THOMAS P. DiNAPOLI
COMPTROLLER

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER
110 STATE STREET
ALBANY, NEW YORK 12236

GABRIEL F DEYO
DEPUTY COMPTROLLER
DIVISION OF LOCAL GOVERNMENT
AND SCHOOL ACCOUNTABILITY
Tel: (518) 474-4037 Fax: (518) 486-6479

January 2018

Phillip Vogt, President
Members of the Board
Syracuse Fire Department Association Inc.
PO Box 11129
Syracuse, NY 13218

Report Number: S9-17-10

Dear President Vogt and Members of the Board:

The Office of the State Comptroller's goals include enabling and encouraging entities that receive and disburse foreign fire insurance (FFI) tax money to properly account for, use and protect this money.

In accordance with these goals, we conducted an audit of FFI tax money in six entities throughout New York State. The objectives of our audit were to determine whether FFI tax money was spent in accordance with special act legislation, city charters or other applicable law. Our objectives also included whether those disbursements were properly supported and accounted for separately and whether the Treasurer, or if there is none, the chief fiscal officer of the entity receiving and disbursing FFI tax money, prepared an annual report on revenue and expenditures of FFI tax money and filed it with the New York State Office of the State Comptroller (OSC), in accordance with General Municipal Law (GML). We included the Syracuse Fire Department Association Inc. (Association) in this audit. Within the scope of this audit, we examined FFI tax money received and used for the period January 1, 2014 through August 26, 2016. This audit was conducted pursuant to the State Comptroller's authority as set forth in Article V, Section 1 of the State Constitution and article 3, Section 33-a[1] of GML.

This report of examination letter contains our findings and recommendations specific to the Association. We discussed the findings and recommendations with officials and considered their comments, which appear in Appendix A, in preparing this report. Except as indicated in Appendix A, officials generally agreed with our recommendations. Appendix B includes our comments on issues raised in the Association's response. At the completion of our audit of the FFI tax money in the six entities, we prepared a global report that summarizes the significant issues we identified at all of the entities audited.

[1] This section generally authorizes the Comptroller to inspect and examine the records and accounts of any entity receiving and disbursing foreign fire insurance tax money, with respect to funds received after January 1, 1976.

Summary of Findings

FFI tax money, totaling over $700,000, was not always used in accordance with Insurance Law. While the Association budgets its use of FFI tax money each year, Association officials were unable to provide documentation that the expenditure of FFI tax money was approved by the membership at the Association's annual meeting.

We tested 33 disbursements, totaling $573,648. Of these, nine payments totaling $542,826 did not have any documentation.[2] These nine payments were made to four payees which served as "third party" custodians of the FFI tax money that subsequently disbursed the funds for various purposes. This custodial transfer of FFI funds by the Association to third parties is inconsistent with Insurance Law. Further, one of the payees disbursed the FFI tax money as cash payments to individual retirees. Individual City firefighters, in certain instances, may have received as much as $27,000 from FFI tax money upon retirement, with payments totaling $610,848 to 33 individuals during our audit period. We question the propriety of using FFI tax money for such a purpose as we believe the payments are not permitted under Insurance Law. We also found that three payments, totaling $1,322 (net of reimbursement), were used for gifts (based on years of service) that were not nominal in value, and therefore were inconsistent with Insurance Law.

In addition, the Association's Treasurer did not submit timely annual reports to the State Comptroller outlining receipts, expenditures and balances for both years in our audit period (2014 and 2015).

Background and Methodology

The Association is a not-for-profit corporation located in the City of Syracuse, Onondaga County. It is comprised of paid firefighters from the City of Syracuse Fire Department, which covers 25 square miles and serves approximately 144,000 residents. All active members of the City of Syracuse Fire Department are entitled to membership in the Association. The Association is governed by a nine-member Executive Board which includes a President, Vice-President, Secretary, Treasurer and five Directors. According to the Association's By-Laws, one purpose of establishing the Association was to receive and distribute shares of FFI tax proceeds generated by Insurance Law Sections 9104 and 9105 for the benefit of its members.[3] It is funded almost exclusively from the FFI tax money, which for the calendar years 2014 through 2016 totaled $952,719.[4]

---

[2] Association officials told us that two of the payments, relating to the supplemental retirement fund (discussed in more detail later in the report), were budgeted based on the Association By-Laws.

