

OPINION NO. 73-128**Syllabus:**

1. The state has preempted the field of pension plans for volunteer firemen and their dependents and no local plan has been authorized since January 1, 1967;

2. An examination of Chapters 146, 741 and 742 of the Revised Code indicates that the General Assembly intended to abolish local pension plans for volunteer firemen; to transfer their assets to the state-wide plan by January 1, 1967; and to preserve all rights which had vested under such local plans up to that date;

3. A municipality which has a volunteer fire department must now contribute to the state-wide pension fund under R.C. 742.34; it may no longer contribute directly to a local pension fund.

To: Joseph J. Baronzzi, Columbiana County Pros. Atty., Lisbon, Ohio
By: William J. Brown, Attorney General, December 13, 1973

Your predecessor's request for my opinion states the facts and poses the questions as follows:

"1. On December 19, 1939, the Council of the

Village of Columbiana, Ohio, duly passed an 'Ordinance Declaring It Necessary And Providing For The Establishment Of Fireman's Relief And Pension Fund For The Village of Columbiana, Ohio'. A copy of same is attached hereto.

"2. At the time the above Ordinance was passed, and at all times since, the Village of Columbiana, Ohio has had a volunteer Fire Department, and has never had any full time, regular firemen.

"3. Said 'Fireman's Relief and Pension Fund' was established, and came into existence, under Chapter 4600 of the Ohio General Code entitled, 'Fireman's Pension Fund'.

"4. Said fund was funded under Section 4605 and Section 4609 of the Ohio General Code which provided for a 4% contribution from the fireman's wages and .3 mills from the tax apportionment.

"5. Said fund has existed over the years, and as of May 3, 1972, amounted to approximately, \$15,000.00, with an additional \$7,783.89 of tax money being held in escrow pending a decision of the general status of said fund.

"6. At the present time, there are a number of retired firemen receiving full or partial benefits, and a certain number of widows receiving survivor benefits."

QUESTIONS:

"1. What is the present status of Columbiana Village Firemen's Relief and Pension Fund.

"2. What effect does Ohio Revised Code Chapter 146 entitled 'Volunteer Firemen's Dependents Fund', Chapter 741, entitled, 'Pension Funds;' and Chapter 742 entitled, 'Police and Fireman's Disability and Pension Fund' have on the Columbiana Village Fund.

"3. Can the Columbiana Volunteer Fireman's Pension Fund lawfully continue to receive the .3 mill from the tax apportionment for the funding of its pension fund."

The pension fund to which you refer was established under Section 4600 of the General Code which ultimately became Section 741.02 of the Revised Code. In 1965, the General Assembly abolished all such local pension funds; set up a state-wide Police and Firemen's Disability and Pension Fund by the enactment of R.C. Chapter 742; and at the same time directed the transfer of all assets of the local funds to the new state fund by January 1, 1967. State, ex rel. Board of Trustees v. Board of Trustees, 12 Ohio St. 2d 105 (1967). At the same time, R.C. 741.02 was amended to bring it into line with the new R.C. Chap. 742. The amendatory language reads as follows:

"A firemen's relief and pension fund established under this section and the board of trustees of such fund established under this section shall cease to

exist on the date the assets of such fund are transferred to the police and firemen's disability and pension fund as provided by section 742.26 of the Revised Code." (Emphasis added.)

The history of the legislation concerning volunteer firemen's pension plans was traced at some length in Opinion No. 71-023, Opinions of the Attorney General for 1971, and I take the liberty of quoting the conclusions reached there which provide the answers to your present questions:

