STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. M-17402
George Fotinopoulos	)	
	)	By: Margaret Mangan
v.	)	Hearing Officer
	)	
State of Vermont	)	For: R. Tasha Wallis
Department of Corrections	)	Commissioner
	)	
	)	Opinion No. 31-01WC

APPEARANCES:

Thomas C. Nuovo, Esq. for the claimant
Keith J. Kasper, Esq. for the defendant

ISSUE:

Whether this claim is barred by 21 V.S.A. § 601 (12)(O)(iv) that exempts from coverage under the Workers' Compensation Act, "any person engaged by the state under retainer or special agreement."

BACKGROUND:

The parties have agreed that a formal hearing is not necessary. The claimant proposes that the findings of fact set out below be used for the purpose of this action. The defendant maintains that the findings do not change the ultimate legal conclusion. All pleadings and documents submitted for Opinion No 14-00WC (May 31, 2000) (later vacated to allow the parties to present evidence) have been considered in this action.

CLAIMANT'S EXHIBITS:

1. VSEA memorandum re: "workmen's compensation amendments," March 11, 1981
2. Minutes of Senate Government Operations Committee, April 1, 1982
3. Report of the Attorney General August 25, 1953
4. Claimant's contract with State of Vermont, October 2, 1997 with May 28, 1998 amendment
5. Claimant's Earnings Statement January 14, 1999
6. Memorandum from William H. Sorrell to Cabinet Secretaries, Commissioners, Constitutional and Statutory Officers, re: Bulletin 3.5 Revision dated August 10, 1995.

DEPARTMENT FORMS:

1. Form 1: Employee's Claim and Employer First Report of Injury, filed March 1, 1999 for date of accident February 22, 1999

2. Letter denying this claim, filed March 1, 1999

3. Form 5: Employee's Notice of Injury and Claim for Compensation, filed March 9, 1999

THE CLAIM

If this claim is found to be compensable, the claimant seeks benefits associated with injuries incurred when an inmate struck him in the face on February 22, 1999.

FINDINGS OF FACT:

For purposes of the instant motion, the following facts are accepted as true:

A: Facts proposed by claimant:

1. The Department of Corrections (Corrections) exercises, in effect, supervision over the daily activities; times of work or other means and methods by which the claimant works and the means and methods by which he provides services.

2. The services claimant renders are categorically typical of those provided by the Department of Corrections.

3. Claimant does not customarily engage in an independently established trade, occupation, profession or business nor does he retain the ability to engage other clients during the term of his contract.

4. The State of Vermont Payroll system issued the claimant's paychecks from which state and federal taxes and FICA contributions were withheld. The State of Vermont paid its share of FICA from Corrections personal service appropriation.

5. Claimant was required to work 40 hours per week.

6. Claimant entered into a contract for a term of 18 months, from October 6, 1997 to May 31, 1999.

7. Claimant was not able to provide his services to the public because he was required to work under a licensed individual until he obtained a license of his own.

8. Claimant is not a corporation. He does not work under an assumed name, nor does he have a separate Federal Employment Insurance Number.

B: Contract Provisions

9. Claimant's contract with the State is designated "Standard Contract for Personal Services." (Claimant's Exhibit 4). As specified in the contract, claimant's form of business was that of "sole proprietor." The original contract term was for seven months; an amendment later extended the term for an additional year. The Attorney General's Office approved the contract.

10. Specifications for work claimant was to perform included, but were not limited to, counseling and other direct therapeutic services to inmates at the facility, psychological evaluation and assessment. Claimant received an hourly wage for his services, which were to be on average 40 hours per week. Other terms included: the length of the contract; the requirement that the Attorney General's Office approve the contract; the ability of either party to cancel the contract with 30 days advance notice; an agreed to hourly wage with time reported on the State's Time Report forms; the right of the State to cancel after one fiscal year if appropriations were insufficient. In addition, the contract provided that the State would not provide individual retirement benefits, group life benefits, health and dental insurance, workers' compensation "or other benefits or services available to state employees…" The state paid the claimant from payroll and deducted state and federal taxes.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the facts asserted. *Goodwin v. Fairbanks, Morse & Co.*, 123 Vt. 161, 166 (1962).

2. A determination essential to the establishment of workers' compensation liability is a legal finding of an employer-employee relationship as those terms are defined in our Workers' Compensation Act (Act). Within the claimant's burden, therefore, is the burden to prove that such a statutory relationship exists between him and Corrections and that no exclusion applies. See *Burdette v. Quality Floors, Inc.*, Opinion No. 61-95WC (Sept. 7, 1995).

