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FULL TIME FIREMEN OF A MUNICIPAL FIRE DEPARTMENT, AND FULL TIME POLICEMEN OF MUNICIPALITY—ELIGIBILITY TO BECOME MEMBERS OF FIREMEN'S OR POLICE—RELIEF AND PENSION FUND—PUBLIC EMPLOYEES RETIREMENT SYSTEM—REFUND—§§741.01 (A), . 31 (A).02, .32, 145.56 R.C.—OAG NO. 2327—1947.

SYLLABUS:

1. Full-time firemen of a municipal fire department who were so employed prior to September 25, 1947 and who as of September 25, 1947 did not meet the requirements of a member of the fire department set forth in Section 741.01 (A), Revised Code, are not eligible to become members of a firemen's relief and pension fund established subsequent to September 25, 1947 pursuant to Section 741.02, Revised Code.

2. Full-time policemen of a municipality who were so employed prior to the date of the establishment of a police relief and pension fund after September 14, 1949, and who meet the requirements of a "member of a police department" as set forth in Section 741.31 (A), Revised Code, are eligible to elect to become members of such fund pursuant to the provisions of Section 741.38, Revised Code.

3. Full-time firemen who come within the definition of member of a fire department under Section 741.01 (A), Revised Code, and full-time policemen who are employed after the date of establishment of a police relief and pension fund and come within the definition of member of a police department under Section 741.31 (A), Revised Code, must become members of such funds and such individuals are no longer eligible for membership or benefits in the Public Employees Retirement System pursuant to the provisions of Section 145.02, Revised Code.

4. When a member of the Public Employees Retirement System becomes a member of a police relief and pension fund established pursuant to Section 741.32, Revised Code, or a firemen's relief and pension fund established pursuant to Section 741.02, Revised Code, such individual upon making application to the Public Employees Retirement Board is entitled to a refund of his contribution made to such System pursuant to the provisions of Section 145.40, Revised Code, and since the funds held by the Public Employees Retirement System are unassignable, pursuant to the provisions of Section 145.56, Revised Code, such refund can be made payable only to the former member of the Public Employees Retirement System.

5. The Public Employees Retirement System is without authority to refund to a governmental unit which has established a police relief and pension fund or a firemen's relief and pension fund, the contributions made by it prior to the establishment of such funds on account of former members of the Public Employees Retirement System who become members of the police relief and pension fund or firemen's relief and pension fund (Opinions No. 2327, Opinions of the Attorney General for 1947 approved and followed).

Columbus, Ohio, September 29, 1960

Hon. James A. Rhodes, Auditor of State
State House, Columbus, Ohio

Dear Sir:

I have your request for my opinion which reads as follows:

"In our examination of cities and villages a question is frequently raised as to the eligibility of certain firemen and policemen for membership in and benefits from a Firemen's Relief and Pension Fund, established under R.C. 741.02, or a Police Relief and Pension Fund, pursuant to R.C. 741.32.

"One problem occurs where an individual was a full-time, regular member of a police or fire department prior to September 25, 1947; but was, immediately prior to that date, a member of the Public Employees Retirement System, and was not contributing to a police or firemen's pension fund. A second problem arises where members of the department were first employed as such after September 25, 1947, and before the establishment of an appropriate pension fund.

"In certain instances the municipality failed for many years to establish pension funds for firemen and policemen, as required by R.C. 741.02 and 741.32, respectively. One such case which came to the attention of this office concerns a village which has employed two or more regular, full-time firemen and policemen since 1946. As of October 26, 1959, the village employed full-time regular members of the fire department, as defined in R.C. 741.01. On the same date ten full-time regular members, as defined in R.C. 741.31, were employed in the police department. Two of such members of the fire department and three such members of the police department were so employed prior to September 25, 1947, the remainder having first become regular members of their respective departments after that date.

"No firemen's or police pension fund was established by the village prior to October 26, 1959. As of that date, all members of each department noted above (and the village as well) were making the regular contributions to the Public Employees Retirement System which are required of members of that system and an employing municipality under Chapter 145, Revised Code.

"On October 26, 1959, the village council enacted ordinances establishing a Firemen's Relief and Pension Fund, and a Police Relief and Pension Fund, in accordance with Chapter 741, Revised Code.

“With reference to the above facts, and assuming the ordinances of October 26, 1959 are in full force and effect, the following questions are raised relative to the present regular, full-time members of the village fire and police departments:

“(a) Are the two firemen who served prior to September 25, 1947 now eligible for membership in the Firemen’s Relief and Pension Fund of the village?”

