

1697.

FIREMEN'S PENSION FUND—RIGHT OF TRUSTEES TO INCREASE PENSIONS GRANTED BY FORMER BOARDS AND TO ADOPT RULES FOR PAYMENT OF VARIOUS EXPENSES OF FIREMEN—CITY COUNCIL'S RIGHT TO PAY SUCH EXPENSES—WHEN SAID FIREMEN MAY PARTICIPATE IN WORKMEN'S COMPENSATION LAW.

SYLLABUS:

1. *The trustees of a city firemen's pension fund may legally adopt a rule providing for payment out of the pension fund of hospital expenses, nursing and similar items for injured firemen.*

2. *Such trustees may legally adopt a rule providing for the payment out of the pension fund of funeral expenses for the deceased members of the fire department who are killed in the performance of duty, or die as a result of injury received in the performance of such duties.*

3. *Such trustees may legally provide for the payment out of the pension fund of the funeral expenses of deceased members of the department who were not killed in the performance of duty and who did not die as the result of injuries received in the performance of duty, if in the discretion of said board such rule is proper.*

4. *Such city board of firemen's pension fund may adopt a rule providing for the payment out of the firemen's pension fund of compensation to members who are injured in the performance of duty, which is equal to the regular salaries such members would receive if not incapacitated.*

5. *Such board of trustees may legally adopt a rule for the payment of compensation to members of said department equal to the regular salaries during illness which is not the result of injuries received during the performance of duty, if in the discretion of said board such rule is proper.*

6. *A city council may legally provide for the payment of all of the above expenses and compensation out of the general fund of the city, under authority of Section 4383 of the General Code, excepting such items therein as do not arise in connection with the performance of the duties of the member.*

7. *The board of trustees of the city firemen's pension fund may legally provide for the payment of compensation to, and for the payment of hospital and other expenses of, injured volunteer members of the fire department who are subject to call and who are paid for each fire attended.*

8. *Where regular members of a city fire department or volunteer members thereof, receiving a fixed sum for each fire attended, are injured in performing services under the direction of the fire department in connection with a fire outside of the corporation limits, they may properly be paid from the firemen's pension fund when the rules provide therefor, irrespective of whether a contract has been entered into between a city and township under the provisions of Section 3298-60, or otherwise.*

9. *When a city council, under the provisions of Section 4383 of the General Code, and the board of firemen's pension fund trustees, fail to provide for the payment of compensation and expenses of such firemen who are injured or disabled in the course of employment, either from the general fund or the firemen's pension fund, such employe is entitled to receive compensation under the Workmen's Compensation Law.*

10. *When members of a city fire department have been retired on a maximum pension of fifty dollars per month, under rules adopted by a former board of*

trustees and in effect at the time of the retirement, the present board of trustees may by a special rule increase the amount of such pension.

11. *The conclusions above stated in branches 1, 2, 3, 4, 5 and 7 are subject to the qualification that in so far as the pension fund is composed of voluntary contributions made under the provisions of Section 4609, such funds may not be used for purposes other than that expressly authorized in said section, which is to increase the pension which may be granted to the contributor or his beneficiaries.*

COLUMBUS, OHIO, March 29, 1930.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is made of the receipt of your communication, as follows:

“Sections 1465-61 and 1465-68, General Code, provide for the payment of compensation and certain expenses out of the State Insurance Fund when employes of the political subdivision are injured, etc. Section 4605, General Code, et seq., relates to firemen's pension funds in municipalities.

It seems that compensation and other expenses of policemen and firemen are paid from the State Insurance Fund when the municipality employing such persons does not have a pension fund. The rules governing the distribution of pension funds in many instances do not provide any payment from such funds of compensation and expenses, providing merely for payment of pensions, and the question has arisen as to what claims under these conditions may be paid from the State Insurance Fund. Other questions have arisen in relation to the relief of injured firemen and policemen, and we will greatly appreciate your consideration of the following questions.

