

LETTER OPINION
93-L-85

March 12, 1993

John T. Goff
Cass County State's Attorney
PO Box 2806
Fargo, ND 58108-2806

Dear Mr. Goff:

Thank you for your letter concerning the employment status of county weed board members, the county weed control officer, and others who work at the direction of the county weed control officer under N.D.C.C. ch. 63-01.1. I apologize for the delay in responding. Specifically, you ask:

1. Whether county weed board members appointed by a board of county commissioners pursuant to North Dakota Century Code Section 63-01.1-04 are county employees for purposes of employee benefits provided by the county, and county compensation and salary systems?
2. Whether county weed control officers appointed or designated by a county weed board pursuant to North Dakota Century Code Section 63-01.1-04.1 are county employees for purposes of employee benefits and county compensation and salary systems?
3. Whether other employees or related positions subordinate to the county weed control officer and county weed board, who perform work at the direction of the county weed control officer and county weed board are county employees for purposes of employee benefits and county compensation salary systems?
4. Whether any of the positions mentioned above, and most specifically, weed control officers and their employees, are covered under a county liability insurance policy for actions taken in the course of their employment, when the

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individual weed control officer and employees are not specifically and expressly named as insureds on the county's liability insurance policy.

Whether a certain individual is an "employee" for the purpose of a particular program depends on how the governing body defines that term. See generally Travers v. Board of Trustees of Employees' Retirement System, 756 S.W.2d 623, 626 (Mo. App. 1988) ("The question of whether one is an officer of the city for purposes of a prohibition against contracting with the city is entirely distinct from the question of whether one is an employee for purposes of membership in the city retirement plan."); Darden v. Nationwide Mutual Ins. Co., 796 F.2d 701, 706 (4th Cir. 1986) ("[T]he definition of 'employee' should be tailored to the purposes of the statute being construed.").

Thus, it is not surprising to discover that the definition of "employee" varies from program to program. For example, N.D.C.C. ? 54-52-01(4) for purposes of the Public Employees Retirement System defines "employee" as "any person employed by a governmental unit, whose compensation is paid out of the governmental unit's funds, or funds controlled or administered by a governmental unit, or paid by the federal government through any of its executive or administrative officials." "Employee," under N.D.C.C. ? 65-01-02(14) for the purposes of workers compensation, is defined, in part, as "every person engaged in a hazardous employment under any appointment, contract of hire, or apprenticeship, express or implied, oral or written, and . . . [a]ll elective and appointed officials of this state and its political subdivisions." N.D.C.C. ? 32-12.1-02 regarding political subdivision liability defines "employee" as "any officer, board member, or volunteer, or servant of a political subdivision." For federal Social Security, an "employee" is defined as "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." N.D.C.C. ? 52-10-02(1).

One item that poses a stumbling block in addressing your concern is that there is not a set definition of "employee" for the purposes of county employee benefits and compensation. Thus, one must proceed on a case-by-case basis, program by program, for each

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class of individuals identified. The issue as to whether an individual is an employee or independent contractor is a mixed question of fact and law. See generally Turnbow v. Job Service North Dakota, 479 N.W.2d 827, 830 (N.D. 1992). Accordingly, the initial inquiry must be to determine whether the individuals are officials, employees, or independent contractors.

The test to be used to distinguish officials from employees is whether the individuals hold their positions by election or appointment, are paid from public funds, perform duties of a continuous nature which are defined by statute and related to the administration of government including the importance, dignity, and independence of the position. Holmgren v. North Dakota Workers Compensation Bureau, 455 N.W.2d 200, 202-204, N.D. 1990).

The responsibility for weed control under N.D.C.C. ch. 63-01.1 was altered in 1981. See 1981 N.D. Sess. Laws ch. 638 [Senate Bill No. 2038]. Prior to 1981, the board of county commissioners was the control authority for the county. Presently, "[t]he county weed board of each county in the state [is] the control authority for that county." N.D.C.C. ? 63-01.1-04. However, the board of county commissioners appoints the county weed board members and, accordingly, is in a position to exercise supervision of that board. See City of Boca Raton v. Cassady, 167 So.2d 886 (Fla. App. 1964) (officials appointed for a specified term may be removed for good cause). The board of county commissioners also sets board member compensation. Each county weed board member serves a four-year term.

N.D.C.C. ? 63-01.1-06 provides that the board of county commissioners may pay the expenses of weed control in any one year from the general fund. Additionally, N.D.C.C. ? 63-01.1-06 provides that the county weed board may certify to the board of county commissioners an annual weed control program tax not to exceed two mills. Once certified, the board of county commissioners must levy that tax and that tax may be levied in excess of the county's general mill levy limitations. See Letter from Attorney General Nicholas J. Spaeth to Mr. Douglas Tollefson (January 4, 1988).

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Applying the test used to distinguish officials from employees to the county weed board members leads me to conclude that the board members should be considered officials. Because the county weed board members are appointed by the county, paid by the county, and may be removed for good cause by the county, it is my opinion that the board members are county officials.

