

to this issue was approved by this office in an opinion rendered to your board under date of May 2, 1934, being Opinion No. 2609.

It is accordingly my opinion that these bonds constitute valid and legal obligations of said city.

Respectfully,

HERBERT S. DUFFY,  
*Attorney General.*

2683.

EMPLOYEE—POLICE DEPARTMENT—FIRE DEPARTMENT  
MUNICIPALITY—STATUS AS TO MEMBERSHIP IN  
PUBLIC EMPLOYEES' RETIREMENT SYSTEM—FIRE-  
MEN'S INDEMNITY FUND—APPLICATION OF SECTION  
486-33c, G. C.

*SYLLABUS:*

1. *It is compulsory for an employe of a police department or a fire department of a municipality that has not established under provisions of law, a police relief fund or a firemen's pension fund, to become a member of the Public Employes' Retirement System, unless such policeman or fireman becomes exempted from membership by filing written application for such exemption with the Retirement Board within three months after the Act goes into effect, or such policeman or fireman is a new member over the age of fifty years and becomes exempted by filing written application for exemption with the Retirement Board within three months after being regularly appointed a policeman or fireman, or such policeman or fireman comes within that class or group of employes that the board has authority to exempt from compulsory membership, as provided in Section 486-33, General Code, or such policeman or fireman comes within the provisions of any other retirement system established under laws of this State.*

2. *The exception contained in Section 486-33c, General Code, does not exclude from membership in the Public Employes' Retirement System, firemen in a municipality that has established a Firemen's Indemnity Fund under provisions of law.*

COLUMBUS, OHIO, July 11, 1938.

HON. RALPH J. BARTLETT, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR: This will acknowledge receipt of your recent communication, which reads as follows:

"We have been requested by the Chairman of the County and City Employes' Retirement Committee to ask you for an Opinion upon the following question:

In Section 3 of Amended House Bill No. 776, known as Public Employees' Retirement System, a statement of those exempted reads as follows:

'But said term shall not include those persons who come within the provisions of any other retirement system established under the provisions of the laws of this state or any charter nor shall the provisions of this act in any manner apply to a police relief fund or a firemen's pension fund established under the provisions of law.'

Do the employes of the police and fire departments of a city not having a police relief fund or a firemen's pension fund established under the law, come within the provisions of said Amended House Bill No. 776?"

The sections of the Public Employees' Retirement System Act (Sections 486-32 to 486-75, General Code, inclusive) pertinent to the answer of your inquiry, are as follows:

"Sec. 486-33a. The state employe's retirement system created by Section 486-33, General Code, shall hereafter be known as the public employes' retirement system, and the state employes' retirement board shall hereafter be known as the public employes' retirement board. Provided, however, that all legal, valid and authorized contracts and agreements entered into by the state employes' retirement board shall be binding on the public employes' retirement board. Beginning July 1, 1938, in addition to the present membership of said retirement system, there shall be included therein all county, municipal, park district, conservancy, health and public library employes as defined herein, and such county, municipal, park district, conservancy, health and public library employes, except as otherwise provided herein, shall have all the rights and privileges and be charged with all the duties and liabilities provided for in the laws relating to said retirement system as are applicable to state employes. Provided, however, that any original member may be exempted from membership by filing written application for such exemption with the retirement board within three months after this act goes into effect; and any new member over the age of fifty years may be exempted from membership by filing written application for exemption with the retirement board within three months after being regularly appointed as a county, municipal, park district, conservancy, health or public library employe."

Section 486-33c, General Code, which reads in part, as follows:

"For the purposes of this act, 'county or municipal employes' shall mean any person holding a county or municipal office, not elective, in the State of Ohio, and/or paid in full or in part by any county or municipality in any capacity whatsoever. \* \* \* *But said term shall not include those persons who come within the provisions of any other retirement system established under the provisions of the laws of this state or of any charter, nor shall the provisions of this act in any manner apply to a police relief fund or a firemen's pension fund established under provisions of law. \* \* \**" (Italics the writer's.)

In an opinion No. 2411, rendered by me on May 7, 1938, it was held:

"It is compulsory for an employe of a charter city that has not established a retirement system for its employes to become a member of the Public Employes Retirement System, unless such employe becomes exempted from membership, by filing written application for such exemption with the Retirement Board within three months after the Act goes into effect, or, such employe is a new member over the age of fifty years, and becomes exempted by filing written application for exemption within three months after being regularly appointed an employe, or, such employe comes within that class or group that the board has authority to exempt from compulsory membership, as provided in Section 486-33, General Code, or, such employe comes within the provisions of any other retirement system established under the laws of this state, or, such employe comes within the provisions of a police relief fund or a firemen's pension fund established under provisions of law."