Question 1. May the trustees of a city firemen's pension fund legally adopt a rule providing for payment out of the pension fund of hospital expenses, nursing and similar items for injured firemen?

Question 2. May the trustees of a city firemen's pension fund legally adopt a rule providing for the payment out of the pension fund of funeral expenses for the deceased members of the fire department who are killed in the performance of duty, or die as a result of injuries received in the performance of duty?

Question 3. May such trustees legally provide for the payment out of the pension fund of funeral expenses for deceased members of the department who are not killed in the performance of duty, and who do not die as the result of injuries received in the performance of duty?

Question 4. May such city board of firemen's pension fund trustees legally adopt a rule providing for payment out of the firemen's pension fund of compensation to members who are injured in the performance of duty, such compensation to be equal to the regular salaries such members would receive if not incapacitated?

Question 5. May such trustees legally adopt a rule providing for the payment of compensation equal to salaries, to be paid to members of the fire department during illness which is not a result of injuries received during the performance of duty?

Section 4383, General Code, reads:

‘Council may provide by general ordinance for the relief out of the police or fire funds, of members of either department temporarily or

permanently disabled in the discharge of their duty. Nothing herein shall impair, restrict or repeal any provision of law authorizing the levy of taxes in municipalities to provide for firemen's, police and sanitary police pension funds, and to create and perpetuate boards of trustees for the administration of such funds.'

Question 6. May a city council legally provide for the payment of all of the above expenses and compensation out of the general fund of the city?

Question 7. May the trustees of the city board of firemen's pension fund legally provide for the payment of compensation to, and for the payment of hospital and other expenses of, injured volunteer members of the fire department, i. e., persons subject to call and who are paid for each fire attended?

Section 3298-60, General Code, as amended in 113 O. L., p. 86, provides in part that cities may give fire protection to townships, etc., when contracts have been entered into.

Question 8. When such contracts have been entered into and regular members of the city fire department are injured in the performance of duty outside of the corporation limits, may compensation, expenses, etc., be legally paid from the firemen's pension fund when the rules provide therefor?

Question 9. When a volunteer fireman in a city, i. e., a person paid a fixed sum for each fire attended, is injured in the performance of duty outside of the corporation limits, may compensation, expenses, etc., be legally paid from the firemen's pension fund, when the rules provide therefor?

Question 10. When regular and volunteer members of the city fire department are injured while attending a fire outside of the city limits, and such city has not entered into a contract with the political subdivision in which the fire occurs, are such regular and volunteer firemen entitled to compensation, expenses, etc., out of the firemen's pension fund when the rules provide therefor?

Question 11. When a city council, as authorized by Sec. 4383, General Code, and a board of firemen's pension fund trustees fail to provide for the payment of compensation and expenses from the general fund, or the firemen's pension fund, are same payable out of the workmen's compensation fund?

Question 12. When members of a city fire department have been retired on a maximum pension of \$50.00 per month, under rules adopted by a former board of trustees, and in effect at the time of the retirement, may the present board of trustees by a special rule increase the amount of such pension?"

Before undertaking to discuss in detail the specific inquiries which you propound, it is believed to be profitable to give consideration somewhat generally to certain fundamental principles involved which will more or less bear upon a number of the questions presented.

Section 4600 of the General Code, as amended by the 88th General Assembly (113 O. L. 62), provides that the council of any municipal corporation having a fire department supported at public expense "may declare the necessity for the establishment and maintenance of a firemen's pension fund." The section then provides for a board of trustees to be known as "trustees of the firemen's pension

fund" and describes the method of its selection, which need not be set forth herein.

Section 4605, General Code, as amended by the 88th General Assembly (113 O. L. 63), provides :

"In each municipality availing itself of these provisions, to maintain the firemen's pension fund, the council thereof each year, in the manner provided by law for other municipal levies, and in addition to all other levies authorized by law, shall levy tax of not to exceed three-tenths of a mill on each dollar upon all the real and personal property as listed for taxation in such municipality, but sufficient in amount within the three-tenths of a mill to provide funds for the payment of all pensions granted to firemen under existing laws. In the matter of such levy, the board of trustees of the firemen's pension fund shall be subject to the provisions of law controlling the heads of departments in the municipality, and shall discharge all the duties required of such heads of departments."

