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PENSION FUND, STATE HIGHWAY PATROL—MEMBER RETIRED BY PENSION BOARD—MAY BE APPOINTED AS SUPERINTENDENT OF HIGHWAY PATROL—APPOINTEE WOULD BE ELIGIBLE TO PENSION UNLESS HE WAIVED IT DURING PERIOD OF APPOINTMENT—SECTIONS 5505.01 ET SEQ., 5503.01, 5505.16, 5505.17 RC.

SYLLABUS:

A member of the State Highway Patrol Pension Fund created by Section 5505.01 et seq., Revised Code, who has been retired by the pension board pursuant to the provisions of Section 5505.16, Revised Code, may be appointed as superintendent of the highway patrol pursuant to the provisions of Section 5503.01, Revised Code. Such person so appointed would be eligible to the pension provided by Section 5505.17, Revised Code, unless he waived such pension during the period of such appointment.

Columbus, Ohio, August 11, 1955

Hon. U. C. Felty, Director, Department of Highway Safety
Columbus, Ohio

Dear Sir:

I have before me your request for my opinion which, after referring to several statutes which will be discussed below, propounds the following questions:

“The Superintendent of the Highway Patrol has been in the service of the patrol since November 16, 1933. He attained the age of fifty-five years on August 16, 1954, and on that date was continued in the service for a period of one year.

“Your opinion is requested whether or not the Superintendent of the Highway Patrol can be legally continued in service subsequent to the expiration of his present one year continuation.

“Your opinion is also requested whether or not the Superintendent of the Highway Patrol, assuming he may be continued beyond his present year, would continue to be a member of the fund and eligible for the benefits of said fund.

“If the Superintendent of the Highway Patrol can be continued in service and is eligible for the benefits of the pension

fund after his continuation, would the same situation also apply to the Assistant Superintendent of the Highway Patrol.”

The statutory sections pertinent to your inquiry are found in two chapters of the Revised Code, Chapter 5503 dealing with the State Highway Patrol and Chapter 5505 dealing with the State Highway Patrol Pension Fund. Section 5503.01, Revised Code, provides in pertinent part as follows:

“There is hereby created in the department of highway safety a division of state highway patrol which shall be administered by a superintendent of the state highway patrol.

“The superintendent shall be appointed by the director of highway safety and shall serve at his pleasure. * * *

“The superintendent, with the approval of the director, may appoint such number of highway patrolmen and radiomen as are necessary * * *. Patrolmen shall not be less than twenty-one nor more than thirty-five years of age * * * at the time of their appointment. * * *

“* * * The superintendent, with the approval of the director, may appoint necessary clerks, stenographers, and employees.”

Section 5503.03, Revised Code, provides in part as follows:

“* * * The superintendent, with the approval of the director, shall * * * make all administrative rules and regulations, * * *. He may * * * classify and rank members of the patrol. * * *”

Turning now to the provisions governing the pension fund, Section 5505.01, Revised Code, provides in part as follows:

“As used in sections 5505.01 to 5505.24, inclusive, of the Revised Code:

“(A) ‘Employee’ means any qualified employee including any member of the uniform division, radio division, the superintendent and assistant superintendent of the division of state highway patrol. In all cases of doubt the state highway patrol pension board shall determine whether any person is an employee as defined in this division and its decision shall be final.”

Section 5505.02, Revised Code, provides in part:

“* * * Membership in the pension fund shall consist of any member of the patrol who is a qualified employee in either the uniform division or the radio division, and the superintendent and assistant superintendent of the state highway patrol.”

Section 5505.16, Revised Code, provides in part:

“* * * Any member who attains the age of fifty-five years and has been in the service of the patrol for a period of twenty years as an employee according to the rules and regulations adopted by the board, must file application for retirement with the board, and if he refuses or neglects to do so such board may deem his application to have been filed on his fifty-fifth birthday. Such member may, upon written application, approved by the superintendent of the state highway patrol, be continued in service for a period of one year after attaining the age of fifty-five years, or until such member has accumulated the twenty years of service.”

