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WORKMEN'S COMPENSATION: Auxiliary Policemen.

POLICE: Workmen's Compensation for Auxiliary Policemen.

Non-compensated auxiliary policemen are covered by the Workmen's Compensation Act while performing their duties.

Opinion No. 4879 July 22, 1975.

Honorable John A. Smietanka
Prosecuting Attorney
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Courthouse
St. Joseph, Michigan 49085

Your letter of April 8, 1975, requests my opinion concerning coverage under the Workmen's Compensation Act for volunteer, unpaid auxiliary policemen who may be injured while performing their duties.

You first ask:

"Are unpaid auxiliary policemen determined to be 'employees' as defined in Public Act of 1969, No. 317, Sec. 161, Sub-Sec. 1(a), which states, '. . . every person in the service of the state or any county, city, township, village or school district under any appointment or contract of hire, expressed or implied, oral or written.'?"

The statutory reference in your question is to MCLA 418.161(1)(a); MSA 17.237.161(1)(a) which defines public employees for the purpose of the Workmen's Compensation Act, in pertinent part, as follows:

"Sec. 161. (1) An employee as used in this act shall mean:

(a) Every person in the service of the state or of any county, city, township, village or school district, under any appointment, or contract of hire, express or implied, oral or written." * * *

It has been determined that the particular auxiliary policemen you are referring to are seven men who are sworn in and carried on the roles of the municipal unit as auxiliary policemen. Each man furnishes his own uniform, firearm and badge and performs all of the functions of a police officer except that he has no arrest power and always works under the direct supervision of a regular full-time police officer. These auxiliary policemen work approximately ten to forty hours a month depending on the need of the municipal unit and the availability of the auxiliary police officer. No compensation is paid to these policemen by the municipal unit although while on duty, auxiliary policemen are subject to the same risk of injury as policemen on the regular payroll.

The tests which have evolved in Michigan to ascertain whether an employer-employee relationship exists are set forth in *Cronk* v *Chevrolet Local,* 32 Mich App 394, 398-399; 189 NW2d 16, 18 (1971) which also reviews the decisional precedent leading up to the present criteria, as follows:

"The determination of the master-servant relationship for purposes of the Workmen's Compensation Act no longer depends upon control. Rather, the court looks to the 'economic reality' of the relationship:

'We have, however, abandoned the control test as the exclusive criterion by which the existence of an employee-employer relationship, for purposes of remedial social legislation, is determined. See *Tata* v *Muskovitz* (1959), 354 Mich 695, which adopted as the law of this state Mr. Justice TALBOT SMITH'S dissenting opinion in *Powell* v. *Employment Security Commission* (1956), 345 Mich 455, 478; "The test is one of economic reality." (Emphasis supplied.) *Goodchild* v. *Erickson* (1965) 375 Mich 289, 293.'

"Justice Smith later discussed what was meant by the term 'economic reality':

'This is not a matter of terminology, oral or written, but of the realities of the work performed. Control is a factor, as is payment of wages, hiring and firing, and the responsibility for the maintenance of discipline; but the test of economic reality views these elements as a whole, assigning primacy to no single one.' (Footnoted case: *Schulte* v. *American Box Board Company* (1959), 358 Mich 21, 33.)

"The Supreme Court in *Goodchild* v. *Erickson* (1965), 375 Mich 289, 293, in finding the existence of an employer-employee relationship stated:

'Viewed in terms of economic reality, we cannot disagree with the appeal board's conclusion that for purposes of assessing liability under the workmen's compensation act Goodchild was an employee of Erickson at the time of his injury. Goodchild was a regular full-time employee of Erickson, received a single pay check from Erickson each week, and was directed by Erickson in unloading the * * * van.'

"We therefore find the Supreme Court, under the 'economic reality' test, looking to the following elements when determining whether or not the employer-employee relationship exists: (1) control; (2) payment of wages; (3) the right to hire and fire; and (4) the right to discipline." (Footnote omitted)

The "economic reality" test has been consistently utilized by the appellate courts to determine the existence of an employer-employee relationship for purposes of remedial social legislation since 1959, but nearly all of the decisions have involved an admitted contract for services and the question was whether the services were performed as an employee or an independent contractor.

In *Cronk, supra,* the test is applied to a plaintiff who was an uncompensated, elected union official injured at a union meeting. The Court held that none of the four elements of the economic reality test, *supra,* applied and that plaintiff was not an employee of the defendant union under the Workmen's Compensation Act.

Unlike the factual situation in *Cronk, supra,* the auxiliary policemen undoubtedly meet the tests of control, the right to hire and fire and the right to discipline. The one factor missing is the payment of wages which is generally considered essential to a "contract of hire".

