

OPINION NO. 80-098

Syllabus:

1. In order to determine whether an attorney employed by a township pursuant to R.C. 309.09(A) is an independent contractor or an employee of the township, it is necessary to consider all the circumstances surrounding the arrangement between the township and the attorney. Relevant factors include the degree

of independence which the attorney possesses, whether the attorney performs legal services solely for the township, whether the attorney is paid for particular services or is paid a yearly salary, whether the township or the attorney provides office space and supplies, and whether the attorney has the right to hire assistants and the obligation to pay those assistants.

2. The compensation of an attorney employed by a township need not be set at a specific dollar amount so long as some clear standard by which the amount of compensation is to be calculated is contained within the order of compensation made by the board of township trustees. Compensation of the attorney includes fringe benefits provided.
3. An attorney who is an employee of a township is entitled to the discretionary fringe benefits granted by the township to its employees, provided that he qualifies for such benefits. Those benefits may include sick leave, vacation, and hospitalization and life insurance coverage. An attorney who is an independent contractor serving a township is entitled to be compensated pursuant to contract, but is not entitled to discretionary fringe benefits due to employees.
4. An attorney who is an employee of a township is entitled to the statutory fringe benefits for which he qualifies, which may include holiday pay, membership in P.E.R.S., workers' compensation coverage, and unemployment compensation benefits. An attorney who is an independent contractor serving a township is not eligible for holiday pay under R.C. 511.10. He may be covered by workers' compensation or unemployment compensation if the township procures such coverage. Whether he is included in the P.E.R.S. system is a matter for determination by the Public Employees Retirement Board.

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio
By: William J. Brown, Attorney General, December 31, 1980

I am in receipt of your request for my opinion on the following five questions:

- (1) Where an attorney is employed as legal advisor to a township pursuant to Section 309.09(A), Ohio Revised Code, is the relationship between the township and the attorney that of an employee or that of an independent contractor?
- (2) Must the compensation of the attorney be fixed at a specific dollar amount, or is it sufficient that the basis upon which the compensation is to be calculated is clearly set forth in the resolution?
- (3) Is an attorney employed by a township pursuant to Section 309.09(A), Ohio Revised Code, entitled to discretionary fringe benefits provided to employees by the township, such as sick leave, vacation, and hospitalization or life insurance coverage?
- (4) Is an attorney employed by a township pursuant to Section 309.09(A), Ohio Revised Code, entitled to statutory fringe benefits required by law for township employees, such as holiday pay, P.E.R.S. membership, [workers'] compensation coverage, or unemployment compensation coverage?

(5) In the event that your response to questions (3) and (4) is in the negative, may the board of township trustees elect to provide such benefits to an attorney employed pursuant to Section 309.09(A), Ohio Revised Code?

R.C. 309.09(A), which authorizes the township trustees to hire additional legal counsel, reads in pertinent part as follows:

[The] prosecuting attorney shall be the legal adviser for all township officers. When the board of township trustees deems it advisable or necessary to have additional legal counsel it may employ an attorney other than the prosecuting attorney of the county, either for a particular matter or on an annual basis, to represent the township and its officers in their official capacities and to advise them on legal matters. No such counsel or attorney may be employed except on order of the board of township trustees, duly entered upon its journal, in which the compensation to be paid for such legal services shall be fixed. Such compensation shall be paid from the township fund.

In your first question, you ask whether an attorney hired pursuant to R.C. 309.09(A) is an employee or an independent contractor. In considering this question, I note that R.C. 309.09 provides that the trustees may "employ an attorney. . . , either for a particular matter or on an annual basis." This language indicates that the trustees have broad discretion in determining what type of arrangement they want to make with the attorney. The arrangement, of course, will vary according to the township's needs. Since the exact terms of the arrangement could vary greatly, it is impossible to conclude, without reference to those terms, whether the attorney is an "employee" or an "independent contractor." Hence, I am unable, by means of an opinion, to provide you with a definitive answer to your first question. I can, however, point out certain well-recognized indicia of an independent contractor relationship which you should bear in mind in considering whether an attorney employed in a particular set of circumstances is an employee or an independent contractor.

