In the present situation, it appears the sovereign power of the state has been exercised by the Legislature in granting authority to the city council and by the city council exercising that authority in a particular way, i.e., smoke control.

The duty of inspecting, investigating and otherwise taking steps to effectuate the purpose of the city ordinance in question, in light of the holding in the Platt case, *supra,* appears to be merely ministerial duties incident to a prior exercise of the sovereign powers of the state. Thus, the position identified by you as Chief Air Inspector of the Bureau of Air Pollution of the City of East Chicago is not a lucrative office, inasmuch as a city ordinance is involved. There would appear to be merely an exercise of a ministerial duty involved as an employee. Thus, it is my opinion, on the basis of the Platt case, *supra,* that there is no conflict between your membership in the Legislature and your holding the position of Chief Air Inspector, under the circumstances which you specify in your letter. Such office in my opinion is not a lucrative office under the state within the prohibition of Article 2, Section 9, but that the exercise of said power under said ordinance would be wholly municipal in its nature.

OFFICIAL OPINION NO. 12

March 2, 1953.

Hon. John A. Van Ness,
President Pro Tem,
Indiana State Senate,
State House,
Indianapolis, Indiana.

Dear Senator Van Ness:

Your letter of January 22, 1953 requesting an official opinion has been received, which letter is as follows:

> "I would appreciate having an official opinion from you as to whether there is anything in the statutes to prevent cities and towns from buying workmen's compensation insurance for firemen and policemen, where no other provision has been made, for injuries and medical care."

As a beginning premise in answering your question, I wish to refer to Opinions of the Attorney General 1944, p. 394, Opinion No. 89 and two basic propositions therein stated with reference to the expenditure of public funds by municipalities. This opinion first holds that the expenditure of public funds must be for a public purpose.

> State *ex rel.* Jackson v. Middleton (1939), 215 Ind. 219, 19 N. E. (2d) 470.

This Attorney General's opinion further holds that a municipal corporation can exercise only the powers expressly granted to it under the organic act by which it is created, those necessarily implied powers incident to the powers expressly granted and those powers essential to the declared objects and purposes of the corporation.

The following provision of the Indiana Acts are applicable:

Burns' 1933 (1952 Repl.) Volume 8, Part 1, Section 40-1701 (The Workmen's Compensation Act), same being Acts 1929, ch. 172, sec. 73, p. 536; Acts 1933, ch. 243, sec. 1, p. 1103.

> "In this act unless the context otherwise requires:
>
> "(a) 'Employer' shall include the state or any political division, any municipal corporation within the state, any individual, firm, association or corporation or the receiver or trustee of the same, or the legal representatives of a deceased person, using the services of another for pay. If the employer is insured it shall include his insurer so far as applicable.
>
> "(b) The term 'employe,' as used in this act shall be construed to include every person including a minor, in the service of another under any contract of hire or apprenticeship, written or implied, except one whose employment is both casual and not in the usual course of the trade, business, occupation or profession of the employer. * * *"

From an examination of the authorities, it has been held that firemen and policemen are employees and not public officers. In the case of City of Huntington v. Fisher (1941), 220 Ind. 83, 85, 40 N. E. (2d) 699, the court said:

> "Firemen and policemen are employees and not public officers."

Concerning the coverage of the Workmen's Compensation Act, Section 40-1202 of Burns' 1933 (1952 Repl.), Volume 8, Part 1, same being Acts 1929, ch. 172, sec. 2, p. 536; Acts 1937, ch. 214, sec. 7, p. 1067; Acts 1943, ch. 114, sec. 1, p. 363, the following statutory language is applicable:

> "From and after the taking effect of this act every employer and every employee, except as herein stated, shall be presumed to have accepted the provisions of this act, respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment, and shall be bound thereby, unless he is hereby authorized so to do and shall have given prior to any accident resulting in injury or death notice to the contrary in the manner herein provided. This act shall not apply to railroad employees engaged in train service, as engineers, firemen, conductor, brakemen, flagmen, baggagemen, or foremen in charge of yard engines and helpers assigned thereto. *This act shall not apply to employees of municipal corporations in this state who are members of the fire department or police department of any such municipality and who are also members of a firemen's pension fund or of a police pension fund.* (Acts 1929, ch. 172, sec. 2, p. 536; 1937, ch. 214, sec. 7, p. 1067; 1943, ch. 114, sec. 1, p. 363.)" (Our emphasis)

The italic part of the above section of the act was added in 1943. Prior to that time, police and firemen of towns and cities were under the provisions of the Workmen's Compensation Law and towns and cities could acquire workmen's compensation coverage for them. This is the effect of the case of the City of Huntington v. Fisher cited above.

