
357

SYLLABUS:

1. A retiree-beneficiary of a police relief and pension fund of one municipality who is employed full time as chief of police of a second municipality is eligible for membership in the police relief and pension fund of the second municipality. Further, such membership is mandatory and the contributions required by Section 741.43, Revised Code, are compulsory.

2. Such an individual will accrue credit in the nature of an inchoate right which may, upon fulfillment of the required conditions, ultimately become a vested right as a beneficiary of the police relief and pension fund of the second municipality.

3. The right of the individual to receive full retirement pension benefits from the police relief and pension fund of the first municipality became vested upon the granting of the retirement pension from that fund and is not affected in any manner by his subsequent employment by a different municipality.

Columbus, Ohio, July 1, 1963

Honorable Roger W. Tracy
Auditor of State
State House
Columbus, Ohio

Dear Sir:

You have requested my opinion on a matter pertaining to police relief and pension funds, as follows:

“(1) When a retiree-beneficiary of the police relief and pension fund of one municipal corporation is em-

Section 741.31, Revised Code, defines "member of the police department" and "member of the fund" for purposes of police relief and pension funds as follows:

"As used in sections 741.31 to 741.54, inclusive, of the Revised Code:

"(A) 'Member of the police department' means any person who received or who receives an original appointment as a policewoman or policeman from a duly established civil service eligible list, or who has been or who is appointed pursuant to section 737.15 or 737.16 of the Revised Code as a full-time regular policeman and is paid solely out of public funds of the employing municipal corporation, or who, immediately prior to September 25, 1947, was contributing two per cent of his annual salary to a police relief and pension fund established pursuant to section 741.32 of the Revised Code, or who was a police matron contributing four per cent of her annual salary to a police relief and pension fund immediately prior to October 1, 1957.

"(B) 'Member of the fund' means any person who is contributing four per cent of his annual salary to the police relief and pension fund established pursuant to section 741.32 of the Revised Code, or who is receiving a pension or disability benefits from such fund as a result of service in the police department."

Section 741.43, Revised Code, provides that the treasurer *shall* deduct from the salary of each *member of the police department* an amount equal to four per cent of his salary for each payroll period and credit the amount so deducted to the municipality's police relief and pension fund. It therefore becomes obvious that the legislature anticipated that each "member of the police department" shall be a "member of the fund," with a possible exception for those for whom an election is provided by Section 741.38, Revised Code, which involves a circumstance not applicable here.

The question then becomes: Is the person appointed as specified in your inquiry a "member of the police department" for purposes of Sections 741.31 to 741.54, inclusive, Revised Code? The definitions of Section 741.31, Revised Code, do not preclude an appointee who has not been required to take a civil service examination from qualification. As stated at 9 Ohio Jurisprudence-2d, Civil Service, Section 81, at page 406, referring to civil service appointments when examinations are impractical:

“* * * although the other sections of the act relating to eligible lists and the certification of names therefrom to the appointing officer provide in terms only for cases in which there has been a competitive examination, it has been held that where appointments are to be made under the provision we are now considering, it is the duty of the commission to select ‘some designated person or persons of high and recognized attainments and the qualities necessary to fill said positions,’ and to certify the same to the appointing authority just as in ordinary cases it would select and certify those who had demonstrated their merit and fitness by attaining the highest standing in a competitive examination.”

Thus it is apparent the definition does not require a competitive examination and does not preclude a person appointed under conditions in which a competitive examination may not be required from being a member of a police department.

A general appraisal of the legislation and decisions relating to this subject reveals a tendency in Ohio of liberal interpretation in such matters; for example, the nullification of the effect of *Mell et al., Trustees, v. State, ex rel. Fritz*, 130 Ohio St., 306, of 1935 by enactment of the “vested rights” statutes; also the repeal of the short-lived provision denying police pension benefits to persons in full-time public service as mentioned in your inquiry.

Another aspect deserves mention. Section 741.46, Revised Code, provides:

“The granting of a pension to any person 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.”

The words “so long as he remains the beneficiary of such fund” in my opinion refer primarily to disability situations and determinations of whether that disability continues. To the extent that it refers to the status of a retiree-beneficiary, I note there is conflict between authorities of various states as to whether a retiree of a public pension fund who re-enters public service remains a beneficiary of that fund. The consensus is that re-employment by the original employer negates continuance of the beneficiary status whereas employment by a different employer does not. The subject

of the effect of re-entry into public employment by a retiree-beneficiary of a public pension fund is discussed extensively at 162 A.L.R., 1475. In Ohio the effect of re-employment by the same employer appears not to have been subjected to judicial determination. However, Ohio joins the majority in the view that re-entry into public employment by employment with a different employer does not negate the continuance of the beneficiary status of a retiree. This is apparent from *State, ex rel., v. Trustees*, 149 Ohio St., 477, as modified in 150 Ohio St., 377. Said case upheld the right of certain retirees to receive the pensions granted them "even though they re-enter public service of the character described in the statutes, which service is not in the departments from which they retired." Therefore, in this instance, it is my opinion that the employment by the City of Oregon does not negate the continuance of the beneficiary status of the retiree from the service of the City of Toledo.

In answer to your questions, it is my opinion that:

1. A retiree-beneficiary of a police relief and pension fund of one municipality who is employed full time as chief of police of a second municipality is eligible for membership in the police relief and pension fund of the second municipality. Further, such membership is mandatory and the contributions required by Section 741.43, Revised Code, are compulsory.

2. Such an individual will accrue credit in the nature of an inchoate right which may, upon fulfillment of the required conditions, ultimately become a vested right as a beneficiary of the police relief and pension fund of the second municipality.

3. The right of the individual to receive full retirement pension benefits from the police relief and pension fund of the first municipality became vested upon the granting of the retirement pension from that fund and is not affected in any manner by his subsequent employment by a different municipality.

Respectfully,

WILLIAM B. SAXBE

Attorney General