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A PART-TIME POLICEMAN IS NOT INCLUDED WITHIN THE DEFINITION OF "MEMBER OF THE POLICE DEPARTMENT" SET FORTH IN SECTION 741.31, R.C., AND CANNOT BE A MEMBER OF THE POLICE RELIEF AND PENSION FUND. §741.31, R.C., OPINION 4609, OAG, 1954 OPINION 1737, OAG, 1948, §4631-3, G.C., AMENDED H.B. 325, 98TH G.A. 1230.2., 345, §741.38, R.C.

SYLLABUS:

A part-time policeman duly employed by a municipality is not included within the definition of "member of the police department" as set forth in Section 741.31, Revised Code, and has not been so included since said section was amended in 1949 by the 98th General Assembly, 123 Ohio Laws 345; and as a result thereof, such part-time policemen may not become members of a police relief and pension fund established pursuant to Section 741.31, *et seq.*, Revised Code. (Opinion No. 3893, Opinions of the Attorney General for 1948, page 502—modified).

Columbus, Ohio, August 10, 1962

Hon. John T. Corrigan, Prosecuting Attorney
Cuyahoga County, Cleveland, Ohio

Dear Sir:

I have your request for my opinion which reads as follows:

“(1) May a part time policeman be or become a member of a statutory police pension fund in Ohio?”

“(2) If so, what are the requisites for establishing such membership by part time policemen and when does such membership commence?”

“We make this request because Revised Code Section 741.31 (G.C. 4631-3) was amended in 1957 after you issued 1948 O.A.G. Opinion No. 3893 (p. 502) and the wording of the present statute has caused us to doubt the eligibility of part time policemen as members of statutory police pension systems.

“Several of our county municipalities have been inquiring about this.”

Whether a person is eligible to become a member of a police relief and pension fund established pursuant to Section 741.31 *et seq.*, Revised Code, depends upon whether he comes within the definition of “member of the police department” as set forth in Section 741.31, Revised Code. See Opinion No. 4609, Opinions of the Attorney General for 1954, page 613 and Opinion No. 1737, Opinions of the Attorney General for 1960, page 630.

The syllabus of Opinion No. 3893, Opinions of the Attorney General for 1948, page 502, referred to in your request, reads as follows:

“1. Where a municipal corporation has established a police relief and pension fund pursuant to the authority of Section 4616, General Code, and employs a police officer for part time services only, which is equivalent to two-thirds of the time regularly worked by the full time police officer, such part time officer, if he has the other qualifications required by law for employment as such police officer, is entitled to membership in the police relief and pension fund.

“2. When such part time police officer has been a regular member of the police relief and pension fund and has contributed to said fund since 1941, up to September 25, 1947, the effective

date of House Bill No. 195 of the 97th General Assembly, he is entitled to participate in the benefits of such fund.

“3. The benefits to which a member of the police relief and pension fund is entitled are governed by Section 4628 et seq. of the General Code, and he is entitled to the benefits of the provisions therein contained, regardless of the fact that he is a part time officer.”

In arriving at the above conclusion, the then Attorney General said, beginning on page 505 of Opinion No. 3893, *supra* :

“In the enactment of the new provisions relative to the police relief and pension fund, the General Assembly saw fit to adopt certain definitions which as stated are to govern in all of the sections relating to the police relief and pension fund. Section 4631-3, General Code, reads as follows :

“The following words and phrases as used in sections 4616 through 4631-2 of the General Code, both inclusive, shall have the following meanings :

“1. “Member of the police department” shall mean any person who receives an original appointment as a police-woman, policeman or police matron from a duly established civil service eligible list or who is appointed to a position in a police department pursuant to section 4384 or 4384-1 of the General Code or who, on the effective date of this act, is contributing two per cent of his annual salary to a police relief and pension fund established pursuant to the provisions of section 4616 of the General Code.

“2. “Member of the fund” shall mean any person who is contributing four per cent of his annual salary to the police relief and pension fund or who is receiving a pension or disability benefits from a police relief and pension fund, established pursuant to the provisions of section 4616 of the General Code, as a result of service in the police department.’

“It will be observed here that this definition of ‘member of the police department’ is somewhat narrower in its scope than Section 4374, *supra*, in that it includes only police women, policemen, and police matrons and would appear to exclude other employes of the department who do not have the status of either of these three.

“It will be observed further that this definition is broad enough to include police officers who may work part of the day or part of the days of the week, as well as those who are employed for full time.”

Said opinion further states that had the General Assembly desired to limit membership in the police relief and pension fund to full-time members of a police department, it could have used language similar to that then found in Section 4615-13, General Code, dealing with the phrase "members of the fire department," as used in the statutes pertaining to the funds for township fire departments, wherein full-time employment was clearly spelled out.

Section 4631-3, General Code, quoted in the above excerpt from Opinion No. 3893, was amended in 1949 by the 98th General Assembly in Amended House Bill No. 325, 123 Ohio Laws, 345, to read in pertinent part as follows :

"The following words or phrases as used in sections 4616 through 4631-4 of the General Code, both inclusive, shall have the following meanings :

"1. 'Member of the police department' shall mean any person who received or who receives an original appointment as a policewoman, policeman or police matron from a duly established civil service eligible list, or who has been or who is appointed pursuant to section 4384 or section 4384-1 of the General Code as a full time regular policeman and who is paid solely out of public funds of the employing municipal corporation or who, immediately prior to September 25, 1947 was contributing two per cent of his annual salary to a police relief and pension fund established pursuant to the provisions of Section 4616 of the General Code.'

