

1651

EMPLOYES—PERSONS HIRED TO TYPE REPORTS OF EXAMINATIONS MADE BY STATE EXAMINERS FOR BUREAU OF INSPECTION AND SUPERVISION OF PUBLIC OFFICES—NOT “INDEPENDENT CONTRACTOR”—EMPLOYES, STATE OF OHIO—SUBJECT TO CLASSIFICATION AND OTHER PROVISIONS OF SECTION 486-7a ET SEQ., G. C.

SYLLABUS:

The persons hired to type the reports of examinations made by state examiners for the Bureau of Inspection and Supervision of Public Offices are not “independent contractors” but are “employees” of the state of Ohio, and as such are subject to the classification and other provisions of Section 486-7a et seq. of the General Code.

Columbus, Ohio, April 12, 1950

Hon. Joseph T. Ferguson, Auditor of State of Ohio
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"This office for many years has engaged several girls to type the reports of examinations made by state examiners, and has compensated each typist on the basis of a certain specific amount for each typed page. On the completion of the typing of each particular report, each girl submits to the Bureau of Inspection and Supervision of Public Offices a bill, or statement, showing the number of typed pages or total charge against the particular subdivision.

"All the facilities and equipment of the Bureau are available to the typists and the work is done in such office. No regular hours of work are established or maintained, and the Auditor of State does not exercise supervision over the typists from the standpoint of discipline or the general supervision that is exercised over other employes in such Bureau. Each typist, when retained, is not required to execute any forms or application for presentation or approval to the State Civil Service Commission. It has been the practice in the past to compensate the typists in the following manner: The amount due each girl is computed and vouchered in substantially the same manner as a payroll is prepared and submitted through the Civil Service Commission and the Department of Finance, and a warrant is drawn to each girl, chargeable against the Bureau of Inspection Rotary Fund. This fund is subsequently reimbursed by payments received from the subdivisions for the typing costs. Deductions are made from the amount due each girl for income tax payments and amounts payable to the Public Employes Retirement System.

"The foregoing is presented as a brief resume' of the manner in which the typists have been employed and paid in the past covering a period of many years. Each report to be typed has been considered a distinct project and the amount of projects available depends on the number of reports submitted by various state examiners. The amount of work that may be allocated or available to each typist may be very irregular at times, depending on the quantity of available reports and even at times, several of the typists may not be called upon to do any work because of the lack of reports.

"In the light of the foregoing, your opinion is requested as to whether or not the Auditor of State may contract with various

persons to type the reports of the state examiners and to reimburse such individuals on a project basis, namely, so much per page for each report typed; or, is the Auditor of State required by law to employ personnel to type such reports who are subject to the provisions of G. C., Section 486-7a, et seq., requiring the classification of such personnel and the payment to them on a monthly or hourly basis. In the event the Auditor of State does have the authority to contract with such individuals, and reimburse them on a per page basis, are such individuals to be considered as state employes and subject to deductions to the Public Employes Retirement System."

As I understand it, basically, your problem is simply, are the typists engaged by the Bureau of Inspection and Supervision of Public Offices to type the reports of examinations made by state examiners subject to the provisions of Section 486-7a, et seq., General Code. The provisions of the General Code referred to were enacted by the 98th General Assembly as Am. Sub. H. B. No. 382, to provide standard classification and pay-ranges for all persons employed by the state of Ohio.

It is clear that the General Assembly intended the broadest coverage possible for the new classification system embodied in said Am. Sub. H. B. No. 382. Section 486-7a, General Code, provides that the classifications shall apply to "All positions, offices and employments in the state service," except those specifically excluded. Since the typists to which you refer clearly do not fall within any of the categories specifically excepted from classification, the only other possibility for excluding them would be to determine they are independent contractors.