Section 4607 of the General Code provides in substance that all fines imposed upon members of the fire department for the purpose of discipline and the proceeds of all suits for penalties for violation of the statutes of the state or ordinances of a municipality in connection with the execution of the duties of the fire department and licenses or other fees payable thereunder shall be credited to the pension fund.

Section 4608, General Code, provides :

"The trustees of the fund may take by gift, grant, devise or bequest, moneys, or real or personal property, upon such terms as to the investment or expenditure thereof as is fixed by the grantor or determined by such trustees."

Section 4609, General Code, authorized the trustees to receive uniform amounts from each person designated by the rules of the fire department, as a member thereof, as he voluntarily agrees to be deducted from his monthly pay, and the amount so received "shall be used as a fund to increase the pension which may be granted to such person or his beneficiaries."

Section 4612, which relates to the rules and regulations for the distribution of such fund, as amended by the 88th General Assembly (113 O. L. 64), provides :

"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."

Inasmuch as your inquiry involves policemen as well as firemen, it is believed proper at this time to consider the sections of the General Code which relate to the police relief fund.

Section 4616 of the General Code, as amended by the 88th General Assembly (113 O. L. p. 64), provides that the council of any municipality which has a police department supported at public expense "may declare the necessity for the establishment and maintenance of the police relief fund." The section then further provides that in case such action is taken by the council, there shall be created a board known as "trustees of the police relief fund." The section further provides

for the creation of the board and its organization, which it is believed need not be discussed in detail herein.

Section 4621 provides for the levying of a tax not to exceed three-tenths of a mill on each dollar upon all the real and personal property as listed for taxation in the municipality in exactly the same language that is used for the levying of a tax under the provisions of Section 4605 for the firemen's pension fund, excepting in the former section the term "police relief fund" is used in place of "firemen's pension fund."

Section 4623 of the General Code provides that fines imposed upon members of the police department by way of discipline and all rewards, fees or gifts paid and given for any extraordinary service of any member of the force, and moneys arising from the sale of unclaimed property, etc., shall be credited to the police relief fund.

Section 4624 authorizes the trustees of the police relief fund to accept donations in the following language:

"The trustees of the fund may take by gift, grant, devise or bequest, moneys or real or personal property, upon such terms as to the investment or expenditure thereof as is fixed by the grantor or determined by the trustees."

Section 4625 provides:

"The trustees of the fund may also receive such uniform amounts from each person designated by the rules of the police department, a member thereof, as he voluntarily agrees to, to be deducted from his monthly pay, and the amount so received shall be used as a fund to increase the pension which may be granted to such person or his beneficiaries, or in the discretion of such trustees money derived from such monthly deductions shall be used to relieve members of the force who contribute thereto when sick or disabled from the performance of duty, for funeral expenses, relief of their families in case of death or for pensions when honorably retired from the force."

Section 4628, General Code, as amended by the 88th General Assembly (113 O. L. 66), which relates to the manner of the distribution of the fund, provides:

"Such trustees shall make all rules and regulations for distribution of the fund, including the qualifications 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."

From the foregoing, it is apparent that there is no substantial distinction, in so far as your inquiries are concerned, in the status of the two funds being considered. In other words, the said funds are created in the same manner under similar general power and are distributed under the rules adopted by the board of trustees.

It will be noted, of course, that the sections dealing with the firemen's pension fund refer to pensions, whereas the sections creating the police relief fund do not

specifically use the word pension. However, it is not believed that this fact in anywise changes the status of the fund in so far as the use thereof is concerned. The law authorizes the board of trustees to provide for the distribution of the fund and to determine the qualifications of those to whom any portion of the fund shall be paid. The sections of the Code, hereinbefore mentioned, must not be confused with the so-called "firemen's indemnity fund," which is provided for under Sections 4647-1, et seq., of the General Code, and which require the establishment of such fund in all municipalities having no firemen's pension fund.