See Wharton v. Everett, 229 A.2d 492, 494 (Del. Super. 1967) ("Members of boards or commissions . . . have been regarded as public officers and not public employees."); McCreary v. Major, 22 A.2d 686 (Pa. 1941) (holding that board members of municipal authority are officials); Cade v. State, 51 S.W.2d 857, 858 (Ark. 1932) (holding that the county board of education members are county officials); Boles v. Groce, 280 S.W. 27, 28 (Tenn. 1926) (members of the county board of education are county officials).

As county officials, the general rule is that "[c]ounty officers are not county employees so as to be included in employment policy established by board of county commissioners for employees." Spaulding v. Board of Cty. Com'rs, Kandiyohi Cty., 238 N.W.2d 602 (Minn. 1976). See also McMurry v. Board of Sup'rs of Lee Cty., 261 N.W.2d 688 (Iowa 1978). However, as mentioned above, the resolution of this issue depends on how the county defines "employee" for the purposes of its employment policies.

Your second question concerns the employment status of the county weed control officer. Under N.D.C.C. ? 63-01.1-04.1(1), the county weed board appoints a county weed control officer who must cooperate with the board. N.D.C.C. ? 63-01.1-09(1) further provides that "employment" of the weed control officer must "be for a tenure and at rates of compensation . . . as the board may prescribe." N.D.C.C. ? 63-01.1-05 provides the county weed control officer must obtain the approval of the county weed board before eradication occurs when more than three acres of land are involved.

N.D.C.C. ? 11-11-11(1) provides that the board of county commissioners shall supervise "the fiscal affairs of the county." N.D.C.C. ? 11-10-01 provides that each county is a corporate body with the authority to "sue and be sued, contract and be

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contracted with."

Applying this statutory scheme to the test to distinguish an officer from an employee, leads me to conclude that the county weed control officer is not an official, but rather is an employee. See Williams v. Cothron, 288 S.W.2d 698, 700 (Tenn. 1956) (road supervisor appointed by members of the Road Commission was a subordinate employee); Mosby v. Board of Com'rs of Vanderburgh Cty., 186 N.E.2d 18, 20 (Ind. App. 1962) (county park manager appointed by county park board was not an officer but an employee). One would need to examine the county weed control officer's employment conditions to determine that individual's employer. Once this factual examination is conducted, it could be determined that the county weed control officer is an employee of the county weed board or the county or both.

As to the individuals working at the direction of the weed control officer, Job Service North Dakota has promulgated an extensive administrative rule to distinguish an independent contractor from a common law employee. See N.D. Admin. Code ? 27-02-14-01. However, the relevant factors used to determine whether a worker is an employee or independent contractor are not helpful in determining the worker's employer. See Ruble v. Arctic General, Inc., 598 P.2d 95 (Alaska 1979).

Unlike the Wyoming statutes that N.D.C.C. ch. 62-01.1 was modeled after, our statute omitted the specific authority of a weed control board to "[e]mploy personnel and determine duties and conditions of employment." Wyo. Stat. ? 11-5-105. When our Legislature has authorized a governmental unit to employ personnel and set employment conditions, it has specifically done so. See N.D.C.C. ? 61-16-09 ("The water resource board shall appoint a secretary and treasurer and such other employees as needed for the efficient conduct of the district's business and shall fix their compensation."); N.D.C.C. ? 23-11-08 ("The commissioners of an authority may employ a secretary who must be its executive director, and such technical experts, and other officers, agents, and employees, permanent and temporary, as it may require."). Accordingly, if it is determined that the individuals working at the direction of the county weed control

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officer are employees, then they must be considered as county employees to make their employment lawful. See Poillucci v. Pattison, 466 N.Y.S.2d 360, 361 (N.Y.A.D. 1983) (holding that the adoption of a county budget is sufficient to lawfully establish employment positions within county government).

Your fourth question states your concern as to county liability for the county weed control board members, weed control officer, and others working at the direction of the weed control officer because they are not specifically named as insureds on the county's liability insurance policy. Whether the county's insurance policy covers the above identified individuals is a question of fact upon which I cannot render an opinion. However, N.D.C.C. ch. 32-12.1 addresses the issue of political subdivision liability. Specifically, N.D.C.C. ? 32-12.1-03 sets limits on political subdivision liability. Under N.D.C.C. ? 32-12.1-03(1), a political subdivision is "liable for money damages for injuries when the injuries are proximately caused by the negligence or wrongful act or omission of any employee acting within the scope of the employee's employment or officer under circumstances where the employee would be personally liable to a claimant in accordance with the laws of this state, or injury caused from some condition or use of tangible property, real or personal, under circumstances where the political subdivision, if a private person, would be liable to the claimant." Accordingly, it would be prudent to compare your liability insurance policy with the statutory requirements of N.D.C.C. ch. 32-12.1 to ensure that the policy is consistent with the county's limits of liability.

I hope this discussion is helpful.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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Enclosure

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