

OPINION NO. 71-023

Syllabus:

1. A volunteer fireman who retired prior to September 25, 1947, could receive a pension if he had contributed the statutory percentage of his annual compensation to the local pension fund.
2. The trustees of the fund had discretion to increase the amount of the pension up to August 26, 1949.
3. If the volunteer retired between September 25, 1947 and August 26, 1949, he is entitled to a pension if he had contributed the statutory percentage of his compensation and it could have been increased prior to August 26, 1949.
4. If he retired between August 26, 1949, and September 16, 1957, he is entitled to a pension if he had contributed the statutory percentage but the amount could no longer be increased by the trustees.
5. The same is true if he retired after September 16, 1957.
6. If a volunteer belonged to a local pension plan and retired prior to August 10, 1939, he would be entitled to a pension whether he contributed to the fund or not, and the amount could be increased up to August 26, 1949 (answer to questions 6 and 7 combined).
7. If the volunteer joined the department after September 25, 1947, he could become a "member of the fund" by contributing the statutory percentage of his annual compensation.
8. A municipality could levy a tax under Section 741.09, Revised Code, up until January 1, 1967, only for the purpose of providing funds for benefits and pensions for volunteers who were "members of the fund".
9. A municipality may not establish its own volunteer firemen's pension system.
10. A municipality may not provide funds for a pension plan to be administered by a local volunteer fire company.
11. The fact that a municipality operates under a charter would not change any of the above answers.

To: Joseph A. Ferguson, Auditor of State, Columbus, Ohio
By: William J. Brown, Attorney General, May 26, 1971

You have requested my opinion as to the status attained by volunteer firemen who belonged to local firemen's relief and pension funds established prior to September 25, 1947. The specific questions posed by your letter are as follows:

- "1. May a volunteer fireman belonging on September 25, 1947 to a local firemen's pension

plan established prior to September 25, 1947, receive a pension benefit from the municipality when he retires prior to September 25, 1947, whether or not he has contributed a portion of his compensation into the fund?

"2. If your answer to the first question is in the affirmative, may the pension board trustees increase at any time after September 25, 1947, the benefit due a pensioner?

"3. Would your answers to questions one and two be any different if the volunteer firemen retired after September 25, 1947 but prior to August 26, 1949?

"4. Would your answers to one and two be any different if retirement took place after August 26, 1949 but prior to September 16, 1957?

"5. Would your answers to one and two be any different if retirement took place after September 16, 1957?

"6. Would the answers to questions one through five be any different where the local pension plan was established prior to August 10, 1939?

"7. Would the answers to questions one through six change if the volunteer fireman belonged to the fund prior to August 10, 1939?

"8. Would your answers to one through six change where a volunteer fireman came into the fund after September 25, 1947?

"9. May a municipality levy a tax under Section 741.09 R.C. to pay for pension benefits accruing in situations considered under questions one through eight?

"10. May a municipality establish a pension plan covering only volunteer firemen who may or may not belong to a Volunteer Firemen's Dependents Fund?

"11. May a municipality under ordinance contract with a local volunteer fire company to provide funds in the form of a lump sum and set annual payments for a retirement pension plan to be administered by the company?

"12. Would the fact that a municipality operates under a charter change any of your answers to questions one through eleven?"

As originally enacted, the local firemen's pension funds were derived from municipal levies, from certain fines, penalties and license fees, from donations, and from such contributions as the individual members of fire departments, whether full-time or volunteer, desired to have deducted from their monthly salaries. Sections 4605, 4607, 4608, 4609, General Code; Opinion No. 2645, Opinions of the Attorney General for 1948, page 50. On August 10, 1939, the law was changed to make

mandatory a two percent deduction thereafter from full-time firemen's salaries. Those who were already members of a department on that date could exempt themselves from this requirement and waive the benefits of the pension fund. Opinion No. 2645, supra, page 50. On the other hand, volunteer members, although not required to do so, could obtain the benefits of the fund by contributing two percent of their salary. Opinion No. 2645, supra, pages 50-53. On September 25, 1947, Section 4609, supra, was again amended to raise the salary deduction to four percent (Opinion No. 2645, supra, page 50); and when on November 5, 1965, the local funds were replaced by the statewide Police and Firemen's Disability and Pension Fund, the mandatory salary deduction was raised in two steps, first to six, and then to seven, percent. Section 742.31, Revised Code.

