

Attorney General



PAUL BARDACKE
Attorney General

Department of Justice

JOHN BIGELOW
Deputy Attorney General

P.O. Drawer 1508
Santa Fe, New Mexico 87504
Telephone: (505) 827-6000
November 1, 1983

Mr. Thomas S. Udall
Environmental Improvement Division
P.O. Box 968
Santa Fe, New Mexico 87504-0968

Re: Attorney General Reference Number 66551/000

Dear Mr. Udall:

You have asked this office for an opinion as to whether volunteer firefighters are "employees" within the meaning of the New Mexico Occupational Health and Safety Act (hereinafter "the Act"). For a number of reasons, we have concluded that for purposes of that Act, volunteer firefighters should be considered as employees. In reaching our conclusion, we have researched applicable statutes and case law, and have considered the nature of the volunteer firefighters system and the characteristics it has in common with other employment relationships.

Section 50-9-3 NMSA 1978 provides that:

"As used in the Occupational Health and Safety Act:

B. "Employee" means an individual, except a domestic employee, who is employed by an employer."

Perhaps the most obvious hallmark of an employment relationship is that an employee works for wages or a salary. This is clearly not the case with volunteer firefighters, who by definition are not paid an immediate wage. However, volunteers do receive other forms of compensation which indicate that they have an employment relationship. The recently enacted Volunteer Firefighters Retirement Act 10-11A-7, NMSA 1978, initiated a program through which qualified volunteer nonsalaried firefighters may be eligible for retirement benefits. This retirement program does not require contributions from the volunteer but is funded entirely from an annual transfer of \$500,000 over from the State Fire Protection Fund to the Volunteer Firefighters Retirement Fund. The State

Mr. Thomas S. Udall
November 1, 1983
Page -2-

Fire Protection Fund is comprised of taxes and fees from certain segments of the insurance business.

Payment of a pension or retirement benefits is commonly held to be deferred compensation for services rendered in the past. Sonnabend v. Spokane, 53 Wash.2d 362, 33 P.2d 918. Kneeland v. Administrator, Unemployment Compensation Act, 138 Conn. 630, 88 A.2d 376. As one court has said:

"A pension paid a governmental employee for long and efficient service is not an emolument... To the contrary it is a deferred portion of the compensation earned for services rendered." Great American Ins. Co. v. Johnson, 257 N.C. 367, 126 S.E. 2d 92.

It should be noted that if the retirement benefits are not considered to be compensation for services rendered to the State then the entire Volunteer Firefighters Retirement Act is probably violative of the anti-donation clause of Article IX, Section 14 of the New Mexico State Constitution which prohibits the State from making any donation to or in aid of any person. It appears then that the State is in fact paying Volunteer firefighters for their services by way of deferred compensation in the form of retirement benefits.

There are additional ways in which volunteers are compensated or treated as employees. For example, Section 3-18-11, NMSA 1978 permits municipalities who have organized volunteer fire departments to use State Fire Protection Fund monies to purchase an accident policy to cover injuries or death of a volunteer. As it would be impermissible to use state funds to purchase such insurance if volunteers were merely private citizens, it seems reasonable to imply that when acting as a firefighter in the service of the state or local government, the legislature has given them a special status. In return for aiding in fire protection, the State will provide funds to buy insurance for possible injury or death. Such coverage is indicative of an employment-like relationship.

Other benefits or compensation that might accrue to volunteers differ among fire departments. For example, it is our understanding that volunteers often receive meals, gasoline for their vehicles, and sometimes lodging. All of these items could be considered evidence of reimbursement of costs for services rendered which would point to an employer-employee relationship.

Another common characteristic of an employment relationship, as opposed to an independent contractor relationship, is that the employer has the right to control not only the result, but the details and means by which the employee's work is accomplished.

Mr. Thomas S. Udall
November 1, 1983
Page -3-

Burton v. Crawford & Co., 553 P. 2d 716, 89 N.M. 436, cert. denied, 558 P. 2d 619, 90 N.M. 7, Candelaria v. Board of County Commissioners of Valancia County, 423 P. 2d 982, 77 N.M.458. In practice, volunteer firefighters are subject to the command of whatever local governing body has created the fire protection program which they serve. Municipalities are authorized to create fire departments, both paid and volunteer, by Section 3-18-11, NMSA (1978), while authorization for counties to create independent fire districts outside municipal limits is found at Section 59-15-6, NMSA (1978).

For the most part, volunteer firefighters serve either municipalities or independent fire districts. Their functions are entirely a creation of municipal or county ordinance, as authorized by state law, and they are completely within the control of the governing body. When called to a fire, volunteers must follow the instructions of the "Chief" or whomever is designated by the local body to be in command. Therefore for purposes of the "right to control test" volunteers appear to be employees.

We think it is also important in reaching this conclusion to look at the purpose of OSHA, which is "to assure every working man and woman safe and healthful working conditions..." As a practical matter, volunteer firefighters often work alongside paid firefighters in responding to a fire. It would appear to make little sense to subject such volunteers to a lower standard of protection in light of the general goals of OSHA.

It may be possible to hypothesize a circumstance when there is a "pure" volunteer, that is, one who does not qualify for pension benefits, is not under the control of a local jurisdiction, and does not receive insurance coverage nor any other form of compensation. However, such a volunteer, as we understand it, would be extremely rare and therefore it would make little sense to base our decision on this potential exception, rather than on the more common case. As such, we conclude that for purpose of OSHA, volunteer firefighters are "employees" for the following reasons:

- (1) Volunteers are eligible to receive compensation for their services from state funds in the form of retirement benefits, insurance coverage and other miscellaneous compensation.
- (2) Volunteers work under the immediate control of the local fire protection body; they are not independent contractors.

Mr. Thomas S. Udall
November 1, 1983
Page -4-

- (3) OSHA should be interpreted in a practical way in order to accomplish its purpose of protecting worker health and safety.

We hope this has answered your questions. Please let us know if we can be of further assistance.

Sincerely,

SHEILA BROWN
Assistant Attorney General

SB/ag