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MEMORANDUM FOR ROBERT WESTHOVEN

FROM: Jerry E. Holmes
Branch Chief, ET2
CC:TE/GE:EOEG

SUBJECT: Elected & Appointed Officials

Key

State = [REDACTED]

This is in answer to your inquiry about the employment classification of certain elected and/or appointed officials of State.

Our view is that, when the common-law rules are applied to each case, elected officials are going to be employees, for reasons discussed below. Appointed officials may be either employees or independent contractors. To make the determination, it is necessary to consider the statutes or ordinances that create the position and delineate the duties of the official.

Section 3401(c) of the Internal Revenue Code (the Code) provides that, for purposes of this chapter, the term "employee" includes an officer, employee, or elected official of a state, or any political subdivision thereof. The chapter referred to is Chapter 24, Collection of Income Tax at Source on Wages. In other words, section 3401(c) applies only for income tax withholding purposes. For purposes of taxes under the

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Federal Insurance Contributions Act (FICA), employee status is determined under the common law.¹ Code section 3121(d)(2).

For FICA purposes, an individual is an employee if, under the common law rules applicable in determining the employer-employee relationship, the individual has the status of an employee. Code section 3121(d)(2). Generally this relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished but also as to the details and means by which the result is accomplished. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. Section 31.3121(d)-1(c), Employment Tax Regulations. Existence of an employer-employee, or independent contractor, relationship is a question of fact.

In applying the common-law rules, the IRS considers whether the service recipient has behavioral and financial control over the worker and evaluates the relationship between the parties, including how they view their relationship.

Behavioral controls are evidenced by facts which indicate whether the service recipient has a right to direct or control how the worker performs the tasks for which he or she is hired. Facts which illustrate the right to control how a worker performs a task include the provision of training or instruction.

Financial controls are evidenced by facts which indicate whether the service recipient has a right to direct or control the financial aspects of the worker's activities. These include significant investment, unreimbursed expenses, making services available to the relevant market, the method of payment, and the opportunity for profit or loss.

¹Section 1402(c)(1) of the Code, pertaining to the Self-Employment Contributions Act (SECA), provides that the term "trade or business," when used with reference to self-employment income or net earnings from self-employment, shall not include the performance of functions of public office, other than those of fee-based public officials not covered under an agreement under section 218 of the Social Security Act. Section 1.1402(c)-2(b) of the Income Tax regulations provides that the term "public office" includes any elective or appointive office of a state or political subdivision thereof.

These provisions do not state that every public official is an employee. They leave open the possibility that there may occasionally be non-employee public officials. These individuals are not carrying on a trade or business for SECA purposes, and consequently they will not be subject to SECA tax on their compensation as public officials. Since they are not employees, they will not be subject to FICA tax.

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The relationship of the parties is generally evidenced by examining the parties' agreements and actions with respect to each other, paying close attention to those facts which show not only how they perceive their own relationship but also how they represent their relationship to others. Facts which illustrate how the parties perceive their relationship include the intent of the parties as expressed in written contracts; the provision of, or lack of, employee benefits; the right of the parties to terminate the relationship; the permanency of the relationship, and whether the services performed are part of the service recipient's regular business activities.

The fact that an individual is employed part-time, or works for more than one municipality, is not indicative of independent contractor status. A part-time worker may be an employee under the common-law rules.

The Code does not define the term "public official," but section 1.1402(c)-2(b) of the regulations gives the following examples: the president, the vice president, a governor, a mayor, the secretary of state, a member of Congress, a state representative, a county commissioner, a judge, a justice of the peace, a county or city attorney, a marshal, a sheriff, a constable, a registrar of deeds, or a notary public.

There is, however, a body of case law defining the term "public official." In Buckley v. Valeo, 424 U.S.1 (1975), the Supreme Court stated that anyone who exercises significant authority pursuant to the laws of the United States is an officer. The term "officers" embraces all appointed officials exercising responsibility under the public laws of the nation. 424 U.S. at 131. Officers perform a significant governmental duty exercised pursuant to a public law. 424 U.S. at 141. Officers administer and enforce the public law. 424 U.S. 139.

More specifically addressing the definition of officer is Metcalf & Eddy v. Mitchel, 269 U.S. 514 (1926), where the Supreme Court considered whether consulting engineers hired by states, municipalities, or water supply and sewage districts were independent contractors or "officers and employees" of a state. "An office is a public station conferred by the appointment of a government. The term embraces the idea of tenure, duration, emolument and duties fixed by law. Where an office is created, the law usually fixes its incidents, including its term, its duties, and its compensation." 269 U.S. at 520 (citations omitted). The independent contractor has liberty of action which excludes control or the right to control characteristic of the employer-employee relationship. 269 U.S. at 521.

