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PENSION RIGHTS—POLICEMAN—741.46 R. C.—"VESTED" PROPERTY RIGHT WHEN GRANTED—INSUFFICIENT FUNDS—ARREARAGES TO BE PAID FIRST—STATE, ex rel. HANRAHAN v. ZUPNIK et al. (161 O. S. 43, 1954.)

SYLLABUS:

The "vested right" in a police pension as contemplated by Section 741.46, Revised Code, is in essence a property right to receive the pension at the rate fixed at the time such pension is granted. Where the police relief and pension fund contains funds insufficient to meet both current pension installments and pension obligations which are in arrears, it is the duty of the trustees of the pension fund to apply the available funds in discharge of the earliest monthly delinquencies then existing, before paying current pension installments.

Columbus, Ohio, January 14, 1957

Hon. James A. Rhodes, Auditor of State
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"During the examination of the City of Lakewood, Ohio, it was disclosed that during the past two years, commencing in the month of October, 1954, and ending in the month of December, 1955, police pensions were not fully paid. The total amount by months is as follows:

"One-half month of October	1954	$4,864.51
Month of November	1954	9,739.71
Month of December	1954	9,739.71
50%of month of August	1955	4,767.21
Month of September	1955	9,534.53
Month of October	1955	9,684.24
Month of November	1955	9,807.52
Month of December	1955	9,807.52

"Sufficient funds are not available to discharge the pension obligations which are in arrears, above set out, and also to pay current pension payments. The question arises as to the priority which the Board of Trustees of the Police Relief and Pension Fund should observe in making payments from the fund. The case of State, ex rel. Hanrahan vs. Zupnik, et al., 161. O. S. 43, does not answer this question specifically.

"In view of the foregoing, your consideration and opinion is requested to the following question:

"Are the Trustees of the Police Relief and Pension Fund required to pay pension payments in arrears before making current pension payments?"

Prior to the amendment of the police pension statutes, and as now revised, pensions were regarded as mere gratuities and created no vested or contractual right; they could be reduced or increased at the discretion of the pension board, whether awarded by it or by predecessor boards. Mell v. State, 130, Ohio St. 306. The law was changed in 1937 by the enactment of Section 741.46, Revised Code, which provides:

"The granting of a pension pursuant to the rules adopted by the board of trustees of the police relief and pension fund *vests a right in such person* so long as he remains the beneficiary of such fund, *to receive such pension at the rate fixed at the time of granting the pension.*" (Emphasis added).

Rights are said to be "vested" when the right to enjoyment, present or prospective, has become property of some particular person or persons as a present interest. United States v. Heinrich, 12 Fed. 2d, 938. It is obvious from the very language of the statute that such property right was intended to be created in pensioners as of the time the pension was granted; and, a fortiori, when a particular installment of the pension has accrued there is a vested right in the pensioner to that installment. The

Supreme Court so declared in State ex rel. Hanrahan v. Zupnik, 161 Ohio St. 43, the syllabus reading:

> "In the absence of statutory provisions to the contrary, when any particular installment of a pension, authorized under a legally established pension system, becomes due, the right of the pensioner thereto immediately becomes vested as a matter of law and such vesting need not be directed or authorized by statute."

The Zupnik case to which you refer is factually not on all fours with the question you state. The pivotal point in that case was the right of pensioners to receive payment of their pensions granted them prior to the enactment of the vested right statute and erroneously omitted in subsequent years. The Court found as a fact that there was sufficient money in the pension fund to pay all monthly installments, current and delinquent, and accordingly ordered the board to pay them. In the case you state, the funds are insufficient to pay all the beneficiaries, and the question to be determined is how the payments are to be applied in such instance.

I believe it is obvious that *every* person granted a police pension has a "vested" right to receive that pension at the rate fixed at the time he retires. This is true for the member who retires today as well as for the member who has been a pensioner for many years. The "vested right" for which the statute provides is not a right which is contingent upon the solvency or financial status of the pension fund at the instant of a given period for installment payment. Rather, the pensioner has a right to look to the *continuing* fund for satisfaction of the pension he is owed. To say otherwise would be to make a mockery of the term "vested right."

Hence, when the particular installments came due in 1954 and 1955, the pension trustees were indebted to the members then pensioned to pay the installments then owing, and any pensioner undoubtedly could maintain an action for the money due him.

Since there is a vested property right in the pension as of the time it is granted, and no order of payment is fixed by statute in instances where there is an insufficiency of funds, the rule of priorities recognized in equity or the law governing the application of payments usually followed by the courts, should be applied. As to the equitable rule, the text in 16 Ohio Jurisprudence 147, Section 58, reads:

> "When a competition arises among holders of equities, none of whom has the legal title or legal lien, and whose claims are all equally meritorious in all other respects, their respective preferences and priorities must still be determined. In that event, and as a last resort, equity falls back upon the maxim, 'where the equities are equal, the elder prevails,' or 'he who is first in time is first in right.' "

A similar course is pursued under the law of payment and is thus stated in 70 Corpus Juris Secundum 276, Section 72:

> "The general rule is that in the case of a running account, where there are various items of debt on one side and various items of credit on the other accruing at different times, and no special appropriation of payments has been made by either party, the successive payments are to be applied in discharge of the items of debit antecedently due, in order of time in which they stand in the account."

See also 31 Ohio Jurisprudence 195, Section 106, where the same rule is also followed in Ohio.

The basic principles determined in the Zupnik case which also involved delinquent installments were these: the vested right statutes did not by implication prevent the vesting of rights to installments which became due prior to the date of their enactment; they did not change the basic purpose or character of the former laws and did not create funds for the payment only of future installments of pensions.

Although the court in the Zupnik case was not faced with the problem of priority as to payment where insufficient funds are available to meet past and current payments, the court did hold, as disclosed by the fourth paragraph of the syllabus, that:

> "Where installments of firemen's and policemen's pensions for certain months of the years 1940 to 1946, inclusive, became due, but were not paid because of insufficient money in the respective funds and are still unpaid, it is the duty of the trustees of the respective funds to subsequently order payment of such installments *whenever the respective funds contain sufficient money to satisfy such past due installments,* and on application therefor a writ of mandamus will issue directing the trustees of the funds, and the treasurer of the municipality as custodian of the funds, to issue the necessary orders and to take the necessary steps to effect such payment." (Emphasis added.)

To be sure the court did not say that past due installments take priority over currently due installments, but it would seem that such is the reasonable inference to be drawn from the court's ruling, especially since the trustees of the fund are said to be under a duty to order payment of past due installments *"whenever* the respective funds contain sufficient money to satisfy such past due installments."

Under these rulings and under the principle of first in time is first in right, a delinquent installment, where the funds are insufficient, should be paid first before the payment of subsequently accruing installments; otherwise it would be an appropriation of one's property to the debts of another.

In specific answer to your question it is therefore my opinion that the "vested right" in a police pension as contemplated by Section 741.46, Revised Code, is in essence a property right to receive the pension at the rate fixed at the time such pension is granted. Where the police relief and pension fund contains funds insufficient to meet both current pension installments and pension obligations which are in arrears, it is the duty of the trustees of the pension fund to apply the available funds in discharge of the earliest monthly delinquencies then existing, before paying current pension installments.

Respectfully,
C. William O'Neill
Attorney General