

**Opinion No. 63**

**Fire Departments—Fire Department Relief Associations—Volunteer Firemen, to Be Paid Pensions—Pensions, Fire Department Relief Association Must Pay to Qualified Members.**

- Held:**
1. It is compulsory for Fire Department Relief Associations to pay a service pension in all cases where the applicant meets the qualifications for length of service and attained age.
  2. Members of a Fire Department whose sole remuneration is \$1.50 for each fire attended are volunteer firemen and when such volunteer firemen qualify for a pension they shall receive a pension in an amount not to exceed \$75.00 per month.
  3. A Fire Department wherein the Fire Chief is paid a monthly salary of \$20.00 per month and the remainder of the firemen are paid \$1.50 for each fire attended is a partly paid and partly volunteer Fire Department and the members thereof must meet the requirements as to an attained age before they shall be eligible to retire.

**4. Each and every Fire Department Relief Association shall establish regulations governing the effective date of retirement.**

October 12, 1949.

Mr. Clyde Gummow  
State Fire Marshal  
Helena, Montana

Dear Mr. Gummow:

You have requested my opinion with respect to several questions pertaining to the Fire Department Relief Association of the City of Chinook, Montana. The facts as you have given them to me are as follows:

"The City of Chinook now maintains and for the past number of years has maintained a Fire Department, the members of which have long been organized into a Fire Department Relief Association, as provided by law. The Fire Department always has been considered a volunteer one, although a Fire Chief is paid a monthly salary by the City now amounting to \$20.00 and the members of the department who respond to a call are paid \$1.50 for a call, but no regular monthly salaries."

The questions which have arisen out of the above factual situation and which you have certified to me are as follows:

1. Is it compulsory upon the Association to pay a pension in all cases where the retired member meets the qualifications for length of service and attained age?
2. Upon retirement of a member, other than the chief, requirements for a pension having been fully met, may the Association by its by-laws provide for the payment of a service pension to such member in any monthly amount not in excess of \$75.00, or must the monthly pension be one-half of the amount received by such member in the last month for which he was paid for a call prior to his retirement?
3. Are members of the Chinook department other than the chief to be considered members of a "pure volunteer Fire Department" and thus eligible for pension after length of service without meeting requirements as to age?
4. Is the pension payable from the effective date of retirement or from the date when application is made for pension?

Section 5129, Revised Codes of Montana, 1935, provides that the members of Fire Departments and volunteer Fire Departments recognized by the City or Town Council in each incorporated City or Town in Montana may form an association to be known as the Fire Department Relief Association.

Section 5132, Revised Codes of Montana, 1935, as amended by Chap. 73, Laws of 1939, as amended by Chapter 98, Laws of 1945, and as last amended by Section 1 of Chapter 194, Laws of 1949, provides for pensions to retired firemen. Section 5132, supra, as contained in Section 1 of Chapter 194, supra, is as follows:

"Each and every Fire Department Relief Association organized and existing under the laws of this State shall pay to each of its members who elect to retire from active service after having completed twenty (20) years or more of active duty and has reached the age of fifty (50) years as a fully paid member of a paid, or partly paid and partly volunteer Fire Department of the City or Town wherein such association has been formed, out of any money in the association's 'disability and pension fund,' a 'service pension' in an amount which shall be equal to one-half ( $\frac{1}{2}$ ) of the sum last received by the member as a monthly compensation for his service as an active member of said Fire Department. Provided, such association may at any time, by a two-thirds ( $\frac{2}{3}$ ) vote of the members thereof, increase or decrease the said service pension whenever the financial condition of the association's 'disability and pension fund' shall warrant such action; provided, that no increase shall be effected as will increase the said 'service pension' to an amount in excess of a sum equal to one-half ( $\frac{1}{2}$ ) of the monthly active duty compensation last received by the member; provided, further, that no decrease shall be effected unless the balance in the 'disability and pension fund' is less than one-half ( $\frac{1}{2}$ ) of one per cent (1%) of the taxable valuation of all taxable property within the limits of the city, town or municipality. In case of volunteer men the compensation shall in no event exceed the sum of seventy-five dollars (\$75.00) per month.

A member of a pure volunteer Fire Department who has served twenty (20) years or more as an active member of such a Fire Department, without qualifying as to any provision pertaining to an attained age, shall be entitled to the benefits provided for by this act."

