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MUNICIPALITY—MAY PROVIDE PENSIONS FOR FIREMEN
AND POLICEMEN ONLY PURSUANT TO SECTIONS 4600
TO 4631, G. C.

SYLLABUS:

A municipality may not provide pensions for members of the police and fire departments in a manner other than directed in Sections 4600 to 4631 of the General Code, and without creating a policemen's or firemen's pension fund as authorized in said sections.

COLUMBUS, OHIO, August 26, 1935.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Your recent request for my opinion reads in part as follows:

“At the request of the City of Cuyahoga Falls, we are submitting the following question to you for an opinion:

Would it be legal for a city to provide pensions for members of the police and fire departments, in a manner other than directed in sections 4600 to 4631 of the General Code, and without creating a policemen's or firemen's pension fund as authorized in such sections, to-wit:

By payment of a stipulated premium per year to a standard liability insurance company which would give the policemen and firemen all the protection ordinarily given them under the police and firemen's pension funds provided by statute?”

The City of Cuyahoga Falls is not a charter City. It is therefore unnecessary to determine whether any distinction exists in the authority of a charter or non-charter city in answering your inquiry.

With reference to the general authority of a municipality to procure liability and indemnity insurance for its employes, attention is directed to the case of *Insurance Company vs. Wadsworth*, 109 O. S. 440, wherein Allen, J., said:

“Under the Ohio statutes a municipipltiy is nowhere prohibited from taking out liability insurance, so that any prohibition against making such a contract through its properly authorized officers must be inferred from the statutes * * * or from the nature of the power exercised.”

In an opinion to be found in *Opinions of the Attorney General for 1927*, Vol. I, page 48, it was held:

“Unless forbidden by its charter, the legislative authority of a municipal corporation may, as a part of the compensation of its employes, legally authorize group insurance on behalf of any or all of the employes of such municipality.”

In a later opinion found in *Opinions of the Attorney General for 1928*, Vol. II, page 1099, it was held:

“The legislative authority of a village may, as a part of the compensation of its employes, legally authorize group indemnity insurance and pay the premium therefor from public funds.”

In a subsequent opinion reported in *Opinions of the Attorney General for 1929*, at page 1716, it was held:

“Boards of education are not authorized to pay from school funds part of the premium on a group life insurance policy for the protection of the teachers in its employ.”

In this opinion the question of whether or not the providing of such insurance was in fulfillment of a public purpose was not discussed. The opinion was based entirely on the lack of authority under the Ohio statutes for a board of education to provide for group insurance for the protection of the teachers in its employ.

All of the opinions quoted supra were given consideration by my immediate predecessor in an opinion reported in *Opinions of the Attorney General for 1931*, Vol. I, page 290. The syllabus of that opinion reads:

“1. In the absence of charter provisions prohibiting or limiting such action, a municipality through its legislative authority may enter into an agreement with an insurance company whereby the insurance company agrees to pay pensions to employes of a municipality after the employe has reached a certain age, or has become incapacitated, in such amounts and under such terms as may be determined by the said legislative authority.

2. Unless prohibited from so doing by provisions of its charter, a municipality may provide group life or indemnity insurance for its officers and employes and pay the premium for such insurance, either in whole or in part, from the public funds of a municipality.”

On page 291 of said opinion it is said :

“There is no statutory authority which either expressly or by necessary implication grants to a municipality in Ohio the power to effect insurance of the kind here under consideration for its officers and employes, other than those provisions authorizing the creation of police and firemen’s pension and indemnity funds. Because of this lack of statutory authority, I would have no hesitancy in saying that a municipality could not lawfully enter into an agreement such as you inquire about were it not for the fact that municipalities have by direct grant of the state constitution authority to exercise all powers of local self-government, and that the city in question has by the terms of its charter, as quoted in your letter, expressed a purpose to assume all authority so granted, if in fact such assumption of power by charter provision is necessary.”

Analyzing these opinions it will be observed that (1) authority on the part of municipal officials to procure such insurance for the municipal employes is predicated upon the home rule provisions of the Ohio Constitution; (2) in none of the cases under consideration were there general state statutes touching the authority of municipalities to contract for such insurance; (3) the provisions of the General Code with respect to police and firemen’s pension and indemnity funds were not discussed in any of the opinions.

