

1331.

FIREMEN'S PENSION FUND—HOW TRUSTEES CREATED—SUCH TRUSTEES UNAUTHORIZED TO ALTER PENSIONS GRANTED TO BENEFICIARIES PREVIOUS TO AMENDMENT OF LAW BY 88TH GENERAL ASSEMBLY—EXCEPTION.

SYLLABUS:

1. *Under the provisions of Section 4600, et seq., General Code, as amended by the 88th General Assembly in Senate Bill No. 79 (113 O. L. 61), the trustees of the firemen's pension fund may be created by council selecting two members, which said two members may conduct the election of the two members of said board to be elected from the membership of the fire department, including the giving of notice and canvassing the vote.*

2. *It was the intention of the Legislature in the enactment of Senate Bill No. 79—(113 O. L. 61) to preserve the pensionable status of beneficiaries of firemen's pension funds existing under the provisions of law prior to the enactment of such bill, and the board of trustees of firemen's pension funds created pursuant to such act are without authority to alter, reduce or revoke pensions heretofore granted in the absence of a specific reservation of said right in the rules and regulations of the board of trustees originally granting such pensions at the time the pensionable status was determined.*

COLUMBUS, OHIO, December 24, 1929.

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

GENTLEMEN:—Acknowledgment is made of your recent communication which reads:

“Amended enate Bill No. 79, 113 O. L., amends sections in the General Code relative to the Firemen's Pension Fund in municipalities. Section No. 4600, General Code, as amended, provides for a Board of Trustees to be composed of six members, two to be chosen by Council from among its own members, two to be elected by the Fire Department from its membership and two residents of the municipality not members of the Council or members of the Fire Department. Section 4601, G. C., provides for the election of two members as trustees, who are members of the Fire Department. The section provides that the Secretary of the Board shall give notice of the election, etc. Section 4602 provides that all votes cast at the Fire Department election shall be counted and canvassed by the Board of Trustees, who shall announce the result, etc. Section 4605 provides that in each municipality creating a Firemen's Pension Fund, the Council shall levy a tax of not to exceed 3/10 of a mill, but sufficient in amount within the 3/10 of a mill to provide funds for the payment of all pensions granted to firemen under existing laws. Section 4612, G. C., provides that the trustees shall make all rules and regulations for the distribution of the fund. Section 4613 provides that all persons drawing pensions, or entitled to them from existing Firemen's Pension Funds, shall be and remain beneficiaries in pension funds created under this chapter, in the same municipality where they are beneficiaries in such existing funds, and shall receive such amounts and be subject to the rules and regulations adopted by the Board of Trustees.

Question 1. In what manner shall the two members of the Fire Department be selected, in a city which at this time, through its Council, declares the necessity of the establishment and maintenance of a Firemen's Pension Fund?

Question 2. When a Board of Trustees is created under the provisions of amended Section 4600, and such Board fixes the maximum amount of a pension to be paid at \$75.00 per month, are members who have been granted a pension of \$100 per month by a Board of Trustees organized under the provisions of the statute before amendment, entitled to such \$100 after the adoption of the rule that \$75.00 per month is the maximum amount?"

Section 4600, General Code, to which you refer, before amendment provided that the trustees of the firemen's pension fund should consist of the director of public safety in cities, and in villages of the fire chief, and five other persons, members of the fire department. However, this section then provided that upon petition of a majority of the members of the fire department said director of public safety or the fire chief might designate a less number than five to be elected.

Section 4601, General Code, before amendment, provided for the election of members. The section provided that on the second Monday of the month following the determination of such director of public safety or fire chief to create said fund an election should be held to choose five trustees from the members of the fire department. The section further provided that the safety director or fire chief, as the case might be, should give notice of the election in the manner set forth in said section.

Section 4602, General Code, provided that the safety director or fire chief, as the case might be, should canvass the votes.

Section 4604, General Code, before amendment, provided that the safety director or fire chief should be president of the board of trustees, and the secretary, clerk, or corresponding officer of the fire department should be the secretary.

From the foregoing it will be observed that in the organization of the board the director of public safety or the fire chief was required to take the initiative in conducting elections in order to elect the remaining members of the board.

