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FIREMEN'S RELIEF AND PENSION FUND:

1. MEMBER WHO DIED SEPTEMBER 25, 1947, EFFECTIVE DATE OF HOUSE BILL 195, 97 GENERAL ASSEMBLY, SECTION 4612-4 G. C.—WIDOW WILL RECEIVE PENSION PRESCRIBED IN PARAGRAPH 5 OF SAID SECTION.
2. MEMBER, ELECTED TO RECEIVE BENEFITS AND PENSIONS UNDER RULES AND REGULATIONS IN FORCE APRIL 1, 1947, DID NOT AFFECT RIGHT OF WIDOW OR OTHER BENEFICIARY TO RECEIVE PENSIONS—SECTIONS 4614-1, 4612-4 G. C.
3. FIREMAN SUSPENDED—DISCIPLINARY PURPOSES—DURING SUSPENSION, DOES NOT CEASE TO BE MEMBER OF FUND—ENTITLED TO ALL BENEFITS INCIDENT TO MEMBERSHIP.
4. FIREMAN SEPARATED FROM SERVICE UNDER SECTIONS 486-16 OR 486-17b G. C.—CEASES TO BE MEMBER OF FUND UNLESS AND UNTIL REINSTATED IN SERVICE.
5. TRUSTEES OF FUND—NO AUTHORITY TO RULE THAT MEMBERS NOT RECEIVING SALARY AND NOT CONTRIBUTING TO FUND SHALL MAKE CONTRIBUTIONS IN SAME AMOUNT AS IF RECEIVING SALARY—SECTIONS 4609, 4615-1 G. C.
6. NO PERSON PERMITTED TO TAKE EXAMINATION OR BE APPOINTED TO MEMBER OF FIRE DEPARTMENT OF CITY ON OR AFTER TWENTY-NINTH BIRTHDAY—SECTION 486-10c G. C.

SYLLABUS:

1. Under the provisions of Section 4612-4, General Code, as enacted by House Bill No. 195, of the 97th General Assembly, a widow of a member of a firemen's relief and pension fund who dies after September 25, 1947, the effective date of said act, will receive the pension prescribed in paragraph No. 5, of said section.
2. A member of the firemen's relief and pension fund who has elected under the provisions of Section 4614-1, General Code, to receive benefits and pensions from said fund in accordance with the rules and regulations in force on April 1, 1947, did not by such election, in any respect alter or affect the right of his widow or other beneficiaries to receive pensions, and such beneficiaries will receive the amounts provided for them in Section 4612-4, General Code.
3. A fireman who is a contributing member of a firemen's relief and pension fund does not, by reason of suspension for disciplinary purposes or during suspension pending hearing on charges for removal, cease to be a member of such fund, but is entitled to all of the benefits incident to membership.
4. A fireman who has been a member of such fund, but is separated from the service under the provisions of either Sections 486-16 or 486-17b, General Code, ceases to be a member of the fund, unless and until reinstated in service.
5. The board of trustees of a firemen's relief and pension fund is without authority to make a rule authorizing members who for any reason are not receiving any salary and therefore are not contributing to such fund, as required by Sections 4609 and 4615-1, to make contributions in the same amount as if they were receiving a salary.
6. Under the provision of Section 486-10c, General Code, no person is permitted to take examination for or be appointed to the position of member of the fire department of a city on or after his twenty-ninth birthday.

Columbus, Ohio, February 18, 1948

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

I have before me your letter in which you request my opinion on several questions arising from the provisions of the law relative to firemen's relief and pension funds, particularly as affected by House Bill No. 195, enacted by the 97th General Assembly.

“QUESTION 1:

Under the rules and regulations adopted by the Board of Trustees of a Firemen's Relief and Pension Fund prior to April 1, 1947, a widow's pension was stipulated as \$40.00 per month. At the death of a retired fireman in the month of December 1947, who had been on pension since 1932, does the widow of such deceased retired fireman come under the rules as adopted prior

to April 1, 1947, or does she come under the provisions of paragraph 5, Section 4612-4 of the General Code?"

