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POLICEMAN OR FIREMAN—RETIRED—PENSION RECEIVED UNDER SECTION 741.18 (A) OR 741.49 (A) RC—MAY NOT BECOME MEMBER OF PUBLIC EMPLOYE' RETIREMENT SYSTEM—ESTABLISHED BY SECTION 145.01 ET SEQ., RC.

SYLLABUS:

A retired policeman or fireman who is receiving a pension pursuant to the provisions of Section 741.18 (A) or Section 741.49 (A), Revised Code, may not become a member of the Public Employes Retirement System established by Section 145.01, et seq., Revised Code.

Columbus, Ohio, June 28, 1954

Hon Fred L. Schneider, Executive Secretary
Public Employes' Retirement System
Columbus, Ohio

Dear Sir:

Your request for my opinion presents the following question:

“May a retired policeman or fireman who is receiving a pension pursuant to the provisions of Section 741.18 (A) or Section 741.49 (A), Revised Code, become a member of the Public Employes Retirement System?”

This question is raised because of the language of Section 145.02, Revised Code, Section 486-33c, General Code, which provides as follows:

“‘Public employees’ does not include those persons who come within any retirement system established under the laws of this state or under any charter, other than the public employees retirement system. Sections 145.01 to 145.57, inclusive, of the Revised Code do not apply to a police relief and pension fund or a fireman’s relief and pension fund. No employee except one who comes within a police relief and pension fund or a fireman’s relief and pension fund shall be excluded from membership in the public employees retirement system because of membership in any other retirement system established under the laws of this state or under any charter unless such employee is contributing to such other retirement system on the basis of the maximum salary set as a limitation by such other retirement system, or unless he is receiving a disability allowance from such other retirement system.”

What appears to be the key language in this section—namely, the provision that “no employee except one who comes within a police * * * or a fireman’s relief and pension fund shall be excluded from membership * * * because of membership in any other retirement system”—has been a part of this section since 1939, 118 O. L. 104, 106, and has existed with only minor changes since that date. It has been the subject of two opinions by prior Attorneys General. In Opinion No. 935, Opinions of the Attorney General for 1939, p. 1297, the first branch of the syllabus holds:

“Members of the public employees retirement system who become entitled to participate in a firemen’s relief and pension fund established pursuant to the mandatory provisions of Section 4600 and related sections of the General Code are, by the terms of Section 486-33c, excepted from the provisions of the public employees retirement act and are not eligible for membership in the public employees retirement system.”

Opinion No. 2327, Opinions of the Attorney General for 1947, page 542, cited the 1939 Opinion with approval, and the first branch of its syllabus provided:

“Under the provisions of Section 486-33c, General Code, employes who are members of the public employes retirement system cease to be members of that system when they come within the provisions of a police relief and pension fund or a firemen’s relief and pension fund.”

In light of these opinions, there appears to be no question that active—i e., contributing—members of police and firemen's pension funds may not be members of the public employes retirement system. But now certain members of those systems have reached retirement age, and have been authorized by the legislature to accept other public employment while receiving pension benefits. See: 123 O.L., 225, and Senate Bill No. 44, 100th General Assembly which removed the restrictions against holding other public employment from retired firemen and policemen, respectively. Do these retired members "come within a police * * * or a fireman's relief and pension fund?"

In answering this question I should first point out that both the 1939 and the 1947 Opinions referred to above assumed that question would be answered in the affirmative. Although the exact question of retired members was not presented to them, the authors of those opinions clearly felt that the two retirement systems were mutually exclusive, and based all of their reasoning on that assumption.

It is my opinion that such an assumption was clearly justified. Even in the absence of precedent, it seems to me that a retired member who is receiving a pension from a fund comes "within" that fund according to ordinary English usage. He certainly is receiving the benefits for which the fund was created. His contributions and those made on his behalf by the state and the political subdivision remain in the fund and help create the reserves from which his pension is paid. Finally, Section 741.54, Revised Code, provides that the state subsidy to local police and firemen's relief and pension funds is computed partially on the basis of a formula which has as one of its factors "an amount equal to one thousand dollars multiplied by the number of members of said fund." I am informed by the Auditor of State that this computation always includes retired members of a fund who are considered as being "within" its provisions.

It should also be pointed out that if the language under consideration does not serve to exclude retired police and firemen from the public employes retirement system, then it is entirely surplusage. Other language in Section 145.02 excludes those employes who are contributing to some other system on the basis of maximum salary, or who are receiving disability benefits from such a system. If the reference to relief and pension funds was not intended to include *retired* police and firemen, then it does not affect any one. I do not believe such an interpretation should be given to the language.

It could be argued that by removing the restriction against retired police and firemen holding other public employment, the General Assembly has expressed its intention that they also be admitted to the public employes retirement system, since the definition of membership in that system includes all public employes. However, the General Assembly has shown that it deals with such matters directly, rather than by implication, when that is its intention. For example, former Section 486-32, General Code, from the time of its enactment in 115 O.L., 614 provided that membership in the system should exclude members of the state teachers' retirement system. This provision remained in the law until the definitions were rewritten by an act set out in 124 O.L., 617. It is my opinion that the statute should be read according to its plain wording until the General Assembly sees fit to change it.

In view of the above, it is my opinion that a retired policeman or fireman who is receiving a pension pursuant to the provisions of Section 741.18 (A) or Section 741.49 (A), Revised Code, may not become a member of the Public Employes Retirement System established by Section 145.01 et seq., Revised Code.

Respectfully,

C. WILLIAM O'NEILL

Attorney General