In view of the provisions of the sections which you mention, as amended, it seems that in the case of the creation of a new board it is with some difficulty that the intention of the Legislature as to the procedure may be discovered. Of course, an entirely different scheme is contemplated with reference to the personnel of the board. Under the new provisions two members of the fire department shall be members of the board whereas in the past there were five such members on the board. Two of the members, are to be chosen by the city or village council, two members shall be elected by the fire department from members of its own body, and two other members shall be residents of the municipality, not members of the council or other legislative body. One of the last two members shall be chosen by the two members selected by council and one of such members shall be chosen by the two members elected by the fire department.

Section 4601, General Code, which relates to the election of the members of the board, as amended, provides:

'On the second Monday of the month following the taking effect of this act, the two members of the board of trustees of the firemen's pension fund to be chosen by the members of the fire department shall be elected in the following manner: The secretary of the board shall give notice thereof by posting it in a conspicuous place at the headquarters of the department and at the house of each company composing it. Between the hours of six o'clock in the forenoon and six o'clock in the afternoon on the day designated each person in the fire department who by its rules is designated a member thereof, shall send or cause to be sent by mail or otherwise, in writing the names of two persons, members of the department who are his choice.

The two members of the municipal council, or other legislative body, to be chosen as members of the board of trustees as provided for in the next preceding section, shall be chosen by the members of the municipal council,

or other legislative body, at their first regular meeting after the taking effect of this act for a term of one year beginning on the second Monday of September and thereafter members of the board shall be chosen annually to assume office on the second Monday of September and to serve for one year or until their successors have been duly chosen and qualified."

From the above, it will be seen that the secretary of the board cannot give notice of the election in case of the creation of a new board for the reason that there is no provision for a secretary until after the election of all the members of the board is organized. Furthermore, Section 4602, General Code, as amended, provides that all votes cast at the fire department election shall be canvassed by the board of trustees. Carrying out the provisions of the section last mentioned literally, it follows that the board as a whole cannot canvass said votes for the reason that it will not be in existence at the time such election is conducted. However, it is believed that in the provisions hereinbefore considered the Legislature, in the language used, was thinking of the reorganization of an existing board and inadvertently overlooked some of the inconsistencies in connection with the creation of a new board. It is a well established principle of law that a trust will not fail for the want of a trustee, and this would seem to apply under the circumstances here existing.

Section 4605, General Code, as last amended, expressly provides that each municipality availing itself of the provisions relative to the firemen's pension fund, in addition to all other levies authorized by law, shall levy a tax not to exceed three-tenths (3/10) of a mill.

It would therefore appear that when council of a municipality has declared the necessity of a firemen's pension fund, it would be a mandatory duty that such levy be made in the absence of a provision for the creation of a new board of trustees. Therefore the accumulation from such tax levies would be for a definite purpose and would be in the nature of a trust fund for the benefit of the fire department, and the principle relative to a trust not failing because of the want of a trustee would be somewhat applicable to the situation, if not practically in point.

Aside from the argument last mentioned, it could well be argued in view of the former provisions of the sections that it was the intent of the Legislature that in the creation of the board the members selected by council are authorized to canvass the vote of the members selected from the fire department. Before the act was amended, one member of the board—the fire chief or the safety director—gave notice and canvassed the votes.

In view of the history of this legislation, it could well be argued that it was the intention of the Legislature that the two members selected by council should canvass the votes for the members of the fire department. If this solution can be sustained, then the only inconsistency would be the serving of notice by the secretary who, of course, will not be in existence until the completion of the board. Inasmuch as the secretary is merely a spokesman for the board, it is believed that this duty could be performed by the two members of the board of trustees who are selected by council. In other words, when council has selected the two trustees they may give notice of the election of the two members from the fire department and canvass the vote to determine who are elected as representatives of such department. This, of course, will result in the establishment of the board notwithstanding the inconsistencies which you point out.

I am inclined to the view that the procedure above outlined is practical and that an election conducted in such manner would be sustained by the courts.

The foregoing will dispose of your first question.

Your second question presents considerable difficulty. You ask whether the new board of trustees may fix a maximum amount of pension less than the amount which has heretofore been granted to pensioners by the board of trustees organized under

the provisions of the statutes before their amendment. Stated concretely, you ask whether a member who is now on a pension at the rate of \$100.00 per month may be reduced to \$75.00 per month.