Section 4647-8, which relates to the distribution of said indemnity fund, expressly designates the method of distribution and who shall be regarded as beneficiaries thereof. However, as hereinbefore indicated, there is no limitation placed upon the board of trustees of the firemen's pension fund or the police relief fund, but the method of distribution thereof is left apparently to the sound discretion of such boards. While, as hereinbefore indicated, the fund relates to "relief" in case of a policeman, as contradistinguished from the term "pension" as used in connection with firemen, yet, as a pension is nothing other than a relief usually gratuitously given, it is believed there is no valid distinction between the two terms.

In my Opinion No. 1331, issued to your bureau under date of December 24, 1929, some consideration was given to the status of the firemen's pension fund. In said opinion the question was considered as to the right of the board of trustees of the firemen's pension fund to reduce the amount of a pension once granted. After reviewing a number of decisions, the following conclusion was reached in said opinion:

"It was the intention of the Legislature in the enactment of Senate Bill No. 79 (113 O. L. 61) to preserve the pensionable status of beneficiaries of firemen's pension funds existing under the provisions of law prior to the enactment of such bill, and the board of trustees of firemen's pension funds created pursuant to such act are without authority to alter, reduce or revoke pensions heretofore granted in the absence of a specific reservation of said right in the rules and regulations of the board of trustees originally granting such pensions at the time the pensionable status was determined."

While the language of the opinion uses the words "alter, reduce or revoke pensions", an examination of the opinion will disclose that the real question before me at that time was whether a pension could be reduced and in said opinion there was no occasion to consider the question as to whether or not a pension might be increased. In this connection your attention is invited to an opinion of the Attorney General, found in Opinions of the Attorney General for 1921, page 113, wherein it was held that:

"The trustees of the police pension fund are empowered by Section 4628 G. C., to amend the rules and regulations so as to increase the amount of pensions to be paid to members, and to make the amendment applicable to those already on the pension roll as well as to those thereafter placed thereon, subject, however, to the express limitation that the amendment shall not become effective until approved by the director of public safety."

It will therefore appear that a pension, whether it relates to a fireman or a policeman, may be increased under the rules and regulations of the board of trustees. However, in view of my opinion that I have hereinbefore referred to, such pension may not be reduced unless it is in pursuance of the rules and regulations adopted,

expressly authorizing such procedure at the time the rights of the pensioner became fixed. As hereinbefore indicated, it would appear that the method of the distribution of such funds, aside from taking such actions as will affect vested rights, is entirely in the discretion of such board and it may provide such relief to the members of the police and fire department, respectively, as it sees fit in the way of pensions or other relief furnished to such officers or beneficiaries, including funeral expenses, hospital bills, compensation for disabilities, etc., whether such relief is provided on account of disabilities arising by reason of their duties or otherwise. However, in connection with your inquiries, it is proper to take cognizance of Section 4383 of the General Code, which is set forth in your communication, which expressly authorizes council by general ordinance to provide for the relief of members of either the police or fire department, temporarily or permanently disabled in the discharge of their duties. It is believed this section is clear authority for the council to provide for either policemen or firemen out of that portion of the general fund described as the "police or fire funds", when they are disabled in the discharge of their duties. Undoubtedly this means that payment may be made from funds appropriated for police or fire purposes on proper legislative authority. However, inasmuch as Section 4383, supra, is expressly limited to such officers who are injured in the discharge of their duties, it naturally follows that it could not be used to pay disabilities which did not arise in connection with the discharge of the duties of such officers. In other words, funds provided by reason of the provisions of Section 4383 may not be distributed as liberally as those provided under the special sections relating to the police relief fund and firemen's pension fund. It therefore appears that municipalities may provide compensation for disabilities and injuries, the cause of which is the same as those provided for by the Workmen's Compensation Act, but it is not imperative that they do so.

