

OPINION 34

OFFICIAL OPINION NO. 34

July 6, 1956

Honorable W. O. Hughes
State Representative
403 Standard Building
Fort Wayne, Indiana

Dear Representative Hughes:

We have received your letter requesting an Official Opinion which raises the following question:

“Can a man who has reached his thirty-fifth birthday but who has not reached his thirty-sixth birthday when appointed to the Fire Department be eligible to participate in the pension system of the Fire Department in cities operating pension funds under the provision of Chapter 31, Acts of 1937, as amended.”

The Acts of 1937, Ch. 31, Sec. 1, as found in Burns' Indiana Statutes (1950 Repl.), Section 48-6518, provides as follows:

“A firemen's pension fund and a board of trustees of the firemen's pension fund are hereby created in every city in this state having a population of 114,500 or more according to the last preceding United States census and which maintains a regularly organized and paid fire department. The provisions of this act in relation to such fund shall likewise apply to all cities having a population of less than 114,500 which maintains a regularly organized and paid fire department, in case the common council of any such city shall elect to establish such board of trustees and firemen's pension fund, and if any such city elects to establish such board and fund its common council shall adopt an ordinance to that effect, and upon the adoption of such ordinance, the provisions of this act in relation to such fund and such board of trustees shall apply to and govern such city.”

The Acts of 1937, Ch. 31, Sec. 15, as amended, as found in Burns' Indiana Statutes (1950 Repl.), Section 48-6532, reads, in part, as follows:

“No person who is over the age of thirty-five [35] years or who fails to pass the physical examination required by the board of trustees shall be appointed, reappointed or reinstated as a member of the fire force of any city contemplated in this act. Every member of the fire force of any such city who is in active service at the time of the taking effect of this act, who is a member of the firemen’s pension fund of such city and who has had previous service in the fire department of such city, but who was over the age of thirty-five [35] years at the time of his reinstatement or reappointment shall be entitled to all of the benefits of the firemen’s pension fund of such city and all of the years of active service of such fireman on the fire force of such city shall be counted in determining his eligibility for retirement. Every member of the fire force of any such city who is in active service at the time of the taking effect of this act, but who is not a member of the firemen’s pension fund of such city, shall, upon the taking effect of this act, be conclusively deemed to be a member of the firemen’s pension fund of such city and shall pay, as unpaid assessments, in addition to his current assessments, the same amount into the pension fund as he would have paid as assessments if he had been a member of the pension fund during all of the years of his service. * * *”

I call your attention to the fact that the language of Burns’ 48-6532, *supra*, has never been construed by the Indiana courts. There are cases, however, in other jurisdictions which have clearly found language of identical import to mean that the disqualification did not take effect until the next following birth date:

Allen v. Baird (1945), 208 Ark. 975, 188 S. W. (2d) 505;

Wilson v. Mid-Continent Life Ins. Co. of Oklahoma City (1932), 159 Okla. 191, 14 P. (2d) 945;

Watson v. Loyal Union Life Assn. of Muskogee (1930), 143 Okla. 4, 286 P. 888.

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Applying the rule used in these cases to the question raised by your letter, I am of the opinion that providing the city in question comes under Burns' 48-6518 *et seq.*, *supra*, then and in that event a fireman who has reached his thirty-fifth [35th] birthday, but has not reached his thirty-sixth [36th] birthday when appointed to the Fire Department, is eligible to participate in the Firemen's Pension Fund.

OFFICIAL OPINION NO. 35

July 9, 1956

Colonel Herman H. Schmitz
Commandant
Indiana State Soldiers' Home
Lafayette, Indiana

Dear Colonel Schmitz:

This is to acknowledge receipt of your letter of May 2, 1956, in which you request an Official Opinion as follows:

"The Indiana State Soldiers' Home has received a statement from the Indiana University Medical Center in the amount of \$2,019.33 for medical care of Mrs. 'X' who was and still is a properly admitted member of the Indiana State Soldiers' Home.

"This member was placed in the care of the I. U. Medical Center in accordance with the Acts of 1947, Chapter 300, Sec. 4, p. 1247, Burns' 52-1134, for surgery and treatment. It is our belief that the payment for the services should be the responsibility of the county auditor in accordance with the Acts of 1947, Chapter 300, Sec. 5b, p. 1217, Burns' 52-1135.

"The Auditor of Posey County has indicated a refusal to pay this obligation because it is his belief that members of the Soldiers' Home are not 'committed' from the county of residence in the sense that a mental patient is 'committed' to a mental hospital or an inmate is 'committed' to one of the correctional institutions, but are voluntary applicants and are, therefore, not the responsibility of the county concerned.