

November 19, 1949

George B. Ollson, Chief
Globe Fire Department
Globe, Arizona

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ARIZONA ATTORNEY GENERAL

Dear Mr. Ollson:

We have your letter of October 20, 1949, wherein you present the following problem:

"We have a man who left this department with twenty-one (21) years of service --ten years (1919 thru 1929) as a volunteer, and eleven years (1938 thru 1949) as Engineer and Chief. These last eleven years he was a full time paid man. He is 58 years of age.

We would appreciate a ruling from you as to whether or not this man is eligible for a pension of any kind under the States Firemen Pension Law. We thought perhaps his volunteer service would count under the old pension law".

Article 19 of Chapter 16, ACA 1939, provides for Firemen's Relief and Pension Funds and is applicable to incorporated cities and towns and unincorporated towns and settlements. Section 16-1904, ACA 1939, as amended, (Chapter 26, Section 3, Laws of 1941) concerns retirement of firemen for length of service and reads in part:

"When any person has served as a full time paid member of the same fire department or fire company in this state for twenty (20) years, the last five (5) years of which shall have been consecutive, then if he either is fifty-seven (57) years of age or over, or becomes physically unable for any cause, while a member of the fire department, to perform the duties of the service, he may, on his application and in the discretion of the board of trustees, be retired on a monthly pension equal to one-half the average monthly salary received by him for the twelve (12) months' period next prior to his retirement, to be paid from the firemen's relief and pension

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fund for his incorporated city or town or organized fire company. The pension shall in no event be less than one hundred fifty dollars (\$150) per month". (Emphasis Supplied)

Prior to its amendment in 1941, the section contained this language:

"Any person appointed or having served as a regular paid member, or any person appointed and having served as a member of a volunteer fire department for twenty (20) years or more in this state, five (5) years of which have been consecutive, immediately preceding the end of such service as a member of a fire department, may be retired and receive from such fund a monthly pension equal to one-half the salary he received preceding such retirement. In the event of the death of the beneficiary hereunder, his widow, children or other persons wholly dependent on him shall be paid the pension. Whenever such substituted beneficiary shall marry or such child attains the age of sixteen (16) years, they shall receive no further pension".

It might be noted that under the provisions of Section 16-1912, ACA 1939, as amended in 1941, the Firemen's Relief and Pension Funds are now made up in part of contributions by the firemen in the form of salary deductions and of equal amounts added from the general revenues of the respective cities and towns and volunteer fire companies. Prior to 1941 the fund in its entirety was composed of the annual tax on fire insurance premiums received and no provision existed authorizing contributions by the firemen or municipality. The amendment of Section 16-1904, supra, removed from service retirement coverage those firemen who are not full-time paid members of the same fire department or company, thus directly affecting volunteer firemen who are neither full-time fire fighters nor are they "paid" firemen in the sense the word is used in the statute (Section 16-2009 ACA 1939, provides that except for extra services, volunteer firemen shall serve without compensation). In Seavert v. Cooper, 187 Iowa, 1109, 175 N.W. 19, the Court in a consideration of a somewhat similar problem held that an Iowa statute providing that firemen serving twenty-two

years in a "paid fire department" may receive a pension (upon fulfilling certain statutory requirements) refers to departments where members devote their entire time to the service and are paid a regular salary and that a fireman cannot include in such twenty-two year period service with the department at a time when the members followed other occupations and were only paid a nominal sum for the time actually engaged in fighting fires.

A similar conclusion was reached in State v. Morris, W.Va., 37 S.E. 2nd. 85, in which the words "paid fire departments" in a statute were construed by the court to relate to firemen whose only vocation is fire fighting for which such firemen are paid substantial salaries and not to those fire departments in which services of officers and members are incidental to their regular vocations.

See also:

Mathewson v. Board of Trustees of Firemen's Pension Fund, 226 Iowa 61, 283 N.W. 256.

