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SPRINGFIELD

May 20, 1982

FILE NO. 82-015

**PENSIONS:
Certain Fees Received by
State Court Reporters Are
Wages from Employment and
As Such Are Covered by the
Federal-State Social Security
Coverage Agreement**

Michael L. Mory, Secretary
State Employees' Retirement System
Post Office Box 4064
2815 West Washington Street
Springfield, Illinois 62708

Dear Mr. Mory:

I have your letter wherein you inquire whether certain fees received by State court reporters are self-employment income or are wages from employment with the State of Illinois which are covered by the Federal-State Social Security Coverage Agreement. For the reasons hereinafter stated, it is my opinion that the fees in question are wages from employment and consequently are subject to FICA withholdings and contributions.

COPIES

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According to your letter:

"* * * [T]he Department of Health and Human Services, the Social Security Administration has made the determination that certain payments received by court reporters of the State of Illinois are wages covered under the agreement. Specifically, these payments are fees received by court reporters for preparation of transcripts which they are required to provide by statute. These fees are received by the reporters outside of the payroll system and include payments by the State for preparation of transcripts for indigents and fees received from third parties for preparation of an original transcript which is required by statute. Fees received for preparation of additional copies are considered to be self-employment income by SSA.

* * *

[Since] * * * most, if not all, court reporters treated the income from fees as self-employment income on Schedule C of their Federal Income Tax Returns, they also made what they believed to be allowable deductions for contributions to Keough plans. The determination that these fees are wages, not self-employment income, will mean that not only are the reporters liable for income taxes that should have been paid on the amount deducted, they are also liable for excise taxes on erroneous payments to such accounts.

* * *

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Federal-State Social Security coverage under Title II of the Federal Social Security Act was originally extended to "Employees of the State or Political Subdivisions, Municipalities and Instrumentalities thereof" under a September 15, 1953 agreement between the Secretary of Health, Education and Welfare and the State of Illinois. Modification No. 256 to the 1953 agreement, effective January 1, 1969, provided Social Security coverage for the Division of the State Employees' Retirement System. Modification No. 256 provides in pertinent part that:

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"The Secretary of Health, Education, and Welfare and the State of Illinois, acting through its representative designated to administer its responsibilities under the agreement of September 15, 1953, hereby accept as an additional coverage group under said agreement and acknowledge full applicability of the terms of said agreement to the following:

Services performed by individuals as employees of the State, as members of a coverage group (as established by Section 218(d)(4) of the Act) of the retirement system identified as the State Employees' Retirement System of Illinois (as established by Section 218(d)(6) of the Act) including services performed by individuals in positions covered by the State Employees' Retirement System but who are ineligible to be members of the retirement system.

Effective date of coverage: January 1, 1969

Excluded Services:

(a) Service in any class or classes of positions the compensation for which is on a fee basis, and

(b) Services performed by a student or student nurse to the extent that such services are excluded from employment by any provision of Section 210(a) of the Act.

* * *

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(Emphasis added.)

According to information received from your office, State court reporters elected to contribute under Modification No. 256.

Court reporters receive their salary through the regular payroll system and appropriate FICA contributions are made thereon. Additionally, those employees are paid certain fees outside the payroll system, in some cases by third parties, and in other cases on warrant of the Supreme Court from special appropriations for that purpose. FICA contributions have not

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been paid on these fees received by court reporters. Consequently, the question arises as to whether or not these fees received by court reporters are wages which are covered by the State-Federal Social Security Agreement, thus requiring appropriate withholdings and contributions to be made thereon.

Section 8 of "AN ACT relating to the qualifications, numbers, appointment, duties and compensation of court reporters, etc." [the Act] (Ill. Rev. Stat. 1979, ch. 37, par. 658) provided in pertinent part that:

"(a) The salaries of all court reporters shall be paid by the State. Full-time court reporters shall be paid not less than \$6,000 nor more than \$20,000 per year for 1979. Full-time court reporters shall be paid not less than \$6,000 nor more than \$22,500 per year for 1980 and not less than \$6,000 nor more than \$24,000 per year thereafter. Part-time court reporters shall be paid not less than \$12 nor more than \$32 per half-day. The salary of each individual court reporter shall be computed from a schedule adopted by the Director of the Administrative Office of the Illinois Courts with the approval of the Supreme Court.

* * *

(d) A court reporter who has been credited with an 'A' proficiency rating, without examination, as provided in Section 7 of this Act, shall receive a salary of \$10,000 per annum. Any increase in the maximum salary payable to reporters shall not result in any increase for such reporter unless and until he has passed the proficiency test.

