



STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON 25305

ROGER W. TOMPKINS
ATTORNEY GENERAL

(304) 348-2021

CONSUMER HOTLINE
(800) 368-8808

January 17, 1990

Walter Smittle, III
West Virginia State Fire Marshal
2100 Washington Street, East
Charleston, West Virginia 25305

Dear Mr. Smittle:

You have requested an opinion concerning the activities of Junior Volunteer Firefighters. Specifically, you have requested an opinion regarding the following questions:

- "1. What activities are permissible for junior firefighters to participate in as a member of a volunteer fire department? Some questions for clarity to the activities of junior firefighters are:
 - a. Can junior firefighters fight fire?
 - b. Can junior firefighters respond to fire calls?
 - c. Can junior firefighters ride on emergency vehicles?
 - d. Can junior firefighters participate in live fire training?
 - e. Can junior firefighters respond to emergency calls where no fire exists, i.e. automobile accidents, drownings, etc.
 - f. Can junior firefighters 16-17 years of age drive emergency vehicles, i.e. fire apparatus, rescue trucks, tanker trucks, etc.?
 - g. Can junior firefighters participate in post-fire activities such as clean-up, etc.?
- "2. Which law takes precedence regarding the activities of junior firefighters, i.e. does statutory law take precedence over regulations promulgated by the Labor Department or are the laws treated equally? Does federal law affect the activities of junior firefighters?
- "3. What is the responsibility of the Volunteer Fire Department to the junior members?
- "4. What legal liability must the fire department assume regarding the junior firefighter activities?

Your letter indicates that volunteer fire departments in West Virginia are utilizing junior members for several fire department activities, including emergency calls. The junior members are usually 16 or 17 years of age, but some junior members are under the age of sixteen. You further noted that during the processing of fire incident and casualty reports by your office, it was noted that some junior members had been injured. Those injuries included:

1. A seventeen year old thrown off the tailboard of an apparatus.
2. A sixteen year old member was injured while riding either the tailboard or running board when the fire engine was struck by another vehicle.
3. A fifteen year old member entered a burning building and fell through the floor.

Your office issued an "advisory memorandum" on August 29, 1988 as a result of injuries which occurred to junior members and junior firefighters under the age of 18 who had responded to emergency calls. The memorandum was based upon your understanding of the current law, and was for consideration and action by the local fire chiefs.

Your opinion request also indicates that several volunteer fire departments are using junior members during daylight hours, including school hours, as primary firefighters. Additionally, some scout troops, who are non-members of the volunteer fire departments, participate as junior fire fighters.

West Virginia Code 21-6-2, entitled "Child Labor", reads in pertinent part as follows:

"No child under eighteen years of age shall be employed or permitted to work in any occupation thus determined to be dangerous or injurious to such children:
Provided, that a child between the ages of sixteen and eighteen years who has completed the minimum training requirements of the West Virginia University fire service extension fire-fighter training section one, or its equivalent, and who has the written consent of his parents or guardian may be employed by or elected as a member of a volunteer fire department to perform fire-fighting functions without any such determination:
Provided, however, that no such child may be permitted to operate any fire-fighting vehicles, enter a burning building in the course of his employment or work or

enter into any area determined by the fire chief or fireman in charge at the scene of a fire or other emergency to be an area of danger exposing the child to physical harm by reason of impending collapse of a building or explosion, unless such child is under the immediate supervision of a fire line officer."

Pursuant to West Virginia Code 21-6-11, the Commissioner of the West Virginia Department of Labor is required to promulgate rules and regulations to the extent necessary to effectuate the purposes of said article in accordance with the provisions of West Virginia Code 29A-1-1 et seq. Such rules and regulations are found in Title 42, Code of State Rules, Series 9 and read, in pertinent part, as follows:

"Section 42-9-6. Minor volunteer fire activities.

"6.1. Under no circumstances can any minor under age sixteen (16) participate in any fire activities.

"6.2. Volunteer fire departments.

"(a) Minors aged sixteen (16) and seventeen (17) who have successfully completed a course of training in fire protection and related safety techniques may engage in limited fire-fighting activities: Provided, That such minors are under direct supervision and control of trained and qualified fire protection personnel. Written permission of the minor's parent or guardian is required, and this written permission must be kept on file as long as the minor's name appears on the volunteer fire department's roster as a potential minor volunteer.

"(b) No person under eighteen (18) years of age shall be permitted to:

"(1) Drive any fire apparatus, ambulance or other official fire vehicle; and/or operate red lights, siren or an audible signal in responding to an alarm on their own personal vehicles or any other vehicle;

"(2) Operate an aerial ladder, aerial platform or hydraulic jack at a fire scene;

"(3) Use rubber electrical gloves, insulated wire gloves, insulated wire cutters, life nets, acetylene cutting units, K-12 power saws, air chisels, portapowers, hurst tools or other equipment related to rescue and fire operations at a fire scene;

"(4) Operate the pumps of any fire vehicle while at the scene of a fire;

"(5) Enter a burning structure, except at designated training sessions at specified training schools conducted by the West Virginia Fire Service Training Program of West Virginia University or the West Virginia State Fire Marshal's office.

"(c) Minors attending school shall not be permitted to respond to a fire during school hours unless such a request is made by the fire official in charge to the principal of the school.

"(d) Minors shall be afforded the minimal personal protective equipment; i.e., boots, bunker coats, helmet, gloves, etc., as it relates to their work outlined in subsection (e)(3) and during training exercises that require such protective equipment.

"(e) The activities of these minors shall be limited to:

"(1) Training;

"(2) First Aid;

"(3) Clean-up service at the scene of a fire, outside the structure, after the fire has been declared by the official in charge to be under control;

"(4) Coffee wagon and food service.