Consideration now will be given to the provisions of the Workmen's Compensation Law, to which you refer. Section 1465-61 provides in part:

"The terms 'employe', 'workman' and 'operative' as used in this act (G. C. No. 1465-45, et seq.), shall be construed to mean:

1. Every person in the service of the state, or of any county, city, township, incorporated village or school district therein, including regular members of lawfully constituted police and fire departments of cities and villages, under any appointment or contract of hire, express or implied, oral or written, except any official of the state, or of any county, city, township, incorporated village or school district therein. Provided that nothing in this act shall apply to police or firemen in cities where the injured policemen or firemen are eligible to participate in any policemen's or firemen's pension funds which are now or hereafter may be established and maintained by municipal authority under existing laws. * * *

Section 1465-68 of the General Code provides for the payment of compensation to such employes as are mentioned in Section 1465-61, who are injured in the course of employment when the injury occurred after January 1, 1914, and was not purposely self inflicted, etc.

Section 1465-61, part of which is hereinbefore quoted, expressly excepts from the operation of said section firemen and policemen in cities where such officers "are eligible to participate in any policemen's or firemen's pension funds which are now or hereafter may be established and maintained by municipal authority under existing law." Said Section 1465-61 was first enacted in 1913 and originally the proviso relative to policemen and firemen read:

"Provided that nothing in this act shall apply to policemen or firemen in cities where policemen's and firemen's pension funds are now or hereafter may be established and maintained by municipal authority under existing laws."

Said proviso was enacted in its present form by the 83rd General Assembly (108 O. L., Pt. 1, p. 313). Prior to the enactment of said section in its present form, relative to the proviso relating to firemen and policemen, it had been consistently held that in the event a city had established a firemen's pension fund or a police relief fund, under no circumstances could such officers participate in the workmen's compensation fund. See Opinions of the Attorney General for 1915, p. 984; 1918, p. 1378. However, my predecessor, in an opinion found in Opinions of the Attorney General for the year 1928, p. 1403, had under consideration the proviso in its present form, and in said opinion, after an extended discussion of the subject with reference to the history of the act as hereinbefore set forth, concluded among other things that:

"The Workmen's Compensation Act was intended to provide a speedy and inexpensive remedy as a substitute for previous unsatisfactory methods and such act should be liberally construed in favor of employes.

Where an enacting clause is general in its language and objects and a proviso is afterwards introduced, such proviso is to be strictly construed and no case is to be taken out of the enacting clause, which does not fall fully within the terms of the proviso.

Regular members of lawfully constituted police and fire departments of cities, under any appointment or contract of hire, may receive compensation from the state insurance fund for injuries received in the course of their employment, except in cases where the injured policemen or firemen are legally qualified and actually entitled to participate in any local policemen's or firemen's pension fund, established and maintained by municipal authority under existing laws.

In case of the death of regular members of lawfully constituted police and fire departments of cities, under any appointment or contract of hire, resulting from injuries received in the course of their employment, the dependents of such members may participate in the state insurance fund, unless such dependents are legally qualified and actually entitled to receive death benefits from a local pension fund, established and maintained by municipal authority under existing laws.

Where regular members of lawfully constituted police and fire departments of municipalities are injured in the course of their employment, resulting in temporary total disability, if such municipalities continue to pay the injured policemen or firemen their regular wages, during the period they are off duty because of their injuries, no loss in the way of compensation is sustained on account of such injuries and there can be no compensation out of the state insurance fund therefor, although such injured policemen or firemen are entitled to receive compensation from the state insurance fund, for medical, nurse and hospital services and medicine, unless they are legally qualified and actually entitled to participate in a local pension fund, established and maintained by municipal authority under existing laws."

