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## RETIREMENT SYSTEM, PUBLIC EMPLOYEES:

1. MEMBERS CEASE TO BE MEMBERS WHEN THEY COME WITHIN PROVISIONS OF POLICE RELIEF AND PENSION FUND OR FIREMEN'S RELIEF AND PENSION FUND—SECTION 486-33c G. C.
2. HOUSE BILL 195, 97 GENERAL ASSEMBLY—TOWNSHIP ESTABLISHED UNDER SECTION 4615-2 G. C.—TOWNSHIP FIREMEN'S PENSION FUND—FULL TIME REGULAR FIREMEN EMPLOYED APRIL 1, 1947—STATUS, CEASE TO BE MEMBER OF PUBLIC EMPLOYEES RETIREMENT SYSTEM—NO OTHER PERSONS UNDER TERMS OF ACT CEASE TO BE MEMBERS OF SYSTEM.
3. MEMBER THROUGH CHANGE IN LAW WHO IS BROUGHT WITHIN PROVISIONS OF FIREMEN'S RELIEF AND PENSION FUND—ENTITLED TO REFUND OF ACCUMULATED CONTRIBUTIONS TO SYSTEM.
4. GOVERNMENTAL UNIT NOT ENTITLED TO REFUND OF CONTRIBUTIONS MADE TO SYSTEM WHEN MEMBER BROUGHT WITHIN PROVISIONS OF FIREMEN'S RELIEF AND PENSION FUND.
5. FULL TIME REGULAR POLICEMEN OR FIREMEN—COME WITHIN PROVISIONS OF POLICE AND FIREMEN'S RELIEF AND PENSION FUNDS—SECTION 4600 ET SEQ., G. C.

## SYLLABUS:

1. Under the provisions of Section 486-33c, General Code, employes who are members of the public employes retirement system cease to be members of that system when they come within the provisions of a police relief and pension fund or a firemen's relief and pension fund.

2. Under the provisions of House Bill 195 of the 97th General Assembly, upon the establishment by a township under the provisions of Section 4615-2, General Code, of a township firemen's pension fund, a person who on April 1, 1947, was employed by such township as a full time regular fireman, or who, being over twenty-one and under thirty years of age is appointed as such fireman after April 1, 1947, will become subject to the provisions of such fund and will cease to be a member of the public employes retirement system. No other persons will under the terms of said act cease to be members of said public employes retirement system.

3. A member of the public employes retirement system who is by reason of a change in the law brought within the provisions of a firemen's relief and pension fund, is entitled to have a refund from the public employes retirement system of his accumulated contributions to such system.

4. When a member of the public employes retirement system is, by reason of a change in the law, brought within the provisions of a firemen's relief and pension fund, the governmental unit by which he has been employed is not entitled to a refund of the contributions which it has made to said retirement system on account of such employe.

5. Under the provisions of Section 4600 et seq., General Code, relating to police and firemen's relief and pension funds, only full time regular policemen or firemen come within the provisions of either of such funds.

Columbus, Ohio, October 23, 1947

Mr. Fred L. Schneider, Secretary, Public Employes Retirement System  
Columbus, Ohio

Dear Sir:

I have before me your request for my opinion, reading as follows:

"A number of questions involving this office have been raised concerning House Bill 195, which we understand became effective September 25, 1947. We therefore ask for your opinion on the following questions:

1. Do firemen, policemen and marshals of municipalities and townships employing two or more of said firemen, policemen or marshals become ineligible for continued membership in the Public Employes Retirement System upon the effective date that House Bill 195 becomes law?

2. In the event question number one is held in the affirmative, what disposition is to be made of the funds now on deposit

for these various firemen, policemen and marshals? That is, are the funds to be transferred to the credit of the newly created pension system, or are the funds to be refunded directly to the individual firemen, policemen or marshals.

3. Are the various governmental units employing these firemen, policemen and marshals entitled to a refund of any portion of the payments that these governmental units have paid into the Employers' Accumulation Fund in the past?

4. What is the status of an individual who receives the major portion of his remuneration from a municipality or township for service other than as a fireman, policeman or marshal but who is employed as a fireman, policeman or marshal for a few hours in the evening?"

Section 486-33c, General Code, sets forth a definite limitation as to the public employes who are and those who are not included within the scope of the public employes retirement system. That section reads as follows:

"The term 'public employes' 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 provisions of law. *No employe except an employe who comes within the provisions of a police relief fund or 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 three thousand dollars per annum or is receiving a disability allowance from such other retirement system." (Emphasis added.)

