

Opinion No. 42-4004

January 28, 1942

BY: EDWARD P. CHASE, Attorney General

TO: Captain Fav Guthrie Coordinator New Mexico State Council of National Defense
Santa Fe, New Mexico

{*151} This will acknowledge receipt of your letter dated January 23, 1942, in which you request an opinion from this office setting forth the law in New Mexico concerning the protection of volunteers in case of accident or injury while working in the Civilian Defense Program.

You enclose with your letter a copy of a brief written by Charles S. Rhyne, Executive Director, to Christian M. Ozias, City Attorney, Fresno, California, dated September 1, 1941, in which Mr. Rhyne reaches the conclusion that municipalities will not incur liability for injuries to or by unpaid volunteer workers under the office of the Civilian Defense in the absence of statutory provisions to the contrary.

With this conclusion, I am in accord. The majority of volunteer workers likely to have accidents or receive injuries during the course of their work may be classed under the general head of volunteer firemen or volunteer policemen, and the common law rule is that a municipality is not liable to third persons for injuries received as a result of acts of firemen or policemen even though due to negligence, in view of the fact that said persons are performing a governmental or public duty, and act as public officers rather than employees of the municipality.

As to the general rule governing firemen, see McQuillan on Municipal Corporations, Sections 2593 and 2814, and as to the rule relative to policemen, see Sections 2591 and 2837. This rule also applies to actions against the municipality by a fireman or policeman injured in the course of his duties, and it has generally been held that such persons cannot recover for injuries against the municipality. McQuillan on Municipal Corporations, Section 2790. However, this rule does not {*152} apply in the case of injuries received as a result of defective streets, sidewalks, etc., on the theory that a fireman or policeman has not assumed the risks incident to such defective streets and sidewalks.

The immunity from suit for injuries received while in the line of duty extends to volunteer firemen as well as paid firemen for the reason that the acts of volunteer firemen are also done in the nature of acts by public officers rather than under the relationship of master and servant. *Thompson vs. City of Albion*, 115 Neb. 208, 212 N.W. 37; *Wild vs. City of Patterson*, 47 N.J. Law 406, Atl. 490.

Persons serving the public as volunteers are not considered as employees of the municipality, and although there seem to be no cases covering volunteers for civilian

defense, yet such workers may be compared by analogy with WPA or relief workers, and in the absence of some showing that such workers are actually employees of the municipality, they have, as a rule, been held as not coming within the Workmen's Compensation Acts requiring compensation to be paid to certain employees. 222 Iowa 1099, 270 N. W. 847, 9 Cal. (2d) 705, 72 P. (2d) 540.

If such volunteer workers are not employees of the municipality, then they do not come within the Workmen's Compensation Act in this state, in view of the fact that the status of employer and employee must exist before a municipality is required to come under the provisions of the same, Laws of 1937, Chapter 92, Sections 1 and 6, sub-sections (H) and (I). This construction of the Workmen's Compensation Act is substantiated by the fact that under Chapter 20, Section 1, Laws of 1935, volunteer firemen who are regular members of a municipal fire department are provided for in case of accidents by the fact that municipalities are authorized to purchase accident insurance for said firemen in an amount not to exceed \$ 2,000.00, and to use the fire protection fund for the purpose of paying premiums on such insurance. There is no statutory prohibition against municipalities extending accident insurance to cover additional volunteer firemen who may volunteer under the civilian defense set-up, and the same thing would apply to volunteer policemen. The only difficulty may be in the lack of funds in the hands of municipalities to be used for this purpose.

In answer to the question propounded by you, there seems to be no statute requiring municipalities to purchase insurance policies for the protection of such volunteer workers, and no statute bringing said volunteers within the Workmen's Compensation Act, and under the present law said volunteers must assume all risks incident to the work which they perform and may not look to the municipality for reimbursement for any injuries sustained.