Although no recent appellate decisions have been found in Michigan on this point, the Workmen's Compensation Appeal Board has interpreted MCLA 418.371(4)[1] as evidence that the Legislature did not consider the designation of a wage as a prerequisite to an employer-employee relationship. In *Betts* v *Ann Arbor School System,* 1975 WCABO . . . the Board quoted from *Davis* v *Michigan Catholic Conference Inc.* 1968 WCABO 147, 153, as follows:

> ' "The designation of a wage for services performed is not a prerequisite to a determination that a contract of hire exists under the compensation statute. It is evident that the Legislature did not consider the designation of a wage as a prerequisite to an employer-employee relationship. . . ." '

It will be further noted that the definition of a public employee in MCLA 418.161(1)(a) *supra,* is broader than the definition of a private employee in that it includes, in the disjunctive, the services of a person under "any appointment" as well as under a "contract of hire". The word "appointment" is defined in *Webster's Third New International Dictionary* as a "designation of a person to hold a non-elective office or perform a function."

It is my opinion that non-compensated auxiliary policemen are appointed within the meaning of the definition of public employee and are covered by the Workmen's Compensation Act while performing their duties. This conclusion is based on the facts in this instance which indicate that the auxiliary policemen are officially designated and appointed as such by the municipal police department; sworn in as policemen to uphold the law; carried on the roles of the department in that capacity; perform all of the functions of a police officer while on duty (with the exception noted, *supra*); are subject to the control, direction and authority of the police department as auxiliary members of a quasi-military organization and can be terminated or disciplined by the appropriate departmental officials. In addition to the fact that the Workmen's Compensation Act requires payment of benefits to auxiliary policemen, it should also be recognized that, while on duty, these persons are subject to the same dangers and assume the same risks as regular policemen in protecting members of the public. Therefore the employing agency should be subject to the same responsibilities where a personal injury arising out of such activity occurs.

The Michigan Court of Appeals in *Hite* v *Evart Products Co.,* 34 Mich App 247; 191 NW2d 136 (1971) and *Alexander* v *Director, Bureau of Workmen's Compensation,* 53 Mich App 262; 217 NW2d 63 (1974) has clearly indicated that the Workmen's Compensation Act will be construed in the manner most consistent with its humanitarian purposes. This attitude of the Courts toward the payment of workmen's compensation benefits virtually assures an interpretation of an employer-employee relationship

[1] MCLA 418.371(4); MSA 17.237(371)(4) provides: "If the hourly earning of the employee cannot be ascertained, or if no pay has been designated for the work required, the wage, for the purpose of calculating compensation, shall be taken to be the usual wage for similar services where such services are rendered by paid employees."

as to auxiliary policemen, particularly since volunteer firemen, safety patrol officers and volunteer civil defense workers are specifically covered by MCLA 418.161(1)(a), *supra.*

Your second and third questions which are interrelated ask the following:

> "Is it necessary for an auxiliary policeman to receive wages or expenses to be an 'employee' as defined in Public Act of 1969, No. 317, Sec. 161 Sub-Sec. 1(2)?"
>
> "If such wages, salary, or expense compensation is required for auxiliary policemen to be determined an 'employee' under this Act, what would be the minimum compensation wages, salary or expense compensation necessary to satisfy this Act?"

In view of my answer to your first question, it is not necessary that a wage be paid to the auxiliary policemen for them to be covered by the Workmen's Compensation Act. If no wage is paid the wage for purposes of workmen's compensation benefits would be at the same hourly rate as that paid for similar services rendered by paid employees as provided by MCLA 418.371(4), *supra.*

Your fourth and last question asks the following:

> "Does the statement, '. . . the benefits of this Act shall be available to any safety patrol officer who is engaged in traffic regulation and management for and by authority of any county, city, village or township, whether such officer is paid, or unpaid and in the same manner as benefits are available to volunteer firemen upon the adoption of the legislative body of the county, city, village or township of a resolution to that effect . . .' mean that such a resolution by the municipal unit's legislative body could make workmen's compensation coverage available to unpaid auxiliary policemen?"

The statutory language you refer to is a part of the definition of a public employee in MCLA 418.161(1)(a), *supra,* which provides in pertinent part, as follows:

> "* * * The benefits of this act shall be available to any safety patrol officer who is engaged in traffic regulation and management for and by authority of any county, city, village or township, whether such office is paid or unpaid, in the same manner as benefits are available to volunteer firemen, upon the adoption by the legislative body of the county, city, village or township of a resolution to that effect. A safety patrol officer or safety patrol force whenever used in this act shall be deemed to include all persons who volunteer and are registered with a school and assigned to patrol any public thoroughfare used by students of any school." * * *

In my opinion, this provision is limited to safety patrol officers engaged in traffic regulation and management and could not be extended to cover auxiliary policemen whose duties are not limited to these functions.

FRANK J. KELLEY,
Attorney General.