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CONTRIBUTION TO A POLICE RELIEF AND PENSION FUND
NOT PAYABLE TO THE ESTATE OF THE DECEASED—
§§741.39, 741.43, 741.49, REVISED CODE.

SYLLABUS:

Contributions made to a police relief and pension fund under Section 741.43, Revised Code, by a member thereof, may not be paid to the estate of the member upon his death, said member having died without leaving a widow, child or dependent parent entitled to benefits under Section 741.39, Revised Code.

Columbus, Ohio, September 10, 1962

Hon. E. Raymond Morehart, Prosecuting Attorney
Fairfield County, Lancaster, Ohio

Dear Sir :

I have before me your request for my opinion which reads as follows :

“I respectfully request your consideration and opinion regarding the following matter.

“A member of the Lancaster Police Department died on June 20, 1962. At the time of his death he was a member of the Police Relief and Pension Fund, having contributed from his salary the sum of \$2,590.29 since his service with the department began on March 28, 1937. At the time of his death there were no surviving spouse, parents or dependent children. The executor of the decedent's estate has requested the Police Relief and Pension Fund Board to pay the total contributions to the estate. Under these circumstances may the board pay the decedent's contributions to the executor of his estate?”

Section 741.32, Revised Code, provides for the creation and maintenance of a police relief and pension fund in municipalities having a police department supported in whole or part at public expense and which employs two or more full-time regular members. Said section also provides for the creation of a board of trustees to administer the fund. Section 741.40, Revised Code, provides for a tax levy for payment of pensions and benefits from the fund. Section 741.43, Revised Code, provides :

“In each municipal corporation in which there is established a police relief and pension fund, the treasurer of the municipal corporation shall deduct from the salary of each member of the police department an amount equal to four per cent of his salary for each payroll period. The sums so deducted shall be credited to such fund.

“This section does not affect any police relief subsidiary fund established and maintained prior to September 13, 1939, or the right of the board to receive contributions thereto and to make disbursements in accordance with its rules.”

Your question requires that I determine whether the estate of a policeman who was a member of such a fund at the time of his death is entitled to a refund of contributions made by him when the member was

not survived by a person entitled to receive benefits pursuant to Section 741.49, Revised Code.

Former Section 4628, General Code, provided that the board of trustees should have the right to "make rules and regulations for the distribution of the fund, including the qualification of those to whom any portion of the fund shall be paid." In 1947 the legislature amended this provision, 122 Ohio Laws, 614, (624), so that a member should be entitled "to receive pensions and benefits as provided in paragraphs 1 through 4, inclusive, of this section." Present Section 741.49, Revised Code, provides in part:

** * * * * *

"Members of the fund who, on or after September 25, 1947, are granted pensions or disability benefits by the board are entitled to receive pensions and benefits as provided by divisions (A) to (E), inclusive, of this section. * * *"

This change by the legislature eliminated any question in regard to the authority of the board to provide by rule for the payment of benefits or refund of contributions from such fund.

Present Section 741.49, Revised Code, provides for the payment of pension and disability benefits to members and the payment of benefits to the widow and dependent children, or in the event the member is not survived by his wife or children, to dependent parents. Section 741.49 (I), Revised Code, provides:

"(I) A member of the fund who voluntarily resigns from active service in the department is entitled to receive an amount equal to the sums deducted from his salary and credited to the fund."

The only other provision contained in Sections 741.31 to 741.54, inclusive, Revised Code, pertaining to a refund is Section 741.37, Revised Code, which provides for a refund from the police relief and pension fund when a member of the police department elects to become a member of a municipal retirement system.

The Supreme Court of Ohio in *Ohio St. ex rel. Dieckroegger v. Conners et al.*, 122 Ohio St. 359, clearly ruled that the board of trustees of a police relief and pension fund is a creature of statute and has no more authority than granted by law. The Court of Common Pleas of Clark County in *Robert F. O'Neal v. Trustees, Springfield Firemen's Pension*

and *Relief Fund*, 10 Ohio Opinions 2d, 197, in considering the question of whether a fireman might obtain a refund where he was removed for cause, ruled:

"1. A fireman, after service for approximately six years and five months, thereafter removed as an active member of the fire division for the specific reason that he drank while on duty in violation of the rules and regulations of the fire department, following charges preferred against him and after hearings held in accordance with law, is not entitled to a refund of contributions made by him through payroll deductions to the Firemen's Pension and Relief Fund.

