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1. PENSION FUND—FIREMEN'S—MATTER OF STATE-WIDE CONCERN—BEYOND HOME RULE POWERS OF MUNICIPAL CORPORATIONS TO LEGISLATE THEREON EXCEPT AS AUTHORIZED BY STATUTE—VILLAGE COUNCIL WITHOUT AUTHORITY TO ABOLISH FUND AND SUBSTITUTE FIREMEN'S INDEMNITY FUND.
2. EXISTENCE OF RELIEF AND PENSION FUND NOT TERMINATED BECAUSE COMPOSED ONLY OF ONE FULL-TIME FIREMAN—EXISTENCE OF FUND MAY BE CONTINUED BY ELECTING VOLUNTEERS AND PART-TIME FIREMEN TO BOARD OF TRUSTEES—SECTION 741.06 RC.
3. TREASURER OF MUNICIPALITY—CUSTODIAN OF FUND—FUND SUBJECT TO PROPER ORDERS OF SUCCESSIVE BOARDS OF TRUSTEES.
4. MEMBER OF FIRE DEPARTMENT—BECAME MEMBER AFTER APRIL 1, 1947—SUBJECT TO PAYMENT OF FOUR PER CENT DEDUCTION—CONTRIBUTIONS TO PENSION FUND.

SYLLABUS:

1. The establishment of a firemen's pension fund is a matter of state-wide concern and beyond the home rule powers of municipal corporations to legislate thereon except as authorized by statute. A village council is without authority to abolish such fund and substitute a firemen's indemnity fund in its stead.

2. The existence of a firemen's relief and pension fund is not terminated because composed only of one full-time fireman. In such case the existence of such fund may be continued by electing volunteers and part-time firemen to the board of trustees as provided by Section 741.06, Revised Code.

3. The treasurer of the municipality is the custodian of such fund, who holds it subject to the proper orders of the successive boards of trustees.

4. A member of the fire department who became such after April 1, 1947, is subject to the four per cent deduction for his contribution to the pension fund, even though the assessment may be of a nominal sum.

Columbus, Ohio, December 7, 1954

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

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

"In 1947 the Village of Louisville had three (3) regular firemen and in accordance with the General Code of Ohio a Firemen's Relief and Pension Fund was set up. Since that time, the number of regular firemen has been reduced so that, at present, there is one (1) regular fireman, although there are still three (3) regulars authorized. The remainder of the force is and was entirely volunteer, being paid only for fire drills and time actually spent in fighting fires.

"Some of the firemen are of the opinion that the present Pension Fund gives less protection to the firemen than the Indemnity Fund would, as the only persons covered are those who, prior to April 1st, 1947, were paying 2% into the old type pension fund (this does not include any of the present firemen) and those who were employed after April 1, 1947. They feel that a Firemen's Indemnity Fund would give more protection to them and their families in the event one of them was killed at a fire or injured at a fire. The Code, as I read it, makes no provision for termination of a Firemen's Relief and Pension Fund once it has been created.

I would appreciate your opinion on the following questions:

'1. Where a Firemen's Relief and Pension Fund is in existence in a village, can the council by ordinance abolish the pension fund and set up a Firemen's Indemnity Fund?

'2. If so, what happens to the Firemen's Relief and Pension Fund balance in the treasury now existing?

'3. If said Pension Fund now existing cannot be terminated, then must every fireman who is employed after April 1st, 1947, be required to pay 4% of his earnings into said fund, even though this might not amount to more than several cents per month?"

There are two systems of firemen's pensions provided by statute: (1) a firemen's relief and pension fund as provided by Section 741.02, Revised Code; (2) a firemen's indemnity fund as provided by Section 741.81, Revised Code. Section 741.02 reads:

"In each municipal corporation having a fire department supported in whole or in part at public expense, and employing two or more full-time regular members, there shall be established and maintained a firemen's relief and pension fund. * * *"

The statute also provides for a board of trustees which shall administer such fund, to consist of six members.

Members are appointed as follows: two by the municipal council, to be chosen from among its own members; two by members of the fire

department from the membership of the department; and two residents of the municipality not engaged in the public service, one to be chosen by the council and one to be elected by members of the department. Where there are only two full-time firemen, it is their duty to serve as members of such board. See Opinion No. 1524, Opinions of Attorney General for 1939, page 2243. The sources of revenue of the pension fund include four per cent salary deductions matched by taxation, proceeds of fines, service charges and donations, as provided by Sections 741.09 to 741.12, Revised Code. Section 741.21, Revised Code, also preserves to volunteer or part-time firemen all rights to receive the pension provided for under existing laws relating to the firemen's pension fund.