The foremost characteristic of an independent contractor is the right to control the manner in which the work is performed. Generally, an independent contractor controls the manner in which work is performed while an employee is directed to perform in a particular way by his employer. Industrial Commission v. Laird, 126 Ohio St. 617, 186 N.E. 718 (1933). An attorney, by nature of his training, will always have a certain expertise in determining the manner of handling legal matters, but, by virtue of the attorney-client relationship, will always be subject, to some degree, to the wishes and decisions of his client. Hence, this criterion, in itself, may be a difficult one to apply to an attorney. Other indicia of the independent contractor relationship, which may be more readily applicable to an attorney, are the independent nature of the contractor's business, the contractor's performance of a particular job at a particular price, the contractor's right to hire assistants and obligation to pay those assistants, and the contractor's obligation to furnish necessary supplies and materials. Cimorelli v. New York Central R.R. Co., 148 F.2d 575 (6th Cir. 1945).

In most instances an attorney is hired to deal with a specific legal problem. He provides his own office and staff, and performs a particular job at a particular price. Therefore, an attorney will usually fall into the category of an independent contractor. There may be some instances, however, in which an attorney would be an employee of the township. If an individual is paid a yearly salary, has office space provided by the township, and has few, if any, other clients, such factors would be indicative of an employer-employee relationship between the township and the attorney.

Your second question concerns the manner in which the terms of compensation are to be fixed by the board of township trustees. R.C. 309.09 provides that no employment of an attorney by a township can be made absent an order of the trustees "duly entered upon its journal, in which the compensation to be paid for such legal services shall be fixed." There is, however, no requirement that the trustees fix an exact dollar amount. Your question asks whether "it is sufficient that the basis upon which the compensation is to be calculated is clearly set forth in the resolution. . . ."

An analogous situation arose in Village of Mayfield Heights v. Irish, 128 Ohio St. 329, 191 N.E. 129 (1934), where a statute (G.C. §4366) provided that a municipal engineer's "compensation" was to be provided for by ordinance and the court held that it was not necessary for the municipality to fix the compensation at a definite sum so as to come within the certificate of available funds requirement of G.C. 5625-33. Instead, the municipality could set the compensation on the basis of a percentage of the cost of public projects. The agreement provided that the village would pay the engineer a percentage of the cost of certain improvements. However, no dollar amount was specified, and no certificate of availability of funds was attached to the contract. The village argued that under G.C. 5625-33 (presently R.C. 5705.41) the contract was void without such a certificate attached to the contract. The court determined that, under such a contract, neither party could place a dollar figure on the engineer's fees prior to actual completion of the project, nor could the village "fix the compensation of its engineer at a definite sum in advance for all services to be performed during any fiscal year." *Id.* at 334. The court therefore waived the certification requirement where neither party could fix a dollar amount prior to rendition of services. R.C. 5705.41 presently provides for a "sliding-scale" certificate for contracts of a continuing nature.

Under the reasoning of Village of Mayfield Heights v. Irish, an order fixing compensation would satisfy R.C. 309.09 so long as that order contained some clear standard by which the amount of compensation was to be calculated. Accordingly, I am of the opinion that, when a board of township trustees employs additional legal counsel pursuant to R.C. 309.09, there is no necessity that the compensation be fixed in an exact dollar amount, provided that the basis upon which compensation is to be calculated is clearly set forth in the order of the board.

It must be noted that the term "compensation" encompasses more than the amount of dollars paid to an employee. Fringe benefits also constitute part of an individual's compensation. State ex rel. Parsons v. Ferguson, 46 Ohio St. 2d 389, 348 N.E.2d 692 (1976). Therefore, should an attorney employed by the township receive any fringe benefits, such benefits must be included in the order of the board of trustees setting the attorney's compensation, and must be entered on the journal as required by R.C. 309.09.

