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MUNICIPALITIES — FIRE DEPARTMENT—FIREMEN'S INDEMNITY FUND, WHEN—MANDAMUS.

SYLLABUS:

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.*

COLUMBUS, OHIO, April 30, 1937.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN: This is in answer to your recent letter which reads as follows:

"We have a request for an interpretation of the laws governing the creation and maintenance of the Firemen's Indemnity Fund in municipalities which do not have a Firemen's Pension Fund, as provided for in Sections 4601-2-3 of the General Code.

We referred the inquirer to Attorney General's Opinion No. 2921, found at page 164, Vol. I of Opinions for 1922, which seems to be in point, however, we were urged to resubmit these questions at the present time.

Question 1. In municipalities having fire departments composed of five or more members in addition to the chief, wherein no Firemen's Pension Fund is maintained, is it the mandatory duty of the officers enumerated in Section 4647-2 G. C., to organize as a Firemen's Indemnity Board and is it the duty of the council or other legislative body to levy a tax for the purpose of creating the Firemen's Indemnity Fund in the manner provided in Section 4647-3 G. C.?

Question 2. If this requirement for a tax levy be mandatory and the legislative body should refuse to provide for the same, what is the remedy at law for the officers or tax payers of such municipality?"

Section 4600, General Code, in permissive language authorizes the establishment of a firemen's pension fund. This section provides in part as follows:

“In any municipal corporation, having a fire department supported in whole or in part at public expense, the council by ordinance may declare the necessity for the establishment and maintenance of a fireman’s pension fund. * * *”

Recognition by the General Assembly of the fact that the establishment of a firemen’s pension fund shall not be considered as mandatory is contained in Section 4647-1, General Code, which section provides in so far as is pertinent, as follows :

“That in all municipalities having no firemen’s pension fund created under the provisions of chapter I, title 12, division 6 of the General Code of Ohio, 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.” (Italics the writer’s).

It is apparent that the legislature has seen fit to impose upon municipalities the mandatory duty of establishing a firemen’s indemnity fund in the event that a municipality maintaining a fire department supported in whole or in part at public expense has not seen fit to avail itself of the permissive provisions of Section 4600, *supra*, relating to the establishment of a firemen’s pension fund. The word “shall” has been consistently held to be a mandatory term in the absence of language indicating the contrary intent on the part of the Legislature. This is such a fundamental principle of statutory construction that citation of the authorities in support thereof is deemed unnecessary. There is clearly no occasion for construing the word as used in Section 4647-1, *supra*, in any other than its ordinary sense. The fact that one or the other of these two funds referred to in Sections 4600 and 4647-1, *supra*, is required to be established, was recognized in an opinion of this office reported in the Opinions of the Attorney General for 1928, Volume 2, page 928.

In your first question you also inquire as to whether or not it is the duty of council or other legislative body to levy a tax for the purpose of creating a firemen’s indemnity fund in the event that the establishment of such fund is mandatory under the circumstances set forth in your communication. The levy provided by Section 4647-4, General Code, for the establishment and maintenance of such an indemnity fund was considered in the 1922 opinion referred to in your communication, which clearly held that such levies are mandatory. I concur in the reasoning and conclusion as to this point as contained in such opinion. The second branch of the syllabus reads as follows :

“In municipalities having no firemen’s pension fund, and having five or more members of the fire department in addition to the presiding officer of the “Trustee of Firemen’s Indemnity Fund,” it is the duty of council under Section 4647-4, G. C. to make a levy not to exceed three-tenths of one mill upon each dollar of the taxable property of the municipality, to provide a firemen’s indemnity fund. Council may use its discretion as to the minimum rate of levy, except that the fund provided in Section 4647-3 ‘shall be raised in not less than four years.’”

With respect to your second question relating to the remedy in the event of the failure of the proper officials to establish such fund in cases where the establishment is required by law. This question is answered by the provisions of Section 12283 of the General Code defining mandamus as “a writ issued, in the name of the state, to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.”

Respectfully,

HERBERT S. DUFFY,

Attorney General.

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DETENTION HOSPITAL COUNTY INDIGENT INSANE—SUBJECT TO DEPARTMENT OF PUBLIC WELFARE—RULES AND REGULATIONS—STATE CONTRIBUTION.

SYLLABUS:

1. *A detention hospital owned or maintained by a county for the purpose of housing and caring for indigent insane persons properly adjudicated as such, is subject to the authority of the Department of Public Welfare to license and inspect such detention hospital.*

2. *The Department of Public Welfare may issue rules and regulations for the management of a detention hospital owned or operated for the indigent insane of a county when the State contributes to the maintenance of such detention hospital.*

3. *The Department of Public Welfare has full authority by virtue of the provisions of Sections 3155 and 3155-1, General Code, to insist on the obedience of such rules and regulations as it may promulgate in*