[3] See By-Laws of the Syracuse Fire Department Association, Inc., revised 1-2017.

[4] $317,093 in 2014, $315,823 in 2015 and $319,803 in 2016

Unless a special law enacted by the State Legislature or a pre-1989 local law provides otherwise, the distribution and use of FFI tax money is governed by Insurance Law Sections 9104 and 9105.[5] In general, Insurance Law provides that the treasurer or other fiscal officer of the fire department affording fire protection coverage to the insured property receives the FFI tax money. If the fire department does not have a treasurer or other fiscal officer, then the FFI tax money is to be paid to the fiscal officer of the authorities having jurisdiction or control of the fire department.[6] Unless provided otherwise by a special act, the FFI tax money may be spent for any purpose which the membership of the fire department or company determine to be for the benefit of the fire department or company, provided the expenditure is not illegal or contrary to public policy. It has been our view that the determination to expend FFI tax money be made by a majority vote of the membership.[7]

In the case of the City of Syracuse, special State legislation enacted in 1905 generally provided that FFI tax money received by the City be paid to the City's Comptroller as treasurer of the "firemen's pension fund."[8] However, notwithstanding this special State legislation, as a result of 1991 litigation, members of the City Firefighters' Union (paid firefighters) are entitled to share in the distribution of the FFI tax money.[9] Subsequent to the litigation, the City and Union entered into a "Stipulation of Settlement and Discontinuance" Agreement (Stipulation Agreement). According to the Stipulation Agreement, the balance of the FFI tax money, over a period of time, is to be paid to the Association.[10] It also appears that the FFI tax money received by the Association is to be used in accordance with Sections 9104 and 9105 of Insurance Law.[11]

To achieve our audit objectives, we conducted interviews with officials, and reviewed policies/procedures, agreements and annual reports. We also reviewed documentation maintained to support disbursements for the records we sampled. We conducted this performance audit in accordance with generally accepted government auditing standards (GAGAS).

---

[5] Insurance Law Sections 9104 and 9105 impose a tax at the rate of 2 percent on the premiums of fire insurance policies written by certain out-of-state insurers. Insurance Law Section 9104 provides that the FFI tax imposed "be paid by every foreign and alien fire insurance corporation, association or individuals which insure property against loss or damage by fire, except foreign mutual fire insurance companies…." Insurance Law Section 9105 provides that the FFI tax imposed be paid by every foreign mutual fire insurance company or association authorized to do business in this State. In general, the FFI taxes imposed by Insurance Law are paid by the Insurer to the New York State Department of Financial Services, which, in turn, distributes the proceeds to the proper local recipients. According to the Department of Financial Services website, recipients of FFI money include fire departments, fire companies, benevolent associations and the Firemen's Association of the State of New York (FASNY).

[6] In a multi-company fire department, the treasurer or fiscal officer receiving the FFI tax money must, in turn, distribute the amount received to the companies constituting the fire department, proportionate to the number of active members in each fire company.

[7] The Stipulation Agreement, discussed later in the Report, contains similar general requirements.

[8] The Special Act Legislation set forth in Sections 6 and 7 of Chapter 683 of the Laws of 1905 was later codified as Sections 13-58 and 13-59 of the Syracuse "Code of Ordinances."

[9] See Syracuse Firefighters Association Local 280 vs Firemen's Retirement Fund of the City of Syracuse, dated July 9, 1991 and Syracuse Firefighters Association Local 280, supra, Index No. 89/5767, order dated July 25, 1991.

