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1. FIRE DEPARTMENT—TOWNSHIP WHICH EMBRACES WITHIN ITS BOUNDARIES PORTION OF DELAWARE RESERVOIR—OWNED BY UNITED STATES—USED BY STATE UNDER LICENSE AGREEMENT—FIRE DEPARTMENT AUTHORIZED BY LAW TO SERVE AREA WITH PROTECTION FROM FIRE—AREA ENTITLED TO SAME DEGREE OF PROTECTION AS ACCORDED OTHER AREAS COMPENSATION ACT—SECTION 505.41 RC.
2. FIREMEN OF TOWNSHIP FIRE DEPARTMENT—REGULARLY EMPLOYED OR VOLUNTEERS—ENGAGED IN PROVIDING FIRE SERVICE FOR THE AREA IN TOWNSHIP IN WHICH THEY ARE EMPLOYED INCLUDED WITHIN PROVISIONS OF SECTION 4123.01 ET SEQ., RC — EMPLOYEES OF TOWNSHIP WITHIN SCOPE OF WORKMEN'S COMPENSATION ACT—SECTION 505.41 RC.

SYLLABUS:

1. The fire department of a township which embraces within its boundaries a portion of the Delaware Area Reservoir owned by the United States and used by the State of Ohio under a license agreement, is authorized by law to serve such portion with protection from fire, and such area is entitled to the same degree of fire protection as accorded any other areas of the township.

2. Firemen of a township fire department, whether regularly employed, or volunteers, while engaged in providing fire service within the area of the Delaware Reservoir located in the township by which they are employed, are by virtue of the provisions of Section 505.41, Revised Code, included within the provisions of Section 4123.01 et seq., Revised Code, and thus are employes of the township within the scope of the Workmen's Compensation Act.

Columbus, Ohio, December 30, 1953

Hon. Clyde E. Lewis, Prosecuting Attorney
Delaware County, Delaware, Ohio

Dear Sir:

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

“The Trustees and Fire Chiefs of several townships have asked me to inquire of you as to their rights, responsibilities and liabilities in the Delaware Reservoir area. The Delaware Reservoir covers several townships.

“The land is owned in fee by the Federal Government upwards of five thousand acres, is leased to the State of Ohio and is operated by the Department of Natural Resources, the Division of Parks and the Division of Wildlife. All public roads within the Reservoir area have been abandoned.

“The Trustees and Fire Chiefs have inquired as follows :

“1. Whether or not the fire departments may lawfully serve this area.

“2. Are they required by law to serve this area?

“3. If not required by law, may they contract for providing fire service?

“4. Would firemen be protected under Workmen’s Compensation?”

Under the provisions of Section 505.37, Revised Code, the board of trustees of a township is authorized to “establish all necessary regulations to guard against the occurrence of fires, protect the property and lives of the citizens against damage and accident,” and to provide all equipment necessary therefor. This section further contains the following provisions :

“The board may employ one or more persons to maintain and operate fire fighting equipment, or it may enter into an agreement with a volunteer fire company for the use and operation of such equipment. The board may compensate the members of a volunteer fire company on such basis and in such amount as it deems equitable.”

The law recognizes that the men employed to operate such fire equipment may either be regular employees or volunteer firemen, and may be employed on either a part time or full time basis. Section 505.41 Revised Code, reads as follows :

“Members of volunteer fire companies, or persons employed by a township on a part-time basis to operate or maintain fire-fighting equipment, or persons employed in any manner incidental to the operation or maintenance of such equipment, are township employees for the purposes of workmen’s compensation insurance, the same as though regularly employed as designated in section 4123.01 of the Revised Code.”

Section 4123.01, Revised Code, referred to in the above quoted section, is a part of the law relating to workmen’s compensation. In that

section the words "employee, workman or operative" are defined as including "every person in the service of the state or of any county, municipal corporation, township or school district therein."

I note from your letter that the land comprising the Delaware Reservoir area, is owned in fee by the federal government, and is leased to the State of Ohio, and is operated by the Department of Natural Resources, the Division of Parks and the Division of Wildlife. Under the provisions of Section 159.01 et seq., of the Revised Code, the acquisition by the United States, of title to land in the State of Ohio may result in the United States obtaining exclusive jurisdiction over such land, such exclusive jurisdiction being, by the terms of Section 159.04, expressly ceded to the United States for all purposes except the service upon such sites of civil and criminal process of the courts of the state.

Such jurisdiction is only completed by the filing with the Governor of the state of a written acceptance of such exclusive jurisdiction. This is required by 40 U. S. Code, Section 255, which provides:

"Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head or other authorized officer of any department or independent establishment or agency of the Government may, in such cases and at such times as he may deem desirable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired, as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted."

Construing this provision, see *Adams v. United States*, 319 U. S., 312; Opinion No. 649, Opinions of the Attorney General for 1945, page 806.

A careful search of the records and files in the office of the Governor, fails to disclose any evidence of the filing of any such notice of acceptance of the land in question. It would appear, therefore, that the

United States has not acquired exclusive jurisdiction over the area in question.

The lease to the State of Ohio, to which you refer, is in fact, a license executed on the 11th day of April, 1951, by authority of the Undersecretary of the Army, together with a supplemental amendment to such license adding other territory, and dated the second day of February, 1952. These license agreements grant the use of something over 7,000 acres of the land in question to the Department of Natural Resources of the State of Ohio, for the purposes generally stated of recreational development and management of fish and game. There is contained in said instrument of license, among others, the following provision :

“4. That the licensee shall protect the property from fire, vandalism, and soil erosion, and may make and enforce such rules and regulations as are necessary, and within its legal authority, in exercising the privileges granted in this license, provided that such rules and regulations are not inconsistent with those prescribed by the Secretary of the Army, to govern the public use of the reservoir area.”

