

Date Issued: March 23, 1981 (AGO 81-29)

Requested by: Senator Gary J. Nelson

- QUESTION PRESENTED -

Whether receipt of limited compensation from the UND Medical Center by a physician serving as a part-time lecturer, consultant and clinical faculty member makes that physician an employee of an institution pursuant to Article VIII, Section 6(2)(a), of the North Dakota Constitution and section 15-10-02 of the North Dakota Century Code.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that a physician serving part time as a lecturer, consultant and clinical faculty member for the UND Medical Center and receiving limited compensation therefore is not an employee pursuant to Article VIII, Section 6(2)(a), of the North Dakota Constitution and section 15-10-02, N.D.C.C., and is therefore not precluded from being appointed to the Board of Higher Education.

- ANALYSIS -

Article VIII, Section 6(2)(a), of the North Dakota Constitution provides in part as follows:

No person employed by any institution under the control of the board shall serve as a member of the board, nor shall any employee of any such institution be eligible for membership on the state board of higher education for a period of two years following the termination of his employment. (Emphasis supplied).

Section 15-10-02, N.D.C.C., in almost identical language states:

No person employed by any institution under the control of the board shall serve as a member of the board, nor shall any employee of any such institution be eligible for membership on the board for a period of two years following the termination of his employment.

The University of North Dakota Medical Center has many private practice physicians serving part time as clinical faculty members throughout the state. These physicians participate at various times as consultants or advisers. They deliver lectures to medical students at a given rate per lecture and conduct conferences with medical students at a given rate per conference. They also oversee senior medical students assigned to them for specific periods of time as part of the student's senior year at the Medical School. This service is in addition to their regular private practice patient load which is the principal source of their income. When services are requested, the physician is free to either accept or reject an offer at that time. The compensation received is a limited part of the

income of the physicians providing this service. No deductions are made from the fees paid to such consultants for taxes, social security, etc.

Other provisions of law have some relevance to the question of a physician's status concerning whether such a physician is an employee under the provisions in question. For example, under the Social Security System "employment" means any service under an employer/employee relationship. section 52-09-20(B), N.D.C.C. Under the prior Social Security System, persons hired under a fee for service basis were excluded from the definition of "employee." section 52-10-02, N.D.C.C. Under unemployment compensation law, section 52-01-01(12), N.D.C.C., "employee" would not include an individual who under common law rules is an independent contractor. The common law rules of employment status are also used by the courts to construe the State's Workmen's Compensation Law, chapter 65-01, N.D.C.C. In my opinion, whether one is an employee employed by an institution under the jurisdiction of the State Board of Higher Education would also have to be determined by common law rules.

The North Dakota Supreme Court has stated that there are a number of factors to be considered in determining whether one is an employee. Burkhardt v. State, 53 N.W.2d. 394 (N.D. 1952). Control over the manner in which the work is done is one of the most important tests. It is this element of control which is the most important common law factor in determining whether one is an employee or by contrast an independent contractor. 53 Am. Jur.2d., Master and Servant, section 2. A private physician providing services to the UND Medical Center is an independent contractor and not an employee.

Obviously, a private physician supervising a senior medical student or giving a lecture is not controlled in how he does his work by the Medical Center to such an extent that he is no longer an independent contractor. As the amount of control increases and the amount of compensation increases, a point would be reached where a physician may be, in fact, an employee of the UND Medical Center. It is my opinion, however, that these private practice physicians providing this limited service for limited compensation are not employees of the UND Medical Center and are therefore not precluded from serving on the Board of Higher Education.

- EFFECT -

This opinion is issued pursuant to section 54-12-01, N.D.C.C. It governs the actions of public officials until such time as the question presented is decided by the courts.

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