For a long time the pertinent statutes made no distinction between a full-time regular member of a fire department, and a volunteer member in respect of their pension rights. Opinion No. 2645, supra, page 50. The amendments effective September 25, 1947, already noted above, for the first time introduced a definition of a member of the firemen's pension fund in the following terms (Section 4615-1, General Code):

"The following words and phrases as used in sections 4600 through 4615-1 of the General Code, both inclusive, shall have the following meanings:

"'Member of the fire department' shall mean 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 4389 of the General Code, or who, on the effective date of this act, is contributing two per cent of his annual salary to a firemen's relief and pension fund established pursuant to section 4600 of the General Code.

"'Member of the fund' shall mean any person who is contributing four per cent of his annual salary to the firemen's relief and pension fund established pursuant to section 4600 of the General Code, or who is receiving a pension or disability benefits from said fund as a result of service in the fire department."

Opinion No. 2645, supra, pages 51-55, and Opinion No. 4609, Opinions of the Attorney General for 1954, pages 616-617, both interpreted this amendment to mean that even a volunteer fireman, who was contributing the statutory percentage of his salary to the fund on the effective date of the act, was just as much a "member of the fund" as was a full-time fireman. On August 26, 1949, in the interim between these two opinions, there had become effective a new enactment of the General Assembly, prescribing in nine numbered paragraphs detailed rules and regulations for the management of the funds and for the disbursement of benefits and pensions. Section 4612-4, General Code, now Section 741.18, Revised Code. The ninth paragraph of this statute had the effect of granting every retired fireman, who was receiving a pension on the effective date of the act, a minimum pension of at least \$1200. But the paragraph concluded:

"* * *The words 'retired fireman' as used in this paragraph shall not include any person whose

retirement resulted or shall result from service as a volunteer or part-time fireman. Any person retiring as a result of such service is not entitled to any right granted under the provisions of this paragraph."

It is to be noted that this exclusion of volunteers referred only to the \$1200 minimum guaranteed by paragraph nine. However, Opinion No. 1092, Opinions of the Attorney General for 1960, reading the exclusion broadly, held that volunteer firemen were ineligible to share in firemen's relief and pension funds, and that they could obtain relief only under the Volunteer Firemen's Dependents Fund enacted on September 16, 1957. Chapter 3310, Revised Code, now Chapter 146, Revised Code. This opinion was, in effect, limited to its own particular facts in two subsequent opinions which held that volunteers were eligible as "members of the fund" under certain circumstances not considered in Opinion No. 1092, *supra*. Opinion No. 2436, Opinions of the Attorney General for 1961; Opinion No. 3294, Opinions of the Attorney General for 1962.

Throughout the various alterations of the statutory scheme governing firemen's pensions, the General Assembly has always been careful to preserve the rights which have accrued to volunteers under prior acts. Thus Section 4600-1, General Code, as originally enacted, provided:

* * * * * * * * *

"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."

Similar language appeared in Section 4612-6, General Code, effective August 10, 1939, and in Section 741.21, Revised Code. Furthermore, Section 4613, General Code, as originally enacted, provided:

"All persons drawing pensions or entitled to them from existing fireman's pension fund shall be and remain beneficiaries in pension funds credited under this chapter in the same municipality where they are beneficiaries in such existing funds, and shall receive such amounts and be subject to the rules and regulations adopted by the board of trustees."

In 1935 the Supreme Court held that a pension was a gratuity, not a vested right, and that the trustees of a fund had broad discretion and could either increase or decrease the amounts of a pension so long as they did not act arbitrarily. Mell v. State, 130 Ohio St. 306. The power of the trustees to decrease the amount disappeared shortly thereafter with the enactment of a statute making such pensions vested rights. Section 4612-1, General Code, provides:

"The granting of a pension to any person hereafter pursuant to the rules adopted by the trustees shall operate to vest a right in such person, so long as he shall remain a beneficiary of such pension fund, to receive such pension at the rate so fixed at the time of granting pension."

For similar provisions protecting existing pension rights, see Section 4612-4, paragraph 9, General Code; Sections 741.18, 741.22, 742.01 (E), 742.37 (A) and 742.46, Revised Code. The discretionary power of the trustees to increase the amount of a pension, referred to in the Mell case, supra, has also been practically abolished by the General Assembly. Section 4612-4, General Code, now Sections 741.18 and 742.37, Revised Code; Opinion No. 3246, Opinions of the Attorney General for 1953. But cf. Section 4612-5, General Code, and Section 742.37 (C), Revised Code.

