OPINION NO. 78-013

Syllabus:

CETA participants and welfare recipients who are "loaned" to the Department of Natural Resources, and who are under the supervision of the Department while performing services are "employees" of the Department for purposes of R.C. 9.83.

To: Robert W. Teater, Director, Ohio Dept. of Natural Resources, Columbus, Ohio

By: William J. Brown, Attorney General, April 11, 1978

I have before me your request for an opinion on the following question:

Are CETA workers who are loaned to the Department of Natural Resources by the sponsoring agency or public relief workers who are required by the county to work

> on public property and loaned to the Department covered by the Department's insurance policy against third-party liability when they operate state equipment?

As you indicate, R.C. 9.83 allows the state and the various subdivisions to join a self insurance fund and to ultimately purchase liability insurance. The section provides, in part, as follows:

> (A) The state and any political subdivision may procure a policy or policies of insurance insuring its officers and employees against liability on account of damage or injury to persons and property, including liability on account of death or accident by wrongful act, occasioned by the operation of such motor vehicles as are automobiles, trucks, motor vehicles with auxiliary equipment, self-propelling equipment or trailers, aircraft or watercraft by employees or officers of the state or a political subdivision, while such vehicles are being used or operated in the course of the business of the state or the political subdivision. On and after the effective date of this section and until liability insurance is in force pursuant to division (B) of this section in the absence of liability insurance authorized by this section, the state is authorized to expend funds to pay judgments rendered in any court against its employees of [or] officers, that result from the employee's or officer's operations of one of the aforementioned vehicles where the employee or officer was acting in the course of his employment, and is authorized to expend funds to compromise claims for liability against its employees of [or] officers, that result from the employee's or officer's operation or use the aforementioned vehicles in the course of his employment. . . (Emphasis added.)

Under this section, the answer to your question turns upon the definition of "employee."

The Comprehensive Employment and Training Act (CETA), 29 U.S.C. §801, et seq., has as its purpose the provision of "job training and employment opportunities for economically disadvantaged, unemployed, and underemployed persons . . . ." To achieve this end, the federal government makes grants to "sponsoring" agencies of state and local governments. Participants for the programs operated by the sponsors are selected on the basis of need and paid with the federal grant monies.

Discussions with members of your office reveal that ODNR has become involved with CETA participants in two ways. Under one program, ODNR is itself the sponsoring agency. Participants are selected by ODNR and are processed through your personnel office. They are paid directly by ODNR, although the funding is federal, and all services performed by these participants are performed for ODNR. Your question, however, does not relate to these participants. Under the second system, CETA participants are "loaned" to ODNR by other sponsors. These other sponsors are the agencies which select the participants and the participants are processed and paid through that sponsor. They are loaned to ODNR because ODNR has jobs for them at times when the original sponsor does not. Although the processing and payment of these loaned CETA participants continues to be conducted by the original sponsor, the actual job site supervision is handled by ODNR. Your department has also indicated that a similar situation exists with respect to the welfare recipients about whom you inquire. Certain counties impose the condition of work upon receipt of welfare benefits, and at times these counties ask that ODNR supply recipients with such work. As is the

case with loaned CETA participants, the "payrolls" are handled by the counties, but the actual job site supervision is handled by ODNR.

The word "employee" is not defined by R.C. 9.83. "Employee" is defined in at least three other sections of the Revised Code, see R.C. 4101.01(D), 4121.13, and 5903.02, but in each instance, the definition is limited by its own terms to the particular Revised Code chapter in which it appears. None of these definitions is controlling for purposes of R.C. 9.83.

In order to better understand what is meant by the word "employee" in R.C. 9.83, it is necessary to analyze the purpose of the statute. In waiving tort liability under R.C. 2743.02, the state is now a potential defendant, and it appears that the purpose of R.C. 9.83 is to protect not only the employees, but the agency as well. For this reason, the category included within the definition of "employee" should be broad enough to include all persons whose negligence would involve potential liability to the agency. In order to resolve that issue, common law principles of respondeat superior must be analyzed.

Federal case law reveals that CETA participants would not be considered federal employees for purposes of imposing liability. Although the issue has not been decided specifically with respect to CETA, in an analagous case, Vincent v. U.S., 383 F. Supp. 471 (E.D. Ark., 1974), affirmed, 513 F. 2d 1296 (8th Cir., 1975), it was held that the mere fact that a person was paid with federal grant monies did not render the federal government liable for his torts under the Federal Tort Claims Act. In that case the funding grant was an OEA grant. The court reasoned that the determinitive factor in resolving the issue of liability was not the mode or source of payment but rather the right to supervise and direct the manner in which services are performed. Accord: Hines v. Cenla Community Action Committee, 474 F. 2d 1052 (5th Cir., 1973). Robles v. El Paso Community Action Agency, 456 F. 2d 189 (5th Cir., 1972). But see Orleans v. U.S., 513 F. 2d 197 (6th Cir., 1975).

For purposes of determining the liability of the master for the torts of the servant, Ohio has also followed the "right to control" test. Simply put, the test states that he who controls the servant must bear the risk of liability for that servant. The rule has been ardently applied in "loaned servant" cases where the issue of who is the actual master is material. Thus, in Ragone v. Vitali & Beltrami, 42 Ohio St. 2d 161, 172 (1975), the following test was reiterated:

> In determining whether, in respect of a particular act, a servant, in the general employment of one person, who has been loaned for the time being to another is the servant of the original employer or the person to whom he has been loaned, the test is whether in the particular service which he is engaged to perform, the servant continues liable to the direction and control of his general employer or becomes subject to that of the person to whom he is lent, - whether the latter is in control as proprietor so that he can at anytime stop or continue the work and determine the way in which it is to be done, with reference not only to the result reached but to the method of reaching it.

(Giovinale v. Republic Steel Corp., 151 Ohio St. 161 (1949) and Halkias v. Wilkoff Co., 141 Ohio St. 139 (1943), approved and followed.)

Numerous other cases support the view that liability follows the right to control. See, e.g. Gilmore v. Grandview Cement Products, Inc., 116 Ohio App. 313 (1962). Board of Education v. Rhodes, 109 Ohio App. 415 (1959). Home Ins. Co. v. Brd. of Commrs., 88 Ohio App. 91 (1949), appeal dismissed, 153 Ohio St. 538 (1950).

Under this test the loaned CETA participants and welfare recipients you describe present a potential source of liability to ODNR. Keeping in mind the apparent purpose of R.C. 9.83 to protect the agencies of the state as well as

"employees" from third party liability, I am of the opinion that the word "employee" should be construed to include any person representing a potential source of liability to the agency and therefore includes these workers. In reaching this conclusion I rely solely upon R.C. 9.83 and therefore do not reach numerous other related questions, particularly the questions of whether these workers are state employees for purposes of the state retirement system or whether they are classified civil servants.

Accordingly, it is my opinion that:

> CETA participants and welfare recipients who are "loaned" to the Department of Natural Resources, and who are under the supervision of the Department while performing services are "employees" of the Department for purposes of R.C. 9.83.