Kotze v. Montclair Police and Firemen's Pension Commission, 9 N.J. (Misc.) 1298, 157 A. 150,

and conversely in support of these cases:

State v. Knowles, 145 Wis. 523, 130 N.W. 451

Such, clearly would seem to be, the intent of the Arizona Legislature as embodied in Section 16-1904, supra, as amended. Any possible doubt that such is the case should be dispelled by the use in our statute of the words "full time".

The general rule of statutory construction here applicable has been expressed as:

"As in the case of other statutes, pension acts applicable to firemen should be construed to give force and effect to the legislative intent as embodied therein, and it is the duty, not only of boards administering such laws, but also of the courts, to enforce them according to their plain and unmistakable provisions,

* * * * * The purpose of the acts being regarded as beneficial or remedial, they should be liberally construed in favor of those to be benefited and the objects sought to be accomplished". 62 C.J.S. Municipal Corporations, Sec. 614(c), p. 1269.

In Sup v. Cervenka, 331 Ill. 459, 163 N.E. 396, the rule is stated:

"* * * While a pension act should be liberally construed to effect the object sought to be accomplished, yet, if the legislative intention is obvious from the language used, that intention must be made effective, and the judiciary will not be warranted in giving the act a meaning not expressed in it".

Certain recognized principles concerning firemen's pension legislation are also worthy of insertion here as their application to the facts at hand will determine the question presented. The following rules are set forth in 62 C.J.S., supra:

"Neither firemen nor those claiming under them have any rights except such as are conferred by the statutes or ordinances creating and governing pension or relief funds, and the legislature has the power to attach such conditions as it sees proper to entitle one to obtain the benefits provided for. On the other hand, payment of pensions or benefits should be made where the conditions prescribed by statute or ordinance for the allowance thereof have been met". Sub-section (a), *ibid.* p. 1266.

"In order to entitle a fireman or his dependents to a pension, the fireman must have performed the services required by law for the required length of time, and he must have reached the required age.
* * * The service which is to be counted in computing the necessary number of

years for retirement depends to some extent on the terms of the regulations. * * * Only the time spent in a paid fire department, and not a period of service with a volunteer or call company, can be counted under some statutes. * * * Subsection (g), *ibid.* p. 1280. (Emphasis supplied.)

* * * In the absence of a statute providing otherwise, the right of a fireman to a pension is generally considered not to be a vested right, particularly before the occurrence of the event on which the money is to be paid; and statutes providing for the creation of a firemen's pension fund have been held not to establish a contractual relationship, at least in such sense that they may not be repealed prior to the vesting of a right to demand and receive a pension. * * * Subsection (a), *ibid.* p. 1267. (Emphasis supplied.)

and finally:

* * * In general the right to a pension is governed by the law in force when the claim to pension arises, such as the law in force at the time of the termination of the fireman's services, * * * Subsection (c) *ibid.* p. 1270.

See Kotze v. Monteclair, *supra*.

The law in force at the time of the retirement of the fireman here in question provided (as it does at the present time) for service retirement pensions for those persons who have served as full-time paid members of the same fire department or company of the State for twenty years, the last five of which shall have been consecutive upon their compliance with certain other statutory provisions. The instant facts are that the fireman in question served only 11 years (1938 through 1949) as a full-time paid member. As at the time of the completion of his first period of service (1929) as a volunteer he had acquired no right to a pension under the law even as it then read, under no theory is he entitled to any "retroactive service credit" for such period which could be added

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to the service rendered from 1938 through 1949.

We must therefore conclude, and it is our opinion, that this former fireman is not eligible for a service retirement pension under our statute.

We express no opinion upon any possible rights of this fireman to a disability retirement under Section 16-1905 ACA 1939, as amended.

We trust the foregoing sufficiently answers your inquiry.

Very truly yours,

FRED O. WILSON
Attorney General

RICHARD C. BRINEY
Assistant Attorney General

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