3. An "employer" is: "any body of persons, corporate or unincorporated, public or private, and the legal representative of a deceased employer, and includes the owner or lessee of premises or other person who is virtually the proprietor or operator of the business there carried on, but, who by reason of there being an independent contractor or for any other reason, is not the direct employer of the workers' there employed." 21 V.S.A. § 601(3). An "employee" is a "person who has entered into the employment of, or works under contract of service or apprenticeship with, an employer…" 21 V.S.A. § 601 (14).

4. An individual working for a state agency, including the Department of Corrections, is considered to be engaged in public employment, which in most instances is covered by the Act. § 601 (4) (12) (A). However, "public employment' shall not include …any person engaged by the state under retainer or special agreement." § 601 (12)(O)(iv).[1] (hereinafter referred to as the "state special agreement exception"). This provision stands in contrast to the statutory definition of employer in § 601 (3) and to a provision that unequivocally specifies that "[a]n employer shall not be relieved in whole or in part from liability created by the provisions of this chapter by any contract, rule, regulation or device whatsoever." 21 V.S.A. § 625[2]; *See also Falconer v. Cameron*, 151 Vt. 530 (1989).

5. Claimant contends that § 625 precludes the defense from arguing that a contract bars this action. Indeed, if this claimant had been employed in the private sector, he would be entitled to benefits under the Act because the contract would not be a valid defense. See § 625; *Falconer*, 151 Vt. 530, 533. And, under both the right to control and nature of the business tests, this claimant would be an "employee" and the Department of Corrections his "employer" as those terms are defined in the Workers' Compensation Act. However, neither test is applicable to this case if § 601 (12)(O) (iv), the state retainer or special agreement exception, applies.

6. Claimant's position would be strengthened if the "statutory employer" concept in § 601(3) or the "contracting out" prohibition of § 625 prevails over the state retainer or special agreement provision in § 601(12)(O)(iv). However, a well-regarded canon of statutory construction provides that the more specific portion of a statute be given effect over the more generalized provision of the same statute to avoid ambiguity. *Appelget & Elliott v. Baird*, 126 Vt. 503 (1967). Because the state special agreement exception of § 601(12)(O)(iv) is more specific than the two general provisions with which it seems to conflict, that exception must prevail.

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[1] This state special agreement exception was adopted by the Legislature in 1982 as 21 V.S.A. § 601 (12) (N). (P.L. No. 165). At the same time, the definition of employment was expanded to include public employment, § 601 (4), and the separate compensation process for state employees, § 626-628, was repealed.

[2] The language in § 625 forbidding "contracting out" has been in effect since 1915. See, *Blake v. American Fork & Hoe*, 99 Vt. 301 (1926).

7. Another cannon of statutory construction applicable when portions of one act are in conflict is that the more recent portion of the statute must be given force and effect because it is the most recent expression of the legislative will. *Montgomery v, Brivner Corp.*, 142 Vt. 461 (1983). The contracting out provision (now § 625) was adopted in 1915. The statutory definitions of employer and employee in § 601 have not been substantively altered since at least 1957. In contrast, § 601 (12), the state retainer exception of the Act, was adopted in its essential current form in 1982. The legislature undoubtedly was aware of the contracting out prohibition in § 625 and the statutory definitions of employer and employee in § 601 when it determined in 1982 that persons hired by the state under a retainer or special agreement would not be covered by the Workers' Compensation Act. § 601(12)(O)(iv). Therefore, if the claimant in this case was hired under such an agreement, he is not entitled to benefits under the Act.

8. Claimant argues that he was not so engaged under a retainer or special agreement. In support, he cites a 1953 Attorney General Opinion that interpreted the word retainer to "apply to members of a profession who undertake to manage or counsel on a given cause, and not to engage in any other form of practice in conflict therewith." 1953 Atty. Gen. Opinion No. 96 at 271. Because he was not given advance sums for his services, not hired to work on a particular cause, but rather was employed over a period of time and paid an hourly wage, the claimant argues correctly that he was not hired under a retainer.

9. Similarly, he argues that he was not hired pursuant to a special agreement, a term that he maintains should have the same meaning as independent contract. Again he cites the Attorney General's opinion, in this instance for the proposition that "generally a 'special agreement' tends to conform more nearly to what is understood as an independent contract, whereby a person undertakes to perform a certain thing but retains to himself the right to control the manner in which the work undertaken is to be performed." Id. at 272.