“(b) Are the five firemen who became members of the department between September 25, 1947 and October 26, 1959 now eligible for membership in the same fund?”

“(c)” If your answer to either of questions (a) or (b) is in the affirmative:

“(1) Is membership of the subject firemen in the Firemen’s Relief and Pension Fund compulsory?”

“(2) Are the subject firemen eligible to continue as members of the Public Employees Retirement System?”

“(3) Were the subject firemen eligible to receive benefits from the Public Employees Retirement System prior to October 26, 1959?”

“(d) If your answer to (c) (2) is in the negative:

“(1) Does the Public Employees Retirement System have authority to refund contributions which were made to the system by the subject firemen?”

“(2) Does the Public Employees Retirement System have authority to refund contributions made by the employing municipality by reason of the employment of such firemen?”

“(e) If your answer to either question under (d) is affirmative:

“(1) Is such refund contingent upon an application for refund by the contributor in question?”

“(2) Can such refund be made by the System directly to the Firemen’s Relief and Pension Fund?”

“(f) Please consider questions (a) through (e) relative to the three policemen employed prior to September 25, 1947, seven policemen first employed after that date, their membership in the Public Employees Retirement System and their relationship to the Police Relief and Pension Fund established on October 26, 1959.

“Your answers to the above questions are of considerable importance to the administration of Public Employees Retirement System, and to many cities and villages in the state. Therefore your formal opinion is respectfully requested.”

Since each question raised in your request is directed to firemen and to policemen, I will treat both in the answers to the questions.

Question (a)

This question relates to the eligibility of policemen and firemen to become members of a policemen or firemen pension fund when, prior to September 25, 1947, they were not members of the policemen or firemen relief and pension fund, but were members of the Public Employees Retirement System.

This question was treated by a former Attorney General in Opinion No. 2327, Opinions of the Attorney General for 1947, page 542. After citing Sections 741.01, Revised Code (formerly Section 4615-1 General Code) and Section 741.31, Revised Code (formerly Section 4631-3 General Code) the then Attorney General said, beginning at page 47:

“Accordingly, I feel impelled to the conclusion that the General Assembly, in enacting these changes and this new legislation, intended that in municipalities where fire and police pension systems were already either compulsory or optional, the members of those forces who were not contributing to a pension fund should be excluded from the system when organized pursuant to the new law and that the new law should apply only to persons appointed after it became effective; furthermore it was the intention that as to the township firemen’s relief and pension system, which is entirely new, firemen already in service were to be included.

“Therefore, since these former appointees of a municipality who were non-contributors are not to be regarded as members of the fire or police department for the purpose of the act, they do not become contributors to the fund and consequently do not become ‘members of the fund’ within the definitions quoted. Accordingly they continue to be members of the public employes retirement system, contributing to its funds and entitled to its benefits.”

Opinion No. 2327, *supra*, was cited and followed in Opinion No. 2641, Opinions of the Attorney General for 1948, page 32, the sixth paragraph of the syllabus of which reads as follows:

“6. Where a municipality establishes a police relief and pension fund after the effective date of House Bill No. 195 of the 97th General Assembly, police officers theretofore employed in its police department do not become members of such fund, but, if they are members of the Public Employes Retirement System they must continue their membership in such system. The fact

that such police officer had obtained an exemption from such retirement system would not change his status as to membership in such police relief and pension system.”

In accordance with the above, therefore, the two firemen are not now eligible to become members in the firemen’s relief and pension fund of the village.

As to members of a municipal police department, Section 741.31, Revised Code, was amended in 1949 by the passage of Amended House Bill No. 325. (123 Ohio Laws, 345) Said section as then amended has not been subsequently changed in a manner which would affect this opinion. Section 741.31, Revised Code, as it now reads is set forth in its entirety later in this opinion. It is obvious from a reading of Section 741.31, Revised Code, as amended in 1949, that the reasoning in Opinion No. 2327, Opinions of the Attorney General for 1947, *supra*, and the sixth paragraph of syllabus of Opinion No. 2641, Opinions of the Attorney General for 1948, *supra*, are no longer applicable as they relate to the eligibility of policemen to become members of a police relief and pension fund. Section 741.31, Revised Code, as then amended and as it presently reads, defines member of a police department as a person who “received or who receives” appointment as a policeman or who “has been or who is appointed” pursuant to the applicable laws as a full time regular policeman. It is clear from the language of said section that the police relief and pension fund is not limited, and has not been limited since the amendment of Section 741.31, Revised Code, by the 98th General Assembly, to members of the police department who received their appointment subsequent to September 25, 1947.

