

January 4, 1950

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ARIZONA ATTORNEY GENERAL

W. E. Stanfill, Senior Sanitarian
Coconino County Health Service
Flagstaff, Arizona

Dear Mr. Stanfill:

We are in receipt of your letter of August 5, 1949, wherein you ask our advice upon the status of those working for the Coconino County Health Service as regards the Public Employees' Retirement Fund.

We sincerely regret the delay in answering your inquiry, but it became necessary to obtain additional information concerning these employees from the county itself, which information was not received by this office until the middle of December.

Membership in the Public Employees' Retirement Fund of Arizona as of July 1, 1949 is limited to:

"* * * any person in the employ of the state whose compensation is paid out of funds of the state, including employees in the classified service and employees of any department, institution, board, commission, officer, court or any agency of the state government receiving State appropriations and having power to certify payrolls authorizing payments of salary or wages against such appropriations or against trust funds held by the treasurer of state, * * *" Section 12-804, ACA 1939 (See 1949 supplement. See also Sections 12-805 and 12-822) (Emphasis supplied).

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From and after January 1, 1950, by the terms of the Public Employees' Retirement Act of 1948, municipalities (including counties) may become participants in the Fund by following the procedure set out in Section 22. Coconino County is not yet a participant in the Fund.

We had previously given an oral opinion to Dr. J. P. Ward, State Director of Public Health, to the effect that where a local health department had been established pursuant to and in full compliance with Sections 68-211 through Section 68-219 ACA 1939, as added by Chapter 55, Laws of 1947, persons employed are in the employ of such departments (county, city-town or district health department) and are not in the employ of the State Department of Health and thus of the State of Arizona. This being the case, it was and is now our opinion that such employees are not covered by the Public Employees' Retirement Act of 1948, and did not become members of the Fund on July 1, 1949, as said Act limited the membership of said Fund as of that date to those who were persons in the employ of the state and its departments, nor could they become members until they came in thereafter as new state employees, or as employees of a municipality electing to participate.

From all of the information we have concerning the operation of the Coconino County Health Service, gained in part from the State Department of Public Health and the legal officers of the county itself, it is apparent that said Health Service is not in fact or law at the present time a "local full time public health service" set up and staffed in accordance with Sections 68-211 through 68-219, supra. Section 68-216 ACA 1939, as added by Chapter 5, Laws of 1947, reads:

"Upon the establishment of a county, city-county, or district health department in conformity with the provisions of this act, all boards of health, positions, and regulations of such participating cities and counties existing by virtue of the provisions of article 2, chapter 68 Arizona Code of 1939 (§§ 68-201--68-205), shall be automatically abolished."
(Emphasis supplied)

It follows from this language that until a local board of health has been established under the provisions of the 1947 act, the legal existence and operation of county and city health departments depends upon, and their continued operation is governed by, Sections 68-201 through 68-205 ACA 1939, the "old" law. Thus the Coconino County Health Service is legally a county board of health pursuant to and subject to these last-cited sections. A careful study of these sections convinces us that the employees of county and city boards of health, as so constituted and governed, are not employees of the State Department of Public Health and thus of the State of Arizona. See Dunshee v. Manning, 59 Ariz. 430, 129 P. 2d 924, at page 433. They are rather employees of the particular counties and cities.

Your letter urges that the employees of the Coconino County Health Service are in fact employees of the State of Arizona, i.e., employees of the State Department of Health. You state that all of the employees of this health unit are employed by the State, the county having the right only to accept or reject individual employees; that resignations, dismissals, and transfers are handled entirely through the State Department of Health; that policies and regulations which govern your activities are those set forth by the State Department of Health; that pay schedules have been those set up by the State Merit System; that all employees have been required to meet minimum qualifications and take examinations for positions through the State Merit System; and that the employees are paid from State funds, some in part and some entirely. It becomes obvious that the Coconino County Health Service has become in some measure at least a hybrid, it having "adopted", through some means or other, the provisions of the "new" law concerning the appointment of personnel in accordance with the regulations of the Merit System of the State Department of Health. See Section 68-215 ACA 1939; as added by Chapter 55, Laws of 1947. Such a method of operation cannot, we are forced to conclude, transform the employees of the Health Service into state employees. For, they not being state employees if the Service is operating as a "local Full time public health service" under the 1947 act, and not being state employees if operating under the prior act (continued in operation until the "new" units are set up) it cannot be the law that by the simple expedient of adopting portions of both acts, such persons are converted into employees of the state.

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The test determinative of whether or not the relationship of employer-employee exists has been laid down by the Arizona Supreme Court to be: Does the alleged employer retain supervision or control over the work performed by the alleged employee? See Grabe v. Industrial Commission, 38 Ariz. 322, 299 P. 1031; L. B. Price Merc. Co. v. Industrial Commission, 43 Ariz. 257, 30 P. 2d 491; Southwestern Lumber Mills v. Employment Security Commission, 66 Ariz. 1, 182 P. 2d 83, 35 Am. Jur. Master and Servant, Section 3; 56 C.J.S. Master and Servant, Section 2, Subsection (d)(1). It is the power of control and not the fact of control that is of primary importance.

Though the county boards of health are subject to the general overall supervisory control of the State Department of Health, (Section 68-202 ACA 1939), the county boards of health by law have the power of direct control of the work performed by their own employees. See Sections 68-201 through 68-203, supra. The facts as to the Coconino County Health Service indicate that the County Board of Health does actually direct the service in many aspects of the work performed by it.

An application of the basic test hereinbefore set forth to the factual situation here presented leads us to the conclusion, and it is our opinion, that the employees of the Coconino County Health Service are not in the employ of the State of Arizona, i.e., the State Health Department, but are rather employees of Coconino County. They are not therefore at the present time members of the Public Employees' Retirement Fund of Arizona. They are entitled to become members of the Fund only if Coconino County elects to become a participant and is accepted by the Board of Trustees of the Fund pursuant to the provisions of Section 22 of the Public Employees' Retirement Act of 1948, and if within the group or groups of employees designated for such membership by said County.

We regret that we are not able to give you a more favorable answer, and express again our sincere regret for the delay occasioned in advising you. Your best recourse seems to be to help bring your county into the Fund through the procedure established in the Retirement Act.

Very truly yours,

FRED O. WILSON, Attorney General

RICHARD C. BRINEY,
Assistant Attorney General

cc: J. P. Ward, State Director of Public Health