

Opinion No. 67-42

March 13, 1967

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Honorable Frederick B. Howden. III Assistant District Attorney P.O. Box 495 Belen, New Mexico

QUESTION

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1. Are volunteer firemen, from the City of Belen, immune from liability for their negligent acts in answering fire calls and performing related functions as firemen for the city.
2. Is the City liable for their torts committed in such circumstances.

CONCLUSION

1. Yes, so long as such acts are not ministerial in nature.
2. No, in the absence of liability insurance to cover the legal damages sustained.

OPINION

{*54} ANALYSIS

The immunity of the City of Belen from suit and subsequent liability for the negligent acts of its firemen in the performance of their duties, is established under the holding of a recent New Mexico case, **Andrade v. City of Albuquerque**, 74 N.M. 534, 537 395 P.2d 597 (1964). This was an action against the City of Albuquerque {*55} and its fire department employee for injuries received by the Plaintiff who was struck on the head by a fire alarm cable due to faulty installation by said employee. The Supreme Court ruled the alleged negligence of the employee came under the protection of the Doctrine of Sovereign Immunity. The Court held that:

The authorities are in almost universal accord with the above proposition that the maintenance and operation of a municipal fire department is a governmental function and that no municipal liability arises for negligence in connection therewith. McQuillin, Municipal Corporation, 3rd Ed., Vol. 18, § 53.52, p. 270; Anno. 84 A.L.R.

We believe this same protection would be afforded by the court to your volunteer firemen if not under the case cited above, then under the principles and authorities cited in Attorney General Opinion 66-63. (Copy of Opinion attached)

However, we invite your attention to Sections 5-6-19 through 5-6-22, N.M.S.A., 1953 Compilation as amended which waives the Doctrine of Sovereign Immunity to the extent of any liability insurance which a city may have in order to pay legal damages incurred by reason of its negligent acts. The procurement of this insurance by the city is not mandatory. The purchase of any amount of liability insurance coverages for its employees is within the discretion of the city officials, but we have consistently recommended such purchase whenever practicable, Opinion No. 66-63, supra.

In conclusion, it is specifically noted that this opinion is confined to negligent acts occurring in the performance of official functions and duties of volunteer municipal firemen. This ruling is not meant to include the well recognized exception to the Doctrine of Sovereign Immunity. The exception concerns individual negligence in the performance of acts which are ministerial in nature as noted in the **Andrade** case at page 539 of the New Mexico Reporter. For our views concerning that exception we further refer you to the enclosed Attorney General Opinion No. 66-63.

By: George Richard Schmitt

Assistant Attorney General