Even if the United States had obtained exclusive jurisdiction over the area in question, it would appear, since the license agreement made the area available to the general public under the control of an agency of the State, that such license would have returned jurisdiction to the state. The agreement contains among other things, authority for the Department of Natural Resources to construct upon such land, buildings and other improvements as may be removed by the licensee when the license is terminated or relinquished. It would accordingly appear that in addition to such structures as the United States might erect, the state would also have an insurable interest in the structures and improvements erected by it.

Coming then to the question as to the right and duty of a township fire department to serve the portion of this reservoir area that lies within the boundaries of the township, I call your attention to Informal Opinion 220, which I rendered on January 22, 1953, where the question was raised as to the obligation of a township fire department to furnish protection to county and state properties located within the boundaries of the township, in the absence of any contract with the county or state providing payment therefor. In that opinion attention was called to the provisions of Section 3298-60, General Code, now found in Sections

9.60 and 307.05, Revised Code, authorizing the county commissioners of a county or the superintendent or other administrative head of any state institution, college or university, to enter into a contract with a township, city or village for fire protection. It was, however, pointed out that such property is located *outside of the boundaries* of the township, city or village. It was further said, in the course of the opinion:

“In confining such authorization to cases where the property is located outside of such township, city or village, I believe it clear that the General Assembly proceeded on the long and well-founded assumption that the political entity involved would afford fire protection to *all* of the property located therein without reference to its ownership.” (Emphasis added.)

In the course of that opinion I quoted with approval the language of my predecessor, in an informal opinion No. 21, rendered February 20, 1946, where it was said:

“* * * If the township itself maintained a fire department, it would hardly be open to question that it would be as much its duty to furnish protection to a public building located within its limits as it would be to furnish such protection to privately owned buildings. Fire protection is not for certain individuals or properties, but for all within the corporate territory.”

It is true that the property here under consideration would be tax exempt. That fact does not, in my opinion, alter or modify the obligation of the township having a fire department to protect it. In addition to property of the state and nation, we have also school houses and churches, which, though tax exempt, are certainly entitled to the same fire protection as other property.

What has been said would appear to answer all of your questions. Since it is plainly the duty of the township fire department to serve all property within the boundaries of the township, whether public or private, there could of course be no question as to their *right* to do so. It is a part of the service for which the members of the fire department are employed and paid. Since firemen belonging to the department, whether regularly employed or volunteers, are, under the statutes regarded as employees within the terms of the workmen's compensation law, there appears to be no open question on that subject.

It may be well to point out that so far as the township itself is concerned, there is no legally enforceable duty imposed upon it to organize or

maintain a fire department of sufficient strength to protect adequately all of the property in the township. In fact, there is no provision in the law by which others may require it to provide any fire fighting equipment or take any steps to protect the property or lives of its citizens.

There could be no action in damages against the township for failure to provide fire protection or for the negligence of its fire department if one has been established, in handling the equipment. Such has been the holding of the Supreme Court in reference to police and fire protection in cities. As to police protection, in *Western College v. Cleveland*, 14 Ohio St., 375, it was held that the city was not liable in damages for the destruction of property by a riotous assemblage, or for the neglect of its officers in failing to preserve the peace. In *Wheeler v. Cincinnati*, 19 Ohio St., 19, it was held :

“The power conferred by the statute, in cities of this state to organize and regulate fire companies, and provide engines, etc., for extinguishing fires is, in its nature, legislative and governmental; and a city is not liable to individuals for damage resulting from a failure to provide the necessary agencies for extinguishing fires, or for the negligence of officers or other persons connected with the fire department.”

In my opinion, whatever duty rests upon public officers as to powers which are conferred on them by law, but not by the law made mandatory, arise by implication. These powers are presumably intended for the betterment and protection of the public, and the officer owes it to his constituents to carry them out to the best of his ability. But his failure to do so can only be punished by political action.

As to the township, therefore, the only duty in the matter is the implied obligation which rests on every department of government to use the powers which have been conferred upon it, to give its citizens the benefits of good government and protection in so far as it is able.

Furthermore, while I consider it the duty of the fire department to protect all property alike, whether public or private, it is realized that it can only do so to the extent that it is provided with equipment and personnel which may be lamentably inadequate, and that there may be occasions when it cannot take care of one area, because its entire capacity is being used in another.

I might also point out that the contractual obligation of the Department of Natural Resources, as the licensee of the United States to "protect the property from fire" does not affect the obligation of the township to furnish such fire protection as it is able to supply any more than such a similar agreement of a private tenant with a private landlord would affect such obligation. Conversely, however, the mere fact that the United States, as licensor, has imposed such obligation on the Department of Natural Resources as licensee does not vest in the Department any authority to compel the township to afford some special degree of fire protection to the area in question.

Accordingly, it is my opinion and you are advised :

1. The fire department of a township which embraces within its boundaries a portion of the Delaware Area Reservoir owned by the United States and used by the State of Ohio under a license agreement, is authorized by law to serve such portion with protection from fire, and such area is entitled to the same degree of fire protection as accorded any other areas of the township.

2. Firemen of a township fire department, whether regularly employed, or volunteers, while engaged in providing fire service within the area of the Delaware Reservoir located in the township by which they are employed, are by virtue of the provisions of Section 505.41, Revised Code, included within the provisions of Section 4123.01 et seq., Revised Code, and thus are employes of the township within the scope of the Workmen's Compensation Act.

Respectfully,

C. WILLIAM O'NEILL
Attorney General