It can be said from the clear and express language contained in Sections 486-33a and 486-33c, supra, and the holding in Opinion No. 2411, that it is mandatory for policemen and firemen, being municipal employes, to become members of the Public Employes' Retirement System, unless they exempt themselves *or come within the exception contained in Section 486-33c, that is, they are policemen or firemen in a municipality that has established a police relief fund or a firemen's pension fund under provisions of law.*

Section 4600, General Code, providing for the creation of a firemen's pension fund, reads in part, as follows:

“In any municipal corporation having a fire 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 firemen’s pension fund. Thereupon, a board of trustees, who shall be known as ‘trustees of the firemen’s pension fund’ shall be created, which shall consist of six members who shall be chosen in the following manner: \* \*”

To the same effect is Section 4616, General Code, which provides for the creation of a Police Relief Fund. This section reads in part, as follows:

“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 fund. Thereupon a board of trustees who shall be known as ‘trustees of the police relief fund’ shall be created, which shall consist of six members, who shall be chosen in the following manner: \* \*”

Section 4605, General Code, provides for the council of a municipality availing itself of the provisions of Section 4600 *supra*, to levy a tax of not to exceed three-tenths of a mill on each dollar upon all the real and personal property for the payment of all *pensions* granted to firemen under existing laws.

Section 4621, General Code, makes the same provision for the levying of a tax in order to maintain the police relief fund.

Section 4612, General Code, authorizes the trustees to make all rules and regulations for distribution of a firemen’s pension fund, including the qualifications of those to whom any portion of it shall be paid. To the same effect are the provisions of Section 4628, General Code, in the case of a police relief fund.

The provisions of Section 4612-1, General Code, relate to a firemen’s pension fund, and provide 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 pension.”

Section 4628-1, General Code, relates to a police relief fund and the language contained in such section is identical with that appearing in Section 4612-1, *supra*.

It is to be observed from the hereinabove quoted sections relating to a firemen's pension fund and a police relief fund:—that, it is entirely within the discretion of the council of a municipality to determine whether or not to establish and maintain a firemen's pension fund or a police relief fund; and that, if either or both of such funds are established, the granting of a pension to a person operates to vest a right in such person to receive the same.

It must be assumed:—that, the legislature recognized that only by the necessary action on the part of council "may" a firemen's pension fund or a police relief fund be established; that, such action being discretionary, some municipalities may have established either a firemen's pension fund or a police relief fund, or both, and that, other municipalities may not have taken the necessary action for the establishment of either or both funds; that, in a municipality where a firemen's pension fund had been established, the firemen were entitled, and had a vested right to share in the firemen's pension fund, in accordance with certain adopted rules and regulations; that, the same would be true in case of policemen in a municipality that had established a police relief fund; but that, in the case of a municipality that had not established a firemen's pension fund the firemen would be deprived of the right to share in any pension fund, and the same would be true in the case of policemen of a municipality that had failed to establish a police relief fund.

The language in the exception contained in Section 486-33c, supra, expressly refers "to a police relief fund or a firemen's pension fund established under the provisions of law." Therefore, no meaning or construction can be gained from this language except that it refers to policemen and firemen in a municipality that has established a police relief fund or a firemen's pension fund. It is clear from the language therein that it was the intention of the legislature in the enactment of this exception to preserve the firemen's and policemen's relief funds and the pensionable status of beneficiaries of such funds, existing under the provisions of law prior to the enactment of Section 486-33c; and that, there is not anything in the language used in the exception which can be interpreted or construed as referring to policemen and firemen in a municipality that *has not established* a police relief fund or a firemen's pension fund under provisions of law.

The rule relating to statutory exceptions to the operation of laws is well stated in 370. Jur., page 783, as follows:

"The general rule is that an exception in a statute amounts to an affirmation of the application of its provisions to all other cases not excepted, and excludes all other exceptions. \* \*"

It is clear that the legislature intended by the language contained in the exception, to except from the provisions of Section 486-33a, supra, only firemen or policemen in a municipality that had established a police relief fund or a firemen's pension fund. Therefore, the general mandatory provisions in Section 486-33a, supra, making it compulsory for all municipal employes to become members of the Public Employes Retirement System are applicable to firemen and policemen in a municipality that has not established a police relief fund or a firemen's pension fund the same as the provisions are applicable to any other municipal employe, provided, however, that exemption from membership has not been filed.

This is a case of the applicability of the well recognized rule of law that appears in the second branch of the syllabus of the case of *Slingsluff vs. Weaver*, 66 O. S., 621:

"But the intent of the law-makers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation. The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed, and hence no room is left for construction."

