

**OPINION
79-180**

March 21, 1979 (OPINION)

T. N. Tangedahl, ACSW
Executive Director
Social Service Board of North Dakota
State Capitol
Bismarck, North Dakota 58505

Dear Mr. Tangedahl:

This is in response to your letter of March 3, 1979, wherein you request our opinion on the status of certain volunteer workers for various county social service boards. In your letter you set forth the following facts and questions:

The Social Service Board of North Dakota administers a "Volunteer Services Program." Through this program, certain of our applicants or clients are provided necessary social services by unpaid volunteers.

Most volunteer service programs are operated by the various county social service board. The activities of the volunteers are supervised by social workers and by "volunteer coordinators." Volunteers provide widely varied services which are often individually fitted to the particular needs of a client. Examples of volunteers who function in more clearly defined roles are the "volunteer companion" (Big Brothers/Big Sisters, "Pals," and "Big Buddies") and the volunteer parent aide or "lay therapist." Volunteers active in these programs receive orientation and training before they are matched with a client who needs the support or attention while the volunteer provides. While providing such services, continued supervision is provided directly to the volunteer by regular social service employees.

The Social Service Board of North Dakota maintains a current listing of all Social Service Board agencies utilizing volunteers and a description of the type of activity is included in individual files for each volunteer program.

Because the function of many volunteers involves participating in activities where a potential liability for personal injury arises, we wish to determine if these volunteers would receive any protection under N.D.C.C. Chapter 32-12.1, "Liability of political subdivisions." Your response to the following question is therefore requested:

Are volunteer participants in the Volunteer Services Program considered to be employees of a political subdivision?

As you recognize in your letter, whether or not a person is entitled to the protection from liability offered under Chapter 32-12.1 of the North Dakota Century Code depends upon whether that person may be

construed to be an "employee" within the meaning of that chapter, as the Legislature has established that the liability of a political subdivision employee is at least to some extent shifted to the political subdivision itself under the provisions of Chapter 32-12.1.

We understand that the "volunteer services" to which you refer is a program authorized by Title XX of the Social Security Act (Act of August 14, 1935, 49 Statute 620), as amended. The Department of Health, Education and Welfare has enacted certain regulations authorizing the social service board to administer the "volunteer services" program. See, 45 CFR Section 228.0 et seq.. While we see that certain provisions of the federal regulations, principally 45 CFR Section 228.80 through Section 228.85, authorize federal financial participation to a state agency training "volunteers" and "and employees", we are unaware of any provision of either the regulations or the Social Security Act itself which would seem to control the definition of "employee" in this instance. Consequently, we believe this question may be resolved with reference to state law.

We note that subsection 3 of Section 32-12.1-02 provides as follows:

3. "Employee" means any officer, employee, or servant of a political subdivision, whether elected or appointed and whether or not compensated, but shall not include an independent contractor, or any person performing tasks, the details of which the political subdivision has no right to control.

We believe it to go without saying that employees are not to be considered as "officers" of the county social service board and thus must be considered an "employee, or servant of a political subdivision" to fall within the definition of "employee" contained in Section 32-12.1-02(3). We believe there can be no question that the various county social service boards are an administrative arm of the county. See, N.D.C.C. Sections 50-01-07 and 50-01-07.1. Any employee of a county social service board is therefore an employee of a "political subdivision", as defined in subsection 5 of Section 32-12.1-03 to include counties.

Whether or not an individual is an "employee" within the meaning of subsection 3 as set forth above appears in turn to be dependent upon whether that person might be considered an "employee, or servant" under general law of this state, as the statutory definition set forth above has followed the dubious practice of including in its definition the word which is sought to be defined. It therefore becomes necessary to determine whether a volunteer may be considered an "employee, or servant", as those words are generally used and defined by the courts of this state without reference to the definition contained in 32-12.1-02, as to again refer to the statutory definition of an "employee" would be a circuitous and ridiculous solution.