[10] It is not clear whether the Stipulation Agreement was approved or ordered by the Court, or otherwise has binding legal effect. For purposes of this report, however, we have assumed the propriety of custody of FFI tax money by the Association.

[11] The Court Order did not address how the FFI tax money may be used by the paid firefighters. Therefore, in the absence of a special act or local law addressing the issue, it is our view that the FFI tax money received by the Association be used in accordance with Sections 9104 and 9105 of Insurance Law.

More information on the standards and the methodology used in performing this audit are included in Appendix C of this report. Unless otherwise indicated in this report, samples for testing were selected based on professional judgment, as it was not the intent to project the results onto the entire population. Where applicable, information is presented concerning the value and/or size of the relevant population and the sample selected for examination.

Audit Results

Cash Disbursements

Under the Stipulation Agreement, the Association generally disburses FFI tax money for "expenditures" only after a majority of the membership approves such expenditures by vote at a meeting. The Stipulation Agreement, however, appears to provide an exception from the majority vote requirement for certain administrative expenditures.[12] Such an exception is inconsistent with Insurance Law, as Insurance Law provides that all FFI tax money be used for the benefit of the fire department or company, as determined by the membership. It has been our view that the determination to expend FFI tax money be made by a majority vote of the membership. Figure 1 shows the types of reported FFI disbursements by reported classification.

Figure 1: Disbursements			
Disbursement Classification	**2014**	**2015**	**2016[a]**
Functions	$47,500	$47,500	$47,500
Calendars	$2,018	$1,919	$2,013
Explorer Post	$5,000	$0	$2,500
Station Subsidies	$45,790	$42,945	$13,555
Retirement Fund	$195,805	$195,021	$0
CISM [Critical Incident Stress Management]	$4,500	$0	$1,500
Service Awards	$1,254	$2,658	$282
Total Benefits to Members	**$301,867**	**$290,043**	**$67,350**
Salaries	$9,600	$9,600	$4,800
Payroll Taxes	$1,488	$1,613	$890
Total Salaries and Taxes	**$11,088**	**$11,213**	**$5,690**
Administrative Expenses	$1,236	$1,294	$686
Professional Services	$4,889	$3,721	$2,779
Total Professional and Administrative	**$6,125**	**$5,015**	**$3,465**
Total Disbursements of FFI	**$319,080**	**$306,271**	**$76,505**
[a] January 1 through July 31, 2016			

The Association disbursed FFI tax money totaling $701,857 for the period January 1, 2014 through July 31, 2016. The Association uses an annual "budget document" for planning its use of FFI tax money. Association officials told us that the amounts were budgeted based on available FFI tax money, historical use of the FFI tax money and future need, except for administrative expenses

[12] Stipulation of Settlement and Discontinuance Section (6)(f)

and supplemental retirement fund contributions that are based on the Stipulation Agreement and the Association's By-Laws, respectively.

We selected 33 disbursements,[13] totaling $573,648, to determine whether the disbursements were appropriate and properly supported and expenditures were reported accurately. The budgeted expenditures include line items such as "administration" (salaries and taxes), "supplemental retirement," "functions," "professional fees" (which included expenses for services of an accountant and certain insurance expenses), service awards (gifts based on longevity), "calendars," "crisis management intervention team" (training), "catastrophic," "Red Cross DAT" [Disaster Action Team] (beverages used at fires), "station subsidies" (which included items of comfort and convenience, such as coffees, condiments, etc.), "historic" and "miscellaneous." Association officials told us that all of the disbursements were submitted to the Association's membership for approval in its annual "budget document"; however, Association officials could not provide documented approval by the membership.

Nine of the disbursements tested, totaling $542,826, did not have any documentation (Figure 2).

