

ner of payment of the fine, and if the defendant fails to pay in accordance therewith, or if under section 13451-8b the court remits or suspends the sentence upon terms, and the defendant does not comply with such terms, there is a default, and the provisions of section 1454 as to default and commitment as a result thereof would apply, and the power of parole is given to the Conservation Commissioner; keeping in mind that it is the duty of the court to sentence, and that the powers granted to the trial court by said sections 13451-8a and 13451-8b, must be exercised by the court at the time of the sentence, and that such powers with respect thereto terminate at the time that the sentence is imposed.

I am therefore of the opinion, in specific answer to your inquiry, that any court having jurisdiction over the misdemeanors mentioned and provided for by section 1454 may, at the time of sentence, direct the time and manner of payment of the fine, which time shall in no case exceed one year from the date of sentence, as provided by section 13451-8a of the General Code, and that such court may, at the time of sentence, remit the same or suspend such sentence in whole or in part upon such terms as the court may impose, as provided by section 13451-8b of the General Code.

Respectfully,

JOHN W. BRICKER,
Attorney General.

4108.

FIREMEN'S PENSION FUND—TRUSTEES MAY ADOPT REASONABLE RULES
RESPECTING ELIGIBILITY FOR PENSION INCLUDING YEARS OF
SERVICE.

SYLLABUS:

The Trustees of a Firemen's Pension Fund may adopt reasonable rules and regulations relative to the qualifications, including the number of years of service, which render a fireman eligible to receive a pension from such fund.

COLUMBUS, OHIO, APRIL 2, 1935.

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

GENTLEMEN:—This will acknowledge receipt of your request for my opinion upon a question propounded by the City Solicitor of Xenia. The letter from the City Solicitor reads as follows:

“The City of Xenia has created under the provisions of the General Code, a Firemen's Pension Fund, which has been duly organized with six trustees selected as provided by law.

The Trustees have submitted to me as City Solicitor, for my approval as to the legality and form, the rules and regulations which they have recently adopted after examining similar regulations in other cities in the state.

After examining these rules and regulations there is one point which arises which involves the respective powers of the Board of Trustees of the Firemen's Pension Fund and the legislative body of the City, which in my opinion is worthy of requesting a formal opinion from the Attorney General,

and I am writing this letter asking that if in your judgment the question merits consideration that an opinion be requested of the Attorney General's office at this time so that rules and regulations governing the payment of pensions in the various Firemen's Pension Funds throughout the State may be appraised of the matters prior to the necessity of litigating the questions in Court.

Enclosed you will find a copy of the Charter of the City of Xenia, Ohio, which provides generally that the City Commission is the legislative body of the City, and provides for a Civil Service Commission. The City Commission and the Civil Service Commission have neither attempted to pass any ordinances or regulations covering retirement age, and there is nothing in the City ordinances nor in the regulations of the Civil Service Commission indicating at what age a member of the Fire or Police Departments is eligible to retirement, and, of course, no provision for compulsory retirement upon a given age.

The Board of Trustees of the Firemen's Pension Fund in their rules governing the payment of benefits have in Rule 1, hereinafter set forth, provided that any member of the Xenia Fire Department who shall have served twenty (20) years and voluntarily retires by resignation or is honorably retired by the City Manager, shall be paid a pension for the balance of his natural life.

The Board of Trustees of the Firemen's Pension Fund likewise have provided a service pension under Rule 4, hereinafter set forth, providing that any member of the Fire Department who has served more than ten (10) years but less than (20) years, shall be placed on the pension roll at a specified pension if he be 'discharged from the Fire Department' providing that 'such discharge was not due to dissipation, immoral conduct, or criminal act.'

Rule 1 of the rules governing payment of benefits under the heading 'Retirement', reads as follows:
'Rule 1.

Any person who is an active member or new member of the Xenia Fire Department at the time of the adoption of these rules, who shall or has served twenty (20) years in said Department, and voluntarily retires by resignation, or when honorably retired by the City Manager, shall in either of said events be paid from such fund, a sum equal to sixty (60%) percent of the average wage of said Department. Said sum to be averaged or computed at each meeting of Board of Trustees, to comply with the increase or decrease of wages of said Department. This sum shall be paid during the rest of his natural life, except in case of violations of the rules of the Board of Trustees. As a reward for additional years of service, by a member of the Fire Department, who by these rules and regulations, is designated as a beneficiary herein, a premium of one (1%) percent, per year, shall be paid for each year of service, above twenty (20) years, but in no case shall any pension be based above twenty-five (25) years of service.'