The language of this section, particularly the portion emphasized, seems to amount to a positive exclusion from membership of all employes who come within the provisions of the police relief fund or the firemen's pension fund. It will be noted in this connection that the words "police relief fund" and "firemen's pension fund" do not exactly describe the "police relief and pension fund" and "firemen's relief and pension fund," which are the subject of the provisions of House Bill No. 195 to which you have referred. However, since the names used in Section 486-33c are those which formerly belonged to those funds I have no hesitancy

in assuming that the reference intended is to the funds as they are now entitled.

The effect of the amendments in House Bill No. 195 so far as fire departments are concerned and so far as relates to your inquiry, appears to be limited principally to the introduction of new provisions requiring each township which maintains a fire department supported in whole or in part at public expense and which employs two or more full time regular firemen, to establish and maintain a "township firemen's pension fund." As to municipalities the new law requires, as did the old, that all municipal corporations having that number of full time regular members of a fire department shall establish and maintain such fund. The provision as to townships is found in Section 4615-2, General Code, and reads as follows:

"Townships of this state which maintain a fire department supported in whole or in part at public expense and which employ two or more full time regular firemen shall establish and maintain a township firemen's relief and pension fund. \* \* \*"

As to police departments the law as embraced in Section 4616 et seq., General Code, formerly made it optional for a municipal corporation to establish a police relief and pension fund. The important change effected by the new law makes the establishment of such fund compulsory in every municipal corporation employing two or more full time regular members of the police department.

It becomes necessary, therefore, to determine what municipal or township employes are by the terms of these new enactments brought within the scope of either of these pension systems. We may note that as to each system provision is made for a deduction from the salary of each member of the fire department and of the police department of a certain percentage which is credited to the fund of which he is a member. Typical of these provisions is Section 4609, General Code, which reads as follows:

"In each municipal corporation, in which there is or hereafter may be established a firemen's relief and pension fund, the treasurer of the municipal corporation shall deduct from the salary of *each member of the fire department* an amount equal to four per cent of his salary for each payroll period. The sums so deducted shall be credited to the firemen's relief and pension fund of the municipal corporation." (Emphasis added.)

Prior to the amendment of this section, it contemplated a contribution by each member of two per cent of his salary. A like provision in substantially identical language is found in Section 4625, General Code, as to "each member of the police department," there being also a change from two per cent in the old law, to four per cent in the new. A similar deduction of four per cent of the salary of a member of a township fire department is found in Section 4615-7, General Code.

In Section 4615-1, General Code, being a new section contained in the act in question, we find the following definition of "member of the fire department" and "member of the fund":

"'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." (Emphasis added.)

In Section 4631-3, General Code, we find similar definitions of "member of the police department" and "member of the fund." These provisions are as follows:

"1. 'Member of the police department' shall mean any person who *receives an original appointment* as a policewoman, policeman or police matron from a duly established civil service eligible list or who *is appointed* to a position in a police department pursuant to Section 4384 or 4384-1 of the General Code or who, on the effective date of this act, is contributing two per cent of his annual salary to a police relief and pension fund established pursuant to the provisions of Section 4616 of the General Code.

2. 'Member of the fund' shall mean any person who is contributing four per cent of his annual salary to the police relief and pension fund or who is receiving a pension or disability benefits from a police relief and pension fund, established pursuant to the provisions of Section 4616 of the General Code, as a result of service in the police department." (Emphasis added.)

A somewhat analogous provision relative to the newly created township firemen's relief and pension fund is found in Section 4615-13, General Code. But note a sharp contrast between this and the definitions above quoted as to the two other funds. Section 4615-13 provides in part:

“‘Member of the fire department’ shall mean any person who, on April 1, 1947, *was employed* by a township as a full time regular fireman in a township fire department established pursuant to Sections 3298-54 et seq., of the General Code and ‘member of the fire department’ also shall mean any person over twenty-one and under thirty years of age who, after April 1, 1947, *is employed* by a township as a full time regular fireman in a township fire department.

‘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 the provisions of Section 4615-2 of the General Code.” (Emphasis added.)

In Sections 4615-1 and 4631-3 *supra*, the words “receives” and “is appointed” cannot be given any but a prospective meaning and therefore cannot include persons who have been employed in a fire or police department under a past appointment. This conclusion is strengthened by the second phrase which declares that “member of the fire department” (police department) shall also include one who “on the effective date of this act” was contributing two per cent.

In direct contrast, Section 4615-13, *supra*, provides as to townships that “member of the fire department” shall mean any person who on April 1, 1947 “was employed” etc., followed by the provision that it shall also include any person within certain age limits who after April 1, 1947 “is employed.” The words “is employed” used here are certainly prospective in their meaning, just as are the same words used in the other quoted sections.

