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ERRONEOUS PAYMENT INTO THE PUBLIC EMPLOYEES RETIREMENT FUND OR THE FIREMEN'S RELIEF AND PENSION FUND—OPINION 1737, OAG, 1960 OPINION 2327, OAG, 1947, (DISTINGUISHED) OPINION 1092, OAG, 1960, §§741.01, 145.02, 145.51, 145.04, R.C.

SYLLABUS:

1. Volunteer firemen who were, on September 25, 1947 contributing two per cent of their annual salary to a firemen's relief and pension fund, established pursuant to Section 741.02, Revised Code, are "members of the fire department" as defined by Section 741.01, Revised Code, and may retain their membership in such fund.

2. Under Section 145.02, Revised Code, where such volunteer firemen are employed in other capacities by a municipality, the fact that they are members of the firemen's relief and pension fund or are receiving a retirement allowance from such fund excludes them from membership in the public employees retirement system.

3. Where, on October 15, 1961, such volunteer firemen were erroneously permitted to become member of the public employees retirement system and to make a contribution for contributing services, and their employer was, pursuant to the provisions of Section 145.51, Revised Code, as effective on October 15, 1961, billed for matching employer contributions resulting from the contributions of such employees, such billing was unlawful and such employer was without authority to make a payment based upon such billing.

4. Where said employer made a payment based upon such billing, the public employees retirement board must, pursuant to Section 145.05, Revised Code, refund such payment or, with the employer's agreement, make an adjustment of the employer's account with the public employees retirement system in the amount of such payment. (Opinion No. 1737, Opinions of the Attorney General for 1960, page 630, and Opinion No. 2327, Opinions of the Attorney General for 1947, page 543, distinguished.)

Columbus, Ohio, September 19, 1962

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

Dear Sir:

Your request for my opinion reads as follows:

"During a recent examination of the City of N., a question was raised as to the legality of certain payments by the city to the Public Employees Retirement System, which were made as the employer's contribution to the System by reason of the employment of two individuals whom I shall designate as H. and S.

"Each of these individuals has been employed by the city, from a date prior to 1932 until the present time, and serves in the city electric department. Both H. and S. also —served this municipality as volunteer members of the fire department and were contributing two percent of their earnings to the Firemen's Relief and Pension Fund on the effective date of House Bill No. 195 of the 97th General Assembly, which was September 25, 1947. the city electric department. Both H. and S. also served this

"Employee H. has continued as a member of the fire department and of the Firemen's Pension Fund until the present time. He is presently contributing four percent of his earnings to the Firemen's Relief and Pension Fund, pursuant to Section 741.12, Revised Code. Employee S. continued as a member of the fire department and the Firemen's Pension Fund until November 1, 1951. As of that date, he retired from the fire department and has since been receiving a pension from the Firemen's Relief and Pension Fund.

"During 1961, each of these employees H. and S. paid into the Public Employees Retirement System the contributions required by Section 145.31, Revised Code, for the restoration of prior service credit. Thereupon, each was accepted as a member of the Public Employees Retirement System, as of October 15, 1961.

"On March 6, 1962, the city paid to the Public Employees Retirement System the employer's contribution, matching the individual payments previously made by each employee, pursuant to Section 145.31, Revised Code.

"In view of the above facts, the following questions are posed:

- "1. Are either or both of the employees valid members of the Firemen's Relief and Pension Fund, by reason of their service as volunteer firemen of the municipality, in view of 1960 O.A.G. No. 1092 (page 24) ?
- "2. Were either or both of these employees eligible for membership in the Public Employees Retirement System on October 15, 1961 ?
- "3. Did the City of N. have authority to pay into the Public Employees Retirement System the employer's contribution which was made March 6, 1962, on account of the prior employment of these individuals ?
- "4. If your answer to question No. 3 is negative, does the Public Employees Retirement System have authority to refund to the city the amounts paid by the city to the System on March 6, 1962 ?

“In order to distinguish this situation from that which was considered in 1961 O.A.G. No. 2436, it should be stated that the City of N. is operated under the statutory form of government and has not adopted a charter. Your conclusions will be of interest to municipal officials throughout the State. Therefore, your formal opinion is respectfully requested.”

I have noted that the city in question is a non-charter city, and based upon the facts stated in your request I find that the conclusion reached in Opinion No. 2436, Opinions of the Attorney General for 1961, issued August 7, 1961, has no bearing upon the questions raised in your letter.