At the out-set of the consideration of this question it must be determined just what relation exists between the new board and the old board in view of the amendments hereinbefore referred to. The provisions of amended Senate Bill No. 79 (113 O. L. 61) are not entirely clear on this point. That is to say, there is no express language in the bill from which may be gathered definitely just what the intention of the Legislature was. I feel, however, that the bill, taken by its four corners, exhibits the intention merely to substitute a new board for the old, but not in any way to abrogate or wipe out the acts heretofore accomplished under laws in effect prior to enactment of the bill. There is no express intention to wipe the slate clean and start again on a new basis. It is merely a substitute of new machinery to carry on the same purposes as had heretofore been administered. Touching this question, I direct attention particularly to the provisions of Section 4605, General Code, to which reference has hereinbefore been made, and which reads as follows:

"In each municipality availing itself of these provisions to maintain the firemen's pension fund, the council thereof each year, in the manner provided by law for other municipal levies, and in addition to all other levies authorized by law, *shall* levy tax of not to exceed three-tenths of a mill on each dollar upon all the real and personal property as listed for taxation in such municipality, *but sufficient in amount within the three-tenths of a mill to provide funds for the payment of all pensions granted to firemen under existing laws.* In the matter of such levy, the board of trustees of the firemen's pension fund shall be subject to the provisions of law controlling the heads of departments in the municipality, and shall discharge all the duties required of such heads of departments."

The underscored portion indicates the change made by the last Legislature. You will observe particularly that the mandatory three-tenths of a mill levy is stated to be "to provide funds for the payment of all pensions granted to firemen under existing laws." The correct interpretation of this language is, in my opinion, that all pensions authorized under laws existing at the time of the granting of such pensions must be taken care of insofar as the three-tenths of a mill levy will accomplish this purpose. If this be true, then whatever rights may exist under pensions granted by virtue of laws in existence prior to the amendment are continued in force without the necessity of any affirmative action on the part of the new board of trustees.

In support of this conclusion reference may be made to the case of *Clench vs. Board*, 249 Pac. (Cal.) 46, in which a similar question was under consideration. There an existing pension system which was formed under statutory authority was subsequently somewhat changed by reason of the adoption of certain ordinances providing for a similar pension system. The court concluded that there was no break in the continuity of pensions granted under the prior statutory authority. (See page 49). The general rule pertinent to any consideration of pension laws was also announced by the court in that case as is disclosed by the 10th branch of the head-notes:

"Pension statutes are to be liberally construed."

I have accordingly reached the conclusion that pensions granted prior to the organization of the new board of trustees are not thereby affected and any right to change the pensionable status of beneficiaries must rest upon statutory authority or other conditions to which reference will hereinafter be made.

Whether there exists in the state itself the right to reduce or revoke a pension once

granted under authority of law by virtue of an amendment or repeal of that law is a question upon which the authorities are by no means uniform. Thus, with respect to firemen's pension funds, it is stated in 43 C. J. page 847:

"While a pension for a fireman or his dependents is generally regarded as a part of the compensation paid the fireman, for some purposes it is regarded as a gratuity, so that one whose right to a pension has accrued may have his rights taken away by subsequent legislation, or affected by the enactment of new requirements; but it has been held that the pension may be taken away only in so far as the right thereto has not accrued prior to the enactment of the statute. Where the rights of a fireman to a pension have become fixed, and the trustees of the pension fund are not authorized to suspend the pension, he cannot thereafter be deprived of his rights by a dismissal."

With reference specifically to the pension fund, the same authority on page 843 states:

"A fund created by law for the purpose of providing pensions for firemen or their dependents is a public fund, and its trustees hold a revocable mandate. It is not the less a public fund because of the payment therein of a part of the salary of a fireman, and such person has no vested right therein which cannot be taken away by subsequent legislation."

Upon the specific question as to the right of the state to change the pensionable status of one already pensioned, it is stated by the same authority at page 818:

"Where the event on which a pension to a police officer becomes payable actually has happened, the right to the pension is vested in the view of some courts, but other courts considering the pension for this purpose merely as a bounty hold that the state may recall or withhold it at any time."

While this statement is made with reference to police pension funds, of course the reasoning is equally applicable to firemen's pensions. Consequently it may be stated that the question is one upon which there is considerable division of authority and concerning which substantial doubt exists. There is a substantial line of authorities in California which indicate the view of the courts of that state to be that pensions, once granted, are vested so as to render the state powerless to change or amend. On the other hand, several other jurisdictions hold, as stated in the leading case of *Gibbs vs. Relief Association*, 145 N. W. 1075:

"As against the state there is no vested right in the pensions accruing from month to month. It may be taken away. The whole pension system may be abrogated without violation of the constitution."