(e) The salaries of all official court reporters employed by the State shall be paid monthly on the voucher of the Supreme Court. The Supreme Court may require all salary claims by part-time reporters to be substantiated by certificates signed by the reporters and approved by the chief judge of the circuit."
(Emphasis added.)

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Section 5 of the Act (Ill. Rev. Stat. 1979, ch. 37, par. 655) provides in pertinent part that:

"* * * The court reporter shall make a full reporting by means of stenographic hand or machine notes, or a combination thereof, of the evidence and such other proceedings in trials and judicial proceedings to which he is assigned by the chief judge, and the court reporter may use an electronic instrument as a supplementary device. To the extent that it does not substantially interfere with the court reporter's other official duties, the judge to whom, or a judge of the division to which, a reporter is assigned may assign a reporter to secretarial or clerical duties arising out of official court operations.

The court reporter shall furnish forthwith one transcript of the evidence and proceedings in a trial or other judicial proceeding correctly made to any party to the trial or proceeding upon the request of such party or his attorney. Unless and until otherwise provided in a Uniform Schedule of Charges which may hereafter be provided by rule or order of the Supreme Court, a court reporter may charge not to exceed 25¢ per 100 words for making transcripts of his notes. The fees for making transcripts shall be paid in the first instance by the party in whose behalf such transcript is ordered and shall be taxed in the suit.

The transcripts shall be filed and remain with the papers of the case. When the judge trying the case shall, of his own motion, order a transcript of the court reporter's notes, the judge may direct the payment of the charges therefor, and the taxation of the charges as costs in such manner as to him may seem just. Provided, that the charges for making but one transcript shall be taxed as costs and the party first ordering the transcript shall have preference unless it shall be otherwise ordered by the court."
(Emphasis added.)

In accordance with sections 1 and 2 of "AN ACT prescribing the duties of official court reporters in connection with assignments and the furnishing of transcripts in certain

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cases involving indigent persons, providing compensation therefor, etc." (Ill. Rev. Stat. 1979, ch. 37, pars. 661, 662), the official court reporter is required to take full stenographic notes at any arraignment wherein the accused may or shall be punished by imprisonment in a penitentiary, and at proceedings arising under article 122 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1979, ch. 38, par. 122-1 et seq.). Additionally, sections 3 and 4 of the aforementioned Act (Ill. Rev. Stat. 1979, ch. 37, par. 663, 664) provide in pertinent part that:

"§ 3. Upon order of the court, the official court reporter shall transcribe and furnish an original and copy of the pre-trial proceedings and the proceedings at the trial of any person where, pursuant to Rule 607 of the Illinois Supreme Court, an order could be entered so requiring, if the defendant is convicted."

"§ 4. The reporter, in full for all his services in connection with the transcribing and filing or furnishing the transcripts referred to in this Act, shall be paid a fee as provided in Section 5 of the Court Reporters Act, approved August 5, 1965, as amended. All such fees shall be paid out of the State Treasury on the warrant of the Supreme Court from appropriations made for such purposes, upon presentation of a certificate signed by the presiding judge setting the amount due said reporter. Such certificate shall as to each original transcript (and copy where fee for copy is authorized) set forth the title and number of the cause in which the transcript was required to be furnished, the nature of the proceedings transcribed (whether an arraignment, proceedings at criminal trial or proceedings at post-conviction hearing) and the fee approved therefor. The Supreme Court may prescribe the form of the certificate and furnish same." (Emphasis added.)

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Rule 607 of the Illinois Supreme Court provides that certain defendants who are without financial means may obtain a report of proceedings. Upon a finding that a defendant is without financial means to obtain the report of proceedings of his trial or hearing, the judge who imposed sentence or entered the order revoking probation or conditional discharge or modifying the conditions thereof, shall order the court reporter to transcribe an original and copy of his notes. Rule 607 further provides that:

"* * * The original and one copy of the report shall be certified by the reporter and filed with the clerk of the trial court as provided below, without charge. The clerk of the trial court shall then, upon written request of the defendant, release the copy of the report of proceedings to the defendant's attorney of record on appeal. In the event no attorney appears of record, the clerk shall, upon written request of the defendant, release the report of proceedings to the defendant, his guardian or custodian. The reporter who prepares a report of proceedings pursuant to an order under this rule shall be paid the same fee for preparing the transcript as is provided by law for the compensation of reporters for preparing transcripts in other cases.

* * *

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Consequently, State court reporters, pursuant to the Act, are compensated by salary and by fee for the preparation of transcripts which they are required by statute to provide. According to your office, salary is the principal source of compensation for Illinois court reporters. I note that fees received for the preparation of extra or additional copies not required by statute are considered by the Federal Social Security Administration to be self-employment income.