In the light of the foregoing, I submit the following answers to your specific questions:

1. If a volunteer fireman belonged to a local pension plan and retired prior to August 10, 1939, he is entitled to receive a pension even if he did not contribute a portion of his compensation to the fund, since prior to that date contributions by the members were on a purely voluntary basis. If, however, he remained in active service after that date, or if he did not join the department until after that date, he was required to contribute two percent of his salary in order to gain the benefits of the fund. I conclude, therefore, that those volunteer firemen who retired between August 10, 1939, and September 25, 1947, were entitled to receive a pension only if they had been contributing two percent of their annual compensation.

2. The discretionary authority of the trustees to increase the amount of a pension, noted by the Supreme Court in 1935 in Mell v. State, supra, was abolished by the enactment of Section 4612-4, General Code, which became effective on August 26, 1949. Consequently, after September 25, 1947, the trustees could only increase the amount of a pension until August 26, 1949.

3. Section 4615-1, General Code, which became effective on September 25, 1947, defined a "member of the fund" as "any person who is contributing four per cent of his annual salary to the * * * fund." As noted above, Opinions of the Attorney General rendered in 1948 and 1954 interpreted this definition to include volunteer firemen, even though their actual four percent contributions might be minimal in total amount. Consequently, a volunteer who retired between September 25, 1947, and August 26, 1949, and who had been contributing the statutory amount, was entitled to the benefits of the fund. And, as was stated in answer to the previous question, the trustees had discretion to increase the amount of his pension until August 26, 1949.

4. August 26, 1949 was the effective date of Section 4612-4, General Code (now Section 741.18, Revised Code), in which the General Assembly prescribed detailed rules and regulations for the management of pension funds and the disbursements of pensions and benefits. The ninth paragraph of this section guaranteed to previously retired firemen a pension of at least \$1200, but retired volunteer firemen were expressly excluded. Although Opinion No. 1092, Opinions of the Attorney General for 1960, read this paragraph as rendering volunteer firemen ineligible to become "members of the fund," subsequent opinions in 1961 and 1962 held that volunteers could be "members of the fund" and limited the earlier opinion to its own particular facts. Consequently, I conclude that any volunteer fireman who had been contributing four percent of his annual salary to the fund, prior to retirement at some time between August 26, 1949,

and September 16, 1957, is a "member of the fund" and is entitled to share in its benefits, even though not guaranteed an annual pension of \$1200 because of the comparatively minimal amount of his own contributions. After August 26, 1949, the trustees had, of course, no discretion to increase the amount of such volunteer's pension.

5. On September 16, 1957, Chapter 3310, Revised Code, which established the Volunteer Firemen's Dependents Fund, became effective. The purpose of this fund was to provide relief for those volunteers who were ineligible to become "members of the fund" of the Firemen's Pension Fund. This is clearly apparent from the language of Section 146.01, Revised Code, which replaced Section 3310.01, Revised Code, on January 10, 1961. That section provides in pertinent part:

* * * * *

"(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* * *."

As noted above, volunteer firemen who had been contributing the statutory amount were eligible "members of the fund" under the Firemen's Pension Act and had no need for relief under the new Dependents Fund. They were, therefore, entitled to pensions if they retired after September 16, 1957.

6-7. As already noted in the answer to your first specific question, a volunteer fireman who belonged to a local pension plan in existence prior to August 10, 1939, and who had retired prior to that date, would be entitled to a pension even though he had made no contribution to the fund. His right to such pension was, of course, preserved under Sections 4600-1 and 4613, General Code, and the trustees had discretion to increase the amount until August 26, 1949. Mell v. State, supra; Section 4612-4, General Code, now Sections 741.18 and 742.37, supra. After August 10, 1939, however, he could not remain a "member of the fund," entitled to a pension on retirement, unless he contributed the statutory percentage of his annual compensation.

8. The answer here has already been foreshadowed in the response to your third specific question. Where a volunteer fireman joined the department after September 25, 1947, he could become a "member of the fund" by contributing the statutory percentage of his annual compensation. If he did so he was entitled to a pension on retirement. Opinion No. 2645, Opinions of the Attorney General for 1948; Opinion No. 4609, Opinions of the Attorney General for 1954; Opinion No. 2436, Opinions of the Attorney General for 1961; Opinion No. 3294, Opinions of the Attorney General for 1962.