Rule 4 of the rules governing payment of pensions under the heading 'Service Pension', reads as follows:
'Rule 4.

Any member of the Xenia Fire Department who may be discharged from the Fire Department after having faithfully served not less than ten (10) years shall be placed on the pension roll at 50% of the retirement pay, and if he serves more than ten (10) years and not more than twenty (20) years, he shall receive 5% in addition for each year of service thereafter, provided such discharge was not due to dissipation, immoral conduct, or criminal act.'

You will note that the Trustees of the Firemen's Pension Fund by the

adoption of rules 1 and 4, set out above, have assumed the authority to determine the retirement age of members of the Fire Department. It is my opinion that such was not the intent and purpose of the General Code sections providing for the creation of the Firemen's Pension Fund, namely Sections 4600 to 4615, inclusive.

The matter is of primary importance to the City of Xenia for the reason that the firemen who are affected by the pension regulations are all young men having been appointed to membership in the department in every instance when they were of an age between twenty-one (21) and thirty (30), and in most instances between the ages of twenty-one (21) and twenty-five (25).

Under rule 1 these men when they reach the age of forty-five (45) will be permitted to resign from the department, obtain other employment, and still receive a pension equal to sixty (60%) percent of the average wage of the department, and if they remain in the department longer than twenty (20) years to receive an additional one (1%) percent per year up to twenty-five (25) years of service. This means that while still in the prime of life these firemen will be pensioned and retired by the Board of Trustees of the Pension Fund, upon their own voluntary desire, and without regard to any regulations which may hereafter be imposed by the City Commission or the Civil Service Commission relative to retirement eligibility.

Rule 4, adopted by the Board of Trustees of the Firemen's Pension Fund, contains an even more drastic possibility. It specifically provides that anyone who is discharged from the Department for any cause other than dissipation, immoral conduct, or criminal act, after serving ten (10) years, is eligible to a pension. It appears that a member of the Department may be discharged from the Department for incompetence, gross neglect of duty, failure to obey orders, and many other causes, which might and should merit discharge and still retain the right to a pension.

I should like to know if Rules 1 and 4 are legally adopted and proper regulations. I should also like to know whether the Board of Trustees of the Firemen's Pension Fund or the City Commission or the Civil Service Commission has the right exclusive or concurrent to determining when a fireman is eligible for retirement either because of advanced age or a number of years of service. I should also like to know if Rule 4 as adopted is legal."

Sections 4600, et seq., General Code, provide for the establishment of Firemen and Policemen Pension Funds. Section 4600 provides for the creation of a Board of six members known as the "Trustees of the Firemen's Pension Fund." Section 4605, General Code, 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 listed for taxation in such municipality. Section 4612, General Code, which is particularly pertinent to your question reads as follows:

"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 trustees of this fund have, of course, only such powers as are given to them by statute. The language of Section 4612, General Code, supra, is very broad and seems to give extensive powers to the trustees in the distribution of this pension fund. The

exercise of the discretion placed in the trustees of this fund would not be interfered with by the courts in the absence of fraud or an abuse of discretion. An examination of the authorities in Ohio tends to show the broadness of these powers.

In the case of *State, ex rel. Meyers vs. Jones*, 37 Ohio App. 400, it was held as disclosed by the first branch of the syllabus:

"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."

The first and third branches of the syllabus of the case of *State, ex rel. Dieckroeger vs. Conners*, 122 O. S. 359, read as follows:

"1. The police relief fund of the City of Cincinnati was established and is maintained by virtue and under authority of statutory law, and the powers of the board of trustees of the police relief fund with respect to such fund are the powers conferred by statute.

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3. Rule 45 of the board of trustees of the police relief fund of the City of Cincinnati, 'Any member of the Police Department who has served fifteen consecutive years, who is discharged for any offense other than dishonesty, cowardice or being convicted of a felony, shall, upon the approval of the Board of Trustees of the Police Relief Fund, be paid a pension from said fund in amount equal to \$2.00 per month for each year of consecutive service, provided the pension under this rule shall in no case be more than \$50.00 per month,' does not confer upon such board a discretion to deny a pension to a 'member of the police department who has served fifteen consecutive years, who is discharged for any offense other than dishonesty, cowardice, or being convicted of a felony.'"

