

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 39

OPINION NO. 36

CITIES & TOWNS - Volunteer firefighters, eligibility for workers' compensation;
FIREFIGHTERS, VOLUNTEER - Eligibility for workers' compensation in incorporated towns;
WORKERS' COMPENSATION ACT - Coverage for volunteer firefighters in incorporated towns;
WORKERS' COMPENSATION ACT - Volunteer firefighters as employees;
MONTANA CODE ANNOTATED - Sections 7-33-4101, et seq., 39-71-101, et seq.

HELD: Volunteer firefighters in incorporated towns are "employees" within the terms of the Workers' Compensation Act.

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9 October 1981

Jan VanRiper
Staff Attorney
Division of Workers' Compensation
815 Front Street
Helena, Montana 59601

Dear Ms. VanRiper:

The Workers' Compensation Division has requested an opinion as to whether volunteer firefighters in incorporated towns are employees under the provisions of the Workers' Compensation Act. The Workers' Compensation Act, § 39-71-101, et seq., MCA, does not specifically refer to volunteer firefighters. The Act does require workers' compensation coverage for all persons who qualify as an "employee" under section 39-71-118, MCA. If those volunteers are considered to be "employees," incorporated towns must comply with the coverage requirements of the Act. It is my opinion that volunteers should be considered "employees" within the terms of the act.

Section 39-71-118(1)(a), MCA, defines "employee" as "each person in this state...who is in the service of an employer...under any appointment or contract of hire, expressed or implied, oral or written." The issue presented by your request is whether volunteer firefighters serve incorporated municipalities "under any appointment or contract of hire."

Unpaid firefighters do not serve under any "contract of hire," because the element of compensation is lacking. See IC A. Larson, The Law of Workmen's Compensation § 47.41(a) (1980). However, other jurisdictions with statutory language similar to that above have determined that government volunteers may be employees "under... appointment." See Betts v. Ann Arbor Public Schools, 403 Mich. 507, 271 N.W.2d 498 (1978) (student teacher); Orphant v. St. Louis State Hospital, 441 S.W.2d 355 (Mo. 1969) (volunteer at state hospital); but see Board of Education v. Industrial Commission, 53 Ill. 2d 167, 290 N.E.2d 247 (volunteer in public school).

Under Montana's statutes concerning the fire departments of incorporated municipalities, volunteer firefighters clearly serve "under...appointment." Section 7-33-4101,

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MCA, requires there to be in every city and town of this state a fire department, organized, managed, and controlled according to the provisions of state law. While first-class cities must have paid fire departments, second-class cities may have supplementary volunteer fire departments and third-class cities and towns may have all-volunteer fire departments. §§ 7-33-4109, 7-33-4128, MCA. Regardless of whether a department is paid or volunteer, however, the procedure for selection of firefighters is the same. Sections 7-33-4106 and 7-33-4122, MCA, state:

The mayor or manager shall nominate, and, with the consent of the council or commission, appoint the chief of the fire department, the assistant chief or chiefs of the fire department, and all firefighters.

Each appointment shall be first made for a probationary term of 6 months, and thereafter the mayor or manager may nominate and, with the consent of the council or commission, appoint such chief and assistant chief or chiefs of the fire department and firefighters, who shall thereafter hold their respective appointments during good behavior and while they have the physical ability to perform their duties.

[Emphasis added.]

Furthermore, the municipality maintains the "right of control" over volunteer firefighters that is essential to any employer-employee relationship under the Workers' Compensation Act. See Sharp v. Hoerner Waldorf Corp., 178 Mont. 419, 425-26, 584 P.2d 1298, 1301-02 (1978); State ex rel. Ferguson v. District Court, 164 Mont. 84, 88, 519 P.2d 151, 153 (1974). All firefighters serve under the supervision of the chief or the chief engineer of the fire department, who in turn is directly responsible to the city or town council. See §§ 7-33-4104, 7-33-4105, 7-33-4109(5), 7-33-4123 to 7-33-4125, MCA.

The Montana Workers' Compensation Act is required to be liberally construed in favor of the claimant. § 39-71-104, MCA. While the liberal construction doctrine has never been applied to the question of the

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underlying employment relationship, it is likely that the Montana Court would agree with language in a Georgia court opinion:

[A]ny legitimate doubt as to whether the status of the claimant is that of employee... is to be resolved in favor of the employee status.

Ratliff v. Liberty Mutual Insurance Co., 149 Ga. App. 211, 253 S.E.2d 799, 801 (1979). See Garland v. Anaconda Co., 177 Mont. 240, 244, 581 P.2d 431, 433 (1978).

THEREFORE, IT IS MY OPINION:

Volunteer firefighters in incorporated towns are "employees" within the terms of the Workers' Compensation Act.

Very truly yours,

MIKE GREELY
Attorney General