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1. FIREMEN'S RELIEF AND PENSION SYSTEM—RULES IN FORCE APRIL 1, 1947—SERVICE CREDIT FOR RETIREMENT—TIME LAID OFF FROM WORK BECAUSE OF LACK OF FUNDS—MEMBER—LAID OFF PRIOR TO ADOPTION OF RULE—COMPLIED WITH RULE IN OTHER RESPECTS—MADE ELECTION—RIGHTS NOT LIMITED BECAUSE PERIOD OF LAY-OFF FROM WORK WAS PRIOR TO ADOPTION OF RULE.
2. POLICE PENSION AND RELIEF FUND—MEMBER—TO RETIRE—SECTION 741.49, RC (A)—PERIOD LAID OFF FROM WORK BECAUSE OF LACK OF FUNDS, SUBJECT TO RECALL, NOT INCLUDED IN REQUIRED 25 YEARS OF ACTIVE SERVICE.

## SYLLABUS:

1. Where the rules of a firemen's relief and pension system in force April 1, 1947, provided that a member of the fund laid off by reason of lack of funds should have the period of his lay-off not exceeding three years, credited to his required period of service for retirement, the fact that he had been laid off for such cause for two years prior to the adoption of such rule, would not limit his right, pursuant to his election duly exercised, to retire and receive his pension under such rules, provided he had complied with said rules in other respects.

2. A member of the police pension and relief fund who desires to retire under the provision of paragraph (A) of Section 741.49, Revised Code, is not entitled to count as a part of his twenty-five years of active service required for such retirement, a period when he was laid off for lack of funds, even though he was at all times during such period of lay-off subject to recall.

Columbus, Ohio, July 12, 1956

Bureau of Inspection and Supervision of Public Offices  
Columbus, Ohio

Gentlemen :

I have before me your request for my opinion together with attached correspondence relative to the qualifications for pension of certain members of the firemen's and police relief and pension systems of the City of Akron. Both cases presented involve the question of periods when officers were laid off, due to shortage of funds as constituting a portion of the period of service required by law or by the rules of the pension board, as a condition to a superannuation pension.

The two cases presented will have to be dealt with separately since the firemen who will be designated herein as "A", resigned from the fire department in 1954 and was granted a pension, while the policeman who will be referred to as "B" is still a member of the department and is looking forward to retirement under the rules laid down in the statute.

It is stated that "A" was employed in 1929; was laid off due to lack of funds in February, 1932, and "reinstated as a fireman in February, 1934." He resigned effective July 1, 1954, and was granted a pension under the rules and regulations of the firemen's relief and pension fund in effect prior to 1947, having elected to remain under the old rules and regulations. This privilege of election was granted by an act which allowed such election for a period of ninety days from its effective date, September 25, 1947, and was renewed by the enactment of Section 4614-1a, General Code, from its effective date May 23, 1951 to January 1, 1952.

Since that time the laws have granted no such privilege and members of the firemen's fund thereafter entitled to pensions must take them under the provisions of Section 741.18, Revised Code.

Prior to the new legislation effective September 24, 1947, it was provided by Section 4612, General Code, as to the trustees of the firemen's pension fund:

"Such trustees shall make all rules and regulations for the distribution of the fund, including the qualifications of those to whom any portion of it shall be paid and the amount thereof, but no rules or regulations shall be in force until approved by a majority of the board of trustees."

The information submitted shows the adoption in 1943, by the board of trustees of the firemen's system of a rule reading as follows:

"If any member of the Fire Department be laid off by reason and authority of Sections 486-17b, General Code of Ohio, and is absent from the department for a period not longer than three years and shall be reinstated in the department any time within that period, any time absent from the department by such fireman shall be granted to him as though he was in the service of said Fire Department, and he shall be eligible to retire on said pension according to the rules and by-laws of said Pension Board, and said time of absence shall be credited to him in computing his years of service; provided, however, that said fireman, after such reinstatement, shall pay to the Pension Board an amount equal to 1% additional to the 2% each and every month until he has completed the delinquent payments of 2% as provided by Section 4609, General Code of the State of Ohio."

If we may consider that resolution as applicable to the "lay-off" which "A" suffered in 1932-1934, then there could be no question as to the regularity of the pension granted to fireman "A". Strictly interpreted, the language of the resolution quoted might appear to be prospective only. But since it was manifestly designed to establish a rule for future retirement rather than a program for future service, I do not consider that I am doing violence to its wording in concluding that it should apply as well to a "lay-off" by reason of shortage of funds in 1932, as well as to one which might occur in 1952. To hold otherwise, would give the rule a discriminatory effect in favor of certain contributing members of the fund as against others. It is an accepted rule of construction that in reference to pension laws a liberal construction in favor of the beneficiaries is to be applied. See Crawford on Construction of Statutes, page 721.

In reaching the conclusion that "A's" pension was lawfully granted, I must indulge two assumptions, (a) that he had served for the period required by the rules for superannuation retirement, and (b) that he did make up the "delinquent payments" as provided in the rule quoted. I feel justified in assuming those conditions in view of the presumption that the board in granting his pension acted regularly, in the absence of any facts indicating the contrary.

I come then, to the status of "B" member of the police relief and pension fund, whose right to retire is in question. I understand that his case is typical of several police officers whose situation is substantially the same. They were laid off because of shortage of funds, for a period of

about seven months. Here we must deal with the statutes which since September 24, 1947, have strictly governed the qualifications for and the amount of pensions.

