

MEMORANDUM

TO: Mike Tallent, Assistant Director

FROM: Sid Hemsley, Senior Law Consultant

DATE: May 10, 2006

RE: Volunteer Firemen (and other volunteers) Running for Local Office

Tennessee Code Annotated, ' 7-51-1501 extends to local government employees broad rights to participate in political activities, but it prohibits such employees from running for office on the local government's governing body unless a law or ordinance authorizes them to do so. However, that statute does not define the term "employee," specifically with respect to the question of whether that term embraces volunteer firefighters, volunteer police officers, and other volunteers. There appear to be no cases in Tennessee or any other jurisdiction that examines a similar statute. Surprisingly, there are no cases interpreting the Hatch Act, that distinguish between employees and volunteers. [See 5 U.S.C.A. ' 1501]

It would be useful for the Tennessee General Assembly to draw a bright line between "employees" and "volunteers" in Tennessee Code Annotated, ' 7-51-1501, but it has already drawn at least a faint one in the statutory scheme of which that statute is a part. It drew it by speaking of the compensation and benefits to which "employees" engaged in political activity on government time are *not* entitled. Generally, volunteers, who work in a myriad of different capacities for local governments, do not receive such compensation and benefits. For that reason, they will probably not qualify as "employees" under that statute. There may be doubtful cases where unusual circumstances exist; statutes and case law on the employee-volunteer distinction gives the courts the tools to handle those cases.

Rules of statutory construction support the conclusions I have drawn in this memorandum. However, I have not cited those rules. The reason is that the rules of statutory construction reflect "dealer's choice" law. They are many and outcome oriented; they can be used to support any decision a court wants to make on a certain question.

Tennessee Code Annotated, ' 7-51-1501 is part of a short statutory scheme contained in

Tennessee Code Annotated, " 7-51-1501B03. Two provisions in that statutory scheme appear to make it clear who is an *employee* of a local government:

First, Tennessee Code Annotated, ' 7-51-1501 itself provides that every employee of a local governmental unit shall enjoy the same rights of other citizens of Tennessee to participate in various political activities [before it makes the exception for candidates for local office], but qualifies that right: When an employee of a local government is participating in such activities, the local government "is not required to pay the employee's salary for work not performed for the governmental entity...."

Volunteers generally do not get paid salaries or wages in the same sense as do employees. Even the nominal sums for calls and drills, etc., that volunteer firefighters are often paid are not ordinarily considered by statute and cases law as salary or wages.

Second, Tennessee Code Annotated, ' 7-51-1503, provides that:

Any time off from work used by the employee for participation in political activities shall be limited to earned days off, vacation days, or by any other arrangement worked out between the employee and the municipal or county governmental body.

Earned days off and vacation days are a hallmark of employment benefits. Most volunteers do not accrue earned days off and vacation days.

Moreover, nothing in the statutory scheme contained in Tennessee Code Annotated, " 7-51-1501B1503 remotely suggests it applies to volunteers. All references in that statutory scheme are to "employees." Indeed, the introduction to Public Acts 1996, Chapter 678, which is the genesis of that statutory scheme says, "AN ACT to amend Tennessee Code Annotated, Title 7, Chapter 51, to secure to all local government *employees* the political freedoms enjoyed by every citizen of Tennessee." In addition, Tennessee Code Annotated, ' 7-51-1502 says that, "The rights granted to county *employees* under ' 5-5-102(c)(1) are preserved." Tennessee Code Annotated, ' 5-5-102(c)(1) preserves the right of county "employees" to run for office on the county legislative body. Subsection (4) authorizes "*employees*" who are members of the county legislative body to vote for matters in which they have a conflict of interest in certain cases.

If the above statutory scheme is viewed as a whole, it seems doubtful that the General Assembly remotely intended to sweep volunteers under the umbrella of Tennessee Code Annotated, ' 7-51-1501. A contrary conclusion results in parents of children who volunteer to perform various kinds of volunteer services at county and city schools, persons who volunteer to staff various programs at community and senior citizens centers, and perhaps even "candy strippers" who do volunteer work at county and city hospitals, being disqualified from running for office on the governing bodies of their local governments on the ground that they are "employees."

For that reason, a strong argument can be made that the statutory scheme contained in Tennessee Code Annotated, " 7-51-1501-03 on its face was not intended to apply to persons doing work for the government we typically understand to be "volunteers." Surely, the General Assembly was aware of at least the rudimentary distinction between employees and volunteers, and that awareness appears when it speaks in that statutory scheme about the salary and earned days off and leave days that belong to "employees."

