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1. FIRE DEPARTMENT OF CITY — PERSON WHO RECEIVED PROVISIONAL APPOINTMENT AND SERVED — FULL TIME REGULAR MEMBER OF SUCH FIRE DEPARTMENT — SUBJECT TO OBLIGATIONS AND ENTITLED TO BENEFITS OF FIREMEN'S RELIEF AND PENSION FUND — SECTIONS 486-14, 4609, 4600 ET SEQ., G. C.
2. APPOINTED TO POSITION IN CITY FIRE DEPARTMENT — SERVED UNDER NON-COMPLIANCE WITH PROVISIONS OF SECTIONS 486-13, 486-14 G. C. — NOT ENTITLED TO BENEFIT OF PROVISIONS OF FIREMEN'S RELIEF AND PENSION FUND — SECTION 4600 ET SEQ., G. C.

## SYLLABUS:

1. A person who has received a provisional appointment as prescribed by Section 486-14 of the General Code, as a member of the fire department of a city, and is serving as such is a full time regular member of such fire department within the meaning of Section 4609 General Code, and is subject to the obligations and entitled to the benefits of the firemen's relief and pension fund as established pursuant to Section 4600 et seq. of the General Code.

2. One who has been appointed to a position in the fire department of a city without compliance with the provisions of Sections 486-13 and 486-14 of the General Code, and is serving in such department, is not entitled to the benefit of the provisions of the firemen's relief and pension fund established pursuant to Section 4600 et seq. of the General Code.

Columbus, Ohio, December 8, 1944

Bureau of Inspection and Supervision of Public Offices  
Columbus, Ohio

Gentlemen:

You have submitted for my opinion certain questions raised by the Auditor of Lorain County. The letter of the Auditor reads in part as follows:

"In several municipal corporations in this state, persons who have not taken competitive civil service examinations are serving as members of the uniform force of the fire departments. In some cases, the persons so serving have been certified by the municipal civil service commission as qualified after non-competitive examinations as provided for in Section 486-14 of the General Code. In other cases, such persons have been appointed without being so certified by the local municipal civil service commission.

Your opinion is respectfully requested on the following questions:

1. Is a person who is serving on the uniform force of the fire department after being certified by the local civil service commission as being qualified following a non-competitive examination a 'full time regular member of the fire department' within the purview of Section 4609 of the General Code so that contributions are required to the Firemen's Relief and Pension Fund?

2. Is such a person so certified a 'full time regular mem-

ber of the fire department' where he has served more than the ninety (90) days provisional period prescribed by Section 486-14 of the General Code?

3. Is a person who has been appointed without being certified and without taking either a competitive or a non-competitive examination a 'full time regular member of the fire department' within the purview of Section 4609 of the General Code?

4. Is such a person or his dependents entitled to payments from the Firemen's Relief and Pension Fund?

Most of these questions arise by virtue of the fact that in some municipal corporations no civil service examinations are being held for the duration of the war. This situation gives rise to the appointment of persons to the fire department who will serve for the duration without requiring in some instances competitive examinations and in other cases without requiring either a competitive or a non-competitive examination. In practically all of such cases, it is the intent of the municipal authorities to require full compliance with civil service statutes, ordinances, rules and regulations immediately after the close of the war."

Section 4609 General Code, reads as follows:

"Each full time *regular* member of the fire department in each municipal corporation unless objection is made as herein-after provided, shall contribute two per cent of the annual salary he receives to the firemen's relief and pension fund. Such two per cent shall be deducted by the treasurer of the municipalities from the member's monthly pay, and the amount so received shall be credited to the relief and pension fund. Each contributing member shall, if he is dismissed or resigns as a member of the fire department in which he is employed, be paid by the board of trustees of the relief and pension fund to which he has contributed the amount of his contribution plus two per cent interest compounded annually, upon demand made by him to the board. Any such person, or his widow or orphans, who has received the amount of his contribution from the relief and pension fund as provided for in this section shall not be entitled to any payment of relief or pension.

*Every member* of the fire department in each municipal corporation shall be deemed to consent and agree to the deductions made and provided for herein, unless he shall notify the treasurer of such municipality, in writing, to the contrary, in which event he shall be held to have expressly waived any benefits to which he and his dependents would therein be entitled from such fund, but shall be entitled to be paid the amount of any deductions theretofore made from his salary. Persons becoming *fremen* after the effective date of this act must contrib-

ute two per cent of their salary as provided for in this act and shall not have the right to object to such deduction.”

(Emphasis added.)

