

3966

1. FIREMEN'S PENSION FUND—TOWNSHIP—BOARD OF TRUSTEES—WITHOUT AUTHORITY TO ADOPT A RULE TO DETERMINE SERVICE REQUIREMENT FOR PENSION TO RETIRING MEMBER OF FUND—AMOUNT FIXED BY SECTION 521.11 RC.
2. TO COMPUTE PERIOD OF ACTIVE SERVICE—MEMBER ENTITLED TO INCLUDE ACTIVE SERVICE IN FIRE DEPARTMENT AS VOLUNTEER OR PART TIME FIREMAN.

SYLLABUS:

1. The board of trustees of a township firemen's pension fund is without authority to adopt a rule determining the service requirement for a pension to a retiring member of the fund, that having been fixed by the provisions of Section 521.11, Revised Code, 4615-9, G. C.

2. A member of a township firemen's pension fund is entitled, in computing his period of active service under Section 521.11, Revised Code, 4615-9, G. C. to include his active service in the fire department, as a volunteer or part time fireman.

Columbus, Ohio, June 16, 1954

Hon. Alva J. Russell, Prosecuting Attorney
Summit County, Akron, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"On October 23, 1947, pursuant to Section 4615-2, et seq. a firemen's pension fund was set up for Coventry Township, Summit County, Ohio. The following motion was passed:

'That all part-time firemen who are now full-time firemen shall be given full credit for the time they served as part-time firemen.'

"The present board of trustees of the said fire department further are asking:

"1. Was this rule in accordance with the board's powers and rights under section 4615-9?

"2. Is such a rule binding upon the present board in determining that such part-time service as a volunteer fireman is to be considered as active service?

"3. May such part-time volunteer service be considered as 'full years said member was in active service of the fire department,' as used in Section 4615-9?"

By an act passed by the General Assembly on June 14, 1947 and effective September 25, 1947, the laws relating to municipal police and fire pension systems were radically changed and an entirely new system of township firemen's relief and pension funds was created. The sections dealing with the township systems were Sections 4615-2 to 4615-13, of the General Code. They have become Sections 521.01 to 521.13, of the Revised Code. The sections of the statute relating to municipal police and firemen's pension systems are in no way connected with the sections creating the township system and throw no direct light on their construction. None of these sections as created in the General Code has been materially changed by the Revised Code and none of them has undergone any amendment since their original enactment.

It is important to have in mind the definition of terms used in these sections. Section 4615-13, General Code, 521.01, R. C., reads as follows:

“The following words and phrases as used in sections 4615-2 through 4615-13 of the General Code, both inclusive, shall have the following meanings:

“‘Board’ shall mean the board established pursuant to the provisions of section 4615-2 of the General Code.

“‘Fund’ shall mean the township firemen’s relief and pension fund established pursuant to the provisions of section 4615-2 of the General Code.

“‘Member of the fire department’ shall mean any person who, on April 1, 1947, was employed by a township as a *full time regular fireman* in a township fire department established pursuant to sections 3298-54 et seq., of the General Code and ‘member of the fire department’ also shall mean any person over twenty-one and under thirty years of age who, after April 1, 1947, is employed by a township as a *full time regular fireman* in a township fire department.

“‘Member of the fund’ shall mean any person who is contributing four per cent of his annual salary to the firemen’s relief and pension fund established pursuant to the provisions of section 4615-2 of the General Code.” (Emphasis added.)

Here it is evident that, *for the purpose of the act*, the only persons who could be considered as members of the fire department were (1) a person who, on *April 1, 1947* was employed as a *full time regular fireman*, and (2) a person over twenty-one and under thirty years of age who, after the effective date of the act, is employed as a *full time regular fireman*. This would exclude a part time fireman from being or becoming a member of the fund, unless, being within the prescribed age limits, he is appointed as a full time regular fireman.

Section 521.02, Revised Code, 4615-2, G.C., reads in part as follows:

“Each township having a fire department supported in whole or in part at public expense, and employing two or more full-time regular firemen, shall establish and maintain a township firemen’s relief and pension fund.

“The fund shall be under the management and control of a board of trustees of the township firemen’s relief and pension fund, composed of six members, chosen as follows: * * *.”

It will be noted that the establishment of such a fund is mandatory in every township where two or more *full time regular firemen* are employed, and there is no authority given to establish such fund in a township which does not have at least two such employes.

The pensions and other benefits to which a member of the fund will be entitled, and the powers of the board with reference thereto, are set forth in Section 521.11, Revised Code, 4615-9, G. C. That section reads in part as follows:

“The board of trustees of the township firemen’s relief and pension fund shall adopt rules and regulations for the management of the township firemen’s relief and pension fund and for the disbursement of benefits and pensions *as set forth in this section*. Members of the fund and their widows, children, and dependent parents shall be entitled to receive benefits and pensions as follows:

“(A) A member of the fund who has completed twenty-five years of *active service in the fire department* and has attained fifty-two years of age may, at his election, retire from the department and upon notifying the board 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 he was in the active service of such department, or an annual pension of twelve hundred dollars, whichever is the greater. Such annual pension shall not exceed sixty-six per cent of the member’s average annual salary for the five year period immediately preceding the date of his retirement. * * *.”
(Emphasis added.)

