

3280

POLICE RELIEF AND PENSION FUND:

1. UPON COMPLIANCE WITH CONDITIONS SET FORTH IN SECTION 741.54 RC, 4631-4 GC, MEMBER ENTITLED TO PAYMENT PROVIDED THEREIN FROM STATE TREASURY.
2. THE ASSETS OF FUND, IF ANY, ON DECEMBER 31, 1947, TOGETHER WITH SUM OF \$1,000.00 MULTIPLIED BY NUMBER OF MEMBERS IN FUND AT TIME DISTRIBUTION OF STATE FUND IS TO BE MADE, IN OR IMMEDIATELY FOLLOWING MONTH OF MARCH EACH YEAR, IS TO BE THE BASIS TO COMPARE ASSETS OF FUND ON NEXT PRECEDING 31ST DAY OF DECEMBER.
3. FUND ESTABLISHED AFTER DECEMBER 31, 1947, AMOUNT TO BE USED TO DETERMINE ELIGIBILITY TO RECEIVE PAYMENT FROM STATE FUNDS, IS \$1,000.00 MULTIPLIED BY NUMBER OF MEMBERS, CONTRIBUTIONS IN FUND—SUM TAKEN AS BASIS TO COMPARE WITH AMOUNT OF ASSETS OF FUND ON NEXT PRECEDING 31ST DAY OF DECEMBER.

SYLLABUS:

1. Under the provisions of Section 741.54 Revised Code, 4631-4 G.C., each police relief and pension fund, regardless of the time when it was organized, is entitled upon compliance with the conditions set forth in said Section 741.54, to the payment from the state treasury provided therein.
2. In determining the qualifications of a police relief and pension fund to receive the benefit provided by Section 741.54 Revised Code, 4631-4 G.C., the assets of such fund, if any, on December 31, 1947, together with the sum of \$1,000 multiplied by the number of members in said fund at the time when distribution of such state fund is to be made, to wit, in or immediately following the month of March in each year, is to be taken as the basis for comparison with the assets of such fund on the next preceding 31st day of December.
3. In case a police relief and pension fund was established after the 31st day of December, 1947, then the amount to be used, under the provisions of Section 741.54 Revised Code, to determine its eligibility to receive the payment therein provided from state funds, is the sum of \$1,000 multiplied by the number of members in said fund, and such sum is to be taken as the basis for comparison with the amount of the assets of such fund on the next preceding 31st day of December.

Columbus, Ohio, November 23, 1953

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

Dear Sir :

I have before me your communication requesting my opinion and reading as follows :

"Section 741.54 R. C. requires the Auditor of State to distribute the subsidy appropriation made by the General Assembly to various Police and Fire Pension Funds who qualify under a formula established in this and other related sections of the Code.

"The Auditor's office, of course, desires to make a proper legal distribution of the appropriation made in House Bill number 10 for the year 1953-54. This office has made a distribution to a majority of the pension funds based on reports submitted in March, 1953. The distribution raised some questions and your advice is sought for future guidance in such distributions.

"We have listed seven cases which present different problems, but by no means all, that have come to our attention. The pension funds in the first four cases were all in existence on December 31, 1947. The question in each of these cases is: 'Should any distribution be made in this case and does the preceding calendar year (prior to filing a report) determine membership or should the membership of December 31, 1947 be used?'

"In cases five, six and seven the pension funds were not in existence in December 31, 1947 and have been created by operation of law. Your opinion is requested as to the proper method for the Auditor of State to make distributions, provided that this section, or any other, requires a distribution of such appropriation to pension funds created subsequent to December 31, 1947. A further question is, 'Was the distribution made in case seven to X Village for the year 1951, a legal payment from the appropriation?'

"Case No. 1. A city or village pension fund has assets of December 31, 1952 of \$40,000. The certification made to the Auditor of State and the records of this office show the fund had assets on December 31, 1947 of \$5,000 plus \$1,000 times 22 members on December 31, 1952 or a total of \$27,000.

"Case No. 2. A city or village pension fund has assets of December 31, 1952 of \$40,000. The certification made to the Auditor of State and the records of this office show

the fund had assets on December 31, 1947 of \$5,000 plus \$1,000 times 12 members on December 31, 1947 or a total of \$17,000.

"Case No. 3. A city or village pension fund has assets as of December 31, 1952 of \$18,000. The certification made to the Auditor of State and records of this office show the fund had assets on December 31, 1947 of \$5,000 plus \$1,000 times 22 members on December 31, 1952 or a total of \$27,000.

"Case No. 4. A city or village pension fund had assets as of December 31, 1952 of \$18,000. The certification made to the Auditor of State and the records of this office show that the fund had assets on December 31, 1947 of \$5,000 plus \$1,000 times 12 members on December 31, 1947 or a total of \$17,000. Should a distribution be made in this case?