In connection with your first question you make reference to Opinion No. 1092, Opinions of the Attorney General for 1960, page 24, the syllabus of which reads as follows:

“Volunteer firemen do not qualify for membership in the Firemen’s Relief and Pension Fund authorized by Section 741.01, Revised Code; and Section 3310.09, Revised Code, requires political subdivisions and fire districts employing volunteer firemen to be members of the Volunteer Firemen’s Dependents Fund and to pay the premium required by said section.”

It should be noted that in arriving at the above quoted conclusion I was dealing with a fact situation wherein the firemen’s relief and pension fund was established subsequent to September 25, 1947. That date is of great importance in determining whether a volunteer fireman could be a “member of the fire department” so as to be eligible to be a member of a firemen’s relief and pension fund. In this regard, your attention is directed to Section 741.01, Revised Code, which reads, in part, 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 fireman’s relief and pension fund established pursuant to section 741.02 of the Revised Code.*”
(Emphasis added)

It will be noted from the above quoted language that any fireman who was contributing two per cent of his annual salary to the firemen’s relief and pension fund as of September 25, 1947, is by definition a member of

the fire department and accordingly is entitled to remain a member of such firemen's relief and pension fund. In the instant case, based upon the facts stated in your request, it appears that the individuals therein enumerated were such members of the fire department, and accordingly were entitled to retain their membership in the firemen's relief and pension fund.

The distinction between the fact situation set forth in your letter and that which was treated in Opinion No. 1092, Opinions of the Attorney General for 1960, page 24, is the time when the volunteer firemen became or attempted to become members of the firemen's relief and pension fund. (For a similar conclusion to the above see Opinion No. 2645, Opinions of the Attorney General for 1948, page 49.)

As to your second question of whether either or both of the employees designated in your request are entitled to membership in the public employees retirement system as of October 15, 1961, your attention is directed to Section 145.02, Revised Code, which as of that date read as follows:

“Notwithstanding the provisions of section 145.03 of the Revised Code, any employee who is contributing to or is receiving retirement or disability benefits from a police relief and pension fund, a firemen's relief and pension fund, state highway patrol, or a municipal retirement system established prior to June 30, 1938, or who has been granted a disability retirement allowance by the state teachers retirement system, or state public employees retirement system, shall be excluded from membership in the public employees retirement system and shall be ineligible to make contributions or accrue benefits in the public employees retirement system.”

Considering the above quoted statutory language in light of the fact that one of the individuals mentioned in your request was, on October 15, 1961, receiving a retirement allowance from a firemen's relief and pension fund and the other individual so mentioned was on that date contributing to a firemen's relief and pension fund, only one conclusion can be reached; that said individuals were not entitled to become members of the public employees retirement system. For similar reasoning and conclusions, your attention is directed to Opinion No. 4013, Opinions of the Attorney General for 1954, page 335, and the third paragraph of the syllabus of Opinion No. 4451, Opinions of the Attorney General for 1954, page 545.

Coming to your third question of whether the city involved herein had authority to pay the employer's contribution to the public employees

retirement system, which contribution was levied as a result of the payment by the employees heretofore mentioned into said system, I presume that the billing for such employer payment was made by the public employees retirement system pursuant to the provisions of Section 145.51, Revised Code, which as of October 15, 1961 read in pertinent part as follows:

“Each employer described in division (D) of section 145.01 of the Revised Code, shall pay into the employers’ accumulation fund, in such monthly or less frequent installments as the public employees retirement board requires an amount certified by the board which shall equal a per cent of the total compensation, earnable by all contributors during the preceding year, which is the sum of the normal contribution rate plus the deficiency contribution rate.

“In addition there shall be added to the employer billing next succeeding an amount equal to any additional payments made to the public employees retirement system by the employee members of the respective employer which payment represents the amount, with interest, paid by such members to receive contributing service credit for service prior to the date of initial contribution to the system. * * *”

(See 128 Ohio Laws 157, at page 186).

With regard to public funds in general, your attention is directed to 44 Ohio Jurisprudence 2d, 381, Public Funds, Section 18, which reads, in part, as follows:

“Public funds can be dispersed only by clear authority of law, and upon compliance with statutory provisions thereto. In case of doubt of the right of any administrative board to expend public moneys upon a legislative grant, such doubt must be resolved in favor of the public and against the grant of power. * * *”

As can be seen by the above quoted provisions of Section 145.51, Revised Code, the authority of the municipality to make a matching contribution must rest directly upon the legal ability of the individual employee to make the initial employee contribution. Since the employees in question herein could not lawfully become members of the public employees retirement system it must follow that the payment made by the municipality was unauthorized under said Section 145.51. It should be pointed out, however, that based upon the facts stated in your letter, said payment was undoubtedly made in good faith by the officers of the municipi-

pality, as at the time of making such payment it appeared that said employees were members of the public employees retirement system. I know of no other statutory provision which would authorize a municipality to make a payment into the system similar to that described in your request, and accordingly it is my opinion that the municipality in question herein was without authority to make such payment.

