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VOLUNTEER FIREMEN RECEIVING THEIR APPOINTMENTS FROM A DULY ESTABLISHED CIVIL SERVICE ELIGIBILITY LIST ARE ENTITLED TO MEMBERSHIP IN FIREMEN'S RELIEF AND PENSION FUND ACCORDING TO 741.01, R. C.— §741.01, R.C., OPINION NO. 1092, OAG FOR 1960.

SYLLABUS:

Members of a fire department of a charter city who are serving as volunteer or part-pay firemen, and who receive their appointment from a duly established civil service eligibility list pursuant to the rules and regulations established by the civil service commission in accordance with the charter of said municipality, are entitled to membership in the firemen's relief and pension fund established pursuant to Section 741.01 *et seq.*, Revised Code, (Opinion No. 1092, Opinions of the Attorney General for 1960, distinguished).

Columbus, Ohio, August 7, 1961

Hon. James A. Rhodes, Auditor of State
State House, Columbus, Ohio

Dear Sir:

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

"A question has been raised as to the applicability of your opinion number 1092, dated January 19, 1960, to a specific fact situation which occurred in a charter city. I enclose, for your reference, (a) one copy of the Charter of the city, as amended to date, (b) copies of two opinions of the city solicitor on the point in question, and (c) copies of various ordinances of the municipality to which the solicitor refers.

"Summarizing the facts in this situation, it appears that while the municipality was a village, a fire department was established. For a number of years, the city has employed both full-time firemen and volunteer firemen. A Firemen's Relief and Pension Fund was established, under Section 4612-4, General Code, by an ordinance dated December 20, 1943. On October 6, 1950, a part-time volunteer fireman was appointed pursuant to the authority then granted to villages in Section 4389, General Code (now R.C. 737.22).

"From and after the date of his appointment, this individual was considered to be a member of the Firemen's Relief and Pension Fund. He contributed to the fund four per cent of all

monies received by him as a volunteer fireman. The municipality was subsequently proclaimed a city by the Secretary of State on September 5, 1951, and officially achieved city status thirty days thereafter, under Section 3498, General Code (now R.C. 703.06).

“At an election held January 16, 1951, the electors adopted a charter which became effective for most purposes on January 1, 1952. Article V, Section 5 of the charter, relative to the duties of the civil service commission, provides in part as follows:

‘* * * Any person who shall have served the City for at least one year next preceding the taking effect of this Charter may be retained in the same or any similar position without examination. Except as herein provided, the Civil Service Commission shall determine the practicability of competitive examinations for any non-elective office or job classification in the service of the city.’

“It is now suggested, in effect, that, under *State, ex rel. Canada v. Phillips*, 168 O.S., 191, and *State, ex rel. Petit v. Wagner*, 170 O.S., 297, a charter municipality may have the authority to provide that a volunteer fireman (such as the individual here in question) who is appointed under R.C. 737.22, is a member of the fire department within the meaning of R.C. 741.01(A); and under R.C. 741.01(B) he is also a member of a pension fund, established pursuant to R.C. 741.02.

“In the instant case, the part-time fireman in question is now deceased. A claim has been filed with the trustees of the pension fund for survivor’s benefits, which are authorized to be paid from such fund under R.C. 741.18.

“Several pertinent arguments in support of an allowance of such a claim are set forth in the opinions of the city solicitor, dated January 30 and February 8, 1961. The latter opinion also poses three questions, with reference to the facts outlined above, which we refer for your consideration and reply as follows:

“1. Under the circumstances outlined above, and discussed in more detail in the papers forwarded herewith, is this charter city required to contribute to the Volunteer Firemen’s Dependents Fund under R. C. 3310.09?

“2. If your answer to the first question is in the affirmative, shall past contributions to the Firemen’s Relief and Pension Fund, made by other part-time firemen, be refunded to them?

“3. Were volunteer firemen, serving the city in October, 1951, in the same position after adoption of the Charter as during the year previous thereto?

