

have this contract upheld. Aside from the question of a lack of authority, it appears to me that the county would be placing itself in a rather inconsistent position if, while contending for the validity of the contract, it were to impair the funds which are to be used for carrying out the contract. In any event, the sections of the Budget Law herein quoted have made special provisions for the expenditure of public funds, and there appears no authority for adopting the course of procedure outlined in your letter.

Summarizing and in specific answer to your question, I am of the opinion that when, under a co-operative agreement between a county and a municipality for the construction of a road improvement within the municipality, as provided in Sections 6949, et seq., General Code, a municipality has paid into the county treasury its portion of the estimated cost and expense of such improvement and a contract has been entered into for such improvement after the certificate required by Section 5625-33, General Code, has been executed, there is no authority vested in the board of county commissioners of such county to return to the municipality such money so paid into the county treasury on account of the fact that pending litigation may result in delaying construction of the improvement.

• Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*

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1534.

APPROVAL, NOTES OF ADAMS RURAL SCHOOL DISTRICT, CHAMPAIGN COUNTY—\$25,000.00.

COLUMBUS, OHIO, February 18, 1930.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

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1535.

APPROVAL, NOTES OF NORWICH TOWNSHIP RURAL SCHOOL DISTRICT, FRANKLIN COUNTY—\$85,000.00.

COLUMBUS, OHIO, February 18, 1930.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

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1536.

WORKMEN'S COMPENSATION LAW—VOLUNTEER VILLAGE FIREMEN AS MEMBERS OF LAWFULLY CONSTITUTED FIRE DEPARTMENT UNDER AN APPOINTMENT OR CONTRACT OF HIRE, ENTITLED TO SUCH LAW'S BENEFITS.

**SYLLABUS:**

*Volunteer firemen of incorporated villages who are members of a lawfully constituted fire department of such village, and are serving as such under an appointment or contract of hire, are employes within the meaning of the workmen's compensation act*

*and are entitled to the benefits of that act in case they sustain injuries in the course of their employment, and if death results from an injury received in the course of employment then their dependents are entitled to the benefits of the act.*

COLUMBUS, OHIO, February 18, 1930.

HON. ED. D. SCHORR, *Director of Commerce, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication which reads as follows:

“In the administration of the Division of Fire Marshal, Department of Commerce, the question arises whether volunteer firemen of an incorporated village under or appointed by the mayor of the village and whose appointment is confirmed by the village council, and whose names appear on the village clerk’s records as volunteer firemen are entitled to compensation from the workmen’s compensation fund in case of death or injury while in the performance of their duties as volunteer firemen.

Will you please give us your opinion?”

Under the provisions of the workmen’s compensation law a village is made an employer subject to that act. This is by virtue of Section 1465-60, General Code, which provides in part as follows:

“The following shall constitute employers subject to the provisions of this act:

1. The state and each county, city, township, incorporated village and school district therein.”

This then leads us to inquire whether or not volunteer firemen are employes subject to the provisions of said act. The workmen’s compensation law provides that all employes shall be entitled to the benefits of the act, and the term “employee” is defined in Section 1465-61, General Code, which reads in part as follows:

“The terms ‘employee’, ‘workman’ and ‘operative’ as used in this act, shall be construed to mean:

1. Every person in the service of the state, or of any county, city, township, incorporated village or school district therein, including regular members of lawfully constituted police and fire departments of cities and villages, under any appointment or contract of hire, express or implied, oral or written, except any official of the state, or of any county, city, township, incorporated village or school district therein. Provided that nothing in this act shall apply to police or firemen in cities where the injured policemen or firemen are eligible to participate in any policemen’s or firemen’s pension funds which are now or hereafter may be established and maintained by municipal authority under existing laws.”

It will be noted from an examination of this section that every person in the service of an incorporated village, including regular members of lawfully constituted fire departments under any appointment or contract of hire, is an employe within the meaning of the act and, therefore, entitled to the benefits of the act. The provisions of the act would also apply to the dependents of such employes, in case death resulted from an injury sustained in the course of employment.

In your communication you do not state whether or not the volunteer firemen are

members of "lawfully constituted \* \* \* fire departments of \* \* \* villages," nor do you state whether or not they are acting "under any appointment or contract of hire." That, of course, would be a question of fact. If they are members of such a fire department under appointment or contract of hire they come within the provisions of the workmen's compensation law and they and their dependents are entitled to the benefits conferred by that law upon such persons.