Prior to the enactment of House Bill No. 195, Section 4612-4, General Code, gave the trustees of the firemen's relief and pension fund full authority to make rules and regulations for the administration of the fund, including the qualifications of those to whom any portion of the fund should be paid, and the amount thereof.

In the revision accomplished by House Bill No. 195, this power is greatly limited and the statute itself performs the function that was formerly committed to the trustees. Section 4612-4, General Code, contains the following provisions:

"The trustees of the firemen's relief and pension fund shall adopt rules and regulations for the management of the firemen's relief and pension fund under their jurisdiction and for the disbursement of benefits and pensions *as set forth in this section.*"
(Emphasis added.)

This section then proceeds to set out specifically the pensions and benefits which are to be paid to different classes of beneficiaries and covers not only pensions and benefits which are to be granted thereafter, but also provides what is to be paid in the future to members of the fund and their dependents who had been granted pensions or benefits prior to the enactment of the new act.

In the final sentence of the first paragraph of this section we find this provision:

"The widows, children and dependent parents who, prior to the effective date of this act, were granted pensions by the trustees of a firemen's relief and pension fund shall be entitled to receive such pensions in accordance with the rules and regulations governing the granting of such pensions in force and effect on April 1, 1947."

This, it will be noted, takes care of the widows, children and dependent parents who, *prior to the effective date of the act* had been granted pensions, and the provision is that they shall continue to receive such pensions in accordance with the rules that were in effect on April 1, 1947.

Coming then to the paragraph of this section which is numbered 5, we find the following provision:

“A widow of a deceased member of the fund shall receive a pension of sixty dollars per month during her natural life or until she remarries, provided, however, that said widow was married to deceased while he was in the active service of the fire department.”

This paragraph plainly refers to one who becomes the widow of a deceased member of the fund after the new act became effective, and the stipulation there contained is clearly that she shall receive a pension of \$60.00 per month during the balance of her natural life, or until she remarries.

Inasmuch, therefore, as the retired fireman referred to in your question died in the month of December, 1947, which was after the passage of the new act, his widow is entitled to receive the pension provided by paragraph 5, of Section 4612-4 supra, to wit, the sum of \$60.00 per month.

“QUESTION 2:

When a fireman, acting in conformity with the provisions of Section 4614-1 of the General Code, has elected to be governed by rules and regulations which were in force prior to April 1, 1947, and said rules provide a pension of \$40.00 per month for his widow, and said fireman dies either before or after retirement, is his widow entitled to receive benefits as provided in paragraph 5 of Section 4612-4, General Code, or would she come under the provisions of the election made by her deceased husband?”

Section 4614-1, General Code, being a part of the new act in question, reads as follows:

“Persons who, on the effective date of this act, have been contributing two per cent of their annual salary to a firemen’s relief and pension fund may elect to receive benefits and pensions from said fund in accordance with the rules and regulations governing the granting of pensions and benefits therefrom in force on the first day of April, 1947. Such election must be in writing and filed with the trustees of said fund within sixty days after the effective date of this act. Provided, however, such persons shall be required to contribute to the fund in the manner and in the amount provided for in Section 4609 of the General Code.”

The words, “persons who, on the effective date of this act, have been contributing two per cent” etc., bring these persons within the definition of “member of the fire department”, as contained in Section 4615-1, General Code, and the further stipulation at the end of the section, that such

persons are required to be contributors to the fund in the manner and in the amount provided for in Section 4609 of the General Code, brings them within the definition of "member of the fund," as contained in Section 4615-1, General Code.

Accordingly, this section, in effect, provides that a member of the fire department who is a member of the fund may, within sixty days after the effective date of this act file a written election to take the benefits that were provided under the rules and regulations of the fund on the first day of April, 1947, instead of the special benefits that are set forth in Section 4612-4 supra.