Figure 2: Unsupported Disbursements by Reported Expenditure

Description	2014	2015	2016[a]	Totals
Functions	$47,500	$47,500	$47,500	$142,500
Explorer Post	$2,500	$0	$2,500	$5,000
Retirement Fund	$195,805	$195,021	$0	$390,826
CISM	$3,000	$0	$1,500	$4,500
Total	**$248,805**	**$242,521**	**$51,500**	**$542,826**

[a] January 1 through July 31, 2016

These nine disbursements were made to four payees. According to Association officials, the annual amount budgeted was paid to the four payees with no invoices required before or after payment was made by the Association. Furthermore, although the Stipulation Agreement authorizes expenditures of the FFI tax money by the Association, the Stipulation Agreement does not provide for the Association to transfer custody of the FFI tax money to a third party for subsequent disbursement by that third party. We contacted each payee and reviewed available documentation to determine the use of the FFI tax money distributed by the Association to the third party, and whether the classification reported by the Association was accurate. We reconciled most of the disbursements to the reported expenditure classification for these nine disbursements based on the payees' records. However, in some instances we were unable to verify, due to a lack of documentation, that the FFI tax money distributed by the Association to the third party was expended by the third party in accordance with Insurance Law. Furthermore, one of the third parties appeared to make the FFI tax money available for the personal use of individual firefighters. In that case, we question the propriety of using the FFI tax money for such a purpose.

<u>Functions</u> – FFI tax money totaling $142,500 was budgeted by the Association for annual events for firefighters during our audit period. Association officials told us that the membership is invited to participate in the annual events, planned by Local Union 280 (Union), and a portion of the

[13] See Appendix C for methodology.

expense is paid by FFI tax money. During our audit period, the Association paid $47,500 annually to the Union without keeping itemized records of the purpose. When contacted, the Union provided us with invoices that exceeded the total paid by the Association.

Explorer Post – The Association told us that it provides payment for beverages at active fire scenes under the "Explorer Post" program. The Association paid the budgeted amount totaling $5,000 during the audit period and budgets for this expense based on historical amounts. When needed, an individual on behalf of the Explorer Post program uses the FFI tax money for the purchase of beverages used at fire scenes and for an annual wholesale store membership. Upon our request, records were provided for beverage purchases and the store membership in 2015 and 2016, totaling $1,281. However, the records reviewed did not show purpose or proof of delivery.

CISM – The Critical Incident Stress Management team provides counseling services to first responders. The Association paid an average of $1,500 per year to CISM during the audit period based on a budgeted amount. The CISM representative provided records showing the representative disbursed over $4,500 for related training instruction. The costs associated with CISM training in 2014 and 2015 included instructor fees, course material and food. These were tracked on a computerized worksheet.

The Association's transfer of FFI tax money to these three payees (functions, Explorer Post and CISM) is inconsistent with Insurance Law. Annual expenditures for membership events, beverages at fire scenes and counseling training appear to be expenditures that would benefit the membership; however, the Association should ensure that it maintains records to document that the membership approved such expenditures, and payment should be reviewed for compliance with Insurance Law.

Retirement Fund – The Association made payments to The Syracuse Fire Department Association Supplemental Retirement Fund, Inc. (Supplemental Retirement Fund) of over $195,000 per year in 2014 and 2015. This fund is used to make one-time cash payments to individual retired firefighters or the families of deceased firefighters. However – besides the questionable propriety of the Association's custodial transfer of FFI tax money to a third party for disbursement – we have long expressed the view that Sections 9104 and 9105 of Insurance Law does not authorize a fire department or company to make FFI tax money available for the personal use of individual firefighters.[14] As a result, we question the appropriateness of the use of FFI tax money paid, totaling $390,826, to the Supplemental Retirement Fund.

Officials stated that the Association's By-Laws establish the disbursement to the Supplemental Retirement Fund at 65 percent of the total FFI tax money received by the Association. A representative of the Supplemental Retirement Fund provided us with records that showed payments, totaling $610,848, to 33 individuals[15] in our audit period. We found that individual City firefighters were paid as much as $27,000 upon retirement from the department. As these cash payments appear to be for the personal use of the individual firefighter, rather than for the benefit of the membership, we question the propriety of using FFI money for this purpose.