A consideration of this question was had in an opinion which was rendered to Hon. Paul J. Wortman, Prosecuting Attorney of Montgomery County, on September 30, 1929, being Opinion No. 937. That opinion was addressed to the proposition of whether or not members of a group called "volunteer" firemen were entitled to the benefits of the workmen's compensation law. In that particular case, the facts disclosed that the department consisted of a fire chief, who received \$1,800.00 per year, of units each of which was under the direction of a captain who received \$30.00 per month, and of firemen who received a minimum compensation of \$1.00 per hour for each fire attended.

The rule established in that opinion is contained in the syllabus which reads as follows:

"A fire chief in charge of township fire apparatus, and the captains under his control in charge of the various units thereof, and the men selected to assist in operating said fire equipment who are paid for their services by the township trustees under regulations adopted by the township trustees in pursuance of Section 3298-54, General Code, are employes within the meaning of the Workmen's Compensation Law, and as such are entitled to the benefits provided for by that act; in case of death resulting from injuries received in the course of their employment with the township, their dependents are also entitled to the benefits provided for in said act.

In that opinion I stated:

"The fact that the firemen under consideration are called 'volunteers' is in no wise controlling. It is the substance of the regulations and provisions made by the township trustees that controls rather than the name by which the organization is known. \* \* \* They give their services to the township when needed in connection with a fire and receive a fixed rate of pay for the services rendered. This amounts to a contract of hire. The fact that the amount of pay which they may receive is very small, in many instances almost nominal, does not affect the consideration of the question. The contract of hire is none the less such a contract even though the pay for the services rendered is small."

The fact that the designation "volunteer firemen" is not controlling in considering this question is emphasized by the Legislature in the firemen's indemnity fund act. In Section 4647-8, General Code, the board authorized to disburse the indemnity fund, when determining the average earnings of a "volunteer fireman", is required to take into consideration the amount of his earnings received from his regular employment "together with his compensation as such volunteer fireman". This clearly indicates that the Legislature did not have in mind that a volunteer fireman could not receive compensation for his services as such fireman.

The answer to your question depends upon the facts in each particular case. If the firemen in question are in the service of a village in connection with a "lawfully constituted" fire department under an appointment or contract of hire, then they are entitled to the benefits of the workmen's compensation law in case they sustain

injuries in the course of their employment, and if death results from such injuries then the dependents of these employes are also entitled to the benefits of the act. On the other hand, if the firemen are merely volunteers who are organized into a so-called fire department and are not in the service of the village under an appointment or contract of hire, they are not entitled to the benefits of the act. In other words, the mere appointment or designation of persons as volunteer firemen is not in itself sufficient to bring the appointee within the provisions of the workmen's compensation law. There must be some element of hire included with the appointment. This is emphasized by a study of the workmen's compensation act as a whole. In my opinion the word "appointment" was used in order to avoid any question based upon the manner of the selection of the employe. A person working for a private concern, in order to be an employe within the meaning of the act, must be in the service of such private employer under a "contract of hire". The term appointment is not used in connection therewith because a private employer usually engages employes by way of contract. There is a difference in public employment—some public employes are hired, and some obtain their positions by way of appointment, and, as stated above, I am of the opinion that the term appointment was included, in referring to public employes, to make it clear that the manner of the selection was immaterial. The fact that there must be an element of hire included in the selection is also emphasized by the provisions of the compensation act in connection with the creation of the fund. All employers (and this includes municipalities) must pay premiums based upon the payroll or wages paid to employes and, in my opinion, this emphasizes the fact that the Legislature intended compensation to be paid to employes who receive some compensation for their services, or in other words, who are upon the payroll and receiving money or its equivalent from an employer for services rendered to such employer.

Therefore it is my opinion that volunteer firemen of incorporated villages who are members of a lawfully constituted fire department of such village, and are serving as such under an appointment or contract of hire, are employes within the meaning of the workmen's compensation act and are entitled to the benefits of that act in case they sustain injuries in the course of such employment, and if death results from an injury received in the course of employment then their dependents are entitled to the benefits of the act.

Respectfully,  
 GILBERT BETTMAN,  
*Attorney General.*

1537.

DISAPPROVAL, AUTHORITY FOR CANCELLATION OF LEASE TO OHIO  
 CANAL LAND BETWEEN NEWARK AND HEBRON, LICKING  
 COUNTY, OHIO.

COLUMBUS, OHIO, February 18, 1930.

HON. A. T. CONNAR, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your recent communication which reads as follows:

"The Department of Highways, by Robert N. Waid, Director, has applied to this department for a transfer of, and the right to occupy and use, for the relocation and reconstruction of a part of I. C. H. No. 359, approximately