It will, however, be observed that this election only purports to give *to the person electing* the right to receive such alternate benefits. There is nothing whatever in this provision that authorizes such person to elect that both he and the other potential beneficiaries under the law should by virtue of his election, receive the benefits that would arise under the rules in effect on April 1, 1947, instead of what the statute gives them. Plainly, under the rules that were in effect under any local pension board, there may and there may not have been ample provisions for the widow and children of members, in fact, such rules may have made no provision whatever for these dependents. The legislature has seen fit to make certain specific and definite grants to persons who may be the widow or dependent children or dependent parents of a member of the fund upon his decease. They do not receive their right to participate in the benefits by reason of any act or designation on his part, and in the absence of express authority given him by law, he certainly has no power to add to or take away from them what the law gives them.

Accordingly, it is my opinion that when a fireman, acting in conformity with the provisions of Section 4614-1, General Code, has elected to receive the benefits and pension in accordance with the rules that were in force on the first day of April, 1947, such election does not in any way affect the rights of his widow, or other dependents, to receive the pensions provided for them in such Section 4612-4, General Code.

"QUESTION 3:

Paragraph 2 of Section 4615-1, General Code, reads as follows:

"Member of the fund" shall mean any person who is contributing four per cent of his annual salary to the firemen's relief

and pension fund established pursuant to Section 4600 of the General Code, or who is receiving a pension or disability benefits from said fund as a result of service in the fire department.'

“(a) When a fireman who is a contributing member of the fund has been suspended or temporarily laid off for retrenchment purposes and does not receive any salary, nor contribute his usual four per cent to the pension fund, would said individual be classified as a ‘member of the fund’ during that period, and would he be entitled to receive benefits in the event anything occurred to him during such suspension or retrenchment period?”

“(b) Would the board of trustees of the firemen’s relief and pension fund be within their legal rights in establishing a rule whereby members who are suspended or laid off will continue to be classified as ‘members of the fund’ providing they contribute the same amount of money to the pension fund as would have been deducted from their compensation had they remained in active service, and further provided that such separation shall not exceed the time limitations stipulated in paragraph 2 of Section 486-16, General Code, relative to the civil service laws of the state of Ohio?”

“(c) Could such rules also be made applicable to members of the department who are granted leave of absence?”

Considering the first branch of this question, I note that it presupposes that the fireman in question has been a contributing member of the fund. He must, therefore, have been a member of the fund prior to the effective date of the act in question, must have been a contributor at the rate of two per cent then required by the law, and must be, after the effective date of the act, a contributor to the fund at the rate of four per cent in so far as he has received a salary for his services. If, at some time during his service as a fireman and while thus a member of the fund, he is suspended as a matter of discipline, as provided by the civil service law, it is evident that during the time when he is not receiving a salary the fiscal officer of the municipality could not deduct the four per cent from his salary, as is required by Section 4609, General Code. But such suspension is but temporary and this does not, in my opinion, change his status as a member of the fire department or as a member of the fund. Whenever his suspension is ended, his salary and the contributions incidental thereto will be automatically resumed.

Section 486-17, General Code, relating to civil service, authorizes the appointing officer to suspend without pay, for purposes of discipline, an

employe or subordinate for a reasonable period not exceeding thirty days, but plainly, he does not by reason of such suspension cease to be a member of the fire department. Even if his suspension is on charges which may result in his removal from the force, he is entitled to the presumption of innocence and in my opinion retains his membership in the fund until removed.

In the case of *Curtis v. State, ex rel. Morgan*, 108 O. S. 292, it was held :

“In all cases of temporary lay-off or suspension of a municipal employe in the classified service, such suspended or laid off employe retains title to the office or position, and is entitled to be reinstated therein, upon the same again being refilled, in preference to all persons.”

The above case was based entirely upon the civil service law, and I do not consider that the holding is necessarily controlling to its full extent, when applied to the law relating to the firemen's relief and pension system. Furthermore, Section 486-17b, General Code, which relates to lay-offs for retrenchment purposes, was not in existence when that case was decided. This section refers to an officer of the police or fire department who had been laid off, through lack of funds or for other causes outlined in Section 486-17a, General Code, relating to removals, as having been “separated from the service” and provides that in the event a position once abolished or made unnecessary, be found necessary to be recreated or reestablished within three years from the date of abolishment, the oldest employe in point of service of those laid off, shall be entitled to the same.