The language of the first sentence in the above quoted section clearly limits the obligation to pay two per cent of their salary to those who are “regular” members of the fire department; likewise the treasurer is only required and authorized to make such deduction from the pay of a regular member. The use in the second paragraph of the words “every member” is certainly limited in its intent to the same “regular” members. Likewise, the provision in the last sentence that “persons becoming firemen” after the effective date of the act must contribute and shall not have the right to object, certainly refers to the class who must contribute and who but for this latter provision, might object.

Accordingly, it becomes important to determine who are and who are not “regular” members of the fire department. Members of this and all other departments of a city secure their appointment by compliance with the provisions of law relative to civil service. Section 486-1, General Code, defines “civil service” as including “all offices and positions of trust or employment in the service of the state and the counties, cities and city school districts thereof.”

Section 486-8 General Code, provides in part:

“The civil service of the state of Ohio and the several counties, cities and city school districts thereof shall be divided into the unclassified service and the classified service.”

There follows under (a) the enumeration of positions which are to comprise the unclassified service and are to be exempt from all examinations. Members of the fire department are not included in the list. The section further provides:

“(b) The classified service shall comprise all persons in the employe of the state, the several counties, cities and city school districts thereof, not specifically included in the unclassified service, to be designated as the competitive class and the unskilled labor class.

1. The competitive class shall include all positions and employments now existing or hereafter created in the state, the

counties, cities and city school districts thereof, for which it is practicable to determine the merit and fitness of applicants by competitive examinations. Appointments shall be made to, or employment shall be given in, all positions in the competitive class that are not filled by the promotion, reinstatement, transfer or reduction, as provided in this act, and the rules of the commission, by appointment from those certified to the appointing officer in accordance with the provisions of this act."

The procedure for appointment is set out in Section 486-13 General Code, reading in part as follows:

"The head of a department, officer or institution in which a position in the classified service is to be filled shall notify the commission of the fact, and the *commission shall*, except as provided in sections 486-14 and 486-15 of the General Code, *certify* to the appointing officer thereof the names and addresses of the *three candidates* standing highest on the eligible list for the class or grade to which said position belongs. In the event that an eligible list becomes exhausted, through inadvertence or otherwise, and until a new list can be created, or when no eligible list for such position exists, names may be certified from eligible lists most appropriate for the group or class in which the position to be filled is classified. \* \* \*

Appointments to all positions in the classified service, as herein defined, that are not filled by promotion, transfer or reduction, as provided for in this act and the rules of the commission prescribed thereunder, shall be made only from those persons whose names are certified to the appointing officer in accordance with the provisions of this act, and no employment, except as provided in this act, shall be otherwise given in the classified service of this state or any political subdivision thereof. The appointing officer shall notify the commission of such position to be filled and shall fill such position by appointment of one of the three persons certified to him as provided in this act."

(Emphasis added.)

The procedure above set forth, when followed, results in a "regular" as contrasted with a "provisional" or "temporary" appointment.

Section 486-14 General Code, provides for temporary and provisional appointments. As far as it relates to provisional appointments, it reads as follows:

"1. Whenever there are urgent reasons for filling a vacancy in any position in the classified service *and the commission is unable to certify to the appointing officer, upon requisition by*

*the latter, a list of persons eligible for appointment after a competitive examination, the appointing officer may nominate a person to the commission for non-competitive examination, and if such nominee shall be certified by the commission as qualified after such non-competitive examination, he may be appointed provisionally to fill such vacancy until a selection and appointment can be made after competitive examination; but such provisional appointment shall continue in force only until regular appointment can be made from eligible lists prepared by the commission, and such eligible lists shall be prepared within ninety days thereafter."*

(Emphasis added.)

It follows then, that in order to have the status of a "provisional appointee" under the section last quoted, the preliminary condition must exist that "the commission is unable to certify upon requisition \* \* \* a list of persons eligible \* \* \* after competitive examination." Then the following steps must be taken, as laid down by the Supreme Court in *State ex rel. Lynch v. Taylor*, 136 O. S. 417, 420, where the court after quoting from Section 486-14 General Code, said:

"From the foregoing it will be observed that in order to consummate a provisional appointment the following steps are necessary:

- (1) The appointing officer's nomination of a person to the commission for non-competitive examination;
- (2) The commission's certification of such nominee as qualified *after* such non-competitive examination; and
- (3) The provisional appointment of the nominee so certified."

When these steps have been taken the appointee is a "provisional" but not a "regular" appointee. Note the language of the statute, "but such *provisional* appointment shall continue in force *only* until *regular* appointment can be made from eligible lists prepared by the commission".

