

OPINION 65-208

Syllabus:

1. A person over thirty years of age, upon return to active service in a township fire department after April 1, 1947, other than for reason of military service pursuant to Section 521.10, Revised Code, may not be reinstated to membership in the Township Firemen's Relief and Pension Fund; such a person must, however, become a member of the Public Employees Retirement System.

2. Chapter 521., Revised Code, does not grant authority to the Board of Trustees of a Township Firemen's Relief and Pension Fund to enact rules or regulations permitting a person who does not qualify under the provisions of that chapter to become a member of the Fund.

To: Roger Cloud, Auditor of State, Columbus, Ohio
By: William B. Saxbe, Attorney General, November 30, 1965

I have before me your request for my opinion which reads in part:

"Approximately nine months ago a person who was a member of a township fire department resigned from his job as a full time fireman to become an employee of the State of Ohio. As permitted by Section 521.11 (I), R.C., he withdrew from the township firemen's relief and pension fund an amount equal to the sums deducted from his salary and credited to the fund upon resigning from service in the township fire department. Since commencing upon state employment he has been making contributions to P.E.R.S. This person is now resigning from state employment to return to the township's fire department as a fireman. He is now more than thirty years of age and had served about nine years with the township fire department."

The questions you pose in conjunction with the above facts are the following:

1. Is this person eligible for membership in the Township Firemen's Relief and Pension Fund, either as a reinstated member or as a new member?
2. Does the Board of Trustees of a Township Firemen's Relief and Pension Fund have authority pursuant to Section 521.11, Revised Code, to adopt a rule providing that a former member of the fund may be reinstated upon paying back into the fund the amount withdrawn?

Section 521.11 (I), Revised Code, provides:

"A member of the fund who voluntarily resigns from active service in the department shall be entitled to receive an amount equal to the sums deducted from his salary and credited to the fund."

The section is explicit in its explanation of the mechanics involved in resignation and severance from membership in the Township Firemen's Relief and Pension Fund, but nowhere is there provided any means whereby a fireman who has previously resigned from active service may be reinstated. Section 521.10, Revised Code, does set forth reinstatement procedures for those firemen who, during national emergencies, enter the armed services, but this provision is limited to a specific instance and is not a general statement of reinstatement procedure.

The Township Firemen's Relief and Pension Funds are entirely creatures of statute. As such, the only rights and privileges afforded are those specifically set forth in the terms of that statute. Therefore, I can only conclude that a member of the fund who has resigned from active service pursuant to Section 521.11, supra, may not be reinstated to membership in the fund upon subsequent return to service.

A former member of the fund who re-enters active service assumes the status of a new employee. This is the case even under Chapter 741., Revised Code, which does provide for reinstatement of members of the Municipal Firemen's Relief and Pension Fund. In Opinion No. 719, Opinions of the Attorney General for 1963, it is stated:

"I * * * believe that the two persons in question, having voluntarily resigned as firemen, lost their identity and status as members of the fund. Upon re-employment their status was that of a new employee * * *"

(Emphasis added.)

As a new employee, a person must qualify pursuant to Section 521.01, Revised Code, to become a "member of the fire department" and "member of the fund" in order to participate in the Township Firemen's Relief and Pension Fund. That section provides as follows:

"As used in sections 521.01 to 521.12, inclusive of the Revised Code:

"(A) 'Member of the fire department' means:

"(1) Any person who, on April 1, 1947, was employed by a township as a full-time regular fireman in a township fire department, established pursuant to sections 505.37 to 505.44, inclusive of the Revised Code;

"(2) Any person over twenty-one and under thirty years of age who, after April 1, 1947, is employed by a township as a full-time regular fireman in a township fire department.

"(B) 'Member of the fund' means any person who is contributing four per cent of his annual salary to the township firemen's relief and pension fund."

The preceding section makes clear the qualifications for a "member of the fire department." A person over thirty years of age when hired or who was not employed as a regular full-time fireman on April 1, 1947, does not qualify as a "member of the fire department." Subsection (B) of Section 521.01, supra, is construed to limit "membership in the fund" to those who qualify as "members of the fire department." Opinion No. 346, Opinions of the Attorney General for 1963, states as follows:

"It will be seen that after defining a member of the fire department the legislature defined 'member of the fund' as 'any person contributing 4% of his annual salary.' This would mean, literally, that any person regardless of employment could become a member of the fund by making the necessary contribution. I can only conclude, however, that the legislature intended to define a member of the fund as 'any fireman (as defined in this section) who is contributing 4% of his annual salary.' "

I concur in the logic of the above cited opinion and conclude that a person who does not qualify as a "member of the fire department" pursuant to Section 521.01 (A), supra, may not become a "member of the fund."

Those firemen who do not meet the qualifications imposed by Section 521.01, supra, are required to become members of the Public Employees Retirement System. Paragraph four of Opinion number 346, supra, states as follows:

"4. It is compulsory that those regularly employed firemen who are ineligible to participate in the firemen's fund, become members of the public employees retirement system, Opinion No. 2961, Opinions of the Attorney General for 1962, approved and followed."

It logically follows that a person who has been a member of the Public Employees Retirement Fund prior to return to service with a township fire department, and who cannot qualify for membership in the Firemen's Relief and Pension Fund, upon rehiring, must continue to participate in the Public Employees Retirement Fund.

It is, therefore, my opinion that a person over thirty years of age, upon return to active service in a township fire department after April 1, 1947, other than for reason of military service pursuant to Section 521.10, Revised Code, may not be reinstated to membership in the Township Firemen's Relief and Pension Fund; but that such person must become a member of the Public Employees Retirement System.

Section 521.11, supra, provides in part that the Board

of Trustees of a Township Firemen's Relief and Pension Fund shall:

"* * * adopt rules and regulations for the management of the township firemen's relief and pension fund and for the disbursement of benefits and pensions as set forth in this section. * * *"

This section provides only for rules and regulations concerning management of the fund and disbursement in compliance with specific provisions enumerated in the section.

The rules and regulations permitted seemingly are those which will facilitate orderly administration of the fund. The tenor of this section does not indicate the grant of authority to the Board of Trustees to enact rules or regulations which would grant any rights or privileges not granted by the statute itself.

Chapter 521., Revised Code, does not provide for the reinstatement of a former member of the fund and I am, therefore, of the opinion that the Board of Trustees of the Township Firemen's Relief and Pension Fund is without authority to enact such a rule.

I am aware that subsequent to January 1, 1967, the Township Firemen's Relief and Pension Funds will cease to exist and their functions will be assumed by the Police and Firemen's Disability and Pension Fund pursuant to Amended House Bill No. 642, enacted October 5, 1965, and effective November 5, 1965. However, the changes effected by Amended House Bill No. 642 are of no relevance to the problem posed herein.

In answer to your specific question, it is my opinion that a person over thirty years of age, upon return to active service in a township fire department after April 1, 1947, having been employed by the State of Ohio in the interim, may not be reinstated to membership in the Township Firemen's Relief and Pension Fund; but that such person must continue his membership in the Public Employees Retirement System. Further, the Board of Trustees of a Township Firemen's Relief and Pension Fund is without authority to enact a rule permitting such reinstatement.