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COMMITTEE ON THE UNAUTHORIZED PRACTICE OF LAW

Appointed by the New Jersey Supreme Court

OPINION 39

Appearance of Non-Attorneys before Appeal Tribunals and Board of Review in Unemployment cases; R. 1:21-1(f) (11)

This Committee has received a request from the Chair of the Board of Review of the New Jersey Department of Labor for an advisory opinion on the issue of whether the fee arrangement of certain firms retained by employers to provide, among other services, representation to employers at unemployment hearings before the Appeal Tribunals and Board of Review of the Department of Labor constitutes the receipt of a fee by a non-attorney in violation of *N.J. Court Rules* R. 1:21-1(f)'s prohibition against receipt of fees by non-attorneys.

Background

The various firms whose arrangements are under review have been retained to assist employers in meeting their unemployment benefit obligations, and have been characterized by the Chair of the Board of Review as third-party administrators or unemployment consultants ("Administrators"). In addition to representing employers at unemployment hearings, the Committee is informed that these Administrators provide the following services: (1) reviewing the employer's unemployment programs; (2) managing all unemployment claims; (3) auditing unemployment benefit charges; (4) providing management training; (5) providing advice

regarding the financing of unemployment benefits; (6) assessing unemployment ramifications of mergers, acquisitions and the like; and (7) preparing reports on claims activity.

It is reported that many of the Administrators charge employers on a fixed fee basis or as a percentage of payroll, with no separate charge for representation at hearings. These Administrators state that representation at hearings "constitutes only a small percentage of the work done for employers." Other Administrators charge an additional amount for representation at hearings.

The persons appearing on behalf of the employers are salaried employees of the Administrators. The Administrators contend that they and their employees serve as an extension of the employer's human resources staff and should be treated as such. However, some Administrators have at times retained other persons, who are neither employees of the Administrator nor attorneys, to represent employers at these hearings. It is not stated whether these persons are compensated for such appearances. We assume, for purposes of this Opinion, that they do receive a fee for their appearances.

The Committee received a separate correspondence on this issue from one of the entities which appears before the Appeal Tribunals and Board of Review ("the Entity"). The arrangement entered into by the Entity with various employers is similar to the arrangement purportedly entered into by other Administrators, with one difference. The majority of these Administrators perform similar services for individual employers rather than groups of employers. The Committee is advised that the Entity is a division of a corporation wholly-owned and controlled by a hospital association, a tax-exempt, nonprofit New Jersey corporation whose membership consists of acute care hospitals of the State of New Jersey and related entities.

In 1972, the hospital association established a group account pursuant to N.J.S.A. 43:21-7.2(i)¹ ("Group Account"). The hospital association acts as the agent of the Group Account. The employer members, also known as the Participating Institutions, of the Group Account became members by entering into an agreement with the hospital association.

Paragraph 8 of that agreement provides that the hospital association shall "undertake to administer the analysis, adjustment, and appeal of all unemployment compensation claims made with respect to former employees of the Participating Institutions[.]" The agreement also provides that the employer members delegate full authority to the hospital association to handle claims and appeals without interference by the employer members. The agreement also permits the hospital association to contract with the Entity to provide these services.

The services described in paragraph 8 of the agreement are performed by full-time, salaried employees of the Entity. The Committee is advised that their activities on behalf of the Group Account and the hospital association, are principally "administrative and clerical in nature." When appeals from administrative determinations are filed by claimants, or by the Entity on behalf of the Group Account, employees of the Entity appear before the Board of Review or the Appeal Tribunals on behalf of the Group Account member who is a party to the proceeding. The Committee is advised that one employee of the Entity spends approximately 80% of her time at hearings, while the other spends approximately 20% of his time. These employees as well as others are compensated solely by the corporation on a salary basis. The Entity is compensated by the hospital association acting as the statutory agent of the Group

¹ N.J.S.A. 43:21-7.2 (i) provides, in pertinent part, as follows: "Two or more employers that have become liable for payments in lieu of contributions may file a joint application for the establishment of a group account for the purpose of sharing the cost of benefits paid that are attributable to services in the employ of such employers. Each such application shall identify and authorize a group representative to act as the group's agent for the purpose of this subsection. . . ."

Account. The employer members pay no fees or retainer to the Entity or any of its employees for their appearances at the hearings. The members' financial obligations stop at their contributions to the Group Account.

It is the Entity's position that: "When employees of [the Entity] appear before the Appeal Tribunals or the Board of Review, they are representing the interest of the Account as ultimate employees of the hospital association, which is the statutory agent of the Account, rather than on behalf of the individual interest of the particular Participating Institution which is the employer named in the proceedings. As such, these employees of [the Entity] are in no different position from full-time employees of individual employers who are not members of any group account representing their employers before the Appeal Tribunals or Board of Review. . . "

Issues

Thus, the specific questions presented to this Committee by request from the Chair of the Board of Review of the New Jersey Department of Labor on behalf of the various firms whose arrangements are under review and the related inquiry from the Entity are as follows:

1. Whether the receipt by an Administrator of a payment for a broad range of services, including representation at unemployment hearings, constitutes acceptance of a fee for such representation contrary to the provisions of R. 1:21-1(f)(11), where no additional or identifiable charge is assessed for the representation?