It is the application of this last section which has given rise to your inquiry.

In considering this question it would be helpful to keep in mind the two classifications of personnel in the *Highway Patrol* itself as distinguished from the *pension fund*—namely, the superintendent and the employees or members of the patrol. The superintendent has no limitations upon his age at appointment, or other qualifications, and serves at the pleasure of the Director of Highway Safety. All other members of the patrol are appointed by the superintendent and must comply with certain standards including that of age at time of appointment. Although the superintendent is specifically made a member of the pension fund, his distinctive character in the patrol is still preserved.

It should also be borne in mind that the fact that the present incumbent of the position of superintendent formerly served as a uniformed member of the patrol is a coincidence only. He could have been appointed superintendent without that experience and at any age; and had it not been for his previous service, the present question would not now be presented.

Consideration should next be given to the relationship between the sections of the statute dealing with the patrol itself and those dealing with the pension fund. It should first be noted that the patrol and the pension fund were not created simultaneously—the patrol having been created in 1933 by an act set out in 115 Ohio Laws, 93, and the pension fund in 1941 by an act set out in 119 Ohio Laws, 752. It should also be noted that the law dealing with the patrol itself has no provision concerning retirement at an age other than that specified for public employees generally. The pension law does have a compulsory retirement age which is set out in the quotation from Section 5505.16, *supra*. Although not specifically spelled out in the law, this provision has generally been taken to compel retirement from the patrol at the age specified in the retirement law, and I see

no reason to question that assumption. And since the members retired by the retirement board are ineligible to be reappointed to the patrol by reason of age, the question which you present has never arisen.

In the case before me, there seems to be no doubt under the literal provisions of Section 5505.16, *supra*, that the superintendent—having attained the age of fifty-five years and having completed twenty years as an “employee” within the meaning of the pension law—must be retired by the pension board. But that does not answer all of the questions. May he, after such retirement, be reappointed by you to the position of superintendent of the patrol?

It is my opinion that he may be so reappointed. In the first place, the statute provides that the director may make the appointment to serve at his pleasure and it makes no reservation as to one who has previously been retired by the pension board or who is receiving an allowance from that fund. Secondly, as I pointed out above, it is only coincidence here, that the present superintendent has attained twenty years of service credit in the fund. Had he been appointed at the age of fifty without previous service, he could be retained at your discretion until the age of seventy without any question. I do not believe that such a coincidence should operate to deprive you of the services of an experienced superintendent if it is your desire to reappoint him.

You have also asked whether the superintendent, if reappointed, would continue to be a member of the fund and eligible for its benefits. It is my opinion that he would be a retired member, eligible to receive the pension provided by Section 5505.17, Revised Code, unless he saw fit to waive such pension. I know of no other benefits from the fund for which he would be eligible.

You have also asked whether my ruling in the case of the superintendent is also applicable to the assistant superintendent. I find nothing in the statute which provides for an assistant superintendent, and I am informed that the person designated as assistant is actually a “Major, Inspector” in the uniformed force so designated by you under your power to classify and rank members of the patrol. In such a case, his retirement and reappointment are governed by the statute covering the age of appointment of members of the uniformed patrol, and the ruling covering the superintendent does not apply to the assistant superintendent.

In view of the above it is therefore my opinion that a member of the State Highway Patrol Pension Fund created by Section 5505.01 et seq., Revised Code, who has been retired by the pension board pursuant to the provisions of Section 5505.16, Revised Code, may be appointed as superintendent of the highway patrol pursuant to the provisions of Section 5503.01, Revised Code. Such person so appointed would be eligible to the pension provided by Section 5505.17, Revised Code, unless he waived such pension during the period of such appointment.

Respectfully,

C. WILLIAM O'NEILL

Attorney General