

OPINION 54

OFFICIAL OPINION NO. 54

July 10, 1953.

David Hunter, Commissioner of Labor,
Department of Labor, State of Indiana,
State House,
Indianapolis, Indiana.

Dear Sir:

I have your letter of June 11, 1953 which is as follows:

"1. In the interpretation of Chapter 232, Acts of 1951 of the General Assembly, Section 5, Sub-section (b).

"A. Is the Commissioner of Labor required to delegate the authority as mentioned in Subsection (b) ?

"B. To what extent is the authority mentioned to be delegated?"

Section 5 of the Acts of the General Assembly of 1951, Chapter 232, as found in Burns' Indiana Statutes Annotated (1950 Repl., 1951 Supp.), Section 20-1205b provides:

"(b) In cities, towns or other governmental subdivisions having a building department which employs licensed inspectors to enforce the provisions of this act, the commissioner shall delegate such building department as the authorized representative of the division to enforce and carry out the provisions of sections 5, 6, 7, 8, and 9 (6, 7, 8, 9, and 10) (§§ 20-1206—20-1210) or any portion thereof as may be designated by him."

The determinative words of the above section are: "the commissioner shall * * * or * * *."

The words "shall" and "must" when found in a statute are not always imperative.

Monroe v. State (1918), 223 N. Y. 208, 119 N. E. 444.

In the case of *Reliance Mfg. Co. v. Langley* (1907), 41 Ind. App. 175, 82 N. E. 114 the Appellate Court of Indiana held that the word "shall" was not mandatory but its effect was to be determined by the requirement of an inspector.

In the case of *State ex rel. Cane v. Knights of Father Mathew* (1912), 164 Mo. App. 361, 144 S. W. 896 the court held a statute which used the word "shall" and subsequently in the same section used the word "or" to mean that the word "shall" should be construed as "may" and therefore was not mandatory but rather discretionary.

The same result was reached in the case of *Pettus v. Hendricks* (1912), 113 Va. 326, 74 S. E. 191, where the statute in question contained the word "shall" and the word "or."

At numerous places in the 1951 Act, Chapter 232 as found in *Burns' Indiana Statutes Annotated* (1950 Repl., 1951 Supp.), Sections 20-1201 to 20-1217, references are made to "the division or its authorized representative." This phrasing is found in the following sections of the act: Sections 5b, 6, 7, 7e, 8, 10a, 10b, 10c, 10d, 11a, 11b, 11c and 11d.

The sections of the act, above quoted, deal in general with the inspection and enforcement of the rules and regulations promulgated by the elevator safety subdivision of the Division of Labor.

The statute in my opinion gives the Commissioner the right, if he so desires, to delegate all of the authority contained in sections 5, 6, 7, 8 and 9, *supra*, or any portion thereof as may be designated by him.

Section 14 of the act provides in substance that nothing in this act shall limit the right of such city, town or other governmental subdivision to enforce the provisions of its own ordinances, by-laws and resolutions and to enforce the provisions of this act as permitted by section 5. It further provides that a city, town or governmental subdivision may lay down additional or more strict requirements for the licensing and inspection of installation, alteration, maintenance or operation of elevators, dumbwaiters or moving stairways. In the event that a city, town or governmental authority does not enforce its own ordinances, by-laws and resolutions, the elevator

OPINION 55

safety subdivision is given the authority to enforce the same in place of said governmental subdivision.

It is therefore my opinion :

1. It is not mandatory for the Commissioner of Labor to delegate to any city or town or other governmental subdivision the authority set out in subsection (b) of Section 5 of Chapter 232 of the Acts of the General Assembly of 1951.

2. The Commissioner may, if he so desires, delegate only that which he has been specifically authorized to delegate and that is the authority to enforce and carry out the provisions of subsections 5, 6, 7, 8 and 9, or any portion thereof as may be designated by him.

OFFICIAL OPINION NO. 55

July 20, 1953.

Mr. Ross Teckemeyer, Executive Secretary,
Public Employes' Retirement Fund,
747 Board of Trade Building,
Indianapolis 4, Indiana.

Dear Mr. Teckemeyer :

Your letter of June 12, 1953 has been received in which you request an official opinion as to the following :

"Is the position of policeman in a city which has not put into operation a police pension fund eligible for social security coverage where the city has adopted a plan covering all positions not covered by an existing pension plan?"

The Acts of the General Assembly of 1925, Chapter 51, as amended, as found in Burns' Indiana Statutes Annotated (1950 Repl.), Section 48-6401 provides in part :

"In every city except cities of the first class there shall be and is hereby created a police pension fund."

The word "shall" is to be considered in the light of its ordinary common use meaning unless some other use is indicated