Under the statutes which became effective on that date the previously existing power of the pension board as given by Section 4628, General Code, to "make all rules and regulations for the distribution of the fund, including the qualifications of those to whom any portion of the fund shall be paid, and the amount thereof," was withdrawn, and there was substituted in Section 4628, General Code, Sec. 741.49, Revised Code, the following provision relating to superannuation pensions:

"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 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 calendar years during which his total annual salary as member of said police department was the greatest 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 calendar years during which his total annual salary as a member of said police department was the greatest."  
(Emphasis added.)

It is worthy of note that the legislature, in providing in said Section 741.49 for lesser pension allowance and for disability benefits, in each case based them on a certain number of years in "active service."

This new legislation also contained an option to the member to take under the former rules of the board, but as the information furnished me does not indicate that such an election was made, we must consider the rights of "B" from the standpoint of the statutes alone. The crucial question with which I am confronted is whether "B" has had twenty-five years of "active service" in the department. It is urged by the chairman of the board that "B" and his associates were "furloughed," not "laid off." He states that the mayor informed them that they were to be removed from the payroll for an indefinite period; further:

"\* \* \* That they were to retain their uniforms, badges and other credentials; that they were to be subject to 24 hour call; were not to leave the city without the consent and permis-

sion of the Chief of Police and that they would be referred to all extra police work available from the Department and were, in fact, during such period referred on numerous occasions to outside or private police work, all of which was performed in full uniform and with all police credentials and in the apparent capacity of Police Officers of the City of Akron. They were further advised by the then Mayor that they were not to be separated from the service or membership in said Police Department and that the action then being taken would not in any manner affect or alter their civil service status nor in any manner interfere with the status as members of the Department and that they would be restored to full pay as soon as practicable. They were further advised to, and did in fact continue payment of their monthly contributions to the Police Pension Fund of the City of Akron. That the then Mayor of the City of Akron released to the local newspapers the statement that his action pertaining to such officers resulted in their being 'furloughed'. The records of the Civil Service Commission of the City of Akron verify and indicate that such officers were furloughed for periods from 8 to 14 months and reinstated sometime in March of 1933. The records of the Police Department of the City of Akron specifically indicate that these officers were 'furloughed' and reinstated sometime in March of 1933."

It is evident that the mayor in laying "B" off for a period, by reason of shortage of funds, did all that was in his power to make him feel that he still belonged to the police department even though he was off the payroll; and that the trustees of the fund considered that he still belonged to the system, because it appears that they required him to pay one dollar per month to the fund. But I am unable to see that either of these acts or attitudes could change a condition of *no service* in the police department into "active service." If as in the case of the fireman we were determining his status by resorting to the rules of the pension board we might give some consideration to the action of the board in making the charge of \$1.00 per month, but the mere fact that the rule held him as a member of the system, would not determine that he was in the "active service" as required by the statute.

The civil service provision, Section 486-17b, General Code, in describing the status of an employee "laid off" because of lack of funds, merely provided that he should be entitled to fill the first vacancy that might occur. It is conceivable that a member of the police department might be laid off for a considerable number of years and enjoy a highly remunerative career in some other line and then go back to the department.

Surely, he could not be said to have been in "active service" during that period, regardless of the attitude of the municipal officers or his own expectation of returning.

In Opinion No. 2765, Opinions of the Attorney General for 1948, page 87, we find this question propounded:

"When a fireman who is a contributing member of the fund has been suspended or temporarily laid off for retrenchment purposes and does not receive any salary, nor contribute his usual four per cent to the pension fund, would said individual be classified as a 'member of the fund' during that period, and would he be entitled to receive benefits in the event anything occurred to him during such suspension or retrenchment period?"

The answer to that question is found in paragraph 4, of the syllabus, reading as follows:

"A fireman who has been a member of such fund, but is separated from the service under the provisions of either Sections 486-16 or 486-17b, General Code, ceases to be a member of the fund, unless and until reinstated in service."

I do not regard that opinion as decisive of the question we are here considering, because it was founded mainly on the definition of "member of the fund" under the new law, which required that he be contributing four per cent of his salary. But there is something persuasive in the language of the opinion at page 93:

"It appears to me that it would be stretching the definition of 'member of the fund' unduly, to hold that a fireman who has been 'separated from the service' under the circumstances outlined in either of the two last mentioned sections, (486-16 or 486-17b, G.C.) could still be regarded as a 'member of the fund', and entitled to its benefits. He has, at most, a mere possibility of returning to the service."

I have not found any decisions defining "active service" with respect to the law under consideration but I note some consideration of the term as relating to military service. In the case of *United States v. Woodworth*, 36 [F. Supp., 645, it was said:

"'Active service' in army does not necessarily mean actual service, but means *service performed at direction of superior officer or officers while receiving emoluments* to which soldier is entitled, and does not include one who has separated himself

from army to follow his own pursuits, *though he may be subject to call to active service*, as in case of reservist.”

(Emphasis added.)

In specific answer to the questions submitted, it is my opinion :

1. Where the rules of a firemen's relief and pension system in force April 1, 1947, provided that a member of the fund laid off by reason of lack of funds should have the period of his lay-off not exceeding three years, credited to his required period of service for retirement, the fact that he had been laid off for such cause for two years prior to the adoption of such rule, would not limit his right, pursuant to his election duly exercised, to retire and receive his pension under such rules, provided he had complied with said rules in other respects.

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Respectfully,

C. WILLIAM O'NEILL

Attorney General