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A FULL TIME MEMBER OF A TOWNSHIP FIRE DEPARTMENT, WHO WAS NOT UNDER 30 YRS. OF AGE WHEN HIRED, IS NOT A MEMBER OF THE TOWNSHIP FIREMEN'S RELIEF FUND, BUT HE IS A PUBLIC EMPLOYEE AND MUST JOIN THE PUBLIC EMPLOYEES RETIREMENT SYSTEM—§§ 521.01, 521.02, 145.02, 145.03, 145.01, OPINION 7464 OAG 1956, OPINION 2327, OAG 1947.

**SYLLABUS:**

A full-time regular member of a township fire department who was hired after April 1, 1947 and was not under thirty years of age when hired, is not properly a member of the township firemen's relief and pension fund within the purview of Chapter 521., Revised Code; but such person is a "public employee" as defined in Section 145.01 (A), Revised Code, and under Section 145.03, Revised Code, it is compulsory that he become a member of the public employees retirement system.

Columbus, Ohio, April 27, 1962

Hon. Thomas A. Beil, Prosecuting Attorney  
Mahoning County, Youngstown, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"At the instance of the Trustees of Boardman Township, Mahoning County, we are requesting your opinion as to the status of certain Boardman Township firemen, who, contrary to statute, had passed their 30th birthday when they were employed as regular full time firemen.

"It has been suggested that these men are not eligible for membership in the Firemens Pension and Relief System and that they should be covered by the Public Employees Retirement System. This belief is supported by the provisions of Revised Code 145.01, 145.02 and 145.03.

"Your kind consideration in this matter will be appreciated."

Chapter 521., Revised Code, provides for a township firemen's relief and pension fund. Under Section 521.11, Revised Code, benefits and pensions are disbursed to members of the fund and their survivors. As to who is a "member of the fund," Section 521.01, Revised Code, provides:

“As used in sections 521.01 to 521.12, inclusive, of the Revised Code:

“(A) ‘Member of the fire department’ means:

“(1) Any person who, on April 1, 1947, was employed by a township as a full-time regular firemen in a township fire department, established pursuant to sections 505.37 to 505.44, inclusive, of the Revised Code;

“(2) Any person over twenty-one and under thirty years of age who, after April 1, 1947, is employed by a township as a full-time regular fireman in a township fire department.

“(B) ‘Member of the fund’ means any person who is contributing four per cent of his annual salary to the township firemen’s relief and pension fund.

Section 521.01, *supra*, does not specifically state that only a “member of the fire department” may be a “member of the fund,” but such construction appears to have been the intent of the legislature in enacting the law.

In Opinion No. 7464, Opinions of the Attorney General for 1956, page 866, the first paragraph of the syllabus states:

“Only a ‘member of the fire department’ as defined in Section 521.01, Revised Code, may become a member of a township firemen’s relief and pension fund established as provided in Chapter 521., Revised Code. Members of a private volunteer fire company which has contracted with a township to provide fire protection service within such township are not ‘members’ of a fire department.”

Starting on page 867 of Opinion No. 7464, *supra*, it is stated:

“Nowhere in this chapter do I find any clear statement as to what persons may or shall become ‘member(s) of the fund.’ The nearest approach to such a statement appears in Section 521.06, Revised Code, as follows:

“‘In each township in which there is a township firemen’s relief and pension fund, the township clerk shall deduct from the salary of each member of the fund an amount equal to four per cent of his salary for each payroll period.  
\* \* \*

“Neither this provision nor the statutory definition of ‘member of the fund’ gives the slightest aid in ascertaining the qualifications required of persons who may participate as members in the benefits of the relief and pension system in question.

"In Section 521.02, Revised Code, it is provided:

"Each township having a fire department supported in whole or in part at public expense, and employing two or more *full-time regular firemen*, shall establish and maintain a township firemen's relief and pension fund.\* \* \* (Emphasis added)

"This provision considered in relation to the fact that it was through necessary to provide the statutory definition of 'member of the fire department,' as noted above, is strongly suggestive of a legislative intent that the benefits of the fund were to be limited to 'full-time regular firemen in a township fire department.'"

