

**OPINION NO. 65-120****Syllabus:**

(1) Section 521.02, Revised Code, does not impose a duty upon or create a right in a township to establish a firemen's relief and pension fund until the township employs two or more full-time regular firemen who would qualify as "members of the fire department" as defined in Section 521.01, Revised Code. Paragraph 1 of the syllabus of Opinion No. 346, Opinions of the Attorney General for 1963, is hereby overruled.

(2) Deductions made from the salaries of full-time regular firemen for a relief and pension fund which is not properly established must either be refunded to such employees by the township clerk or remitted by the township clerk to the public employees retirement system if such proper contributions to that system were not made during the time the firemen's relief and pension fund was improperly established.

(3) Full-time regular firemen of a fire department of a township which is not authorized to establish its own firemen's relief and pension fund must participate as members of the public employees retirement system and the township clerk must deduct and remit the proper employee and employer contributions.

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**To: Chester W. Goble, Auditor of State, Columbus, Ohio**  
**By: William B. Saxbe, Attorney General, July 9, 1965**

You have requested my opinion with regard to various questions concerning whether Township X has the mandatory obligation to establish and maintain a firemen's relief and pension fund and if so, when did such duty arise and how should such duty be carried out. For purposes of this opinion I feel it necessary to set forth only the following facts:

Township X from 1941 until 1957 participated in a joint township fire protection agreement with another township and a municipal corporation all of which shared expenses and held title to the fire equipment on an agreed percentage basis. All firemen appointed by the joint subdivisions served on a voluntary basis subject to emergency calls and were compensated for services rendered, if and when, called upon.

On March 1, 1957, the joint fire protection agreement was dissolved and all equipment and fire prevention responsibility passed solely to Township X. Township X decided to establish a firemen's relief and pension fund as of April 1, 1965. The Township has a membership in the Volunteer Firemen's Dependents

Fund pursuant to Chapter 146, Revised Code, and prior to that it had established a Firemen's Indemnity Fund until the statutes authorizing such funds were repealed September 16, 1957, 127 Ohio Laws 956, and the fund liquidated as provided by law. See Section 146.18, Revised Code. You indicate that there are five full-time firemen employed by the township fire department, each of whom are presently covered by the public employee's retirement system. I shall assume this represents the full-time staff since 1957. You have identified these persons and provided the following facts:

ABC was appointed a volunteer fireman in 1943 and from 1946 until 1956 ABC served as fire chief. During this period he never received more than \$160 a year and he, as the other volunteer firemen, was subject only to call to respond to fires and was required to attend meetings and drills but did not spend any regular time at the fire house. On March 1, 1957, ABC became full-time chief which means he reported to the fire house eight hours per day and was compensated on an annual salary basis.

DEF was appointed a volunteer fireman in 1942 and became a full-time fireman on January 1, 1962, at which time he was 47 years of age.

GHI was appointed as a volunteer fireman in 1942 and became a full-time fireman on March 1, 1957 at age 40.

KLM was hired as a volunteer fireman in 1953 and became a full-time fireman on May 1, 1960 at which time he was 29 years of age.

NOP was hired as a volunteer fireman in 1956 and became a full-time fireman on May 1, 1960 at age 37.

The following is quoted from your request:

"(4) If it were to be assumed that on March 1, 1957, the township had no firemen eligible for membership in the township firemen's relief and pension fund by reason of the age limitations to be found in Section 521.01, Revised Code, would the township, nevertheless, be required to establish the fund and appropriate money to such fund semi-annually as provided in Section 521.05, Revised Code, if the township on and after March 1, 1957 was 'employing two or more full-time regular firemen,' within the meaning of Section 521.02, Revised Code? If so, is the township at this time required to make up the past due payments?"

"Your opinion on the above questions is respectfully requested in view of the fact that the township has already begun to deduct four per cent from the salaries of each of these firemen discussed above and would like to discontinue payments to P. E. R. S....."

The provisions in Chapter 521, Revised Code, pertaining to township firemen's relief and pension funds were first enacted in 1947, 122 Ohio Laws, 614. The sections most applicable to

the consideration of this question are as follows:

Section 521.01, Revised Code.

"As used in sections 521.01 to 521.12, inclusive, of the Revised Code:

"(A) 'Member of the fire department' means:

"(1) Any person who, on April 1, 1947, was employed by a township as a full-time regular fireman in a township fire department, established pursuant to sections 505.37 to 505.44, inclusive, of the Revised Code;

"(2) Any person over twenty-one and under thirty years of age, who, after April 1, 1947, is employed by a township as a full-time regular fireman in a township fire department.

