

OPINION
62-101

August 9, 1962 (OPINION)

DEFINITION

RE: Persons Hired on a Fee Basis

This is in response to your question as to whether or not the Administrative definition set out hereinafter would be in accord with the provisions of section 52-10-02 of the North Dakota Century Code and the Federal-State agreement.

The basis for such definition is to clarify the provisions of section 52-10-02(c) which states as follows:

The term 'employee' includes an officer of a state or political subdivision as well as all persons employed in and by regulatory boards, commissions or councils, recognized and established by the statutes of the state of North Dakota, except part-time elected persons or person hired on a fee basis, if excluded by the federal-state agreement; * * *

The agreement referred to did exclude persons hired on a fee basis. The proposed definition defining what is meant by "persons hired on a fee basis" as found in section 52-10-02(c) and "services in positions the compensation for which is on a fee basis" as found in Modification 79 of the Federal-State agreement is as follows:

This language is construed and defined to include, but not limited to, services performed by members of a profession on regulatory boards established by law to regulate and license members of their profession for which they receive per diem payments."

We observe that the term "hired on a fee basis" is not defined in the statutes. We realize that the term "fee" is capable of suggesting various meanings, depending on the manner and circumstances under which it is used. Resorting to semantics would be of little value. The legal definitions of the term "fee" in this instance are of no legal assistance. It, therefore, becomes necessary to place a more definite meaning on the term "fee" as used in subsection (c) as quoted on page 1.

This state has a number of regulatory boards established by law which license and regulate members of their profession. the board members are members of the profession which they regulate. The regulatory boards referred to are found in Title 43 of the North Dakota Century Code, and to list merely a few, are such as the Board of Medical Examiners, Plumbing Board, State Board of Professional Engineers, State Board of Dental Examiners and State Board of Hairdressers and Cosmetologists. The board members on the State Board of Hairdressers and Cosmetologists as established by Chapter 43-11 of the North Dakota Century Code receive \$15.00 for each day employed in the

actual discharge of such duties. A similar provision exists for members of other boards for the various professions.

Invariably the per diem is not comparable to the wage, salary or remuneration earned by such board member in his regular profession for the same length of time. This would strongly indicate that the per diem is not in the form of compensation for actual services rendered or compensation for loss of earnings in their profession while serving on such board. It appears, in reality, merely a token compensation for such services rendered and can properly be considered a fee. This is particularly true where it is observed that the common accepted method of payment for professional services is on a fee basis.

We are also impressed that the board members, in most instances, are performing services of a professional nature. In other words, it requires a certain degree of professional knowledge to adequately serve on such boards. This becomes more eminent where the board prepares the examination and actually conducts the examination and grades the results of such examination.

The provisions of subsection (c) of section 52-10-02 are also open for construction. The term "employee" is defined therein to include "an officer of a state or political subdivision as well as persons employed in and by regulatory boards * * *." In the limited sense, board members are not true officers of a state or political subdivision, as such term is commonly used and understood. It is doubtful whether the board members are officers of the state or political subdivision but this need not be resolved in this instance because of the results reached otherwise. The statute does not specifically state that the board members are deemed to be employees, but precisely states that the persons employed by such boards are deemed to be employees of the state. The factors discussed indicate that the terms referred to are not explicit and need further defining for certain purposes.

We also observe that the state agency under section 52-10-08 is instructed to make and publish rules and regulations not inconsistent with the provisions of the act which it finds necessary or appropriate for the efficient administration of the act.

In considering the circumstances and conditions under which professional members serve on the various regulatory boards for which they receive a per diem, we are inclined to believe that the remuneration is, in reality, more akin to a fee than a wage or salary.

In view of the language employed in the statute to which reference has been made above, it is our opinion that an administrative definition is desirable to properly administer the provisions of the Act (Social Security Act - State-Federal under Title 52 of the North Dakota Century Code). It is our further opinion that the proposed definition is accord with the provisions of section 52-10-02 of the North Dakota Century Code and the Federal-State agreement.

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