"9. It is obvious that municipalities could levy a tax under Section 741.09, Revised Code, to pay for pension benefits of those volunteer firemen entitled to them as 'members of the fund.' Prior to January 1, 1967, the pension fund was financed by such levies, by certain fines, penalties and fees (Section 741.10, Revised Code), by donations (Section 741.11, Revised Code), and by the statutory deduction from the salaries of the members (Section 741.12, Revised Code). However, these sections were designed for the benefit of those firemen who had attained the status of 'members of the fund,' and I can find no authority by which a municipality could levy a further tax under Section 741.09, Revised Code, for the benefit of volunteers who had not qualified as 'members of the fund' by contributing the statutory percentage of their annual compensation. Section 741.21, Revised Code, permits certain small fire departments, composed largely of volunteers, to gain the benefits of the fund, but it does not excuse the volunteers from the statutory requirement of becoming 'members of the fund' in order to become eligible for its benefits. Furthermore, both Sections 741.09 and 741.21, *supra*, appear to have become obsolete on January 1, 1967, when the local funds were abolished in favor of the state-wide Police and Firemen's Disability and Pension Fund (Section 742.26, Revised Code), which is now financed by the statutory salary deductions (Section 742.31 and 742.32, Revised Code), by a contribution from the general fund of the municipality (Section 742.34, Revised Code), and by a contribution from the state itself (Section 742.36, Revised Code).

"10-12. In view of the foregoing, I conclude that a municipality may not establish its own pension plan for volunteer firemen, that it may not provide funds for a pension plan to be administered by a local volunteer fire company, and that the fact that a municipality operates under a charter would not alter any of the answers already given. Where the state has pre-empted the field, municipalities may not enact their own pension plans. *Cincinnati v. Gamble*, 138 Ohio St. 220. In commenting on this decision, Opinion No. 4609, Opinions of the Attorney General for 1954, at page 615, stated:

"* * * [T]he Supreme Court held that in matters of state-wide concern the state is supreme over its municipalities and may in the exercise of its sovereignty impose duties and responsibilities upon them as arms or agencies of the state; that matters

relating to police and fire protection are of state-wide concern and under the control of state sovereignty; that the establishment of pensions for firemen and policemen is governed by statute. In view of these pronouncements, it is clear that municipalities in Ohio are without power, except when authorized by statute, to abolish or change pension systems established by the state for the benefit of all firemen and policemen within the state.'

"It is true that some of the broad language in the Gamble case, supra, was overruled in State, ex rel. Canada v. Phillips, 168 Ohio St. 191, 201, in which the municipality was held to have authority to appoint a particular police officer in a manner somewhat at variance with the state statute, so long as the municipality's act was not at variance with the constitution. However, the Phillips decision, supra, did not overrule the actual decision in Gamble, supra, apparently because in pension matters the state has pre-empted the field. It is clear that that is the case now since the local pension boards have now been abolished and replaced by the state-wide board."

Although the General Assembly had abolished the local funds, it had, as the Opinion further pointed out, always been careful to preserve those rights of volunteer firemen and their dependents which had become vested under prior law. In this respect I said:

"Throughout the various alterations of the statutory scheme governing firemen's pensions, the General Assembly has always been careful to preserve the rights which have accrued to volunteers under prior acts. Thus Section 4600-1, General Code [R.C. 741.06], as originally enacted, provides:

* * * * *

"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 fund.'

* * * * *

"In 1935 the Supreme Court held that a pension was a gratuity, not a vested right, and that the trustees of a fund had broad discretion and could either increase or decrease the amounts of a pension so long as they did not act arbitrarily. Mell v. State, 130 Ohio St. 306. The power of the trustees to decrease the amount disappeared shortly thereafter with the enactment of a statute making such pensions vested rights. Section 4612-1, General Code [R.C. 741.15], provides:

"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 a beneficiary of such pension fund, to receive such pension at the rate so fixed at the time of granting pension.'"

The necessary conclusion from the foregoing is that the fund to which you refer has been operating without legal authority since January 1, 1967, and that its assets should be transferred to the state-wide fund. All rights which had vested prior to January 1, 1967, will, of course, be preserved. It may well be that the circumstances will show that numerous equitable rights have also arisen since that date, but I have no information upon which to base an opinion as to this aspect of the matter.

In specific answer to your questions it is my opinion, and you are so informed, that:

1. The state has preempted the field of pension plans for volunteer firemen and their dependents and no local plan has been authorized since January 1, 1967;

2. An examination of Chapters 146, 741 and 742 of the Revised Code indicates that the General Assembly intended to abolish local pension plans for volunteer firemen; to transfer their assets to the state-wide plan by January 1, 1967; and to preserve all rights which had vested under such local plans up to that date;

3. A municipality which has a volunteer fire department must now contribute to the state-wide pension fund under R.C. 742.34; it may no longer contribute directly to a local pension fund.