"(B) 'Member of the fund' means any person who is contributing four per cent of his annual salary to the township firemen's relief and pension fund."

Section 521.02, Revised Code.

"Each township having a fire department supported in whole or in part at public expense, and employing two or more full-time regular firemen, shall establish and maintain a township firemen's relief and pension fund.

"The fund shall be under the management and control of a board of trustees of the township firemen's relief and pension fund, composed of six members, chosen as follows:

"(A) Two members shall be elected by the board of township trustees from its own membership.

"(B) Two members shall be elected by the members of the fire department of the township from its own membership.

"(C) Two members shall be representatives of the general public and residents of the township, chosen as follows:

"(1) One member shall be elected by the members of the board of trustees of the township firemen's relief and pension fund who are members of the board of township trustees.

"(2) One member shall be elected by the members of the board of trustees of the township firemen's relief and pension fund

who are members of the fire department.

"\* \* \* \* \*"

There is no doubt that Section 521.02, supra, creates a mandatory duty upon the township to establish such a relief and pension fund when the fire department employs "two or more full-time regular firemen." The determination, therefore, upon which all of your inquiries turn is what is meant by "full-time regular firemen" as used in Section 521.02, supra, requiring the creation of such fund.

The act itself does not define the term "full-time regular" but it is apparent that the legislature recognized that townships may only require firemen for temporary purposes or for employment on account of special or temporary circumstances, unusual conditions and emergencies. An employee so hired would not fit within the common understanding of the terms "full-time" and "regular." Deskins v. Borough of West Brownsville, 388 Pa., 547, 131 A. 2d, 101; Opinion No. 2327, Opinions of the Attorney General for 1947, page 542. See also Section 741.06, Revised Code, relating to municipal relief and pension funds which differentiates between "full-time regular" and "volunteer or part-time" members.

On the basis of the facts submitted in your letter of request, it is clear that there were no full-time regular firemen until March of 1957 when Township X established its own fire department and placed three volunteer firemen on a regular eight-hour a day status and compensated them on an annual salary basis.

It is to be noted, however, that Section 521.01, supra, defines "member of the fire department" as something more than a full-time regular fireman. To qualify as a "member of the fire department" a full-time regular fireman must meet one of the two following requirements as provided in Section 521.01, supra: 1) he was employed prior to 1947; 2) he was employed at a time he was between the ages of twenty-one and thirty. It is further noted that several of my predecessors have considered the problem evidenced by Section 521.01, supra, that there is no conclusive aid in the statutes which establishes the qualifications required of a fireman before he may become a "member of the fund." As indicated in Opinion No. 346, Opinions of the Attorney General for 1963, and as here again considered for purposes of this opinion, I concur with the conclusion of prior opinions that only a "member of the fire department" as defined can qualify as a "member of the fund." See Opinion No. 7464, Opinions of the Attorney General for 1956, page 866; Opinion No. 2961, Opinions of the Attorney General for 1962, page 307.

It seems logical to me that the legislature intended something more by defining "member of the fire department" than merely prescribing the qualifications of the members eligible to serve on the board of trustees created under Section 521.02, supra, since that is the only specific reference to that term in all of Chapter 521, supra. This conclusion is supported, however, by the reference in Section 521.11, Revised Code, which provides disability benefits to members of the fund injured in the course of employment while a "member of the department."

It is apparent, therefore, that if the first paragraph of Section 521.02, supra, is read literally a township would be re-

quired to establish a relief and pension fund and make annual appropriations thereto from general revenues as so provided even though none of the full-time regular firemen employed qualify as eligible "members of the fund." It does not seem reasonable, however, that the legislature intended that a township should establish and appropriate money to a fund in which no full-time regular fireman employed by the township may participate as a member. I believe it is necessary, therefore, to examine more thoroughly the nature of the duty under Section 521.02, supra.

It is interesting to note that the remaining paragraphs of Section 521.02, supra, provide for the management of such a fund and specifically direct that the board of trustees of the fund shall be composed of six members. Such members are to be chosen as follows: two members elected from the board of township trustees, two members elected from the members of the fire department (as defined in Section 521.01, supra) and two members representing the general public, one of which is to be elected by the two board members who are "members of the fire department." If it were to be concluded that a fund must be established only when two or more full-time regular firemen are employed, then in the instant situation this fund would have had to have been established in 1957. Had this been done, however, there would have been no eligible members to serve on the board of trustees and no provision is made that such positions on the board could be filled by a full-time regular fireman who is not a member of the fund. In 1957, there only could have been three trustees, i.e., two members elected by the township trustees, and the member elected by these members to represent the general public. See Section 521.02 (A) and (C) (1), supra. It follows therefore that to meet the mandatory requirements regarding the composition of the board of trustees that must be established at the time the fund is created, there must be at least two "members of the fire department" which is something different from just two full-time firemen.