The following appears at page 364:

"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. Manifestly, the requirement that qualification be determined by rule excludes any implication that the Legislature intended that the board of trustees of the police relief fund should determine qualification in any other manner; and the same is true of the requirement that the amount be determined by rule."

At page 367 the following appears:

"Were this question here for initial consideration, we would reach the

conclusion that the power conferred upon the board of trustees of the police relief fund by Section 4628, General Code, includes a power to exercise a discretion to specify, by rule duly adopted, the qualification of those to whom a pension shall be paid and the amount thereof, but does not include a discretion to deny qualification where such rule has been complied with. * * *

The principles enunciated in the *Connors* case supra, were approved in the case of *State, ex rel. Eden vs. Kundts*, 127 O. S. 276, the syllabus of which reads as follows:

"1. The police relief fund of the city of Columbus is established under and by virtue of Section 4616 et seq., General Code, which empower the board of trustees, created as therein provided, to administer such fund and to adopt rules and regulations governing the distribution thereof.

2. The right of a retired or dismissed police officer to a pension from such fund is governed by the rules adopted and in force at the time of his retirement or dismissal."

While these two cases pertain to the Police Pension Fund the principles are likewise applicable to Firemen's Pension Fund since the statutes creating both funds are very similar. From the opinion by Matthias, J. in the *Kundts* case, supra, I quote the following:

"The police relief fund is authorized by Section 4616 et seq., General Code, which provide for the selection of a board of trustees and empower it to administer such fund and to adopt rules and regulations covering the same. The rules above referred to were duly adopted pursuant to the authority so conferred.

Clearly the right of a retired or dismissed police officer to a pension from such fund is governed entirely by the rules adopted and in force at the date of his retirement or dismissal. * * *

An interesting opinion of this office on the powers of trustees of a Firemen's Pension Fund to adopt rules and regulations by virtue of Section 4612, General Code, supra, is to be found in *Opinions of the Attorney General for 1930, Vol. I, page 517*. The first four branches of the syllabus of that opinion read as follows:

"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 their 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 mem-

bers who are injured in the performance of duty, which is equal to the regular salaries such members would receive if not incapacitated."

In Opinions of the Attorney General for 1930, Vol. I, page 555, it was held as disclosed by the syllabus:

"The trustees of a firemen's pension fund have no legal authority to adopt and enforce a rule to the effect that members of the fire department must leave the service of such department at a given age."

At first blush this opinion might seem to indicate that the trustees in the present inquiry could not legally adopt the rules in question. However, it is to be noticed that this opinion merely holds that the trustees of a Firemen's Pension Fund may not pass a rule requiring men to divorce themselves from the service of such Department at a certain age. It in nowise affects the authority of the trustees to adopt a rule making firemen eligible for a pension at a given age. From the opinion at page 556, I quote the following:

"In reading the sections hereinbefore mentioned, there would appear to be no provisions which either expressly or by implication in any wise authorize the board of trustees of the firemen's pension fund to determine the qualifications of any member of the fire department to serve in such capacity. Such board of course may determine whether or not a given member is qualified to receive a pension, and fix the terms and conditions upon which one may be pensioned or receive contributions from the pension fund. However, we must necessarily look to other provisions of the statutes to determine the authority which functions in connection with the removal of officers."

Rule 1 quoted in the letter from the City Solicitor provides that a member of the Fire Department who serves twenty (20) years and voluntarily retires or is honorably discharged shall be paid a certain pension. Rule 4 provides that a member who serves at least ten (10) years and is discharged for other than certain enumerated offenses shall receive a certain pension. Clearly the Board of Trustees had power to pass rules such as they did in the instant case. In fact it is their mandatory duty under the provisions of Section 4612, General Code, supra, to adopt rules and regulations relative to the disposition of pension funds. No question of fraud is presented and if the rules may be considered reasonable they are, of course, valid. The question of reasonableness is one of fact rather than of law but it would appear that a court should and would be slow in substituting their judgment for that of the Board of Trustees.

In view of the above and in specific answer to your inquiries, it is my opinion that the Trustees of a Firemen's Pension Fund may adopt reasonable rules and regulations relative to the qualifications, including the number of years of service, which render a fireman eligible to receive a pension from such fund.

Respectfully,
JOHN W. BRICKER,
Attorney General.