

Note from the Attorney General's Office:

1963 Op. Att'y Gen. No. 63-346 was overruled in part by
1965 Op. Att'y Gen. No. 65-120.

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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.

2. Where only one member of the department qualifies under Section 521.01, Revised Code, it is the duty of that individual to serve on the pension fund board.

3. A person who is contributing 4% of his annual salary to the township firemen's relief and pension fund, but who does not qualify as a "member of the fire department" under Section 521.01, Revised Code, is not a member of said fund. Opinion No. 2961, Opinions of the Attorney General for 1962, approved and followed.

4. It is compulsory that those regularly employed 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.

5. Improperly deducted funds which have been deposited in the township firemen's relief and pension fund, together with their increment from interest earned must be refunded to the township clerk who shall forthwith remit the same to the public employees retirement system.

6. The Public Employees Retirement Board may proceed to effectuate payment of employee and employer contributions for that period of employment during which these firemen, ineligible to participate in the township firemen's relief and pension fund, were required by law to be members of the Retirement System.

7. Pursuant to Section 505.38, Revised Code, the board of township trustees has implied power, as a necessary incident of its express power, to adopt a code of regulations pertaining to qualifications for the appointment of firemen.

8. The board of township trustees has no express or implied power to appoint a board similar to a civil service board to determine qualifications for the appointment of firemen.

Columbus, Ohio, June 27, 1963

Hon. Lynn B. Griffith, Jr.
Prosecuting Attorney
Trumbull County
Warren, Ohio

Dear Sir:

Your request for my opinion reads in pertinent part as follows:

"Three years ago the Township of Howland in Trumbull County established its own township fire department and inaugurated a program under Chapter 521 of the Ohio Revised Code. The township has five men who are

regularly employed in their fire department. Under the provisions of Section 521.02 any township fire department employing 'two or more full time regular firemen, shall establish and maintain a township firemen's relief and pension fund.'

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"At the time of the establishment of the fire department all of the members of the department were considered to be eligible for the fund, although only one qualified under the provisions of Section 521.01. Your opinion is requested concerning the following questions:

"1. Is it mandatory upon the township trustees of Howland Township to establish a fund under Section 521.02 where they have five firemen employed but only one who qualifies under the provisions of Section 521.01?

"2. Assuming that the benefit fund does apply to the Howland Township Fire Department and where only one member of the department qualifies under the provisions of Section 521.01, who are eligible to vote for a member of the board and who is eligible to be a member of the fund board from the department?

"3. Under the provisions of Section 521.01 (b), member of the fund is defined. Can a person be a 'member of the fund' who is contributing 4% of his annual salary to the fund but who does not qualify as a 'member of the fire department' under the provisions of Section 521.01?

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"5. If these regular firemen cannot be members of the firemen's fund, should they participate in the public employees retirement fund?

"6. If they should be properly included under the public employees fund should the money placed in the firemen's fund be transferred to the public employees retirement fund or should it be reimbursed to the firemen?

"7. Should interest be paid on money improperly withheld from the salaries?

"The township trustees are authorized to organize a fire department and employ men to maintain and operate the fire fighting equipment. Although there are provisions made in Section 505.38 for employment of firemen and removal, no specific power is given to the township trustees with respect to qualifications for appointment as firemen. Do the township trustees have implied power under Section 505.38 to adopt a code of regulations for

qualification for appointment? Would the township trustees have implied power to appoint a board similar to a civil service board to determine qualifications for appointment or would this be an improper delegation of discretionary power.”

Section 521.02, Revised Code, provides in part:

“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.

“ * * *

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* * *”

(Emphasis added)

You state that the Township of Howland employs five firemen but only one of them qualifies under Section 521.01, Revised Code, as set forth hereinafter, relative to participation in the township firemen’s relief and pension fund. The language used in Section 521.02, Revised Code, is mandatory in nature and requires the establishment of a firemen’s relief and pension fund where two or more full time regular firemen are employed, even though only a single individual qualifies to participate in the fund.

Section 521.01, Revised Code, is as follows:

“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.”

Unlike Section 741.06, Revised Code, governing municipal firemen’s pension funds, there is no express statutory provision pertaining to township firemen’s pension funds, concerning who are eligible to vote for a member of the board and who is eligible to be a member of the fund board where only one member of the

fire department qualifies under the provisions of Section 521.01, Revised Code. In municipal corporations in which there are less than two full time members of the fire department, volunteer or or part time members may be elected to the firemen's pension fund board.

