

VOLUME NO. 33

Opinion No. 11

FIRE DEPARTMENT RELIEF ASSOCIATION; computation of time necessary for firemen retirement and service pensions. Section 11-1925, R.C.M. 1947.

- HELD:**
- 1. A fully paid fireman who is not working in the department during the time of a disability is not on active duty and does not accrue time toward the necessary 20 years of active duty for service pension.**
 - 2. The time to be applied toward the 20-year requirement for retirement is computed from the first day that the fireman is hired.**

November 25, 1969

Mr. Ronald R. Brown
Assistant State Fire Marshal
Capitol Building
Helena, Montana 59601

Dear Mr. Brown:

You have requested my opinion on the following questions:

1. Does the time that a fully paid fireman is temporarily disabled and not working in the department count toward the 20-year requirement for a service pension?
2. Does a fireman's time toward the 20-year requirement for a service pension begin the day he is hired or the day he is appointed after a six-month probation period?

Section 11-1925, Revised Codes of Montana, 1947, states in part:

“Each and every fire department relief association organized and existing under the laws of this state shall pay to each of its members who elect to retire from active service after having completed twenty (20) years or more of **active duty** and has reached the age of fifty (50) years as a fully paid member of a paid, or partly paid and partly volunteer fire department . . . , out of any money in the association's ‘disability and pension fund,’ a ‘service pension’” (Emphasis supplied).

The above cited statute establishes two requirements that must be met before a service pension can be paid. A member of the department must have completed at least twenty years of active duty and reached fifty years of age before he qualifies for the service pension. In Vol. 26, Opinions of the Attorney General, opinion no. 91, section 11-1925, R.C.M. 1947, was construed. It was determined in that opinion that, “These two qualifications are separately stated in section 11-1925, supra, and both conditions must be met.” The same conclusion was reached by the Supreme Court of Appeals of West Virginia under a similar statute in **State v. The Board of Trustees of the Policemen's Pension or Relief Fund of the City of Bluefield**, 135 S.E.2d 262 (1964) (W. Vir.)

The answer to your first question is found in the interpretation of the term “active duty” as used in the above cited statute. Although the Montana Supreme Court has not defined the term “active duty”, its meaning and interpretation have been considered by other states. In **State v. The Board of Trustees of the Firemen's Pension Fund of the City of Muncie**, 194 N.E.2d 727, (1963) (Ind.), a member of the fire department was retired because of a disability. The court ruled that the time which elapsed during a disability retirement could not be

computed as time toward a voluntary retirement under a separate statute. The court stated at page 732:

“During this period of time, appellant’s husband was not a member of the ‘paid fire force’, he was not in ‘such service,’ as the term is used in the statute, . . .”

State v. Bachrach, et al., Trustees of Firemen’s Relief and Pension Fund of City of Cincinnati, 195 N.E.2d 803, (1964) (Ohio) involved a person attempting to qualify for a firemen’s pension fund after working 21 years of active duty out of the 25 years required by state law. The years other than those on active duty had been spent on a leave of absence. The court construed and defined the term “active service” at page 805 of the opinion: “The phrase, ‘active service’, connotes an actual participation in the employer’s business . . .”

Hence, a person who is not working in the department during the time of disability is not on active duty, and does not accrue time toward the necessary twenty years of active duty for service pension.

The answer to the second question is similar to the first, in that section 11-1925, R.C.M. 1947, speaks only in terms of years of active duty and not in terms of elapsed time from the date of appointment after the probationary period to date of retirement. Hence, the time to be applied toward the twenty-year requirement for retirement is computed from the first day that the fireman begins “actually participating in the business of the employer”, and probationary period is active duty. **State v. Bachrach, et al.**, cited supra. In this case, the time would begin on the date that the member is hired.

THEREFORE, it is my opinion that:

1. A fully paid fireman who is not working in the department during the time of a disability is not on active duty and does not accrue time toward the necessary twenty years of active duty for service pension during such time of disability, and
2. The time to be applied toward the twenty-year requirement for retirement is computed from the first day that the fireman is hired.

Very truly yours,

ROBERT L. WOODAHL
Attorney General