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1. FIREMEN'S PENSION FUND — AUTHORITY — BOARD OF TRUSTEES — LIMITED — NO AUTHORITY TO FIX AGE FIREMEN OBLIGED TO RETIRE FROM SERVICE — SECTION 4612-4 G.C.

2. STATE HAS ESTABLISHED TENURE, VILLAGES, CITIES, MEMBERS FIRE DEPARTMENT — REMOVAL FOR CAUSE — MUNICIPAL COUNCIL WITHOUT POWER TO DETERMINE AGE — RETIREMENT — FIREMEN — SECTIONS 486-17a, 4378, 4380, 4389 G.C.

SYLLABUS:

1. The authority given to the board of trustees of the firemen's pension fund by Section 4612-4, General Code, is limited to making rules and regulations for the distribution of the firemen's pension fund, including the qualifications of those to whom any portion of such funds shall be paid, and the amount thereof, and such board is without authority to fix the age at which firemen are obliged to retire from service in the fire department.

2. By the provisions of Section 4389, General Code, as to villages, and Sections 486-17a, 4378 and 4380, as to cities, the state has established a tenure, subject to removal for cause, of members of the fire department, and the council of a municipality is without power to determine the age at which firemen must retire.

Columbus, Ohio, December 7, 1942.

Bureau of Inspection and Supervision of Public Offices,
Columbus, Ohio.

Gentlemen:

I have your request for an opinion reading as follows:

"We are enclosing herewith a letter from the City Solicitor of Painesville, in which a question is submitted which we are unable to answer definitely from rulings heretofore given us.

Inasmuch as the question submitted is of general interest and application to all municipalities in the state operating firemen's pension systems, may we request that you examine the inclosure and give us your opinion in answer to the following question:

Does the council of a municipality have the right to determine the age at which a fireman must retire, or does the board of trustees of the firemen's relief and pension fund have exclusive

power to determine this question by favor of the provisions of section 4612-4 of the General Code?"

Accompanying your inquiry is a letter from the city solicitor of Painesville, setting out the terms of a rule adopted by the trustees of the firemen's relief and pension fund and an ordinance of the city council. His letter reads in part as follows:

> "Rule 13 of the Rules and Regulations governing the Board of Trustees of the Firemen's Relief and Pension Fund which was adopted June 30, 1941, among other provisions, contains the following, to-wit:
>
> 'All members of the Painesville City Fire Department shall retire upon reaching the age of 65 years, provided, however, that each regular, full time, paid member of the Painesville City Fire Department, who has been in active service for a period of 25 consecutive years before reaching the age of 65 years, may retire at any time after 25 years of actual service, in which event the trustees shall, upon retirement, authorize payment to such retired member at the rate of $85.00 per month, and for each additional year of active service in excess of 25 years as fireman, said trustees shall authorize payment of $1.50 per month for each year so served in excess of 25 years, but in no event shall the trustees authorize payment of a sum in excess of $100.00 per month to such retired member.'
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> On May 4, 1942, the council of the city of Painesville amended Section 3 of Ordinance No. 2102, passed June 2, 1941, which section as amended reads as follows:
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> 'At the end of the calendar year in which any individual employee of either the police or fire department of the city of Painesville shall have attained the age of sixty-five (65) years, the active connection of such individual with the police department or the fire department, as the case may be, shall be terminated. Provided that during the national emergency created by the state of war existing between the United States of America and the Axis Powers or until January 1, 1945, any member having reached the age of sixty-five (65) years may, upon written application approved by the city manager and the council of the city of Painesville, be continued in service for a period of one year, and thereafter may be continued in service for periods of one year each, upon the filing of like application and approval.' "

Your question involves a consideration of the statutes and constitutional provisions relating to the powers of the trustees of the firemen's relief and pension fund and the council of a municipality, respectively.

The provisions of the General Code, relative to the firemen's relief and pension fund, are found in Sections 4600 to 4615, inclusive, of the General Code. Most of these sections were amended by the 93rd General Assembly.

In its present form Section 4600 provides in part as follows:

> "In all municipal corporations having fire departments supported in whole or in part at public expense, and employing two or more full time regular members, there shall be established and maintained a firemen's relief and pension fund. A board of trustees, the members of which shall be known as 'trustees of the firemen's relief and pension fund' shall be established in each such municipality."

