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OPINION	:	No. 79-1203
	:	
of	:	<u>April 11, 1980</u>
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SUBJECT: CALIFORNIA CONSTITUTION ARTICLE VII, SECTION 4(1)—
Article VII, section 4(1) of the California Constitution does not authorize the California Museum of Science and Industry to make an exempt appointment of an individual to a position which involves: a full-time, ongoing, year-round assignment; duties and a reporting relationship which remain unchanged over the year; and a split in payroll responsibility.

The State Personnel Board has requested an opinion on the following question:

Does Article VII, section 4 (1) of the California Constitution, which exempts from civil service officers and employees of district agricultural associations who are employed for less than 6 months in a calendar year, authorize the California Museum of Science and Industry, a district agricultural association, to make an exempt, appointment of an individual to a position under the following circumstances:

1. The position involves a full-time, ongoing, year-round assignment;
2. The duties of the position remain essentially unchanged over the year;

3. The reporting relationship of the position remains unchanged over the year; and
4. The person appointed remains in the position on a full-time, ongoing, year-round basis but is on the state's payroll for one day less than six months and is on the payroll of the California Museum Foundation of Los Angeles, a nonprofit corporation, for the remainder of the year?

CONCLUSIONS

Article VII, section 4(1) of the California Constitution does not authorize the California Museum of Science and Industry to make an exempt appointment of an individual to a position where:

1. The position involves a full-time, ongoing, year-round assignment;
2. The duties of the position remain essentially unchanged over the year;
3. The reporting relationship of the position remains unchanged over the year; and
4. The person appointed remains in the position on a full-time, ongoing, year-round basis but is on the state's payroll for one day less than six months and is on the payroll of the California Museum Foundation of Los Angeles, a nonprofit corporation, for the remainder of the year.

ANALYSIS

Article VII, section 1 of the California Constitution provides:

“(a) The civil service includes every officer and employee of the state *except as otherwise provided in this Constitution.*

(b) In the civil service permanent appointment and promotion shall be made under a general system based on merit ascertained by competitive examination.” (Emphasis added.)¹

¹ With respect to the exclusivity of the civil service laws, see generally, 63 Ops. Cal. Atty. Gen. 24, 31 (1980); 61 Ops. Cal. Atty. Gen. 68 (1978); 56 Ops. Cal. Atty. Gen. 353 (1973); 43 Ops. Cal. Atty. Gen. 319 (1964); 24 Ops. Cal. Atty. Gen. 173 (1954); 17 Ops. Cal. Atty. Gen. 152 (1951); 3 Ops. Cal. Atty. Gen. 242 (1944); 1 Ops. Cal. Atty. Gen. 578 (1943), and cases discussed therein.

California's Constitutional provisions with respect to state civil service were originally adopted

Article VII, section 4 presently sets forth thirteen categories of officers and employees who are exempt from state civil service. As material herein, section 4 provides:

“Sec. 4. The following are exempt from civil service:

.....

(1) Officers and employees of district agricultural associations employed less than 6 months in a calendar year.

.....”

This exemption for district agricultural associations was added to the California Constitution by vote of the people at the November 7, 1950 General Election. The reason for this amendment was set forth in the Arguments To The Voters at this election (Ballot Pamphlet, page 12) as follows:

“One of the difficult problems in state civil service is to maintain for local district agricultural fairs and for racing events eligible lists of employees who are employed only on a temporary basis to perform work which is of short duration. Under existing law a considerable number of documents must be prepared by these fairs in order to meet the technicalities of the existing constitutional provisions relative to such short-time employment. For this reason the Legislature, without a dissenting vote, adopted this constitutional amendment which exempts from civil service officers and employees of district agricultural associations, who are employed less than six months in any one calendar year and also stewards and veterinarians of the California Horse Racing Board who are employed on a part-time basis. The adoption of this provision in the amendment will eliminate a large volume of unnecessary clerical procedure.”

The Sixth District Agricultural Association is known as the California Museum of Science and Industry. (Food & Agr. Code, § 4101, hereinafter “Museum”). The State Personnel Board conducted a personnel audit of the Museum in August 1979, and published a report thereon, which gave rise to this opinion request (“Classification and Delegated Functions Audit, California Museum of Science and Industry, August 1979”—hereinafter “Audit”). The functions of the Museum are described in the Audit, at page 1, as follows:

by the people in 1934 as Article XXIV. That Article was repealed in 1976, and the provision transferred to new Article VII.