10. Although the Workers' Compensation Act does not define "retainer" or "special agreement," the designation of those terms in § 601 (12)(O)(iv) as exceptions to "public employment" clearly directs our analysis to the Vermont Personnel Act where classified state service is defined and its exceptions delineated. 3 V.S.A. § 309 et.seq. For example, the Personnel Act provides that "A person or persons engaged under retainer, contract, or special agreement" are not included in classified service "when certified to the governor by the attorney general that such engagement is not contrary to the spirit and intent of the classification plan and merit system principles and standards provided by this chapter." 3 V.S.A. § 311 (a)(10). A crucial question raised in the instant case is whether the retainer, contract and special agreement exceptions to the classified system have the same meaning within the workers' compensation system.

11. If an individual were "classified" as that term is used for state employees, all the benefits inherent in an employer-employee relationship would follow, including workers' compensation benefits. However, in those situations where the classified system cannot meet the need for a particular engagement in public employment, the Attorney General is empowered to approve additional positions outside the classified system.

12. While not addressing the Workers' Compensation Act, the Vermont Supreme Court nonetheless examined the meaning and application of the term "special agreement" in the context of the Vermont State Retirement System. *Fitzpatrick v. Vermont State Treasurer,* 144 Vt. 204 (1984). In *Fitzpatrick* the plaintiff was appointed as an attorney to the Department of Employment and Training pursuant to a personal services contract. The court defined "special agreement" as "one with peculiar provisions or stipulations not found in the ordinary contract relating to the same subject mater, and which, if omitted, the law will not supply (citations omitted)." Id at 209. It noted that "[a] special contract is always an express contract." Id. It then set out the terms of the agreement under which Fitzpatrick had been hired: three days per week on a per diem basis; appointment subject to approval of the governor; a position "exempt" from the merit system rules; payment for the first nine state holidays; annual and sick leave credits on a pro-rated basis; payment by vendor payments, not regular payroll; no state or federal tax withholding; and tax filing as self-employed.

13. Finally, in *Fitzpatrick* the Court noted, "when the attorney general certified to the governor that the plaintiff's contract was not contrary to the spirit and intent of the classification plan and merit system principles and standards, he did so on a form that identified plaintiff's contract as a 'Special Agreement.'" The Court concluded: "Putting all of the above indicia together, the conclusion is inescapable that plaintiff's employment …was by "special agreement"; as a result he was ineligible for membership in the Vermont Employees' Retirement System." Id. at 210.

14. The contract in *Fitzpatrick* and the one in this case both require the Vermont Attorney General's approval pursuant to 3 V.S.A. § 311 (a)(10). That factor alone, the defendant argues, should mandate the conclusion that this claimant was hired under a special agreement. But the Court in *Fitzpatrick* did not base its decision on a single criterion. Instead it considered "all the above indicia" before concluding that plaintiff was hired pursuant to a special agreement.

15. In this case, the claimant was hired under a contract different from the state employees' contract. Its terms, somewhat different from those in *Fitzpatick,* included: specifications of work to be performed; a list of psychological services the claimant was to provide; the length of the contract; the requirement that the Attorney General's Office approve the contract; the ability of either party to cancel the contract with 30 days advance notice; an agreed to hourly wage with time reported on the State's Time Report forms; the right of the State to cancel after one fiscal year if appropriations were insufficient. In addition, the contract provided that the State would not provide individual retirement benefits, group life benefits, health and dental insurance, workers' compensation "or other benefits or services available to state employees…" In contrast with the facts in *Fitzpatrick,* in this case the State paid the claimant from payroll and deducted state and federal taxes.

16. Although this case is a closer one than *Fitzpatrick,* the same conclusion is warranted. That is because the claimant worked under a contract that is different from the contract under which classified employees work. He did not receive benefits such as sick leave and vacation pay, benefits that the *Fitzpatrick* plaintiff received pro rata. His job depended on legislative appropriations and could be terminated with 30 days notice of either party. And it required the approval of the Attorney General before it could be limited. All of these factors together convince me that this claimant was hired under a special agreement with the State. Accordingly, 21 V.S.A. § 601(12)(O)(iv) bars this claim.

ORDER:

Defendant's Motion for Judgment as a Matter of Law is GRANTED. This claim is DISMISSED.

Dated at Montpelier, Vermont this 14th day of September 2001.

_____
R. Tasha Wallis
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior (county) court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.