LETTER OPINION
95-L-11

January 26, 1995

Ms. Patricia Burke
Burleigh County State's Attorney
514 East Thayer
Bismarck, ND 58501

Dear Ms. Burke:

Thank your for your letter regarding work-related injuries to persons performing court-ordered community service.

N.D.C.C. ? 12.1-32-02(1)(f) authorizes courts to sentence criminal defendants to an "appropriate work detail" or community service instead of a term of imprisonment. It is my understanding that community service is imposed as a condition of probation, and its non-performance can result in the revocation of that probation. Your letter also explains that those persons ordered to perform community service in your county are referred to a private community service program, which in turn places them with a public or private non-profit organization in coordination with those persons' other employment or school commitments.

You first ask what potential liability for work-related injuries exists for organizations receiving these services. As discussed below, workers' compensation coverage is available but not required for community service workers, so I begin by discussing the potential liability of organizations that supervise these workers but do not obtain this optional coverage.

Employers shall indemnify their employees "for losses caused by the employer's want of care . . . unless relieved of liability under the workmen's compensation laws . . . ." Lindenberg v. Folson, 138 N.W.2d 573, 582 (N.D. 1965), citing N.D.C.C. ? 34-02-03. Unlike employees, a person "who volunteers to act for another cannot recover for personal injuries as a servant of such other." Severinson v. Nerby, 105 N.W.2d 252, 256-57 (N.D. 1960) (emphasis added).

However, an "occupier of premises" owes a duty of reasonable

care towards all people lawfully on the premises to prevent foreseeable injuries. O'Leary v. Coenen, 251 N.W.2d 746, 751 (N.D. 1977); see also Jacobs v. Bever, 55 N.W.2d 512, 515 (N.D. 1952) (status as employee or invitee "immaterial"). This duty extends to volunteers, who recover not as servants, but as people injured while lawfully on the supervising organization's premises. Clark v. Moore Memorial United Methodist Church, 538 So. 2d 760 (Miss. 1989); Bartolomeo v. Evangel Church of God, 564 N.Y.S.2d 184, 185 (App. Div. 1991), citing Lichtenthal v. St. Mary's Church, 561 N.Y.S.2d 134 (App. Div. 1990). See also 30 C.J.S. Employer's Liability ? 32 (1992); 53 Am. Jur. 2d Master and Servant ? 179 (1970), and cases cited therein.

Therefore, regardless of the legal status of persons performing court-ordered community service, it is my opinion that a supervising organization might be liable for work-related injuries on its premises caused by the organization's negligence, depending upon the particular facts and circumstances involved.

Your letter also asks how supervising organizations can minimize their liability for these injuries. Liability for work-related and other injuries is a concern of political subdivisions as well as private organizations. See Kitto v. Minot Park District, 224 N.W.2d 795 (N.D. 1974); N.D.C.C. ch. 32-12.1. As you know, most work-related injuries are covered by the workers' compensation fund instead of private insurance. By participating in the fund, an employer is generally relieved of any other liability to its employees for personal injuries. N.D.C.C. ? 65-01-08. However, workers' compensation coverage is required only for "employees", N.D.C.C. ? 65-01-05, and a person usually must be an "employee" or the dependent of an employee to receive benefits from the fund. N.D.C.C. ? 65-05-05.

The term "employee" is defined for workers' compensation purposes as "every person engaged in a hazardous employment under any appointment, contract of hire, or apprenticeship, express or implied, oral or written . . . ." N.D.C.C. ? 65-01-02(15). Most state courts interpreting similar language have concluded that prison inmates are not employees of the organization that receives the services, because a "contract for hire" cannot exist without the consent of both parties and some form of consideration. See 1B Arthur Larson, The Law Of Workmen's Compensation ? 47.31 (1994); Note, A Time For

Recognition: Extending Workmen's Compensation Coverage to Inmates, 61 N.D.L. Rev. 403 (1985).

Two courts have extended this rule to persons performing community service instead of a term of imprisonment. In Republic-Franklin Insurance Company v. City of Amherst, 553 N.E.2d 614 (Ohio 1990), the Ohio Supreme Court concluded that a community service worker is not entitled to workers' compensation benefits as an "employee" because the worker's relationship with the supervising organization is not consensual:

> [C]ommunity service work is imposed by the court in lieu of sentence for conviction of a misdemeanor. A person who consents to perform community service in lieu of sentence enters into an agreement with the court, not the agency where the work is performed. There is no express or implied contract of hire between the community service worker and the agency using his services. Hence, the community service worker cannot be considered an employee of the agency.

Id. at 618. A California appellate court reached the same result because no consideration "flowed from the beneficiary of the community service to the defendant." California State University, Fullerton v. Workers Compensation Appeals Board, 21 Cal.Rptr.2d 50, 54 (Ct. App. 1993) (Fullerton), citing 61 Cal. Op. Att'y Gen. 265 (1978). The California Supreme Court recently granted review of a decision by a different appellate court that disagreed with Fullerton and concluded that a community service worker is an "employee" for workers' compensation purposes. Arriaga v. County of Alameda, 29 Cal.Rptr.2d 212 (Ct. App. 1994), review granted 874 P.2d 902 (1994).

As noted in Arriaga, 29 Cal.Rptr.2d at 214, the definition of "employee" is not limited to a "contract of hire," but also includes any appointment or apprenticeship. However, implicit in an "appointment, contract for hire, or apprenticeship" is a consensual, bargained-for exchange of labor for some form of compensation. Not only is the person forced to perform community service or go to jail, the person receives no remuneration of any kind from the supervising organization. The benefits a person receives from performing community service come from the sentencing court, not the supervising organization. See Fullerton, 21 Cal.Rptr.2d at 54; 61 Cal. Op. Att'y Gen. at 269. From the perspective of the supervising organization, the person performing community

service is simply a volunteer. For these reasons, it is my opinion a court order imposing community service as a condition of probation does not create an employer-employee relationship under N.D.C.C. Tit. 65.

Because a person performing community service is not an "employee" as defined in N.D.C.C. ch. 65-01, the person cannot receive benefits from the fund without specific statutory authority. N.D.C.C. ch. 65-06.2 makes such coverage available for "inmates," including "a person who . . . is ordered or elects to perform public service for a city or county in conjunction with or in lieu of a jail sentence." N.D.C.C. ? 65-06.2-01 (emphasis added). Under the plain language of the statute, this election is not available when community service is performed for private organizations instead of "a city or county." However, because these workers do not receive remuneration for their services from the supervising organization, it may be possible for a private non-profit organization to obtain worker's compensation insurance for them under N.D.C.C. ? 65-07-01 as volunteers. See Fullerton, 21 Cal.Rptr.2d at 54; 61 Cal. Op. Att'y Gen. at 269.

Instead of obtaining optional workers' compensation insurance, a supervising organization can also reduce its liability exposure by obtaining private insurance or simply making its workplace as safe as possible. However, because the optional workers compensation coverage provides an exclusive remedy and no-fault benefits, it may be the best alternative.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

jcf/vkk