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As an initial matter, Modification No. 256 specifically excludes from coverage "service in any class or classes of positions the compensation for which is on a fee basis". However, this exclusion cannot be read as excluding from wages that income of court reporters which is paid by fee and including as wages that part of compensation which is paid by salary. By its own language, the exclusion excludes a class of positions for which compensation is established on a fee basis. Modification 256 does not exclude fees paid to individuals who, as a class, are not compensated solely on a fee basis. This conclusion is further supported by reference to section 218(u) of Title II of the Social Security Act (42 U.S.C.A. 418), which provides in pertinent part that:

" * * *

(u)(1) Notwithstanding any other provision in this section, an agreement entered into under this section may be made applicable to service performed after 1967 in any class or classes of positions compensated solely on a fee basis to which such agreement did not apply prior to 1968 only if the State specifically requests that its agreement be made applicable to such service in such class or classes of positions.

(2) Notwithstanding any other provision in this section, an agreement entered into under this section may be modified, at the option of the State, at any time after 1967, so as to exclude services performed in any class or classes of positions compensation for which is solely on a fee basis.

(3) Any modification made under this subsection shall be effective with respect to services performed after the last day of the calendar year in which the modification is agreed to by the Secretary and the State.

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(4) If any class or classes of positions have been excluded from coverage under the State agreement by a modification agreed to under this subsection, the Secretary and the State may not thereafter modify such agreement so as to again make the agreement applicable with respect to such class or classes of positions." (Emphasis added.)

Illinois court reporters, as discussed above, are required by statute and as a part of their official duties of employment to furnish certain transcripts. While providing these transcripts in accordance with statute, the court reporters are performing services in the employ of the State.

Additionally, 20 CFR § 404.1041, which relates to the provisions of Title II of the Social Security Act, as amended, provides as follows:

"(a) The term 'wages' means remuneration paid to you as an employee for employment unless specifically excluded. Wages are counted in determining your entitlement to retirement, survivors', and disability insurance benefits.

(b) If you are paid wages, it is not important what they are called. Salaries, fees, bonuses and commissions on sales or on insurance premiums are wages if they are remuneration paid for employment.

(c) The way in which you are paid is unimportant. Wages may be paid on the basis of piecework or a percentage of the profits. Wages may be paid on an hourly, daily, weekly, monthly, or yearly basis. (See § 404.1056 for special rules for agricultural labor.)

* * *

"

(Emphasis added.)

Finally, according to information which you have received from Region V of the Department of Health and Human Services:

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* * *

Provisions in the Handbook for State Social Security Administrators and in the Claims Manual with respect to fees paid in remuneration for state employee services, and with respect to court reporters in particular, are clear and have been consistently applied over a long period of time. The Claims Manual articulates this policy as follows:

Fees paid to employees as remuneration for services performed in connection with their employment are wages. This is so even though the fees are paid to the employee by third parties such as members of the public rather than by the governmental unit for which he works. The source of remuneration does not determine whether the payments are wages; the determining factor is whether the amounts are compensation for services in employment. If services in positions compensated on a fee basis have been excluded in a particular coverage group, an employee in such a position is not covered. CM § 1464.5(a). 1/

The Manual also states with respect to court reporters:

Official court reporters in State courts are State employees with respect to services performed by them which are required by statute. However, fees received by them for services not required by statute, such as furnishing extra copies of transcripts, may be earnings from [self-employment]. CM §1457.7.

* * *

"

Consequently, although the fees collected for furnishing statutorily required transcripts are in some cases paid by third parties (Ill. Rev. Stat. 1979, ch. 37, par. 655) and in other cases paid out of the State treasury from special appropriations made for such purpose (Ill. Rev. Stat. 1979, ch. 37, par. 664), the fact that the fee itself is paid outside the regular payroll system, for the reasons discussed above, is not

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determinative in the situation where the fee is paid to the court reporter as a part of his employment and pursuant to statutorily prescribed duties.

