an "employee" for purposes of unemployment compensation, workmen's compensation, and the withholding of taxes.

R.C. 4141.01(B)(1) defines "employment" as follows for purposes of the statutes governing unemployment compensation:

> "(B)(1) 'Employment' means:
>
> (a) Service performed for wages under any contract of hire, written or oral, express or implied, including service performed in interstate commerce and service performed by an officer of a corporation, without regard to whether such service is executive, managerial, or manual in nature, and without regard to whether such officer is a stockholder or a member of the board of directors of the corporation;
>
> (b) Services performed by an individual for remuneration unless it is shown to the satisfaction of the administrator that such individual:
>
> (i) Has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact;
>
> (ii) That such service is outside

> the usual course of the business for which service is performed; and
>
> (iii) That such individual is customarily engaged in an independently established trade, occupation, profession, or business."

With respect to workmen's compensation under R.C. Chapter 4123, R.C. 4123.01(A) defines an employee. That subsection reads in part:

> "(A) 'Employee ' 'workmen,' or 'operative' means:
>
> (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.)

The Supreme Court, in considering whether a person was an "employee" for purposes of workmen's compensation, or merely an independent contractor, has followed the direct control test. Behner et al v. Industrial Comm., 154 Ohio St. 433 (1951), Bobik v. Industrial Comm., 146 Ohio St. 187 (1946). In Councell v. Douglas, 163 Ohio St. 292, 295 (1955), the Court quoting from Miller v. Metropolitan Life Insurance Co. 134 Ohio St. 289, 291 (1938) stated:

> "The relation of principal and agent or master and servant is distinguished from the relation of employer and independent contractor by the following test: Did the employer retain control or the right to control the mode and manner of the work contracted for? If he did, the relation is that of principal and agent or master and servant. If he did not but is interested merely in the ultimate result to be accomplished, the relation is that of employer and independent contractor."

Therefore, in determining the responsibility of the State, as an employer for purposes of R.C. Chapter 4123 (workmen's compensation) or R.C. Chapter 4141 (unemployment compensation), it is necessary to consider whether an individual performing services under a personal services contract is by terms of the contract, and in practice, an employee or an independent contractor. This determination by its nature must be made on a case by case basis using the direct control test.

The withholding of federal income tax is provided for in

26 U.S.C. 3401 et seq. Section 3401, provides the following definitions of "employee" and "employer":

> "(c) Employee--For purposes of this chapter, the term 'employee' includes an officer, employee, or elected official of the United States, a State, Territory, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing. The term "employee" also includes an officer of a corporation.
>
> "(d) Employer--For purposes of this chapter, the term 'employer' means the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person, except that--
>
> (1) if the person for whom the individual performs or performed the services does not have control of the payment of the wages for such services, the term 'employer' (except for purposes of subsection (a) means the person having control of the payment of such wages, and
>
> (2) in the case of a person paying wages on behalf of a non-resident alien individual, foreign partnership, or foreign corporation, not engaged in trade or business within the United States, the term 'employer' (except for purposes of subsection (a) means such person."

The courts in construing the obligations imposed by this statute on employers have used the direct control test to decide whether an employer-employee relationship exists. McGuire v. United States, 349 Fed. 644 (1965); R. & H. Corporation v. United States, 255 F. Supp. 870 (D.C. Pa. 1966). In McGuire v. United States, supra, the Court stated at p. 646:

> "Generally, right to control and direct the specific manner in which an individual works toward the desired end product of his work is the fundamental element of the employee-employer relationship; but where doubt exists as to the nature of the relationship, courts must look to the particular facts of each case. The total situation of the parties is controlling."

Therefore, in the case of an individual working under a personal services contract, a mere disclaimer in the contract of any responsibility for withholding taxes is not necessarily determinative of the question. Rather it is necessary to consider the circumstances of each contract, including the specific provisions for the payment of compensation, to determine whether there is an employer-employee relationship,

with the State as the employer, under 26 U.S.C. 3401(d), for purposes of withholding.

With respect to the state income tax, R.C. 5747.06(A) imposes the duty to withhold taxes on every "employer, including the state," who makes payment of any compensation to an employee who is a taxpayer. While R.C. Chapter 5747 does not define "employer" or "employee," R.C. 5747.01 provides that, absent an express definition, terms used in R.C. Chapter 5747 are to have the same meaning as when used in a comparable context in the Internal Revenue Code and other statutes of the United States relating to federal income taxes. Therefore, the same test may be applied to the duty to withhold state income taxes as is the case with federal income taxes.

R.C. Chapter 718, which relates to municipal income tax, contains no provisions concerning the withholding of such taxes. Therefore, in the absence of a statute specifically requiring employers to withhold a municipal income tax, it is necessary to look to the laws of each municipal corporation to determine an employer's duties.

In specific answer to your question, it is, therefore, my opinion and you are so advised that:

1. Individuals rendering services pursuant to a personal services contract are not "employees" as that term is used in R.C. 124.01(F), and are, therefore, not employees for purposes of sick leave, military leave, leaves of absence, and vacation, all of which are incidents of public employment subject to the civil service laws (R.C. Chapter 124).

2. In the absence of specific provisions in the contract for such benefits, the State has no duty to compensate an individual rendering services under a personal services contract for time served on jury duty, or to pay the cost of hospitalization or health insurance for such individual.

3. The State's responsibility as an employer for purposes of workmen's compensation, unemployment compensation and the withholding of income taxes is based on the existence of an employer-employee relationship, which must be determined on a case to case basis using the common law direct control test.