In Pope v. Commissioner, 138 F.2d 1006 (6th Cir. 1943), the Sixth Circuit, following Metcalf & Eddy, established the following standards to define the term "public office." (1) It must be created by the constitution or the legislature, or by a municipality or other body with authority conferred by the legislature. (2) There must be a delegation of a portion of the sovereign powers of government to be exercised for the benefit of the public. (3) The powers conferred and the duties to be discharged must

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be defined either directly or indirectly by the legislature or through legislative authority. (4) The duties must be performed independently and without control of a superior power other than the law. (5) The office must have some permanency and continuity, and the officer must take an official oath.

In summary, an official is an agent and employee of the state with the power to act on behalf of the state. The duties of the office, and frequently its compensation, are defined by statute. An official acts with a certain amount of independence under the law, but many officials are also responsible to other officials, as specified in statutes or ordinances. An elected official is responsible to the public, and the public or a superior official usually has the power to remove him. An appointed official is also usually under the supervision and authority of another official or body. A public official does not have the freedom from supervision characteristic of an independent contractor. These facts are all indicative of employee status.

Some appointed officials, however, are given sufficient independence that they are not employees under the common law. Rev. Rul. 61-113, 1961-1 C.B. 400, deals with individuals who serve as members of a hearing board of an air pollution control district, who are appointed by the county board of supervisors, take an oath of office, hold public hearings, and submit their decisions to the county. They are not under the control and direction of the county board of supervisors or any other body. Their compensation is based on the number of hearings they attend. Their services constitute the performance of the functions of a public office and do not constitute a "trade or business" for purposes of Code section 1402(c)(1).

It is becoming increasingly common for governments to contract out some traditional governmental functions. Generally the functions contracted out will not involve exercise of the police or taxing powers of government, and there will be a statutorily created authority which has the responsibility of making final decisions. The practice of contracting out nevertheless creates ambiguous situations and hybrid entities which are difficult to classify.

QUESTION

1. Is a property assessor an employee or an independent contractor?

An assessor establishes or estimates the value of real property for purposes of property taxes.

State statute defines "municipal official" as any elected or appointed member of a municipal government, including assessors.² State statutes require municipalities to

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elect or appoint assessors and provide for penalties for a municipal official who neglects or refuses to perform a duty of office or commits a civil violation.³

State statutes allow various methods of choosing assessors. The legislative body of a town may decide whether to appoint a single assessor or to elect a board of assessors. The municipal officers of one or more towns may enact an ordinance providing for a single joint assessor to be appointed. When the town has not elected a full board of assessors, the selectmen serve as assessors, and, if a selectman resigns the position of assessor, a new assessor may be appointed. A municipality may also appoint a board of assessment review.⁴ The statute provides for officials to be sworn in. The statute provides that the town may fix the compensation of assessors, or, if no compensation is fixed, provides that a daily fee be paid.

State statutes further provide that a municipality may employ a part-time, non-certified assessor or a full-time assessor, who must have State certification. A municipality may also contract with a firm or organization that provides assessing services. In such a case, the professional assessor firm will submit assessments to the board of assessors or selectmen. Standards for assessing firms are provided by State law.⁵

The statute provides for the development of guidelines for professional assessing firms, including development of a model contract for contracting out this function. It also requires the State tax assessor to provide technical assistance to municipalities, at their request, in evaluating and selecting professional assessing firms.⁶

The Supreme Court of State considered the appeal of a taxpayer disputing the amount of a property tax assessment. The court stated that local assessors are public officers, though they may not have special training or assessment skills. On the other hand, local assessors may contract with professional appraisers, who may be expected to use more sophisticated methods. Local assessors, however, are required to be informed about professional methods and to use their own knowledge to check the accuracy of professional appraisers' recommendations.⁷ In other words, elected or

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appointed assessors or boards of assessors are public officials who must ultimately use their own judgment in evaluating the recommendations of independent professional appraisers whom they hire. These independent professional appraisers are independent contractors.

State statute establishes assessing standards for municipalities. State provides training to assessors and provides certification. It publishes a list of certified assessors and assessing firms. It establishes guidelines for professional assessing firms and publishes an assessment manual, identifying accepted and preferred methods of assessing property.⁸

ANAYLSIS

Under the common-law rules, these statutory provisions establish the degree of control sufficient to create an employer-employee relationship. They establish duties, provide for training , establish standards, and provide sanctions for failure to perform the duties of the office. They provide for methods of compensation. They define the assessor as a public official. Public officials are required to take an oath of office. Assessors act as employees and agents to exercise the taxing power of the state. Therefore assessors and members of boards of assessment, whether elected or appointed, are employees. Appraising firms are independent contractors.

QUESTION

2. Are animal control officers employees or independent contractors?

You have stated that animal control officers may be elected or appointed and that often they work for more than one municipality.

