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1. POLICE RELIEF FUND — NOW POLICE RELIEF AND PENSION FUND — MEMBERS OF POLICE DEPARTMENT WHO MADE CONTRIBUTIONS TO SUCH FUND — SECTION 4625 G. C. — PRIOR TO SEPTEMBER 13, 1939 — NOT ENTITLED UPON SEPARATION FROM SERVICE TO CLAIM OR RECEIVE A REFUND OF CONTRIBUTIONS — EXCEPTION — DEATH OR RETIREMENT.
2. SECTION 4628-1 G. C. CREATING VESTED RIGHTS IN PENSION GRANTED FROM POLICE RELIEF AND PENSION FUND DID NOT OPERATE TO GIVE MEMBER RIGHT TO RECEIVE SUCH REFUND.
3. NO OBLIGATION ON TRUSTEES OF POLICE RELIEF FUND TO SET ASIDE OR HOLD IN TRUST FOR SOLE BENEFIT OF MEMBER OF POLICE DEPARTMENT CONTRIBUTIONS MADE TO SUCH FUND UNDER SECTION 4625 G. C. PRIOR TO ITS AMENDMENT, EFFECTIVE SEPTEMBER 13, 1939, 118 O. L. 729.

SYLLABUS:

1. Members of the police department who made contributions to the police relief fund (now the police relief and pension fund) pursuant to Section 4625, General Code, prior to September 13, 1939, are not entitled upon their separation from the service for any reason other than death or retirement, to claim or receive a refund of such contributions.

2. The enactment of Section 4628-1, General Code, creating vested rights in a pension granted from the police relief and pension fund did not operate to give such member a right to receive such refund.

3. There was no obligation on the trustees of the police relief fund to set aside or hold in trust for the sole benefit of a member of the police department, contributions made by him to such fund pursuant to Section 4625, General Code, prior to the amendment of that section, effective September 13, 1939 (118 O. L. 729.)

Columbus, Ohio, April 17, 1944

Bureau of Inspection and Supervision of Public Offices

Columbus, Ohio

Gentlemen:

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

"We are inclosing herewith our file of correspondence with our Cleveland Examiner, concerning his inquiry on the subject of refunds of voluntary contributions made by members of the Police Department to the Police Relief Fund, prior to the amendment of Section 4625 G. C., by H. B. 68, 118 O. L., 729.

An opinion on that subject by the City Law Department is also inclosed herewith.

Will you kindly examine the inclosures and give us your opinion in answer to the following questions?

1. Are members of the Police Department entitled to receive refund of contributions made to the fund under Section 4625 G. C., as it existed prior to September 13, 1939, upon their separation from the service for any reason other than death or retirement?

2. Did the enactment of Section 4628-1 G. C., effective June 25, 1937, creating vested rights for all participants in the pension funds, alter the situation to any degree?

3. If the contributions made under former Section 4625 G. C., are to be set aside for the sole benefit of the contributor, should separate segregated trust funds be established to account for the moneys so received in order that the benefits may be properly distributed?

4. If these contributions are to be used for the sole benefit of the contributor, and if rules of the pension fund trustees contain no special provision giving such contributors any benefits beyond those enjoyed by non-contributing members, how can such contributions be used otherwise for the benefit of the contributor after they have retired on pension?"

The police relief and pension fund is organized under Section 4616 et seq. of the General Code. Section 4616 provides:

"In any municipal corporation, having a police department supported in whole or in part at public expense, the council by ordinance may declare the necessity for the establishment and maintenance of a police relief and pension fund. * * *"

Section 4621 provides for a tax not exceeding three-tenths of a mill per dollar for the support of such fund.

Section 4623 provides for the payment into such fund of fines imposed upon members of the police department and all rewards, fees or proceeds of gifts paid on account of any extraordinary service of a member of the force and money arising from the sale of unclaimed property.

Section 4624 authorizes the trustees of the fund to receive donations by reason of gifts, devises or bequests.

Section 4625, as it stood prior to September 13, 1939, read as follows:

“The trustees of the fund may also receive such uniform amounts from each person designated by the rules of the police department, a member thereof, as he voluntarily agrees to, to be deducted from his monthly pay, and the amount so received shall be used as a fund to increase the pension which may be granted to such person or his beneficiaries, or in the discretion of such trustees money derived from such monthly deductions shall be used to relieve members of the force who contribute thereto when sick or disabled from the performance of duty, for funeral expenses, relief of their families in case of death or for pensions when honorably retired from the force.”