[14] See e.g. OSC Opn No. 2000-6 and citations therein.

[15] We found in one instance that the payee was paid fees from the Supplemental Retirement Fund for CPA service of $1,325, which were unrelated to individual firefighters receiving cash payments upon retirement.

We also found three disbursements, totaling $1,322 (net of reimbursement), that were for the purchase of gifts such as rings and watches for individual members based on their years of service. The Association making gifts to individual members that are not nominal in value[16] is inconsistent with Insurance Law.

As we shared our findings with Association officials during the audit, they told us they were following past practices and were not aware that the manner in which FFI tax money was expended by the Association, in some instances, may have been inconsistent with Insurance Law. Further, they did not know that records were not maintained of votes or attendance at meetings until requested for review. However, this lack of knowledge resulted in disbursement of FFI funds in a manner that appears to be inconsistent with Insurance Law.

Annual Financial Report

GML requires the treasurers of organizations that receive and disburse FFI tax money to file with OSC an annual report of the receipts, expenditures and balances related to such money.

We found the Treasurer submitted reports to OSC after the March 1 deadline, for calendar years 2014 and 2015, on April 20, 2015 and March 15, 2016, respectively. By not filing the annual report timely, the Association was not in accordance with this statutory requirement. This required filing helps ensure the transparency of the Association's use of the FFI tax money.

Recommendations

The Board should:

1. Maintain records that show membership approval of FFI expenditures, and ensure that all FFI tax money is disbursed in accordance with Insurance Law.

2. Maintain supporting documentation of FFI expenditures.

3. Consult with legal counsel, as appropriate, concerning whether the Association should recoup FFI tax money transferred by the Association to, and currently held in, the Supplemental Retirement Fund if such FFI tax money is to be disbursed for an inappropriate use under Insurance Law.

The Treasurer should:

4. Report receipts, expenditures and balances related to FFI tax money to the State Comptroller's office by the annual statutory deadline date.

The Board of the Syracuse Fire Department Association Inc. has the responsibility to initiate corrective action. A written corrective action plan (CAP) that addresses the findings and recommendations in this report should be prepared and forwarded to our office within 90 days. We encourage the Board to make this plan available for public review in the Secretary's office.

[16] Association officials told us that the member is allowed $200 for the gift; any value over that amount is to be reimbursed by the member.

We thank the officials of the Syracuse Fire Department Association Inc. for the courtesies and cooperation extended to our auditors during this audit.

Sincerely,

Gabriel F. Deyo
Deputy Comptroller

APPENDIX A

RESPONSE FROM ASSOCIATION OFFICIALS

The Syracuse Fire Department Association Inc. officials' response to this audit can be found on the following pages.

The Association's response refers to two attachments. Since the purpose of these attachments is clear in the context of the response letter, they are not included here.

Bernard T. King
Charles E. Blitman*
Jules L. Smith
James R. LaVaute
Donald D. Oliver
Jennifer A. Clark
Monica R. Heath
Kenneth L. Wagner
Timothy R. Bauman
Nathaniel G. Lambright
Daniel E. Kornfeld⌂◊
Daniel R. Brice
Jonathan M. Cerrito∆

Ginger B. LaChapelle◊
Brian J. LaClair
Bryan T. Arnault*

Michael R. Daum**
Nolan J. Lafler

* Also admitted in MA
⌂ Also admitted in MD
∆ Also admitted in CT
◊ Also admitted in DC
** Also admitted in NJ

Blitman&King LLP
Attorneys and Counselors at Law
Syracuse • Rochester • New York • Albany
bklawyers.com

Franklin Center, Suite 300
443 North Franklin Street
Syracuse, NY 13204-5412
Phone: 315.422.7111
Fax: 315.471.2623

Kelly L. Cook, CEBS
Leslie A. DuMond, CEBS
Marlene G. Naistadt, MBA

Nathan H. Blitman
(1909-1990)

November 30, 2017

Ann C. Singer, Chief Examiner
OSC
State Office Building, Suite 1702
44 Hawley Street
Binghamton, NY 13901-4417