It may be noted that prior to its last amendment this section provided that "In any municipal corporation having a fire department supported in whole or in part at public expense, the council by ordinance *may* declare the necessity for the establishment and maintenance of a firemen's pension fund." In its present form the statute provides that under the conditions stated there *shall* be established and maintained a firemen's pension fund.

Section 4605 reads in part as follows:

> "In each municipality the council thereof each year, in the manner provided by law for other municipal levies, and in addition to all other levies, authorized by law, shall levy a tax of not to exceed three-tenths of a mill on each dollar upon all real and personal property as listed for taxation in such municipality, but sufficient in amount within the three-tenths of a mill to provide funds for the payment of all relief and pensions granted or that may be granted during the ensuing year to firemen, or to widows or children of deceased firemen, under existing laws or rules adopted pursuant to existing laws. * * * If the levy herein provided for does not raise sufficient funds in any municipality or municipalities with which to pay firemen's relief or pensions, such municipality or municipalities may by action of council appropriate sufficient funds with which to make such payments."

Section 4612-4 reads as follows:

> "The boards of trustees established pursuant to section 4600 of the General Code shall adopt all rules and regulations providing for distribution of the fund including the qualifications of those to whom any portion of it shall be paid and the amount thereof."

This section prior to the latest amendment was carried in substantially the same language as Section 4612.

The extent of the powers of the trustees as to making rules and regulations for the distribution of the funds has been the subject of consideration by the courts in a number of decisions, and by this department in a number of opinions, but we do not think it necessary to review these at length. They are in accord in holding that the trustees have very broad powers as to making rules and regulations within the scope of their authority, which under the terms of the statutes relate solely to the distribution of the fund and the qualifications of those to whom any portion of it should be paid, and the amount thereof.

In the case of State ex rel. v. Kennedy, 137 O.S. 586, a portion of the syllabus is as follows:

> "Under the provisions of Section 4612-4, General Code, the board of trustees of the firemen's pension fund is authorized to adopt rules for the distribution of the fund created and maintained for pensions and the payment thereof to those coming within the qualifications prescribed. Pensions for those retired from, and not compensation for those continuing in, public service are within the contemplation of these statutory provisions."

While it appeared in the above case that the board had adopted a rule that any member "shall be retired" at th eage of 60, and providing certain pensions upon retirement, the question in the case was solely whether the board could allow a pension that was larger in amount than the salary the fire chief had been receiving, and the right of the board to fix an age limit was not an issue and was not referred to by the court. Accordingly, the case is not an authority on that question.

Among others I note the following opinions of the Attorney General wherein these powers are recognized and discussed: 1926 Opinions Attorney General, 415; 1930 id. 517; 1930 id. 555; 1935 id. 348; 1939 id. 2251; 1940 id. 894; 1941 id. 37; and 1941 id. 330. In each of these opinions the powers accorded to the trustees were limited to the scope set out in Section 4612-4, viz., "rules and regulations providing for distribution of the fund, including the qualifications of those to whom any portion of it shall be paid and the amount thereof."

One of my predecessors, however, had before him substantially the

same question as to the powers of the trustees as is involved in your inquiry, and it was held in 1930 Opinions Attorney General, p. 555:

> "The trustees of a firemen's pension fund have no legal authority to adopt and enforce a rule to the effect that members of the fire department must leave the service of such department at a given age."

Quoting from that opinion at page 556:

> "It is a cardinal rule of construction that public officers, under the Ohio law, have only such powers as are expressly granted to them and such implied powers as are necessary to carry into effect the express powers granted.
>
> In reading the sections hereinbefore mentioned, there would appear to be no provisions which either expressly or by implication in any wise authorize the board of trustees of the firemen's pension fund to determine the qualifications of any member of the fire department to serve in such capacity. Such board of course may determine whether or not a given member is qualified to receive a pension, and fix the terms and conditions upon which one may be pensioned or receive contributions from the pension fund. However, we must necessarily look to other provisions of the statutes to determine the authority which functions in connection with the removal of officers."

The opinion proceeds then to call attention to the provisions of the civil service laws which provide the causes for which and the procedure under which a member of the fire department may be removed. I do not deem it necessary for our present purpose to go into the statutes relative to the dismissal of a fireman under civil service procedure, since your inquiry merely calls for a determination of the question as to where the authority lies to fix the age when firemen must retire.

