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CIVIL SERVICE STATUS—PUBLIC EMPLOYEES IN CLASSIFIED SERVICE AS AFFECTED BY MILITARY SERVICE—POWERS OF TRUSTEES OF POLICE RELIEF AND PENSION FUND—SECTIONS 486-16a AND 4628-3 G. C. ARE NOT IN PARI MATERIA—NEITHER OF SAID SECTIONS HAS ANY BEARING OR EFFECT UPON THE OTHER.

SYLLABUS:

Section 486-16a, General Code, relating to the civil service status of public employes in the classified service as affected by their military service, and Section 4628-3, General Code, relating to the powers of trustees of the police relief and pension fund are not in pari materia, and neither of said sections has any bearing or effect upon the other.

Columbus, Ohio, May 18, 1945

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

Your request for my opinion reads as follows:

"We are inclosing herewith a letter from our City of Columbus Examiner, in which he seeks interpretation of Sections 486-16a and 4628-3 of the General Code, concerning the service credits allowable to members of the city police department for military service performed in the first and second World Wars.

As we do not have any ruling by which we are able to answer the general question submitted by the State Examiner, may we request your consideration and opinion in answer to the following question:

Do the provisions of Section 4628-3, General Code, prevail over Section 486-16a by limiting the service credit for military service of policemen to thirty months?"

Section 4628-3, General Code, to which you refer, is a part of the chapter relating to pension systems for members of the police and fire departments of municipalities. By the provisions of Section 4628, General Code, the trustees of the police relief and pension fund are given broad

authority as to the distribution of such fund. That section which has been in force in substantially the same form for at least thirty years, reads as follows:

“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.”

The courts have frequently recognized the broad and controlling character of the powers thus conferred on the board of trustees. Without extended citations we may note the very recent cases of *State ex rel. v. McIntosh*, 145 O. S. 107; *Batchelor v. Newness*, 145 O. S. 115 and *State ex rel. v. Wieber*, 145 O. S. 121.

The statutes make no provision whatever specifically granting to any member of the police force any right to a pension or other benefit except through the rules which the trustees are authorized to make.

Section 4628-3, General Code, was enacted in 1937 in the following language:

“Trustees of the police relief fund are hereby authorized to adopt rules for the allowance of credit toward retirement of those members of the police department who have actively served in the armed forces of the United States army, navy or marine corps in time of warfare or when armed expeditions were conducted during their period of service, and such members have been honorably discharged; such credit shall not exceed thirty months.”

The only change made in that section since its enactment was by the 95th General Assembly in changing the name “police relief fund” to “police relief and pension fund.”

It is quite clear on reading the above and all other sections relating to police pensions, that they have no relation whatever to the *civil service status* of the members. They relate only to retirement and the right to receive a pension or other relief. Section 4628-3 *supra*, does not purport to confer any new right on a member of the force, but merely further

defines the power of the board of trustees in making rules. The section is not mandatory but merely permissive in its form.

Coming then to Section 486-16a, General Code, that section is a part of the chapter relating to civil service. It was enacted in 1941 and amended by the 95th General Assembly, becoming effective in its amended form August 11, 1943. In so far as pertinent, it reads as follows:

"Any person who at the time he held or holds an office or position under the classified service and has held such office or position for a period of ninety days or more, enlisted or enlists in the *armed services* of the United States *subsequent to December 8, 1941*, was or is commissioned in *said armed services* or was or is called into *said armed services* in consequence of an act of Congress, the call of the president of the United States, or due to his status in the reserve forces, national guard, or other similar defense organization shall, within thirty days after making application therefor, be restored to the office or position held by him immediately prior to his entering into the *armed services* of the United States, provided, such person is at such time physically able to perform the duties of such office or position. * * *

Whenever the time or period of employment in the classified service affects the *status, rank, rating or qualifications* in any respect of any person who has served in the *armed services* of the United States as contemplated by this section such person shall be given credit for the period in which he served in *such armed services* as though such time were served in the course of regular employment. * * *

