

The conclusion reached in *State ex. rel. Johnson vs. Board of Education*, supra, appears also in an opinion rendered prior to this decision by my predecessor in office, on February 20, 1936, No. 5176, wherein, in the fourth branch of the syllabus it was held:

“Sections 4692, 4696 and 4736, General Code, were not repealed by implication by the provisions of the so-called School Foundation Law (Secs. 7600-1 to 7600-8, inclusive, of the General Code) except to the extent that the authority granted to county boards of education to transfer school territory and create new school districts by the terms of said Sections 4692, 4696 and 4736, General Code, is limited by the terms of Sections 7600-7, General Code, to the transfer of school territory and the creation of new school districts to conform to a legally adopted and approved plan of organization of their several county school districts.”

Therefore, in specific answer to your question it is my opinion that, the county auditor is not authorized to accept the certificate from the Union County Board of Education and effect the transfer of the land back to the Madison County Board of Education and the Pike Township Board of Education.

Respectfully,

HERBERT S. DUFFY,

Attorney General

2908.

POLICEMAN—INJURED IN LINE OF DUTY—ON PENSION LIST—CIVIL SERVICE STATUS ONE YEAR—STATUS WHEN REEXAMINED AND FIT TO RETURN TO PERFORMANCE OF DUTIES.

SYLLABUS:

1. *A policeman who was injured in the line of duty and upon his application was placed on the pension list by the Board of Trustees of the Police Pension Board of his city, retained his civil service status for one year thereafter and no longer, under virtue of Section 486-12, General Code of Ohio.*

2. *A policeman who was placed on the pension list by the Board of Trustees of the Police Pension Fund of his city on June 10, 1935,*

and continued thereon until April 5, 1938, at which time he applied for re-examination and reinstatement to his former position of patrolman, and who, upon such re-examination was found by the Board of Trustees of the Police Pension Fund to be physically fit to perform the duties of policeman, loses his pensionable status and is no longer entitled to same.

COLUMBUS, OHIO, September 1, 1938.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN: I am in receipt of your communication relative to the present rights of Don Davidson, a member of the police department of the city of Steubenville, together with letter of John J. Griesinger, Jr., City Solicitor of said city and copies of letters passing between your department and Mr. Griesinger.

The questions submitted are quite voluminous. I find it necessary to quote Mr. Griesinger's first letter to your department in order to obtain the statement of fact upon which an opinion must be predicated, likewise the reference to the law under which the city authorities are endeavoring to operate in the matter.

"On May 1, 1927, Don Davidson, a patrolman of the Police Department of the city of Steubenville, was seriously wounded in line of duty. Don Davidson had been a police officer for several years and was in the classified service.

Don Davidson was not dropped from the classified service, and did, after a short period, return to work in the Police Department. He continued as a member of the Police Department until June 10, 1935, when he made application to the local Police Pension Board to be placed on disability pension. His application was accompanied by medical reports, which disclose that he was suffering from partial disability, due to said previous injuries. On said 10th day of June, 1935, the Police Pension Board granted his application and he has been on pension for partial disability since said 10th day of June, 1935.

Davidson made no application, as far as we know, to the Civil Service Commission, for leave, or to be carried in the classified service.

On April 5, 1938, Davidson wrote the Police Pension Board making application for re-examination and re-instatement to active duty in the Police Department.

We are advised that the local Civil Service Commission adopted the rules of the State Civil Service Commission.

Rule 33, Section 1, of the Steubenville Police Pension Fund, reads as follows:

'If any member, as set forth above, shall be injured or diseased caused or resulting from duty in the Department, and he be partially permanently disabled as a result thereof, he shall receive from the said Police Pension Fund a sum of not less than Twenty-five (\$25.00) Dollars nor more than Sixty (\$60.00) Dollars per month, payable monthly, the sum to be paid to be within the discretion of the Board of Trustees, and said Board of Trustees hereby reserving the right to at any time demand and have a re-examination of said member, and if in their discretion he should not longer receive the sum that may have been allowed to him, payment shall cease within thirty days after notice in writing be given to him.'

