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OPINIONS

SOCIAL SECURITY: Drainage districts.

JURISTIC ENTITIES: Drainage districts.

DRAINS: Social security coverage for employees of drainage districts; composition of districts.

Neither a county drainage district nor an inter-county drainage district is a political subdivision or an instrumentality of the State or a juristic entity. Employees, if any, of a drainage district are not eligible for coverage under the Social Security Act.

A drainage district comprises an area of land which will be drained and benefited by the construction of a drain, and the boundaries of the district are initially fixed by the survey made at the time that the route and type of construction of the proposed drain are determined.

No. 4037

January 2, 1963.

Mr. Lawrence Farrell
Executive Secretary
State Employees' Retirement Board
Lewis Cass Building
Lansing, Michigan

Under the provisions of Act 205, P.A. 1951, as amended, the State Employees' Retirement Board created by Act 240, P.A. 1943 is designated as the "department" to enter into an agreement with the appropriate federal agency for the coverage of eligible employees of the State and its political subdivisions under the Social Security Act. You, as Executive Secretary of the Retirement Board, have requested the opinion of the Attorney General on questions pertaining to coverage as hereinafter stated. Attached to your request for an opinion you forwarded correspondence with local officials from which the following facts may be summarized:

There are approximately 650 drains¹ in Berrien County each of which has its own drainage district. In Berrien County one Mr. "A" works as a maintenance man on the county drains. He works by the hour and is paid at an hourly rate fixed by the drain commissioner. Mr. "A" keeps his own time and also the time of his helpers. He turns in a time report to the county drain commissioner every two weeks and is compensated by drain orders drawn against the regular or revolving drain funds and charged to the drain or drainage districts where the maintenance work was done.

In a typical work day Mr. "A" will drive his car to the drain maintenance garage where he obtains a county-owned truck loaded with

¹ The number of drains in Berrien County is not abnormal. See Opinion No. 2138, O.A.G. 1955, p. 579, where it is recited that at that time there were 700 drains in Genesee County.

shovels, cleaning rods, tile boxes, tile and similar paraphernalia. He then drives the county truck to the drain commissioner's office where he receives his working orders for the day. A sample of a day's working orders follows:

1. clean inlet on Lee & Hoppe Drain, Benton Township.
2. repair tile on Jackson Drain, Sodus Township.
3. remove obstruction Pipestone Creek, Pipestone Township.
4. clean out inlet of Decker Drain, Lake Township.
5. check catch basins and manholes on Heyne Drain, Lincoln Township.

Mr. "A" and his helpers may work from 1 to 4 hours or more on each drain depending on the nature of the repair or maintenance work to be done.

For the purpose of determining the eligibility of Mr. "A" for coverage under Social Security, you request an opinion on four questions which will be stated and answered in the order submitted by you.

"Question 1. Can a Drain District in the State of Michigan qualify as a separate 'juristic entity' under the provisions of the Federal Social Security Act and Sec. 2 (f) of Act No. 205, P.A. 1951, as amended, the State social security enabling act?"

The Federal Social Security Act authorizes the Secretary of Health, Education and Welfare upon request to enter into an agreement with any state for the purpose of extending coverage to individuals performing services as employees of such state or any political subdivision thereof. The same section of the Federal Act defines the term "political subdivision" as including an instrumentality of (A) a state, (B) one or more political subdivisions of a state, or (C) a state and one or more of its political subdivisions. See 42 U.S.C.A. § 418.

Act 205, P.A. 1951² made available Social Security coverage to certain officers and employees of the State of Michigan. Section 2 of the Michigan act contains the applicable definitions. Subparagraph (f) of Section 2 in part provides:

"The term 'political subdivision' includes the regents of the university of Michigan, the state board of agriculture, and an instrumentality (1) of the state, (2) of 1 or more of its political subdivisions, or (3) of the state and 1 or more of its political subdivisions, but only if such instrumentality is a juristic entity which is legally separate and distinct from the state or subdivision and only if its employees are not by virtue of their relation to such juristic entity employees of the state or subdivision: * * *."

Under date of December 5, 1952 Alanson W. Willcox, General Counsel of the Federal Security Agency (the predecessor of Health, Education and Welfare in Administration of Federal Social Security) wrote this office expressing his views as to the proper interpretation of the Michigan statute.