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Upon the adoption of the Revised Code, the above quoted provisions of Section 4631-3, General Code, became a part of Section 741.31, Revised Code, and Sections 4384 and 4384-1 General Code became Sections 737.15 and 737.16, Revised Code, respectively. Section 741.31, Revised Code, was amended by the 102nd General Assembly in Amended House Bill No. 689, 127 Ohio Laws, 843, (1957), however, such amendment has no effect upon the question raised in your request.

There can be no doubt that under the foregoing 1949 amendment to Section 741.31, Revised Code, a chief of police or a policeman in a village appointed under Section 737.15 or 737.16, Revised Code, is not a "member of the police department" as defined in Section 741.31, Revised Code, unless he is a fulltime regular policeman, since it is clear that the phrase "fulltime regular policeman" in said latter statute modifies the phrase therein dealing with such appointments.

As to whether it was also intended that the phrase "as a full time regular policeman" modifies the words, "who received or who receives an original appointment as a policewoman, policeman or police matron from a duly established civil service list" your attention is called to Vol. 2, *Sutherland Statutory Construction*, 3rd Edition, Section 4921, page 448, which reads:

"Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent. Thus a proviso is construed to apply to the provision or clause immediately preceding it. But where the sense of the entire act requires that the qualifying words apply to several preceding or even succeeding sections the word or phrase will not be restricted to its immediate antecedent. Thus it is apparent that the rule relating relative or referential terms is of no great force and will be applied only when its application is consistent with the legislative intention."

See also 50 Ohio Jurisprudence 2nd, 307, Statutes, Section 324 *et seq.*

It will be noted that Amended House Bill No. 325, *supra*, which inserted the qualifying language here in question in Section 741.31, Revised Code, (then Section 4631-3, General Code), also enacted the provisions of law now found in Section 741.38, Revised Code, (123, Ohio Laws, 345).

Section 741.38, Revised Code, grants a right to join an existing police relief and pension fund and reads in part as follows:

"Any person who is employed full time as a member of a police department by a municipal corporation in which a police relief and pension fund is established * * *

"* * *

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* * *"

An examination of the provisions of Sections 741.31 and 741.38, Revised Code, being part of the same act, should be made in an effort to ascertain the intention of the legislature with regard to the phrase in question herein. It will be noted that new membership for policemen on the force when a fund is established is limited to full-time employees, Section 741.38, *supra*. If the legislature intended that membership be available to all new policemen it would seem that it would not have so restricted membership for existing policemen. While such restriction would not violate the legislative power, it would create an inequity within

the law and such inequity would not result if the phrase in question in Section 741.31, *supra*, was intended to modify both of the phrases which precede it. When language is susceptible to two interpretations, one which is equitable and one which is not, the equitable construction is favored. 50 Ohio Jurisprudence 2d, 214, Statutes, Section 233.

Another principle of statutory construction which is helpful in answering this question is found in 50 Ohio Jurisprudence 2d, 296, Statutes, Section 312, which reads in part as follows:

“* * * The body enacting the amendment is presumed to have in mind such judicial construction, and if, in the subsequent statute, it uses different language in the same connection, the presumption arises that a change of the law was intended. A manifest intention to alter the effect of a statute is more readily followed by the courts where the change is apparently in pursuance of a suggestion by the court in the decision of a case involving an application of the former statute. * * *”

While there was no judicial interpretation of the statutory language which preceded that found in Section 741.38, *supra*, as enacted by Amended House Bill No. 325, *supra*, Opinion No. 3893, *supra*, had been rendered less than one year prior thereto. It seems apparent that the legislative changes then enacted were as a result of said opinion, for the suggestion made in said opinion as to the method which could have been followed by the General Assembly in order to cause membership in the police relief and pension fund to be available to full-time policemen only was followed.

Your attention is also called to Opinion No. 1737, Opinions of the Attorney General for 1960, page 630, where I was called upon to answer several questions dealing with police relief and pension funds, and while the instant question is not therein treated, the syllabus is specifically limited to full-time policemen.

Considering the foregoing, I am of the opinion that the General Assembly in enacting Amended House Bill No. 325, *supra*, intended to limit membership to a police relief and pension fund to full-time regular policemen and that the phrase “full time regular policemen” as used in Section 741.31, Revised Code, modifies the phrases in said section that immediately precede it.

While it appears that your second question need not be answered, it is suggested that, as to duly appointed part-time policemen, the provision

of Chapter 145., Revised Code, dealing with the Public Employees Retirement System be examined. Such an employee would not be excluded from membership in that system by Section 145.02, Revised Code; however, the provisions of Section 145.03, Revised Code, dealing with the availability exemptions may be determined to be applicable.

In specific answer to your question, I am of the opinion and you are advised that a part-time policeman duly employed by a municipality is not included within the definition of "member of the police department" as set forth in Section 741.31, Revised Code, and has not been so included since said section was amended in 1949 by the 98th General Assembly, 123 Ohio Laws 345; and as a result thereof, such part-time policemen may not become members of a police relief and pension fund established pursuant to Section 741.31, *et seq.*, Revised Code. (Opinion No. 3893, Opinions of the Attorney General for 1948, page 502—modified).

Respectfully,

MARK McELROY

Attorney General