

1948

1. POLICE RELIEF AND PENSION FUND—POLICE OFFICERS, FAIRBORN, FORMER MEMBERS POLICE DEPARTMENT, VILLAGE OF FAIRFIELD—EMPLOYES OF MUNICIPAL CORPORATION WHICH ESTABLISHED POLICE RELIEF AND PENSION FUND—SECTION 4631-3a G. C., AM. H. B. 325, 98 G. A.
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5. MEMBER OF POLICE DEPARTMENT—INCLUDES VILLAGE MARSHAL ELECTED PURSUANT TO SECTION 4384 G. C. PRIOR TO AMENDMENT SEPTEMBER 5, 1941 AND A POLICE CHIEF APPOINTED PURSUANT TO SECTION 4384 G. C. AFTER ITS AMENDMENT—PERSON WHO SERVES IN BOTH CAPACITIES ENTITLED TO PRIOR SERVICE CREDIT IN POLICE RELIEF AND PENSION FUND FOR SERVICE RENDERED DURING TIME HE WAS EMPLOYED BOTH AS ELECTED MARSHAL AND AN APPOINTED CHIEF OF POLICE.

SYLLABUS:

1. Police officers of the present city of Fairborn who were former members of the police department of the village of Fairfield, come within the purview of the second paragraph of Section 4631-3a, General Code, as enacted in Amended House Bill No. 325, 98th General Assembly, as employes of a municipal corporation which established a police relief and pension fund after the effective date of Section 4631-3a, General Code.

2. Police officers of the city of Fairborn who were former members of the police department of the village of Fairfield may qualify as members of the police relief and pension fund of the city of Fairborn, if said officers have given written notice to the trustees of such fund on or before January 20, 1950, and pay into such fund the amount required by the third paragraph of Section 4631-3a, General Code.

3. The police relief and pension fund of the city of Fairborn was established in so far as the election provision of Section 4631-3a, General Code, pertains to former members of the police department of the village of Fairfield on January 1, 1950, and the written notice required to be given by said section is twenty days after that date. The twenty day provision of said section is mandatory.

4. The contribution required by Section 4631-3a, General Code, for a new member to obtain prior service credit in a police relief and pension fund is two per cent of the member's annual salary from September 13, 1939 to September 25, 1947, and four per cent of his annual salary from September 25, 1947 to the date he elected to become a member of the fund. This is true regardless of when the fund was established in a municipality.

5. A member of the police department, as that term is defined in Section 4631-3, General Code, as amended by Amended House Bill No. 325, 98th General Assembly, includes a village marshal who was elected pursuant to Section 4384, General Code, prior to its amendment on September 5, 1941, and a police chief appointed pursuant to Section 4384, General Code, after its amendment in September, 1941. A person who serves in both capacities is entitled to prior service credit in a police relief and pension fund for service rendered during the time he was employed both as an elected marshal and as an appointed chief of police.

Columbus, Ohio, June 26, 1950

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

Your request for my opinion is as follows:

“A question has arisen in connection with the examination of the records of the city of Fairborn, Greene County, concerning the status of police officers of the former village of Fairfield now annexed to the village of Osborn and designated as the City of Fairborn (January 1, 1950).

“All members of the police department of the village of Fairfield were members of the Public Employes Retirement

System by reason of their failure to qualify for membership in a Police Relief and Pension fund prior to the enactment of H. B. 325, amending Section 4631-3, General Code, and enacting Sections 4631-3a and 4631-3b, General Code, effective September 14, 1949.

"The Council of the village of Fairfield made a levy of $\frac{3}{10}$ of a mill for the police relief and pension fund in the year 1949 but did not create the police relief and pension fund in the manner provided by Section 4616 of the General Code. Therefore, the members of the Fairfield village police department could not legally exercise the option provided in Section 4631-3a, General Code, to become members of the police relief and pension fund prior to the time said village was annexed to the village of Osborn on January 1, 1950. However, all members of the former village of Fairfield police department were promptly employed by the new city of Fairborn in the same capacity in the police department.

"The village of Osborn, now the city of Fairborn, has a duly established police relief and pension fund. The newly employed police officers (former village of Fairfield police officers) wish to become members of the City of Fairborn police relief and pension fund, and obtain full credit for all time served as members of the Fairfield village police department without complying with the provisions of Section 4631-3a, G. C. relative to making a payment into the fund of an amount equal to that which they would have been required to pay had they been entitled to rights in a police relief and pension fund during the period of time they were members of the Fairfield village police department.