² C.L.S. § 38.851 et seq.; M.S.A. 1960 Rev. Vol. § 17.801 et seq.

The pertinent portion of that letter is quoted in Opinion No. 2454, O.A.G. 1956, at page 193, issued to your predecessor.

It is to be noted that neither the Federal Social Security Act nor the Michigan act undertakes to give a basic definition of the term "political subdivision." All that the definition does is to say that the word political subdivision shall be understood to include an instrumentality of (A), (B) or (C), supra. We must look therefore to an independent source for a definitional statement of the term "political subdivision." In the case of *State, Lydecker et al, Prosecutors v. The Drainage and Water Commissioners of the Township of Englewood*, 41 N.J. Law 154, decided by the Supreme Court of New Jersey in 1879, it was said:

"The political divisions of the state are those which are formed for the more effectual or convenient exercise of political power within the particular localities. Originally, counties and townships, in which a uniform state policy is observable, composed this class almost or quite exclusively. Then, as population became denser in certain places, and there was added to this common design a special necessity for local government different from that proper to more rural districts, villages, towns and cities were constituted, and, as these were separated by their charters of incorporation from the townships of which they had before been part, and absorbed their functions, they also became political divisions. In these institutions, therefore, must be discovered the essential characteristics of their class, and they will be such common and prominent features as have co-existed with these organizations throughout their history, and are not possessed by other bodies of legislative creation which stand outside of the same category. These distinctive marks are, I think, that they embrace a certain territory and its inhabitants, organized for the public advantage, and not in the interest of particular individuals or classes; that their chief design is the exercise of governmental functions, and that to the electors residing within each is, to some extent, committed the power of local government, to be wielded either mediately or immediately, within their territory, for the peculiar benefit of the people there residing. Bodies so constituted are not merely creatures of the state, but parts of it, exerting the powers with which it is vested for the promotion of these leading purposes which it was intended to accomplish, and according to the spirit which actuates our republican system. They are themselves commonwealths and therefore are properly entrusted with the sovereign power of taxation to meet their own necessities." (pp. 156, 157)

The foregoing "distinctive marks" of a political subdivision were approved by the New Jersey Court of Errors and Appeals in the subsequent case of *Allison v. Corker* (1902), 67 N.J. Law 596, 52 Atl. 362. The New Jersey decision was followed and approved by the Supreme Court of Arkansas in the case of *Arkansas State Highway Commission v. Clayton* (1956), 226 Ark. 612, 292 S.W. 2d 77, which involved the Federal Social Security Act and the right to coverage under the Arkansas implementing statute containing language in substance the same as Michigan.

In the case of *The Board of Metropolitan Police of the City of Detroit v. The Board of Auditors of Wayne County*, 68 Mich. 576, the Supreme

Court had under review an act adopted in 1887 to extend the powers of the board of Metropolitan police of the city of Detroit over certain townships in Wayne County for the purpose of enforcing the liquor law. In determining the nature of the metropolitan police board the Court directed attention to the act by which the board was created and to its title which read: "An act to establish a police government for the city of Detroit." The Court then commented on the significance of the title as follows:

"Although the title of the act refers to a police government, this cannot mean a government in the ordinary sense in which municipal and local governments exist. * * * Under our system we can have no governments, general or special, that do not immediately represent a popular constituency, and no properly called governmental power can be lodged anywhere else. Our State Constitution has provided for local municipalities, embracing counties, cities, villages, townships, and school districts, which it has been held mean such bodies of those names as were of a nature familiar and understood. The Legislature has power to confer upon townships, cities, villages, and boards of supervisors local legislative and administrative powers such as are suited to their condition. But there is no other power mentioned in the Constitution for conferring similar public governing authority elsewhere, and these bodies are all created by popular elections."

It next becomes necessary to determine what is "an instrumentality" which by the definition is to be included within the concept of a "political subdivision." A recognition of the meaning of various terms and relationships is desirable. There is a distinct difference in legal connotation between words like "agency" and "instrumentality" on the one hand and the word "agent" on the other. This difference in terms was clearly recognized in the case of *Pantess v. Saratoga Springs Authority* (1938), 8 N.Y. Supp. 2d 103. In that case the Supreme Court said:

"There are activities which are governmental in their nature which are carried on directly by the State, although through an agency employed for that purpose; and there are still others for the carrying out of which the State has delegated to an agency the necessary powers to that end. * * * Where the State assumes to act directly in the carrying out of its governmental function, even though it create and use a corporation for that purpose, it assumes responsibility for the conduct of its agent. * * * But when the State delegates the governmental power for the performance of a state function, the agency exercises its independent authority as delegated, as does a city, and its responsibility for its acts must be determined by the general law which has to do with that class of agent and corporate activity, apart from liability on the part of the State."

