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1. FIREMEN'S INDEMNITY FUND—MANDATORY DUTY OF TOWNSHIP WHICH HAS FIRE DEPARTMENT, MAINTAINED IN WHOLE OR IN PART AT EXPENSE OF TOWNSHIP, TO ESTABLISH SUCH FUND—SECTION 4647-1, G. C.
2. TOWNSHIP TRUSTEES—NO LEGAL AUTHORITY TO EXPEND PUBLIC FUNDS FOR INSURANCE TO PROTECT TOWNSHIP FROM LIABILITY FOR DAMAGES DUE TO DEATH OR INJURY OF FIREMAN IN EMPLOY OF TOWNSHIP.
3. BASIS TO DETERMINE TOTAL DISABILITY ALLOWANCE FROM FIREMEN'S INDEMNITY FUND—TO VOLUNTEER FIREMAN FOR TOTAL DISABILITY—UNDER SECTION 4647-8, G. C. TOTAL OF AVERAGE EARNINGS BOTH AS FIREMAN AND IN REGULAR EMPLOYMENT, ALLOWANCE LIMITED TO TWO-THIRDS OF AVERAGE EARNINGS, AND TO A MAXIMUM OF EIGHTEEN DOLLARS PER WEEK.
4. NO AUTHORITY IN LAW WHEREBY TOWNSHIP TRUSTEES MAY SUPPLEMENT PENSIONS OR OTHER BENEFITS PAYABLE FROM FIREMEN'S INDEMNITY FUND, BY APPROPRIATION OF OTHER TOWNSHIP FUNDS.

SYLLABUS:

1. Under the provisions of Section 4647-1 of the General Code, it is the mandatory duty of a township which has a fire department maintained in whole or in part at the expense of the township, to establish a firemen's indemnity fund.

2. Township trustees are without legal authority to expend public funds in procuring insurance protecting the township from liability for damages by reason of the death of or injury to a fireman in the employ of such township.

3. The basis for determining the total disability allowance from the firemen's indemnity fund to a volunteer fireman for total disability, is, under the provisions of Section 4647-8, General Code, the total of his average earnings both as such fireman and in his regular employment, the allowance for such total disability being limited to two-thirds of his average earnings, and to a maximum of eighteen dollars per week.

4. There is no authority in law whereby the township trustees may supplement the pensions or other benefits payable from the firemen's indemnity fund, by appropriation of other funds of the township.

Columbus, Ohio, October 1, 1945

Hon. Carl Abaecherli, Prosecuting Attorney
Lebanon, Ohio

Dear Sir :

I have before me your request for my opinion, reading as follows :

“The trustees of one of the townships situated in Warren County, in which a volunteer fire department has been established for nearly two years, the township owning the fire apparatus and building housing it, and providing fire protection for all the residents of the township, including those of an incorporated village therein but without charge to said village, the fire department consisting of six volunteer firemen, including a chief, who are on no regular salary but who are paid \$4.00 each for each ‘fire run’ and who, when in training, receive \$1.00 for each night of training, have asked me to answer the following question :

‘In the event of any injury or death being suffered by any of the members of this volunteer fire department while acting in the course of their duties as volunteer firemen, would the township be liable for such injuries or death? If so, by what means may the trustees provide for and protect themselves against such liability?’

The board of trustees in question tells me that they have been advised by an insurance agent that he can cover them with some sort of public liability (which I am inclined to doubt, as this seems to me to be attempting to substitute for coverage under the Workmen’s Compensation Act), but the trustees feel that such coverage would be too expensive.

Since Section 4647-1 of the General Code provides that ‘in all municipalities or *townships* having no firemen’s pension fund * * * and having and maintaining therein a fire department supported in whole or in part at public expense, a firemen’s indemnity fund *shall* be created and disbursed as herein provided,’ my first reaction to the question was to call this section and the eight sub-sections immediately following to the attention of the trustees, particularly in view of the 1937 Attorney General’s Opinion (Vol. I) Number 546, page 925, which holds that the use of the word ‘shall’ in Section 4647-1 is a mandatory term (although the governmental subdivision there involved appears to have been a municipality rather than a township as in the present instance); however, a more recent Attorney Gen-

eral's Opinion (1939 A. G. O. Vol. I, Number 198, page 249, Syllabus 2) holds that a township which houses a volunteer fire department and pays for the maintenance thereof * * * *may* establish a firemen's indemnity fund authorized by Sections 4647-1 et seq. My questions therefore in the instant case are as follows:

1. Under the facts and circumstances as outlined in the beginning of this letter, is it mandatory for the board of township trustees in question to create a firemen's indemnity fund under the provisions of Section 4647-1 et seq.?

