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FIREMEN'S PENSION FUND—SECTION 4600 ET SEQ. G. C.—BOARD OF TRUSTEES WITHOUT POWER OR AUTHORITY TO ADOPT RULE AND REGULATION TO DISTRIBUTE ANY SURPLUS WITHIN A FIXED MAXIMUM LIMIT “AS A SORT OF GRATUITY” TO THOSE GRANTED PENSIONS—SECTION 4612-4 G. C.

SYLLABUS:

A board of trustees of a firemen's pension fund created and maintained pursuant to the provisions of Section 4600, et seq., of the General Code, is without power or authority to adopt a rule and regulation providing for the distribution of such pension fund (Sec. 4612-4, G. C.) whereby any surplus in the fund may be distributed within a fixed maximum limit “as a sort of gratuity” among the persons to whom pensions have been granted.

Columbus, Ohio, September 23, 1940.

Honorable Robert E. Fuller, Prosecuting Attorney,
Findlay, Ohio.

Dear Sir:

I have your request for my opinion, reading as follows:

“Several townships in Hancock County are giving serious consideration to the matter of providing fire protection for their respective territories by way of contract with adjacent municipalities which have their own fire departments.

General Code Section 3298-60 provides in detail for such contracts and for a variety of ways for determining the measure of consideration to be paid for the services so rendered, the final paragraph thereof providing in part:

“* * * ; and said contracts may provide for the reimbursement of the subdivision wherein the fire department members are employed for any pension or indemnity award or premium contribution assessed against the employing subdivision for workmen's compensation benefits, for injuries or death of its fire department members occurring while engaged in rendering service in pursuance thereof.’

Manifestly, if such factors be included as a feature of a given

contract with a municipality, the township has an immediate interest in the provisions of law providing for such pensions, etc.

In one of the interested municipalities which does maintain a Firemen's Pension Fund under the authority of General Code Section 4600, et seq., the board of trustees thereof is presently considering a revised set of Rules and Regulations for the distribution of such fund, pursuant to the authority in it vested under General Code Section 4612. One of the proposals under consideration is a rule whereby the pensioner is to receive a flat minimum sum per month plus a given amount in addition, based on the number of years of service rendered prior to his becoming entitled to pension, in total up to a specified maximum percentage of the monthly salary of the member at the time of becoming entitled to pension. Then the proposal is to add to this rule a provision that when and if the fund has a sufficient surplus the board of trustees may grant to pensioners an additional amount, within the maximum, during such period of time as it is felt that the fund will stand the increased payments without jeopardizing the rights of future pensioners, with the idea that the member receiving the increased amount will take the addition as a sort of gratuity, but will have a vested right only in the payment of the sums specified under the first quoted part of the rule.

General Code Section 4612-1 reads as follows:

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

In view of this statute, and in consideration of the general outline of the plan above suggested, would it ever be possible under any circumstances for the board of trustees to reduce a pension back to the original amount granted after an increase had once been allowed? Your opinion in this regard will be greatly appreciated pending further negotiation between the interested subdivisions."

Section 4612-1, General Code, quoted in your letter, was amended by the 93rd General Assembly (118 v. 552; Eff. 8-10-39), so as to read:

"The granting of relief or pension to any person or persons pursuant to the rules adopted by the trustees shall operate to vest a right in such person or persons to obtain and receive the amount fixed by the board of trustees. The right to obtain and receive the relief or pension herein granted may be enforced by an action in mandamus instituted in the court of common pleas in the county in which the person or persons granted such relief or pension reside."

In substance you ask if the board of trustees of a firemen's relief and pension fund, established pursuant to the provisions of Section 4600, et. seq.,

General Code, should use such surplus funds as it may from time to time have subject to its order, for the purpose of increasing or adding to (within a maximum limit fixed prior to the granting of such pensions) pensions theretofore granted according to law to persons entitled thereto, would the pensioner, by virtue of the provisions of Section 4612-1, supra, have a vested right in the augmented pension.

It seems to me that we are at the outset confronted with the question as to whether or not the board of trustees may retain jurisdiction to fix the amount of pensions granted pursuant to rules adopted by such board within predetermined minimum and maximum limits, or is such a board required to fix the amount of such pensions at a definite amount prior to the granting thereof. I am of the view that the latter is the correct interpretation of the statutes.

