

3673

POLICE, SANITARY — MEMBERS PUBLIC EMPLOYEES RETIREMENT SYSTEM — EMPLOYED IN MUNICIPALITIES WHERE NO SANITARY PENSION FUND ESTABLISHED — WHERE NOT EXEMPTED UNDER SECTION 486-33a G.C. — WHILE UNDER JURISDICTION SAID RETIREMENT SYSTEM, MAY NOT WITHDRAW MEMBERSHIP AND ESTABLISH LOCAL SANITARY POLICE PENSION FUND TO LATER MERGE WITH LOCAL POLICE RELIEF FUND.

SYLLABUS:

Sanitary police in municipalities which have not established a sanitary police pension fund, who have not exempted themselves in accordance with the provisions of Section 486-33a of the General Code, and are now members of the Public Employes Retirement System, may not, so long as they remain public employes as defined in the public employes retirement law, withdraw their membership in such system and establish a local sanitary police pension fund for the purpose of later merging such fund with the local police relief fund, or for any other purpose.

Columbus, Ohio, April 11, 1941.

Mr. William E. Hoge, Secretary, Public Employes Retirement System,
Columbus, Ohio.

Dear Sir:

Your letter of April 5, 1941, requesting my opinion, duly received.
Your communication reads:

“It has been pointed out to this office by certain departments of health in municipalities over the state that sanitary policemen have a right, under the General Code of Ohio, to establish Sanitary Police Pension Funds. It is also pointed out that under the General Code, Sections 4621 and 4632, sanitary police pension funds may be merged with regular municipal police pension funds.

It would be assumed that if sanitary police funds had been established in the cities and then merged with the regular police

funds before the establishment of this system, they would naturally not be included within the membership of this system.

However, the question is: Since the sanitary police in these municipalities have not established a pension fund which could have been merged with the regular police funds, can they now, since they are members of this system, withdraw their membership here and establish such sanitary police fund with the expectation of later merging with the regular municipal police fund?"

Section 4621, General Code, as amended by the 93rd General Assembly (118 v. 661; Eff. 9/6/39), reads as follows, the words emphasized indicating the amendments:

"In each municipality availing itself of these provisions to maintain the police relief fund the council thereof each year in the manner provided by law for other municipal levies, and in addition to all other levies authorized by law shall levy a 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 the municipality but sufficient in amount within the three-tenths of a mill to provide funds for the payment of all pensions granted to policemen *and that may be granted under existing laws to policemen and those eligible to receive pensions during the fiscal year for the purpose of which such levy is made.* In the matter of such levy the board of trustees of the police relief fund shall be subject to the provisions of law controlling the heads of departments in the municipality, *as provided in section 5625-20 of the General Code,* and shall discharge all the duties required of such heads of departments.

Provided, however, that if any municipal corporation shall have established a sanitary police fund, which fund shall have been merged by ordinance with the police relief fund, and the board of trustees of the police relief fund shall have succeeded to the duty of providing for the beneficiaries of the said sanitary police pension fund out of the police relief fund, in such event the council of such municipality, in the manner provided by law for other municipal levies, and in addition to all other levies authorized by law, shall each year levy a tax sufficient in amount to provide funds for the payment of all pensions granted to policemen, both sanitary and regular, *and that may be granted under existing laws to policemen and those eligible to receive pensions during the fiscal year for the purpose of which such levy is made,* but not to exceed thirty-five one hundredths of a mill upon all the real and personal property as listed for taxation in the municipality."

Section 4632, General Code, also referred to in your letter,

"In any municipal corporation, having a sanitary police

force, supported in whole or in part at public expense, the council by ordinance may declare it necessary to establish and maintain a sanitary police pension fund. Thereupon a board of trustees, who shall be known as 'trustees of the sanitary police pension fund' shall be created, which shall consist of the board or officer having charge or control of the health department in such municipality and five persons, members of the sanitary police force. But upon petition of a majority of the members of the sanitary police force, such board or officer, as the case may be, may designate a less number than five to be elected trustees."