In State of Montana, Etc. v. United States (9th Cir. 1973), 489 F.2d 522, 524, a suit was maintained by the State of Montana through the Board of Administration of the Public Employees' Retirement System of the State of Montana against the Secretary of Health, Education and Welfare to recover tax assessed under the Social Security Act as an employer contribution allegedly due on account of fees collected and lawfully retained by a justice of the peace for performing marriage ceremonies. In affirming the decision of the lower court, the United States Court of Appeals, Ninth Circuit, held that fees collected and lawfully retained by a justice of the peace in Montana for performing marriage ceremonies were not earnings with which the State was not connected, but were to be regarded as wages received by a State employee so as to subject Montana to the requirements of the Social Security Act that it pay an amount equal to the sum of the employer's and employee's taxes which would be imposed with respect to wages paid State's employees if the services were subject to characterization as employment. According to the court, Montana justices of the peace perform various duties for which statutory "miscellaneous fees" are set. Justices of the peace are also paid salaries

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and are permitted to keep those fees designated as "miscellaneous". The issue in the case was whether those retained fees were to be regarded as wages received as a State employee or as earnings unconnected with the State. The State took the position that, because performing a marriage ceremony is optional with the justice and is a service for the persons whose marriage he is solemnizing, the justice is not acting in the employ of the State. In response, the court stated at page 524:

"The fact that a justice of the peace may decline to perform marriages is of little relevancy. That an employee may choose whether or not to do particular work does not change its character if undertaken. We need think only of voluntary overtime, or voluntary assumption of the work of another employee. The test is not the employee's right to refuse the work, but its nature if performed.

Equally, from whom he receives payment should not control. It must be obvious that an employer may choose whatever method of effecting compensation he sees fit, see 20 C.F.R. § 404.1026 (1973), and it should make no difference whether the third party pays the employer, who, in turn, compensates the employee, or whether the third party, at the employer's direction, pays the employee himself. Nor, in the light of the statutory scheme, can there be any doubt of the fact that the payment here is made at the State's direction." (Emphasis added.)

As discussed above, court reporters under the Illinois scheme receive a statutorily prescribed salary. (Ill. Rev. Stat. 1979, ch. 37, par. 658.) A court reporter is required to make a full reporting of all proceedings and trials to which he is assigned and to the extent that it does not substantially

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interfere with a court reporter's official duties, a court reporter may be assigned secretarial or clerical duties arising out of official court operations. (Ill. Rev. Stat. 1979, ch. 37, par. 655.) In addition, as a part of their duties of employment, court reporters are statutorily directed to prepare original transcripts for third parties and indigents. (Ill. Rev. Stat. 1979, ch. 37, par. 655, 661-64.) According to information received from your office, court reporters, by administrative rule, are prohibited from performing reporting services for any other employer. Further, as can be seen from the statutory duties of a court reporter, he must be available at all times, including Saturdays and holidays, to perform his duties as court reporter.

According to your office:

"(1) It is the State's position that court reporters are independent contractors in the preparation of transcripts of court proceedings and are not paid for these services by the State of Illinois. The payments mentioned in the audit report are payments for the preparation of transcripts for indigents who are determined by the court to be unable to pay the court reporters themselves. Therefore, the State is not paying the reporters for services performed for the State but, in effect, [is] * * * making aid payments to the indigent by directly paying the court reporters for [their] * * * services to the indigent. Those who are able pay the court reporter directly for these services.

The following additional factors indicate the court reporters are independent contractors:

(a) The court reporters are not trained by the State in their skills as reporters and transcribers but possess the necessary skills prior to employment.

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(b) The court reporters incur all costs associated with the preparation of transcripts to include purchasing their own typewriters.

(c) The court reporters are subject to profit or loss in the preparation of transcripts."

As discussed above, the source of the payment for the statutorily prescribed service is not determinative of whether or not fees are wages within the meaning of the Social Security Coverage Agreement. Moreover, the court in State of Montana, Etc. v. United States, at pages 524-25, specifically dealt with the State's contention that the work for which the justice received the fees in question was a personal venture, thus placing the justice in the position of an independent contractor:

" * * *

The two analogies the state makes to certain independent contractors are not helpful. We see a substantial difference between the justice's statutorily authorized activity and that of a golf professional employed by a club who, in addition to his club duties, is permitted to give private instruction.

* * *

It is true that members of the clerical profession, and certain others, are allowed to perform marriage ceremonies, Mont.Rev.Code § 48-116 (1947), and that clerics, vis-a-vis the state, may well be thought of as independent contractors. We see no necessary inconsistency. Indeed, in addition to the fact that the justices are on the state's regular payroll, and that their marriage performing powers arise directly out of their position as state employees, they are controlled in a significant manner in which the clerics are not, viz., they are limited to a \$5 maximum charge. The clerics can charge what they please. There is, accordingly, as to the justices a significant incremental element of control.

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In sum, we conclude that Mr. Howard was performing an employer-oriented service, and that the marriage fees he was allowed to retain were part of his overall compensation." (Emphasis added.)