Are the provisions relative to police and firemen’s pension funds of such character as to warrant a different conclusion than that reached in the opinions referred to supra? That requires a consideration of the pertinent statutes.

Section 4600, General Code, provides in part:

“In any municipal corporation having a fire department supported in whole or in part at public expense the council by ordinance *may* declare the necessity for the establishment and maintenance of a firemen’s pension fund. Thereupon a board of trustees * * * *shall* be created * * * .” (Italics the writer’s)

Section 4616, General Code, contains similar provisions for the establishment and maintenance of a police relief fund.

Section 4605, General Code, reads in part:

“In each municipality availing itself of these provisions, to maintain the firemen’s pension fund, the council thereof each year, * * * in addition to all other levies, authorized by law, *shall* levy tax of not to exceed three-tenths of a mill on each dollar upon all the

real and personal property as listed for taxation in such municipality, *but sufficient in amount within the three-tenths of a mill to provide funds for the payment of all pensions granted to firemen under existing laws.* (Italics the writer's)

Section 4621, General Code, contains similar provisions respecting the police relief fund.

The sections quoted supra were originally enacted in 1902, Amended in 1904, and particularly important is the fact that by amendment in 1929 the special levy provided for in Sections 4605 and 4621, General Code, was changed from "shall be authorized to levy" to "shall levy."

Returning for the moment to Sections 4600 and 4616, General Code, it is apparent that by the use of the word "may" in each of such sections the municipality is not required in the first instance to establish a firemen's or policemen's pension funds. In fact it was held in an opinion reported in *Opinions of the Attorney General for 1930*, Vol. II, page 1367, that "where a municipal council has passed an ordinance establishing a police relief fund and a board of trustees has been created and no other action has been taken, the council may legally repeal legislation establishing said fund if it chooses to do so." This opinion indicates that it is a discretionary matter as to whether or not the council of a municipality does declare the necessity for the establishment of the firemen's pension or policemen's relief fund. However, touching the necessity of making the special levies provided in Sections 4605, and 4621, General Code, the Attorney General in the same opinion said:

"Therefore, it is believed that where a municipality has taken such action as is necessary for the establishment of a police relief fund and the creation of a board of trustees of such fund, it is the mandatory duty of council of such municipality to provide a reasonable sum under the provisions of Section 4621 to maintain the police relief fund even though there are no pensions to be paid therefrom but there are contemplated payments for relief. In other words, the act contemplates that there will be obligations to be paid from the fund and in anticipation thereof the council should provide a reasonable amount for said purpose notwithstanding at the time the relief is requested there are no existing obligations."

In that connection Section 4647-1, General Code, reads:

"That in all municipalities having no firemen's pension fund created under the provisions of chapter 1, Title 12, Division 6, (Section 4600 et seq.) of the General Code of Ohio, and having and maintaining therein a fire department supported in whole or in

part at public expense, a firemen's indemnity fund shall be created and disbursed as herein provided."

It was held in an opinion to be found in *Opinions of the Attorney General for 1930*, Vol. III, page 1613, that:

"A municipality not having provided for a firemen's pension fund may not terminate the firemen's indemnity fund created by the mandatory provisions of section 4647-1, General Code."

On page 1614 of said opinion the Attorney General said:

" * * * the statute (4647-1) makes it mandatory that a firemen's indemnity fund be established in those municipalities having no pension fund and which maintain a fire department supported in whole or in part, at public expense. In view of the mandatory provisions of the section that such a fund be maintained, it is my opinion that a village council is without power to terminate the same, unless, of course, such a municipality had first established a pension fund, * * *."

Although, as previously stated herein, the exact question which you have raised has not heretofore been the subject of an opinion by an Attorney General, nevertheless previous Attorneys General have commented upon the mandatory features of Section 4600 et seq., General Code.

In an opinion to be found in *Opinions of the Attorney General for 1922*, Vol. I, page 198, the Attorney General said at page 200:

"It seems apparent that the principal intention of the General Assembly was to make mandatory the act contained in General Code Sections 4600 et seq."