“Your opinion in response to these questions will be of

considerable interest to the trustees of firemen's pension funds and other municipal officials through the State. Therefore, your formal opinion is solicited in the matter."

It appears from the copies of the city ordinances attached to your request that the city in question presently has a fire department which consists of a chief, an assistant fire chief, two lieutenants, three Class "A" firemen and twenty firemen. The volunteer fireman whose death gave rise to the instant question apparently was one of the "twenty firemen" of the said city. It also appears that the compensation to be paid to a "fireman" of said city is \$3.00 per month and in addition thereto \$1.00 per hour for relief work and \$3.00 for each fire attended. The twenty firemen of said city come within the classification which is commonly known as volunteer firemen, or perhaps part-pay firemen, but they are certainly not full-time firemen.

Section 741.01, Revised Code, sets forth the pertinent definition to be used in the sections pertaining to the firemen's relief and pension fund and reads as follows :

"As used in sections 741.01 to 741.25, inclusive, of the Revised Code :

"(A) 'Member of the fire department' means any person who receives an original appointment as a fireman from a duly established civil service eligible list, or who is appointed to a position in a fire department pursuant to section 737.22 of the Revised Code, or who, on September 25, 1947, was contributing two per cent of his annual salary to a firemen's relief and pension fund established pursuant to section 741.02 of the Revised Code.

"(B) 'Member of the fund' means any person who is contributing four per cent of his annual salary to the firemen's relief and pension fund established pursuant to section 741.02 of the Revised Code, or who is receiving a pension or disability benefits from such fund as a result of service in the fire department."

Section 741.12, Revised Code, provides that four per cent of the salary of each member of the fire department be deducted and paid into the firemen's relief and pension fund. It follows, therefore, that each "member of the fund" must be a "member of the fire department" within the definition of Section 741.01, *supra*.

Section 741.18, Revised Code, sets forth the benefits which a member of the firemen's relief and pension fund is entitled to receive.

Your first question refers to Section 3310.09, Revised Code. As to this, the provisions of Chapter 3310., Revised Code, are now found in Chapter 126., Revised Code. Said chapter establishes a volunteer firemen's dependents fund and provides for benefits to be paid to the dependents of volunteer firemen. "Volunteer fireman" as used in Chapter 146., Revised Code, is defined in Section 146.01 (A), Revised Code, which reads as follows:

"Sec. 146.01. As used in sections 146.01 to 146.19, inclusive, of the Revised Code:

"(A) 'Volunteer fireman' means a duly appointed fireman on either a non-pay or part-pay basis who is ineligible to be a member of a firemen's relief and pension fund or whose employment as a fireman does not in itself qualify him for membership in the public employees' retirement system. It, includes a volunteer fireman who is a member either of a fire department of a political subdivision or a fire district or of a private volunteer fire company which has elected to participate in the volunteer firemen's dependents fund. It includes firemen drafted, requisitioned, or appointed to serve in an emergency."

It will be noted that if a fireman on part pay is eligible for membership in a firemen's relief and pension fund established pursuant to the provisions of Section 741.01, *et seq*, Revised Code, he is not a "volunteer fireman" within the meaning of that term as used in Chapter 146., Revised Code, and therefore would not be entitled to the benefits described therein. Nor would his employer be amenable to the provisions of said chapter because of his employment.

Although the "twenty firemen" of the fire department of the city in question herein obviously do not receive wages as compensation for their efforts which would differ materially from those received by any other volunteer firemen on a pay status, it may be of some benefit to note the difference in benefits which would be received by such firemen as members of the firemen's relief and pension fund established pursuant to Section 741.02, Revised Code, as opposed to benefits to which they would be entitled as volunteer firemen pursuant to the provisions of Chapter 146., Revised Code. "Members of the fund" of a firemen's relief and pension fund are entitled to benefits pursuant to Section 741.18, Revised Code, which section may be summarized as follows:

A. A pension based on years of service and average salary which cannot exceed 66% of the member's average annual salary during the five years in which his salary was the highest.

