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FIREMEN'S PENSION FUND—POLICE RELIEF AND RETIREMENT FUND—TRUSTEES—HAVE POWER, BY ENACTMENT OF RULES TO INCREASE PENSIONS THERETOFORE GRANTED TO RETIRED MEMBERS.

SYLLABUS:

The trustees of a firemen's pension fund and the trustees of a police relief and retirement fund have the power, by the enactment of rules to that effect, to increase pensions theretofore granted to retired members of the city police and fire departments.

Columbus, Ohio, June 6, 1946

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

Your request for my opinion reads as follows:

"We are inclosing herewith a letter from one of our examiners in which he shows that the Trustees of a city Police Relief and Retirement Fund and the Trustees of the Firemen's Pension Fund, have increased the pension allowance to those on retirement from time to time.

Will you kindly examine the inclosure and give us your opinion in answer to the following question:

Are the trustees of said respective pension funds authorized by the provisions of sections 4612-4 and 4628 or other sections of the General Code, to change the pensions granted to retired members of the city police and fire departments, it being understood that pensions so granted may not be reduced by reason of the provisions of sections 4612-1 and 4628-1 General Code?"

Section 4612-4 relating to the firemen's relief and pension fund established pursuant to Section 4600, et seq. of the General Code, reads as follows:

"The boards of trustees established pursuant to section 4600 of the General Code shall adopt all rules and regulations providing for distribution of the fund including the qualifications of those to whom any portion of it shall be paid and the amount thereof."

Section 4628, General Code, contains a similar provision relative to the police relief and pension fund that was established pursuant to the provisions of Section 4616, et seq., of the General Code. Said Section 4628 reads as follows:

“Such trustees shall make all rules and regulations for distribution of the fund, including the qualifications of those to whom any portion of the fund shall be paid, and the amount thereof, with power also to give credit for prior continuous actual service in the fire department or in any other department of the city rendering service in fire prevention, but, no rules or regulations shall be in force until approved by a majority of the board of trustees.”

These sections confer broad powers upon the trustees of these funds and the courts have uniformly accorded the trustees in exercising their rule-making powers with respect to the distribution of their funds a wide degree of discretion. *Karb v. State ex rel.*, 54 O. S. 383; *Roth v. Trustees*, 62 O. S., 659; *State ex rel Lemperle v. McIntosh*, 145 O. S. 107; *O’Neill v. Quillin*, 63 O. App. 209; *State ex rel v. Police Relief Fund*, 72 O. App. 51; *Mell et al v. State ex rel*, 130 O. S. 306; *State ex rel v. Cleveland*, 135 O. S. 13; *State ex rel v. McCarthy*, 139 O. S. 654.

In the case of *Mell v. State ex rel*, supra, it was held:

“A pension granted by public authorities is a gratuitous rather than a vested or contractual right.

An existing board of trustees of a pension fund has discretionary power to modify pension awards theretofore made by it or by predecessor boards, by increasing or reducing the amount thereof, providing the same is done reasonably and not arbitrarily.”

The court in its opinion at page 309 said:

“The unquestioned rule is that a pension granted by the public authorities is not a contractual obligation but a gratuitous allowance, in the continuance of which the pensioner has no vested right; and that a pension is accordingly terminable at the will of the grantor, either in whole or in part. * * *

Pensions * * * are gratuitous. They involved no agreement of parties; and the grant of them creates no vested right.

And this is so even where a pensioner has made compulsory contributions to the fund. * * *

The right to pension not being vested, the board has a right at any time, in its discretion, to modify or alter pension awards by increasing or decreasing them, so long as it acts reasonably and not in an arbitrary fashion. This right the board may exercise pursuant to and under its own rules and regulations then prevailing, and, in the absence of abuse, mandamus will not issue to control its discretion."

The above case was decided in 1935. Thereafter, in 1937 the General Assembly enacted Section 4612-1 relating to firemen's relief and pension fund, reading with a slight subsequent modification as follows:

"The granting of relief or pension to any person or persons pursuant to the rules adopted by the trustees shall operate to vest a right in such person or persons to obtain and receive the amount fixed by the board of trustees. The right to obtain and receive the relief or pension herein granted may be enforced by an action in mandamus instituted in the court of common pleas in the county in which the person or persons granted such relief or pension reside."

At the same time it enacted Section 4628-1 relating to the police relief and pension fund, and reading as follows:

"The granting of a pension to any person hereafter pursuant to the rules adopted by the trustees shall operate to vest a right in such person, so long as he shall remain the beneficiary of such pension fund, to receive such pension at the rate so fixed at the time of granting such pension."

It will be noted that these two statutes are not exactly alike, since Section 4628-1 relates only to a pension granted "hereafter," while Section 4612-1, which formerly had the same reading, has been somewhat modified. With that difference we are not here concerned. There is nothing in either of these sections which could by any possibility prevent the board which has previously granted a pension from adopting a rule which would have the effect of *increasing* it. The whole idea of vested right is that one obtains a right either for present or future enjoyment which cannot be disturbed or taken away. There is nothing in the term "vested right" which so limits a right that it cannot be amplified or added to. An examination of a large number of cases cited in "Words and Phrases" fails to reveal any suggestion that the granting of a vested right or some act vesting a contingent right could have the negative effect of preventing the holder from receiving additional rights or an amplified

right. The purpose of the General Assembly in enacting Sections 4612-1 and 4628-1 was to enlarge and not in any way to restrict the rights of pensioners.

One of my predecessors had a somewhat similar question before him, as shown by an opinion found in 1921 Opinions of Attorney General, page 113. He had before him Section 4626, supra, which was then in substantially its present form, and held as follows:

“The trustees of the police pension fund are empowered by section 4626 G. C. to amend the rules and regulations so as to increase the amount of pensions to be paid to members, and to make the amendment applicable to those already on the pension roll as well as to those thereafter placed thereon, subject, however, to the express limitation that the amendment shall not become effective until approved by the director of public safety.”

In the course of his opinion it was said:

“Nowhere in the statutes on the subject is there to be found any provision either expressly or by necessary implication prohibiting the trustees from increasing the amount of pensions of members previously placed on the pension roll, nor, it may be added, is there any provision requiring that the pensions of members already on the pension roll shall be increased so as to make them uniform in amount with pensions to be paid to members subsequently placed thereon.”

In my opinion there is nothing in the present statutes which in any way changes the rule thus announced.

Accordingly, and in specific answer to your inquiry, it is my opinion that the trustees of a firemen's pension fund and the trustees of a police relief and retirement fund have the power, by the enactment of a rule to that effect, to increase pensions theretofore granted to retired members of the city police and fire departments.

Respectfully,

HUGH S. JENKINS
Attorney General