When such classified employee is restored to his position *and to the status, rank, rating or qualifications hereinbefore provided* following such military service, the former incumbent of such position who has not entered such *armed services* shall be demoted to the next lower rank and the youngest classified employee in point of service in the next lower rank shall be demoted, and so on down until the youngest employee in point of service has been reached, who shall be laid off, if necessary. The person so laid off shall be placed in an equitable rank upon the same eligible list from which he secured original appointment, or an eligible list subsequently established for the position, or upon an eligible list which the commission shall regard as appropriate for the classification involved. The term 'placed in equitable rank' as used herein shall mean a rotation purely on the basis of prior service. * * *." (Emphasis added.)

To understand the meaning of the words "status, rank, rating or

qualifications", used repeatedly in this section, it will be helpful to refer to two of the preceding sections relating to civil service, both of which sections were in force before the original enactment of Section 486-16a. Section 486-15 reads in part as follows:

"Vacancies in positions in the classified service shall be filled in so far as practicable by promotions. The commission shall provide in its rules for keeping a record of efficiency for each employe in the classified service, and for making promotions in the classified service on the basis of merit, to be ascertained as far as practicable by promotional examinations, *by conduct and capacity in office, and by seniority in service*; and shall provide that vacancies shall be filled by promotion in all cases where, in the judgment of the commission, it shall be for the best interest of the service so to fill such vacancies. All examinations for promotions shall be competitive. In promotional examinations *efficiency and seniority* in service shall form a part of the maximum mark attainable in such examination. In all cases where vacancies are to be filled by promotion, the commission shall certify to the appointing authority only the name of the person having the *highest rating*. * * *." (Emphasis added.)

Here it will be noted that seniority in service is given a prominent part in determining the rank or rating of all employes in the classified service, which, of course, includes members of police and fire departments. Section 486-15a, General Code, which relates only to those departments provides that no position above the grade of patrolman or fireman shall be filled except by promotion from the lower grade or rank, and requires the certification by the civil service commission to be of the person having the "highest rating."

The emphasis placed by these sections upon "rank or grade", "rating", and "efficiency and seniority" plainly supplies the key to the meaning of the words "status, rank, rating and qualifications" as used in Section 486-16a supra. This section too, deals with all classified employes, including policemen and firemen. Plainly it has nothing whatever to do with any subject but the civil service status of a person who is in line for promotion and is called into military service. It makes no reference to his future retirement, and in my opinion has no possible bearing on that subject. This statute fixes the status of every classified employe and preserves his right so far only as his standing as an active employe in civil service is concerned,

and for that purpose gives him credit for his *entire period of military service as provided in said Section 486-16a*, while as already pointed out Section 4628-3, General Code, grants the member of the police force no right, but merely empowers the trustees of the relief and pension fund to take into consideration, if they deem proper, for retirement purposes only, military service *in any war*, up to a limit of thirty months. Thus, it is quite clear that the two sections are totally unrelated both as to subject matter and purpose.

Aside from the reasons above given, I believe a consideration of the chronological order of the enactments in question will lead to the conclusion that the legislature did not intend Section 4628-3, General Code, to control Section 486-16a *supra*. Section 4628-3 in precisely its present substance was in effect since May 13, 1937; Section 486-16a was newly enacted in 1941, and contained a provision of like effect to the present section as to the preservation of the "rank and position" of a civil service employe who was called into military service. The amendment effective August 11, 1943, elaborated the former language considerably. The amendment of Section 4628-3, which became effective eight days later did nothing whatever to the former statute except to change the name of the system, a change which was made by the same act in every section of the police pension law. Manifestly, there was no intention to give it any new effect or force, and certainly not as against the clear provisions of a statute on a wholly unrelated subject.

It is therefore my opinion that Section 486-16a, General Code, relating to the civil service status of public employes in the classified service as affected by their military service, and Section 4628-3, General Code, relating to the powers of trustees of the police relief and pension fund are not *in pari materia*, and neither of said sections has any bearing or effect upon the other.

Respectfully,

HUGH S. JENKINS

Attorney General