

Opinion No. 19**Fire Relief Association — Pension
Benefits — Interest — Statutory
Construction—Adopted Minors
— Guardians.**

HELD: 1. The monthly pension to widows or minors paid by the Fire Department Relief Association, shall be the same amount as the deceased fireman drew as a pension prior to his demise.

2. The Fire Department Relief Association is not required to pay interest on the past due pension benefits.

3. The Fire Department Relief Association must pay a pension to an eligible minor even though the child has, subsequent to his father's demise, become legally adopted.

4. The pension benefits should be paid to the guardian of the minor child for the use and benefit of the child.

June 13, 1955.

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

Dear Mr. Holmes:

You have requested my opinion on the following set of facts:

"The Glasgow Fire Department has not paid pension benefits to two widows of deceased firemen who were, prior to their demise, drawing pension benefits.

"The first fireman died after receiving one monthly pension check. He is survived by his wife who has not remarried. The first fireman had no children.

"The second fireman also died after receiving one monthly pension check and was survived by his widow and a minor child. His widow has since remarried."

Upon the above set of facts you have raised the following questions:

1. Should the monthly pension to the widows or minors be the same amount as the deceased fireman drew as a pension or only one-half of the amount?
2. Is the Fireman's Relief Association required to pay interest on the past due amounts, and if so, at what rate and would it be compounded monthly?
3. In the case of the second fireman, does the Fireman's Relief Association have to pay a pension to the minor child who has since been legally adopted by the present husband?
4. If a pension is required to be paid to the minor child, would the payment be made to the mother of the child, for its care, and is it required that the mother be legally appointed guardian before we can make such payment?

The first question is answered by Section 11-1927, R.C.M., 1947, which provides that the monthly pension to widows or minors shall be the same amount as the deceased fireman drew as a pension prior to his demise. That section states in part:

"Each and every fire department relief association, organized and

existing under the laws of this state, shall pay to the widow or orphans of a deceased member of said association . . . , a monthly pension in amount which shall be equal to one-half of the monthly compensation last received by such deceased member for his services as an active member of the fire department in the city or town wherein such association has been formed" (Emphasis supplied.)

This amount is the same as provided for pension payments to eligible firemen under Section 11-1925, R.C.M., 1947, and Section 11-1926, R.C.M., 1947.

You will note that the words "shall pay" are underlined in the above quotation. Section 3, Chapter 98, Laws of 1945, amended Section 5134, R.C.M., 1935, (now Section 11-1927, R.C.M., 1947) to make the section read that every Fire Department Relief Association "shall pay" to widows or orphans of eligible deceased firemen a monthly pension equal to one-half (½) of the monthly compensation last received by such deceased member for his services as an active member of the fire department in the city or town wherein such association has been formed.

The change from "may pay" to "shall pay" makes it compulsory and mandatory upon the Fire Department Relief Association to pay a pension to the eligible widows or orphans of deceased firemen. The legislative intent has been expressed so as to deny the association the right to exercise its discretion in allowing the pensions. (See Opinion 49, Volume 25, Reports and Opinions of the Attorney General.)

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 vs. District Court, 106 Mont. 272, 76 Pac. (2d) 634.)

In Section 3, Chapter 98, Laws of 1945, 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 5134, R.C.M., 1935 (now Section 11-1927, *supra*) has been changed from "may pay" to "shall pay".

There are, however, certain limitations stated in Section 11-1927, *supra*, as amended by Chapter 194, Laws of 1949, and they are as follows:

" . . . the pension herein provided for shall not be paid to the orphans of deceased firemen after they have attained the age of eighteen (18) years. In case of volunteer firemen such pension shall in no event exceed the sum of seventy-five (\$75) per month."

In answer to your second question, I must state that under the facts as presented, there are no provisions in the law for the payment of interest on these overdue pension benefits as they are not contractual obligations in nature but a gratuitous allowance. (State *ex rel. Casey vs. Brewer, et al.*, 107 Mont. 550, 88 Pac. (2d) 49.)

The third question must be answered in the affirmative because of the specific provisions of Section 11-1927, R.C.M., 1947, requiring such payment. An ancillary question is raised as to whether the rights of the minor are severed by his subsequent adoption. The applicable rule, in *Re Kay's Estate*, 127 Mont. 173, 260 Pac. (2d) 391, is as follows:

" . . . In this jurisdiction the adoption of a child does not destroy his status as one of the issue of his natural ancestors nor does an adopted child lose his right to inherit from his natural parent."

Thus, it is obvious that a minor, eligible to receive pension benefits, would not have that right cut off by an act over which he has no control, to-wit: adoption by his mother's second husband, and the Fireman's Relief Association would have to pay the minor the benefits due and owing.

Regarding the fourth question presented, reference must be made to Sections 91-4507, 91-4508, R.C.M., 1947, wherein it is stated.

"91-4507. No person, whether a parent or otherwise, has any pow-

er as guardian of property, except by appointment as hereinafter provided."

"91-4508. A guardian of the person or property, or both, of a person residing in this state, who is a minor, or of unsound mind, may be appointed in all cases, other than those named in Section 91-4506, by the district court, as provided in this title."

The amounts due and owing the minor child, in the instant case, are his properties and must be adequately safeguarded. Therefore, for the mother to have any power over the benefits she would have to be appointed as guardian by the district court. She, in the instant case, would have preference over all others if she is competent to handle her own business affairs. Section 91-4605, R.C.M., 1947, provides:

"The father of the minor, if living, and in case of his decease, the mother, being themselves respectively competent to transact their own business, and not otherwise unsuitable, must be entitled to the guardianship of the minor. A married woman may be appointed guardian."

Once the mother is appointed guardian, payments should be made to her for the care of the child.

Therefore it is my opinion that:

1. The monthly pension to widows or minors paid by the Fire Department Relief Association shall be the same amount as the deceased fireman drew as a pension prior to his demise.

2. The Fire Department Relief Association is not required to pay interest on the past due pension benefits.

3. The Fire Department Relief Association must pay a pension to an eligible minor even though the child has, subsequent to his father's demise, become legally adopted.

4. The pension benefits should be paid to the guardian of the minor child for the use and benefit of the child.

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