But if we assume that the term "employee" contained in Tennessee Code Annotated, ' 7-51-1501 is ambiguous on the issue of whether it includes volunteers, American Justice Insurance Reciprocal v. Hutchinson, 15 S.W.3d 811 (Tenn. 2000), helps clear up that ambiguity. There, the U.S. District Court for the Eastern district of Tennessee certified to the Tennessee Supreme Court the question of:

Whether the Sheriff of Knox County and employees of the Knox County Sheriff's Department were volunteers of the Scott County Sheriff's Department when they received no compensation from Scott County but received their regular salary from Knox County [in helping the Scott County Sheriff's office] end a siege in Scott County]?

A wrongful death suit arose out of that siege, and the Scott County's liability insurance policy expressly covered "volunteers." However, the policy did not define the term "volunteers." Reasoning that "When called upon to interpret a term used in an insurance policy that is not defined therein, courts in Tennessee sometimes refer to dictionary definitions." [Citations omitted by me.] The dictionary to which the Court turned to determine the definition of "volunteer" was *Black's Law Dictionary*, 1576 (6th Ed. 1990):

A person who gives his services without any express or implied promise of remuneration. One who intrudes himself into a matter which does not concern him, or who pays the debt of another without request, when he is not legally or morally bound to do so, and when he has no interest to protect in making such payments. A person who pays the debt of another without a request, when not legally or morally bound to do so and not in protection of his own interest. [At 814.]

The Court's problem at that point was not with the definition of "volunteer," but with determining whether the drafters of the insurance policy intended the kind of assistance rendered by the Knox County Sheriff's Department to be included within the term "volunteer" under the policy:

Focusing on the content of this and similar definitions of the term “volunteer,” both parties have propounded arguments focusing on whether the Knox County defendants assisted the Scott County Sheriff’s Department with the expectation of compensation and whether being dispatched to the neighboring county constitutes acting of one’s own free will....[At 815]

The Court did not know the answer, falling back on the rule that “where language in an insurance policy is susceptible of more than one reasonable interpretation...it is ambiguous,” and “If the ambiguous language limits the coverage of an insurance policy, that language must be construed against the insurance company and in favor of the insured.” [At 814]

The courts in Tennessee and other states regularly turn to the dictionary to supply the definitions of ambiguous terms in many contexts other than insurance contracts. It is logical that the definition of “volunteer” used by the Court in American Justice Insurance Reciprocal has general application to the definition of “volunteer” in a variety of contexts, including the question of whether a volunteer is an employee under Tennessee Code Annotated, ' 7-51-1501. The definition of “volunteer” in *Blacks Law Dictionary* as “A person who gives his services without any express or implied promise of remuneration....” is consistent with the distinction between “employees” and “volunteers” found in the statutes and cases reflected in this Memorandum.

But there may occasionally be questions of whether a certain person is an employee or a volunteer. Those questions probably most arise with respect to volunteer firefighters and police officers under the compensatory programs of some local governments. In Tennessee and other jurisdictions, statutes and cases address the distinction between employees and volunteers, most often in the context of workers’ compensation laws and the Fair Labor Standards Act, but also in other contexts where the employment status of a person is the key to a benefit of one kind or another. It can be argued that those statutes and cases do not apply to the distinction between employees and volunteers for the purposes of Tennessee Code Annotated, ' 7-51-1501. But that conclusion is wrong for the reason already addressed above: Tennessee Code Annotated, ' 7-51-1501 is part of a statutory scheme which itself points to the indices that characterize who is an employee for the purpose of that scheme. Those indices include pay and benefits. The statutes and cases that distinguish between employment and volunteers for the purposes of workers’ compensation law and of the Fair Labor Standards Act, and other purposes, are based on similar indices and put meat on the bones of those indices. There is no reason for the courts not to use some or all of those statutes and cases to determine whether a person, in questionable cases, is an employee or a volunteer.

State Statutes Bearing on Question of Who Is A Volunteer

Tennessee Tort Liability Act (TTLA): That Act, found at Tennessee Code Annotated, ' 29-20-101 et seq., provides that:

A regular member of a volunteer or auxiliary firefighting, police or emergency assistance organization of a governmental entity shall be considered to be an employee of that governmental entity for the purpose of this chapter without regard to the elements set forth in subsection (a). [Tennessee Code Annotated, ' 29-20-107(d)]

That provision itself clearly concedes that such volunteers are not employees except for the purposes of the TTLA. Subsection (a) requires that in order for a person to qualify as an “employee” he receive the same benefits as all other employees of the governmental entity, including retirement benefits and the eligibility to participate in insurance programs, and the same job protection system and rules, such as civil service or grievance procedures as are other persons employed by the governmental entity. Generally, volunteers are not entitled to such benefits and considerations, and are otherwise not treated as employees. They are not required to respond to calls, attend drills, or training at the penalty of discipline that can threaten their “jobs.” If they fail to follow the rules pertaining to volunteers, the fire chief, police chief, or head of other kinds of volunteers simply removes them from the list of volunteers after a period. But they are not “terminated” as would be an employee for failure to perform his duty, or for other reasons.