Re: Syracuse Fire Department Association

Dear Ms. Singer:

We represent the Syracuse Fire Department Association Inc. ("SFDA"). We are writing this letter as a written response to the draft Office of the State Comptroller ("OSC") Audit dated October 23, 2017. We agree with the majority of the report's conclusions and recommendations and look forward to complying with them with one exception. We disagree with that part of the audit's conclusions that foreign fire insurance moneys ("FFI") may not be used to make payments to the Syracuse Fire Department Association Supplemental Retirement Fund, Inc. ("Supplemental Retirement Fund") which then makes a one-time cash payment to individual retired or disabled firefighters or the families of deceased firefighters (the "one-time payments"). Specifically, we disagree with your conclusion that the one-time payments are not lawful payments for the benefit of the membership under the Insurance Law.

Insurance Law §§ 9104 and 9015 provide for use of FFI for the benefit of the "fire department." It has long been the OSC's position that FFI may be expended for any purpose, other than an illegal purpose or purpose contrary to public policy, that the members of the fire department determine to be for the use and benefit of the department. OSC Opn. 2002-13. The Court of Appeals has held in Trustees of the Exempt Firemen's Benevolent Fund of the City of New York v. Roome, 93 NY 313 (1883) that "[t]he appropriation was to the fire department. What use they would make of it – to what purpose apply it – was left to them to determine where they had not already determined." Other Courts have held similarly that the recipient has discretion to disburse the funds consistent with purposes of the organization. Watt v. Richardson, 6 A.D.3d 1117 (4th Dep't 2004). In this spirit, OSC has opined that it takes a "very liberal position with respect to the purposes for which such moneys may be expended." OSC Opn. 82-10. The OSC's liberal approach has authorized expenditures for things such as sports teams (billiards, bowling and softball), clothing, real property, legal fees, publications, athletic

{B0021958.1}

and fitness equipment, fundraising, appliances, parties and social functions for both members and non-members, computers, and remodeling and the purchase of fire equipment provided it is not compelled to do so by the employer. OSC Opn. 2002-13; OSC Opn. 01-6; OSC Opn. 97-20; OSC Opn. 89-16; OSC Opn. 82-334; OSC Opn. 82-10; OSC Opn. 81-328; OSC Opn. 81-146; OSC Opn. 80-536; OSC Opn. 80-506; OSC Opn. 80-79; OSC Opn. 79-814; OSC Opn. 79-303. Of additional relevance, OSC has authorized expenditures of FFI for accident insurance, health benefits, and for death benefits and life insurance for members and retired members and their families. OSC 91-59; OSC Opn. 83-120; OSC 82-356; OSC 80-119; OSC 78-401; OSC Opn. 80-625; OSC Opn. 78-619; 5 OSC Opn. 537-1949; 3 OSC Opn. 204-1947.

The audit cites to OSC Opn. 2000-6 (and the cases cited therein) in support of the conclusion that the one-time payments are not authorized under Insurance Law §§ 9104 and 9105 because, the draft opines, it would be tantamount to providing FFI for the personal use of individual firefighters rather than the benefit of the membership. OSC Opn. 2000-6 opined that FFI could not be used to support a length of service award program ("LOSAP") established by a village for the volunteer firefighters. Relying on Wilcox v. Schenck, 52 A.D.2d 349 (3d Dep't 1976), OSC Opn. 1987-88, and OSC Opn. 1982-10, the OSC opined that the FFI could not be used to fund the village's LOSAP program because this would be a direct cash payment to firefighters and because "the Village may not compel the use of foreign fire insurance tax moneys to fund the village's cost of operating a service award program." It is respectfully submitted that the OSC has in each of these opinions improperly interpreted Wilcox and the Insurance Law and that this issue should be revisited with the one-time payments made by the Supplemental Retirement Fund on the SFDA's behalf.