In the case of *Ciulla v. State* (1948), 77 N.Y. Supp. 2d 545, the Court of Claims of the State of New York, after quoting from the *Pantess case*, supra, reached the conclusion that the words "agency" and "instrumentality," with respect to a state, have a distinct difference in legal meaning from the word "agent," in that the former terms contemplate an authority to which the state delegates governmental power for performance of a state

function, while the latter term connotes one through whom the state acts in directly carrying out its governmental functions.³

The term "juristic entity" is not a term of art but is to be given its ordinary meaning of an entity recognized by the law. Regarding the Michigan implementing statute, the Attorney General in 1956 said:

"The plain purpose of the state statute is to require, as an essential condition of eligibility, that an agency be not only a political subdivision and instrumentality of the state, but that it be a legally separate entity, so that the state may have a legally responsible employer other than the state to deal with in making the agreement for coverage."⁴

There are basically two types of drainage districts in Michigan:

- (1) the county drainage district; and
- (2) the inter county drainage district.

Their characteristics will be discussed separately.⁵

County Drainage District

The method of establishing a county drainage district is outlined by the following steps:

1. An application to lay out a drainage district (§ 51).
2. The survey (§ 52).
3. An order by the county drain commissioner designating the drainage district, giving it a name or number and describing its boundaries (§ 54).

The County Drain

After the drainage district has been established as outlined above, the following steps are applicable to the county drain:

1. A petition to establish, locate and construct a drain (§ 71).
2. Appointment by the county drain commissioner of 3 disinterested freeholders as a board of determination (§ 72).
3. Hearing (§ 72).

³ Cf. *In re Lindsay-Strathmore Irrigation District*, 21 Fed. Supp. 129 holding a California irrigation district not to be a political subdivision of the state but a public corporation for municipal purposes since irrigation in California is a public use; *Fletcher v. Mapes*, 62 Fed. Supp. 351, holding a California irrigation district not to be a political subdivision but a state agency; *First State Bank of Gainesville v. Thomas*, 38 Fed. Supp. 849, holding a private banking institution, although chartered by the state, to not be an instrumentality of the state for the purpose of exemption from the Social Security Act.

⁴ O.A.G. 1956, pp. 192, 193.

⁵ Drain proceedings are governed by the provisions of the Drain Code of 1956, as amended. C.L.S. § 280.1; M.S.A. 1960 Rev. Vol. § 11.1001, et seq. The parenthetical section citations hereafter used refer to corresponding sections of the Drain Code as now in effect.

4. Approval of the proposed drain by the board of determination (§ 72).
5. Obtaining the right of way by releases from landowners (§ 73) or by condemnation, if necessary (§ 75, et seq.).
6. Actual construction work.

There is no drainage board in a county drainage district but its operation is under the jurisdiction of the county drain commissioner. The cost of construction of the county drain is spread upon the area determined to be benefited by the drain in the form of special assessments. The amounts collected are known as drain taxes.

In 1960 the legislature directed that any drainage district theretofore or thereafter established shall be a body corporate with power to contract, to sue and be sued, and to hold, manage and dispose of real and personal property.⁶ The provisions of the 1960 act could have practical effect on a county drainage district only to the extent of the acquisition of easements and land for the establishment of a county drain. Under the 1960 act after the route of the drain is fixed by the survey the releases of rights of way are to be obtained by the drain commissioner and this act permits them to be obtained in the name of the drainage district. In some instances it may be advantageous to buy land instead of resorting to condemnation and under the 1960 act this may be done by taking title in the name of the drainage district with the power in the district to dispose of any excess land not needed for the drain. Aside from the foregoing advantages, the 1960 act designating a county drainage district as a body corporate appears not to create a separate entity.⁷ It is difficult to see how a county drainage district can function as a body corporate since it has no independent officers nor does it have its own drainage board.