Tennessee Workers’ Compensation Law: The Workers’ Compensation Law defines the term “employee” broadly:

....includes every person, including a minor, whether lawfully or unlawfully employed, the president, any vice-president, secretary, treasurer or other executive officer or corporate employer without regard to the nature of the duties of such corporate officials, in the service of an employer, as employer is defined in subdivision (12), under *any contract of hire or apprenticeship, written or implied.*

The same law contains a test for determining whether a person is an employee or an independent contractor [Tennessee Code Annotated, ' 50-6-102(11)], but it does not separately define “volunteer.” However, it does require that workers' compensation insurance carriers "shall be required to offer medical benefits coverage for *paid-on-call and volunteer firefighters.*" [Tennessee Code Annotated, ' 50-6-401(a)(1)] The language of that requirement seems to make it clear that under the Workers’ Compensation Law neither kind of firefighter is an “employee.” That Law simply requires that “paid-on-call and volunteer firefighters” must be offered medical benefits by workers’ compensation insurance carriers even though they are *not* employees.

In Hill v. King, 663 S.W.2d 435 (Tenn. App. 1983), the question was whether a certain deputy sheriff, killed while he was helping the sheriff transport a prisoner in the sheriff’s airplane, was an employee or a volunteer. The distinction was important because if he was an employee, his survivors were limited to the compensation provided employees under the

Workers' Compensation Law; if he was a volunteer, his survivors could seek the more generous recovery provided by the Tennessee Tort Liability Act.

The Tennessee Supreme Court outlined the relationship between the deputy and the county sheriff:

.... the deceased [deputy sheriff] sustained a unique relationship with Dan King, Sheriff of Robertson County. He had been commissioned a deputy sheriff, had received a pistol and uniform, and was authorized to serve process and transport prisoners. Each employee of the sheriff was permitted to eat one meal at the jail during each tour of duty. He was paid no salary, could work as much or as little as he chose, *and even when scheduled to work, he was not obligated to report for duty.* He was reimbursed for fuel used and expenses incurred on official business. He did regularly report to work; and when he did, he was subject to orders exactly as other salaried officers were. [At 437]

But the deputy sheriff was a volunteer rather than an employee, held the Court, because he was "not for hire," and had not entered into "an agreement for pay." In fact, the Court went at great length to define the distinction between employees and volunteers, the latter of which were not "hired" in a sense, which "connotes a payment of some kind" [At 440]. The Court listed a multitude of voluntary arrangements where the individual in question got no payment for his work, or got meals, expenses, and other gratuities that were not "wages." [At 443] [Also see Garner v. Reed, 856 S.W.2d 698 (Tenn. 1993), which, citing Hill v. King, above, in great detail explains the necessity of a contract for hire in creating the employment relationship, and what the creation of the contract for hire requires.]

Although the above cases applied to the distinction between "employees" and "volunteers" for the purposes of Tennessee's Workers Compensation Law, it seems exquisitely logical that a contract for hire is a prerequisite for becoming a municipal employee in any context, including in the context of Tennessee Code Annotated, ' 7-51-1501.

Status of Volunteers under the Fair Labor Standards Act

Statute and Regulations

The FLSA distinguishes between "employees" and "volunteers" for the purposes of that Act, and permits governments to provide volunteers workers' compensation, and other insurance coverage without making them employees for the purposes of that Act. Under the FLSA:

The term "employee" does not include any individual who volunteers to perform services for a public agency which is a state, a political subdivision of a state, or an interstate governmental agency, if

(I) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered.... [29 U.S.C., section 203(e)(4)(A)]

The regulations implementing the FLSA provide that:

An individual who performs hours of service for a public agency or civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered, is considered to be a volunteer during such hours.... [29 C.F.R. section 553.101]

(a) *Volunteers may be paid expenses, reasonable benefits, a nominal fee, or any combination thereof, for their services without losing their status as volunteers.*

(b) An individual who performs hours of service as a volunteer for a public agency may receive payment for expenses without being deemed an employee for the purpose of the FLSA.....

