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1. "MEMBER OF FIRE DEPARTMENT" DEFINED SECTION 521.01 R. C.—TOWNSHIP FIREMEN'S RELIEF AND PENSION FUND DOES NOT INCLUDE MEMBERS OF PRIVATE VOLUNTEER FIRE COMPANY.
2. LIMITATION ON LIABILITY FOR NEGLIGENCE—SECTION 701.02 R. C.—NOT APPLICABLE TO PRIVATE VOLUNTEER FIRE COMPANY.

## SYLLABUS:

1. Only a "member of the fire department" as defined in Section 521.01, Revised Code, may become a member of a township firemen's relief and pension fund established as provided in Chapter 521., Revised Code. Members of a private volunteer fire company which has contracted with a township to provide fire protection service within such township are not "members" of a fire department.

2. Where a board of township trustees has contracted for fire protection service within the township with a private volunteer fire company composed of residents of such township, the provisions of Section 701.02, Revised Code, establishing a limitation on the liability for negligence on the part of members of a municipal fire department, have no application to the members of such private company rendering fire protection service under such contract.

Columbus, Ohio, November 29, 1956

Hon. Calvin W. Hutchins, Prosecuting Attorney  
Ashtabula County, Jefferson, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"The Township Trustees of the Township of Pierpont in Ashtabula County, have entered into a contract with a group of residents of the Township organized as a Volunteer Fire Company for the furnishing of fire protection in the township.

"The Fire Equipment and the building in which it is housed, have been purchased from funds subscribed from the residents of the township. The Township, as such, has no legal interest in either the equipment or the building in which it is kept.

"Will you please advise whether or not members of the Volunteer Fire Department furnishing fire protection to the Township come within the provisions of Chapter 521.

“Will you please advise also whether or not Section B of Sec. 701.02 of the Revised Code is applicable to the Volunteer Firemen, who are operating the vehicles owned by their organization under contract with the Township.”

As to your first question we find certain definitions in Section 521.01, Revised Code, 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.”

Nowhere in this chapter do I find any clear statement as to what persons may or shall become “member(s) of the fund.” The nearest approach to such a statement appears in Section 521.06, Revised Code, as follows:

“In each township in which there is a township firemen’s relief and pension fund, the township clerk shall deduct from the salary of each member of the fund an amount equal to four per cent of his salary for each payroll period. \* \* \*”

Neither this provision nor the statutory definition of “member of the fund” gives the slightest aid in ascertaining the qualifications required of persons who may participate as members in the benefits of the relief and pension system in question.

In Section 521.02, Revised Code, it is provided:

“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.” \* \* \*

(Emphasis added.)

This provision considered in relation to the fact that it was thought necessary to provide the statutory definition of "member of the fire department," as noted above, is strongly suggestive of a legislative intent that the benefits of the fund were to be limited to "full-time regular firemen in a township fire department."

Of much significance in support of such a view are the several provisions set out in Section 521.11, Revised Code, for the payment of specific benefits from the fund. In division (A) of this section it is provided, in part:

"(A) A member of the fund who has completed twenty-five years of *active service in the fire department* and has attained fifty-two years of age may, at his election, retire from the department and upon notifying the board in writing of such election shall receive an annual pension, payable in twelve monthly installments, in an amount equal to two per cent of his average annual salary for the five year period immediately preceding the date of his retirement multiplied by the number of years he was in the *active service of such department*, or an annual pension of twelve hundred dollars, whichever is the greater.  
\* \* \*"  
(Emphasis added.)

In division (B) of this section it is provided:

"(B) A member of the fund who is permanently and totally disabled as a result of the performance of his official duties as a *member of the department*, shall be paid annual disability benefits until death, payable in twelve monthly installments, in an amount equal to sixty-five per cent of his annual salary for the last year he was in the active service in the department."  
(Emphasis added.)

In division (C) we find this provision:

"(C) A member of the fund who is partially disabled as a result of the performance of his *official duties as a member of the department*, and such disability prevents his from performing such duties and impairs his earning capacity, shall be paid monthly disability benefits in an amount to be fixed by the board. \* \* \*"  
(Emphasis added.)

In division (D) we find the following provision:

"(D) A member of the fund who has completed five or more years of *active service in the department* and has incurred disability not caused or induced by the actual performance of his official duties as a member of the department, or by his own

negligence, and such disability prevents him from performing such duties and impairs his earning capacity, shall receive monthly benefits in an amount to be fixed by the board. \* \* \*

(Emphasis added.)

In division (E) of this section it is provided:

“(E) A member of the fund who has served fifteen or more years as an active member of the department and is discharged therefrom for any reason other than dishonesty, cowardice, intemperate habits, or conviction of a felony shall receive an annual pension, payable in twelve monthly installments, in an amount equal to one and one-half per cent of his average annual salary for the five year period immediately preceding such discharge multiplied by the number of full years he has in the active service of the department. Such pension payments shall not commence until the member has attained the age of fifty-two years and until twenty-five years have elapsed from the date on which he became a *full-time regular fireman in the department.*”

(Emphasis added.)