It appears to me quite clear from the language used that these voluntary contributions were placed by the contributing members in the hands of the trustees for the purpose of creating special benefits to the group so contributing, to be used and distributed by the trustees *in their discretion* for either one or all of the special purposes suggested by the language employed. The trustees could provide by rule that when any of these contributing members were sick or disabled, a part of these extra contributions should be used to furnish them medical or surgical care, and in case of death, to pay funeral expenses and relief of the family. Manifestly, the entire amount of these voluntary contributions might be used in providing these sick benefits, funeral expenses and family relief. Upon his honorable retirement a member who had thus contributed could receive from these funds an increase of pension over that regularly allowed by the rules of the system.

There is nothing in the language employed that suggests the idea

that the voluntary contributions thus made by an individual member should be set up in a trust fund for his sole benefit, and certainly no language indicating that he would have a right under any circumstances to claim re-payment to him of the amounts so contributed.

The General Assembly on June 1, 1939, amended Section 4625, making a radical change and introducing an entirely new idea. That section as amended effective September 13, 1939, read as follows:

“In each municipality maintaining a police relief fund, or in which a police relief fund is hereafter established and maintained, the treasurer of the municipality *shall deduct from the salary of* each policeman or member of the police department, who by its rules is designated a member thereof, for each and every payroll period an amount equal to two per centum of his salary, provided that no deduction shall be made from that portion of his salary which exceeds thirty-six hundred dollars per annum, and shall deposit the moneys so deducted to the credit of the police relief fund. Money derived from such deductions shall be used by the board of trustees of such fund for the relief of such policemen or members of the police department, who by its rules are designated as members thereof, when sickness or disability prevents their performance of duty, relief of their dependents in case of death, or for pensions when honorably retired from the force. Every policeman or member of the police department, who by its rules is designated a member thereof, in such municipality shall be deemed to consent and agree to the deductions made and provided for herein, unless he shall notify the treasurer of such municipality in writing to the contrary in which event he shall be held to have expressly waived any benefits to which he and his dependents would therein be entitled from such fund, *but shall be entitled to be paid the amount of any deductions theretofore made from his salary.* A policeman who is separated from the department for any reason other than death or retirement, upon demand, shall be entitled to and shall be paid the full amount of deductions made *under this act.* If a policeman dies leaving no dependents entitled to relief or award from the police relief fund, the full amount of said deductions shall be returned to his legal representative. If this legal representative cannot be found the moneys so deducted shall be forfeited and credited to the fund. Nothing contained herein shall in any manner affect any police relief subsidiary fund heretofore established and maintained, and the right of the trustees to receive contributions thereto and make disbursements in accordance with its rules.”

(Emphasis added.)

The amendment of this section by the 95th General Assembly makes only slight verbal change and does not affect its purport in the least.

Here, it will be observed that contribution to the fund, to the extent of two per cent of the salary of each member of the police department was made compulsory and the treasurer was required to deduct it monthly from the salary of each member. Provision was made that any member of the department might notify the treasurer of the municipality that he did not wish such deduction to be made from his compensation, "in which event he shall be held to have expressly waived any benefits to which he and his dependents would therein be entitled from such fund, but shall be entitled to be paid the amount of any deductions theretofore made from his salary."

It was further provided that a policeman who quit the service for any reason other than death or retirement, should be entitled on demand, to be paid the full amount of deductions made "*under this act*".

It seems to me quite plain that with the introduction of this wholly new principle of compulsory deductions, the legislature in giving a policeman the right to remain outside of the system and to withdraw the amount of any deductions theretofore made, intended to permit the withdrawal of nothing except those deductions which had been made pursuant to this new act. Whatever deductions had been made under the original section had been voluntary contributions by members of the system, and they had been made for the purposes designated in the statute as it then stood. The deductions made under the new act have nothing of a voluntary character, but along with their imposition there was granted to the member the privilege of staying out of the system or of dropping out at any time he saw fit, and of withdrawing what had already been taken from him.

The Supreme Court has had occasion to consider the character of pensions such as are set up by the statutes under consideration, relative to both policemen and firemen. In the case of *Mell v. State*, 130 O. S., 306, it was held:

"A pension granted by public authorities is a gratuitous rather than a vested or contractual right."

That case involved the question of the right of the board of trustees of the firemen's pension fund to adopt new rules which would have the effect of increasing or reducing the amount of pensions theretofore

granted. The court said in its opinion that:

“A pension is generally defined as a gratuity, at all times subject to the will of the donor. It is a creature of law rather than of contract and the pensioner has no vested right in the continuance of a gratuitous allowance.”

Citing 21 Ruling Case Law, p. 242, and other authorities. The court, pursuing the same subject said:

“And this is so even where a pensioner has made compulsory contributions to the fund.”