Section 521.02, Revised Code, provides in pertinent part:

“* * *

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* * *

“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.*

“The public members of the board of trustees of the township firemen's relief and pension fund shall not hold an elective or appointive office in the public service.”

(Emphasis added)

As there is only one fireman in the Howland Township fire department who qualifies as a “member of the fire department,” Section 521.01 (A), Revised Code, it is the duty of that individual to serve on the pension fund board. I concur in the analogous reasoning as stated in Opinion No. 1524, Opinions of the Attorney General for 1939 at page 2247:

“* * * Since the legislature has seen fit to make mandatory the creation of a firemen's relief and pension fund in all municipal corporations employing two or more regular members, it is manifest that in municipalities where

there are only two full time members, it is the duty of such full time members to serve on the board of trustees. In other words, it is just as much a part of the duty of such full time regular members to serve as trustees as to fight fires or perform any other duty lawfully imposed upon them as full time regular firemen."

It necessarily follows that where only one individual fireman is possessed of the statutory qualifications requisite for membership on the board of trustees of the township firemen's relief and pension fund, the duty to serve on the board is all the more apparent.

As there is no express statutory provision requiring the board to act only through the concurrence of all its members, present and voting, I assume the board may legally function on a quorum basis.

The fact that a person, who does not qualify as a "member of the fire department" under Section 521.01 (A), Revised Code, is contributing 4% of his annual salary to the fund does not make said person a "member of the fund," Section 521.01 (B), Revised Code.

It will be seen that after defining a member of the fire department the legislature defined "member of the fund" as "any person contributing 4% of his annual salary." This would mean, literally, that any person regardless of employment could become a member of the fund by making the necessary contribution. I can only conclude, however, that the legislature intended to define a member of the fund as "any fireman (as defined in this section) who is contributing 4% of his annual salary."

I concur in the reasoning and conclusion as stated in Opinion No. 2961, Opinions of the Attorney General for 1962.

"Section 521.01, *supra*, does not specifically state that only a 'member of the fire department' may be a 'member of the fund,' but such construction appears to have been the intent of the legislature in enacting this law."

"Division (A) (1) of Section 521.01, *supra*, applying to firemen hired after April 1, 1947, states that only those over twenty-one and under thirty years of age when hired are considered members of the fire department within the purview of Chapter 521. Thus, although the persons here

concerned may have been validly hired as firemen by the township, since they were not under thirty years of age when hired, they are not 'members of the fire department' and consequently not 'members of the fund,' within said Chapter 521."

Those firemen employed by the township, other than the sole individual who qualifies as a "member of the fire department" are not members of the township firemen's relief and pension fund. However, such persons are "public employees" and as such it is compulsory that they be members of the public employees retirement system. The syllabus of Opinion No. 2961, *supra*, states:

"A full-time regular member of a township fire department who was hired after April 1, 1947 and was not under thirty years of age when hired, is not properly a member of the township firemen's relief and pension fund within the purview of Chapter 521, Revised Code; but such person is a 'public employee' as defined in Section 145.01 (A), Revised Code, and under Section 145.03, Revised Code, *it is compulsory* that he became a member of the public employees retirement system."

(Emphasis added)

I come now to the disposition of those funds already extracted, due to an error in law, from those firemen ineligible to participate in the township firemen's relief and pension fund. There is no express provision included in the statutes pertaining to the funds by which it may be ascertained whether these funds should be refunded to the individual firemen or withdrawn from the fund and paid into the public employees retirement system. Suffice it to say that the absence of a statutory provision authorizing a transfer of these funds to the public employees retirement system, indicates a lack of authority to do so.

It is however of paramount importance at this juncture to consider the case of *State, ex rel. Public Employees Retirement Board, et al., v. Baker et al., County Commrs. of Madison County, et al.*, 169 Ohio St., 499. The first three branches of the syllabus read as follows:

"1. Under the provisions of Section 486-33 f, General Code (Sections 145.48, Revised Code), of the Public Employees Retirement Act of Ohio, it is mandatory that the employer shall pay to the employer's accumulation fund the same rates per cent of the compensation of each

employee member employed by it for normal contribution and for its employees in pursuance of the provisions of Sections 486-68a to 486-68e, both inclusive.