In Wilcox, the Appellate Division, Third Department reviewed a dispute brought by paid firefighters against three volunteer fire companies seeking a declaration that the paid firefighters were entitled to participate in the distribution of the funds together with the volunteer fire companies.[1] Id. at 350. The dispute did not concern in any way the propriety of the usage of the distribution by the fire companies, as was later addressed in MacIsaac v. Poughkeepsie, 158 A.D.2d 140, at 142 (3d Dep't 1990). The court ruled that the FFI is to be "for the use and benefit of the Fire Department of said village which is hereby declared to consist of paid firemen as well as the active and participating members of the three volunteer companies...." Id. at 351. The court held that the "funds as such are not available for the personal use of either the paid or volunteer fireman." Id. This statement was clearly not made in the context of a dispute over the usage of FFI but simply in support of the court's ruling that

[1] The great majority of litigation involving FFI, including litigation brought by our office, involves disputes between paid professional firefighters and volunteers when the paid firefighters are not provided said distributions. There have not been the same level of court activity involving department's expenditure of FFI.

the volunteer firefighters cannot be prioritized for distribution to the exclusion of the paid firefighters. This dicta from a lower court opinion and cited by the appellate court, however, has taken on a life of its own by the OSC. The OSC has followed this dicta and repeatedly issued opinions that certain direct payments to members violate the Insurance Law. The OSC has opined that direct payments to members not attending parties, OSC Opn. 1982-10, and for interest-free loans to firemen in connection with their personal purchase of firefighting equipment or clothing violates the Insurance Law. OSC Opn. 1987-88. Wilcox has also been followed more recently in OSC Opn. 2004-5 where the OSC opined that the FFI could not be used to purchase annuities for members.

Unlike Wilcox which involved the distribution of the FFI to certain companies within a department, in MacIsaac v. Poughkeepsie, the Appellate Division, Third Department actually addressed the issue of the usage of FFI proceeds when the city passed a local law requiring the proceeds to be used for the acquisition, construction and maintenance of a firehouse and the purchase and care of the requesting vehicles and equipment. MacIsaac, at 140-141. There, the court held that the monies were not intended to be used for general municipal charges such as the construction, maintenance and repair of firehouses and equipment when those decisions were required by municipality. Id. at 141. Instead, the court held that the employer's requirement that monies be spent in a certain way violates the Insurance Law and that "it has been clearly established that the tax proceeds are generated by Insurance Law §§ 9104 and 9015 are intended for the personal use and benefit of municipal fire department members * * *." Id. MacIsaac remains good law although the quoted section above has been questioned by OSC.

See Note 1 Page 14

Here, all uniformed members of the Syracuse Fire Department ("Department") are automatically members of the SFDA. See SFDA By-Laws attached as "Exh. A." Sixty-five percent of all FFI are paid to the Supplemental Retirement Fund pursuant to the SFDA's By-Laws to be used to pay supplemental retirement benefits to retiring members under an employee pension plan. The Supplemental Retirement Fund was therefore created for the sole purpose of providing a one-time case benefit which was originally acquired from FFI and investments related thereto to members of the SFDA upon their retirement or other qualifying event (disability or death). See Supplemental Retirement Fund By-Laws attached as "Exh. B." It is submitted that these distributions are expended for a legal purpose which was determined by the members to be for the use and benefit of the Department's members. These expenditures are similar in nature to expenditures of FFI for accident insurance, health benefits, death benefits and life insurance for members and retired members and their families that OSC has previously found consistent with the Insurance Law. In all of those types of cases the individual payments would be made to a member or the family of a member. Further, unlike expenditures for sports or social functions which many members might not participate in and which also provide benefits to non-department members, the one-time payments will benefit all members who meet the requisite years of service or that discontinue service due to a death or disability. There can be no doubt that a retirement benefit that all members receive is a real, substantive and meaningful benefit to the membership especially when compared to billiards, t-shirts, alcohol, parties, televisions and appliances which are of questionable value to the entire membership. To be blunt, OSC must introduce some common-sense into its analysis of the one-time payments.