Accordingly, I feel impelled to the conclusion that the General Assembly, in enacting these changes and this new legislation, intended that in municipalities where fire and police pension systems were already either compulsory or optional, the members of those forces who were not contributing to a pension fund should be excluded from the system when organized pursuant to the new law and that the new law should apply only to persons appointed after it became effective; furthermore it was

the intention that as to the township firemen's relief and pension system, which is entirely new, firemen already in service were to be included.

Therefore, since these former appointees of a municipality who were non-contributors are not to be regarded as members of the fire or police department for the purpose of the act, they do not become contributors to the fund and consequently do not become "members of the fund" within the definitions quoted. Accordingly they continue to be members of the public employes retirement system, contributing to its funds and entitled to its benefits.

To be specific, the only persons who by the terms of the act in question cease to be members of the public employes retirement system are those who are employed as members of the fire department of a township which employs two or more full time regular firemen, and is therefore required by the law to establish a township firemen's relief and pension system.

Relative to your second question, as to the disposition of funds now on deposit for these various firemen, policemen and marshals who have heretofore contributed to the retirement system, I call your attention to an opinion of my immediate predecessor found in 1939 Opinions of the Attorney General, page 1297, the syllabus of which is as follows:

"1. Members of the public employes retirement system who become entitled to participate in a firemen's relief and pension fund established pursuant to the mandatory provisions of Section 4600 and related sections of the General Code are, by the terms of Section 486-33c, excepted from the provisions of the public employes retirement act and are not eligible for membership in the public employes retirement system.

2. When a member of the public employes retirement system becomes eligible to participate in the benefits of a firemen's relief and pension fund established pursuant to the mandatory provisions of Section 4600 and related sections of the General Code, it is the duty of the retirement board to refund the accumulated contributions of such member, which should be refunded when he comes within the provisions of the municipal firemen's relief and pension system."

It was stated in the course of that opinion that there is no express provision in the statutes covering the situation or authorizing or requiring the retirement board to refund to firemen who have been brought

into a firemen's relief and pension system by a change in the law, the contributions which they have made to the retirement system, but I agree with the then Attorney General that the law implies an obligation on the part of the board to refund such contributions to the member who has made them, when by a change in the law itself he is excluded from the retirement system and is compelled to become a member of the firemen's relief and pension system.

I can find no authority in the law authorizing a return to a governmental unit of contributions which it has made to the public employes retirement system on account of employes who subsequently become members of a police or firemen's relief and pension system. Both the retirement system and the pension system are public agencies set up by the law and there is not the same principle of natural justice calling for return of funds contributed by the public to one or the other that exists in the case of contributions which an employe was compelled by law to make. If the General Assembly had desired to require such adjustment as to public funds it could easily have so provided.

Answering your fourth question as to the status of a person who receives the major portion of his remuneration from a municipality or township for service other than as a fireman, policeman or marshal, but who is employed as a fireman, policeman or marshal for a few hours in the evening, I call your attention to the statutes above quoted containing definition of "member of the fire department," etc. In each case only a person who has a "full time regular" employment is included in the definition. This would seem to exclude persons employed in either a fire department or police department for part time as suggested in your question, and they would therefore remain members of the public employes retirement system.

Specifically answering your questions it is my opinion :

1. Under the provisions of Section 486-33c, General Code, employes who are members of the public employes retirement system cease to be members of that system when they come within the provisions of a police relief and pension fund or a firemen's relief and pension fund.

2. Under the provisions of House Bill 195 of the 97th General Assembly, upon the establishment by a township under the provisions of Section 4615-2, General Code, of a township firemen's pension fund, a



person who on April 1, 1947 was employed by such township as a full time regular fireman, or who, being over twenty-one and under thirty years of age is appointed as such fireman after April 1, 1947, will become subject to the provisions of such fund and will cease to be a member of the public employes retirement system. No other persons will under the terms of said act cease to be members of said public employes retirement system.

3. A member of the public employes retirement system who is by reason of a change in the law brought within the provisions of a firemen's relief and pension fund, is entitled to have a refund from the public employes retirement system of his accumulated contributions to such system.

4. When a member of the public employes retirement system is, by reason of a change in the law brought within the provisions of a firemen's relief and pension fund, the governmental unit by which he has been employed is not entitled to a refund of the contributions which it has made to said retirement system on account of such employe.

5. Under the provisions of Section 4600 et seq., General Code, relating to police and firemen's relief and pension funds, only full time regular policemen or firemen come within the provisions of either of such funds.

Respectfully,

HUGH S. JENKINS,  
Attorney General.