

**OPINION
79-192**

March 22, 1979 (OPINION)

Honorable Tish Kelly
State Representative
House Chambers
State Capitol
Bismarck, North Dakota 58505

Dear Representative Kelly:

This is in reply to your letter of January 10, 1979, requesting our opinion as to whether the Southeast Mental Health and Retardation Center (hereafter SMHRC) is a political subdivision under Chapter 25-12, N.D.C.C.

After examining the materials enclosed with your letter and from discussions with legal counsel associated with the Center, it appears that the question really is whether SMHRC is a "local public agency" as defined at 45 Code of Federal Regulations 1361.13.

As in all cases concerning the application or construction of federal laws and regulations, this office cannot pretend to preempt those federal agencies having authority to interpret regulations and administer their respective programs. However, we do have the following observations concerning the legal status of mental health and retardation service units established pursuant to Chapter 25-12, N.D.C.C., and SMHRC in particular.

Under Section 25-12-01, N.D.C.C., a "service unit" may be established only by a political subdivision of the state, and operated either by that subdivision alone or jointly with other subdivisions, in accordance with Section 54-40-08, N.D.C.C., which provides for cooperative agreements between or among political subdivisions.

Section 25-12-01 further provides that this "service unit" however created, may, if it so chooses, contract with a nonprofit corporation for the furnishing of requested services.

Section 25-12-03 provides that this "service unit" is to be governed by a board of directors. Where a service unit is established by joint operation pursuant to Section 54-40-08, the board is comprised of members appointed by the participating subdivisions. Section 25-12-03 may be misleading in its introductory sentence, in that reference is made to establishment of the service unit by a "body corporate." This term must, again, refer to the governing body of a city or county, as there is no provision for any other "body corporate" to establish such a unit. (The "nonprofit corporation" referred to in Section 25-12-01 cannot "establish" such a unit. It can only contract with it to provide services.)

These service units, in our opinion, are clearly administrative bodies of the cities or counties that created them, whether established singly or by joint cooperative action. Were it for us to decide, we would have no difficulty in describing them as "local

public agencies."

Insofar as the SMHRC is concerned, it appears that the existence of a nonprofit corporation in connection with the service unit has caused considerable confusion. As you point out, one must examine the history of this unit in order to understand the nature of the nonprofit corporation. Based upon the information provided in your letter, it appears that the nonprofit corporation in this instance was created for the purpose of implementing the joint exercise of governmental powers of the participating counties of the Southeast Unit. It is not a separate independent nonprofit corporation of the type referred to at Section 25-12-01. In this instance, the corporation is the same entity as the unit. Its board of directors is the board of directors of the unit, and these board members are appointed by their respective governing bodies in accordance with the provisions of Section 25-12-03, N.D.C.C. While the creation of this corporation was perhaps not necessary, the fact that it was created should not be viewed as extralegal.

In fact, we speculate that the corporation was created as a result of correspondence between Mr. Eugene Kruger, then state's attorney for Cass County, and this office, in 1965, shortly after the law providing for the establishment of mental health units was enacted but before its effective date. In a letter dated April 20, 1965, Mr. Kruger asked:

Can a private nonprofit corporation be established now without regard to any requirements of the act and use such corporation to aid in establishing the required budgets and plans so that a mental health unit composed of a political subdivision or subdivisions can later be established?

In an opinion dated April 30, 1965, we replied:

We believe a nonprofit corporation may be established now without regard to any requirements of the Act and use such corporation to aid in establishing the required budgets and plans so that a mental health unit composed of a political subdivision or subdivisions can later be established. In so holding we recognize that the establishment of such corporation for such purpose is valid under the general corporation laws of this state.

Thus, it would be our opinion that the Southeast Mental Health and Retardation Service Center is the same entity as the Southeast Mental Health and Retardation unit, which has been organized and exists as a governmental entity, as described above, pursuant to the provisions of Chapter 25-12, N.D.C.C.

Sincerely,

ALLEN I. OLSON

Attorney General