The determination as to whether or not the relationship which exists is that of independent contractors or master-servant (employer-employee) depends upon the facts in each case. The principal test applied by the courts involves the right to control the work performed. If the employer has the right to control, the legal relationship has been generally held to be that of master and servant, or employer and employe; but if the manner or means of performing the work is left to one responsible for the result alone, the person performing the work has been classified generally as an independent contractor. Other tests or factors considered by the courts in determining whether or not the relationship is that of an independent contractor include:

- (1) Who has control of the premises where the work is being done;

- (2) Who furnishes the appliances or apparatus used or necessary to perform the work;
- (3) Does the employer have the right to hire and fire;
- (4) Does a binding contract exist between the parties for breach of which a cause of action would arise?

For general discussion of the problem, see 21 O. Jur. *Independent Contractors*, Sections 3 through 14, and 27 Am. Jur., 485-504. See also the following cases: *Gillum v. Industrial Commission*, 141 O. S. 373, the second branch of the syllabus of which reads as follows:

“Whether one is an independent contractor or in service depends upon the facts of each case. The principal test applied to determine the character of the arrangement is that if the employer reserves the right to control the manner or means of doing the work, the relation created is that of master and servant, while if the manner or means of doing the work or job is left to one who is responsible to the employer only for the result, an independent contractor relationship is thereby created.”

Bobik v. Industrial Commission, 146 O. S. 187, where the first branch of the syllabus reads as follows:

“The chief test in determining whether one is an employe or an independent contractor is the right to control the manner or means of performing the work.”

Miller v. The Metropolitan Life Ins. Co., 134 O. S. 289, 292, where the Supreme Court of Ohio observed as follows:

“* * * That which distinguishes an independent contractor from an agent is the freedom from employer control over the work contracted for. The control exercised by an independent contractor over his work is exclusive of that exercised by any other. *Where it is not thus exclusive, and its execution must conform to the directions and instructions of the employer, the relation is that of agent and not of independent contractor.*
* * *”
(Emphasis added.)

Snodgrass v. Cleveland Cooperative Coal Co., 31 O. A. 470, 480, where the court of Appeals for Cuyahoga County noted as follows with respect to the necessity of a binding contract between the parties in order to create the relationship of independent contractor:

“The term ‘independent contractor’ presupposes the existence of a binding contract between the parties, for a breach of

which a cause of action arises. There can be no relationship of 'independent contractor' without the existence of such binding contract between the parties. * * *

Applying the tests suggested above, it would appear reasonable to conclude that the persons engaged to type the reports of examinations made by state examiners are not independent contractors. While you may question that there is any "control" exercised over the persons in question, I believe that within legal contemplation it can be stated that the "right of control" does exist. Also significant from the legal standpoint are the facts that the work is done in offices supplied by the Bureau of Inspection and Supervision, and that the appliances and apparatus used by the typists are the property of said Bureau and made available to the typists for the purpose. Further, I am sure that you would be the first to deny that you do not have the right to hire and fire these employes. Finally, I am not aware that any binding contract exists between you and the typists for the breach of which a cause of action would arise.

The conclusion indicated in the preceding paragraph is reenforced by the opinion of my predecessor found in 1945 Opinions of the Attorney General, page 444, involving the right of such persons to receive vacation pay, where it is clear from the discussion that they were assumed to be "employees" of the State of Ohio. I find further indication as to the status of these persons from the fact that deductions are currently being made from their earnings for the Public Employes Retirement System and for hospitalization insurance. With respect to the latter, I assume that the deduction is made under authority of Section 669-12 of the General Code, which authorizes deductions from the salary of "an employe or employes of the state of Ohio * * *" for such purpose.

Before concluding perhaps I should note that the fact the Bureau of Inspection and Supervision of Public Offices is reimbursed by the subdivision concerned, the cost of having the reports typed does not affect the status of the persons typing the reports. See Opinions of the Attorney General for 1947, pages 576, 579, where it was held as follows with respect to the status of the state examiners:

"The fact that the state thus reimburses itself for the compensation of these examiners in no way affects their status as public employes and as employes of the state."

In specific answer to your question, I am therefore of the opinion that the persons hired to type the reports of examinations made by state examiners for the Bureau of Inspection and Supervision of Public Offices are not "independent contractors" but are "employees" of the state of Ohio, and as such are subject to the classification and other provisions of Section 486-7a et seq. of the General Code.

Respectfully,

HERBERT S. DUFFY,
Attorney General.