Amended House Bill No. 325 of the 98th General Assembly also enacted Section 741.38, Revised Code. Said section reads as follows:

“Any person who is employed full time as a member of the police department by a municipal corporation in which a police relief and pension fund is established pursuant to section 741.32 of the Revised Code after September 14, 1949, and who is so employed before and at the time such fund is established, may, at his election, become a member of the fund upon giving written notice to the board of trustees of the police relief and pension fund within twenty days after the date of the establishment of such fund of his election to become a member.

“Any person who is or on becoming a member of the fund pursuant to this section shall be subject to the salary deduction provided for in section 741.43 of the Revised Code. Such person

shall, in addition, pay into the fund an amount equal to that which he would have been required to pay had he been entitled to rights in the fund during the period he was a member of the department and not a member of the fund. Such person shall be given full credit as a member of the fund for all time served as a member of the department, regardless of the date on which he became a member of the fund."

Section 741.38, Revised Code, was considered in Opinion No. 1948, Opinions of the Attorney General for 1950, page 433.

Section 741.38, Revised Code, *supra*, permits any member of a police department (as defined in Section 741.31 (A) Revised Code) who was so employed prior to or at the establishment of a police relief and pension fund after September 14, 1949, to elect whether or not he will become a member of such fund, in accordance with the terms of said section. It thus appears that such election is available to all members of the police department at the date of the establishment of a police relief and pension fund.

Therefore, members of the police department who meet the requirements of Section 741.31 (A), Revised Code, which would include the three policemen employed prior to September 25, 1947, are eligible to elect to become members of a police relief and pension fund established subsequent to September 14, 1949.

Question (b)

This question relates to the eligibility of policemen and firemen to become members of the policemen's or firemen's pension funds where such persons became members of the respective departments between September 25, 1947 and the date of the establishment of the policemen and firemen pension fund by the municipality involved—such persons having been members of the Public Employees Retirement System.

Section 741.01, Revised Code, reads as follows:

"As used in sections 741.01 to 741.25, inclusive, of the Revised Code:

"(A): 'Member of the fire department' means any person who receives an original appointment as a fireman from a duly established civil service eligible list, or who is appointed to a position in a fire department pursuant to section 737.22 of the Revised Code, or who, on September 25, 1947, was contributing two per cent of his annual salary to a firemen's relief and pension fund established pursuant to section 741.02 of the Revised Code.

“(B) ‘Member of the fund’ means any person who is contributing four per cent of his annual salary to the firemen’s relief and pension fund established pursuant to section 741.02 of the Revised Code, or who is receiving a pension or disability benefits from such fund as a result of service in the fire department.” Section 741.31, Revised Code, reads as follows:

“As used in sections 741.31 to 741.54, inclusive, of the Revised Code:

“(A) ‘Member of the police department’ means any person who received or who receives an original appointment as a policewoman or policeman from a duly established civil service eligible list, or who has been or who is appointed pursuant to section 737.15 or 737.16 of the Revised Code as a full-time regular policeman and is paid solely out of public funds of the employing municipal corporation, or who, immediately prior to September 25, 1947, was contributing two per cent of his annual salary to a police relief and pension fund established pursuant to section 741.32 of the Revised Code, or who was a police matron contributing four per cent of her annual salary to a police relief and pension fund immediately prior to October 1, 1957.

“(B) ‘Member of the fund’ means any person who is contributing four per cent of his annual salary to the police relief and pension fund established pursuant to section 741.32 of the Revised Code, or who is receiving a pension or disability benefits from such fund as a result of service in the police department.”

From the facts stated in your request, and in accordance with the involved meet the requirements set forth in the definition of member of answer to Question (a) above, it appears that the firemen and policemen the fire department or the police department above quoted. It must necessarily follow that the subject firemen are eligible for membership and the subject policemen are eligible to elect to become members in the respective pension funds.

Question (c) (1)

This question asks whether it is compulsory that the individuals set forth in Question (b) become members of the police relief and pension fund or the firemen’s relief and pension funds.

Section 741.12, Revised Code, which applies to the firemen’s relief and pension fund reads as follows:

“In each municipal corporation in which there is established a firemen’s relief and pension fund, the treasurer of the municipal corporation shall deduct from the salary of each member of the

fire department an amount equal to four per cent of his salary for each payroll period. The sums so deducted shall be credited to such fund.”

Section 741.43, Revised Code, relating to police relief and pension funds, reads as follows:

“In each municipal corporation in which there is established a police relief and pension fund, the treasurer of the municipal corporation shall deduct from the salary of each member of the police department an amount equal to four per cent of his salary for each payroll period. The sums so deducted shall be credited to such fund.