B. Disability benefits equal to 66% of his last year's annual salary.

C. Partial disability benefits which cannot be greater than 66% of his annual salary for the highest five years of service.

D. Disability benefits not in excess of 50% of his average monthly salary, or 2% of his average monthly salary for the five years in which his annual salary was highest, whichever is smaller.

E. Retirement allowance calculated by multiplying his average salary times the number of years of service times 1½%.

F. Survivor benefits of \$75 per month to his widow for as long as she lives or until she remarries.

G. Survivor benefits of \$35 per month for each surviving child until he reaches 18 or marries.

H. Survivor benefits to his dependent parents if he has no children and is not married at the time of his death of \$30 per month each, or if only one survives him, \$60 per month.

I. A refund of his accumulated contributions.

J. The provisions of this division do not apply to volunteer or part time firemen.

K. This division increases the benefit to be granted to certain members, which benefits were fixed by rules in force on April 1, 1947 at at least \$1500 a year annually and also increases the benefits to be received by a member, who under Division A, C, or J received benefits prior to October 20, 1959 to \$1500 annually.

The benefits which would be granted under the volunteer firemen's dependents fund are found in Section 146.12, Revised Code, which reads as follows:

"Benefits shall be paid from the volunteer firemen's dependents fund to or on behalf of the following persons:

"(A) To the widow of a volunteer fireman killed while in the discharge of his duties as a volunteer fireman or who dies from exposure or injury received while in the discharge of such duties, a lump sum award of one thousand dollars, and, in addition, the sum of fifty dollars per month so long as she remains his widow;

"(B) To the mother, guardian, or other persons upon whom a child of a volunteer fireman is dependent for chief support, the sum of twelve dollars and fifty cents per month for each dependent child of such volunteer firemen, but not to exceed the total sum of fifty dollars per month. Such payments shall con-

tinue until the dependent child is sixteen years old, unless such child is regularly attending a recognized school of secondary educational level, in which case the payments shall continue until the child is eighteen years old or has completed school, whichever date is earlier.

“(C) To a volunteer fireman, totally and permanently disabled while in the discharge of his duties as a volunteer fireman the sum of fifty dollars per month. No payment shall be made to a volunteer fireman under full salary during the time of his disability.”

A comparison of the benefits granted under each of these systems shows that the survivor benefits to widows and children are granted on almost the same conditions, that disability benefits are granted on a completely different formula, that a pension is non-existent for a volunteer fireman under the provisions of Chapter 146., Revised Code, and other obvious distinctions.

It should also be noted that the funds used to pay benefits under Chapter 146., Revised Code, are received by the volunteer firemen's dependents fund by the assessment of a premium provided for in Section 146.07, Revised Code, and additional premiums provided for in Section 146.09, Revised Code, upon each political subdivision or fire district or private volunteer fire company which has volunteer firemen as defined in Section 146.01, *supra*. This fund is self sustaining and spreads the cost of benefits throughout the state of Ohio regardless of the subdivision from which a benefit must be paid. The benefits to be paid by the firemen's relief and pension fund established pursuant to Section 741.02, Revised Code, however, are paid from funds received by salary deductions from members thereof, a tax levy on real and personal property of the municipality in which the fund is located, and from funds paid to the relief and pension fund by the state treasurer from state funds pursuant to the provisions of Section 741.54, Revised Code.

From this background authority it appears that the legislature has recognized the distinction between volunteer firemen and firemen who act in that capacity as the principal means of their livelihood. The legislature has gone to great lengths to establish two separate funds with distinctly different benefits payable in different fashions. Therefore, as to Opinion No. 1092, Opinions of the Attorney General for 1960, I am of the opinion that the syllabus therein properly states the law of Ohio as applied to the facts which created the question.