State statute, as stated above, defines "municipal official" as any elected or appointed member of a municipal government. Under State statutes, animal control officers are required to be appointed by each municipality to enforce various sections of the State statutes dealing with animal control.⁹ They are required to attend training and must be State certified. They not only control animals running at large, but have the responsibility of enforcing laws for the control of rabid animals and civil and criminal statutes against abuse of animals.¹⁰ They are empowered to serve warrants to demand

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

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that animals be licensed and to enter upon property to take possession of ill-treated animals with a court order.¹¹

State statutes establish that remuneration for animal control officers is determined by municipal officers. State statutes establish penalties for official refusal and neglect of duty and establish an Animal Welfare Board, one of whose duties is to enforce the penalties.¹²

ANALYSIS AND CONCLUSION

We conclude that animal control officers are employees. State statutes define animal control officers as officers required to be appointed by municipalities. They define the duties of the office in considerable detail and establish penalties for neglect of duty. Animal control officers are under the control of the officers of their municipalities and the State Animal Welfare Board. The State requires animal control officers to be trained and certified. Training and certification are indicia of control. Animal control officers' duties are not confined to picking up stray animals, but also include enforcing civil and criminal statutes. In other words, animal control officers are authorized and trained to exercise the police powers of the state. As such they are officers and employees, not independent contractors.

QUESTION

3. Are road commissioners employees or independent contractors?

The office of road commissioner is statutorily mandated, but there are many variations in practice. State statute provides three options for selection of a road commissioner. A town can have one or more elected road commissioners; it can authorize the selectmen to appoint and control a road commissioner, or it can allow the board of selectmen to serve as a board of road commissioners.

An appointed road commissioner may be disciplined and terminated, for cause after notice and a hearing, by the selectmen. In a town manager form of government the manager typically either serves as or oversees the road commissioner. An elected road commissioner cannot be disciplined or removed from office by the selectmen. The

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voters may recall an elected road commissioner if the town has a charter or ordinance permitting it.¹³

Road commissioners' duties are supervisory in nature. They are responsible for inspecting roads and having snow and obstructions removed. They are required to account for their expenditures and keep records of permits granted for excavation, etc. They must inspect work to determine if it is properly done.¹⁴

The road commissioner's compensation is determined by the municipality. In some cities, the road commissioner is paid a yearly salary to act as supervisor of the roads and to oversee the road work done by contractors. In towns where the road commissioner uses the town's equipment, he is treated as an employee. In some towns, the commissioner receives an hourly wage for minor road maintenance and takes bids for major projects. In smaller towns, the road commissioner may receive yearly compensation in a lump sum, for instance [REDACTED]. The commissioner may be a contractor who owns road equipment and is paid as an independent contractor for doing road work.¹⁵ In such cases, the commissioner, in the role of contractor, might have workers that he treats as employees. The contracting entity may also be incorporated.

ANALYSIS AND CONCLUSION

Road commissioners are officials and employees. The job of road commissioner is defined by State statute as a required public office. The commissioner must take an oath and is responsible either to the selectmen, who can dismiss him, or to the electorate. State statute provides specific penalties for neglect of road commissioners' duties, as well as the general penalties for neglect of duties. These facts provide sufficient evidence of the right to control to create an employer-employee relationship. It appears that many, if not most, road commissioners are treated as employees.

A question arises when a road commissioner is also treated as an independent contractor for doing work on the roads, especially when he also supplies equipment and has employees in his role as contractor. Courts recognize that an individual can function in more than one capacity. For instance, an individual can be the secretary of a corporation and its lawyer, as in Idaho Ambucare Ctr., Inc. v. U.S., 57 F.3d 752 (9th Cir. 1995).

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The IRS takes the position that an individual can serve in two capacities, provided that the two capacities are not interrelated. In Rev. Rul. 58-505, 1958-2 C.B. 728, the officers of an insurance company performed administrative duties for the company and also sold insurance policies under a standard independent contractor agreement. The IRS held that they worked in two distinct capacities, employee and independent contractor. The ruling states that, if the two services are "interrelated," the officers do not act in two separate capacities. If, however, the services in the two capacities are separate and distinct, then the status of each type of service must be considered separately. This means that there is no interrelation either as to duties or remuneration in the two capacities.

How can a road commissioner function in two capacities when his official duties require him to supervise and evaluate the work which he does as an independent contractor? According to Rev. Rul. 58-505, both the duties and the remuneration must be separate and distinct. In this case, the remuneration is separate, but the duties overlap in such a way that we conclude they are interrelated. Therefore the road commissioner is an employee with respect to his duties as contractor. Essentially, he will always be subject to the control of either the selectmen or the electorate for the work he undertakes on the roads.

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