In making the determination of who is an "employee, or servant", we note that while there have been no cases in point decided under Chapter 32-12.1, there has been considerable litigation both in this state and others of this question under workmen's compensation laws, and, while those laws under which cases have been decided may not be

similar to Chapter 32-12.1, the cases are nevertheless instructive as it is the determination of what constitutes an "employee, or servant" that is important.

Whether we depend primarily upon the general interpretation of the terms "employee" or "servant", or upon the language of the definition of "employee" contained in Section 32-12.1-02, we assume that a person may be an "employee" whether or not compensated, as compensation has traditionally not been the primary factor in determining whether a person is an employee. The traditional test which has been recognized in this state on numerous occasions is the degree of control which the employer has over the manner in which the employee accomplishes his work. This concept is recognized in the definition of Section 32-12.1-02(3). Thus, in *Newman v. Sears, Roebuck and Company*, 43 N.W.2d. 411 (N.D. 1950), the North Dakota Supreme Court said:

"One of the most important tests to be applied in determining whether a person who is doing work for another is an employee or an independent contractor is whether the person for whom the work is done has the right to control, not merely the result, but the manner in which the work is done, as well as the method used." *Janneck v. Workmen's Compensation Bureau*, 67 N.D. 303, 272 N.W. 188, 189 (1937). See also *Bernardy v. Beals*, 75 N.D. 377, 28 N.W.2d. 374 and cases cited.

One of the best discussions of the general rules for determining the status of an employee as an employee as well as a discussion of evidence fulfilling these rules is contained in the *Bernardy* case cited above in *Newman*. In *Bernardy* the court held:

Whether a worker is an employee or an independent contractor is sometimes difficult to determine. Certain tests have been developed by this and other courts to aid in the determination. One of the most important tests to be applied is the right of employer to control not merely the result but the manner in which the work is done and the methods used in its performance. (Citations omitted)

An important factor in determining the right of control is the power of the employer to terminated the employment at any time without liability. (Citations omitted)

Factors that may also be considered in determining whether the relationship is one of employee or independent contractor is the furnishing of tools, the control of the premises where the work is done and the mode of payments. (Citations omitted)

And, in *Mutual Life Insurance Company v. State, et al*, 71 N.D. 78, 84, 298 N.W. 773, 776 (1941) the court stated:

Generally the final and determining test in such case may be said to be who has the right of control of the details of the work. If the person for whom the work is being done has the right of control, whether he exercises it or not, and is concerned not only with the result of the work but also with the manner and method of its doing, he is held to be an

employer and the person doing the work his employee. On the other hand, if he is concerned merely with the result of the work and has no control over the details of its doing, the person doing the work is held to be an independent contractor.

It is also clear from these cases that such general rules as those cited above cannot be given a mechanical application. As the court in Bernardy, supra, said:

The question of whether the claimant was an employee or an independent contractor cannot be decided by the summary application of a general rule. Only a studied consideration of all the facts and circumstances enables us to reach a definite conclusion.

The same feeling was announced in the case of Welch v. North Dakota Workmen's Compensation Bureau, 75 N.D. 608, 31 N.W.2d. 498 (1948), when the court said citing a Nebraska case:

It is true, however, that a correct determination of any case of this character must depend largely upon the particular facts and circumstances surrounding the particular case in hand. Sometimes what would seem at first to be a very slight fact or circumstance arising in the case will influence the entire decision, resulting in a conclusion different from what otherwise it would have been." (Citation omitted)

This same reasoning must apply to the determination of the status of volunteers under the "Volunteer Services Program". You do state in your letter that the volunteers are subject to "continued supervision" by regular social service employees while performing their assigned duties. While we might agree under these circumstances that the great majority of volunteers may probably be considered "employees" of the various county social service boards, we stress that as a final matter such a determination is dependent upon the totality of the circumstances involved in each individual case, none of which have been presented, nor would it be practical to present, in your request. We therefore suggest that a careful review of the evidence presented and discussed in such cases as Bernardy is appropriate and that a determination of the volunteers' status for the purposes of insurance protection be made upon such factual bases.

We trust that the foregoing will prove of assistance to you.

Sincerely,

ALLEN I. OLSON

Attorney General