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POLICE DEPARTMENT—MEMBER RETIRED NOVEMBER 2, 1954—ELECTED TO RECEIVE BENEFITS OF PENSIONS ACCORDING TO RULES OF PENSION BOARD—HE SHALL NOT PARTICIPATE IN POLICE RELIEF AND PENSION FUND WHILE ENJOYING ANY PUBLIC EMPLOYMENT—EMPLOYMENT BY US GOVERNMENT IN ABSENCE OF ANY PROVISION IN RULES EXCLUDING EMPLOYMENT IS PUBLIC EMPLOYMENT—SECTIONS 741.493, 741.49 RC.

SYLLABUS:

A member of the police department who retired on November 2, 1954, and who had pursuant to Section 4631-1 of the General Code, or to Section 741.493, Revised Code, elected to receive the benefits and pensions in accordance with the rules of the pension board in effect on April 1, 1947, instead of those provided by Section 741.49, Revised Code, is bound by the provisions contained in such rules that he shall not participate in the police relief and pension fund while he is enjoying any public employment. Employment by the United States Government in the absence of any provision in said rules excluding such employment, is public employment within the provision of such rules.

Columbus, Ohio, November 25, 1955

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

Gentlemen:

I have before me your communication requesting my opinion and reading as follows:

"I am enclosing a letter received from our Examiner-in-Charge in Dayton, which I believe is self-explanatory. The question he asks appears to be this:

"Is a former member of the police department of the city of Dayton, who retired on November 2, 1954, and *who had elected to retire under the rules in effect on April 1, 1947, and who did so retire*, entitled to continue to receive his pension while employed by the United States Government at the Wright-Patterson Air Force Base?

"You will please recall that Rule No. 11, of the Rules and Regulations of the Dayton Police Pension and Relief Fund, in effect on April 1, 1947, provided in part as follows:

'In the event that such person accepts *any public employment * * **, then, during the time such beneficiary is so employed * * *, *he shall not participate in the police relief and pension fund' * * **" (Emphasis added.)

Accompanying your letter is a letter from your state examiner, in which he refers to Opinion No. 5871, rendered October 20, 1955, and asks for a clarification of that opinion in connection with the question you present.

Prior to September 25, 1947, it was provided by Section 4628, General Code, that the board of trustees of a police pension system should have the right "to make all rules and regulations for the distribution of the fund, including the qualifications of those to whom any portion of the fund shall be paid, and the amount thereof."

Pursuant to that authority it would appear from your letter that the Trustees of the Dayton Pension Board had adopted the rule mentioned in your letter, reading as follows :

"In the event that such person accepts *any public employment* * * *, then during the time such beneficiary is so employed * * * *he shall not participate* in the police relief and pension fund * * *."
(Emphasis added.)

In the complete revision of the police pension law which became effective September 25, 1947, said Section 4628 was radically changed. It was carried into the Revised Code as Section 741.49. The provision authorizing the trustees to set up rules for the granting of pensions and the amount thereof, was supplanted by a series of rules determining as a matter of law what the pensions and disability allowances should be under various circumstances. In the same act, Section 4631-1, General Code, was enacted, reading as follows :

"Persons who, on the effective date of this act, have been contributing two per cent of their annual salary to a police relief and pension fund may elect to receive benefits and pensions from said fund *in accordance with the rules and regulations* governing the granting of pensions and benefits therefrom, in force on the first day of April, 1947. Such election must be in writing and filed with the trustees of said fund within sixty days after the effective date of this act. Provided, however, such person shall be required to contribute to the fund in the manner and in the amount provided for in section 4625 of the General Code."
(Emphasis added.)

It will be noted that a period of sixty days from the effective date of the act was allowed for the exercise of this opinion. That period having expired, the General Assembly later enacted Section 749.493, Revised Code, effective October 2, 1953, by which it extended the time within which a member of the police department might exercise the same election. That section reads in part as follows :

"A member of the police department of a municipal corporation who, on October 1, 1953, is contributing four per cent of his annual salary to a police relief and pension fund and who on

September 25, 1947, was contributing two per cent of his annual salary to the same police relief and pension fund may, notwithstanding any election made by such member as provided for in volume 122, Ohio Laws, page 456 (627), section 4631-1 (General Code), *elect to receive benefits and pensions from said fund in accordance with the rules and regulations governing the granting of pensions and benefits therefrom, in force on the first day of April, 1947, or as provided for by the provisions of section 741.49 of the Revised Code.* Such election must be in writing and filed with the trustees of said fund on or before December 31, 1953.” (Emphasis added.)

It appears from your letter that the member in question, who retired on November 2, 1954, had pursuant to the authority of one or the other of the statutes above quoted, elected to retire under the rules in effect on April 1, 1947.

It appears very clear that having so elected, he must abide by his election and take the pension which the rules of his board, in effect on April 1, 1947, provided, and subject to the qualifications and conditions set forth in such rules. It is to be noted that the statute gave him a choice between the pension provided by such rules and the fixed amount set forth in Section 741.49 of the Revised Code.

Under these circumstances I see no escape from the conclusion that he is bound by his choice, and so long as he holds another public position he cannot receive the pension provided by such rules.

Examination of the rules of the pension board above referred to, shows that there was no provision therein exempting employment by the United States Government from the restriction as to “public employment.” And giving to the words their ordinary and natural meaning, I must hold that employment by the United States Government is “public employment,” within the meaning of the rule quoted.

Opinion No. 5871, which I released on October 20, 1955, and to which your examiner refers, dealt with a provision of the pension law which could not possibly affect the member referred to in your letter. That opinion turned upon the construction of paragraph (J) of Section 741.49, Revised Code, which reads as follows :

“Every retired policeman, who was receiving a pension prior to September 25, 1947, shall receive an annual pension, payable in twelve monthly installments, in an amount equal to twelve times the highest monthly pension granted such policeman by the board

prior to such date, or twelve hundred dollars, whichever amount is the greater. There is hereby vested in every such policeman the right to be paid and to receive a pension in the amount fixed by this division." * * * (Emphasis added.)

It will be observed that this provision of the statute relates only to a person who prior to September 25, 1947, had retired and was receiving a pension, and the holding in the opinion referred to was that this statutory pension entirely supplanted the pension that might have been granted him by his board prior to that date. Accordingly, any condition or limitation in the rules of the board which were in effect at the time of granting such pension by the pension board, was wiped out by the statute, and the member took his pension not pursuant or according to any terms or conditions fixed by the board but solely by virtue of and under the conditions fixed by the law as it now stands. The member to whom your letter refers does not in any wise come within the provisions of the statute last referred to, or within the scope of the opinion mentioned.

Accordingly, it is my opinion and you are advised that a member of the police department who retired on November 2, 1954, and who had, pursuant to Section 4631-1 of the General Code, or to Section 741.493, Revised Code, elected to receive the benefits and pensions in accordance with the rules of the pension board in effect on April 1, 1947, instead of those provided by Section 741.49, Revised Code, is bound by the provision contained in such rules that he shall not participate in the police relief and pension fund while he is enjoying any public employment. Employment by the United States Government in the absence of any provision in said rules excluding such employment, is public employment within the provision of such rules.

Respectfully,
C. WILLIAM O'NEILL
Attorney General