"Case No. 5. B city or village pension fund was created in June, 1952 and on December 31, 1952, had assets of \$80.00 (received from members' contributions) and had 2 members. The mandatory levy has been made but no tax money has been received before December 31, 1952. Can a distribution of the legislative appropriation be legally made to this pension fund?

"Case No. 6. C Village pension fund was created in December, 1952 and had no assets but 2 members on December 31, 1952. Can a distribution of the legislative appropriation be legally made to this pension fund?

"Case No. 7. X Village pension fund was created in September, 1949 and had assets on December 31, 1949 of \$562.00, and had 6 members during the year 1951, and the office of Auditor of State's records show that this made a total of \$6,562.00. The assets of the fund on December 31, 1951 were \$6,131.00 and on the basis of such figures the Auditor's office distributed to the Village the sum of \$795.00 as its distributive share of the then existing pension appropriation. Was it correct to use the assets at the close of the first year the pension system was in existence as the basis of making a determination of whether or not X Village was entitled to a distribution as of the close of December 31, 1951?"

The answers to these questions turn largely upon an analysis of the provisions of Section 741.54, Revised Code, 4631-4, G. C. This section reads as follows:

"There is hereby created in the state treasury the 'local police and firemen's relief and pension fund.' The treasurer of state shall be the custodian of the fund which shall be distributed in the manner provided for in this section. The fiscal officer of

each municipal corporation in which a police or firemen's relief and pension fund has been established pursuant to section 74I.02 or 74I.32 of the Revised Code shall, in March of each year, certify to the auditor of state the name of such fund and the total value of the real and personal property listed for taxation in the municipal corporation.

"The auditor of state shall, upon receipt of each certification issue a warrant on the treasurer of state, payable from the local police and firemen's relief and pension fund, in favor of each police and firemen's relief and pension fund in an amount equal to one tenth of a mill on each dollar value of real and personal property listed in the certification.

"No distribution shall be made under this section to any police or firemen's relief and pension fund in any calendar year if the assets of said fund as of the *thirty-first day of December of the next preceding calendar year are in excess* of an amount equal to the assets of said fund as of December 31, 1947, plus an amount equal to one thousand dollars multiplied by the number of members of said fund and no distribution shall be made in any year if the legislative authority of the municipal corporation in which the fund has been created fails to comply with section 74I.09 or 74I.40 of the Revised Code." (Emphasis added.)

Sections 74I.09 and 74I.40, Revised Code, 4605 and 4621, G. C., deal, respectively, with the firemen's relief and pension fund and the police relief and pension fund. Section 74I.09 reads as follows:

"In each municipal corporation in which there is a firemen's relief and pension fund established pursuant to section 74I.02 of the Revised Code, the taxing authority thereof shall, each year, in the manner provided for the making of other municipal levies, and in addition to all other levies authorized by law, levy a tax of three tenths of a mill upon all the real and personal property as listed for taxation in the municipal corporation for the purpose of providing funds for the payment of benefits and pensions from the fund. All revenues derived from such levy shall be credited to the firemen's relief and pension fund of the municipal corporation.

"If at any time the moneys to the credit of the fund are not sufficient to meet current relief and pension payments, the legislative authority of the municipal corporation may appropriate, from the general fund of the municipal corporation to the firemen's relief and pension fund, sufficient money to meet such payments."

Section 74I.40 underwent an amendment by the 100th General Assembly in Senate Bill #44. The section contains a provision sub-

stantially identical with that contained in Section 741.09, supra, requiring a tax levy of three-tenths of a mill, and has a further provision which is to apply in the event a municipal corporation shall have established a sanitary police fund which shall have been merged by ordinance with the police relief and pension fund. In such case, the legislative body of the municipal corporation is required to levy annually a total tax of thirty-five hundredths of a mill in lieu of the three-tenths of a mill otherwise required.

Your letter appears to me to present two questions: (1) as to the distribution of the state's contribution in case the pension fund was established after December 31, 1947; and (2) as of what date shall the total membership of the fund be calculated.

Both of these questions were, in my opinion, fairly covered by Opinion No. 2641, Opinions of the Attorney General for 1948, page 32, where a series of questions was presented, the first of which read as follows:

"Where a firemen's relief and pension fund is established in a municipal corporation pursuant to Section 4600, General Code, in any year after the effective date of H.B. 195 (September 25, 1947) and the 4 percent contributions of the members have been deposited to the credit of said firemen's relief and pension fund, as provided in Section 4609, General Code, and the tax levy made as provided in Section 4605, General Code, but the proceeds from such taxes have not been collected and distributed by the county auditor, is such local firemen's relief fund and pension fund entitled to receive the distribution provided in Section 4631-4, General Code, in an amount equal to 1/10 of a mill on each dollar value of real and personal property as listed in the certification by the fiscal officer of such municipal corporation, although the assets of such local fund as of December 31 in such year consisted of members' contributions only?"