Illinois courts have stated that it is impossible to lay down a rule by which the status of an individual as an employee or independent contractor can be defined in all cases. Each case must depend on its own facts and ordinarily no one feature of the relation is determinative, but all must be considered together. (Kehrer v. Industrial Com. (1937), 365 Ill. 378, 382.) However, the most important or principal factor in determining the relationship has been held to be the right of the employer to control the manner of doing the work, though not the exercise of that right. (Taber v. Defenbaugh (1956), 9 Ill. App. 2d 169, 173; Best Manf. Co. v. Creamery (1923), 307 Ill. 238, 241.) According to the court in Manahan v. Daily News-Tribune (1977), 50 Ill. App. 3d 9, 13-14:

"An independent contractor is one who undertakes to produce a given result, but is not controlled by his employer as to the method by which he achieves that result. (Dumas v. Lloyd (1972), 6 Ill. App. 3d 1026, 286 N.E.2d 566.) There is no absolute rule by which one can determine who is an independent contractor and who is an employee. Due consideration must be given to the acts and understanding of the parties to each relationship. Those factors to be considered are:

'* * * the right to control the details, manner, and method by which the work is to be done is probably the principal consideration; if the person for whom the work is done retains such right to control the details, manner, and method, the relation of employer-employee ordinarily exists; an independent contractor is one who

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renders service in the course of an occupation, who undertakes to produce a given result or to do a specific piece of work or job for another party, but is not subject to the orders or control of the latter in respect to the details of the work, the details or methods being left to his discretion, and he representing the will of the person for whom the work is done only as to the results and not as to the means by which the job is accomplished; the manner of payment, whether by the piece, job, day, or hour, the right to discharge, the skill required, the furnishing of materials, equipment, and tools, are all of some significance, but no one circumstance is necessarily controlling; whether the party performing the service is engaged in a business apart from the regular business of the person for whom the work is done, and whether the work done is a part of the regular business of the person for whom it is done or is only incidental to his main business, are also factors; if the facts are undisputed, and the problem concerns the legal status to be inferred from them, and the facts permit more than one reasonable inference, there is a question of fact and the trier of the facts may draw the inference, and its decision as to the preponderance or greater weight of the evidence will ordinarily not be disturbed on review; only when the undisputed facts are susceptible of but a single reasonable inference does the issue become one only of law.' Westlund v. Kewanee Public Service Co. (1956), 11 Ill. App. 2d 10, 20-21, 136 N.E.2d 263, 268."

As discussed above, Illinois State court reporters as employees of the State are on the State's regular payroll. Their duty to provide certain transcripts is mandated by statute and is a part of their overall duties. The fee which they may charge is specifically limited by statute. Court reporters must be available at all times, including Saturdays and holidays, for performance of their duties. Based on similar facts, the court

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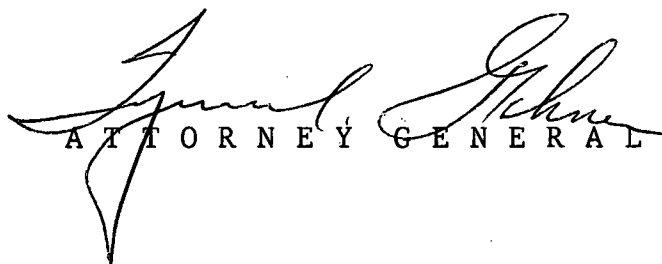
in State of Montana, Etc. v. United States found a sufficient element of control so as to remove the "employer oriented" service from characterization as that of an independent contractor.

As is pointed out in information received from your office, court reporters incur all costs associated with the preparation of transcripts, including the purchase of their own typewriters. Additionally, court reporters are not trained by the State in their skills as reporters and transcribers but possess the necessary skills prior to employment. However, court reporters, as discussed above, as employees of the State are subject to a substantial degree of control. Moreover, in accordance with section 7 of "AN ACT relating to the qualifications, numbers, appointment, duties and compensation of court reporters, etc." (Ill. Rev. Stat. 1979, ch. 37, par. 657), court reporters are required to take proficiency tests and must, except as provided therein, test at a certain level of proficiency or shall be discharged. Court reporters' salaries to some extent may reflect the level of proficiency tested. (Ill. Rev. Stat. 1979, ch. 37, par. 658(c)(d).) Ultimately, it is only by virtue of their position as a State employed court reporter that their statutorily prescribed duty to provide the transcripts in question even arises. Therefore, for the

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reasons discussed above, it is my opinion that the fees retained by court reporters for preparation of statutorily-required transcripts are a part of the overall compensation paid and therefore are required to be treated as wages for the purposes of the Social Security Coverage Agreement.

Very truly yours,


ATTORNEY GENERAL