There is no statutory provision for the dissolution of the fund in the event the membership is reduced to less than two full-time firemen. On the contrary, it seems that the statute intended the fund to be of perpetual succession by providing in Section 741.13, Revised Code, that the treasurer of the municipal corporation shall be the custodian of the fund, bonded as such, and authorized to pay it out only upon proper orders of the board of trustees.

The question of the power of a municipality, by ordinance, to terminate the existence of its firemen's pension fund and substitute a firemen's indemnity fund in its place, necessarily involves a consideration of the municipal powers of local self-government. The answer will be found in *Cincinnati v. Gamble*, 138 Ohio St., 220, where the City of Cincinnati maintained a policemen's and firemen's pension fund under charter provisions. The state later enacted the Uniform Pension Act which subjected all municipal corporations having police and fire departments to its provisions. The validity of the statute was challenged on the ground that it encroached on the powers of local self-government granted to municipal corporations by the Constitution. Rejecting such contention the Supreme Court held that in matters of state-wide concern the state is supreme over its municipalities and may in the exercise of its sovereignty impose duties and responsibilities upon them as arms or agencies of the state; that matters relating to police and fire protection are of state-wide concern and under the control of state sovereignty; that the establishment of pensions for firemen and policemen is governed by statute. In view of these pronouncements, it is clear that municipalities in Ohio are without power, except when authorized by statute, to abolish or change pension systems

established by the state for the benefit of all firemen and policemen within the state.

Furthermore, there can be no co-existence of the two systems. A firemen's indemnity fund could only be established in a municipality which has no firemen's pension fund, but not in one which has such fund. The language of Section 741.81, Revised Code, is very clear on that point and permits no other interpretation. The section provides :

"Any municipal corporation which does not have a firemen's relief and pension fund created under section 741.02 of the Revised Code, and which maintains therein a fire department supported in whole or in part at public expense, shall create and disburse a firemen's indemnity fund provided by Sections 741.82 to 741.88, inclusive, of the Revised Code."

The conclusion I have reached as to your first specific question makes it unnecessary to consider the second.

On the question of salary deductions, I do not find anything in the statute which exempts members of the fire department from contribution to the fund on the basis of their earnings even though their assessments may be trivial. Section 741.01, Revised Code, defines a "member of the fund" to mean any person who is contributing four per cent of his annual salary to the firemen's relief and pension fund; and Section 741.12, Revised Code, makes such deductions mandatory. It provides :

"In each municipal corporation in which there is established a firemen's relief and pension fund, 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 sums so deducted shall be credited to such fund."

The word "salary," as distinguished from percentages or fees, contemplates any periodical payment for services rendered. *Thompson v. Phillips*, 12 Ohio St., 617. Hence, any compensation in the form of salary is subject to the deductions for the benefit of the fund. It may be said to be similar to the "average earnings" method provided by Sections 521.19 and 741.87, Revised Code, for computing benefits to volunteer firemen, namely—"the earnings of such fireman as his regular employment together with his compensation as a volunteer fireman." See Opinion No. 480, Opinions of Attorney General for 1945, page 607.

Then, too, the money paid into the fund, of whatever amount, is never lost in the event of separation from the service. Section 74I.08(i), Revised Code, specifically provides that "a member of the fund who voluntarily resigns from active service in the department shall be entitled to receive an amount equal to the sums deducted from his salary and credited to the fund."

Accordingly, in specific answer to your questions it is my opinion that:

1. The establishment of a firemen's pension fund is a matter of state-wide concern and beyond the home rule powers of municipal corporations to legislate thereon except as authorized by statute. A village council is without authority to abolish such fund and substitute a firemen's indemnity fund in its stead.

2. The existence of a firemen's relief and pension fund is not terminated because composed only of one full-time fireman. In such case the existence of such fund may be continued by electing volunteers and part-time fireman to the board of trustees as provided by Section 74I.06, Revised Code.

3. The treasurer of the municipality is the custodian of such fund, who holds it subject to the proper orders of the successive boards of trustees.

4. A member of the fire department who became such after April 1, 1947, is subject to the four per cent deduction for his contribution to the pension fund, even though the assessment may be of a nominal sum.

Respectfully,

C. WILLIAM O'NEILL

Attorney General