Section 28 of the Rules of the Steubenville Police Pension Fund reads as follows:

'Any member who is retired for disability shall, at any time the Board deems it advisable, present himself for examination by said Board and a physician to be employed by said Board as provided in Rule 11, hereof, and, if found fit for duty, such fact shall be certified to the Director of Public Safety, who shall assign such member to duty in the Police Department.'

As we see it, this case raises three questions:

1. Suppose the Pension Board made an order for the re-examination of Davidson, and, as a result of said re-examination, he was found fit for service on the Police Department, and under Rule 28 he was certified to the Director of Public Safety for assignment to duty in the Police Department, would said Rule 28 of the Pension Board have any legal effect?

2. Would the Safety Director be required to again assign him to duty on the Police Department? Would the Safety Director be required to assign Davidson to active duty when there were no present vacancies? Would Davidson retain his seniority rights? Davidson, as we are advised, has not been carried on the Civil Service Eligibility List since making application for and having been placed on pension June 10, 1935.

3. Again, suppose that the examination of Davidson found him fit for duty, and he was certified to the Safety Director, and the Safety Director refused to assign Davidson to duty on the Police Department, and the Court should uphold the contention of the Safety Director, would then the Pension Board be required to again place Davidson on disability pension, whereas, as a result of his request and their examination, he had been found to be under no further disability.

The Pension Board, together with the Civil Service Com-

mission and the Safety Director, desire, and have requested, an opinion of the Attorney General on the questions set forth in this letter."

I further quote the questions as submitted in your communication, viz:

"Question 1. Suppose the Pension Board made an order for the re-examination of Davidson, and, as a result of said re-examination, he was found fit for service on the Police Department, and under Rule 28, he was certified to the Director of Public Safety for assignment to duty in the Police Department, would said Rule 28 of the Pension Board have any legal effect?

Question 2. Would the Safety Director be required to again assign him to duty on the Police Department? Would the Safety Director be required to assign Davidson to active duty when there were no present vacancies? Would Davidson retain his seniority rights? Davidson, as we are advised, has not been carried on the Civil Service Eligibility list since making application for and having been placed on pension June 10, 1935.

Question 3. Again suppose that the examination of Davidson found him fit for duty, and he was certified to the Safety Director, and the Safety Director refused to assign Davidson to duty on the Police Department, and the Court should uphold the contention of the Safety Director, would then the Pension Board be required to again place Davidson on disability pension, whereas, as a result of his request and their examination he had been found to be under no further disability.

As we are forwarding to you our entire file on this subject, we shall greatly appreciate the return of the inclosures with your reply."

Boiling your matter down, Davidson was injured on May 1, 1929, in the line of duty. He was in the classified service. After a short time he returned to work and continued to work until June 10, 1935, when he applied for disability pension and the Police Pension Board granted same and Davidson has been continued on the pension list to this date.

On the 5th day of April, 1938, Davidson made application for re-examination and reinstatement to active duty, and all proceedings stopped at this point.

Your first question is hypothetical, viz:

“Suppose the Pension Board made an order for the re-examination of Davidson, and, as a result of said re-examination, he was found fit for service on the Police Department, and under Rule 28, he was certified to the Director of Public Safety for assignment to duty in the Police Department, would said Rule 28 of the Pension Board have any legal effect?”

Section 28 of the Rules of the Police Pension Board is neither harsh nor unreasonable under the grant of power contained in Section 4644, General Code, which reads:

“Such trustees shall make all rules and regulations for the distribution of the fund, including the qualifications of those to whom any portion of the fund shall be paid and the amount thereof, but no rules or regulations shall be in force until approved by the board or officer, as the case may be, having charge or control of the health department.”

I am uninformed as to what happened to Davidson's civil service status when the board granted him his pension. Was he retired or dismissed? It must have been one or the other. Inasmuch as a pension was granted him, it would seem that he was retired. If he was retired from active service on pension, he lost his civil service status unless there is some law or rule somewhere to save him. No rule of the Board is cited that carries his status along for almost three years after he has left the service, nor am I able to find any statutory authority permitting an employe under civil service to retain his status without subsequent examination.

Eligible lists, under the rule of the Civil Service Commission of Ohio, have a life of two years, as provided by Section 486-12, General Code.