"In addition to the question raised in connection with the examination at Fairborn, we have received a number of requests from various other village officials for interpretation of the provisions of Sections 4631-3, 4631-3a and 4631-3b of the General Code. Since the answers to these questions are of state-wide interest, we are submitting copies of letters received requesting such information, and respectfully request that you consider the following questions and give us your formal Opinion in answer thereto:

1. When a police officer of a village annexed to an adjoining village is employed by said village, is such police officer entitled to membership in the police relief and pension fund of the village of which annexation was made, under authority of the provisions of Section 4631-3a and 4631-3b of the General Code?

2. If the answer to question number one is in the affirmative, and such police officer has failed to exercise his option to become a member of the police relief and pension

fund within twenty days after becoming a member of the police department of the village to which such annexation was made, is such police officer entitled to membership in the police relief and pension fund after the twenty day period provided in Section 4631-3a, G. C., has elapsed?

3a. If the answer to question number one is in the negative, and such police officer of the former village is considered a new employe of the village to which such annexation was made, is said police officer entitled to credit in the pension fund for all time served as a member of the former village police department?

3b. In the event such police officer is found to be entitled to credit for prior service in the former village, will he be required to make a payment into the fund of an amount equal to that which he would have been required to pay had he been entitled to rights in a police relief and pension fund during the time he was a member of the former village police department, as provided in Section 4631-3a of the General Code?

4. The provisions of Section 4625, G. C., prior to September 13, 1939, permitted members of a police pension fund to make contributions to the fund, but were not mandatory. Said Section 4625, G. C., was amended by H. B. 68 effective September 13, 1939, making it mandatory that an amount equal to 2% of the compensation of such police officers be deducted each month from their salary. Said statute was again amended by H. B. 195 effective September 25, 1947, to provide that an amount equal to 4% of the compensation paid police officers be deducted monthly from their salary. In view of the foregoing changes in Section 4625, G. C., how shall the amount required by the provisions of Sections 4631-3a and 4631-3b, General Code, to be paid into the police relief and pension fund, be determined?

5. Section 4631-3 G. C. defines a member of the police department and reads in part as follows :

“ ‘Member of the police department’ shall mean any person who received or who receives an original appointment as a policewoman, policeman or police matron from a duly established civil service eligible list, or who has been or who is appointed pursuant to section 4384 or section 4384-1 of the General Code as a full time regular policeman and who is paid solely out of public funds of the employing municipal corporation, or who, immediately prior to September 25, 1947, was 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.”

“In view of the foregoing definition, is a duly appointed and

qualified member of a village police department who served as the elected village marshal of said village prior to the amendment of Section 4384 G. C. by Amended Senate Bill No. 3, effective September 5, 1941, entitled to credit in the pension fund for service rendered during the time employed both as an elected Marshall and as Chief of Police appointed pursuant to law?"

As I understand the first question you present, the police officers of the former Village of Fairfield have never been members of a police relief and pension fund in any form. The police officers of the Village of Osborn were members of a duly established fund of said city. Pursuant to authority contained in Section 3566 et seq. of the General Code, the Village of Fairfield was annexed to the Village of Osborn, and the new city was named Fairborn, effective January 1, 1950, with the charter of the Village of Osborn adopted November 2, 1948, being adopted by the electors as the charter of the new city. The police officers of the former Village of Fairfield now wish to participate in the Police Relief and Pension Fund of the City of Fairborn and to receive prior service credits in such fund.

Reference is necessary to Section 4631-3a, General Code, as contained in Amended House Bill No. 325, 98th General Assembly. That section reads as follows:

"Any person who, on the effective date of this act, is employed full time as a member of the police department, as defined in section 4631-3 of the General Code, by a municipal corporation in which a police relief and pension fund has been established on or before such date, and who is not a member of the fund as defined in said section 4631-3 of the General Code, may, at his election, become a member of the fund upon giving written notice to the trustees of the fund within twenty days after the effective date of this act of his election to become a member of said fund.

Any person who is employed full time as a member of the police department by a municipal corporation in which a police relief and pension fund is established pursuant to section 4616 of the General Code after the effective date of this act and, who is so employed before and at the time said fund is established may, at his election, become a member of the fund, as defined in section 4631-3 of the General Code, upon giving written notice to the trustees of the police relief and pension fund within twenty days, after the date of the establishment of said fund, of his election to become a member of said fund.