The first branch of the syllabus reads as follows:

"1. Upon compliance with the conditions set forth in Section 4631-4, General Code, any police or firemen's relief and pension fund may receive from the State Auditor in March 1948, or in March of any year thereafter, a warrant for the payment from the state treasury in the amount prescribed by said Section 4631-4."

The sections of the General Code, referred to in that opinion were part of Amended House Bill No. 195, which became effective September 25, 1947, and which contained a radical revision of the statutes relative to both the firemen's and the police relief and pension systems. Comment-

ing on the provisions of Section 4631-4 General Code, 741.54 R. C., the then Attorney General said:

“It is to be observed that the fiscal officer of each of these funds is required during the month of March, 1948 and each March thereafter, to certify to the Auditor of State the total value of the property listed for taxation in the municipal corporation or the outlying portion of the township as the case may be. It is further provided that the Auditor ‘upon receipt of each certification provided for herein’ shall issue his warrant on the Treasurer of State for an amount equal to 1/10 of a mill per dollar of such taxable property. Before issuing such warrant he is required to make a comparison of the actual assets in the fund as of December 31st of the next preceding calendar year with a theoretical sum arrived at by taking the actual assets in that fund as of December 31, 1947, and adding thereto as many thousands of dollars as there are members in said fund. He is forbidden to issue the warrant above mentioned, if the actual assets in the fund as of December 31st of the next preceding year are in excess of such theoretical sum.

“The above provision as to the calculation and comparison is somewhat confusing. On first impression, it might appear that no such calculation could be made and no warrant issued earlier than March of 1949 in favor of a fund which was established after September 25, 1947, the effective date of the new law. However, the intention of the General Assembly to authorize the certificate to the Auditor and the payment by the Auditor in or immediately following March of 1948, is too clear to be disregarded. There seems to me to be no real difficulty in harmonizing the several provisions of this section. It is true that in calculating what might be paid in March of 1948, we are called upon to compare the conditions of the fund as of December 31, 1947, with a theoretical amount in that fund as of the same date. But that comparison must plainly result in showing that such fund will be entitled at least in the first year of the operation of the law, to the subsidy, because whatever amount has actually come into the fund by March, 1948, will certainly be less than the same amount, plus \$1,000 multiplied by the number of members in the system.

“The ‘number of members’ referred to in this section clearly refers to the number of members in the system at the time the calculation is made, and not to the number on December 31, 1947. In the case of a newly organized system such as you suggest, it is manifest that there could be no members in the system on December 31, 1947 if it had not been organized until a later time.

“In the light of the foregoing and in specific answer to your question, it is my opinion that where a firemen’s relief and pension

fund is established in a municipal corporation pursuant to Section 4600, General Code, at any time after the effective date of H.B. 195 (September 25, 1947) and the tax levy provided in Section 4605, General Code, has been duly levied, such pension fund may upon filing with the Auditor of State the certificate required by Section 4631-4, General Code, receive from the Auditor a warrant from the subsidy provided by said section."

I concur fully in that statement. It seems necessary for the sake of clarity to point out that the reference to "March of 1948" grew out of language contained in the General Code, Section 4631-4, 741.54 R. C., which was changed in the revision. The third sentence originally read: "The fiscal officer * * * shall, during the month of March 1948 and each March thereafter, certify" etc. In the revision, the sentence reads: "The fiscal officer shall, in March of each year" etc.

Since the Act became effective September 25, 1947, it is manifest that March of 1948 was the earliest date when the certificate of the fiscal officer could be filed. As to local pension systems established after the effective date of the Act, the March following their organization would be the earliest possible time for such procedure.

The statute provides that "upon receipt of each certification" the auditor shall issue his warrant to each local pension fund. This implies immediate action but as it is coupled with two conditions, (a) as to the assets of the local fund and (b) that it has made the required levy, we must assume that the Auditor already has the information on these matters, or has the means of obtaining it at once.

It is to be noted that compliance with Sections 741.09 and 741.40, Revised Code, does not require that the tax levy shall have been *collected*, but only that it has been *levied*. Under the provisions of Section 5705.34, Revised Code, 5625-25, G.C., tax levies must be certified to the county auditor on or before the first day of October, or at such later date as may be approved by the Board of Tax Appeals. It is obvious that a system which has been organized too late in a calendar year to permit of the levy of a tax for the succeeding year would not be able to qualify for the subsidy in the March next following, but that situation would not prevent it from qualifying in the next following year.

I am convinced that it was not the intention of the legislature to discriminate in the matter of those payments by the state, between local pension funds established *before* or *after* December 31, 1947. That date,

for the purpose of establishing a formula or measuring rod was doubtless adopted merely because it marked the beginning of the operation of the new law relative to the pension systems, and particularly the subsidy from the state. There is nothing whatever in the law that would warrant the suggestion contained in the seventh case which you present, that the date to be used for fixing the formula should be December 31 of the year following the organization of the local fund instead of the date fixed by the statute.