“This section does not affect any police relief subsidiary fund established and maintained prior to September 13, 1939, or the right of the board to receive contributions thereto and to make disbursements in accordance with its rules.”

It is to be noted that deductions are required to be made by the treasurer of the municipal corporations from the salary “of each member of the fire department” or “of each member of the police department.”

Since the firemen involved in Question (b) above are members of the fire department as defined in Section 741.01 (A), Revised Code, it follows that a deduction of 4 per cent must be taken from their salaries. The taking of this deduction makes them “members of the fund” under the provisions of Section 741.01 (B), Revised Code. Although there is no specific requirement of compulsory membership, the requirement that deductions be withheld from the members of the departments, which automatically makes the member of the department a “member of the fund,” has the same effect as a compulsory requirement that all members of the department, as defined by statute, be members of the fund. As to policemen who were employed subsequent to the establishment of a police relief and pension fund, Sections 741.31 and 741.43, Revised Code, would cause the same result.

Your attention is also called to Opinion No. 4609, Opinions of the Attorney General for 1954, page 613, and particularly to the fourth paragraph of the syllabus of that opinion relating to the mandatory nature of Section 741.12, Revised Code.

Since Section 741.38, Revised Code, *supra*, gives policemen who were duly employed prior to the establishment of a police relief and pension fund an option to join such fund, as to them there is no compulsory requirement.

Question (c) (2)

This question relates to the eligibility of the individuals set forth in question (b) above to continue as members of the Public Employees Retirement System.

Section 145.02, Revised Code, provides for exclusions from membership in the Public Employees Retirement System and reads as follows:

“Notwithstanding the provisions of section 145.03 of the Revised Code, any employee who is contributing to or is receiving retirement system shall be excluded from membership in the public fund, a firemen’s relief and pension fund, state highway patrol, or a municipal retirement system established prior to June 30, 1938, or who has been granted a disability retirement allowance by the state teachers retirement system, or state public school employees retirement system shall be excluded from membership in the public employees retirement system and shall be ineligible to make contributions or accrue benefits in the public employees retirement system.”

Since the firemen set forth in Question (b) above are required to contribute to the firemen’s relief and pension fund under the clear provisions of Section 145.02, *supra*, they are not eligible for membership in the Public Employees Retirement System. The same would be true of those policemen who elected to become members of the police relief and pension fund under Section 741.38, Revised Code, as well as those policemen employed subsequent to the establishment of the police relief and pension fund.

Question (c) (3)

This question relates to the eligibility of the individuals set forth in Question (b) above to receive benefits from the Public Employees Retirement System while they were members of such System prior to October 26, 1959, the date of the establishment of the local police relief and pension fund and firemen’s relief and pension fund.

Your attention is called to the first paragraph of the syllabus of Opinion No. 1624, Opinions of the Attorney General for 1960, issued on August 9, 1960, which reads as follows:

“1. A person who was a member of the police department of a municipal corporation which was required by Section 741.32, Revised Code, to establish and maintain a police relief and pension fund covering such members, but failed to do so, was not ‘within a police relief and pension fund’ under Section 145.02,

Revised Code, as existing immediately prior to August 1, 1959, and was not 'contributing to or * * * receiving retirement or disability benefits from a police relief and pension fund' under the same section as effective August 1, 1959; and such person was not, therefore, excluded from membership in the public employees retirement system under either version of said Section 145.02."

Since the individuals set forth in Question (b) above were legally entitled to be members of the Public Employees Retirement System prior to October 26, 1959, it follows that such individuals were entitled to benefits pursuant to Chapter 145. of the Revised Code as members of the Public Employees Retirement System.

Question (d) (1)

This question relates to the authority of the Public Employees Retirement System to refund the contributions made to that System by the individuals set forth in Question (b) above.

Refund of contributions made to the Public Employees Retirement System by former members of that System is authorized by Section 145.40, Revised Code. The firemen and the policemen who elected to become members of the police relief and pension fund under the provisions of Section 741.38, Revised Code, set forth in Question (b) above clearly come within the provisions of said section and are therefore entitled to a refund of their contributions. Your attention is once again called to Opinion No. 2327, Opinions of the Attorney General for 1947, the third paragraph of the syllabus, which reads as follows:

"A member of the public employes retirement system who is by reason of a change in the law brought within the provisions of a firemen's relief and pension fund, is entitled to have a refund from the public employes retirement system of his accumulated contributions to such system."

Question (d) (2)

This question relates to the authority of the Public Employees Retirement System to grant a refund of contributions made by the municipality which established the local police and firemen relief and pension funds involved herein.

