

VOLUME NO. 35**Opinion No. 67**

CITIES AND TOWNS — Departments, fire, disability fund; CITIES AND TOWNS—Departments, fire, volunteer; CITIES AND TOWNS—Department, fire, relief association; CITIES AND TOWNS—Firemen, no volunteer in first class cities; CITIES AND TOWNS—Firemen, relief association, volunteers; CITIES AND TOWNS—Offices and officers, volunteer firemen; FIRE DEPARTMENT RELIEF ASSOCIATION—Benefits, volunteers; FIRE DEPARTMENT RELIEF ASSOCIATION—Relief, who entitled to; VOLUNTEER FIREMEN—First class cities, not authorized; VOLUNTEER FIREMEN—Relief association benefits. Sections 11-1901, 11-1909, 11-1922, 11-1925, 11-1926, 11-1927, 11-1928, and 11-1936, R.C.M. 1947.

- HELD:**
1. A first class city shall not supplement its paid fire department with volunteer firemen.
 2. A second class city may supplement its fire department with volunteer firemen.
 3. Volunteer firemen are entitled to all relief association benefits other than service pension.

January 28, 1974

Mr. William A. Penttila
 Chief, Fire Marshal Bureau
 State Capitol
 Helena, Montana 59601

Attention: Mr. Gary W. Younker
 Deputy Fire Marshal

Dear Mr. Penttila:

You have requested my opinion on the following questions:

1. May a first-class city which has a paid fire department supplement that department with volunteer firemen?
2. Assuming that a second-class city with a paid fire department may supplement that department with volunteer firemen, how should the relief association and the pensions of the volunteers be handled?

In reference to your first question, section 11-1901, Revised Codes of Montana, 1947, states in part:

(a) There **shall** be in every city and town of this state a fire department, which **shall** be organized, managed and controlled as in this chapter provided, ... (Emphasis supplied)

The use of the mandatory "shall" in that section leaves no doubt that every city and town in the state is required to maintain a fire department of some kind. **State ex rel. McCabe v. District Court**, 106 Mont. 272, 76 P.2d 634 (1938).

Section 11-1909, R.C.M. 1947, states in part:

For the purpose of supporting volunteer fire departments **in any city or town which does not have a paid fire department**, and for the purpose of purchasing the necessary equipment therefor, the council in any city or town, may assess and levy, in addition to other levies permitted by law, a special tax ... (Emphasis supplied)

The legislature showed clear intent, by the use of the emphasized portion of the above-quoted section, to grant authority to support volunteer fire departments only to cities which do not have a paid fire department.

It is well settled in this state that cities have only those powers granted them by statute or which are necessarily implied as adjuncts to powers granted by statute. This court has repeatedly stated that "unless a power is vested in the municipality by express law [or by necessary implication therefrom], the presumption is against the exercise by the city of any such power." **State ex rel. Griffin v. Butte**, 151 Mont. 546, 445 P.2d 739 (1968).

Thus, only those cities which do not have paid fire departments are authorized by section 11-1909, *supra*, to support volunteer fire departments by tax levies.

However, section 11-1936, R.C.M. 1947, states in part:

In addition to a paid department, the city council, city commission or other governing body **in cities of the second class** may make provision for a volunteer fire department in addition to the paid fire department ... (Emphasis supplied)

Only cities of the second class are authorized by that section to supplement their paid fire departments with volunteers.

It is a rule of statutory construction that the express mention of one matter excludes other similar matters not mentioned. **Helena Valley Irrigation District v. State Highway Commission**, 150 Mont. 192, 433 P.2d 791 (1967)

The express mention of second-class cities in section 11-1936, *supra*, excludes all other classes of cities not mentioned, including first-class cities.

Thus, a first-class city which has a paid fire department may not supplement that department with volunteer firemen.

In reference to your second question, section 11-1936, in addition to allowing second-class cities to supplement their paid departments with volunteers, states:

[A] volunteer being described as one who is an enrolled member of the volunteer fire department and assists the paid fire department; who is eligible to serve only on the board of trustees of the fire department relief association of such city, provided not more than three volunteer members are on said board of trustees, **but who shall not be entitled to a "service pension."** (Emphasis supplied).

Fire department relief associations consisting of members who are paid firemen and members who are volunteer firemen are authorized by section 11-1922, R.C.M. 1947. Sections 11-1925 through 11-1928 control the disbursement of fire department relief association funds and should be followed by an association established under section 11-1922, *supra*.

Under section 11-1936, supra, when a second-class city supplements its paid department with volunteer firemen, such volunteers are not entitled to a "service pension." However, those volunteers are entitled to all other benefits provided by sections 11-1925 through 11-1928, supra.

THEREFORE, IT IS MY OPINION:

1. A first class city shall not supplement its paid fire department with volunteer firemen.
2. A second class city may supplement its fire department with volunteer firemen.
3. Volunteer firemen are entitled to all benefits provided in sections 11-1925 through 11-1928, R.C.M. 1947, except for the service pension provided therein.

Very truly yours,

ROBERT L. WOODAHL
Attorney General