Section 4612-4, General Code, authorizes and directs the board of trustees to "adopt all rules and regulations providing for the distribution of the fund including the qualifications of those to whom any portion of it shall be paid and the amount thereof."

And as you shall have noted, Section 4612-1, supra, provides that the granting of relief or pensions pursuant to such rules "shall operate to vest a right" in the beneficiary "to obtain and receive the amount *fixed* by the board of trustees."

Section 4611, General Code, provides that the "trustees of the fund may invest the funds received by them" in the type of securities named in the section.

To provide moneys for and maintain the pension fund, by the terms of Section 4609, General Code, each "full time regular member of the fire department in each municipal corporation," unless such member elects otherwise as provided in such section, in which case he subjects himself to the disabilities therein set forth, is required to contribute two per cent of his annual salary, while Section 4605, General Code, makes mandatory a tax levy each year "of not to exceed three-tenths of a mill on each dollar upon all 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 relief and pensions granted or that may be granted during the ensuing year."

From the above and cognate sections of the General Code, two things are manifest, viz., (1) that while the Legislature has prescribed that the pension fund shall be provided for on a year to year basis, (2) it has also made provision for the investment of any surplus funds in the kinds of municipal bonds specified in Section 4611, supra. As held in Opinion No. 1781, rendered by this office under date of January 29, 1940, to the Bureau of Inspection and Supervision of Public Offices:

“Moreover, by the terms of Section 4611, supra, the trustees are expressly authorized to invest the moneys in the fund in question in interest-bearing bonds of the kind described in said section, thus clearly evidencing an intention on the part of the legislature that any unexpended balance in the firemen’s relief and pension fund should be invested and not placed in a general fund. Obviously, any such investment becomes a reserve fund and must be given proper consideration by a board of trustees when preparing and submitting its estimate for the information and advice of council.

As has been seen, the legislature has provided for the levying of an annual tax for the fund under consideration, and in addition has provided by Section 4609, General Code, as amended in Amended Substitute Senate Bill No. 52, supra, that each full time regular member of the fire department shall, unless objection is made thereto, as provided in such section, contribute two per cent of his annual salary to the relief and pension fund. Manifestly, notwithstanding the fact that the legislature has made provision for what may be termed a reserve, it seems to have been the intent of the General Assembly that the fund be operated on a pay-as-you-go basis.”

In view of the method prescribed by the Legislature for the financing of the pension, including the provisions of Section 4611, supra, permitting the investment of funds, it seems to me quite clear that the board of trustees may not retain the power to divide any surplus under its control among those who have been granted pensions in accordance with the rules and regulations adopted under the provisions of Section 4612-4, supra. To hold otherwise would have the effect of (1) running counter to what seems to me to be the plain intention of the law-making body, as above outlined; (2) practically making Section 4611, supra, a dead letter; and (3) permitting the board of trustees to divide both the money paid by the taxpayers and the two per cent compulsory contribution of the firemen.

It is, of course, unnecessary to cite authority to the effect that statutory boards, commissions and officers have such powers and only such powers as have been expressly granted by statute, together with such implied powers

as may be necessary to carry the express powers into effect. And it is an equally well settled principle that where the Legislature prescribes the mode of exercise of the power conferred on such a board, "the mode specified is likewise the measure of the power granted." See *Frisbie Company vs. The City of East Cleveland*, 98 O. S. 266 (1918), and *Opinions, A. G.*, 1939, Vol. II, 1697.

For all of which reasons, it is my opinion that:

A board of trustees of a firemen's pension fund created and maintained pursuant to the provisions of Section 4600, et seq., of the General Code, is without power or authority to adopt a rule and regulation providing for the distribution of such pension fund (Sec. 4612-4, G. C.), whereby any surplus in the fund may be distributed within a fixed maximum limit "as a sort of a gratuity" among the persons to whom pensions have been granted.

In view of the above conclusion, a specific answer to your question is unnecessary.

Respectfully,

THOMAS J. HERBERT,
Attorney General.