This question was also considered in Opinion No. 2327, Opinions of the Attorney General for 1947, *supra*, the fourth paragraph of the syllabus of which reads as follows:

“4. When a member of the public employes retirement system is, by reason of a change in the law, brought within the provisions of a firemen’s relief and pension fund, the governmental unit by which he has been employed is not entitled to a refund of the contributions which it has made to said retirement system on account of such employe.”

While the facts set forth in that opinion relate to contributions to the Public Employees Retirement System made prior to the mandatory requirement that all municipalities having two or more full-time regular policemen or firemen establish a local fund, I am of the opinion that the conclusion therein must apply here since the employee policemen and firemen who were members of the Public Employees Retirement System were in each instance entitled to benefits from the Public Employees Retirement System, and since there is still no authority granted by the legislature to the Public Employees Retirement System to make such refund.

Question (e) (1)

This question is whether or not the refund to the employee member is contingent upon his making application to the Public Employees Retirement System.

Section 145.40, Revised Code, is applicable to this instance and provides that a refund shall be made “upon application to the board.” This explicit requirement clearly indicates that no refund can be made without the application for such refund being first submitted to the Public Employees Retirement Board by the former member.

Question (e) (2)

This question relates to the authority of the Public Employees Retirement System to make the employee member refund referred to above directly to the firemen’s relief and pension fund and the police relief and pension fund. Section 145.56, Revised Code, reads as follows:

“The right of a person to a pension, as annuity, or retirement allowance itself, any optional benefit, any other right accrued or accruing to any person under sections 145.01 to 145.57, inclusive, of the Revised Code, or of any municipal retirement system established subject to such sections, under the laws of this state or any charter, the various funds created by sections 145.01 to 145.57, inclusive, of the Revised Code, or under such municipal retirement system, and all moneys and investments and income thereof, are hereby exempt from any state tax, including the in-

heritance tax, any county, municipal, or other local tax, and shall not be subject to execution, garnishment, attachment, the operation of bankruptcy or the insolvency laws, or other process of law, and shall be unassignable except as specifically provided in such sections.”

It is to be noted that the above section makes funds of the Public Employees Retirement System unassignable except as specifically provided in Chapter 145., Revised Code. I am unable to find any specific provision which would authorize an employee member to assign his accumulated contributions to another. I therefore must conclude that a member is without the authority to make such an assignment and the Public Employees Retirement System is therefore without authority to pay the accumulated contributions of a member to anyone other than the member.

In summary of the above I am of the opinion and you are advised:

1. Full-time firemen of a municipal fire department who were so employed prior to September 25, 1947 and who as of September 25, 1954 did not meet the requirements of a member of the fire department as set forth in Section 741.01 (A), Revised Code, are not eligible to become members of a firemen's relief and pension fund established subsequent to September 25, 1947 pursuant to Section 741.02, Revised Code.

2. Full-time policemen of a municipality who were so employed prior to the date of the establishment of a police relief and pension fund after September 14, 1949, and who meet the requirements of a “member of a police department” as set forth in Section 741.31 (A), Revised Code, are eligible to elect to become members of such fund pursuant to the provisions of Section 741.38, Revised Code.

3. Full-time firemen who come within the definition of member of a fire department under Section 741.01 (A), Revised Code, and full-time policemen who are employed after the date of establishment of a police relief and pension fund and come within the definition of member of a police department under Section 741.31 (A), Revised Code, must become members of such funds and such individuals are no longer eligible for membership or benefits in the Public Employees Retirement System pursuant to the provisions of Section 145.02, Revised Code.

4. When a member of the Public Employees Retirement System becomes a member of a police relief and pension fund established pur-

suant to Section 741.32, Revised Code, or a firemen's relief and pension fund established pursuant to Section 741.02, Revised Code, such individual upon making application to the Public Employees Retirement Board is entitled to a refund of his contributions made to such System pursuant to the provisions of Section 145.40, Revised Code, and since the funds held by the Public Employees Retirement System are unassignable, pursuant to the provisions of Section 145.56, Revised Code, such refund can be made payable only to the former member of the Public Employees Retirement System.

5. The Public Employees Retirement System is without authority to refund to a governmental unit which has established a police relief and pension fund or a firemen's relief and pension fund, the contributions made by it prior to the establishment of such funds on account of former members of the Public Employees Retirement System who became members of the police relief and pension fund or firemen's relief and pension fund (Opinion No. 2327, Opinions of the Attorney General for 1947 approved and followed).

Respectfully,
MARK McELROY
Attorney General