The writer of that opinion then went on to note that in Section 521.11, Revised Code, there are several provisions basing the benefits and pension of a member on years of active service in the fire department, plus other references leading to the conclusion that a member of the fund must be a full-time regular fireman in a township fire department.

I am in accord with the conclusion reached by my predecessor in said Opinion No. 7464.

If the firemen here concerned were, on April 1, 1947, employed as full-time regular firemen in the township fire department, and are making the required contributions, then they are obviously members of the fund within Section 521.01, *supra*, regardless of their age when they were employed. Thus, for the purposes of this opinion, I will assume that your question pertains to full-time regular firemen hired by the township after April 1, 1947.

Division (A) (1) of Section 521.01, *supra*, applying to firemen hired after April 1, 1947, states that only those over twenty-one and under thirty years of age when hired are considered members of the fire department within the purview of Chapter 521. Thus, although the persons here concerned may have been validity hired as firemen by the township, since they were not under thirty years of age when hired, they are not "members of the fire department" and consequently not "members of the fund," within said Chapter 521.

I now come to the question of whether the firemen who were hired after they reached thirty years of age are required to become members of the public employees retirement system.

Section 145.01 (A) provides in part:

“(A) ‘Public employee’ means any person holding an office, not elective, under the state or any county, municipal corporation, park district, conservancy district, sanitary district, health district, *township*, metropolitan housing authority, state retirement board, public library, county law library, union cemetery, joint hospital, institutional commissary, state university rotary fund, or board, bureau, commission, council, committee, authority, or administrative body as the same are, or have been, created by action of the general assembly or by the legislative authority of any of the units of local government named in this division, or employed and paid in whole or in part by the state or any of the authorities named in this division in any capacity not covered by section 3307.01 or 3309.01 of the Revised Code.” (Emphasis added)

Section 145.02, Revised Code, provides:

“Notwithstanding the provisions of section 145.03 of the Revised Code, any employee who is contributing to or 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 school 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.” (Emphasis added)

Section 145.03, Revised Code, provides in part:

“A public employees retirement system is hereby created for the employees of the state and of the several local authorities mentioned in section 145.01 of the Revised Code. Membership in the system shall be compulsory and shall consist of all public employees upon being appointed.

“\* \* \*

\* \* \*

\* \* \*”

A consideration of Section 145.01 (A), Revised Code, indicates that a person who is employed and paid in whole or in part by a township is a public employee. Section 145.03, *supra*, makes it equally clear that it is mandatory that all public employees not specifically exempted become members of the system. Section 145.02, *supra*, does, however, exempt an employee who contributes to or receives retirement or disability benefits from a firemen’s relief and pension fund.

In considering the effect of the pension law at its inception in 1947, one of my predecessors in Opinion No. 2327, Opinions of the Attorney General for 1947, page 542, ruled that only those persons who were members of the township firemen's pension and relief fund, established under Section 4615-2, General Code, present Section 421.02, Revised Code, would cease to be members of the public employees retirement system. At page 548 of that opinion it is stated :

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

I believe that it is equally clear that an individual who is hired by the township to serve in the township fire department but who does not become a “member of the fire department,” and not, therefore, a member of the fund, remains subject to the provisions of Chapter 145., Revised Code, and must become a member of the public employees retirement system.

Having concluded that the firemen in the instant question are not members of the fund within the purview of Chapter 521., *supra*, such firemen should not be contributing to the firemen's relief and pension fund and are not exempted from membership in the public employees retirement system.

Accordingly, it is my opinion and you are advised that a full-time regular member of a township fire department who was hired after April 1, 1947 and was not under thirty years of age when hired, is not properly a member of the township firemen's relief and pension fund within the purview of Chapter 521., Revised Code; but such person is a “public employee” as defined in Section 145.01 (A), Revised Code, and under Section 145.03, Revised Code, it is compulsory that he become a member of the public employees retirement system.

Respectfully,  
MARK McELROY  
Attorney General