In arriving at the above conclusion, I am not unmindful of the fact that Section 4647-1, General Code, imposes a mandatory duty upon a municipality for the creation of a firemen's indemnity fund if such municipality has not established a firemen's pension fund. This section reads as follows:

"That in all municipalities having no firemen's pension fund created under the provisions of chapter I, Title 12, Division 6 of the General Code of Ohio, and having and maintaining therein a fire department supported in whole or in part at public expense, a firemen's indemnity fund shall be created and disbursed as herein provided."

It must be observed that the exception in Section 486-33c, supra, is limited "to a police relief fund or a firemen's pension fund." It must be assumed that the legislature knew of the statutory authority for the establishment of a firemen's indemnity fund, and therefore, if it so desired, could have included a firemen's indemnity fund within the exception. It is a well recognized principle of statutory

construction that the mention or inclusion of persons of one class or of several classes, implies the exclusion of all persons in other classes. The well recognized principle of "expressio unius est exclusio alterius" has direct application here. This rule of law is well expressed in the following case, *Steubenville vs. Reiner*, 7 Ohio Law Abstract, page 342, as follows:

"Mention in statute, of one class or several classes of person, implies exclusion of all others."

Equally applicable is the rule of law so well expressed in the case of *Ohio Savings and Trust Company vs. Schneider, et al.*, 25 Ohio Appellate, 259, in the following language:

"Courts cannot read into a statute that which does not appear therein, it being presumed that lawmakers placed in the statute all that was intended."

I deem it advisable to make some comment on the fact that in the case of a firemen's pension fund the word *pension* is used; that in the police relief fund the word *relief* is employed.

Section 4405, General Code, provides for levying a tax to provide funds for the payment of all *pensions* granted to *firemen* and likewise, Section 4621, General Code, provides for levying a tax to provide funds for the payment of all *pensions* granted to *policemen*. Therefore, it must be said that no importance can be attached to the word "pension" used in referring to a firemen's pension fund, and the word "relief" in referring to a police relief fund. The word *pension* is consistently used instead of *relief*, throughout all the sections relating to the police relief fund. However, in the case of a firemen's indemnity fund, the situation is different. Section 4647-8, General Code, reads as follows:

"The beneficiaries of any such firemen's indemnity fund shall be members of the fire department or their dependents who shall be entitled to be paid the amounts following:

For the total disability of a fireman, sustained while in the discharge of his duties as fireman, the sum of two-thirds of his salary or average earnings, which shall in no case exceed eighteen dollars (\$18.00) per week, and which shall be fixed and determined by the said board of firemen's indemnity fund. For partial disability such an amount per week as shall be fixed by the board of firemen's indemnity fund which in no case shall exceed ten dollars (\$10.00) per week. Provided, however, that no such pension shall be paid to a

fireman under full salary during the time of any such disability.

In case of a volunteer fireman the 'average earnings' as used in this section shall be computed on the earnings of such fireman as his regular employment together with his compensation as such volunteer fireman.

To the widow of any fireman killed while in the discharge of his duties as fireman, or who dies from exposure or injury received while in the discharge of such duty, a sum not to exceed twenty-five dollars (\$25.00) per month, so long as she remains his widow, and the further sum of not to exceed ten dollars (\$10.00) per month for each dependent child under sixteen years of age."

It is to be observed that the provisions of Section 4647-8, supra, provide for payment of "amounts" in case of total disability, or partial disability, or, to a "widow of any fireman killed while in the discharge of his duties as fireman, or who dies from exposure or injury received while in the discharge of such duty." There is not anything in the statute that can be construed as making the payment of the amounts specified in Section 4647-8, supra, as being payment of pensions.

The word "indemnity" is defined in Webster's Twentieth Century Dictionary, as follows:

"2. Indemnification; compensation for loss, damage or injury sustained; reimbursement."

The language employed in Section 4647-8, supra, is consistent with the word "indemnity" in that it provides for payment of compensation for loss or injury sustained by reason of total or partial liability or death while in the discharge of duty. It therefore cannot be said that the exception contained in Section 486-33c, supra, excludes from membership in the Public Employes Retirement System, firemen in a municipality that has established a firemen's indemnity fund. Therefore, in specific answer to your question it is my opinion that, the employes of the police and fire departments of a municipality that has not a police relief fund or a firemen's pension fund established under the provisions of law, come within the provisions of the Public Employes' Retirement System Act Section 486-32 to 486-75, of the General Code, inclusive.

Respectfully,

HERBERT S. DUFFY,  
*Attorney General.*