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TAXES, UNCOLLECTED — NO VESTED RIGHTS EXIST IN SAME — WHEN BONDS ISSUED TO ANTICIPATE COLLECTION OF SUCH TAXES, SECTION 2293-43 G.C., TO PAY INDEBTEDNESS POLITICAL SUBDIVISIONS, AND PROVIDE FUNDS FOR POOR RELIEF, “FIREMEN’S RELIEF AND PENSION FUND,” OPERATED UNDER SECTION 4600 ET SEQ., G.C., NOT ENTITLED TO ANY PART OF SUCH DELINQUENT TAX COLLECTIONS.

STATE CIVIL SERVICE LAWS — JURISDICTION, APPOINTING AUTHORITY TO SUSPEND MEMBER FIRE DEPARTMENT IN CLASSIFIED SERVICE — TIME — DAYS OF SUSPENSION — SECTION 486-17 ET SEQ., G.C.

1. *No vested rights exist in uncollected taxes, and when bonds are lawfully issued in anticipation of the collection of such taxes, as for example bonds issued under the provisions of Section 2293-43, General*

Code, for the purpose of paying unsecured indebtedness of political subdivisions, and providing funds for poor relief, the firemen's relief and pension fund created and administered under the provisions of Section 4600 et seq., of the General Code, is not entitled to any part of such delinquent tax collections. (State ex rel v. Gesell, 137 O.S. 255 (1940)).

2. *Under the provisions of the state civil service laws, including Sections 486-17, 486-17a and 486-17b of the General Code, the appointing authority may not lawfully suspend a member of the fire department in the classified civil service for a period of five or more days and stipulate in the order of suspension that the days of suspension shall be effective on certain days in two or more subsequent periods of time.*

Columbus, Ohio, February 21, 1941.

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

Gentlemen:

I have your letter requesting my opinion which reads as follows:

"We are enclosing herewith a letter received in this office from the Secretary of the Board of Trustees of the Firemen's Pension Fund of a certain city, containing two questions which we are unable to answer from interpretation of the Pension laws heretofore given us.

Will you kindly examine the correspondence and advise us in answer to the following:

Question 1. When delinquent tax bonds have been issued under provisions of section 2293-43 of the General Code, does the Sinking Fund have any priority right relative to delinquent tax collections (see 2293-43 paragraph 'h') or is the Pension Fund entitled to its allocated share of such delinquent tax collections?

Question 2. Is it permissible under Civil Service Statutes for the suspending officer to suspend a member of the fire department for a period of five days or more, stipulating in the order that two days of the suspension will be in effect on March 10th and 11th, and three days on March 22nd, 23rd and 24th, etc.?"

1. Your first question was answered by the Supreme Court of Ohio in the recent case of *The State, ex rel. City of Cleveland, v. Gesell, Dir. of Finance, etc.*, 137 O.S. 255 (1940). In that case Judge Zimmerman, speaking for the court said as follows at pages 259, 260 to 262:

"This court has indicated in more than one decision that

no vested rights exist in uncollected taxes. And the General Assembly possesses the power, which was exercised in the enactment of Section 2293-43, General Code, to allow the diversion of delinquent uncollected taxes from the purpose for which they were originally levied, so long as there is no collision with the Constitution. * * *

It is urged that taxes originally levied for firemen's and policemen's pensions are in the nature of a trust, and a diversion thereof to other purposes is inhibited.

From the pertinent statutes (Sections 4605 and 4621, General Code), it will be observed that the special levies for firemen's and policemen's pensions are current levies to 'provide funds for the payment of all pensions.' The taxes thus collected are distributed currently in the payment of pensions, and in the same manner as the proceeds from any other annual tax. The only 'vested right' a pensioner could have would be the receipt of the payments due him by the rules and regulations of the proper pension board.

It is nowhere shown that any recipient of a pension in Cleveland has not received the pension to which he was entitled during any year, regardless of the collection of taxes levied for pensions. Complaint as to the diversion of uncollected taxes, originally levied for the pension funds, is at most theoretical, and what has been previously said as to the disposition of other delinquent uncollected taxes is applicable here.

Of course, contributions, donations and the like, in the pension funds, would constitute a 'trust fund' in favor of those directly concerned.

