

950

SALARY—POLICE RELIEF AND PENSION FUND—“AVERAGE ANNUAL SALARY”—MEANS AVERAGE ANNUAL SALARY AUTHORIZED BY LAW, NOT AVERAGE OF WHAT IS ACTUALLY EARNED—SECTION 4628 G. C.

SYLLABUS:

“Average annual salary”, as it is used in Section 4628, General Code, means average annual salary authorized by law and not the average of what is actually earned.

Columbus, Ohio, September 8, 1949

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

Your request for my opinion reads in part as follows:

“Inasmuch as the correct interpretation of the provisions of Section 4628, General Code, with reference to the definition of the words ‘members average annual salary’ as used therein, is of statewide interest, may we request that you examine the enclosed correspondence, including the Opinion of the Law Director of the City of Toledo, and give us your formal Opinion in answer to the following question:

For the purpose of determining the amount of annual pension due a member of the police relief and pension fund at retirement, as provided in paragraph 1 of Section 4628, General Code, how shall the words 'average annual salary' be construed?

Do the words 'average annual salary' as used in said paragraph 1 of Section 4628, General Code, refer to the police officer's fixed base salary for the position held over the preceding five years, or do they refer to the salary actually earned and received by such police officer during said five year period?"

The Opinion of the Law Director of the City of Toledo reads in part as follows:

"In the opinion of this department, since the statute uses the words 'average annual salary' and not average annual earnings or some similar phrase, the word 'salary' relates to the amount of annual compensation which the officer was entitled to receive, rather than the actual amount of compensation which he did in fact receive. Applying this formula, the various salaries he was entitled to receive during the five year period should be divided by 5 and the answer is the average annual salary for the five year period.

"The five year period is the immediate five years preceding the date of his retirement.

"In the opinion of this department, the time off during this five year interval should not be considered in computing the average annual salary.

"In reaching the conclusion which we have reached, we have considered the meaning of the word 'salary' and other words in which the legislature might have used had it intended to base the pension on the earnings actually received in the period in question."

That part of Section 4628, General Code, in controversy reads as follows:

"A member of the fund who has completed twenty-five years of active service in the police department and has attained fifty-two years of age may, at his election, retire from the police department and upon notifying the trustees in writing of such election, shall receive an annual pension, payable in twelve monthly installments, in an amount equal to two per cent of his *average annual salary* for the five year period immediately preceding the date of his retirement multiplied by the number of years said member was in the active service of said police department or an annual pension of twelve hundred dollars, whichever is the

greater, provided however, such annual pension shall not exceed sixty-six per cent of the member's *average annual salary* for the five(5) year period immediately preceding the date of his retirement. * * *”
 (Emphasis added.)

It can be seen that the key word to be construed is “salary.” Does it mean the fixed salary or the amount actually earned?

I have searched the various authorities and am unable to find a specific case in point. There are numerous cases involving construction of the words “average annual earnings”, “average weekly wage”, etc., but I have not found a case construing the precise words contained in Section 4628. In the Opinions of the Attorney General for 1946, page 37, the words “final average salary” are construed as they apply to the provisions of the General Code relating to the Public Employes Retirement System, but I do not believe the reasoning in that opinion applies to the question here.

In the case of *Thompson v. Phillips*, 12 O. S. 617, the word “salary” was defined as follows :

“It is manifest, from the change of expression in the two clauses of the section (Section 20, Article II, Constitution of Ohio) that the word ‘salary’ was not used in a general sense, embracing any compensation fixed for an officer, but in its limited sense, of an annual or periodical payment for services—a payment dependent on time, and not the amount of the services rendered.”

In Volume 32, Words and Phrases, Permanent Edition, the following definitions are given :

At page 38:

“The word ‘salary’ ordinarily means compensation stipulated for services—annual or periodical wages or pay. *Strauss v. Cohen Bros. Co.*, 169 Ill. App. 337.”

At page 40:

“*Distinguished from Allowance.*

“A ‘salary’ is a fixed compensation decreed by authority and for permanence, and is paid at stated intervals, and depends upon time, and not the amount of services rendered; ‘allowance’ being a variable quantity. *Blaine County v. Pyrah*, 178 P. 702, 703, 32 Idaho Ill.”

At page 42 :

“The word ‘salary’ is more frequently applied to annual employment than to any other, and its use may import a factor of permanency, and the use of a sum of money equivalent to a year’s pay, in describing the amount which the employee was to receive, is a proper circumstance for consideration in connection with other incidents, to determine whether the employment was for a year. *Maynard v. Royal Worcester Corset Co.*, 85 N. E. 877, 878.”

At page 48 :

“The word ‘salary’ may be defined generally as a fixed annual or periodical payment for services, depending on the time, and not the amount of services rendered. *King v. Western Union Telegraph Co.*, 65 S. E. 944, 946, 84 S. C. 73.”

From the above definitions it would seem that the legislature intended the word “salary” to mean the police officer’s fixed salary as authorized by law and not the amount actually earned. This becomes more evident if one considers that during the last five years of an officer’s service, he is more apt to have greater periods of leave of absence without pay, due to his age. If earnings were the criterion, it is possible that the actual amount he received during the five years preceding retirement would be less than any other five year period in his service.

Knowledge of the meaning of the word “salary” must be imputed to the legislature in view of the numerous court decisions containing a construction of this word and if the legislature had the word “earnings” in mind, it should have used that word. In acts in which there was a failure to use the word “earnings”, its intention must have been to use the word “salary” as it has been judicially defined.

Therefore, it is my opinion that the words “average annual salary” as used in Section 4628, General Code, relative to the police pension fund, mean the police officer’s average fixed salary authorized by law and not the average of what he actually received.

Respectfully,

HERBERT S. DUFFY,
Attorney General.