The answer to your first question is that it is compulsory and mandatory upon a Fire Department Relief Association to pay a pension in all cases where a retired member meets the qualifications as to length of service and has reached the retirement age. Section 5132, Revised Codes of Montana, 1935, before amendment, provided that every Fire Department Relief Association "may pay" a service pension. Section 1 of Chapter 73, Laws of 1939, amended Section 5132 supra, to make the Section read that every Fire Department Relief Association "shall pay" a service pension when the individual meets the qualifications set forth in the act. Section 5132, as last amended by Section 1 of Chapter 194, Laws of 1949, retains the "shall pay" language adopted in the 1939 amendment. The change from "may pay" to "shall pay" is certainly a strong indication of the legislative intent to make it mandatory upon each association to pay a service pension and

not to allow the association to exercise its discretion as to allowing the pensions. The general rule in Montana in the construction of a statute containing the word "shall" is that such statute is mandatory in nature unless it clearly appears that such was not the intention of the legislature. State ex rel. McCabe v. District Court, 196 Mont. 272, 76 Pac. (2d) 634. In Section 1 of Chapter 194, Laws of 1949, there is no indication of legislative intention that "shall" was not used as a mandatory expression. The expressed intention is all to the contrary inasmuch as the language of Section 5132 has been changed from "may pay" to "shall pay."

Since the answer to your second question necessitates a determination as to whether the members of the Chinook Fire Department, other than the Fire Chief, are volunteer firemen, I shall answer your third question first.

Inasmuch as the Chinook Fire Chief is paid a salary of \$20.00 per month, I am of the opinion that the Chinook Fire Department is not a "pure volunteer Fire Department," the members of which may retire without qualifying as to any provision pertaining to an attained age under the provisions of Chapter 194, supra. It is my view that the Chinook Fire Department is a partly paid and partly volunteer department rather than a "pure volunteer Fire Department." There can be no question but that the Fire Chief is a paid member. While he is paid only \$20.00 per month, such pay is steady and for his monthly services regardless of the number of fires attended. It is also my view that the payment of \$1.50 per call to the other members of the Chinook Fire Department does not make them paid firemen. There is authority in Opinion No. 73, Volume 17, Report and Official Opinions of Attorney General to the effect that when members of a Fire Department are paid for attending a fire, such department is not a volunteer department. I cannot entirely agree with the holding in that opinion. Payment of \$1.50 for each fire call responded to does not make such a department a paid department. A determination of whether or not a man is acting in a voluntary capacity should not be contingent upon the question of payment for the services rendered. Rather it must be decided by the manner in which the services of the firemen are made available. Webster's New International Dictionary, 2nd Edition, defines a volunteer as follows:

"One who enters into, or offers himself for, any service of his own free will."

The above quoted definition, in my opinion, supports the position I have adopted with reference to the distinction between volunteer firemen and members of an ordinary paid Fire Department. A volunteer fireman responds not because he is paid to do so or as a part of his regular duties, but rather he responds of his own free will. He need not attend at fires if he chooses to remain away, whereas a paid fireman must attend fires as a part of the duties he has contracted to perform. Therefore, I am of the opinion that all the members of the

Chinook Fire Department, with the exception of the Fire Chief, are volunteer firemen. However, since the Fire Chief is paid a monthly salary, the Chinook Fire Department is a partly paid and partly volunteer department and the members thereof must meet all the qualifications, and particularly the qualification as to an attained age before they are eligible to retire.

Having found that all the members of the Chinook Fire Department, with the exception of the Fire Chief, are volunteer firemen the answer to your second question is that the association shall pay a pension to volunteer firemen and that the pension may be in any amount not to exceed \$75.00 per month. Chapter 194, Laws of 1949, provides generally that pensions for firemen shall be equal to one-half of the monthly compensation received by the firemen for his last month as an active member of the department. Since such a method of computation could not be equitably applied to volunteer firemen in that they may have gone to ten fires in the last month they were active or there may have been no fires during such last month, the legislature provided specifically for volunteer firemen and in Section 1 of Chapter 194, *supra*, provided that volunteer firemen shall receive a pension of an amount not to exceed \$75.00 per month.

Question four inquires as to whether the pension must be paid from the effective date of the retirement or from the date upon which application for the pension is made. This is a question of administration which each Fire Department Relief Association must provide for in its by-laws and regulations. The various Code Sections dealing with Fire Department Relief Associations do not delineate any procedure to be followed in the administration of the granting of pensions and therefore each association must make its own rules and determine its own administrative policies otherwise within the law. The act does not state what effective date of retirement shall be. An association could in its discretion make a regulation that the date upon which the application for retirement is received shall be the effective date of the retirement, or it could make any other reasonable regulation that is consistent with the spirit of the act and not repugnant to law.

Therefore, it is my opinion that:

1. It is compulsory for Fire Department Relief Associations to pay a service pension in all cases where the applicant meets the qualifications for length of service and attained age.
2. In the factual situation submitted by you, all the members of the Fire Department, other than the Fire Chief, are volunteer firemen and such volunteer firemen who qualify for a pension shall receive a pension in an amount not to exceed \$75.00 per month.
3. The Chinook Fire Department is a partly paid and partly volunteer department and the members thereof may not retire without meeting the requirements as to age set forth in the pension act.

Only members of a "Pure Volunteer Fire Department may retire without meeting the requirements as to an attained age.

4. Each Fire Department Relief Association shall establish reasonable regulations governing the effective date of retirements, not inconsistent or repugnant to equity and law.

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