In the annual report of the Attorney General for 1912, Vol. II, at page 1037, the then Attorney General said:

" * * * Nor do I find any authority vested in council to create a pension fund other than that provided for in the statutes. Such authority is inconsistent with all principles of statutory construction. Having prescribed in detail the kinds of firemen's pension funds which council may provide for, it necessarily follows that the legislature did not extend authority to council to provide for some other kind of pension fund."

In view of the provisions contained in Sections 4605 and 4621, General Code, respecting the levy of a special tax for the firemen's pension and policemen's relief funds, it is obvious that unless such funds are established agreeable to the provisions of 4600 et seq., no special levy may be made. This is manifest by the express provisions of Sections 4605 and 4621, General Code, which provide that the levy shall be made "in each municipality availing itself of these provisions." "These provisions" obviously refer to Sections 4600 et seq., which establish the firemen's pension and police relief funds. Nor is there any authority for the payment of premiums on liability or accident insurance from the moneys in the pension or relief funds established by Section 4600 et seq., General Code. It was so held in *Opinions of the Attorney General for 1931*, Vol. I, page 93, the syllabus of which opinion reads:

"A board of trustees of a firemen's pension fund established in a municipality according to law has no authority to provide from said fund for the payment of premiums for indemnity liability or accident insurance for the members of the fire department in the municipality where the pension fund has been created."

Further evidence of legislative intent may be gathered from Section 1465-61, General Code, wherein "employe" "workman" and "operative" as contemplated in the Workmen's Compensation Law are defined. It is provided in that section:

" * * * nothing in this act shall apply to police or firemen in cities where the injured policemen or firemen are eligible to participate in any policemen's or firemen's pension funds which are now or hereafter may be established and maintained by municipal authority under existing laws."

In *Opinions of the Attorney General for 1915*, Vol. I, page 984, the then Attorney General said:

"I might add that contribution to the Workmen's Compensation fund for policemen and firemen is mandatory upon a city which does not maintain a policemen's or firemen's pension fund under Sections 4600 et seq. General Code. * * If a municipality has established a policemen's or firemen's pension fund under 4600 et seq., of the General Code, the members of such police or fire department may not in any event receive relief from the Workmen's Compensation Fund. (Sec. 1465-61 G. C.)"

We have then, in Sections 4600 et seq., provisions stating that a muni-

cipality *may* establish a firemen's pension or police relief fund. It is discretionary with council as to whether or not any fund is established for those purposes. However, with respect to firemen, unless a pension fund is created, a firemen's indemnity fund *shall* be established. Having determined that a pension fund should be created for firemen and policemen, council is required to establish a police relief fund, firemen's pension fund or firemen's indemnity fund agreeable to the provisions of Section 4600 et seq. General Code. A special tax levy must be made for the support and maintenance of these funds when established.

Applying rules of statutory construction to this situation, it is said in Lewis' *Sutherland Statutory Construction*, page 919; where authority is given to do a particular thing, and the mode of doing it is prescribed, it is limited to be done in that mode; all other modes are excluded. See cases cited.

Again, at page 1135, the same authority states:

"Where legislation points out specifically how an act is to be done, although without it the court or officials under their general powers would have been able to perform the act, yet as the legislature imposed a special limitation, it must be strictly pursued; and although performed by a discretionary officer, the limitation of the statute renders the doing of the act ministerial in him performing it, in which no discretion can be indulged. Enabling statutes, on the principle of *expressio unius est exclusio alterius*, impliedly prohibit any other than the statutory mode of doing the acts which they authorize. This is illustrated by the numerous cases where statutory rights and remedies are given in respect to which the statute must be strictly pursued. Where a statute in granting a new power prescribes how it shall be exercised, it can lawfully be exercised in no other way."

Specifically answering your inquiry, I am of the opinion that a municipality, may not provide pensions for members of the police and fire departments, in a manner other than directed in Sections 4600 to 4631 of the General Code, and without creating a policemen's or firemen's pension fund as authorized in said sections.

Respectfully,

JOHN W. BRICKER,
Attorney General.