In 1935 Opinions Attorney General, p. 348, another of my predecessors had occasion to consider the rule adopted by the trustees of a firemen's pension fund, providing that a member of the fire department who has served twenty years in the department and retires by resignation or is honorably retired by the city manager, should in either case be paid from the pension fund a sum equal to 60% of the average wage of the department, and further that any member who should be discharged for certain named causes after ten years of service should be placed on the pension roll at 50% of the retirement pay. It was held:

> "The trustees of a firemen's pension fund may adopt reasonable rules and regulations relative to the qualifications, including the number of years of service, which render a fireman eligible to receive a pension from such fund."

Referring to the former opinion (1930 Opinions Attorney General, p. 555) above noted, the Attorney General said:

> "At first blush this opinion might seem to indicate that the trustees in the present inquiry could not legally adopt the rules in question. However, it is to be noticed that this opinion merely holds that the trustees of a firemen's pension fund *may not pass a rule requiring men to divorce themselves from the service of such department at a certain age.* It in nowise affects the authority of the trustees to adopt a rule making firemen eligible for a pension at a given age." (Emphasis mine.)

It seems to me clear that in adopting a rule to the effect that "all members of the Painesville fire department shall retire on reaching the age of sixty-five years", the trustees exceeded their power. There is nothing in the language of the statute authorizing them to adopt a rule to that effect, nor is there any implication that can be drawn from the powers conferred by the statute.

Coming now to the powers of the city council, I find in the statutes express authority granted to municipalities in regard to the establishment and maintenance of fire departments.

Section 3617, General Code, being a part of the enumeration of the general powers, provides as follows:

> "To organize and maintain police and fire departments, erect the necessary buildings and purchase and hold all implements and apparatus required therefor."

Section 4377 reads as follows:

> "The fire department of each city shall be composed of a chief of the fire department and such other officers, firemen and employes as are provided by ordinance of council. The director of public safety shall have the exclusive management and control of such other surgeons, secretaries, clerks and employes as are provided by ordinance or resolution of council."

Statutes conferring upon municipalities powers relative to the per-

formance of those duties which are distinctly recognized as being a part of the duties of the state in the protection of its citizens, carry with them not only the power, but the *duty* to exercise the power on behalf of the state. This principle has always been recognized by the courts in referring to the police and fire departments.

As stated by Cholson, J., in Western College v. Cleveland, 12 O.S., 375, 377:

> "It is obvious that there is a distinction between those powers delegated to municipal corporations to preserve the peace and protect persons and property, whether to be exercised by legislation or the appointment of proper officers, and those powers and privileges which are to be exercised for the improvement of the territory comprised within the limits of the corporation, and its adaptation to the purposes of residence or business. As to the first, the municipal corporation represents the state — discharging duties incumbent on the state; as to the second, the municipal corporation represents the pecuniary and proprietary interests of individuals. As to the first, responsibility for acts done, or omitted, is governed by the same rule of responsibility which applies to like delegations of power; as to the second, the rules which govern the responsibility of individuals are properly applicable."

The same principle is expressed in the opinion of Chief Justice Marshall in the case of Wooster v. Arbenz, 116 O.S. 281. The court at page 284 of the opinion uses this language:

> "* * * In performing those duties which are imposed upon the state as obligations of sovereignty, such as protection from crime, or fires, or contagion, or preserving the peace and health of citizens and protecting their property, it is settled that the function is governmental, and if the municipality undertakes the performance of those functions, whether voluntarily or by legislative imposition, the municipality becomes an arm of sovereignty and a governmental agency and is entitled to that immunity from liability which is enjoyed by the state itself. If, on the other hand, there is no obligation on the part of the municipality to perform them, but it does in fact do so for the comfort and convenience of its citizens, for which the city is directly compensated by levying assessments upon property, or where it is indirectly benefited by growth and prosperity of the city and its inhabitants, and the city has an election whether to do or omit to do those acts, the function is private and proprietary."

