

OPINION NO. 69-028**Syllabus:**

A fireman who was injured May 23, 1957, while in the employ of the City of Youngstown Fire Department, who began receiving benefits on June 1, 1959, from the Youngstown Firemen's Pension Fund, and who is now receiving benefits from the Police and Firemen's Disability and Pension Fund created by Section 742.02, Revised Code, is not eligible to receive compensation for permanent total disability as long as the pension received is at least as great as the compensation that would be payable.

To: M. Holland Krise, Chairman, Industrial Commission, Columbus, Ohio
By: Paul W. Brown, Attorney General, March 20, 1969

I have before me your request for my opinion on the following matter:

"* * * whether a claimant who was injured May 23, 1957, while in the employ of the City of Youngstown Fire Department, who began receiving benefits on June 1, 1959, from the Youngstown Firemen's Pension Fund,

and who is now receiving benefits from the Policemen's and Firemen's Disability and Pension Fund created by Section 742.02, R.C., is eligible to receive compensation for permanent total disability. For the purpose of this opinion, assume that the pension which the claimant is receiving is in excess of the compensation payable for permanent total disability."

You have also called my attention to Section 4123.02, Revised Code, which provides in part:

"Sections 4123.01 to 4123.94, inclusive, of the Revised Code do not apply to policemen or firemen in municipal corporations where the injured policemen or firemen are eligible to participate in any policemen's or firemen's pension funds established and maintained by a municipal corporation, unless the amount of the pension funds provided by the municipal corporation through taxation and paid to such policemen or firemen is less than they would have received if the municipal corporation had no such pension fund. In such event policemen and firemen shall receive the regular state compensation for policemen and firemen in municipal corporations where no such pension funds have been created, less the sum received by the policemen or firemen from the pension funds provided by the municipal corporation through taxation. * * *"

This statute denies Workmen's Compensation to a fireman who is eligible to receive a disability pension from funds provided through taxation by a municipal corporation whenever the disability pension is at least equal to the Workmen's Compensation that would be payable to other injured workmen who are similarly disabled.

Section 4123.02, Revised Code, was enacted prior to the creation of the state-administered Police and Firemen's Disability and Pension Fund under Chapter 742, Revised Code. Therefore, the question arises whether participation in the state pension funds created by Section 742.02, Revised Code, is participation in "any * * * firemen's pension funds established and maintained by a municipal corporation." Although no court of this State has touched precisely upon this question in any reported decision, it is my opinion that participation in the Police and Firemen's Pension Fund created by Section 742.02, Revised Code, precludes payment of permanent total disability compensation by operation of Section 4123.02, supra, when the disability pension is at least equal to the compensation that would be payable.

Before the enactment of Chapter 742 of the Revised Code, municipalities were required to maintain Firemen's Pension Funds under Section 741.02, Revised Code (G.C. S4600). State, ex rel. English v. Industrial Commission, 160 Ohio St. 443 (1954). These funds were maintained by both employer contributions raised through a tax levy and through deductions from

employee's wages. Firemen who were paid disability pensions from these funds in excess of the compensation that would be payable under Workmen's Compensation were constitutionally denied payment of Workmen's Compensation for disability by Section 4123.02, Revised Code, and by predecessor provisions in 1465-61, General Code. State, ex rel. English v. Industrial Commission, supra, State, ex rel. Van Liew v. Industrial Commission, 165 Ohio St. 545 (1956).

The enactment of Chapter 742 of the Revised Code caused all of the municipal pension funds set up under Section 741.02, *supra*, to be superseded by the Police and Firemen's Disability and Pension Fund; however, municipalities were not relieved of their duty to provide funds from taxes to pay firemen's pensions. In addition, the rights of participants in municipal firemen's funds to receive benefits and pensions in accordance with the rules of the superseded funds became fixed by operation of Section 742.37 (A), Revised Code. The assets of the superseded municipal funds were required to be transferred entirely to the state pension funds on January 1, 1967. Therefore, the effect of the enactment of Chapter 742, *supra*, was to leave unchanged both the substantive rights of firemen who had participated in the superseded municipal funds and the duty of cities to provide sufficient tax monies to pay pensions and benefits for their employees. Chapter 742, *supra*, merely placed the administration of all pension fund assets in the discretion of the state pension fund trustees and relieved cities of the administrative duties.

Because the enactment of Chapter 742 of the Revised Code changed none of the substantive rights and duties that existed prior to its effective date and because it only effected changes in the management of the assets of the municipal pension fund, it is my opinion that participation in the Police and Firemen's Disability and Pension Fund is, in fact, participation in "any * * * firemen's pension funds established and maintained by a municipal corporation." It is my opinion that Section 4123.02, *supra*, merely requires that cities establish and maintain pension funds; a city fulfills these required functions by collecting taxes and paying money to the state pension fund equal to its accrued liability for firemen's pensions. The state pension fund acts merely as an intermediary between a fireman and his employer; the fireman receives the same pension provided by the same source of taxation that he formerly received from his municipal pension fund. The fact that a municipality now uses a state agency to manage and distribute its firemen's pensions instead of using its own agency should not affect the relationship between its firemen and the Workmen's Compensation Laws.

Section 4123.02, Revised Code, excludes firemen from Workmen's Compensation who participate in any pension fund established and maintained by a municipality, the broad language of the statute does not require participation in a particular fund. The exclusion is not limited to participation in funds that were created pursuant to laws in existence at the time of the enactment of Section 4123.02, Revised Code. The present exclusion from Workmen's Compensation contained in Section 4123.02, Revised Code, eliminated the requirement of its predecessor in Section 1465-61, General Code, that municipal funds be established under laws already in existence. Therefore, it can be seen that Section 4123.02, Revised Code, anticipated that firemen's pensions might be administered in

a manner different from that provided by Section 741.02, et seq. in 1953. Because Chapter 742, supra, created rights and duties that were identical to those that existed in the municipal pension funds which it caused to be superseded, participation in a fund created by Section 742.02, supra, would bar payment of compensation in every instance that participation in a municipal firemen's pension fund would bar payment.

Therefore, it is my opinion and you are so advised that a fireman who was injured May 23, 1957, while in the employ of the City of Youngstown Fire Department, who began receiving benefits on June 1, 1959, from the Youngstown Firemen's Pension Fund, and who is now receiving benefits from the Police and Firemen's Disability and Pension Fund created by Section 742.02, Revised Code, is not eligible to receive compensation for permanent total disability as long as the pension received is at least as great as the compensation that would be payable.