2. Whether the receipt of an additional payment by an Administrator for representation provided by one of its salaried employees constitutes the receipt of a fee in violation of the provisions of R. 1:21-1(f)(11)?

3. Whether the receipt of a fee by individuals retained by the Administrators to represent employers at the hearings, who are neither attorneys nor employees of the Administrators, is prohibited by R. 1:21-1(f)(11)?

4. Whether, in the circumstances expressed above, the Entity, acting as an agent of the hospital association and of the members of the hospital association Group Account, or another Administrator acting as agent for a single employer are permitted to represent employers before the Appeal Tribunals and Board of Review under R. 1:21(f)(11)?

Discussion

Paragraph (f) of Rule 1:21-1, originally paragraph (e), was adopted, effective September 1983, to allow non-attorneys to appear before the Office of Administrative Law and administrative agencies in contested cases in certain circumstances. See Comment to Paragraph (f) of R. 1:21-1. The Supreme Court's Committee on Civil Practice, which recommended the amendment, explained that "[t]he rule attempts to enumerate those situations in which the public interest would be served by allowing non-attorneys to appear in contested cases, and in which the dangers posed by such representation would be absent or substantially minimized." Report of the Supreme Court's Committee on Civil Practice, 111 N.J.L.J. Index Page 669 (1983). Subparagraph (11) was added to paragraph (f), effective September 2002, to include representation by non-attorneys of "a claimant or employer in administrative hearings before the Appeal Tribunals or Board of Review of the Department of Labor." See Comment to Paragraph (f) of R. 1:21-1. Subparagraph (11) is qualified, as are all of the subparagraphs in paragraph (f), by the following language: "No representation or assistance may be undertaken pursuant to subsection (f) by any disbarred or suspended attorney or by any person who would otherwise receive a fee for such representation."

As an initial matter, the Committee is not convinced that these Administrators should be treated as an extension of the individual employer's human resources staff. Unlike an employee of a human resources department who may occasionally be asked to represent her employer at an unemployment hearing, the Administrators here are specifically required to represent employers at unemployment hearings as an integral part of their administrative function. The Committee is informed that in about 8,000 of the approximately 35,000 annual

hearings conducted by the Labor Department, employers are represented by employees of these Administrators. This is more than occasional.

With respect to the Entity, it attempts to distinguish itself from the other Administrators by arguing that it is not a "third party administrator," but is instead the "agent of the Group Account appointed by the members of the Group Account through their execution of the Agreement." For purposes of its analysis under R. 1:21-1, this Committee is not convinced that the Entity functions differently from the other Administrators who are paid on a fixed fee or as a percentage of payroll for all services provided. Nonetheless, it is not the title of the Administrator or the Administrator's relationship with the employer that is significant.

What is significant here is that the Administrators (and the Entity) provide an "array" or broad range of services related to the employers' unemployment benefit obligations, and that they are compensated for that array of services -- and not specifically for their representation at unemployment hearings. Thus, by virtue of their responsibility for the entire panoply of services relating to the administrative function of the employers' unemployment benefit obligations, these Administrators have a level of knowledge and, perhaps expertise, that qualifies them to represent the employers at administrative hearings. This is consistent with the Supreme Court's Committee on Civil Practice Report note that the "dangers posed by such representation would be absent or substantially minimized."

The issue that this Committee is concerned with is whether a non-attorney is receiving a fee for representing an employer, or an employee, before the Appeal Tribunals or Board of Review of the Department of Labor in violation of R. 1:21-1(f)(11). If, for example, the Entity or another Administrator were collecting a separate fee for representing the members

of the Group Account at unemployment hearings, the Entity or the Administrator in question would be violating the rule.

Turning now to the specific issues at hand, it is the opinion of this Committee with respect to (1), that the fee arrangement of those Administrators who charge employers on a fixed fee basis or as a percentage of payroll for all services provided, does not violate R. 1:21-1(f)(11) because their role at hearings is an integral part of their administrative function, and no fee is being charged for representation at hearings. To conform to R. 1:21-1(f)(11), the Administrators' participation at hearings before the Appeal Tribunals and Board of Review may not, under any arrangement, represent their principal service to the employer. An Administrator that functions primarily as a representative at hearings, even though it may have contracted to provide a variety of contingent and little-used advisory and other services, would be in violation of R. 1:21-1(f)(11). With respect to (2), it is the opinion of this Committee that the Administrators may not charge or receive additional monies for representing employers at hearings. This would clearly violate the specific terms of R. 1:21-1(f)(11). With respect to (3), the Administrators may not retain and pay a non-attorney to represent employers at these hearings. This too would violate R. 1:21-1(f)(11). These two circumstances (questions 2 and 3 above) suggest that representation at the hearings is not an integral part of their administrative functions. With respect to (4), the Entity may continue to represent members of the Group Account before the Appeal Tribunals and Board of Review, not because it is an agent of the Group Account members, but because the Entity does not receive a fee for representing the members of the Group Account at these hearings. The identical logic applies to all other Administrators.