Other sections essential to a resolution of your inquiries are Sections 486-32, 486-33a and 486-33c, General Code. Section 486-32, supra, provides in part as follows:

"That the following words and phrases as used in this act, unless a different meaning is plainly required by the context, shall have the following meaning: * * *

(5) 'Member' shall mean any person included in the membership of the retirement system as provided in this act. * * *

(7) 'Employer' for the purposes of this act shall mean the state of Ohio, county, municipality, park district, conservancy district, health district or public library, as the case may be. * * *

(22) 'Original member' of the public employes retirement system shall mean a state, county, municipal, park district, conservancy, health or public library employe who was at any time a state, county, municipal, park district, conservancy, health or public library employe prior to the thirtieth day of June, 1938, whether or not such employment has been continuous, and who became a member of the retirement system on or before June 30, 1938. * * *

(23) 'New member' of the public employes retirement system shall mean a state, county, municipal, park district, conservancy, health or public library employe who shall have become a state, county, municipal, park district, conservancy, health or public library employe and a member of the retirement system at a date subsequent to June 30, 1938. * * * "

Sections 486-33a and 486-33c, supra, were first enacted by the 92nd General Assembly on December 22, 1937 (117 v. 743), and were amended

by the same General Assembly on February 28, 1938 (117 v. 840), the amendments serving only to bring park district employes within the provisions of the Public Employes' Retirement System. Section 486-33c, General Code, was again amended on March 23, 1939 (93rd G.A.; 118 v. 104), the amendments of this date, in so far as here pertinent, being indicated by the words emphasized. These sections read in part:

Section 486-33a:

"The state employes retirement system created by section 486-33, General Code, shall hereafter be known as the public employes retirement system, and the state employes retirement board shall hereafter be known as the public employes retirement board. * * * Beginning July 1, 1938, in addition to the present membership of said retirement system, there shall be included therein all county, municipal, park district, conservancy, health and public library employes as defined herein, and such county, municipal, park district, conservancy, health and public library employes, except as otherwise provided herein, shall have all the rights and privileges and be charged with all the duties and liabilities provided for in the laws relating to said retirement system as are applicable to state employes. Provided, however, that *any original member may be exempted from membership by filing written application for such exemption with the retirement board within three months after this act goes into effect; and any new member over the age of fifty years may be exempted from membership by filing written application for exemption with the retirement board within three months after being regularly appointed as a county, municipal, park district, conservancy, health or public library employe.*" (Emphasis mine.)

Section 485-33c:

"For the purposes of this act, 'county or municipal employes' shall mean any person holding a county or municipal office, not elective, in the state of Ohio, and/or paid in full or in part by any county or municipality in any capacity whatsoever. * * * *For the purposes of this act a sanitary district shall be considered a conservancy district and employes of any such sanitary district shall be considered as conservancy employes, and the retirement board shall have authority to grant to any such employes who were employes of any such sanitary district between the date of April 18, 1938, and June 30, 1938, both dates inclusive, all rights and privileges of original membership, including a period of three months after the effective date of this act during which such employes may be permitted to claim exemption from participation in the retirement system.* * * * But said term shall not include those persons who come within the provisions of any other retirement system established under

the provisions of the laws of this state or of any charter, nor shall the provisions of this act in any manner apply to a police relief fund or a firemen's pension fund established under the provisions of law. *No employe except an employe who comes within the provisions of a police relief fund or a firemen's pension fund shall be excluded from membership in the retirement system because of membership in any other retirement system established under the provisions of the laws of this state or of any charter unless such employe is contributing to such other retirement system on the basis of two thousand dollars per annum or is receiving a disability allowance from such other retirement system.* The board shall have authority to exempt from compulsory membership in the retirement system classes or groups of employes engaged in work of a temporary, casual or exceptional nature, but individuals in any such class or group may become members by making application therefor, subject to the approval of the retirement board; provided, however, that any county, municipal, park district, conservancy, health or public library employe who is, or who becomes, a member must continue such membership as long as he is such employe, even though he may be in or transferred to an exempted class or group. In all cases of doubt the retirement board shall determine whether any person is a county, municipal, park district, conservancy, health or public library employe as defined herein, and its decision shall be final. * * * " (See 118 v. 104).

Sections 4621 and 4632, above quoted, were first enacted in 1902 (95 v. 227, 240), the year in which the Supreme Court held, in the cases of *State ex rel Knisely, et al. v. Jones, et al.*, 66 O.S. 453, and *State ex rel., Attorney General v. Beacom et al.*, 66 O.S. 491, that acts of the Legislature which were so drawn as to apply to only one city contravened Section 26, Article II, of the Constitution and were, therefore, unconstitutional. Prior to 1902 there was no general act relating to all municipalities making provisions for the "firemen's pension fund," the "police relief fund" or the "sanitary police pension fund." It is unnecessary to trace in detail the history of Sections 4621 or 4632, supra. Suffice it to say, in the act of 1902, in the amended act of 1904, in the General Code and in subsequent amendments to the different sections, having to do with such funds, different provisions in many respects were made with reference to the three several and distinctive funds designated and known by the nomenclature above set forth.