“2. Under the provisions of Section 486-68, General Code (Section 145.47, Revised Code), it is likewise mandatory that the employer shall deduct the employee’s contribution from his salary and pay it into the retirement system.

“3. The failure to pay the required contribution of an employer or an employee does not relieve the obligation for payment of the other.”

The *Baker* case was an action in mandamus and posed a factual situation arising through neglect or misunderstanding on the part of the employer, Board of County Commissioners, resulting in complete dereliction of duty with regard to payment of either the employee’s contribution or the employer’s contribution to the Public Employee’s Retirement System.

The Court found that there was a clear legal duty, specifically enjoined by law upon the Board of County Commissioners to pay the same and the Writ of Mandamus was allowed.

Applying this reasoning to your specific question, the money placed in the fireman’s fund, together with any increment from interest earned, must be returned to the township clerk who shall forthwith remit the same to the public employees retirement system.

The Public Employees Retirement Board may then proceed to effectuate payment of employee and employer contributions, from the township clerk and these particular firemen, for that period of employment during which they were required by law to be a member of the Retirement System. This procedure will enable the particular employees to provide for future retirement as provided for in specific detail pursuant to Chapter 145, Revised Code.

In order to facilitate a complete understanding of the responsibilities involved, I am incorporating in my opinion the syllabus of Opinion No. 2334, Opinions of the Attorney General for 1961:

“Where in 1948 a township employed a person who was by the provisions of then existing Section 486-33, Gen-

eral Code, required to be a member of the Public Employees Retirement System, and such person worked until 1957 without becoming a member of said System, then became a member in 1957 and left such employment in 1958, the board of township trustees is now required to pay the amount of employer contributions which should have been paid as a result of such person's employment from the commencement thereof until the time that such person actually became a member of the Retirement System. Under such circumstances, if such board of township trustees fails to make such payment, the Public Employees Retirement Board may proceed under the provisions of Section 145.51, Revised Code, in order to effectuate payment of the amount so delinquent."

You requested in addition, my opinion on other matters pertaining to the adoption of certain standards and procedures for the determination of qualifications as to the appointment of firemen in Howland Township.

Section 505.38, Revised Code, provides in pertinent part:

"* * * The board (township trustees) shall provide for the employment of such firemen as it deems best, and shall fix their compensation. * * *

"* * * * * * * *"

In reply to your specific question, I am of the opinion that the language in the above quoted section of the applicable statute would constitute implied power, as a necessary incident, of the township trustee's express power, to adopt a code of regulations for qualification for appointment of firemen.

The township trustees have no express or implied power to appoint a board similar to a civil service board to determine qualifications for appointment. The above quoted statute specifically states that "the board (township trustees) shall provide for the employment of such firemen *as it deems best.*" The authority to make such determination is specifically delegated to the board of township trustees.

"The well-settled rule of agency, that when authority reposed in an agent involves personal trust and particularly when it involves personal judgment, skill, or discretion, the agent cannot without express or implied authority from his principal, delegate his powers has been invoked as the basis for the principle prohibiting

legislative delegation of powers. * * * 10 *Ohio Jurisprudence 2d, Constitutional Law, Section 310, pages 386-387.*

Therefore, it is my opinion and you are hereby advised that:

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.

2. Where only one member of the department qualifies under Section 521.01, Revised Code, it is the duty of that individual to serve on the pension fund board.

3. A person who is contributing 4% of his annual salary to the township firemen's relief and pension fund, but who does not qualify as a "member of the fire department" under Section 521.01, Revised Code, is not a member of said fund. Opinion No. 2961, Opinions of the Attorney General for 1962, approved and followed.

4. It is compulsory that those regularly employed 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.

5. Improperly deducted funds which have been deposited in the township firemen's relief and pension fund, together with their increment from interest earned must be refunded to the township clerk who shall forthwith remit the same to the public employees retirement system.

6. The Public Employees Retirement Board may proceed to effectuate payment of employee and employer contributions for that period of employment during which these firemen, ineligible to participate in the township firemen's relief and pension fund, were required by law to be members of the Retirement System.

7. Pursuant to Section 505.38, Revised Code, the board of township trustees has implied power, as a necessary incident of its express power, to adopt a code of regulations pertaining to qualifications for the appointment of firemen.

8. The board of township trustees has no express or implied power to appoint a board similar to a civil service board to determine qualifications for the appointment of firemen.

Respectfully,

WILLIAM B. SAXBE

Attorney General