The Mell case was decided in December, 1935. At the next session of the legislature (very probably as a result of that decision) there was enacted as a supplement to the statutes relative to the police pension system, Section 4628-1, General Code, which became effective May 26, 1937, and which reads as follows:

“The *granting of a pension* to any person hereafter pursuant to the rules adopted by the trustees shall operate to *vest a right* in such person, so long as he shall remain the beneficiary of such pension fund, *to receive such pension* at the rate so fixed *at the time of granting* such pension.”

(Emphasis added.)

On the same day, there was enacted by way of supplement to the statutes relative to the firemen's pension system, Section 4612-1, in identical language. The result of these enactments would be to modify the decision in the Mell case in so far as it related to pensions already granted to and being received by the pensioner. The question arises, therefore, whether these new provisions operated in any degree to change the prospective right of the members of the police force who were still in service to participate in the pension fund. It seems to me very clear that they did not have any such effect. In the case of *State ex rel. v. Cleveland*, 135 O. S., 13, decided in 1939, the court had under consideration the right of a pension board to make changes in its rules and the binding force of prevailing rules. The court said in its opinion at page 16:

“The general rule is that the right of a retired police officer to a pension from the police relief fund is governed by the rules in force at the time of his retirement.”

The court, referring to the case of *Mell v. State*, supra, said:

"The case of *Mell v. State ex rel. Fritz*, 130 Ohio St., 306, was decided prior to the enactment of Section 4628-1, General Code (effective May 26, 1937), which *created a vested right in a granted pension*. * * * So long as the rules are not amended to provide for a reduction, the board of trustees has no authority to reduce a pension *previously allowed by it*. The board must act in conformity to its rules."

(Emphasis added.)

I cite these cases only to show that the court regarded Section 4628-1 as creating a vested right only in a pension which had already been granted and as having nothing to do with the potential or prospective right of a member of the police force to receive a pension or to participate in the pension fund in any other manner. The language of Section 4628-1 is, itself, so clear that no other conclusion could be reached — "the granting of a pension * * * hereafter pursuant to the rules adopted * * * shall operate to vest a right * * * to receive such pension at the rate so fixed at the time of granting such pension". Clearly, this new statute had no effect whatsoever except to fix the right of a pensioner to continue to receive his pension after it had once been granted to him under the rules of the board prevailing at the time it was granted. This section did not purport to and certainly did not have the effect of creating any right in a member of the system to withdraw contributions which he had theretofore made either voluntarily or compulsorily.

The same recognition of the effect of this statute is carried into the decision of the court in the case of *State ex rel. v. McCarthy*, 139 O. S., 654. In this case the relator had been retired from the fire department and granted a pension at the rate of \$80.00 per month, beginning September 1, 1934, which he continued to draw until August 1, 1938, when he accepted a position as chief of the fire department of another municipality, from which he received a salary. It appeared that in 1935, after his pension had been granted and was being paid, the board of trustees of the firemen's pension fund adopted new rule XIX, providing that whenever any pensioner accepted another public position he should be automatically removed from the pension fund payroll, and should remain so as long as he was thus employed. The court, in discussing this ruling said in the opinion at page 655:

"The importance of rule XIX can not be denied. At the time relator was granted his pension, a pension was not a vested right, but a mere gratuity, and could be reduced by amendment of the rules. Mell et al. Trustees v. State, ex rel. Fritz, 130 Ohio St., 306, State, ex rel. White Gdn. v. City of Cleveland, 135 Ohio St., 13, 17. Moreover, Section 4612-1, General Code, which became effective after relator's pension was allowed, *applies only to pensions granted subsequent to its effective date*. There is no doubt of the power of the board to change by rule a gratuitous pension so as to suspend its payment during the time the pensioner is holding another position, the salary of which is paid from funds raised by taxation." (Emphasis added.)

Here, again is a distinct recognition on the part of the court of the fact that these new sections giving pensioners a vested right in a pension *when granted* affected nothing but granted pensions and could have no bearing whatsoever on the right of a member of either the police or fire department to withdraw contributions which he had theretofore made.

Applying the principles above outlined, and in specific answer to your questions it is my opinion:

1. Members of the police department who made contributions to the police relief fund (now the police relief and pension fund) pursuant to Section 4625, General Code, prior to September 13, 1939, are not entitled upon their separation from the service for any reason other than death or retirement, to claim or receive a refund of such contributions.
2. The enactment of Section 4628-1, General Code, creating vested rights in a pension granted from the police relief and pension fund did not operate to give such member a right to receive such refund.
3. There was no obligation on the trustees of the police relief fund to set aside or hold in trust for the sole benefit of a member of the police department, contributions made by him to such fund pursuant to Section 4625, General Code, prior to the amendment of that section, effective September 13, 1939 (118 O. L. 729.)
4. In view of the answer to your third question, no answer to your fourth inquiry appears to be necessary.

Respectfully,

THOMAS J. HERBERT
Attorney General