2. If such duty is not mandatory upon such board of trustees, what is the best method of protecting themselves against liability from possible claims for injury or death upon the part of the members of such volunteer fire department?

3. In the event the establishment of such an indemnity fund is mandatory, the next question is the method of determining the amounts of the benefits to be paid a volunteer fireman who has become totally disabled. Section 4647-8 provides that in such cases there shall be paid 'the sum of two-thirds of his (the fireman's) salary or average earnings which shall in no case exceed eighteen dollars per week, and which shall be fixed and determined by said board of firemen's indemnity fund.' It has been held in an earlier Attorney General's Opinion (1922 Vol. I, Number 2826, page 37) that in such case, the amount of the pension is determined upon the basis of two-thirds of the salary earned in the fireman's *official* capacity, not exceeding eighteen dollars per week; however, the last paragraph of Section 4647-8 provides that 'In case of a volunteer fireman, the "average" earnings as used in this section shall be computed on the earnings of such fireman as (at?) his regular employment together with his compensation as such volunteer fireman'; therefore, in the event the provisions of Section 4647-1 are mandatory upon the township trustees under the circumstances set forth above, what is the mathematical basis to be used in computing the payments to be made?

4. It does not appear to me that the law provides a sufficient reserve (a minimum fund of only \$400 is required under Section 4647-3) in the case of a township with a relatively small tax duplicate, against the contingency of a total disability or a number of partial disabilities extending over a period of time. Should such prove to be the case, from what source would benefits be paid?"

I shall discuss the questions raised by you, in their order.

Your first question is whether it is mandatory for the board of township trustees in a township which owns a building and apparatus for a

fire department operated by voluntary firemen, to establish a firemen's indemnity fund under the provisions of Section 4647-1 et seq., General Code. Said Section 4647-1, General Code, reads as follows:

"That in all municipalities or townships having no firemen's pension fund created under the provisions of chapter I, title 12, division 6 of the General Code of Ohio (G. C. secs. 4600 et seq.), and having and maintaining therein a fire department supported in whole or in part at public expense, a firemen's indemnity fund shall be created and disbursed as herein provided."

It will be noted that this section refers not only to townships, but also to municipalities. The "firemen's pension fund" here referred to is that provided for in Section 4600 et seq. of the General Code, which apply only to municipalities, and which require every *municipality* which has a fire department with two or more full time regular members, to establish a firemen's relief and pension fund. Inasmuch as those sections do not contain any such requirement as to a township, it follows, of necessity, that the provisions of Section 4647-1, General Code, apply to every township which maintains a fire department.

This section was construed in an opinion of the Attorney General, found in 1937 Opinions Attorney General, page 925, wherein it was held:

"1. In municipalities having a fire department supported in whole or in part at public expense, the establishment of a firemen's indemnity fund is mandatory.

2. Under such circumstances, in the event of failure or neglect to establish such fund as provided by law, the establishment of such fund may be compelled by an action in mandamus."

In a later opinion found in 1939 Opinions Attorney General, page 249, this section was again under consideration, and it was held:

"2. A township which houses a volunteer fire department and pays the department \$25.00 a fire and \$100.00 a year is a township having and maintaining therein a fire department supported in whole or in part at public expense and *may* establish a firemen's indemnity fund as authorized by Section 4647-1 et seq., General Code.

3. A township can levy the tax authorized in Section 4647-4 of the General Code on all the taxable property lying in the township, including the property in a village located in the township." (Emphasis added.)

It will be found upon an examination of this opinion, that the question submitted to the Attorney General was not as to whether it was the *duty* of the township, under the circumstances named, to establish a firemen's indemnity fund. The only question he had before him was whether the township had the *authority* to do so in a case where the fire department was owned and operated by a group of volunteer firemen, and housed, with the permission of the township trustees, in a part of the town hall, the township paying the voluntary fire department \$100.00 a year and \$25.00 a fire. He held that this was equivalent to "having and maintaining therein a fire department supported in whole or in part at public expense" and therefore, that the township had the right to establish the firemen's indemnity fund and to levy a tax therefor, under the provisions of Section 4647-4, General Code, which authorized such levy. There is nothing in this opinion which in any way detracts from the conclusion announced in the 1937 opinion above noted.

It is accordingly my opinion that under the circumstances mentioned in your communication, it is the duty of the township to establish a firemen's indemnity fund pursuant to the provisions of Section 4647-1 et seq., General Code.