Any person becoming a member of the fund pursuant to the

provisions of this section shall be subject to the salary deduction provided for in section 4625 of the General Code and in addition such person shall make a payment into the fund of an amount equal to that which he would have been required to pay had he been entitled to rights in a police relief and pension fund during the period he was a member of the police department and not a member of the fund. Such person shall be given full credit as a member of the fund for all time served as a member of the police department regardless of the date on which he became a member of the fund."

In my opinion the first paragraph of Section 4631-3a, General Code, does not apply to the former members of the Fairfield Police Department for the reason that the Village of Fairfield had not established a police relief and pension fund prior to September 14, 1949, and the first paragraph of said section only applies to those employes of a municipal corporation having a fund in existence prior to September 14, 1949.

The question now presents itself as to whether the former members of the Fairfield Police Department would come within the purview of the second paragraph of Section 4631-3a, General Code. To come within this paragraph the policeman must be an employe of a municipal corporation which established a fund after September 14, 1949. In my opinion the former members of the Fairfield Police Department must come within the terms of this paragraph for the reason that Section 3574, General Code, which relates to annexation, states that:

"When annexation is completed the two former corporations shall be governed as one, embracing the territory of both, and the inhabitants of all such territory shall have equal rights and privileges. * * *"

In the case of *State ex rel. N. C. Lothrop et al. v. M. B. Excell*, 21 O. C. C. (N. S.) 603, it is stated that annexation does not put an end to the corporate life and powers of the annexed municipality, but simply merges them with those of the annexing corporation. As there has been a merger between the Village of Osborn and the Village of Fairfield, and as the corporate life and power of Fairfield is not ended, I believe it is reasonable to say that the police relief and pension fund of Osborn is newly established as to Fairfield and the member of the Fairfield Police Department and as a result thereof, the second paragraph of Section 4631-3a applies to the members of the Fairfield Police Department, and that said members were employed at the time the fund was established.

My reasoning is further strengthened by the provisions of Section 69 of the charter of the City of Osborn which was accepted by the electors of Fairfield and Osborn on November 2, 1948. That section reads in part, as follows:

“Nothing in this charter contained * * * shall affect or impair the rights or privileges of officers or employes of the Village or of any office, department or agency existing at the time when this charter shall take effect * * * in relation to the personnel * * * pension and retirement rights * * * or any other rights or privileges of officers or employes of the Village or any office, department or agency thereof.”

This section of the charter, in my opinion, was enacted with the intention of preserving any rights an employe may have with respect to those things enumerated. Since the state law gives a policeman the right to become a member of a pension fund it is my belief that the framers of the charter attempted to preserve this right.

In the light of the above, it is therefore my opinion that a former member of the police department of the Village of Fairfield, who is now a member of the police department of the city of Fairborn may qualify as a member of the Police Relief and Pension Fund of the city of Fairborn if said policeman has given written notice to the trustees of said fund and pays into the fund the amount required by Section 4631-3a, General Code.

The answer to your second question must be in the negative. In my opinion the Police Relief and Pension Fund of the city of Fairborn was established, in so far as the former members of the Fairfield Police Department are concerned, on January 1, 1950, and pursuant to Section 4631-3a, General Code, the written notice required to be given to the trustees of the fund is twenty days or in the case of the Fairfield Police Department, before January 20, 1950. This is a mandatory provision of the statute and must be complied with.

The answer to your third question is unnecessary since in my opinion the police officers of the former village of Fairfield are not new employes but employes who were employed at the time the fund was established, and if the twenty day notice is given they are required to make payments into the fund in amounts equal to that which they would have been required to pay had they been entitled to rights in a police relief and pension fund during the period they were members of the police department and not members of the fund.

Your fourth question relates to a construction of the last paragraph of Section 4631-3a relative to the amount of contribution necessary. The particular phrase in controversy reads as follows:

“* * * and in addition such person shall make a payment into the fund of an amount equal to that which he would have been required to pay had he been entitled to rights in a police relief and pension fund during the period he was a member of the police department and not a member of the fund. * * *”

As you state in your letter contributions to a pension fund were not mandatory prior to September 13, 1939. After September 13, 1949 a two percent contribution was mandatory and after September 25, 1947 a four percent contribution was mandatory.

In a specific situation if a city had a police relief and pension fund in 1939, and the new member of the fund was a policeman in 1939, there is no doubt that the new member would have to contribute 2% of his salary from September 13, 1939 to September 25, 1947, and 4% of his salary from September 25, 1947 to the date he became a member.

