

LAW LIBRARY
ARIZONA ATTORNEY GENERAL

October 11, 1949

Lloyd K. Swasey, M.D.
Medical Director
Arizona State Tuberculosis Sanatorium
Tempe, Arizona

Dear Dr. Swasey:

We are writing this opinion in response to a request from you as Medical Director of the Arizona State Tuberculosis Sanatorium requesting clarification of your status as regards the Public Employees' Retirement Fund of Arizona. Your letter of September 19, 1949, was addressed to Miss Ruth Pittman, Secretary of the Fund, c/o the State Auditor's office. The Auditor's office presented the letter to us asking our official opinion upon the matter. Your letter reads:

"Due to an oversight, I was not asked whether I wished the retirement benefit or not and was paid in July 1949, without any deduction made therefor.

I am at this time submitting a request that I be permitted to participate in the retirement fund as I feel I perform the required number of hours although the status given to me is an exempt position classified for part time professional employees of the Health Department. If acceptable as a member of the fund, reimbursement for the month of July 1949, will be made.

At this time I have been unable to get a clear ruling of my prior service with the State of Arizona. I was first employed on October 16, 1937, and held a permanent status until June 3rd, 1942, at which time I was granted military

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leave. Upon return from the military service, I re-entered the employment of the State of Arizona in December 1945, at which time I was classified in the exempt position."

Your letter and our conversation with you disclose the following to be the principal facts surrounding your employment. The Arizona State Tuberculosis Sanatorium is set up as a division of the State Department of Health, and the position of Medical Director of the Sanatorium is recognized as a regular salaried position by the State Merit System Council, personnel agency for the Department of Health. The salary for the position is paid from funds appropriated by the legislature specifically to the Sanatorium for personal services. We are advised that the duties of the Medical Director are both administrative and medical, and that until approximately one month ago, the Director performed all of the medical work done at the Sanatorium. The administrative duties entail among other things the handling and processing of all admissions to and discharges from the Sanatorium. The Medical Director is on twenty-four hour call and is personally present at the Sanatorium six days each week at an average (as you estimate it) of something just under three hours per day. You advise us that the duties of the position normally require additional services supplemental to those periods of time spent physically present at the Sanatorium, including night calls, administrative work, and consultations and services rendered at your private office, and that the total time demanded by the position is normally in excess of nine hundred hours per year. You further advise us that you did not at any time file with the Board of Trustees of the Retirement Fund a notice of election not to be included in the Fund and a waiver of all other rights you would otherwise have as a member.

Your status must be determined by an application of the following provisions of the Public Employees' Retirement Act of 1948 (See page 325, et seq., Session Laws, 1949). Section 5 (a) provides in part:

"Any person who is an employee on the effective date shall become a member

of the fund as of that date, unless during the period of sixty days prior to that date, such employee shall have filed with the board on a prescribed form, a notice of election not to be included in the membership of the fund, and a duly executed waiver of all present and prospective rights and benefits which he would otherwise have as a member. * * * "
(Emphasis supplied)

"Employee" is defined in Section 4 as:

" * * * 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, or any person in the employ of a municipality or in any institution, board, commission, office, bureau or any other agency maintained by a municipality, or any person in the employ of the board of trustees herein created, but shall not include the following: (a) members of the legislature; (b) officials elected by vote of the people; (c) employees occupying positions normally requiring performance of duty of less than nine hundred hours, one hundred days or four months during a calendar year; (d) independent contractors or officers and employees paid wholly on a fee bases; (e) employees who are members or are eligible to membership in other retirement or

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pension funds maintained in whole or in part by contributions by the state or a municipality unless the members of such other funds elect to join the fund as provided elsewhere herein." (Emphasis Supplied)

The foregoing facts clearly show that you are an employee of the State (a department thereof) and that your compensation is paid out of funds of the State. It follows that you became a member of the Fund as of July 1, 1949, (not having filed a waiver) unless one of the exclusions in the above quoted definition of "employee" can be invoked. The above underlined subdivisions in the quoted definition seem to be the only ones which would have any possible application to your case. As hereinbefore indicated, and upon the facts given to us, the position of Medical Director appears to require performance of duty of more than nine hundred hours during a calendar year. For this reason, subdivision (c) must be considered inapplicable. Nor, in our opinion, can subdivision (d) be invoked. The Medical Director of the Arizona State Tuberculosis Sanatorium does not stand in the position of an independent contractor. He is in the major aspects of his work subject to the control and supervision of the State Department of Health. In this regard, for an analogous situation, see Industrial Commission v. Navajo County, 64 Ariz. 172, 167 P. 2d 113. Nor is the Medical Director to be classified as an employee "paid wholly on a fee basis". His compensation is a "salary" as distinguished from a "fee", a "salary" being a fixed compensation based on service for definite and regular periods of time and paid at regular and fixed intervals. "Fees" are compensation for particular services rendered at irregular and uncertain periods. See State of Arizona v. Frohmler, 46 Ariz. 413, 52 P. 2d 483. The services rendered by the Director, both administrative and medical, are of a continuing nature and are rendered in the main, as the facts hereinbefore detailed show, at definite and regular periods of time, i.e., so many hours each day, six days a week, and compensation is paid on a regular payroll at regular and fixed intervals.

We therefore conclude upon the factual and legal predicate herein set forth that you as Medical Director of

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the Arizona State Tuberculosis Sanatorium are now, and have been since July 1, 1949, a member of the Public Employees' Retirement Fund of Arizona. To gain membership credit for any periods of time for which contributions were not made, contributions must be made to the Fund at the proper rate. See Section 6 (b) and Section 23.

We trust the foregoing sufficiently answers the question you have presented.

Very truly yours,

FRED O. WILSON
Attorney General

RICHARD C. BRINEY
Assistant Attorney General

RCB:ec
cc: Auditor's Office