

N.D.A.G. Letter to Omdahl (Jan. 3, 1991)

January 3, 1991

Honorable Lloyd Omdahl
Lt. Governor
State Capitol
Bismarck, ND 58505

Dear Lt. Governor Omdahl:

Thank you for your November 23, 1990, letter inquiring whether employees of the public corporations formed pursuant to N.D.C.C. § 54-56-04 may be bonded through the State Bonding Fund.

N.D.C.C. ch. 54-56 established the Children's Services Coordinating Committee (hereafter the Committee) comprised largely of state executive officials whose function is to "plan for and coordinate delivery of services to children and adolescents who are abused, neglected, emotionally disturbed, mentally ill, medically disabled, runaways, homeless, deprived, school dropouts, school-age parents, chemical or alcohol abusers, unruly, or delinquent." N.D.C.C. § 54-56-03. The Committee was authorized to "charter public corporations to implement programs" for such children. N.D.C.C. § 54-56-04. "Each such corporation must possess all powers and perform all the duties usual to corporations for public purposes or conferred upon it by law." *Id.* N.D.C.C. § 54-56-04 also provides that the employees of the public corporations "must be deemed state employees for purposes of immunity and participation in fringe benefits."

I am aware that two corporations have been formed in connection with the functioning of the Committee. The corporations were formed as nonprofit corporations pursuant to N.D.C.C. ch. 10-24, the Nonprofit Corporation Act. The corporations are independent nonprofit corporations and are not controlled or directed by the Committee. The corporations are each managed by a board of directors as provided by the Nonprofit Corporation Act. N.D.C.C. § 10-24-17.

It is my understanding that no state funds are appropriated directly for projects and programs undertaken by the corporations. Rather their funds are derived from contributions from private sources as well as from state and federal sources. The Committee pays the wages of the corporate employees from grants and contributions of money received by the Committee from private and public sources.

You specifically inquire whether employees of the public corporations may be bonded through the State Bonding Fund.

The State Bonding Fund is statutorily created and "maintained as a fund for the bonding of public employees and public officials." N.D.C.C. § 26.1-21-02. With respect to

eligibility for bonding by the Fund, "[p]ublic employees and public officials of the state and each political subdivision thereof . . . must be insured in the fund . . . upon application to the state bonding fund and upon approval by the commissioner [of insurance]." N.D.C.C. § 26.1-21-10.

A public employee is defined as "any person employed by the state or any of its political subdivisions, an officer or employee eligible under section 57-15-56 [employees of certain programs for senior citizens], an employee under section 61-16.1-05 [treasurer and other employees of a water resource district], and an officer or employee of an international peace garden." N.D.C.C. § 26.1-21-01(5). "'State' means state departments, agencies, industries, and institutions, and an international peace garden." N.D.C.C. 26.1-21-01(7). "'Political subdivision' means a county, city, township, school district or park district, or any other unit of local government." N.D.C.C. § 26.1-21-01(4).

The corporations are not political subdivisions by definition. The employees of the corporations do not fall within the definition of public employees as they are not employed by the state or a political subdivision.

Other factors also distinguish the employees of the corporations from public employees. I am advised that the employees are not on the roster of state classified service employees under the unified state personnel system. N.D.C.C. ch. 54-44.3. Furthermore, employees of the corporations are not employees of a "governmental unit" as defined for purposes of participating in the public employees retirement system, N.D.C.C. § 54-52-01(7) and the uniform group insurance program, N.D.C.C. §§ 54-52.1-01(4), 54-52.1-02. A governmental unit means "the state . . . or a county or city thereof, a school district . . . a district health unit, and the Garrison Conservancy District." N.D.C.C. § 54-52-01(7).

Further, no statute specifically authorizes the employees in question to be covered by the State Bonding Fund. Consequently, it is my opinion that they are not eligible for bonding coverage through the Fund.

Sincerely,

Nicholas J. Spaeth

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