I find it impossible to conclude that a member of a private fire *company* which has contracted, as provided in Section 505.44, Revised Code, to provide fire protection to a subdivision, could be regarded as a “regular full-time fireman in a township fire department,” even though such individuals are regarded as “township employees for the purposes of workmen’s compensation insurance,” as expressly provided in Section 505.41, Revised Code. This being so, it necessarily follows that members of such private fire companies could not be paid the benefits provided in divisions (B), (C), and (E) of Section 521.11, *supra*. Moreover, in view of the option provided in Section 505.37, Revised Code, whereby townships may either (1) “employ one or more persons to maintain and operate fire-fighting equipment,” or (2) “enter into an agreement with a volunteer fire company for the use and operation of such equipment,” I am impelled to the view that members of such private fire companies cannot be regarded as in “the active service of the fire department” within the meaning of divisions (A) and (D) of Section 521.11, Revised Code.

Although certain other benefits are provided in Section 521.11, *supra*, for the survivors of deceased “members,” it is highly significant that no provision is made in this chapter for varying amounts of members’ contributions, as might be expected in cases where “members of the fund” were eligible for certain listed benefits but not so eligible for others.

For these reasons, therefore, I conclude that the members of the private fire company here in question are not eligible as such to become members of the relief and pension fund established by the township under authority of Section 521.02, Revised Code.

As to your second question, we may initially note that Section 701.02, Revised Code, provides in part:

“Any municipal corporation shall be liable in damages for injury or loss to persons or property and for death by wrongful act caused by the negligence of its officers, agents, or servants while engaged in the operation of any vehicle, upon the public highways of the state, under the same rules and subject to the same limitations as apply to private corporations for profit, but only when such officer, agent, or servant is engaged upon the business of the municipal corporation.

“The defense that the officer, agent, or servant of the municipal corporation was engaged in performing a governmental function, shall be a full defense as to the negligence of:

“(A) \* \* \*

“(B) Members of the fire department while engaged in duty at a fire, or while proceeding toward a place where a fire is in progress or is believed to be in progress, or in answering any other emergency alarm.

“Firemen shall not be personally liable for damages for injury or loss to persons or property and for death caused while engaged in the operation of a motor vehicle in the performance of a governmental function.

“Policemen shall not be personally liable for damages for injury or loss to persons or property and for death caused while engaged in the operation of a motor vehicle while responding to an emergency call.”

In Section 505.44, Revised Code, we find these provisions:

“In order to obtain fire protection, or to obtain additional fire protection in times of emergency, any township may enter into a contract, for a period not to exceed three years, with one or more townships, municipal corporations, or private fire companies, upon such terms as are agreed to by them, for services of fire departments, or the use of fire apparatus, or the interchange of the service of fire departments or use of fire apparatus, within the several territories of the contracting subdivisions and private fire companies, if such contract is first authorized by the respective boards of township trustees or other legislative bodies.

“Section 701.02 of the Revised Code, so far as it is applicable to the operation of fire departments, applies to the con-

tracting political subdivisions and *fire department members* when such members are rendering service outside their own subdivision pursuant to such contract." \* \* \* (Emphasis added.)

The second paragraph in the section quoted above would suggest that the legislative draftsmen were under the impression that Section 701.02, *supra*, would be applicable where township "fire department members" were rendering fire protection service *within* the township by which they are employed. However, Section 701.02, *supra*, does not by its terms so provide nor do I find any other statutory provision which operates to make such section applicable in the case of township fire departments, or in the case of volunteer fire companies providing fire protection service under contract with townships, while such a department or company is rendering a fire protection service *within* the township which has established such department or which has contracted for such service with such company.

It is well established, of course, that the provisions of Section 5571.10, Revised Code, imposing liability on a board of township trustees by reason of its negligence, is limited to roads and the discharge of the board's duties in relation thereto. Accordingly, townships and boards of trustees of townships are not liable for negligent operation of township fire equipment, such operation being an essential governmental function, with respect to which no liability has been imposed by statute. In this connection, see Opinions of the Attorney General for 1933, p. 217, No. 180; Opinions of the Attorney General for 1950, p. 730, No. 2498; and 39 Ohio Jurisprudence, p. 338, section 88.

I know of no principle, however, by which a governmental immunity of this sort can be extended to employees, agents or contractors of a governmental unit. It was for this reason, no doubt, that the legislature was impelled to enact in Section 701.02, *supra*, the exemption from liability on the part of members of a municipal fire department, for it has long been established that fighting fires is a governmental function, and that, in the absence of a statute imposing such liability, municipal corporations are not liable for the negligence of their firemen when so employed. See *Wheeler v. Cincinnati*, 19 Ohio St., 19.

The provision noted above in Section 505.44, Revised Code, for a limited application of the provisions of Section 701.02, Revised Code, to "contracting" political subdivisions and fire department members "when such members are rendering services *outside* their own subdivision" quite

strongly suggests a misconception of the law on the part of the legislative draftsmen as to the application of that section where such services are rendered *within* “their own subdivision”; but such misconception cannot alter the plain and unambiguous terms of the statute. See *Slingluff v. Weaver*, 66 Ohio St., 621.

I conclude, therefore, in specific answer to your inquiry, that:

1. Only a “member of the fire department” as defined in Section 521.01, Revised Code, may become a member of a township firemen’s relief and pension fund established as provided in Chapter 521., Revised Code. Members of a private volunteer fire company which has contracted with a township to provide fire protection service within such township are not “members” of a fire department.

2. Where a board of township trustees has contracted for fire protection service within the township with a private volunteer fire company composed of residents of such township, the provisions of Section 701.02, Revised Code, establishing a limitation on the liability for negligence on the part of members of a municipal fire department, have no application to the members of such private company rendering fire protection service under such contract.

Respectfully,

C. WILLIAM O’NEILL  
Attorney General