Without an extended discussion, it is believed that the foregoing conclusion

of my predecessor is decisive of the proposition that under the present status of Section 1465-61 of the General Code, a fireman or policeman regularly employed by a city may participate in the Workmen's Compensation fund to the extent that he is not receiving compensation for the same cause from any firemen's pension fund or police relief fund. In other words, the term "eligible to participate" has reference to such an officer or his dependents being in position to receive from the municipal pension or relief fund compensation for a similar injury as is provided for under the Workmen's Compensation law. Therefore, it would appear that where the board of trustees of the firemen's pension fund or the board of trustees of the policemen's relief fund provides a pension and does not provide for the payment of funeral expenses or compensation in case of disabilities received in the course of employment, such officers receiving the injuries would be eligible to participate in the Workmen's Compensation fund. On the other hand, if the municipalities have undertaken to grant compensation for injuries similar to that provided for in the Workmen's Compensation Act, that fact would deny such officers the right to participate in the Workmen's Compensation fund.

Based upon the foregoing considerations and discussions, and in specific answer to your inquiries in their order, it is my opinion that:

1. The trustees of a city firemen's pension fund may legally adopt a rule providing for payment out of the pension fund of hospital expenses, nursing and similar items for injured firemen.

2. Such trustees may legally adopt a rule providing for the payment out of the pension fund of funeral expenses for the deceased members of the fire department who are killed in the performance of duty, or die as a result of injury received in the performance of such duties.

3. Such trustees may legally provide for the payment out of the pension fund of the funeral expenses of deceased members of the department who were not killed in the performance of duty and who did not die as the result of injuries received in the performance of duty, if in the discretion of said board such rule is proper.

4. Such city board of firemen's pension fund may adopt a rule providing for the payment out of the firemen's pension fund of compensation to members who are injured in the performance of duty, which is equal to the regular salaries such members would receive if not incapacitated.

5. Such board of trustees may legally adopt a rule for the payment of compensation to members of said department equal to the regular salaries during illness which is not the result of injuries received during the performance of duty, if in the discretion of said board such rule is proper.

6. A city council may legally provide for the payment of all of the above expenses and compensation out of the general fund of the city, under authority of Section 4383 of the General Code, excepting such items therein as do not arise in connection with the performance of the duties of the member.

7. The board of trustees of the city firemen's pension fund may legally provide for the payment of compensation to, and for the payment of hospital and other expenses of, injured volunteer members of the fire department who are subject to call and who are paid for each fire attended.

8. Where regular members of a city fire department or volunteer members thereof, receiving a fixed sum for each fire attended, are injured in performing services under the direction of the fire department in connection with a fire outside of the corporation limits, they may properly be paid from the firemen's pension fund when the rules provide therefor, irrespective of whether a contract has been

entered into between a city and township under the provisions of Section 3298-60, or otherwise.

The conclusion that I have last stated makes it unnecessary to specifically reply to questions 9 and 10 set out in your communication.

11. When a city council, under the provisions of Section 4383 of the General Code, and the board of firemen's pension fund trustees, fail to provide for the payment of compensation and expenses of such firemen who are injured or disabled in the course of employment, either from the general fund or the firemen's pension fund, such employe is entitled to receive compensation under the Workmen's Compensation Law.

12. When members of a city fire department have been retired on a maximum pension of fifty dollars per month, under rules adopted by a former board of trustees and in effect at the time of the retirement, the present board of trustees may by a special rule increase the amount of such pension.

The conclusions above stated in branches 1, 2, 3, 4, 5 and 7 are subject to the qualification that in so far as the pension fund is composed of voluntary contributions made under the provisions of Section 4609, such funds may not be used for purposes other than that expressly authorized in said section, which is to increase the pension which may be granted to the contributor or his beneficiaries.

Respectfully,

GILBERT BETTMAN,
Attorney General.

1698.

APPROVAL, BONDS OF VILLAGE OF NORTH OLMSTED, CUYAHOGA COUNTY—\$3,421.14.

COLUMBUS, OHIO, March 29, 1930.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

1699.

APPROVAL, BONDS OF VILLAGE OF NORTH OLMSTED, CUYAHOGA COUNTY—\$5,823.80.

COLUMBUS, OHIO, March 29, 1930.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.