Likewise, Section 486-16, General Code, provides that any person holding an office under the classified service, who has been “separated from the service” without delinquency or misconduct on his part may, with the consent of the Commission be reinstated within one year from the date of such separation.

It appears to me that it would be stretching the definition of “member of the fund” unduly, to hold that a fireman who has been “separated from the service” under the circumstances outlined in either of the two last mentioned sections, could still be regarded as a “member of the fund”, and entitled to its benefits. He has, at most, a mere possibility of returning to the service. The statutory definition of “member of the fund” clearly contemplates one who is in position to contribute to the fund *and is con-*

tributing, and the exception which I have above made as to a fireman under a purely temporary suspension is conceded only because it appears that such a person is not separated from the service, but is only off duty temporarily, with a high presumption that he will shortly return to active duty, and to a resumption of his contributions.

Accordingly, it is my opinion that where a fireman who is a contributing member of the fund, has been suspended for disciplinary purposes, and does not receive any salary or contribute his usual four per cent to the pension fund during such suspension, he is still entitled to be classed as a "member of the fund", as defined by Section 4615-1, General Code, during that period, and in the event of any occurrence during such suspension that would otherwise entitle him to a pension or other benefit under the provisions of the law, he would not by reason of these facts lose such right.

I am further of the opinion that a fireman who has been separated from the service, either voluntarily or by reason of retrenchment or reduction in the fire force, does not during such separation, remain a "member of the fund."

Coming to the second and third branches of your question, as to the right of a board of trustees of a firemen's relief and pension fund to establish a rule whereby members during such suspension or lay-off may contribute to the fund at the same rate as if they had been receiving a salary, I find no provision in the law, whereby a board of trustees would have any right to establish such rule or whereby any member would have the right to make contributions under such circumstances. The only provision in the law which contemplates any contribution by members of the fund is that found in Section 4609, General Code, which provides that the treasurer of the municipal corporation shall deduct from the salary of each member of the fire department an amount equal to four per cent of his salary for each payroll period. The only purpose and effect of such a rule would be to allow a fireman to further build up the amount of his retirement allowance, and the law plainly does not contemplate that he shall have a right to add anything to his contributions for that purpose beyond the amount required to be deducted from his salary as above stated.

"QUESTION 4:

Section 486-10c of the General Code reads as follows:

'No person shall be eligible to take an examination for and to receive an original appointment to a fire department, subject to the civil service laws of Ohio, unless he has reached the age of twenty-one and is not more than twenty-nine years of age.'

"Under the provisions of said Section 486-10c, General Code, is a man twenty-nine until he attains the age of thirty, or would he be considered more than twenty-nine after his twenty-ninth birthday?"

The section which you have quoted, is a newly enacted provision of the law relating to civil service appointments. Your question appears to me to have been very directly disposed of by an opinion of one of my predecessors, found in 1937 Opinions of the Attorney General, page 1540. That opinion arose upon a construction of Section 2965-1, General Code, relating to relief to the blind, and reading in part as follows:

"Relief shall be given under this act to any needy blind person who:

"(a) Is not less than eighteen nor more than sixty-five years of age."

The first paragraph of the syllabus is as follows:

"Under Section 2965-1, General Code, the phrase 'nor more than 65 years of age,' is a statutory limitation which means what it says, and that is, when a person passes his sixty-fifth birthday, he is then 'more than 65 years of age,' and cannot thereafter participate in any further payments of relief to the needy blind, by county commissioners, as is provided under the authority of Section 2965 et seq. of the General Code."

The then Attorney General, in discussing that proposition referred to the case of *Watson v. Loyal Union*, decided by the Supreme Court of Oklahoma, 286 Pac. Rep., page 888, in which it was held:

"A person is not over 55 years of age, within the meaning of Section 2, chapter 32, S. I. 1925, until he arrives at the age of 56."