In considering the problems presented by this case, it is important not to lose sight of the fact that taxes on property are levied for the requirements of a *particular fiscal year*. * * * If there are no other restrictions, taxes can be levied annually to an extent not in conflict with Section 2, Article XII of the Constitution. It would thus seem that the General Assembly may, without impairing 'vested rights,' authorize new uses for delinquent uncollected taxes."

II. In connection with your second question, your attention is directed to Sections 486-17, 486-17a and 486-17b, General Code. Section 486-17 reads as follows:

"No person shall be reduced in pay or position, laid off, suspended, discharged or otherwise discriminated against by an appointing officer for religious or political reasons or affiliations. No chief of police or chief of a fire department or any member of a police or fire department shall be reduced in rank, laid off, or suspended, except as provided in sections 486-17a and 486-17b of the General Code with reference to the removal of any officer, employe or subordinate in the classified service of the state,

counties, cities and city school districts. In all such cases of reduction, lay-off or suspension of an employe or subordinate, whether appointed for a definite term or otherwise, the appointing authority shall furnish such employe or subordinate with a copy of the order of lay-off, reduction or suspension and his reasons for the same, and give such employe or subordinate a reasonable time in which to make and file an explanation. Such order together with the explanation, if any, of the subordinate shall be filed with the commission. In case the order applies to the chief of police or chief of a fire department or any member of police or fire departments of a municipality, the commission shall conduct a hearing following the filing of the order and explanation, to determine the sufficiency of the cause of the order. Nothing in this act contained shall limit the power of an appointing officer to suspend without pay, *for purposes of discipline*, an employe or subordinate for a reasonable period, not exceeding thirty days, excepting that in the case of the chief of police or chief of a fire department or any member of police or fire departments of a municipality, the suspension shall be made in the manner and subject to the right of appeal as herein provided; *provided, however, that successive suspensions shall not be allowed*, and provided further that the provisions of this section shall not apply to temporary and exceptional appointments made under the authority of section 486-14 of the General Code." (Emphasis mine.)

Section 486-17a, General Code, provides for the tenure of officers and employes in the classified service of the state, counties, cities and city school districts holding positions under the state civil service laws; sets forth the causes for removal; and makes provision for the procedure to be followed when removing a person in the classified service.

Section 486-17b, General Code, provides as follows:

"Whenever it becomes necessary in a police or fire department, through lack of work or funds or for causes other than those outlined in section 486-17a of the General Code, to reduce the force in such department, the youngest employe in point of service shall be first laid off. Should a position in the police or fire department once abolished or made unnecessary be found necessary to be recreated or reestablished within two years from the date of abolishment, or should a vacancy occur through death, resignation, or through any other cause within two years from the date of the abolishment of the position or lay off, the oldest employe in point of service of those laid off shall be entitled to same providing he was at the date of his separation a regular and permanent employe. When a position above the rank of patrolman in the police department and above the rank of regular fireman in the fire department is abolished and the incumbent has been permanently appointed in accordance with the provisions of this act, he shall be demoted to the next lower rank and the youngest officer in point of service in the next

lower rank shall be demoted, and so on down until the youngest person in point of service has been reached who shall be laid off."

It will be noticed that it is expressly provided in Section 486-17, supra, that nothing in the state civil service act shall "limit the power of an appointing officer to suspend without pay, *for purposes of discipline*, an employe or subordinate *for a reasonable period*, not exceeding thirty days; * * * provided, however, that successive suspensions shall not be allowed." The suspension permitted is for a reasonable *period* and not *periods* and the one purpose of a suspension under the provisions of the last paragraph is to discipline the person so suspended. In the new Century Dictionary, one of the definitions of the word "discipline," when used as a noun, is "punishment inflicted by way of *correction and training*." Webster's New International Dictionary contains the same definition in these words: "4. Correction; chastisement inflicted by way of correction and training; hence, training through suffering." When, in the judgment of the appointing officer, the ways of a member of a fire department are such that they require correction by punishment, or the fireman needs training by the same method, the statute contemplates and the fireman should be given such number of days suspension (not exceeding thirty) as the appointing officer deems necessary to correct the evils by which the suspension was engendered, which days should run successively, and on their expiration the fireman should be returned to duty on the theory that having been sufficiently disciplined he will "go and sin no more." Any other construction would not only do violence to the theory of the section under consideration, but would, at least in one respect, violate the positive injunction of the statute "that successive suspensions shall not be allowed." Certainly if the appointing officer may not by a series of orders directly cause successive suspensions to be suffered, he cannot by the issuance of a single order indirectly accomplish what he is otherwise expressly prohibited from doing.