“The California Museum of Science and Industry contains permanent and temporary exhibits dealing with a wide variety of subjects. Most of the permanent exhibits are designed to educate the public in various scientific and industrial fields. In keeping with the Museum’s educational objectives, it also conducts many workshops and seminars throughout the year. The Museum’s temporary exhibits range from how to grow a bonsai tree to a large display of ‘cartoons’ used to create stained glass windows. The Museum has approximately 130 employees. Annually, the Museum attracts about four million people to its exhibits and other activities. The Museum is located near downtown Los Angeles. Until November of 1977, it did not have a full-time personnel officer.”

The Museum, as a District Agricultural Association, falls within the clear wording of the exemption of Article VII, section 4(1), *supra*, with respect to employees hired for less than six months in a calendar year.

“In 1950, the California Museum Foundation of Los Angeles was established as a nonprofit corporation to function as a membership auxiliary to the Museum (the State agency). The Foundation was established ‘exclusively for charitable purposes which shall be achieved by soliciting funds for the purpose of acquiring and maintaining exhibits and other material to be displayed by the Sixth District Agricultural Association of the State of California in its museum buildings and by assisting in the establishment and operation of educational activities of and by promoting the general welfare of the California Museum of Science and Industry.’” (Audit, p. 6).

The following practice, as outlined by the Audit, gave rise to this request for our opinion:

“It was found that each year several exempt appointments have been made using the above cited exemption [of Article VII, section 4(1)] that may be out of conformance with the Constitutional restriction [of Article VII, section 1]. For a number of years, the Museum has made exempt appointments for individuals who are employed on a full-time, year-round basis. The Museum has done this by placing these individuals on the State’s exempt payroll for six months out of each calendar year and then placing the same individual on the Museum Foundation’s payroll for the other six months of the calendar year. When the funding change occurs, there is no detectable change in the person’s job or reporting relationship.

The audit staff has confirmed six cases of individuals who have been paid in this manner over the past year.” (Audit, p. 8.)

It is the conclusion of this office that an individual who is hired by, and is employed by the Museum under the foregoing system, remains an employee of the Museum and the state even after he or she is transferred to the Foundation payroll. Accordingly, the exemption provided by Article VII, section 4(1) of the California Constitution does not authorize exempt appointments under such circumstances.

“The essential characteristic of [an] employment relationship is the right to control and direct the activities of the person rendering service, or the manner and method in which work is performed” (*Villanazul v. City of Los Angeles* (1951) 37 Cal. 2d 718, 721). “If the employer has the right to control, an employer-employee relationship exists, whether or not the potential control is executed with respect to all details.” (*City of Los Angeles v. Vaughn* (1961) 55 Cal. 2d 198, 201.)

The source of income is not a controlling factor in determining whether an employer-employee relationship exists. The compensation may be provided by a third party. (*Id.*, at pp. 200–201, court reporters compensated for civil transcripts by litigants still in employ of court; *Claremont C. Club v. Industrial Acc. Com.* (1917) 174 Cal. 395, 398, golf caddies compensated by club members still employees of club; see also, *Jones v. Goodson* (10th Cir. 1941) 121 F.2d 176, 179, and cases cited therein: “it is not essential that the name of the servant be on the payroll of the master . . . the compensation may be paid by a third person, not the master.”) In fact, compensation is not even a requisite element for the existence of an employer-employee relationship. (*Estate of Pelletier* (1963) 221 Cal. App. 2d 347, 352: “It is not material to such relationship that the servant does not receive pecuniary compensation”; *Chavez v. Sprague* (1962) 209 Cal. App. 2d 101, 111: “The fact that a person is not paid monetary compensation for his services does not prevent him from occupying the status of an employee”; see also 43 Ops. Cal. Atty. Gen. 319 (1964), *supra*, uncompensated crossing guards held to be civil service employees.) As stated in *Edwards v. City of Chino* (1972) 28 Cal. App. 3d 148, 155:

“Payment, while a factor to be considered, is not controlling *the crucial question is the right to direct and control the activities of the alleged employee.*” (Emphasis added.)