Furthermore, the Constitution, Article XVIII, Section 3, grants municipalities very broad powers which clearly include the power to establish police and fire departments. That section reads as follows:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

However, this section contains a reservation to the Legislature with respect to the exercise of the police powers granted in those broad terms to municipalities. The courts have repeatedly stated that as to matters relating to the welfare of the entire state and not strictly local in their nature, the Legislature is supreme, and that regulations adopted by municipalities must not conflict with state legislation on the same subject. This principle was applied as to fire departments in the case of State ex rel v. Houston, 138 O.S. 203, a portion of the syllabus of which is as follows:

"Power is granted to municipal corporations to legislate in the interest of public peace and the protection of persons and property within their territorial limits, but such legislation must not conflict with state legislation on the same subject, and there is reserved to the legislature power to direct the manner and method by which municipal corporations shall effectively carry out their functions having to do with the preservation of the peace and the protection of persons and property. * * *

Fire protection is a matter of concern to the people of the state generally, and when the Legislature enacts general laws to make more efficient the management of fire departments within the cities for the protection of persons and property against the hazards of fire, the cities of the state may be required within reasonable limits to provide funds for the purpose of carrying out such legislation."

The court at the same time decided the case of State v. Gamble, 138 O.S. 220, where a similar principle was applied to a police department. A portion of the syllabus of that case reads as follows:

"1. By virtue of Sections 3 and 7 of Article XVIII of the Constitution, a municipality, irrespective of whether it has adopted a charter, has powers of local self-government and may adopt and enforce within its limits such local police, sanitary and other similar regulations as are not in conflict with general law. * * *

3. 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.

4. In general, matters relating to police and fire protection

are of state-wide concern and under the control of state sovereignty. * * * "

The Supreme Court has also applied the same principle to matters relating to public health. In Bucyrus v. Department of Health, 120 O.S. 426, it was held:

> "The provisions of Article XVIII of the Constitution of Ohio do not deprive the state of any sovereignty over municipalities in respect to sanitation for the promotion or preservation of the public health which it elects to exercise by general laws."

To the same effect is State ex rel. v. Underwood, 137 O.S. 1. In the opinion in this case by Judge Day, the court, referring to the organization of district boards of health with certain powers conferred upon them by the Legislature, said:

> " * * * This, in our opinion, evidences a legislative intent to withdraw from municipalities the powers of local health administration previously granted to them, and to create in each city a health district which is to be a separate political subdivision of the state, independent of the city with which it is coterminus, and to delegate to it all the health powers thus withdrawn from municipalities."

The court, in a previous case, Youngstown v. Evans, 121 O.S. 342, which has not been overruled or modified, in discussing Section 3 or Article XVIII of the Constitution, uses this language at page 347 of the opinion:

> " * * * It is more consonant with reason, in interpreting the constitutional provision as a whole, to assume that it was intended to clothe municipalities with power to prescribe rules of conduct in all matters relating to local police, sanitary, and other similar regulations, where no rules had been prescribed by the General Assembly; and, as to the matter where the General Assembly had theretofore or might thereafter prescribe rules, the municipal ordinances and regulations would be effective *only so far as consistent with general law.* That is to say, *if the entire ordinance were wholly repugnant to a general law, it would be wholly invalid; if repugnant in certain of its provisions, the repugnant part would be invalid.*" (*Emphasis* mine.)

We are obliged to concede, therefore, that if the Legislature, in the exercise of its paramount right to control the organization and conduct of a municipal fire department, has enacted legislation which would

conflict with an ordinance of a municipality undertaking to fix an age at which members of a fire department must retire, then such ordinance, at least to the extent of its inconsistency with the statute, must give way. This brings me to a consideration of certain sections of the General Code.

Section 4378, referring to the general duties of police and fire departments, provides in part as follows:

> "The police and fire departments in every city shall be maintained under the civil service system, as provided in this subdivision."

Section 4379 gives the chief of police and chief of the fire department power to suspend any of the officers or employes in their respective departments for certain cases therein named.

Section 4380 provides that in case of suspension, the chief shall certify the fact, together with the cause, to the director of public safety, who shall proceed to hear the charge and render judgment.

Section 486-17a provides in part as follows:

> "The tenure of every officer, employe or subordinate in the classified service of the state, the counties, cities and city school districts thereof, holding a position under the provisions of this act, shall be during good behavior and efficient service; * * * "

The same section further makes provision for an appeal to the civil service commission, and from its adverse decision to the court of common pleas, in the case of the removal of the chief or any member of the police or fire department of a municipality.