In line with the Gibbs case is the case of *Price vs. Farley, et al.*, 22 O. C. C. 48, in which the relator, a pensioner of the fire department of the city of Cleveland, who had been drawing a pension for several years at the rate of \$50.00 per month, was reduced by subsequent act of the Legislature to the rate of \$42.50 per month. Respecting the validity of this action on the part of the Legislature, the court says:

"While the granting of pensions to the class to which the relator belongs, is highly meritorious and to be commended, it is, nevertheless, of such a nature as to leave it within the power of the Legislature to wholly abolish or change,

and no one, whatever may be the merits of his claim, is entitled to any other or different pension than provided by the existing statute.

The repeal in 1890, of all the acts upon this subject, left no foundation upon which the relator can rest a claim for a pension at all except under the provision of the present act passed at the time of said repeal. It is only because of that act that he is entitled to receive any pension whatever.

He is receiving now a pension in accordance with the provision of the present act, which is all, under the statute, he is entitled to receive."

As far as I have been able to discover, this is the only case in Ohio which deals squarely with the question of the right of the Legislature to revoke or change existing provisions. It must be concluded, therefore, that such right exists.

We are not, however, in this question dealing with any attempt on the part of the Legislature itself to make any reduction in the rate of pensions. An examination of the terms of the bill clearly reveals that no such intention can be deduced. Whatever right exists, therefore, must find its basis in the powers granted to the board of trustees by virtue of the amendment. These powers are, insofar as they relate to this subject matter, contained in Section 4612, General Code, which is as follows:

"Such trustees shall make all rules and regulations for the distribution of the fund, including the qualifications of those to whom any portion of it shall be paid and the amount thereof, but no rules or regulations shall be in force until approved by a majority of the board of trustees."

This constitutes an amendment to the old section, the only change being that the approval now is required of the majority of the board whereas the section formerly required the approval of the director of public safety or fire chief. This power is quite broad and leaves entirely to the discretion of the board the qualifications of the beneficiaries and the amount to which such beneficiaries shall be entitled. In this respect the law differs from that of many jurisdictions wherein matters of this kind take the form of statutory provisions. There are numerous decisions to the effect that these statutory provisions are subject to alteration and repeal by the Legislature even as to those already upon a pensionable status. It remains to be determined whether the same rule is applicable to the board of trustees which is in the nature of an administrative body with powers perhaps less extensive than those of the Legislature itself.

It has often been said by the courts that statutory power conferred to adopt rules and regulations give to those rules and regulations the force and effect of laws, so long as they are within the statutory power conferred and are otherwise reasonable. I am not prepared to say, however, that this principle necessarily extends so as to permit the board of trustees of a firemen's pension fund to alter and amend its rules and regulations so as to affect existing pensions. Especially is this true in view of the provisions of Section 4605, General Code, *supra*, making it the mandatory duty of the municipality to make a levy to take care of all existing pensions.

A leading case in Ohio dealing with the administration of the firemen's pension fund is that of *State ex rel. vs. Board of Trustees*, 20 O. C. C. (n. s.) 13, the head note of which is as follows:

"A fireman who has been retired and regularly put upon the pension roll in accordance with the laws of the state and the regulations of the trustees of the firemen's pension fund, can not thereafter be discharged from the fire department for violating one of its rules before his retirement, and his pension be reduced.

In the course of the opinion at page 15, the court states:

"We are, therefore, required to determine whether the Board of Trustees of the Firemen's Pension Fund had power to change the status of the relator as a beneficiary under the pension fund, after he had retired at his own option, and after his name had been placed upon the pension roll at the rate provided for one in his class.

Reference to the rule under which the relator retired, and had his name placed upon the roll at a rate equal to eleven-sixteenths of his salary, discloses a requirement that 'the member so retired without special disability shall always receive the same amount of pension as when retired'.

If this part of the rule be given effect according to its clear terms, the rights of the relator were fixed when his name first went upon the pension roll.

In the absence of this requirement of the rule, we think that when the relator retired under the rules, and the payment of his pension was authorized and his name placed upon the pension roll, all questions affecting his status were determined, and the subsequent act of the Board of Trustees, based upon his discharge after retirement, was without authority, and could not affect his status as already fixed."

The court here lays special emphasis upon the fact that the rule specifically provided that the members should always receive the same amount of pension, and it is further stated that, in the absence of such rule, the court was of the opinion that the status of the pensioner was fixed when his name was placed upon the pension roll and that the board was thereafter without authority to change that status. This case is accordingly apparently dispositive of the right of the trustees to change the pensionable status once fixed in accordance with its rules and regulations where those rules either specifically provide for the continuance of the amount of the pension or are silent on the subject.