Following portions of this section specify the amount of pension to which a member of the fund may be entitled for lesser periods of service, and also benefits for disability suffered while within or outside of the performance of his official duties. There are further provisions giving to the widow, minor children and parents of a deceased member, certain benefits. As to the amount of these pensions and benefits, the pension board is given no authority or discretion whatever, except as to certain disability benefits. Paragraph 2 of this section, provides a definite benefit for life, to a member who is permanently and totally disabled as a result of the performance of his duties. This section then proceeds to give the board authority to fix, within certain limits, the benefits for partial disability incurred in the regular performance of the member’s duties and for disability not caused by the performance of such duties.

Aside from these provisions, the board has no authority, by rule or otherwise, to determine the qualifications for receipt of pension or the amount thereof. The authority of the board is strictly limited by the

language of the first sentence above quoted from Section 4615-9, to the "disbursement of benefits and pensions *as set forth in this section.*"

Accordingly, I am of the opinion that the board of trustees of the pension board had no authority to adopt a resolution or rule determining the service requirements of members of the fund to receive the pensions and benefits set forth in the law. The law, itself, specifies these requirements.

This brings me to the question which appears really to underly your questions, to wit: Is a member of a township firemen's pension fund entitled to credit for his period of service as a part time fireman prior to becoming such member, in determining his right to a pension or other benefit under Section 521.11, Revised Code 4615, G. C.

The pertinent language of that section, as bearing on superannuation, is as follows:

"A member of the fund who has *completed twenty-five years of active service* in the fire department and has attained fifty-two years of age, may at his election, retire from the department, and * * * shall receive an annual pension * * * 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 he was *in the active service of such department, * * **" (Emphasis added.)

Similar language as to "active service" is used in the section with relation to pensions based on other periods of service. Paragraph 4, relating to a member who is honorably discharged from the department, uses slightly different language, to wit, "A member of the fund who has served fifteen years as an *active member* of the fire department * * *." It appears to me that these words mean precisely the same as "active service."

Note that in no case does the law specify "full time service" or "active service on full time." There may be different degrees of activity between a fireman who is stationed for certain hours of the day in a fire house, and one who in his home or shop, is subject to call at any moment, day or night, but it cannot be denied that running to a fire and extinguishing it, is "active service," whether it occurs twice a day or twice a week.

While, as above stated, the act of June 14, 1947, in so far as it related to municipal pension systems, had no direct bearing on the newly created township system, yet it does in my opinion throw light on the general attitude of the legislature toward part time firemen. Prior to that act, municipalities were authorized to establish such system, whether or not they employed any full time firemen, and it was provided in Section 4600-1, General Code, that where there were less than five full time regular members of the department, volunteer firemen might be elected to the board of trustees. This provision, in substance, was carried into the 1947 act and there was also added in Section 4612-6, General Code, the following:

“This act shall be construed as preserving to volunteer, or part time firemen all rights to receive the pension provided for under existing laws relating to the firemen’s pension system.”

Accordingly, while the general assembly did not see fit to admit part time firemen to membership in the township firemen’s pension fund, it is certainly safe to assume that it was aware that there were thousands of full time regular firemen who formerly had served as part time employes and others who, being otherwise eligible, might later be employed as full time firemen. I am of the opinion that the general assembly did intend in the provision of Section 521.11, Revised Code, above quoted, that members of the fund should have credit for their active service as volunteer firemen in the employ of the township in determining their eligibility for pensions. There is certainly nothing in the language used in the statute that would deny them that right.

My conclusion in this respect is in general accord with the conclusion reached by one of my predecessors in Opinion No. 2645, Opinions of the Attorney General for 1948, page 49, wherein he expressed the opinion that a part time or volunteer firemen of a municipal fire department who qualified within the statutory definition of a “member of the fund” by contributing prior to April 1, 1947, two per cent of his annual salary, was entitled to make the election provided by Section 4614-1, General Code. There, of course, the principal question presented was whether he was a “member of the fund.” Here the persons in question clearly are “members of the fund” within the statutory definition. The statute providing for payment of benefits does not limit such payment to those who qualify by reason of years of service as a “member of the fund.” If it did, no service, whether full time or part time, could be considered, if such service predated

the establishment of the fund on or after April 1, 1947. Instead, it provides for payment based upon "years of active service in the fire department."

In the light of the foregoing, it is my opinion and you are advised:

1. The board of trustees of a township firemen's pension fund is without authority to adopt a rule determining the service requirement for a pension to a retiring member of the fund, that having been fixed by the provisions of Section 521.11, Revised Code, 4615-9, G.C.

2. A member of a township firemen's pension fund is entitled, in computing his period of active service under Section 521.11, Revised Code, 4615-9, G.C., to include his active service in the fire department, as a volunteer or part time fireman.

Respectfully,

C. WILLIAM O'NEILL
Attorney General