I find nothing in the present law, or in the statutes as they formerly existed, authorizing a merger of the "police relief fund" with the "sanitary police pension fund" or the merger of any two of the three funds above mentioned, unless it be contained in the second paragraph of Section 4621,

supra; and whether or not this section does authorize a merger of the kind referred to in your letter is unnecessary here to determine.

It may be that such mergers have in fact been made in the past even though there be no express and specific statutory authority therefor, albeit there is nothing in the Public Employees Retirement Law permitting members thereof to resign therefrom, withdraw such monies as they may have paid in and become members of another pension system. You will observe that by the terms of Section 486-33a, supra, "any original member may be exempt from membership by filing a written application for such exemption with the retirement board within three months" after the effective date of the act in which such section was enacted, and that "any new member *over the age of fifty years* may be exempt from membership by filing written application for exemption with the retirement board within three months after being regularly appointed" a public employe as provided in such section.

The term "original member" is defined in paragraph (22) of Section 486-32, supra, the term "new member" being defined in paragraph (23) of the same section.

As held in Opinion No. 832, Opinions, Attorney General, 1939, Vol. 2, p. 1085:

"1. By the express terms of the first proviso of Section 486-33, General Code, when a public employee, who is an original member of the public employees retirement system, desires to be exempted from membership, he must have filed a written application for such exemption with the retirement board within three months after the act in which said section was enacted went into effect.

2. The fact that such a member was engaged in litigation during said three months period, for the purpose of determining whether he had been wrongfully discharged from his position as a public employee, or determining whether or not his position had been unlawfully abolished, does not relieve him from the necessity of filing a written application for exemption from membership with the retirement board within three months after the effective date of the act in case he desires to be exempted, nor does such fact extend the three months period fixed by the Legislature within which such written application for exemption must have been filed with the retirement board."

You will also note that in Section 486-33c, supra, as amended by

the 93rd General Assembly, after defining the various kinds of public employes, other than state employes, required to become members of the Public Employes Retirement System, it is provided that such definitions, "shall not include those persons who come within the provisions of any other retirement system established under the provisions of the laws of this state or of any charter, nor shall the provisions of this act in any manner apply to a police relief fund or a firemen's pension fund established under the provisions of law," it being further provided, however, that "no employe except an employe who comes within the provisions of a police relief fund or a firemen's pension fund shall be excluded from membership in the retirement system because of membership in any other retirement system established under the provisions of the laws of this state or of any character unless such employe is contributing to such other retirement system on the basis of two thousand dollars per annum or is receiving a disability allowance from such other retirement system." It is significant that notwithstanding the fact that in the same act having general application to all municipalities, as well as in the amendments thereto and in the General Code, provision was made for "firemen's pension funds," "police relief funds" and "sanitary police pension funds," the section in question expressly mentions only police relief funds and firemen's pension funds. One of the fundamental canons of statutory construction and interpretation is that the mention of one, that is, the mention of certain particular things, excludes all others. *Expressio unius est exclusio alterius*. Having expressly mentioned police relief funds and firemen's pension funds in Section 486-33c, there being no reference whatsoever to sanitary police pension funds, it must be concluded that it was the intention of the Legislature that sanitary police should become members of the Public Employes Retirement System, unless they were exempted under the provisions of Section 486-33a, *supra*.

It is manifest from the entire act that unless exempted as provided in either Section 486-33a or 486-33c, *supra*, all public employes of the kind defined in the act must become members of the Public Employes Retirement System. For example, under Section 486-33c, provision is made for the Public Employes Retirement Board to exempt from compulsory membership certain types of employes, and the conclusion is irresistible that the sanitary policemen about whom you inquire, having failed to exempt themselves as provided in Section 486-33a, and having become members of the Public Employes Retirement System, they may not now withdraw from such system so long as they remain public

employees within the scope of the Public Employes Retirement law.

In view of the foregoing, and for the reasons stated, and in specific answer to your question, it is my opinion that sanitary police in municipalities which have not established a sanitary police pension fund, who have not exempted themselves in accordance with the provisions of Section 486-33a of the General Code and are now members of the Public Employes Retirement System, may not, so long as they remain public employes as defined in the public employes retirement law, withdraw their membership in such system and establish a local sanitary police pension fund for the purpose of later merging such fund with the local police relief fund, or for any other purpose.

Respectfully,

THOMAS J. HERBERT,

Attorney General.