I do not believe that contributions would be necessary from salary earned prior to 1939, because if such new member had been a member of the fund from 1939 to the present date he would be required to pay, and prior to 1939 he was not required to pay. Section 4631-3a states that he must pay the amount he would have been required to pay into the fund. As he would not have been required to pay before 1939, no contribution would be necessary.

A difficult problem would present itself if a municipality had established a fund after 1939. Would the member be required to contribute payments from salary earned before the fund was established? In my opinion, this question must be answered in the affirmative, and the new member would be required to contribute that percentage of his salary as required by law from 1939 to the present time. The reason I have reached this conclusion is, first, the wording of Section 4631-3a, which says in the third paragraph thereof, that the member must contribute an amount:

“* * * equal to that which he *would* have been required to pay *had* he been entitled to rights in a police relief and pension fund.”
(Emphasis mine.)

The last sentence of said section indicates that the legislature intended this, since he is given full credit for all time. By requiring a member to

contribute from his former salary, the legislature provided a means to increase the pension fund and to enable such fund to be based on an actuarial basis.

My second reason for reaching this conclusion is that Section 4631-3a and Section 4631-3b, General Code, were enacted primarily for the purpose of creating a police relief and pension fund in villages which prior to 1947 did not maintain such fund. In 1947, Section 4616, General Code, made it mandatory for each municipal corporation to establish a fund. No way was provided at that time for a present member of the police department who was a member of another pension fund, to become a member of the police fund. Section 4631-3a was enacted to permit policemen to become members of their local fund, and in order to secure the fund on a sound insurance basis, the legislature required a new member to contribute a percentage of his past salary because he would be receiving benefits for the full time he is employed.

Your fifth question relates to the definition of "member" contained in Section 4631-3, General Code, as contained in Amended House Bill No. 325, 98th General Assembly. That definition is quoted in your letter, so it will be unnecessary to set it out here. You inquire whether a member of the village police department who served as an elected village marshal pursuant to Section 4384, General Code, before its amendment on September 5, 1941, is entitled to credit in the pension fund for time served as marshal and credit for time served as a police chief appointed pursuant to Section 4384 after 1941.

In my opinion, the answer to this question must be in the affirmative because, in my opinion this is what the legislature intended. The whole plan of police pension funds was aimed at providing security for police officers. Certainly, a village marshal, whether elected or not, is a police officer.

Further, the language of Section 4631-3 in my opinion includes within its purview both an elected marshal and an appointed police chief. This is evidenced by the use of the word "or" in the definition. Thus Section 4631-3 reads in part:

"* * * or who has been *or* who is appointed pursuant to
Section 4384 * * *"
(Emphasis added.)

In my opinion this was intended by the legislature to mean any person

who has been a policeman pursuant to Section 4384, General Code, or any person who has been appointed pursuant to Section 4384, General Code.

In summary and conclusion, it is my opinion :

1. Police officers of the present city of Fairborn who were former members of the police department of the village of Fairfield, come within the purview of the second paragraph of Section 4631-3a, General Code, as enacted in Amended House Bill No. 325, 98th General Assembly as employes of a municipal corporation which established a police relief and pension fund after the effective date of Section 4631-3a, General Code.

2. Police officers of the city of Fairborn who were former members of the police department of the village of Fairfield may qualify as members of the police relief and pension fund of the city of Fairborn, if said officers have given written notice to the trustees of such fund on or before January 20, 1950 and pay into such fund the amount required by the third paragraph of Section 4631-3a, General Code.

3. The police relief and pension fund of the city of Fairborn was established in so far as the election provision of Section 4631-3a, General Code, pertains to former members of the police department of the village of Fairfield on January 1, 1950, and the written notice required to be given by said section is twenty days after that date. The twenty day provision of said section is mandatory.

4. The contribution required by Section 4631-3a, General Code, for a new member to obtain prior service credit in a police relief and pension fund is two percent of the member's annual salary from September 13, 1939 to September 25, 1947, and four percent of his annual salary from September 25, 1947 to the date he elected to become a member of the fund. This is true regardless of when the fund was established in a municipality.

5. A member of the police department, as that term is defined in Section 4631-3, General Code, as amended by Amended House Bill No. 325, 98th General Assembly, includes a village marshal who was elected pursuant to Section 4384, General Code, prior to its amendment on September 5, 1941, and a police chief appointed pursuant to Section 4384, General Code, after its amendment in September, 1941. A person who

serves in both capacities is entitled to prior service credit in a police relief and pension fund for service rendered during the time he was employed both as an elected marshal and as an appointed chief of police.

Respectfully,

HERBERT S. DUFFY,
Attorney General.