Moreover, a conclusion contrary to the one here reached would in some measure permit the circumvention of the provisions of Section 486-17b, supra, in the following way: Most of the cities in the state are complying with the provisions of Section 17-1a, General Code, which, inter alia, provides that where "the eight hour regulation" has not been adopted, members of a city fire department shall not be kept on duty "more than twenty-four consecutive hours, except in cases of extraordinary emergency," after which they "shall be allowed to remain off duty for at least twenty-four consecutive hours," and that each in-

dividual member "in addition to receiving a minimum of twenty-four hours off duty" in each period of forty-eight hours shall receive an additional period of twenty-four consecutive hours off duty in each period of fourteen days." Cities not complying with the terms of Section 17-1a, supra, have made somewhat similar provisions by ordinance. (Two cases are now pending in and have been submitted to the Supreme Court of Ohio for the purpose of having determined the question as to whether or not a charter city may by ordinance provide for hours off duty of its firemen other than as prescribed by Section 17-1a, supra.) Whether the day or days off duty be provided for by law or by ordinance, however, can make no difference in so far as the instant question is concerned, for if successive suspensions may be ordered over a period of time in one order as suggested in your inquiry, lay-offs because of lack of funds, or lack of work, or for other reasons might be accomplished by the simple expedient of directing a thirty-day suspension and so scheduling the days of suspension as to have them fall on the days the fireman is entitled to off duty with pay, thus decreasing the fireman's salary and conserving the funds appropriated for the operation of the fire department. By such a plan men of any rank might in substance and effect be laid off instead of "the youngest person in point of service" as required by Section 486-17b, supra, or any city ordinance of like tenor.

Research fails to disclose any adjudicated cases bearing upon your second question. However, in *McQuillin, Municipal Corporations*, 2nd Ed., Revised Vol. 2, p. 468, it is asid:

"Whether suspension is the exercise of a judicial or administrative power depends upon whether it is made with or without a hearing. By whom the power may be exercised and the manner in which it is to be exercised are usually prescribed by law. The grounds of suspension may rest in the discretion of the officer or body having the power of suspension, but when the grounds are stated by the law, the act for which the officer or employee is suspended must be clearly within its provisions. It may be summary without a hearing, or the filing of written charges and a hearing may be required.

* * * A charter provision giving the police commissioner power to punish police officers by suspension without pay, limiting the time thereof to thirty days for any offense, does not affect the power of the commissioner, granted by another provision, to suspend without pay pending the trial of charges.

* * * Under many civil service laws, employees may be temporarily suspended for a named period, pending further pro-

ceedings, without formal proceedings for removal or suspension. * * * ”

In this connection it has been held that where the statute limits the power of suspension for disciplinary purposes, to a definite number of days, at the expiration of such period the person so suspended is automatically restored to duty and is entitled to pay for all time in excess of the limits of suspension fixed by statute. See cases cited in note 86 of the above text. That is to say, when the Legislature or other law-making body has fixed the maximum number of days for which a person may be suspended for the purpose of discipline or has imposed any other restriction, such as a provision that successive suspensions for disciplinary purposes shall not be allowed, the authority authorized so to suspend may not go beyond the terms of the statute or ordinance limiting the officers' power in this respect.

For the above reasons and in specific answer to your questions, it is my opinion that:

1. No vested rights exist in uncollected taxes, and when bonds are lawfully issued in anticipation of the collection of such taxes, as for example bonds issued under the provisions of Section 2293-43, General Code, for the purpose of paying unsecured indebtedness of political subdivisions, and providing funds for poor relief, the firemen's relief and pension fund, created and administered under the provisions of Sections 4600, et seq., of the General Code, is not entitled to any part of such delinquent tax collections. (State ex rel v. Gesell, 137 O.S. 255 (1940).

2. Under the provisions of the state civil service laws, including Sections 486-17, 486-17a, and 486-17b of the General Code, the appointing authority may not lawfully suspend a member of the fire department in the classified civil service for a period of five or more days and stipulate in the order of suspension that the days of suspension shall be effective on certain days in two or more subsequent periods of time.

Respectfully,

THOMAS J. HERBERT,
Attorney General.