The law is settled that the county drain commissioner in performing his duties is not the agent or representative of the county or the townships and municipalities within the county. Thus, there is no support for the argument that a drainage district is an instrumentality of any of these political subdivisions based upon the powers and duties of the drain commissioner. In the case of *Brooks v. County of Oakland*, 268 Mich. 637, 639, our Supreme Court made this comment:

“The drain commissioner, in establishing the project, and the county treasurer, in taking and handling the assessments, are not agents of

⁶ Section 5 of the Drain Code as added by Act No. 96, P.A. 1960; M.S.A. 1961 Cum. Supp. § 11.1005. Prior to the adoption of the 1960 act, special assessment drainage districts had been construed by our Court as being created simply for the purpose of collecting taxes from the benefited land for the construction of the drain. *Spiegel v. Barrett*, 189 Mich. 111, 114.

⁷ The Supreme Court of Utah in discussing the meaning of the term “body corporate” said: “Neither the name an entity is given, nor the failure to properly characterize it by name, determines its status in the law. We must look to the nature of the entity, its powers and duties, to determine whether or not it is a corporation.” *Utah State Building Commission v. Great American Indemnity Co.*, 105 Utah 11, 140 Pac. 2d 763.

the county nor are the funds received for the use of the county. The officers perform special statutory duties for drainage districts.”

Another statement appears in *Bloomfield Village Drain District v. Keefe*, 119 Fed. 2d 157, 163, decided by the Circuit Court of Appeals, Sixth Circuit. It was there said:

“Under Michigan law the drain commissioner does not represent any political entity except the drain district, and his representations are in no way binding upon the townships, the municipalities or the counties, for none of these political subdivisions is chargeable either with the acts of the drain commissioner or with the acts of its officers in the administration of the drain law.”⁸

The county drain commissioner must look to the statutes as the source of his powers and since his functions are not governmental in a political sense his implied or inherent powers are decidedly limited if he has any such powers at all. For example, the drain commissioner may not expend money in such amounts as in his judgment are necessary for the maintenance and repair of a drain and assess the cost against the benefited area. Under Section 196 of the Drain Code, the drain commissioner is limited, except where a petition for the purpose has been filed, to the expenditure for maintenance and repair of an amount not to exceed in any one year \$500 per mile or fraction thereof or 1% of the original cost of the drain and 1% of extensions thereof.

The foregoing analysis serves to demonstrate that a county drainage district is not a political entity nor is it an instrumentality of the state or one or more of its political subdivisions. Neither is the drainage district itself a political subdivision. The case of *State, Lydecker et al, Prosecutors*, cited supra, involved a sewerage, drainage and water district of the Township of Englewood. The Court held that the statute under which the district was created did not establish a political subdivision of the state. The Court discussed this phase of the case by saying:

“The board of commissioners is constituted a corporation, and is invested with some control over a defined territory, but with the inhabitants of that territory, as such, it has no concern. It is formed, not for the public advantage, but in the interest of a particular class—the landowners of the district. Its chief end is not the government of the persons and things within its territory, but mere land improvement at the expense of the land, either by general tax or special assessment; and the electors of the district have no voice whatever in its corporate

⁸ Your letter of request indicates your familiarity with the Opinion of the Attorney General, No. 2138, holding that persons employed by the county drain commissioner in the repair of county drains are not county employees under the Federal Social Security Act. O.A.G. 1955, p. 579. In that opinion the Attorney General placed reliance upon the case of *Township of Cooper v. Little*, 220 Mich. 62, from which the following quotation was made: “In a long line of cases beginning with *Dawson v. Township of Aurelius*, 49 Mich. 479, this court has uniformly recognized that the fiscal affairs of a drain were separate and distinct from the general fiscal affairs of the municipality and that the municipality was not bound or obligated by the acts of the drain commissioner.”

affairs, the choice of commissioners and the approval of plans devolving on the owners of the land alone."⁹

Intercounty Drainage Districts

The statutory provisions for the establishment of an intercounty drainage district follow the same basic pattern as those hereinbefore outlined for a county drainage district. An intercounty drainage district differs in that it involves benefited areas in two or more counties (§ 101). The intercounty drainage district has a drainage board consisting of the drain commissioner of each of the affected counties and the State Director of Agriculture or his deputy (§ 102). In *Schobert v. Inter-County Drain*, 342 Mich. 270, the issue before the Court was whether the members of the drainage board of an intercounty drainage district were "state officials" not subject to the jurisdiction of a circuit court in a proceeding in mandamus. In holding the drainage board not to be state officials within the meaning of the applicable statute, the Court announced:

"They are not entrusted with the general administration of State affairs; they are not heads of State departments; their authority is not coextensive with the borders of the State; nor is the interest of the State at large involved save in a most general sense."
(p. 284)

I have examined the pertinent statutes and find nothing therein which indicates that an intercounty drainage district has any different legal status than that of a county drainage district. In my opinion an intercounty drainage district is neither a political subdivision nor an instrumentality nor a juristic entity.