The facts in the instant case are basically different than those set forth in Opinion No. 1092, *supra*, in that the city involved herein has adopted a charter which establishes a civil service commission which has the authority to determine the qualifications of city employees, including fireman and volunteer firemen. Apparently, the persons who are acting as volunteer firemen for said city, and who are designated as firemen, were employed according to the standards established by said civil service commission. The Supreme Court of Ohio by its ruling in the case of *State, ex rel. Canada v. Phillips*, 168 Ohio St., 191, has determined that the provisions of a city charter relating to the appointment of persons to positions in the classified service of a police department take precedence over the state's statutes on the same subject. It would reasonably follow that such provisions would also govern in connection with the appointment of firemen.

Since the city in question has adopted a charter which establishes a civil service commission and grants to that commission power to "provide by rule for the ascertainment of merit and fitness as the basis for appointment and promotion in the service of the city," Article V, Sections 4 and 5 of the city charter, and since the legislative body of said city has established a fire department which consists in part of "twenty firemen" who are apparently selected by said civil service commission pursuant to its rules, I am of the opinion that, based upon the *Canada case, supra*, such firemen are "appointed as firemen from a duly established civil service eligibility list" as provided in Section 741.01 (A), Revised Code, and are, therefore, entitled to membership in the firemen's relief and pension fund established pursuant to Section 741.01, *et seq.*, Revised Code.

In arriving at the above conclusion, I am not unmindful of the fact that said conclusion causes individuals throughout the state who are in fact acting as volunteer firemen to have different rights based upon the action of the municipality in adopting or failing to adopt a charter providing for a civil service commission. The Supreme Court of Ohio, however, has recognized just such a distinction in the case of *State, ex rel. Petit, et al v. Wagner, et al*, 170 Ohio St., 297, wherein the syllabus reads as follows:

"A noncharter municipality is without authority under the provisions of Section 3, Article XVIII, Constitution, to prescribe by ordinance a method for the selection of a chief of police which is at variance with the provisions of Section 143.34, Revised Code."

Furthermore, your attention is called to the first and second paragraphs of the "syllabus by the court" in the case of *Thatcher, et v. Hogan, et*, 69 Ohio Law Abs., 35, which read as follows :

"1. The status of firemen in a fire department is determined by official acts of a municipal corporation and civil service laws and rules and not by judicial interpretation of the word 'fireman' or of the duties and hazards of employment.

"2. Employees of the Division of Fire, or a bureau of such division, are not ipso facto firemen so as to become eligible for a fireman's pension unless first qualified and appointed as firemen as required by law."

Since the answer to your first question is in the negative, your second question need not be answered.

As to the third question raised in your request, it is apparent from what I have said previously herein and from Opinion No. 1092, Opinions of the Attorney General for 1960, that prior to the establishment of the charter in question, a volunteer fireman of a city who was not selected from an established civil service eligibility list was not eligible for membership in a firemen's relief and pension fund. As you have pointed out in your letter, however, such persons were entitled to retain their position without the necessity of taking a civil service examination, Article V, Section 5, of the charter of the city in question. The purpose of this provision and similar so-called grandfather clauses, is to provide for those employees previously employed by the city the benefits and protection afforded to other employees who hold civil service status because of competitive examinations. *Hornberger v. Fischer* 95 Ohio St., 148 and *State, ex rel. Reilly v. Hamrock, et al*, 142 Ohio St., 290. Therefore, I am of the opinion that such employees should, subsequent to the adoption of said charter, be considered as being appointed from a duly established civil service eligibility list and be entitled to membership in the firemen's relief and pension fund.

In accordance with the above, it is my opinion and you are advised that members of a fire department of a charter city who are serving as volunteer or part-pay firemen, and who receive their appointment from a duly established civil service eligibility list pursuant to the rules and regulations established by the civil service commission in accordance with the charter of said municipality, are entitled to membership in the fire-

men's relief and pension fund established pursuant to Section 741.01, *et seq.*, Revised Code, (Opinion No. 1092, Opinions of the Attorney General for 1960, distinguished).

Respectfully,

MARK McELROY
Attorney General