Your second question is as to the method of protecting the township against liability and possible claims for injury or death on the part of such members of such volunteer fire department, in case we find that it is not the mandatory duty of the township to establish a firemen's indemnity fund. In view of my answer to the first question it would seem that an answer to the second question might not be required. However, I think it proper to say that there appears to me to be no risk of liability falling upon the township trustees in the case you present, against which any insurance could lawfully be taken. I would direct your attention to the opinion of my immediate predecessor found in 1943 Opinions Attorney General, page 181, wherein it was held:

"A board of county commissioners may not legally expend public funds to pay premiums upon policies of public liability insurance insuring the county against liability for damages and injuries sustained by persons attending privately promoted events taking place in a Memorial Building of the county or while attending meetings of an organization occupying space in the Memorial Building."

As will appear from a reading of that opinion, the reason underlying it is that a board of county commissioners is not liable in its corporate capacity either by statute or at common law, to an action in damages for an injury resulting to a private party by negligence in the discharge of its official functions. This proposition appears to be well established as to county commissioners and other like public bodies including townships, whose powers and liabilities are strictly limited to those conferred by law. I know of no statute or common law principle that would make a township liable for damages or injury to any private person caused by negligence on the part of its agents or employes in the operation of a fire department, and *a fortiori*, in so far as injury might occur by reason of the proper operation of the fire department, there would certainly be no liability; and the township trustees would have no right to expend public money in procuring insurance against a supposed liability which does not exist.

A further reason why there can be no danger of liability arising against a township by reason of injury to or death of a volunteer fireman is found in the Workmen's Compensation Act. Volunteer firemen have been held to be within the protection of that act, (1930 Opinions Attorney General, page 280), and the township, contributing as an employer to the public insurance fund, is protected from any possible liability on account of death or injury to its employes while in the performance of their duties.

Coming then, to your third question, as to the method of determining the amount of the benefits to be paid to volunteer firemen under Section 4647-8, General Code, we find it provided by that section:

“The beneficiaries of any such firemen's indemnity fund shall be members of the fire department or their dependents who shall be entitled to be paid the amounts following:

For the total disability of a fireman, sustained while in the discharge of his duties as fireman, the sum of two-thirds of his salary or average earnings, which shall in no case exceed eighteen dollars (\$18.00) per week, and which shall be fixed and determined by the said board of firemen's indemnity fund. For partial disability such an amount per week as shall be fixed by the board of firemen's indemnity fund which in no case shall exceed ten dollars (\$10.00) per week. Provided, however, that no such pension shall be paid to a fireman under full salary during the time of any such disability.

*In case of a volunteer fireman the 'average earnings' as used in this section shall be computed on the earnings of such fireman as his regular employment together with his compensation as such volunteer fireman. * * *".* (Emphasis added.)

The portion of the above section which I have emphasized was not in the law at the time of the rendition of the opinion to which you refer, found in 1922 Opinions Attorney General, page 37. As the law then stood, the benefits were obviously limited to two-thirds of the salary or earnings of the volunteer firemen as such. The General Assembly thereafter, evidently with the intention of giving such firemen a more substantial allowance, amended the law introducing the new provisions under which "average earnings" were to include not only the compensation of the firemen as such but also his earnings in his regular employment.

The total of such earnings furnish the maximum basis upon which disability allowances are to be paid. The statute limits them to two-thirds of his salary or average earnings and to a maximum of \$18.00 per week for total disability, and for partial disability to such amount per week as shall be fixed by the board of the firemen's pension fund, in no case to exceed \$10.00 per week.

Your fourth inquiry points to the provision of Section 4647-3, General Code, which reads as follows:

"The indemnity fund shall consist of an amount of not less than three-ten thousandths of one per cent of the total tax valuation of each municipality or township, but in no case shall such fund be less than four hundred dollars (\$400.00)."

You suggest that the sum of \$400.00 required as a minimum would provide an insufficient reserve against the contingency of a total disability or a number of partial disabilities extending over a period of time, and inquire from what source benefits will be paid in such case. It will be noted that this section does nothing but establish a minimum for the fund, to wit, three-ten thousandths of one per cent of the total tax valuation of the township or the sum of \$400.00, whichever is greater.

Section 4647-4, General Code, contemplates that the taxing authority shall levy such an amount of tax not in excess of three-tenths of one mill, that the amount of the fund required shall be raised in not less than

four years. That would appear to be the maximum contemplated by the law. It is further provided that when said fund has been once raised, the taxing authorities shall annually thereafter make such levy as shall bring the amount of the fund to the amount provided for in the act and that such levies shall be in addition to all other levies provided by law and not limited by any law restricting such levies.

If such fund so provided proves inadequate to take care of disabilities and of the pensions provided for widows and dependent children of firemen, then the remedy must lie with the General Assembly. There is no evidence in the present enactments of an attempt to place the fund on an actuarial basis. Furthermore, I find no authority conferred by law upon the township trustees to supplement the pensions provided by the firemen's indemnity fund out of other funds of the township.

Respectfully,

HUGH S. JENKINS

Attorney General