(e) *Individuals do not lose their volunteer status if they receive a nominal fee from a public agency. A nominal fee is not a substitute for compensation and must not be tied to productivity. However, this does not preclude the payment of a nominal amount on a "per call" or similar basis to firefighters.....* [29 C.F.R. section 553.106]
[Emphasis is mine]

With respect to the provision of workers' compensation insurance, the regulations also provide that:

(d) individuals do not lose their volunteer status if they are provided reasonable benefits by a public agency for whom they perform volunteer service. Benefits would be considered reasonable, for example, when they involve the inclusion of individual volunteers in group insurance plans (such as liability, health, life, disability, workers' compensation) or pension plans or "length of service" awards, commonly or traditionally provided to volunteers of State and local government agencies, which meet the additional test in paragraph (f) of this section. [29 C.F.R., section 553-106(d)]

Paragraph (f) says that "the total payments made (expenses, benefits, fees) in the context of the economic realities of the particular situation" will be considered in the determination of whether an individual loses his status as a volunteer under the Fair Labor Standards Act. [29

Economic Realities Test v. Totality of Circumstances Test

The courts are not in agreement as to the test for determining whether a person is an employee or a volunteer for FLSA purposes, even under the above rules. Some courts have used the “economic realities test,” under which a person is an employee if he is economically dependent upon the business to which he renders service, and a volunteer if he is not.

Other courts have concluded that while the economic realities test applies to the question of whether a person is an employee or independent contractor, it does not work well on the question of whether a person is an employee or a volunteer. The person in question may not be presently economically dependent upon the employer, but his volunteer work may rest on reasons other than altruistic ones, including future economic reasons, such as the selection of future employees from the ranks of volunteers. Those courts have adopted the “totality of circumstances test.” [See Krause v. Cherry Hill Fire District, 969 F. Supp. 270 (D. N.J. 1997); Rodriguez v. Township of Holiday Lakes, 866 F. Supp. 1012 (S.D. Tex. 1994); Torado v. Township of Union, 27 F. Supp. 517 (D. New Jersey 1998). Also see the unreported case of Cleveland v. City of Elmendorf, 2004 WL 305609 (W.D. Tex)].

Presumably, the Tennessee courts could adopt a totality of circumstances test for distinguishing between employees and volunteers for the purpose of Tennessee Code Annotated, ' 7-51-1501.

The Issue of How Much and What Kind of Compensation

The question of how much and what kind of compensation before a volunteer becomes an employee has been important in the cases in which the volunteers received some kind of compensation:

- Krause, above: The “volunteers” were held to be employees for a certain period during which they were paid a minimum of \$5.05 per hour and a maximum of \$9.00 per hour.

- Doty v. Town of South Prairie, 120 P.3d 941 (Wash. 2005): The Washington Supreme Court said that the \$6 per call and \$10 per drill stipend paid by the town to its volunteer fire fighters did not constitute “wages” within the meaning of that state’s workers compensation law, reasoning that:

In light of our Minimum Wage Act, Chapter 49.46 RCW, it is highly unlikely that our legislature would consider the stipend the town paid Doty as constituting remuneration for the firefighting service she performed. Doty received the same small stipend amount regardless of the duration of the call and the extent of the services performed. This is not remuneration for her services, but more reasonably, maintenance and reimbursement for expenses

incurred in performing her assigned duties, such as reimbursement for travel and food expenses a volunteer inevitably incurs in responding to calls. [At 542]

Likewise, the premiums paid by the city for in-line-of-duty insurance benefits under another statute did not constitute wages, said the Court.

- Tawes v. Frankford Volunteer Fire Company, 2005 WL 83784 (D. Del.) (Unreported): The Court held that a person was a volunteer rather than an employee for the purposes of the Americans With Disabilities Act, even though he was entitled to the following benefits:

Pension benefits: Entitled to contribute \$60 a year to the state pension fund (or if the person worked 40 hours for the fire company, the fire company would make the contribution); entitled to receive certain pension benefits at age 60 after 10 years of service.

Line of duty benefits (restricted to injury and death arising from line of duty): Secondary automobile insurance; death benefits, disability benefits, funeral expenses, state worker's compensation benefits.

Other benefits: discounts on wireless phones and phone service; use of the fire companies premises; \$300 tax credit for the purchases of essential firefighter equipment; firefighters skills training; uniforms and equipment.

I found no case in which the total compensation during a particular period paid to a person labeled as a volunteer was an issue, although it seems logical that at some point total compensation could be significant enough to raise the question of whether the person is a volunteer or an employee for the purposes of Tennessee Code Annotated, ' 7-51-1501.