The 1943 amendment above referred to changed this situation by removing towns and cities from the provision of the Workmen's Compensation Law where its policemen or firemen were members of a Firemen's Pension Fund or of a Policemen's Pension Fund. Therefore, since 1943, a town or city could not cover their police and firemen by workmen's com-

pensation if such firemen or policemen were members of such a pension fund, for they would not be under the Workmen's Compensation Law.

In this connection we call your attention to the Acts of 1905, ch. 129, as amended, the same being Burns' 1933 (1950 Repl.), Volume 9, Part 2, Section 48-6501 *et seq.* Under this act, cities of the first, second, third, and fourth classes maintaining a regularly organized and paid fire department are required to have a firemen's pension fund and cities of the fifth class have an option in regard thereto. This general rule has certain modifications in other provisions of the act.

We also call attention to Chapter 51 of the Acts of 1925, Burns' 1933 (1950 Repl.), Volume 9, Part 2, Section 48-6401 *et seq.*, relating to certain police pension funds. Under this act, all cities except cities of the first class are required to have a police pension fund, and cities of the first class are covered by another act. See Burns' 1933 (1950 Repl.), Volume 9, Part 2, Section 48-6419, same being section 1, ch. 154 of the Acts of 1941.

We find no provision requiring towns to have either a police or firemen's pension fund.

It should be noted that provisions have been made for members of volunteer fire departments, by making it mandatory for the city, town or township in which they serve to carry accident and disability insurance in an amount of $1,500.00 for each member. Burns' 1933 (1950 Repl.), Volume 9, Part 2, Sections 48-6138, 48-6141, same being the Acts of 1939, ch. 163, sec. 3; Acts 1941, ch. 196, sec. 1.

A provision for policemen and firemen to receive medical and surgical care during the period of recovery from an injury, illness or disease, as well as hospital and nursing benefits is found in Burns' 1933 (1950 Repl.), Volume 9, Part 2, Section 48-6155, same being sec. 1, ch. 71, of the Acts of 1941. Another provision makes it mandatory that a city carry this protection and payment therefor must be made from the general fund. Burns' 1933 (1950 Repl.), Volume 9, Part 2, Section 48-6156, same being sec. 2, ch. 71 of the Acts of 1941. Coverage under the provisions of police and firemen's pension funds, or workmen's compensation would be equivalent to the pro-

tection provided in Section 48-6155, *supra,* and greater because of weekly wage payments during period of disability under workmen's compensation. It is possible that the period of disability may exceed the maximum period allowed under workmen's compensation, and thus Section 48-6155, *supra,* would theoretically apply. However, I have been unable to find any cases on this particular point, but the case of City of Huntington v. Fisher (1941), 220 Ind. 83, 40 N. E. (2d) 699, and the case of Mullins v. Bollinger (1944), 115 Ind. App. 167, 55 N. E. (2d) 381, 56 N. E. (2d) 496, tend to indicate that such might be the basis of upholding such a construction.

From a consideration of the above, it is my opinion that a town may procure workmen's compensation for its firemen and policemen. Since the effective date of the 1943 amendment to the Workmen's Compensation Act above referred to, only those cities whose firemen and police are not members of a firemen's pension fund or of a police pension fund can acquire workmen's compensation insurance covering its firemen and police. As above pointed out, cities of the first, second, third and fourth class are required to have police pension funds and cities of the fifth class have an option in regard thereto.

This answers your question as it applies to cities, except it is necessary to determine in a city of the fifth class whether the particular city has or has not established a firemen's pension fund. It is our opinion that those cities and towns which either have or are required by law to have such a pension fund are not authorized to procure workmen's compensation insurance for the reason that the workmen's compensation laws are not applicable to them.

As pointed out above, Section 48-6138 of Burns', *supra,* does provide that it is mandatory for any city, town or township having a volunteer fire company(s) to procure insurance the provisions of which are found in Burns' 1933 (1950 Repl.), Volume 9, Part 2, Section 48-6139, same being sec. 4, ch. 163, of the Acts of 1939:

> "Each policy of insurance shall provide for the payment to any member of any such volunteer fire company who shall meet with an accident causing disability which shall prevent such member from pursuing his

usual vocation, provided such accident and injury was caused by and arose out of the duties of such member as a volunteer fireman, a weekly indemnity of not less than twenty-five dollars ($25.00) and that, during the first thirty (30) days after such injury or disability, such fireman shall be furnished free of charge, an attending physician and such surgical, hospital and nurse services and supplies as may be necessary. Such weekly payments shall continue as long as such disability shall continue, but the aggregate amount to be paid to or on behalf of any such member on account of any one injury or disability, shall not exceed fifteen hundred dollars ($1500). Every such policy of insurance shall also provide for the payment of a sum of not less than thirty-five hundred dollars ($3500) to the dependent or dependents of any such volunteer fireman in the event of the death of such volunteer fireman caused by an accident, injury, or injuries received by such volunteer fireman while engaged in the performance of his duties as such. Every such policy of insurance shall also provide for the payment of a sum of not less than thirty-five hundred dollars ($3500) to such volunteer fireman in the event that he becomes totally and permanently disabled by accident arising out of the performance of his duties as such volunteer fireman.

"The term 'dependent' as used in this act shall be construed to include the widow and all children under eighteen (18) years of age of such volunteer fireman; and in the event that any such fireman dies leaving no widow or no child under eighteen (18) years surviving, but leaving other persons wholly dependent upon him for support, such other persons shall in such event be entitled to the death benefit hereinbefore provided."

The payment for premiums must be made from the general fund in the case of a city or town, or the township fund, in the same manner as other lawful expenses in such city, town or township are paid, all of which is provided for in Section 48-6141 of Burns' 1933 (1950 Repl.), Volume 9, Part 2, same being sec. 6, ch. 163 of the Acts of 1939.

Your attention is further directed to Acts of 1941, ch. 71, sec. 1, Burns' 1933 (1950 Repl.), Volume 9, Part 2, Section 48-6155 by which it is provided that any city which maintains a paid fire department and police department shall pay for the care of any fireman or policeman who suffers injury or who contracts illness or disease in the performance of his duty as such fireman or policeman. This statute has been interpreted by the Attorney General in 1946, p. 246, Opinion No. 64 to authorize and empower cities to carry insurance on the liability created by said statute. The statute and opinion of the Attorney General above referred to applies to firemen and policemen who are paid by a city.

While there is no express statutory prohibition on the purchase of workmen's compensation insurance by a town or city, nevertheless this does not permit towns or cities to do what they have not been prohibited from doing. However, cities and towns have certain incidental implied powers which arise as a result of the express powers given by virtue of their existence.

It is a general rule that officers charged with the duty of caring for and managing public property, such as buildings, have the implied power to carry insurance. Our Indiana Appellate Court has adopted this rule. In the case of Clark School Twp. v. Home Insurance & Trust Company (1898), 20 Ind. App. 543, at page 547, 51 N. E. 107, the court said:

> "We are of the opinion that, under the statutory provisions placing upon the trustee the duty of caring for and managing the school property, he has such implied authority, that, in the exercise of his discretion, he may make reasonable expenditures from the special school revenue by way of procuring insurance on such property against fire."

Also see:

100 A. L. R. 581 (Note page 600);
14 Am. Jur., Counties, Sec. 38;
43 Am. Jur., Public Officers, Sec. 307;
1946 O. A. G. No. 64.

As has often been stated, a city possesses many miscellaneous implied powers which arise as the result of a statutory

enactment or of an inherent power. See McQuillen on Municipal Corporations, 2nd Edition, Revised Volume 1, Section 384.

Therefore, bearing in mind the above statutory provisions, it is my opinion that if it is not within the exceptions previously stated there is nothing in the statutes preventing a city or town from buying workmen's compensation insurance. Careful examination should be made by each respective city or town of the coverage imposed or permitted by law, before expending monies to insure a liability imposed, either by statute or by virtue of a legal relationship of employee-employer under the terms of Workmen's Compensation Act as amended.

OFFICIAL OPINION NO. 13

March 3, 1953.

Mr. Harry E. Wells,
Insurance Commissioner,
Department of Insurance,
State House,
Indianapolis, Indiana.

Dear Sir:

I have your request for an official opinion as set out in your letter which is as follows:

> "There are several insurance companies doing business in Indiana which were organized under a law passed in 1897, being Chapter 195, Acts of 1897 (Sections 39-421 to 39-446, Indiana Statutes Annotated), authorizing the organization of the companies 'on the assessment plan.' By Section 272 of the Indiana Insurance Law of 1935 (Chapter 162, Acts 1935, Section 39-5025, Indiana Statutes Annotated), it was expressly provided that from and after the taking effect of that Act, no company shall be organized or incorporated under any law of this state to make and do an insurance business on the assessment plan.
>
> "Section 27 of the Indiana Insurance Law of 1935 (Chapter 163, Acts 1935, Section 39-3324, Indiana Statutes Annotated) provides as follows: