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POLICE RELIEF AND PENSION FUND ORGANIZED UNDER SECTION 4616 ET SEQ. G. C.—RULE BY BOARD OF TRUSTEES —INVALID—VIOLATES SECTION 4625 G. C.—PROVISION, NO DEDUCTIONS FOR SAID FUND SHALL BE MADE BY TREASURER OR OTHER FINANCE OFFICER OF MUNICIPALITY FROM PAY OF POLICE OFFICER UNTIL REPORT OF DESIGNATED PHYSICIAN UPON EXAMINATION OF OFFICER HAS BEEN ACTED UPON BY BOARD.

SYLLABUS:

A rule adopted by the board of trustees of a police relief and pension fund organized under Section 4616, et seq., General Code, providing that no deductions shall be made by the treasurer or other finance officer of the municipality from the pay of any police officer, for the account of the police relief and pension fund, unless and until such officer shall have been examined by a physician designated by said board, and the report of such physician shall have been acted upon by said board, is in violation of the provisions of Section 4625 of the General Code, and is invalid.

Columbus, Ohio, September 28, 1943.

Hon. Alva J. Russell, Prosecuting Attorney,
Akron, Ohio.

Dear Sir:

I acknowledge receipt of your communication requesting my opinion, reading as follows:

"The Board of Trustees of the Police Relief Fund of Akron, Ohio, has requested me to ask you for an opinion as to the validity of Rule 23, adopted July 1, 1943, by the trustees of the Police Relief Fund, which reads as follows:

'That no deductions shall be made by the finance department from the pay of any police officer appointed on or after July 1, 1943, on or for the account of the Police Relief Fund, unless and until such officer shall upon request have been examined by a physician designated by the Board of Trustees of the Police Relief Fund, and the report of such physician shall have been acted upon by the trustees of the Police Relief Fund.'

While I know it is not within the province of your department to give advice to employees and officers of cities on municipal problems, I will appreciate very much an opinion from you as to the right of the Board of Trustees of the Police Relief Fund to enact such a rule under the provisions of Section 4628, and the other sections of the General Code relating to police relief funds."

While the question you have raised is, as you say, a municipal problem, it is also one of rather general interest, particularly in view of the holding of the Supreme Court that the conducting of the police department of a city and of the pension system are matters of state-wide concern (*Cincinnati v. Gamble*, 138 O. S., 220).

The deductions from the pay of police officers, referred to in the rule quoted in your letter, are those provided for by Section 4625, General Code, which reads:

"In each municipality maintaining a police relief and pension fund, or in which a police relief and pension fund is hereafter established and maintained, the treasurer of the municipality shall deduct from the salary of each policeman or member of the police department, who by its rules is designated a member thereof, for each and every payroll period an amount equal to two per centum of his salary, provided that no deduction shall be made from that portion of his salary which exceeds thirty-six hundred dollars per annum, and shall deposit the money so deducted to the credit of

the police relief and pension fund. Money derived from such deductions shall be used by the board of trustees of such fund for the relief of such policemen or members of the police department, who by its rules are designated as members thereof, when sickness or disability prevents their performance of duty, relief of their dependents in case of death, or for pensions when honorably retired from the force. Every policeman or member of the police department, who by its rules is designated a member thereof, in such municipality shall be deemed to consent and agree to the deductions made and provided for herein, unless he shall notify the treasurer of such municipality in writing to the contrary in which event he shall be held to have expressly waived any benefits to which he and his dependents would therein be entitled from such fund, but shall be entitled to be paid the amount of any deductions theretofore made from his salary. A policeman who is separated from the department for any reason other than death or retirement, upon demand, shall be entitled to and shall be paid the full amount of deductions made under this act. If a policeman dies leaving no dependents entitled to relief or award from the police relief and pension fund, the full amount of said deductions shall be returned to his legal representative. If his legal representative cannot be found the moneys so deducted shall be forfeited and credited to the fund. Nothing contained herein shall in any manner affect any police relief subsidiary fund heretofore established and maintained, and the right of the trustees to receive contributions thereto and make disbursements in accordance with its rules."

This section was amended to its present form by the 95th General Assembly, the amendment becoming effective August 19, 1943. The only change from the former reading was the change of name from "police relief fund" to "police relief and pension fund", which change was, by the same act, carried through all the relevant sections of the General Code, viz., Sections 4616 to 4631, inclusive.

By Section 4628, General Code, the trustees of the fund are given certain rule-making powers. This section reads:

"Such trustees shall make all rules and regulations for distribution of the fund, including the qualification of those to whom any portion of the fund shall be paid, and the amount thereof, with power also to give credit for prior continuous actual service in the fire department or in any other department of the city rendering service in fire prevention, but, no rules or regulations shall be in force until approved by a majority of the board of trustees."

It will be observed that Section 4625, above quoted, requires the treasurer of each municipality in which a police relief and pension fund is maintained to deduct and deposit to the credit of the police relief and

pension fund, two per cent of the salary of *each policeman or member* of the police department, "who by its rules is designated a member thereof." This section contains a provision whereby any policeman or member of the police force may exempt himself from such deduction of pay, in which case he automatically waives any benefit in the fund for himself and his dependents, but aside from this, the deduction from pay appears to be general and mandatory.

It might be argued that the words contained in the first sentence of Section 4625, particularly "who by its rules is designated a member thereof", have reference not to membership in the police department but to membership in the relief and pension system, and that the reference to "rules" is to the rule-making power of the trustees of the fund. And since the trustees are given power to determine by rule "the qualifications of those to whom any portion of the fund shall be paid," it might be claimed with some plausibility that the rule in question was designed to exclude men from the benefits of the pension fund who in a time of emergency might be appointed to the force when well on their way to total physical disability.

However, an examination of all statutes relating to the police relief and pension fund discloses a frequent repetition of the words "members" and "rules", and we cannot avoid the conviction that the Legislature is speaking of membership in the police department and of rules of that department. For instance, later on in Section 4625 we find this language:

"Every policeman or member of the police department, who by its rules is designated a member thereof, in such municipality shall be deemed to consent and agree to the deductions made and provided for herein," etc.

True, we do not find in the statutes any express authority given to the police department as such to make rules designating who is a member of such department. The only provision which may be applicable is that found in Section 4382, General Code, which authorizes the director of safety in cities to classify the service in the police and fire departments in conformity with the ordinance of the council determining the number of persons to be employed therein and to "make all rules for the regulation and discipline of such departments, except as otherwise provided in this subdivision."

The Legislature itself seems rather definitely to have determined who shall constitute the police department and to have left the director of public safety but little discretion in that respect by providing in Section 4374, General Code:

"The police department of each city shall be composed of a chief of police and such other officers, patrolmen and employes as council shall, from time to time, provide by ordinance."

It is not necessary, however, for the purpose of this opinion, to determine precisely what if any employes of the police department authorized by council might be considered as outside the purview of Section 4625, General Code. It is sufficient to say that all who are by the rules of the police department, or by the terms of the statute, members of that department, are subject to the salary deduction provided by Section 4625, unless they exempt themselves from the burdens and benefits as therein pointed out, and the treasurer is required to make the salary deduction as to every member who does not exempt himself, in accordance with the law.

The rule which your board has adopted undertakes to modify the statute to the extent of forbidding the finance department from making any deduction from the pay of any police officer appointed on or after July 1, 1943, on or for the account of the police relief fund, unless and until such officer shall *upon request* have been examined by a physician and the report of the physician shall have been acted upon by the trustees. It does not appear clearly whose "request" is intended in the use of the words "upon request", but it is probably immaterial. The net result of the rule is that the board of trustees might by its final action control and limit the action of the treasurer or finance department contrary to the mandate of the statute, and deny to a policeman the right of participation in the relief and pension fund which the Legislature has expressly given to every member of the police force.

The trustees of police relief and pension funds are granted by law very broad powers in the matter of making rules as to the distribution of the pension funds, including, as already pointed out, the determination of the qualifications of those to whom any portion of the fund shall be paid. The Supreme Court, in the case of *State ex rel. v. Cleveland*, 135 O. S. 13, said at page 16 of its opinion:

"The general rule is that the right of a retired police officer to a pension from the police relief fund is governed by the rules in force at the time of his retirement. *State ex rel. Eden, v. Kundts*, 127 Ohio St., 276, 188 N. E., 9; *State, ex rel. Dieckroegger, v. Connors*, supra, 122 O. S. 359. See also *State ex rel. Mansfield, v. Turnbull*, 132 Ohio St., 235, 242, 6 N. E. (2d), 971."

Prior to the enactment of Section 4628-1, General Code (effective May 26, 1937), which declared that the granting of a pension thereafter should operate to create a vested right in the pensioner, it was even held

that a pension once granted could, pursuant to a subsequent amendment of the rules, be decreased. *Mell v. State*, 130 O. S. 306.

While the board is thus given very broad power in determining the qualifications of the beneficiaries of the pension fund, and while it is impossible to lay down a precise boundary for the exercise of its power, it does not follow that it may use this power arbitrarily or refuse pensions entirely to those for whose benefit the system has been created and who have contributed to its maintenance. It was said by the Supreme Court in *State ex rel. v. Conners*, 122 O. S. 359, at page 364 of the opinion :

“When the Legislature by Section 4628 made it the mandatory duty of the board of trustees of the police relief fund to make rules and regulations for the distribution of the fund, including the qualifications of those to whom any pension shall be paid and the amount thereof, the Legislature vested in the board of trustees of the police relief fund discretion only to prescribe the rule by which qualifications for pension will be determined and the rule by which the amount of such pension will be computed.”

And, in the case of *State ex rel. v. Jones*, 37 O. App. 400, it was held :

“1. Trustees of the pension fund, under Sections 4616 to 4631, General Code, are not vested with discretionary power to grant or refuse pensions, but are required to exercise their discretion in specifying, by rules and regulations duly approved, the qualifications of those entitled to pensions and the amount thereof so as to secure distribution according to fixed standards applicable to each class of beneficiaries.”

Furthermore, the power of the board cannot be extended to overruling the provisions of the statute as to the creation of the fund or as to contributions required to be made to it, and that is what the rule which you have submitted undertakes to do.

Accordingly, in specific answer to your question, it is my opinion that the rule adopted by the board of trustees of the police relief fund of Akron on July 1, 1943, as set forth in your communication, is in violation of the provisions of Section 4625 of the General Code and is invalid.

Respectfully,

THOMAS J. HERBERT,
Attorney General.