Your third question concerns what you describe as "discretionary benefits." Specifically, you have asked whether an attorney employed by a board of township trustees pursuant to R.C. 309.09 is "entitled" to sick leave, vacation, hospitalization and life insurance coverage. As your question indicates, whether a township grants such benefits to its employees is left to the discretion of the township trustees. See generally 1964 Op. Att'y Gen. No. 814, p. 2-38; 1951 Op. Att'y Gen. No. 1035, p. 882; R.C. 505.60. An individual employed by the township is, therefore, entitled to only those benefits which the township trustees have chosen to provide. It is reasonable to assume that an attorney who is an employee of the township should receive the same sick leave benefits as any other township employee. Clearly, however, an attorney who is an independent contractor is entitled to be compensated pursuant to contract, but is not entitled to receive benefits due to employees.

As is the case with sick leave, there is no express statutory authority for the granting of vacation leave to township employees. R.C. 121.161, which confers vacation benefits upon state employees, is limited to "full-time state employee[s]." However, a township possesses the authority to grant vacation leave to its

employees. 1951 Op. Att'y Gen. No. 1035, p. 882, 884 ("[v]arious political subdivisions would have implied powers to grant their regular employees reasonable leave with pay, both as to vacations and by way of sick leave"). Therefore, an attorney who is an employee of the township would be entitled to such vacation time as is granted generally to township employees. Again, an attorney who is an independent contractor is not entitled to the vacation time due to an employee.

The final portion of your third question involves hospitalization and life insurance coverage for an attorney hired pursuant to R.C. 309.09. R.C. 505.60 allows the trustees to purchase both types of insurance. It provides:

(A) The board of township trustees of any township may procure and pay all or any part of the cost of hospitalization, surgical, major medical, or sickness and accident insurance or a combination of any of the foregoing types of insurance to provide uniform coverage for township officers and employees and their immediate dependents from the funds or budgets from which said officers or employees are compensated for services, whether issued by an insurance company, a hospital service association, or a non-profit medical care corporation, duly authorized to do business in this state. Any township officer or employee may refuse to accept the insurance coverage without affecting the availability of such insurance coverage to other township officers and employees.

(B) A board of township trustees may procure and pay all or any part of the cost of group life insurance to insure the lives of officers and full-time employees of the township. The amount of group life insurance coverage provided by the board to insure the lives of officers of the township shall not exceed five thousand dollars per officer.

It is clear from this section that an attorney hired pursuant to R.C. 309.09 may be included in a group hospitalization plan procured by the township trustees if the attorney is an "employee." However, only "officers and full-time employees of the township" are eligible for participation in a group life insurance plan. The determination of whether an attorney hired pursuant to R.C. 309.09 is a "full-time employee" must be made with reference to the terms of the arrangement between that attorney and the township. If an employer-employee relationship exists, and if the attorney satisfies the full-time requirement of R.C. 505.60(B), then the insurance plans contemplated by R.C. 505.60 may be extended to include that attorney. However, if the attorney is an "independent contractor" then no such coverage may be extended since the township's authority to purchase such insurance is limited by R.C. 505.60 to "employees."

In your fourth question, you ask whether an attorney hired pursuant to R.C. 309.09 is entitled to "statutory fringe benefits," such as holiday pay, P.E.R.S. membership, workers' compensation coverage, or unemployment compensation coverage.

Holiday pay for township employees is provided for in R.C. 511.10, which states, in pertinent part:

Any township employee working on a salary or hourly basis is entitled to eight hours of holiday pay for New Year's day, . . . and Christmas day, of each year, provided that the employee is a regular employee with at least six months full-time township service prior to the month when such holiday occurs. (Emphasis added.)

