

Opinion No. 182.

Cities and Towns—Municipal Corporations—Firemen, Age Limit—General Laws Apply to.

Held: (1) Section 5113, Revised Codes of Montana, 1935, applies to cities operating under a commission form of government as well as to cities organized under the general municipal incorporation laws.

(2) In Montana a municipality has only such powers as are expressly conferred and such as are necessarily implied and are indispensable in order to accomplish the purpose of its creation. Hence, a city may not by ordinance reduce the age limit for firemen at the time of employment below the age limit specified by Section 5113, Revised Codes of Montana, 1935.

July 25, 1946.

Mr. John J. Holmes
State Auditor and Ex Officio
Commissioner of Insurance
State Capitol
Helena, Montana

Dear Mr. Holmes:

You have inquired of this office:

(1) Whether Section 5113, Revised Codes of Montana, 1935, applies to cities operating under a commission form of government as well as

to cities organized under the general municipal incorporation laws;

(2) Whether a city may by ordinance reduce the maximum age for firemen at the time of appointment from the age specified by Section 5113.

Section 5113, Revised Codes of Montana, 1935, provides:

"The qualification of firemen shall be that they shall be qualified voters of the city or town, **not over forty-five years of age**, and shall have passed a physical examination by a practicing physician duly authorized to practice in this state, which examination shall be in writing and filed with the city or town clerk. Such examination shall disclose the ability of such applicant to perform the physical work usually required of firemen in the performance of their duty. Should there be any firemen in the existing fire department of cities and towns, whose age at the time of their appointment is forty-five years or over, the same shall be retired from the service of such department." (Emphasis mine.)

Section 5366, Revised Codes of Montana, 1935, relating to organization of commission forms of city governments, provides:

"Any city may abandon its organization and reorganize under the provisions of this act, by proceeding as hereinafter provided."

Section 5383, Revised Codes of Montana, 1935, provides in part:

"The council shall have and possess and the council and its members shall exercise **all executive, legislative, and judicial powers and duties now had, possessed, and exercised** by the mayor, city council, board of public works, park commissioners, board of water-works trustees, board of library trustees, attorney, assessor, treasurer, auditor, city engineer, and other executive and administrative offices in cities organized under the general municipal incorporation laws . . ." (Emphasis mine.)

You will notice Section 5113 was enacted in 1899 and was in full force and effect when Section 5366 and 5383

were enacted in 1911. Section 5383 appears to be a clear expression of the legislative assembly to the effect that commission forms of city government, so far as their powers and duties under the law are concerned, are identical to cities organized under the general municipal incorporation law.

Your second question is one concerned with conflict of state statutes and city ordinances. 43 Corpus Juris 215 has this to say:

"Since a municipal corporation is a creature of the state, continuing its existence under the sovereign will and pleasure of the state, possessing such powers and such only as the state confers upon it, subject to addition or diminution of power at the state's supreme discretion, municipal regulations must not directly or indirectly contravene the general law, nor can such regulations be repugnant to the policy of the state as declared in general legislation. The power of the corporation to exercise its police power over a particular subject matter ceases when the state acts upon the same subject matter, unless there is room for the exercise of concurrent jurisdiction . . ."

43 Corpus Juris 219 adds this:

"As a general rule, additional regulation to that of the state law does not constitute a conflict therewith. The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith, unless the state limits the requirement for all cases to its own prescriptions. But it has been held that a municipal ordinance or regulation which is designed simply to invade a zone which can be occupied only for the purpose of facilitating the enforcement of the total actual prohibition already enacted by the state is not in keeping with the spirit or policy of the state law and is in conflict therewith. Merely because a municipal ordinance is not as broad as the statute does not render it so inconsistent as to make it void."

I should be inclined to the view permitting a city to reduce the maximum age limit below that specified in the statute—due to the fact different cities may reasonably require different regulations based upon density of popula-

tion, risk of fire created by proximity of dangerously inflammable timber or grass land, the quantity of structures within the municipality which constitute fire hazards and for similar reasons—were it not for the expression of our Supreme Court in two cases. In *Helena Light and Railway Company v. The City of Helena*, (1912) 47 Mont. 18, 31, 130 Pac. 446, and *State ex rel. Quintin v. Edwards*, (1909) 40 Mont. 387, 303, 106 Pac. 695, our Court stated a municipality has only such powers as are expressly conferred by the law creating it and such as are necessarily implied and are indispensable in order to accomplish the purpose of its creation. Those cases assert that when there is a fair and reasonable doubt as to the existence of a particular power, it must be resolved against the municipality and the power denied, for the reason that the state has granted in clear and unmistakable terms all that it intended to grant.

Obviously, if permission had been granted in clear and unmistakable terms by the legislative assembly for cities to reduce the maximum age limit of firemen at the time of appointment, the question presented would not have arisen. A doubt exists as to the existence of the cities' power, and, pursuant to the law as enunciated in the cases city above, the question must be resolved against the municipality and the power denied.

It is therefore my opinion:

(1) Section 5113, Revised Codes of Montana, 1935, applies to cities operating under a commission form of government as well as to cities organized under the general municipal incorporation laws.

(2) In Montana under our law as given to us by our legislature, a municipality has only such powers as are expressly conferred and such as are necessarily implied and are indispensable in order to accomplish the purpose of its creation. Hence, a city may not by ordinance reduce the age limit for firemen at the time of employment below the age limit specified by Section 5113, Revised Codes of Montana, 1935. The legislature in its wisdom is the only authority in this state that may extend or restrict the authority of city government.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General