I answer your first question by saying that a drainage district, either county or intercounty, cannot qualify under the provisions of the Federal Social Security Act as a political subdivision, or an instrumentality of the state, or as a juristic entity.

"*Question 2.* If a Drain District does qualify as a separate 'juristic entity' for social security purposes, can the State Employees' Retirement Board enter into an agreement with the Drain District to provide social security coverage for employees of the Drain District? (Please include in your opinion employees of Drain Districts established under Chapters 20 or 21 of the State Drain Code, as well as all other Drain Districts established in the State of Michigan)."

⁹ The Attorney General is aware of the pronouncement by the Circuit Court of Appeals in the case of *Bloomfield Village Drain District v. Keefe*, supra, that a drain district in Michigan "exhibits the essential characteristics of a public corporation" and is capable of acting as an entity with an existence independent of its members and subject to suit as obligor on its bonds. That case lays substantial emphasis for support of its conclusions on Article VIII, Section 15a of the Michigan Constitution which provides: "Any drainage district, established under provision of law, may issue bonds for drainage purposes within such district." The issue in that case was one of federal jurisdiction and the Attorney General is not persuaded by the reasoning in the Court's opinion that a drainage district should be held to be a juristic entity for the purpose of identifying it as an employer under the Social Security Act, capable of accepting liability for the payment of employers' contributions.

My answer to Question 1 disposes of your second question.

"*Question 3.* What comprises a Drain District? Is each drain considered a Drain District, eligible to enter into an agreement, or would the District be composed of all drains under the jurisdiction of the County Drain Commissioner? Presently the Drain Commissioner is an elected official of the county, and is being reported for social security on the county report, except in counties which have excluded elective positions."

Fundamentally a drainage district comprises an area of land which will be drained and benefited by the construction of a drain.¹⁰ Initially the area to be included in the drainage district is fixed by the survey made at the time that the route and type of construction of the proposed drain are determined. A drain does not exist independent from a drainage district. Further explanation is to be found in the case of *Whitmore v. Calhoun County Treasurer*, 314 Mich. 431, 436:

"The John Wood drain was the middle one of three separate and distinct drains, each legally established with separate drainage assessment districts. The fact that these three drains together constitute a continuous drainage system does not make them a single drain."

"*Question 4.* Would it be necessary for the Retirement Board to obtain from each Drain District (Berrien County has approximately 650 drains) entering into a social security agreement a guarantee deposit, to be used in case of default in the payment of social security tax by the Drain District? (See Sec. 2 (f) of Act No. 205, P.A. 1951, as amended. Also, A.G. Memo Opinion No. 548, 6/24/59)."

Since my answer to your first question forecloses the possibility of coverage of employees, if any, of a drainage district under the Federal Security Act, the processing of an agreement for coverage and a guarantee deposit is moot.

As indicated by the foregoing analysis of your questions, the problem is mainly to find an entity recognized by law and which can be identified as the legally responsible employer. Secondly, it becomes necessary to ascertain the source of funds from which the employer's contribution for Social Security coverage may be paid. It lies within the power of the legislature to supply these deficiencies by the enactment of appropriate legislation.¹¹

FRANK J. KELLEY,
Attorney General.

¹⁰ Under the Drain Code a drain embraces not only a watercourse or ditch for the drainage of surface waters but also includes a sanitary or storm sewer or combination thereof (§ 3). Your request is understood to refer only to surface water drains and this opinion is accordingly so limited.

¹¹ As an example, the legislature by Act 152, P.A. 1962, effective May 9, 1962, authorized county boards of supervisors to adopt resolutions providing public liability or other insurance at county expense to cover the potential liability of the various drainage districts under the supervision of the county drain commissioner for the acts and defaults of the commissioner and his deputies, except acts of malfeasance or misfeasance.