If, therefore, the phrase "full time regular member of the fire department" is to be defined by reference to the statute regulating the appointment of members of that department, I should feel compelled to hold that provisional appointees are not "regular" appointees and therefore not subject to the provisions of Section 4609 General Code, and hence not entitled to the benefits of the firemen's relief and pension fund. But

on an examination of the statutes governing the creation and administration of that fund I am convinced that the legislature in enacting Section 4609 did not have in mind the definition of "regular" as indicated in Section 486-14 General Code. On the contrary it appears to have adopted or at least suggested a different definition.

The statutes providing for the establishment and maintenance of the firemen's relief and pension fund are embraced in Sections 4600 to 4615 inclusive, of the General Code. Section 4600 makes it mandatory for all municipal corporations having fire departments supported in whole or in part at public expense, and employing two or more "regular members" to establish and maintain a firemen's relief and pension fund. It further provides for a board of trustees for such fund, consisting of two members chosen by the council from its own members; two to be elected by the fire department "from members of its own department" and two other citizens.

Section 4612-6 provides as follows:

"This act shall apply to all municipalities which operate fire departments employing less than two full time regular members, when the council of any such municipality declares the necessity of providing for relief and pensions for members of its fire department. Upon the declaration of such necessity by the council all the provisions of this act shall apply to the municipality for which the council acts.

This act shall be construed as preserving to volunteer, or part time firemen all rights to receive the pension provided for under existing laws relating to the firemen's pension fund."

Section 4600-1 reads as follows:

"The trustees elected from the membership of the fire department shall be *full time regular members* of such department *as distinguished from volunteer members* except in municipalities where there are less than two full time members. In such municipalities volunteer or part time members may be elected to the board of trustees."

(Emphasis added.)

Here, then, is the key to the meaning which the legislature evidently intended to apply to the words "regular member" as used in the statutes governing this fund. Plainly, "regular member" is to include all members

of a fire department other than volunteer members; and even they are entitled to participate under certain specified circumstances. Under this definition it would follow that all members of a city fire department who have been appointed in accordance with the civil service laws, whether they are "provisional" or "regular" under the terms of Section 486-14 General Code, are "regular" members within the meaning of the provisions of Section 4600-1 et seq., General Code relating to the firemen's relief and pension system. The members of the department mentioned in your first question would appear to have been appointed in accordance with the law as "provisional" appointees, and therefore are within the provisions of Section 4609 of the General Code and are subject to the obligations and entitled to the benefits of the pension law.

I have considered your inquiries on the assumption that they related to fire departments in cities. It should be observed that the laws relating to civil service have no application to appointments to positions under the government of villages. However, since the letter of the county auditor refers to "municipalities", I call attention to Section 4389 General Code, which provides:

"In each village having or hereafter establishing a fire department, the head thereof shall be a fire chief, appointed by the mayor with the advice and consent of the council, who shall continue in office until removed therefrom for the causes and under the powers and procedure provided for the removal of officers by sections 4236 to 4267, inclusive, of the General Code. Council may provide for the employment of such firemen as it deems best and fix their compensation, or for the services of volunteer firemen and *such firemen shall be appointed by the mayor with the advice and consent of the council*, and shall continue in office until removed therefrom for the causes and under the powers and procedure provided for the removal of officers by sections 4263 to 4267, inclusive, of the General Code."

(Emphasis added.)

Plainly, members of a village fire department who have been appointed in the manner provided by law are within the provisions of Section 4600 et seq., General Code, and subject to the obligations and entitled to the benefits of the pension law in question.

As to the appointees mentioned in your third question, if we may assume that they were employed in a city department, it would appear that they have been appointed in a manner wholly in disregard of the



civil service laws and can have no standing as "regular" members of the fire department even under the definition adopted by the legislature in Section 4609 General Code, and they are not entitled to participate in the firemen's relief and pension fund. It is my opinion that giving ever so liberal an interpretation to the law in question, it was not the intention of the legislature to extend the benefits of the fund to anyone who was illegally appointed to a position in a fire department.

Therefore, in specific answer to your inquiries it is my opinion:

1. A person who has received a provisional appointment as prescribed by Section 486-14 of the General Code, as a member of the fire department of a city, and is serving as such is a full time regular member of such fire department within the meaning of Section 4609 General Code, and is subject to the obligations and entitled to the benefits of the firemen's relief and pension fund as established pursuant to Section 4600 et seq. of the General Code.

2. One who has been appointed to a position in the fire department of a city without compliance with the provisions of Sections 486-13 and 486-14 of the General Code, and is serving in such department, is not entitled to the benefit of the provisions of the firemen's relief and pension fund established pursuant to Section 4600 et seq. of the General Code.

**Respectfully,**

**THOMAS J. HERBERT**

**Attorney General**