As to those cases set out in your letter, in which it appears that the fund was established before December 31, 1947, there would seem to be no difficulty in applying the formula for determining the amount of the allowance that is to be made out of the "local firemen's and police relief and pension fund" in the state treasury. In those cases it is plain that the fiscal officer of each municipal corporation would during the month of March in each year, make the certification to the Auditor of State which is required by the law, and that the auditor would immediately ascertain and determine (a) that the municipality in question had levied the three-tenths of a mill tax required by the law, and (b) whether the assets of the fund as of December 31st of the next preceding calendar year are or are not in excess of an amount equal to the assets in said fund as of December 31, 1947, plus an amount equal to \$1,000 multiplied by the number of members in the system at the time the calculation is made, which is in March of the current year. That calculation would determine whether or not the municipality in question was entitled to this subsidy for that year. If it is found to be so entitled, payment should be made at once.

As to the funds that were established subsequent to December 31, 1947, it is plain that they could not on that date have any assets. Therefore, the total amount that is to be used for determination of their right to receive the subsidy would consist of the single factor of \$1,000 multiplied by the number of members in the system at the time the calculation is made.

As you state, it appears that the pension funds in the first four cases instanced by you, were in existence December 31, 1947, while the remaining three were organized after that date.

I find it impossible on the basis of the facts given in your letter, to apply the principles and conclusions above set forth to the seven indi-

vidual cases enumerated. You have appeared to assume that the number of members in the system is to be taken either as of December 31, 1947 or December 31 of the year immediately preceding the proposed allowance. Neither assumption is in accord with the conclusion reached in the 1948 opinion, which I consider sound, to wit, that the number which is to be considered each year for the purpose of applying the formula, is the current membership, that is, the number of members at the time of the certification by the fiscal officer of the municipality.

If I could assume that the number of members which you mention in each case was the number at the time of such certification, my conclusions as to the right of the several systems to receive the subsidy in 1953 would be as follows:

Applying the principles above stated, it would appear to me that in Cases Nos. 1, 2 and 4 the total of the assets of the fund as of December 31, 1952, as compared with the assets on December 31, 1947, plus \$1,000 multiplied by the number of members in the system, would result in a denial of the benefits of the subsidy for the year 1953, since their assets on December 31, 1952, were in excess of the amount arrived at by applying the formula.

On the contrary, in Cases 3 and 5, those funds would clearly be entitled to the subsidy for the year 1953. The fund referred to as Case No. 6, which was not organized until December, 1952, could hardly, prior to March 1953, have levied the required tax and therefore could not qualify in March 1953, for the subsidy for that year.

Case No. 7 requires special examination. It appears to deal with the right of "X" village to receive the payment from the state for the year 1951. The facts given by you do not disclose the amount of the assets of the fund on December 31, 1950, which would enter into the calculation. It is stated that during 1951 the system had six members. If I might assume that the fund had \$562 of assets on December 31, 1950, then it would appear very clear that that sum was less than the \$6,000 which would be arrived at by multiplying 6 by 1,000, and therefore, the fund of that village would clearly be entitled to the subsidy that was paid to it. I do not understand that the amount of the assets in the fund as of December 31, 1951, would have anything to do with determining the amount of the subsidy for 1951. The amount of assets in the system on December 31, 1951, would be one of the elements for determining the right of

the system to receive the subsidy in the year 1952. By supplying the facts which do not appear, you doubtless will have no difficulty in determining the legality of the payment you say was made to that village.

In specific answer to the questions you have submitted, it is my opinion and you are advised:

1. Under the provisions of Section 741.54 Revised Code, 4631-4 G.C., each police relief and pension fund, regardless of the time when it was organized, is entitled, upon compliance with the conditions set forth in said Section 741.54, to the payment from the state treasury, provided therein.

2. In determining the qualifications of a police relief and pension fund to receive the benefit provided by Section 741.54 Revised Code, 4631-4 G.C., the assets of such fund, if any, on December 31, 1947, together with the sum of \$1,000 multiplied by the number of members in said fund at the time when distribution of such state fund is to be made, to wit, in or immediately following the month of March in each year, is to be taken as the basis for comparison with the assets of such fund on the next preceding 31st day of December.

3. In case a police relief and pension fund was established after the 31st day of December, 1947, then the amount to be used, under the provisions of Section 741.54 Revised Code, to determine its eligibility to receive the payment therein provided from state funds, is the sum of \$1,000 multiplied by the number of members in said fund, and such sum is to be taken as the basis for comparison with the amount of the assets of such fund on the next preceding 31st day of December.

Respectfully,

C. WILLIAM O'NEILL

Attorney General