"2. Revised Code, Section 741.18, by specifying in paragraph (i) the conditions under which a refund of contributions may be made, expresses an intention to deny such refund under any other conditions.

"3. It is a familiar rule of statutory construction that the expression of one thing is the exclusion of another.

"4. In Ohio a right to pension or to other relief under the pension laws becomes vested only when the right to receive the pension or relief becomes fixed, pursuant to the rules governing the fund, but once such rights become vested they cannot thereafter be set aside."

The court at pages 200-201 of its opinion stated:

"* * * * * * * * *

"Coming now to the specific issue before the court, whether or not contributions may be refunded to a member of the fund upon his discharge from the service for cause, there is indeed little authority in Ohio other than an informal opinion rendered by the attorney general for Ohio dated June 5, 1956, to which reference has heretofore been made. The Bureau of Inspection and Supervision of Public Offices requested an opinion on a number of questions, including the following: 'May a fireman who has served either more or less than 15 years, but who is discharged for dishonesty, cowardice, intemperate habits, or conviction of a felony, obtain a refund of the contributions made to the Firemen's Relief and Pension Fund?' In answer to this request the attorney general stated the following:

" 'A member of the Firemen's Relief and Pension Fund, who has served either more or less than 15 years, but who is discharged from the Fire Department by reason of dishonesty, cowardice, intemperate habits, or conviction of a felony *has no right* to a refund of the contributions made by him to the firemen's relief and pension fund.'

“Although this seems to be the only expression of opinion in Ohio on this specific issue, which was directed to the court’s attention, the many authorities reported in other jurisdictions seemingly agree with the foregoing and with the statement appearing in McQuillin on Municipal Corporations Vol. 3 on Page 522, as follows:

“Contributions made by an employee to the pension fund are not the property of the contributor or his estate and as a general rule are not recoverable, either by the employee or by his dependents especially where the contributor has been discharged for cause.”

“The Court of Appeals of Georgia interpreting a statute similar to the one in Ohio held:

“‘A police officer of the City of Atlanta had no vested property right in sums assessed against his salary as a member of the police department for the police pension fund and the officer upon his discharge from the police department *could not recover the amount which he had contributed to the pension fund.*’ *Green v. West*, 9 S.E. (2d) 102.

“‘The Court of Civil Appeals of Texas, interpreting a municipal pension law in which as here the contributions were compulsory, held:

“‘A policeman who became a member of city pension fund and contributed 5% of his base salary from January 11, 1944, until he was discharged for cause on March 15, 1955, was not entitled to a return of approximately \$1500 contributed to the fund out of salary, since contributions made to pension fund *are not property of contributor or his estate and hence are not recoverable.*’ *Reagan v. Board of Firemen, Pension Fund, etc.*, 307 S.W. (2d) 958.

“See also to the same effect, *Jud v. City of San Antonio* 313 S.W. (2d) 903 and *Gaines v. Shank* 312 S.W. (2d), 268.’ The *Reagan case* is well reasoned and contains a number of citations from other jurisdictions supporting the holdings there made.

* * * * *

I am not unmindful that the court in the *O’Neal* case was dealing with a firemen’s relief and pension fund; however, it appears that the reasoning contained therein is applicable to the situation presented by your request.

Section 741.51, Revised Code, provides that there can be no vested right until a person receives a benefit or a pension. There is no provision contained in Sections 741.31 to 741.54, inclusive, Revised Code, which

directly or by implication gives authority to the board of trustees of a police relief and pension fund to refund a member's contributions to his estate when he dies without a surviving spouse, child or dependent parent. Section 741.39 (I), Revised Code, authorizes a refund only when a member voluntarily resigns. Following the reasoning of the *O'Neal* case, *supra*, therefore, it would appear that the legislature intended to preclude a member from obtaining a refund in any other manner. I might also point out that the public employees retirement system, Section 145.43, Revised Code, the state teachers retirement system, Section 3307.48, Revised Code, and the public school employees retirement system, Section 3309.44, Revised Code, are specifically authorized to pay the accumulated contributions to a member's estate under circumstances such as here concerned; thus, implying that in order for such authority to be vested in an administrative body the authority must be specifically granted by law.

In conclusion, it is my opinion and you are advised that contributions made to a police relief and pension fund under Section 741.43, Revised Code, by a member thereof, may not be paid to the estate of the member upon his death, said member having died without leaving a widow, child or dependent parent entitled to benefits under Section 741.39, Revised Code.

Respectfully,

MARK MCELROY

Attorney General