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(1) BOARD OF TRUSTEES OF A FIREMEN'S RELIEF AND DISABILITY PENSION FUND IN ACTING UPON AN APPLICATION FOR BENEFITS IS NOT BOUND TO ACT IN ACCORDANCE WITH OPINIONS OF THREE PHYSICIANS APPOINTED RELATIVE TO 741.18, R.C., BUT SHOULD CONSIDER ALL EVIDENCE IN DETERMINING ELIGIBILITY—

(2) MEMBERS OF ABOVE BOARD ARE NOT LIABLE FOR ACTS PURSUANT TO 741.18 (C), JUDGED TO BE ERRONEOUS UNLESS BAD FAITH OR CORRUPT MOTIVES BE PRESENT—
§741.18, R.C.

SYLLABUS:

1. A board of trustees of a firemen's relief and pension fund in acting upon an application for disability benefits filed pursuant to the provisions of Section 741.18 (C), Revised Code, is not bound to act in accordance with the majority opinion of the three physicians appointed pursuant to said section, and such a board should consider all of the evidence bearing upon the facts which must be determined as a prerequisite to the eligibility of the applicant for such benefits.

2. The individual members of a board of trustees of a firemen's relief and pension fund are not personally liable for any action taken by them pursuant to the provisions of Section 741.18 (C), Revised Code, which may subsequently be determined to have been erroneous, unless such action is coupled with bad faith or corrupt motives.

Columbus, Ohio, July 18, 1961

Hon. James A. Rhodes, Auditor of State
State House, Columbus, Ohio

Dear Sir:

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

"I enclose a copy of an injury which was directed to this office by the Chairman of the Board of Trustees of the Firemen's Relief and Pension Fund of the City of C. Also enclosed are copies of medical and legal opinions which were made available to that board with reference to the case in point.

"In summary, a member of the Fire Department of the City of C. became physically unable to continue the duties of his position. After an appropriate examination, the fire surgeon recommended that he be separated from the department by reason of his physical disability. Following the procedure established in the last two paragraphs of R.C. 741.18 (C), the disabled fireman was examined by three physicians, selected in accordance with the statute.

"Each of the examining physicians submitted a written report of his findings to the board. Copies of each such report are also enclosed with this letter. You will note that each physician arrived at a different diagnosis of the cause of the subject's disability. After reviewing the conclusions of the examining physicians, the board made a formal finding that the applicant was suffering from a heart condition which did not exist at the time of his original employment, and which made him physically unable to continue as an active fireman.

"It is apparent that the legality of any expenditures from the pension fund, in the nature of pension payments to this individual, will depend upon the authority of the board to arrive at this conclusion, in view of the diagnoses on which it was based. It further appears that the authority of the board in this case depends, to a substantial degree, upon the legal interpretation of the last two paragraphs of R.C. 741.19 (C) (cited above).

"This provision in the law is relatively new, and has not been previously interpreted, to our knowledge, either by a court or your office. Since its provisions affect the legality of actions by all such boards of trustees, the questions which have arisen here are of concern to officials of most municipalities of the State. Therefore, I request your formal opinion as to the following questions:

1. Is a board of trustees of a firemen's relief and pension fund bound to act according to the majority opinion of a committee of three physicians, appointed pursuant to R.C. 741.18 (C), in disposing of an application for disability pension under this Section?
2. If your answer to the first question is in the affirmative; what is the basis for a decision of the board, either to grant or withhold such a pension, where no two medical opinions submitted are mutually reconcilable as to the probable cause of physical disability?
3. If your answer to question No. 1 is in the negative, does the board have authority to consider the probative value of other evidence, in addition to the three medical opinions provided by statute, in determining whether or not the subject pension should be granted?
4. Can individual members of such a board be held personally liable, in the absence of fraud or collusion, for pension payments authorized by board action which was not in accordance with your interpretation of the above statute?
5. If your answer to question No. 4 is in the affirmative, and an action is brought by the city solicitor against the board or its members; is the board authorized to employ legal counsel, outside of the office of the city solicitor, in its defense?"

Your questions will be treated separately.

As to your first question, Section 741.18 (C), Revised Code, reads in pertinent part as follows:

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"A member of the fund who is disabled as a result of heart disease, which disease or any evidence of which disease was not revealed by the physical examination passed by the member upon entry into the department, shall be presumed to have incurred the disease while performing his official duties as a member of such department unless the contrary is shown by competent evidence.

"If such disability prevents the member from performing his official duties and impairs his earning capacity he shall be paid annual disability payments in accordance with this division.

"A member of the fund who applies for disability benefits as a result of heart disease not revealed by the physical examination passed by the member upon entry into the department shall

be examined by three physicians ; one of whom shall be designated by the municipal corporation ; another of whom shall be designated by the trustees of the firemen's relief pension fund and the third shall be selected by the other two previously designated physicians. Each examining physician shall submit a written report of his findings to the board."

You will note from the above quoted provision of law that the claimed disability, heart disease, must prevent the member from performing his official duties and impair his earning capacity. Section 741.18, Revised Code, does not expressly state who is to make the aforementioned findings. It is, of course, apparent that such findings would be based upon facts and medical opinion. A reading of all of the provisions dealing with the firemen's relief and pension fund, however, can lead to but one conclusion, and that is that the firemen's relief and pension fund board is charged with the duty and obligation of determining that the statutory requirements which are necessary before any benefit can be granted have been met. In the instant case it therefore must follow that the reports of the physicians appointed pursuant to Section 741.18 (C), *supra*, are not dispositive of the question which is before the firemen's relief and pension fund board. Such reports merely become part of the evidence from which the board must determine whether or not the party making application is duly qualified for the benefits requested.

As to the nature of the power and authority exercised by the board in these matters, your attention is called to the following statement found in 42 American Jurisprudence, 370, Public Administrative Law, Section 61, which reads as follows :

"The power to hear and determine, or to ascertain facts and decide by the application of rules of law to the ascertained facts, is undoubtedly a part of the judicial power, but this power is not peculiar to the judicial office. It appertains as well to the other departments of the government as to the judiciary. Administrative officers may hear and determine, or ascertain facts and decide by the application of rules of law to the ascertained facts, and the power exercised by them is administrative or quasi-judicial, and not judicial, at least in the sense of a violation of the principle of separation of powers. Whether the power to hear and determine is judicial depends upon the nature of the subject of the inquiry, the parties to be affected, and the effect of the determination. What might be a judicial proceeding in determining controversies between private individuals is not necessarily such where the interests of the sovereign state are

involved. The power of administrative and executive officers to hear and determine many matters more or less directly affecting public or private rights, not being in the nature of a suit or of an action between parties, is not the exercise of judicial power, within the meaning of the Constitution. However, the power to pass upon evidence and decide, or to find the facts and apply the law, is judicial within the rule that a court may be invested with power to review only judicial acts, and within the principle of immunity from liability for judicial acts.”

In making the determination involved herein, the board is acting in a quasi judicial capacity. Therefore, the board, acting in good faith, is not bound to act in accordance with a majority opinion of the physicians appointed by the board if other competent testimony or evidence before the board would justify a contrary result.

Since Question No. 1 is answered in the negative, Question No. 2 need not be answered.

As to Question No. 3, it is of course apparent, based upon my answer to Question No. 1, that the board not only has the right but has the duty in determining the questions of fact which must be decided prior to the granting of benefits to consider all of the evidence available to the board on said questions. In making its judgment, the board, of course, must give probative weight to any and all evidence which is before it.

Coming to Question No. 4, membership on the board of trustees of a firemen's pension fund, which would include the board in question, has been held not to be a "public office" in a given instance. *Moxon, et al v. The State ex rel. Binyon*, 36 Ohio App., 24. However, the discretion granted to such boards has been recognized by the courts. *The State ex rel. Downing v. Johnson, et al*, 101 Ohio App., 496. The civil liability of public officers generally is found in 44 Ohio Jurisprudence, 2d, 570, Public Officers, 78, which reads in pertinent part as follows:

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“It is the well-settled rule that a public officer acting within the scope of his authority is not liable individually, in the absence of bad faith or a corrupt motive, for failure properly to perform a duty involving judgment and discretion. An officer who is entitled to exercise discretion cannot be held liable or accountable for errors of judgment, such as paying money to the wrong person. This immunity extends to errors in the determination both of law and of fact. However, it has been held that the rule

that an officer cannot be held accountable for errors of judgment does not apply to ministerial officers except in instances where they act in a quasi-judicial capacity.

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Although I recognize that the court in the *Moxon* case, *supra*, decided that membership on such a board was not a “public office,” I am of the opinion as aforesaid that the duties and functions of such board involved herein are quasi-judicial and therefore the above quoted proposition of law is applicable. It follows that in the absence of fraud or collusion, interpreting those words to include bad faith or corrupt motives, the members of a firemen’s relief and pension fund board cannot be held personally liable for any failure to properly perform the duties imposed upon them by Section 741.18 (C), *supra*.

Since the fourth question is answered in the negative, the fifth question need not be answered.

In accordance with the above, it is my opinion and you are advised:

1. A board of trustees of a firemen’s relief and pension fund in acting upon an application for disability benefits filed pursuant to the provisions of Section 741.18 (C), Revised Code, is not bound to act in accordance with the majority opinion of the three physicians appointed pursuant to said section, and such a board should consider all of the evidence bearing upon the facts which must be determined as a prerequisite to the eligibility of the applicant for such benefits.

2. The individual members of a board of trustees of a firemen’s relief and pension fund are not personally liable for any action taken by them pursuant to the provisions of Section 741.18 (C), Revised Code, which may subsequently be determined to have been erroneous, unless such action is coupled with bad faith or corrupt motives.

Respectfully,

MARK McELROY

Attorney General