There is some apparent inconsistency in the provisions of Sections 4379 and 4380, on the one hand, and those of Section 486-17a on the other, in reference to the proceedings for the removal of members of the police and fire department. The court of appeals held in the case of Eidt v. State, ex rel., 39 Oh. App., p. 43:

> "The procedure for the discharge of a policeman in the classified service of a municipal corporation is that prescribed by Section 486-17a, General Code, and a failure to comply with the provisions of Sections 4379 and 4380, General Code, does not invalidate the proceeding."

The court said at page 49 of the opinion:

> "We are clearly of the opinion that, in so far as the provisions of Sections 4379 and 4380, General Code, conflict with the provisions of the civil service act, they are inoperative because they have been superseded by the later express and specific provisions of the civil service act."

The case of State ex rel. v. Lowellville, 139 O.S. 219, while relating to a village whose fire department is governed by somewhat different laws than those pertaining to cities, yet seems to have a decisive bearing on the question here under consideration. The syllabus of that case is in part as follows:

> "1. Section 10, Article XV of the Constitution, which requires appointments in the civil service to be made according to merit and fitness to be ascertained as far as practicable by competitive examinations, applies to the state, counties and cities but not to villages.
>
> 2. Matters pertaining to the fire protection of a municipality are of state-wide concern and subject to regulation by the General Assembly.
>
> 3. Section 4389, General Code, which governs the appointment, tenure of office and removal of a fire chief in villages is a valid enactment and prevails over a village ordinance covering the same subject matter.

The ordinance under consideration in that case contained a provision for the summary removal of the chief of the fire department by the mayor. The court, at page 225 of the opinion, said:

> "The precise question involved has not entirely escaped attention in this jurisdiction. Judge Hart in State ex rel. Strain, Dir., v. Houston, Chief, supra, uses this language: '*The state has established a tenure* subject to removal for cause for the members of the fire department of villages of the state (Section 4389, General Code), and a civil service status for firemen in cities (Sections 4378, 4380, General Code), and a state-wide system of firemen's pensions, *all of which are considered matters of state-wide concern and subject to state legislation.* Thompson v. City of Marion, 134 Ohio St., 122, 16 N. E. (2n), 208.' " (Emphasis mine.)

One of my predecessors had before him the question of the authority of council to prescribe the age limits beyond which a policeman should be ineligible to serve on the police force. His opinion is found in Opinions Attorney General, 1935, p. 276. He held:

"A non-charter city may, by ordinance, provide an age limit beyond which a policeman shall be ineligible to serve on the police force, provided that such limitations as to age are reasonable and there is no discrimination."

In the course of the opinion he discussed the possible conflict with civil service laws, and quoted decisions of the court holding that a municipality could set up its own scheme of civil service regulations which might conflict with Section 486-1 et seq., General Code, relating to civil service. He cited State ex rel Lentz v. Edwards, 90 O.S. 305, and Hile v. Cleveland, 118 O.S. 99. In the same year this opinion was rendered, the court of appeals, in the case of Toledo v. State ex rel., 51 Oh. App. 329, arrived at the same conclusion, holding:

"I. The council of the city of Toledo, a charter city, has the power to fix by ordinance a compulsory retirement age for the members of its police and fire divisions.

2. An ordinance fixing the compulsory retirement age of the members of the police and fire divisions at sixty-five years is reasonable and within the sound discretion of council."

The court, in the course of that opinion, pointed out some very convincing reasons why a rule such as was adopted by the council in that case was based upon sound reason; among others, that the average age of the police department was already so great as to call for criticism from the insurance underwriters and a general increase in insurance rates in the city.

However, it seems to me that the decision of the Attorney General, last above noted, as well as the holding in the case just cited, must give way to the contrary principle which seems to have been developed by decisions of the Supreme Court hereinabove referred to and crystalized in the case of State ex rel v. Lowellville, supra.

I am therefore brought to the conclusion that a municipal council is without power to fix an age at which a member of the fire department must retire.

Apparently the only method by which a member of the fire depart-

ment can be removed from active service in the department without his consent, is by filing charges and trial under the proceedings laid down in the civil service laws.

Respectfully,

THOMAS J. HERBERT
Attorney General.