It is conceivable, however, that the board of trustees may, at the time of the granting of the pension to the particular beneficiary, have as one of its rules and regulations a provision to the effect that all pensions granted are subject to reduction or revocation upon proper action by the board. No such rule is before me and I know of no instance in which such a rule has received the consideration of the courts. It is, however, conceivable that such a rule might have been in existence at the time of the granting of a pension and, if that be true, then, in my opinion, the authority of the board to reduce or revoke the pension would seem to be clear. Inasmuch as the statute gives to the board power to make all rules and regulations for the administration of the fund, including the qualifications of those to whom it shall be paid, it logically follows that the board in the first instance by its rules and regulations may entirely preclude the granting of a pension to any particular class of employes. If this be true, then it may quite properly be said that the board is at liberty to provide a rule preventing the vesting of any right to a pension in such a manner as to make it not subject to reduction or revocation.

Additional consideration of questions concerning rules and regulations of a board of this character is found in the case of *State ex rel. vs. Holmes, et al.*, 23 O. C. C. (n. s.) 133. The Ohio authorities therefore recognize the importance of construing in each instance the rights of pensioners growing out of the rules and regulations of the board. Hence it necessarily follows that no categorical answer to your question may be given without consideration of the rules and regulations applicable to the particular case.

In this connection it should be stated that the rules and regulations of the board lawfully charged with the control of pension funds at the time a particular pension was granted would, in my opinion, control and the right of the new board, organized under the law as it now exists, to change by the adoption of new rules and regulations would depend upon the reserved power of amendment contained in the rules of the

prior board. If that right were reserved, then the power of the new board is a continuing one and the right to the pension is not vested to the extent of limiting that power. On the other hand, if the rules and regulations of the old board were such as to recognize the continuing right to the pension, or if those rules contain no reserved right of amendment or repeal, then the status of the pensioner became fixed in such a way as to render the board thereafter powerless to make a change.

The only distinction that I am able to make between the right of the state itself to alter and amend existing pensions and that of a board of trustees vested with full power to make rules and regulations with reference thereto is that the state cannot preclude itself by any commitment so far as pensions are concerned from altering or repealing the authority for such pensions, whereas the board of trustees, in order to preserve its right of amendment and repeal must, at the time of the granting of the pension, have an existing rule and regulation specifically making such reservation. Unless the reservation be made, the trustees have exhausted their authority when they have once fixed the qualifications and the amount to be paid and any action thereafter taken attempting to change the status would be of no force and effect.

In view of the foregoing and in specific answer to your questions, It is my opinion that:

1. Under the provisions of Sections 4600, et seq., General Code, as amended by the 88th General Assembly in Senate Bill No. 79 (113 O. L. 61), the trustees of the firemen's pension fund may be created by council selecting two members, which said two members may conduct the election of the two members of said board to be elected from the membership of the fire department, including the giving of notice and canvassing the vote.

2. It was the intention of the legislature in the enactment of Senate Bill No. 79 (113 O. L. 61) to preserve the pensionable status of beneficiaries of firemen's pension funds existing under the provisions of laws prior to the enactment of such bill, and the board of trustees of firemen's pension funds created pursuant to such act are without authority to alter, reduce or revoke pensions heretofore granted in the absence of a specific reservation of said right in the rules and regulations of the board of trustees originally granting such pensions at the time the pensionable status was determined.

Respectfully,

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1332.

BONDS—AUTHORIZED BY SCHOOL DISTRICT ELECTORS PRIOR TO EFFECTIVE DATE OF UNIFORM BOND ACT—PROCEDURE FOR THEIR ISSUE AT PRESENT TIME—FUNDS TO BE APPLIED TO ORIGINAL PURPOSES—MAXIMUM MATURITY—RECOMMENDED PROCEDURE.

SYLLABUS:

1. *When bonds have been lawfully authorized to be issued by the electors of a school district in 1921 under the law then in force and effect, the board of education of such school district may now proceed to issue such bonds under authority of such election.*

2. *Such bonds should be issued pursuant to Sections 2293-25 and 2293-26, offered to the trustees of the sinking fund as provided in Section 2293-27 and in the event such offer is not accepted, advertised and sold as provided in Sections 2293-28 and 2293-29, General Code.*

3. *When such authorization by the electors in 1921 was for the purpose of acquiring real estate and erecting a school building, in the event the board of education should now;*