An attorney hired pursuant to R.C. 309.09 is thus entitled to holiday pay pursuant to R.C. 511.10 so long as the attorney is "a regular employee with at least six months full-time township service." A determination of whether the attorney is an "employee" must be made with reference to the arrangement between the attorney and the township. Naturally, an "independent contractor" would not be entitled to holiday pay pursuant to R.C. 511.10, since the statutory language is limited to "employees."

Membership in the Public Employees Retirement System is compulsory for all "public employees." R.C. 145.03. The term "public employee" is defined to include "any person holding an office, not elective, under the state or any . . . township." R.C. 145.01(A). An attorney hired pursuant to R.C. 309.09 might be included within this definition depending upon the terms of the arrangement which the attorney has with the township. However, R.C. 145.01(A) specifically empowers the Public Employees Retirement Board to "determine whether any person is a public employee," and a decision in any particular case is one properly made by that Board rather than by an opinion of the Attorney General. See 1975 Op. Att'y Gen. No. 75-075.

Compensation under the workers' compensation system is limited to "employees." R.C. 4123.54. R.C. 4123.01(A)(1) defines "employee" so as to include: "Every person in the service of . . . any . . . township . . . under any appointment or contract of hire." Whether an attorney hired pursuant to R.C. 309.09 is an "employee" for the purposes of R.C. Chapter 4123 depends upon the arrangement between the attorney and the township. However, R.C. 4123.03 allows for special coverage for any person performing any services for a township. Therefore, the township could procure coverage for any attorney, even an independent contractor, under R.C. 4123.03.

Unemployment compensation benefits are payable to any individual who meets the requirements of R.C. Chapter 4141. The basic requirement is that the individual was engaged in "employment" as that term is defined in R.C. 4141.01(B). While an attorney hired pursuant to R.C. 309.09 could qualify, the question turns largely upon whether he is an employee or independent contractor. R.C. 4141.01(B)(1)(b) defines "employment" as:

Service performed 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 the service is performed; and
- (iii) That such individual is customarily engaged in an independently established trade, occupation, profession, or business.

Under this language, the question of whether an attorney hired pursuant to R.C. 309.09 is engaged in "employment" can be answered only on a case-by-case analysis. However, the township could elect to extend coverage to any attorney by filing notice with the administrator under R.C. 4141.01(A)(4) and (5).

I believe that my response to your third and fourth questions makes it unnecessary to specifically address your fifth question.

Therefore, it is my opinion, and you are advised, that:

1. In order to determine whether an attorney employed by a township pursuant to R.C. 309.09(A) is an independent contractor or an employee of the township, it is necessary to consider all the circumstances surrounding the arrangement between the township and the attorney. Relevant factors include the degree of independence which the attorney possesses, whether the attorney performs legal services solely for the township, whether the attorney is paid for particular services or is paid a yearly salary, whether the township or the attorney provides office space and supplies, and whether the attorney has the right to hire assistants and the obligation to pay those assistants.
2. The compensation of an attorney employed by a township need not be set at a specific dollar amount so long as some clear

standard by which the amount of compensation is to be calculated is contained within the order of compensation made by the board of township trustees. Compensation of the attorney includes fringe benefits provided.

3. An attorney who is an employee of a township is entitled to the discretionary fringe benefits granted by the township to its employees, provided that he qualifies for such benefits. Those benefits may include sick leave, vacation, and hospitalization and life insurance coverage. An attorney who is an independent contractor serving a township is entitled to be compensated pursuant to contract, but is not entitled to discretionary fringe benefits due to employees.
4. An attorney who is an employee of a township is entitled to the statutory fringe benefits for which he qualifies, which may include holiday pay, membership in P.E.R.S., workers' compensation coverage, and unemployment compensation benefits. An attorney who is an independent contractor serving a township is not eligible for holiday pay under R.C. 511.10. He may be covered by workers' compensation or unemployment compensation if the township procures such coverage. Whether he is included in the P.E.R.S. system is a matter for determination by the Public Employees Retirement Board.