

Opinion No. 144

**Cities and Towns—Fire Departments—Fire Department
Relief Associations.**

Held: When a fireman has served his probationary period, and has been appointed a fireman by the Mayor and City Council, he is not to be considered a substitute, when construing prohibitions against substitute firemen being eligible for membership in firemen relief associations, even though such fireman is merely taking the place of a fireman now serving in the Armed Forces.

December 28th, 1950.

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

Dear Mr. Holmes:

You have given me a set of facts which is substantially this: A member of the Missoula Fire Department is now serving in the Armed Forces. Another man is now working on the fire department in the place of this serviceman. This new man has served his six months probationary period with the fire department and has been appointed a fireman by the Mayor and the City Council.

Based on these facts you have asked me whether or not this new fireman is eligible to be admitted to the Missoula Fire Department Relief Association. To aid me you have sent a copy of the By-Laws of the Fire Department Relief Association of the City of Missoula, which By-Laws were approved March 29, 1947.

A portion of Section 1, Article I of the By-Laws reads:

"Any confirmed paid member of the Missoula Fire Department who is physically qualified is eligible to become a member of the Association provided, however, that no person who is serving **as a substitute** or is on probation or who has not been confirmed a member of the Missoula Fire Department is eligible for membership in the Association." (Emphasis supplied.)

These limitations on membership in the Missoula Fire Department Relief Association are also found in the following sentence from Section 11-1923, Revised Codes of Montana, 1947, as amended by Section 1, Chapter 39, Laws of 1949:

"No one serving as a substitute or on probation, nor any person who has not been confirmed a member of an organized fire department is eligible for membership in the relief association."

Your statement of facts does not disclose under what conditions the Mayor and the City Council appointed the new fireman, nor whether there is any limitation by city ordinance on the number of firemen the department can have. However, I think it is safe to say that from the facts given that the new fireman is not prohibited from joining the Relief Association because of being on probation or not a confirmed member of an organized fire department. Your statement discloses that the new fireman has served his probationary period and has been confirmed a member of the fire department by the action of the Mayor and the City Council. The only remaining prohibition against this fireman being eligible for the Relief Association, other than physical requirements, is the possibility of his being considered a substitute.

The code section that provides for the appointing of firemen is Section 11-1902, Revised Codes of Montana, 1947. This section now reads in part as follows:

" . . . The Mayor or Manager shall nominate, and, with the consent of the council or commission, appoint the chief of the fire department, and assistant chief or chiefs of the fire department, and all firemen, and each appointment shall be first made for a probationary term of six (6) months, and thereafter the mayor or manager may nominate, and, with the consent of the council or commission, appoint such chief and assistant chief or chiefs of the fire department and firemen, who shall thereafter hold their respective appointments during good behavior, and while they have the physical ability to perform their duties. . . "

The above code section was Section 3377, Revised Codes of Montana, 1907, and is substantially the same today as it was in 1910 when the Supreme Court of Montana decided the case of *State ex rel. Driffill v. City of Anaconda, et al.*, 41 Mont. 577, 111 Pac. 345. The court in that case when talking about this code section said:

" . . . The statute, however, is a civil service law, and does secure to every paid fireman a right to his position. . . "

Based on this and the facts you have given me, I think it can be said that this new fireman is a **confirmed member** of the Missoula Fire Department and not a **substitute** when defining these underlined words as they are used in both the By-Laws and the applicable statute. However, beyond this, it is my opinion that a practical approach to the problem will show reasons why this fireman should not be considered a substitute. This new fireman has replaced a regular fireman, and will for what may be an indefinite period of time pursue the occupation of a regular fireman. While it may be true that this new fireman may have to leave the force when the serviceman returns, yet should he be considered only a substitute during this entire period of time until it is definitely decided that he will remain with the Fire Department or be replaced? The future may hold too many unforeseeable events for us now to say that this man is only a substitute.

Section 11-1904, Revised Codes of Montana, 1947, provides that should the City Council reduce the number of firemen in the Fire Department that such reduction will be in reverse order of appointment. I mention this merely to show that many regular firemen, who are clearly not substitutes may have to leave a fire department because of a reduction in the force. Yet, would any one argue very strongly that a fireman should be considered a substitute because some time in the future he might have to leave the department? I think this argument can be applied to the present situation.

It is my opinion, based on the given facts, and outside of any physical requirements to be met by the applicant, that this fireman is

eligible for membership in the Missoula Fire Department Relief Association.

Just as a word of caution, I add that nothing in this opinion should be construed as affecting the rights of the serviceman to reinstatement in the Fire Department.

Very truly yours,
ARNOLD H. OLSEN,
Attorney General.