Further, it is submitted that Wilcox was not in any way intended to address the issue of retirement benefits being provided from FFI. Indeed, the dicta relied on by previous OSC opinions was never meant to control future distribution of FFI in situations where virtually all members would benefit from the majority-approved expenditure of the one-time payment. Again, the dicta was meant to quell any dispute that certain volunteer companies were entitled to the moneys over a paid professional company. Further, the Appellate Division's ruling in MacIsaac addresses the spirit and intent of the Insurance Law with respect to the FFI distribution and it clearly supports the distribution of the FFI for the one-time payment. To date, the issue of whether pension payments could be proper expenditures under the Insurance Law has not been litigated, but if it were to be, the SFDA believes the one-time payments would be found to be lawful.

Therefore, based on all of the reasons and legal authorities cited herein, we respectfully request that the draft audit's findings be modified to accept the distribution of the FFI for the one-time payment.

Please contact me with any questions or concerns.

Very truly yours,

BLITMAN & KING LLP

Nathaniel G. Lambright

NGL:jas

cc: Phillip Vogt, President
Syracuse Fire Department Association

APPENDIX B

OSC COMMENT ON THE ASSOCIATION'S RESPONSE

Note 1

Our Legal staff advises us that they fully considered the MacIsaac case with respect to whether FFI tax money may be expended for the personal use and benefit of the fire department members, in connection with OSC Opn No. 2000-6, Footnote 3. In the absence of any subsequent judicial decisions or statutory amendments contrary to the views expressed in that Footnote, those views remain unchanged. Moreover, the court in MacIsaac noted that, in amending Insurance Law Sections 9104 and 9105 in 1988, there was no indication of any intent to alter the purpose for which the tax proceeds could be expended. This suggests the court recognizes that our longstanding pre-1988 view that Insurance Law Sections 9104 and 9105 did not authorize direct cash payments to firefighters (e.g., OSC Opn Nos. 87-88, 82-10) was not impacted by the 1988 amendments. Finally, our draft report merely questions the propriety of using FFI tax money to make a one-time "supplemental retirement benefit" payment to individual retirees of the fire department, if such payments are for the personal use of the individual firefighter. As a result, we are making no modifications to the report.

APPENDIX C

AUDIT METHODOLOGY AND STANDARDS

We performed the following audit procedures to complete our audit objective:

- We reviewed the Syracuse Firefighters Association Local 280, Index No. 89/5767, order dated July 25, 1991 and the Stipulation of Settlement and Discontinuance document to determine authority to receive and use FFI tax money.

- We interviewed Association officials involved in the administration, receipt and use of FFI tax money for general background information and policies/procedures in place.

- We reviewed the Association's records including by-laws, board minutes, receipts, financial reports and other available documentation and correspondence related to FFI and addressing financial activity.

- We reviewed the Association's minutes and available documentation for information concerning approvals on FFI tax money disbursements.

- We reviewed canceled checks and supporting documentation, such as invoices for individual FFI tax disbursements, to determine compliance with applicable laws.

- We evaluated the reliability of reported FFI tax disbursements for our audit scope period and accounting for the FFI tax money to determine whether money was deposited into the bank account.

- We reconciled FFI tax disbursements to annual reported amounts. We selected an audit sample of one disbursement per type of budget classification, for 33 disbursements, and traced those disbursements to bank statements, including canceled check images, to determine whether they were in accordance with the Stipulation Agreement and applicable laws. We reviewed supporting documentation to ascertain whether the classifications per the auditee's books and as reported annually were accurate, and appropriate according to the law.

- For disbursements selected without supporting documentation on record, because custody of FFI tax money was transferred to a third party, we met with payees to determine whether payment was received and timely and whether documentation was available to show what FFI tax money was used for and whether the total amount was used.

- We compared the Association's annual report to the copy on file at the State Comptroller's office, including date received.

We conducted this performance audit in accordance with GAGAS. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.