Coming to your fourth question as to whether the public employees retirement system has authority to refund to the city the amount erroneously paid by it as employer contributions, I have been unable to find any specific authority, statutory or otherwise, which deals with or has dealt with said question.

I may note in passing that a similar question was dealt with by this office in Opinion No. 1737, Opinions of the Attorney General for 1960, page 630, wherein the fifth paragraph of the syllabus reads as follows:

“The Public Employees Retirement System is without authority to refund to a governmental unit which has established a police relief and pension fund or a firemen’s relief and pension fund, the contributions made by it prior to the establishment of such funds on account of former members of the Public Employees Retirement System who became members of the police relief and pension fund or firemen’s relief and pension fund (Opinion No. 2327, Opinions of the Attorney General for 1947 approved and followed).”

As pointed out in the above syllabus, a conclusion similar to that reached in said Opinion No. 1737 was reached by one of my predecessors in Opinion No. 2327, Opinions of the Attorney General for 1947, page 543.

It will be noted, however, that in each of the above mentioned opinions, the question answered dealt with the authority of the public employees retirement system to refund the employer contributions made by the employer as a result of the employment of an employee who was, during the time that the contributions were made, entitled to be a member of the system. Said opinions are, therefore, not controlling on the question raised in your request.

As to the authority of the public employees retirement board, Section 145.04, Revised Code, reads as follows:

“The general administration and management of the public employees retirement system and the making effective of sections 145.01 to 145.57, inclusive, of the Revised Code, are hereby

vested in a board to be known as the 'public employees retirement board,' which shall consist of seven members as follows:

“* * * * * * * * *”

As pointed out earlier herein, the public employees retirement board, on October 15, 1961, had, pursuant to Section 145.51, *supra*, the authority to issue to an employer a billing which would require an employer contribution equal to the amount of an employee payment for contributing service credit. Certainly the authority granted to the public employees retirement board by Section 145.04, *supra*, to manage the public employees retirement system would require that any billing to an employer would be only in an amount which the law would permit the system to levy upon such employer. In the instant case, it clearly appears that the employee members in question could not lawfully make the contributions which they made on October 15, 1961 and the matching employer payment was not authorized. From this it must naturally follow that the public employees retirement board was without authority to bill the employer for a matching contribution and that the payment required of the employer was an error of law.

Since it is the responsibility of the public employees retirement board to manage the system in accordance with the provisions of Chapter 145., Revised Code, I am of the opinion that when the board receives an employer contribution pursuant to a billing, and the billing and contribution are contrary to the provisions of that chapter, the board has the authority and is charged with the duty of adjusting such employers account. Such adjustment can be in the form of a refund to the employer or a credit to its account which would reduce other obligations owed by such employer to the system.

In accordance with the foregoing, therefore, I am of the opinion and you are advised:

1. Volunteer firement who were, on September 25, 1947 contributing two per cent of their annual salary to a firemen's relief and pension fund, established pursuant to Section 741.02, Revised Code, are "members of the fire department" as defined by Section 741.01, Revised Code, and may retain their membership in such fund.

2. Under Section 145.02, Revised Code, where such volunteer firemen are employed in other capacities by a municipality, the fact that they are members of the firemen's relief and pension fund or are receiving a retirement allowance from such fund excludes them from membership in the public employees retirement system.

3. Where, on October 15, 1961, such volunteer firemen were erroneously permitted to become members of the public employees retirement system and to make a contribution for contributing service, and their employer was, pursuant to the provisions of Section 145.51, Revised Code, as effective on October 15, 1961, billed for matching employer contributions resulting from the contributions of such employees, such billing was unlawful and such employer was without authority to make a payment based upon such billing.

4. Where said employer made a payment based upon such billing, the public employees retirement board must, pursuant to Section 145.05, Revised Code, refund such payment or, with the employer's agreement, make an adjustment of the employer's account with the public employees retirement system in the amount of such payment. (Opinion No. 1737, Opinions of the Attorney General for 1960, page 630, and Opinion No. 2327, Opinions of the Attorney General for 1947, page 543, distinguished.)

Respectfully,

MARK McELROY

Attorney General