Interpretative guidelines applicable to the consideration of the meaning of Section 521.02, supra, are found in Sutherland, Statutory Construction, Vol. 2, in the following sections reading in part as follows:

Section 4706, pages 339-40.

"The literal interpretation of the words of an act should not prevail if it creates a result contrary to the apparent intention of the legislature and if the words are sufficiently flexible to admit of a construction which will effectuate the legislative intention. The intention prevails over the letter, and the letter must if possible be read so as to conform to the spirit of the act...Thus words or clauses may be enlarged or restricted to harmonize with other provisions of an act. The particular inquiry is not what is the abstract force of the words or what they may comprehend, but in what sense were they intended to be used in the act...."

Section 4703, pages 336-37.

"...A statute is passed as a whole and not in parts or sections and is animated by

one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole. Thus it is not proper to confine interpretation to the one section to be construed."

With these guidelines in mind, I am led to the conclusion that "two or more full-time regular firemen" must be read to mean "members of the fire department" in order to carry out all of the dictates of Section 521.02, supra, and to effect a reasonable application of the law which would not require a township to do a vain act, i.e., establish and contribute to a firemen's relief and pension fund when there are no eligible firemen to benefit from such a fund.

In reaching this conclusion, I am not unmindful of Opinion No. 346, Opinions of the Attorney General for 1963, which held in the first paragraph of the syllabus:

"1. It is mandatory upon the township trustees to establish and maintain a township firemen's relief and pension fund under Section 521.02, Revised Code, where they have five firemen employed but only one of the five firemen qualifies under the provision of Section 521.01, Revised Code, relative to participation in said fund."

The facts in this opinion did not raise exactly the same question as herein presented since the fund had already, in fact, been established. Upon consideration of this matter I must conclude, however, that the first paragraph of the syllabus of Opinion No. 346, supra, must be overruled and held to be of no further effect. The conclusion and rationale of the 1963 Opinion regarding the composition of the board of trustees would not be improper or inapplicable to the situation where the members of the fire department are reduced to one member after the proper establishment of the fund. Such rationale however would not suffice in considering whether conditions existed which bring into operation the mandatory duty to create the fund in the first instance. Although under the facts herein presented KLM would have qualified as a "member of the fire department" and a "member of the fund" in 1960, this one eligibility is not enough to create the right or duty to establish a relief and pension fund.

It is therefore my opinion that there is no duty imposed upon Township X to establish and maintain a firemen's relief and pension fund since at no time has the department employed two or more full-time regular firemen who qualify as "members of the fire department" and from whom salary deductions must be made pursuant to Section 521.06, Revised Code. It will therefore be necessary for the township clerk to refund any salary deductions so made under Section 521.06, supra, and further necessary that the full-time regular firemen continue to be considered as members of the public employees retirement system to which the township shall remit employee as well as employer contributions.

Opinion No. 346, supra, stated in paragraph 4 of the syllabus with which I concur:

"It is compulsory that those regularly em-

ployed firemen who are ineligible to participate in the firemen's fund, become members of the public employees retirement system, Opinion No. 2961, Opinions of the Attorney General for 1962, approved and followed."

From the facts herein indicated, I assume that the contributions to the public employees retirement system have not been in arrears.

Since the provisions relating to township indemnity funds were repealed in 1957 as indicated, I can assume that the Indemnity Fund established by Township X was distributed and the board disbanded as provided in Section 146.18, supra. The state-wide Volunteer Firemen's Dependents Fund was established in 1957 and it appears that Township X properly has a membership in such fund to cover those volunteer firemen not otherwise eligible for a relief and pension fund or the public employees retirement system.

It is therefore my opinion and you are hereby advised that:

(1) Section 521.02, Revised Code, does not impose a duty upon or create a right in a township to establish a firemen's relief and pension fund until the township employs two or more full-time regular firemen who would qualify as "members of the fire department" as defined in Section 521.01, Revised Code. Paragraph 1 of the syllabus of Opinion No. 346, Opinions of the Attorney General for 1963, is hereby overruled.

(2) Deductions made from the salaries of full-time regular firemen for a relief and pension fund which is not properly established must either be refunded to such employees by the township clerk or remitted by the township clerk to the public employees retirement system if such proper contributions to that system were not made during the time the firemen's relief and pension fund was improperly established.

(3) Full-time regular firemen of a fire department of a township which is not authorized to establish its own firemen's relief and pension fund must participate as members of the public employees retirement system and the township clerk must deduct and remit the proper employee and employer contributions.