

OPINION NO. 79-014**Syllabus:**

Municipal police and firemen who are eligible to receive benefits from a municipal disability fund, established by a city, which provides full pay to police and firemen who are disabled as a result of injuries sustained in the line of duty, are excluded by R.C. 4123.02 from benefits under the workers' compensation system.

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio
By: William J. Brown, Attorney General, May 22, 1979

I have before me your request for my opinion concerning R.C. 4123.02. The problem which you raise concerns two ordinances of the City of Steubenville which grant to the members of Police Department and Fire Department of that city "disability pay" for time lost as the result of injuries sustained in the line of duty. Specifically, you have asked:

With such an ordinance in effect, are the disabled police or firemen still eligible to receive benefits from [Workers'] Compensation?

The statute at issue in your question is R.C. 4123.02. It provides:

Sections 4123.01 to 4123.94, inclusive, of the Revised Code do not apply to policemen or firemen in municipal corporations where the injured policemen or firemen are eligible to participate in any policemen's or firemen's pension funds established and maintained by a municipal corporation, unless the amount of the pension funds provided by the municipal corporation through taxation and paid to such policemen or firemen is less

than they would have received if the municipal corporation had no such pension fund. In such event policemen and firemen shall receive the regular state compensation for policemen and firemen in municipal corporations where no such pension funds have been created, less the sum received by the policemen or firemen from the pension funds provided by the municipal corporation through taxation. The sum paid from such pension fund shall be certified to the industrial commission by the treasurer or other officer controlling such pension fund.

In order to determine whether or not this exemption applies, the ordinances must be analyzed. Steubenville Ordinance Number 1977-202 provides, in relevant part:

. . . Chapter 131 of the Codified Ordinances of the City of Steubenville, Ohio, is now amended and there is hereby created within said Chapter, Section 131.05 to be entitled "Disability Pay", which Section shall read as follows:

- (A) Any member of the Police Department of the City of Steubenville, who becomes temporarily or permanently disabled as the result of injuries sustained in the line of duty, shall be entitled to time off with full pay during the time in which such disability continues without having said time off credited to vacation time or to sick time.
- (B) Any police officer becoming disabled and utilizing the provisions of SubSection (A) of this Section shall be required to present to the appointing authority certification from the attending physician of the disabled employee, certifying to the fact that said employee is disabled, that said disability occurred as a result of injuries sustained in the line of duty, and whether or not such disability is permanent or partial, and in the event that said disability is of a partial nature, whether or not the injured person is capable of performing any type of work, and the kind of work able to be performed.
- (C) In the event that the disabled employee is certified by the attending physician as being partially disabled, and in the event said attending physician shall certify that the disabled employee is able to perform certain light work, then said employee shall be required during the period of partial disability to perform whatever services [are] permitted by the attending physician during the period of disability.
- (D) In the event of any member of the Police Department of the City becoming permanently or partially disabled while in the line of duty, said person shall be required to file his or her application for benefits from the Police and [Firemen's Disability and Pension] Fund of the State of Ohio, as well as with the Workmen's Compensation Fund of the State of Ohio, for

approval of benefits as soon as physically able to do so. Upon the approval of benefits to said injured person, said person shall be required to pay back to the city any moneys received from either Fund which are over and above what was paid to said injured person in excess of the regular rate of pay during said period of disability.

- (E) In the event that the disability of a member of the Police Department of the City of Steubenville shall be of a permanent nature, to the extent that said permanency means total disability that will prevent the disabled employee from returning to work as a police officer of the City, the City will pay benefits as hereinabove set forth until such time as said employee is declared eligible for total disability benefits, at which time, said benefits from the City shall cease.
- (F) The City reserves the right at any time to request a physical examination of said injured employee by a physician of the City's choosing.

Ordinance Number 1977-203 contains identical provisions with respect to members of the fire department.

In order to better evaluate the significance of these two ordinances, some background discussion is necessary. During the 1950's, several cases tested the constitutionality of R.C. 4123.02, largely on the basis that it was violative of equal protection provisions of the state constitution. The argument was made that the statute made no exemption with respect to township policemen or firemen and thereby established an unreasonable classification. The statute was eventually held to be constitutional. See State ex rel. Van Lieu v. Industrial Comm'n, 165 Ohio St. 545 (1956); State ex rel. English v. Industrial Comm'n, 160 Ohio St. 215 (1953), rehearing, 160 Ohio St. 443 (1954); State ex rel. City of Columbus v. Industrial Comm'n, 158 Ohio St. 240 (1952).