Up to this point, I have dealt largely with the status of those volunteer firemen who belonged to local pension funds established prior to September 25, 1947, and who maintained their status as "members of the fund" by contribution of the required statutory percentage. I assume, however, from the second paragraph of your letter, that you are most concerned with the status of those volunteers who did not contribute, and that that concern dictated the last four questions you have posed.

9. It is obvious that municipalities could levy a tax under Section 741.09, Revised Code, to pay for pension benefits of those volunteer firemen entitled to them as "members of the fund." Prior to January 1, 1967, the pension fund was financed by such levies, by certain fines, penalties and fees (Section 741.10, Revised Code), by donations (Section 741.11, Revised Code), and by the statutory deduction from the salaries of the members (Section 741.12, Revised Code). However, these sections were designed for the benefit of those firemen who had attained the status of "members of the fund," and I can find no authority by which a municipality could levy a further tax under Section 741.09, Revised Code, for the benefit of volunteers who had not qualified as "members of the fund" by contributing the statutory percentage of their annual compensation. Section 741.21, Revised Code, permits certain small fire departments, composed largely of volunteers, to gain the benefits of the fund, but it does not excuse the volunteers from the statutory requirement of becoming "members of the fund" in order to become eligible for its benefits. Furthermore, both Sections 741.09 and 741.21, supra, appear to have become obsolete on January 1, 1967, when the local funds were abolished in favor of the state-wide Police and Firemen's Disability and Pension Fund (Section 742.26, Revised Code), which is now financed by the statutory salary deductions (Sections 742.31 and 742.32, Revised Code), by a contribution from the general fund of the municipality (Section 742.34, Revised Code), and by a contribution from the state itself (Section 742.36, Revised Code).

10-12. In view of the foregoing, I conclude that a municipality may not establish its own pension plan for volunteer firemen, that it may not provide funds for a pension plan to be administered by a local volunteer fire company, and that the fact that a municipality operates under a charter would not alter any of the answers already given. Where the state has pre-empted the field, municipalities may not enact their own pension plans. Cincinnati v. Gamble, 138 Ohio St. 220. In commenting on this decision, Opinion No. 4609, Opinions of the Attorney General for 1954, at page 615, stated:

"* * *[T]he 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."

It is true that some of the broad language in the Gamble case, supra, was overruled in State, ex rel. Canada v. Phillips, 168 Ohio St. 191, 201, in which the municipality was held to have authority to appoint a particular police officer in a manner somewhat at variance with the state statute, so long as the municipality's act was not at variance with the constitution. However, the Phillips decision, supra, did not overrule the actual decision in Gamble, supra, apparently because in pension matters the state has pre-empted the field. It is clear that that is the

case now since the local pension boards have now been abolished and replaced by the state-wide board.

In specific answer to your questions, it is my opinion and you are hereby advised that:

1. A volunteer fireman who retired prior to September 25, 1947, could receive a pension if he had contributed the statutory percentage of his annual compensation to the local pension fund.

2. The trustees of the fund had discretion to increase the amount of the pension up to August 26, 1949.

3. If the volunteer retired between September 25, 1947 and August 26, 1949, he is entitled to a pension if he had contributed the statutory percentage of his compensation and it could have been increased prior to August 26, 1949.

4. If he retired between August 26, 1949, and September 16, 1957, he is entitled to a pension if he had contributed the statutory percentage but the amount could no longer be increased by the trustees.

5. The same is true if he retired after September 16, 1957.

6. If a volunteer belonged to a local pension plan and retired prior to August 10, 1939, he would be entitled to a pension whether he contributed to the fund or not, and the amount could be increased up to August 26, 1949 (answer to questions 6 and 7 combined).

7. If the volunteer joined the department after September 25, 1947, he could become a "member of the fund" by contributing the statutory percentage of his annual compensation.

8. A municipality could levy a tax under Section 741.09, Revised Code, up until January 1, 1967, only for the purpose of providing funds for benefits and pensions for volunteers who were "members of the fund."

9. A municipality may not establish its own volunteer firemen's pension system.

10. A municipality may not provide funds for a pension plan to be administered by a local volunteer fire company.

11. The fact that a municipality operates under a charter would not change any of the above answers.