That case arose in connection with a life insurance policy issued under a law which limited the company to issuing benefit certificates to persons whose limit of age "shall not exceed 55 years of age". The court said that a person is not ordinarily considered over fifty-five years of age until he arrives at the age of fifty-six, and the court considered that that was

the sense in which the legislature intended to use the language it did. No other case has been found supporting that proposition.

It is true that the average person, when asked to state his age, will answer in terms of his last preceding birthday, yet he would readily admit if pressed for a precise answer, that he is that many years old, plus so many months, and is therefore past the age stated. The laws of Ohio are full of limitations as to age, and it is my opinion that in every case where something is permitted or prohibited as to persons not over a stated age, the law means that arrival at that age fixes the limit. When we come to consider the question from a legal standpoint, it seems to me we could have no excuse for giving a phrase such as the one under consideration any other than a strict literal meaning.

Referring, for example, to the school laws, it is provided by Section 4838-2, General Code, that public schools shall be free to all school residents between six and twenty-one years of age. There is another provision in Section 4836-3, General Code, which provides that any person *more than twenty-one years of age*, shall be permitted to attend evening schools, upon the payment of such tuition as the board of education prescribes. Certainly, it could not be claimed that these provisions as to school age authorizes a person who lacks a month of *twenty-two* years of age, to come within the provisions as to free schools, or that attendance at evening school would not be permitted to one who was twenty-one and on his way to twenty-two.

Section 4849, General Code, makes attendance at school compulsory for a child between six and eighteen years of age. It certainly could not be contended that a child who has passed his eighteenth birthday and is heading toward his nineteenth, could be compelled under this section to go to school. Section 4851, General Code, allows the superintendent of schools to issue an age and schooling certificate to a child "only upon satisfactory proof that the child to whom the certificate is issued, is over sixteen years of age." Certainly, it could not be argued that such child is sixteen until he has reached his seventeenth birthday, and therefore would be precluded from having such certificate until he has reached his seventeenth birthday.

We have similar age limits dealing with delinquent children and with the offense of contributing to the delinquency of a child. These statutes define the age of children who come within the provisions of these laws

as including any child under eighteen years of age and defining adult, as including any person eighteen years of age or over. It appears to me that these definitions can leave no doubt as to the legislative intent to establish the eighteenth birthday as the absolute dividing line. It was so held in a well considered case decided by the Supreme Court of Colorado—Gibson v. People, 44 Colo., 600, where the statute defined a delinquent child as including one “sixteen years of age or under”, and the court said in its opinion: “Had it been the intention to include children up to the time when they reach their seventeenth birthday, the General Assembly would naturally have said ‘children under seventeen years of age’. A child is sixteen years of age on the sixteenth anniversary of his birth, and thereafter is over sixteen years of age.”

House Bill No. 195 was enacted within a few days of the enactment of said Section 486-10c, which we have been considering. In said House Bill No. 195, there was provision for a new organization, to wit, a township firemen’s relief and pension system. In Section 4615-13, General Code, a “member of the fund” in that system was defined as including “any person over twenty-one and *under thirty years* of age, who after April 1, 1947, is employed by a township as a full time regular fireman in a township fire department. This provision manifestly permits a township fireman to become a member of the department and of the fund, up to the age of thirty, whereas the civil service statute to which reference has been made, places a limit of twenty-nine years on the eligibility of an applicant for appointment to the fire department of a city. However, this inconsistency does not change the conclusion, which I consider irresistible, that Section 486-10c, General Code, limits the eligibility of any person to take an examination for and receive an original appointment to a fire department *of a city*, to the time when he reaches his twenty-ninth birthday, and does not permit one to receive such examination or appointment after that time. Strictly speaking, a person becomes twenty-nine years of age at the first moment of his twenty-ninth birthday, and a moment later he is more than twenty-nine. It would follow that an applicant for such appointment is ineligible to take the examination or receive the appointment referred to in Section 486-10c on or after the day he reaches the twenty-ninth anniversary of his birth.

Respectfully,

HUGH S. JENKINS,

Attorney General.