Subsequently, two exceptions were established to the application of R.C. 4123.02. In 1956 Op. Att'y Gen. No. 7140, p. 708, my predecessor expressed the conclusion that the statutory limitation of R.C. 4123.02 does not extend to medical benefits because such benefits are not included within the "regular state compensation" referred to in the statute. In City of Akron v. Thomas-Moore, 9 Ohio App. 2d 33 (Summit County 1967), the Court of Appeals for Summit County held that the exemption of R.C. 4123.02 does not extend to death benefits because that section has no application to dependents of a fireman or policeman.

In 1965, the General Assembly enacted R.C. Chapter 742, which established a statewide Police and Firemen's Disability and Pension Fund. By requiring that the assets of each individual municipal fund be transferred to the state fund, R.C. 742.26 effectively bypassed R.C. 4123.02, which applies only to funds held by a municipality. State ex rel. Currin v. Industrial Comm'n, 20 Ohio App. 2d 175 (Franklin County 1969), aff'd, 22 Ohio St. 2d 204 (1970).

In general, courts seem to have avoided application of the exemptive provisions of R.C. 4123.02, where possible. See generally Young, Ohio Workmen's Compensation Law §4.17 (2d ed. 1971). This approach is supported by R.C. 4123.95, which specifically requires that all provisions of the workers' compensation law are to be ". . . liberally construed in favor of employees and the dependents of deceased employees." This does not mean, however, that R.C. 4123.02 is totally meaningless. Effect must be given to the clear language of the statute. See, e.g., Slingluff v. Weaver, 66 Ohio St. 621 (1902); R.C. 1.47(B).

Returning now to your specific question, I note that R.C. 4123.02 refers to a "pension fund," while the ordinances to which you refer make no mention of any such fund. Rather, it appears from the ordinances that the "disability pay" is to be budgeted from the general fund of the city. This difference in terminology is not, however, a sufficient ground to prevent the operation of R.C. 4123.02. The "fund" contemplated by the statute is basically that provided for in each ordinance. It is paid by the municipality and is "established" by it through taxation. The name that the fund bears is not significant.

I note, also, that paragraph (D) of each ordinance provides for a reduction in benefits to the extent that the injured person receives benefits from the state police and firemen's disability and pension fund or from the workers' compensation fund. Thus, the amount owed by the city depends upon the amount drawn from the workers' compensation fund. Under the ordinances, therefore, an officer is entitled to full benefits, regardless of his eligibility for workers' compensation; however, the benefits may come from any one, or more, of three sources: the workers' compensation fund, state pension fund, and the city's disability fund.

To determine whether the system established by the City of Steubenville exempts the employee from benefits under the workers' compensation fund, it is necessary to determine the intent of the General Assembly in enacting and retaining the provisions of R.C. 4123.02. As mentioned above, the General Assembly acted on the question of exemptions from workers' compensation in 1965 when it passed R.C. 742.26. It must be assumed that, in retaining R.C. 4123.02 while establishing a state pension system, the General Assembly intended to preserve the exemption from workers' compensation with respect to municipal police and firemen who receive benefits from a city. The ordinances in question come within the provisions of R.C. 4123.02. It is clear that they provide benefits for police and firemen who would otherwise be entitled to workers' compensation. While it could be argued that the municipal benefits are supplemental benefits not paid in lieu of workers' compensation, that argument is not supported by the language of the ordinances. In addition, the intent of the General Assembly must be given effect; to allow workers' compensation under the ordinances by claiming that the ordinances provide merely "supplemental" benefits would reduce R.C. 4123.02 to a nullity. Therefore, to the extent that municipal benefits are available under these ordinances, the policemen and firemen are, under R.C. 4123.02, ineligible for workers' compensation. While I might question the wisdom of R.C. 4123.02, I am without authority to repeal legislation.

Accordingly, it is my opinion, and you are advised, that:

Municipal police and firemen who are eligible to receive benefits from a municipal disability fund, established by the city, which provides full pay to police and firemen who are disabled as a result of injuries sustained in the line of duty, are excluded by R.C. 4123.02 from benefits under the workers' compensation system.