With respect to the State Civil Service, the Court declared in the leading case, *State Compensation Ins. Fund v. Riley* (1937) 9 Cal. 2d 126, 135:

“ . . . Petitioner does not refer us to any provision of the Constitution or statute which distinguishes between urgent temporary employment and

permanent employment or between skilled and nonskilled employees, or between professional and nonprofessional services. When civil service was adopted in 1934 by vote of the people, it was unequivocally declared to be the policy of this state that every employee and officer of the state should be included therein with certain enumerated exceptions not here involved. All types of service were included therein—no distinction between professional and nonprofessional, or *between temporary and permanent employment was made* either in the constitutional provision or in the act. There can be no doubt that both the constitutional provision and the statute embrace within their terms professional as well as nonprofessional service . . . [T]he true test is not whether the person is an ‘independent contractor’ or an ‘employee,’ but whether the services contracted for, *whether temporary or permanent*, are of such a nature that they could be performed by one selected under the provisions of civil service. If the services could be so performed then in our opinion it is mandatory upon such appointing power to proceed in accordance with the provisions of the Constitution and statute above summarized.” (Emphasis added.)

(Compare, *Burum v. State Compensation Insurance Fund* (1947) 30 Cal. 2d 575.) Accordingly, employment with the state, whether temporary or permanent, falls within the requirements of the civil service laws (unless specifically exempted by a constitutional exception) *if it is the type of work which could be performed by one hired under the provisions of civil service.*²

Applying the foregoing principles to the question presented herein, we conclude as to an employee of the Museum appointed to a position 1) which involves a full-term, ongoing, year-round assignment; 2) which has duties which remain essentially unchanged over the year; 3) which has a reporting relationship which remains unchanged over the year; but 4) which switches from the state’s payroll to the Foundation’s payroll one day

² This rule has been more finely honed in *California State Employees’ Assn. v. Williams* (1970) 7 Cal. App. 3d 390, in which the court approved the state’s contract “calling for the conduct of administrative tasks of the state’s Medi-Cal program by private carriers.” (*Id.*, at p. 392.)

The Court construed the Constitution as not preventing “legislative experimentation in new forms to fit new functions.” (*Id.*, at p. 399.) It conceded, however, that its “new rule” could not, nor did it supplant the rule set forth in the *Burum* and *Riley* cases cited in the text that the state’s work must be performed by civil service employees (unless constitutionally exempted) unless “the work cannot be adequately or competently or satisfactorily performed by civil service personnel.” (*Id.*, at pp. 400–401.)

We are not concerned herein with such a “legislative experimentation in new forms to fit new functions.”

short of six months in the calendar year, that that, employee is an employee of the Museum, and the state, for the full period of time. In short, the change in payroll status does not alter the employer-employee relationship from that of being a state employee to that of being a Foundation employee. The Museum, which, from the facts presented to us, retains and exercises full management and control of the employee at all times, also consequently remains the employer at all times. We are merely presented with the situation where a third party, the Foundation, pays the compensation for six months and one day per calendar year. Under the case law just discussed, that fact, standing alone, will not make the Foundation the employer.³

Accordingly, since the Museum and the state are the sole employer at all times, the provisions of Article VII, section 4(1) of the California Constitution would not be applicable. The appointment would not be one for “less than 6 months in a calendar year” to trigger that exemption for the Museum. It therefore follows that the “full-time” employees partially compensated by the state and partially by the Foundation should be appointed pursuant to civil service rules and regulations. The fact that this conclusion may create administrative problems for the Museum is not material. As we concluded in 2 Ops. Cal. Atty. Gen. 86, 87 (1943), “heads of departments have their administrative problems and are often sorely pressed for solution,” but that does not justify ignoring civil service laws.

³ We also note parenthetically that we are not presented with the situation where the Foundation and the Museum could be considered joint employers, with the former being the general employer and the latter being the special employer for the second six-month period. The Foundation was neither the employer at the time of the payroll change to that of the Foundation, nor does the Foundation exercise any control over the employee during the second six-month period to establish any employment relationship. (Compare *Mott v. Chronicle Pub. Co.* (1927) 201 Cal. 610, 613-617, with *Pruitt v. Industrial Acc. Com.* (1922) 189 Cal. 459, 464-466.)