"(f) In no case, however, shall these minors be permitted to:

"(1) Operate high pressure hose lines, except during training;

"(2) Ascend ladders, except during training activities.

"6.3. Junior forest fire crew members.

"(a) Forest fire fighting is considered emergency work which must be performed. These minors must be sixteen (16) or older, the consent of the minor's parents is required, and if the minor is in school, the consent of the school principal must be obtained before

employing the individuals for emergency work during school hours.

"(b) Such minors are to be under the direct supervision and control of a forest fire warden or fire official.

"Note: All other provisions of the West Virginia Child Labor Law and the regulations promulgated thereunder affecting the employment of minors shall be applicable in all cases."

The rules and regulations promulgated by the Department of Labor more specifically define what activities are permitted under the Child Labor Law. Those rules and regulations clearly state that ". . . [u]nder no circumstances can any minor under age 16 participate in any fire activities." [Emphasis added.] [Thus, junior volunteer firefighters beneath the age of 16 are not permitted.] Additionally, only those individuals who have successfully completed a training course in fire protection and related safety techniques may engage in the limited fire fighting activities listed in Subsection 6.2(e) of the rules and regulations, and those activities must be under the direct supervision and control of trained and qualified fire protection personnel, and then only with the written consent of the minor's parent or guardian. Boy Scouts would not qualify unless these specific requirements were met.

Subsection 6.2(c) of the Rules and Regulations addresses the issue of junior volunteers who attend school. Those individuals cannot respond to a fire during school hours unless a proper request is made by the fire official in charge to the principal of the school.

Subsection 6.2(b)(1) of the Rules and Regulations prohibits anyone under the age of eighteen from driving any ". . . fire apparatus, ambulance or other official fire vehicle. . . ." However, the rules and regulations do not prohibit a junior volunteer firefighter from riding on emergency vehicles.

Subsections 6.2(a) and (e)(1) of the Rules and Regulations refer to a course of training in fire protection and training, respectively, but do not specify whether said training is or can be "live fire training". However, Code 21-6-2 refers to completion of the "minimum training requirements of the West Virginia University fire service extension fire-fighter training section one, or its equivalent. . ." Therefore, if Section 1 of the West Virginia University fire service extension fire-fighter

training course involves "live fire training," then it would be permissible for junior volunteers to participate in similar training. However, the course coordinators should be consulted to determine whether there are specific limitations on age.

Pursuant to Subsection 6.2(e)(3) of the Rules and Regulations, a junior volunteer may clean up at the scene of a fire, outside of the structure, after the fire has been declared "under control" by the official in charge.

You also questioned whether a statute or its rules and regulations take precedence one over the other, or whether they are to be treated equally. A regulation promulgated by an administrative agency, addressed to and reasonably adapted to the enforcement of a statute, the administration of which is confided to such agency, has the force and effect of law if it is not in conflict with express statutory provisions. Johnson v. Monongahela Power Co., 146 W.Va. 900, 123 S.E.2d 81 (1961).

The West Virginia Administrative Procedures Act (W.Va. Code Section 29A-1-1(c)) defines a "rule" as a regulation of general application and future effect promulgated by an agency to implement, extend, apply, interpret or make specific the legislation enforced or administered by it. An administrative body has the authority to make rules and regulations which are not inconsistent with the provisions of the statute under which it functions, but an administrative body may not issue a regulation which is out of harmony with, or which alters or limits the statute being administered. State v. West Virginia State Board of Health, 137 W.Va. 284, 70 S.E.2d 903 (1952); Tulley v. State Farm Mut. Auto. Ins. Co., 345 F.Supp. 1123 (S.D. W.Va. 1972).

The rules and regulations adopted by the West Virginia Department of Labor appear to comply with all the requirements for administrative rules and regulations and should, therefore, if not in direct conflict with the statute, be given equal weight with the statute. The regulations only apply, interpret and make specific the statute, which is precisely the expected function of a rule or regulation.

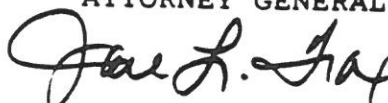
The responsibility in terms of legal liability of the volunteer fire department to its junior members is a serious matter. An employer is liable for those injuries against which the Child Labor Law was intended to guard, and the fact that the minor misrepresented his age does not preclude recovery in an action for damages caused by violation of W.Va. Code 21-6-2. See, Norman v. Virginia-Pocahontas Coal Co., 68 W.Va. 405, 69 S.E. 857, 31 L.R.A. (N.S.) 504 (1910), overruled on other

grounds, Pitzer v. M. D. Tomkies & Sons, 136 W.Va. 268, 67 S.E.2d 437 (1951). If a volunteer fire department permits junior volunteer firefighters to participate in prohibited activities, the fire department is subjecting itself to potential lawsuits for injuries with the possibility that insurance coverage would not apply since the action was a violation of the law. If failure to comply with Code 21-6-2 results in an injury, there is prima facie negligence on the part of the employer. Waldron v. Garland Pocahontas Coal Co., 89 W.Va. 426, 109 S.E. 729 (1921). Additionally, if death was the result of an act of negligence of the employer, the fact that the father consented to the unlawful employment is no defense in an action for wrongful death. Irvine v. Union Training Co., 97 W.Va. 388, 125 S.E. 110 (1924).

Your final question is whether federal law affects the activities of junior members. My review of current Federal law and conversation with the United States Department of Labor indicates no federal law on junior firefighters. That being the case, West Virginia State law and Legislative Rules as I have previously discussed, apply to your questions.

Very truly yours,

ROGER W. TOMPKINS
ATTORNEY GENERAL



BY: JAN L. FOX
DEPUTY ATTORNEY GENERAL

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