Section 486-16, General Code, provides in part as follows:

“Any person holding an office or position under the classified service who has been separated from the service without delinquency or misconduct on his part may, with the consent of the commission, be reinstated within one year from the date of such separation to a vacancy in the same or similar office or position in the same department; and whenever any permanent office or position in the classified service is abolished or made unnecessary, the person holding such office or position shall be placed by the commission at the head of an appropriate eligible list, and for a period not to exceed one year shall be

certified to an appointing officer as in the case of original appointments.”

Now these are the only sections of the General Code that could bear on Davidson's case, and I am doubtful if they even touch it remotely.

Section 486-12, General Code, apparently has reference to the rights of a person on the eligible list who has not received an appointment.

Section 486-16, General Code, applies to a person who has been separated from the service without delinquency or misconduct on his part.

If Davidson was separated from the service, he separated himself when he applied for and received his pension, and he did not apply for reinstatement within the year. It probably would have been useless, as the fact that he continued to draw the pension for three years would indicate that he would have been physically unfit to perform the duties after the expiration of the first year.

It seems harsh to take a person's civil service status away from him because of physical incapacity, but it was not taken from him; he surrendered it. The Supreme Court of Ohio has flatly held that in order to qualify as to "merit and fitness" the individual must be physically fit to perform his duties.

State ex rel Mansfield vs. Turnbull, Mayor, et al.

State ex rel Mansfield, et al., vs. Board of Trustees, et al., 132 Ohio State Reports, p. 235.

Likewise, the case of *State ex rel Hayes vs. Pfeiffer, et al.*, 132 Ohio State Report, p. 335, bears upon the question of retirement as a condition precedent to the right to a pension.

I am advised by the Civil Service Commission of Ohio that it did on one occasion reinstate a policeman and preserve to him his civil service status after he had been retired on a pension for three years, but that this was done in the spirit of justice and right and not because of any law or rule authorizing such action.

In the instant case, it would seem that Davidson should retain his civil service status as a matter of right, but theology and law are two different branches and I am compelled to deal with the law. There being neither rule nor law that preserves to Davidson his civil service status after three years, he just does not have it, and of course is not eligible for his old position which was in the classified civil service.

Strong argument can be advanced to the effect that the civil service status of a policeman should be preserved to him for a reasonable length of time after he has been placed on the pension list and Section 486-16, General Code, has made provision to the effect that within one year any person who is separated from the classified service without delinquency

or misconduct on his part "*may, with the consent of the commission, be reinstated within one year from the date of such separation,*" and I cannot question the wisdom of the provision.

There is another side to the proposition. The police department of a city is its most important department. Its primary purpose is to insure public safety. If a patrolman goes out of commission, just so much of the city as he patrols is uncared for until another patrolman is appointed in his place. The city must be safeguarded. Another patrolman is chosen from an eligible list. His tenure is during good behavior and efficient service. He behaves himself and renders efficient service for three years, then he is told that the sick policeman, whose place he was appointed to fill, has recovered, is ready to again properly fill the place, his civil service status has been restored, and he, the qualified and acting patrolman must step "down and out." He does,—then what becomes of him? He has been removed from his classified civil service position during good behavior and efficient service, no charges have been filed, his position has not been abolished, he has not been laid off or suspended, as provided by Section 486-17, General Code, yet he must surrender his position to one who at the time has no civil service status. There are no vacancies and he is without a position. Surely such a situation is not contemplated by the civil service laws.

It must necessarily be held that Davidson had no civil service status on April 5, 1938, when he applied for reinstatement and restoration to his former position, and it follows as a natural conclusion and consequence that anything the Pension Board and Safety Director would do along the line of such reinstatement and restoration would be an absolute nullity. This holding disposes of questions 1 and 2, submitted by you.

Your third question is largely hypothetical, but it can be reduced to its lowest terms as follows: If, after Davidson's request for reinstatement and re-examination, he is re-examined and the Board of Trustees of the Police Pension Fund find that he is no longer under physical disability, then as a matter of common sense his pension would cease, as he would no longer have a pensionable status. The fact that he had drawn the pension for three years could not be accepted as an argument that he could continue to draw it for three more years in face of the fact that he was physically fit to perform his official duties.

Respectfully,

HERBERT S. DUFFY,
Attorney General.