

ner and with like power in the fixing of rates for municipally owned utilities as is provided in the case of public utilities.

In conclusion, it is my opinion that a municipality now owning or operating a utility is subject to the jurisdiction of your Commission for the purposes of fixing rates to be charged the patrons of such utility for services and that your Commission has the authority and power to act on said petition even though this particular municipal utility came into being in the year 1940. I am assuming herein that no election by the voters thereof, as prescribed by statute, has taken place.

OFFICIAL OPINION NO. 16

April 25, 1947.

Mr. C. E. Ruston, State Examiner,
State Board of Accounts,
304 State House,
Indianapolis, Indiana.

Dear Mr. Ruston:

I have your letter requesting an opinion on the following questions:

"1. Is a city of the fifth class entitled to participate in the provisions of the acts concerning police pension funds.

"2. Is the chief of police who has been serving in that capacity for eighteen years but who has never served in any other capacity with the police department entitled to the privileges of the police pension fund act.

"3. Is a present member of the police department who was thirty-eight years of age at the time of becoming a member of such department entitled to the privileges of the police pension fund acts."

In answer to your first question I call your attention to Section 1 of Chapter 51 of the Acts of 1925, page 167, as

amended by Section 1 of Chapter 188 of the Acts of 1941, page 565; Burns' 1945 Pamphlet Part Section 48-6401, which provides in part:

“* * * Section 1. That in every city except cities of the first class there shall be and is hereby created a police pension fund.”

Prior to the 1941 amendment the 1925 Act applied only to cities of the first, second, third and fourth classes and was so limited both in Section 1 and by its title. The 1941 Act, above referred to, by Section 4, thereof also amended the title of said 1925 Act to make it include cities of the fifth class. Under the 1941 amendment the provisions of the 1925 Act concerning police pension funds are applicable to cities of the fifth class.

As to your second question, the police pension act of 1925 as amended provides in part in Section 2: “Every *member of the police force* who has been accepted and designated as a beneficiary of the police pension fund” and “Every person becoming a *member of the police force* from that time be liable to the payment of such assessment, and, in becoming a member of such police force, shall be conclusively deemed to undertake and agree to pay the same and have it deducted from his salary as herein required.” (Our emphasis).

Burns' 48-6402, 1945 Pamphlet Part.

The various provisions of the law refer to “members” of the police force.

The question of whether the chief of the fire force of a fifth class city was entitled to the benefits of the fire pension fund was before the Appellate Court in the case of State *ex rel.* Harrell v. City of Wabash (1946), 65 N. E. (2) 494 and the court said:

“The sole question presented by this appeal is whether the chief of the fire force in a fifth class city is a ‘member’ of such fire force so as to be eligible to membership in the Firemen’s Pension Fund created under the 1937 Act. Acts 1937, Chapters 31, 55, Sections 48-6518 to 48-6544, Burns’ 1933 Supp. Appellant unsuccessfully contended in the trial court for an affirmative answer to the question.

“We think the decision of the trial court was clearly correct. The involved Pension Fund Act in all its provisions and by its clear and explicit terms applies only to ‘members’ of the fire force. The statute which governs the appointment and removal of members of the fire force and the chief of the fire force respectively in cities of the fifth class (Acts 1905, Chapter 129) makes clear that the ‘chief’ is not a ‘member’. Section 160 of that Act as amended in 1935, Acts 1935, Chapter 282, Sec. 48-6105, Burns’ 1933 Supp., provides that a ‘member’ of the fire force is subject to discharge only for cause. But Section 80 of the same Act, Sec. 48-1502, Burns’ 1933, Sec. 11459, Baldwin’s 1934, provides that the chief of the fire force serves at the pleasure of the mayor.”

It is noted that the basis of the above decision was the difference in the method of appointment and removal of the chief from the method of appointment and removal of the rest of the force. The fire chief was appointed and removed at the pleasure of the mayor while the rest of the force had tenure and could only be removed for cause.

State *ex rel.* Shanks v. Common Council, City
of Washington (1936), 212 Ind. 38, 42.

We therefore need to examine the statute relating to the police force in cities of the fifth class to see if the same situation obtains.

Section 48-1502 Burns’, referred to in the Harrell case, provides that the mayor appoints the “city marshal” (chief of police) and the chief of the fire force and may remove them from office. This is Section 80 of Chapter 129 of the Acts of 1905.

Section 170 of said Chapter 129 of the Acts of 1905 as amended in 1919, same being Section 48-6120 Burns’ 1933, provides in part as follows:

“In cities of the fifth class, so far as applicable, all the duties and powers in this act provided to be exercised by the chief of police shall be exercised by the city marshal, and all duties and powers of the

chief of the fire force shall be exercised in such (cities) of the fifth class as in other cities; and all provisions for appointments, discharge, duties and powers of members of the police and fire forces shall also extend, as far as applicable, to such cities of the fifth class. * * *

Chapter 182 of the Acts of 1925, page 441, Section 48-6119 of Burns' 1933, provides as follows:

"In all cities of the fifth class, the officers and members of the police force shall be appointed by the mayor and shall be subject to the direction of and to discharge by the mayor. The number of officers and members constituting the police force in any such city of the fifth class and the compensation to be paid to such officers and members for their services, shall be determined by the common council and prescribed by ordinance."

Section 8 of Chapter 233 of the Acts of 1933, Burns' 48-1219 relates to cities of the fifth class and provides in part:

"The mayor shall appoint a city attorney, a chief of fire department, a chief of police, and such boards, commissions, officers and other employees, in accordance with the provisions of law now in effect and as hereinafter provided."

Section 10 of this act provides that nothing in the act shall be construed to amend or alter any law concerning the employment or dismissal of the members of the fire and police department. This section was amended last in 1945 (Chapter 32, Section 1; Burns' 48-1222, 1945 Supp.), but the proviso was carried forward.

Up to this point there would seem to be a difference in the fire and police forces of cities of the fifth class. As to the fire chief, he was appointed by the mayor and served at his pleasure. The rest of the fire force were employed as in cities of higher classification, had tenure and were removable only for cause on hearing. But under the 1925 Act all officers and members of the police force were appointed by the mayor and subject to discharge by him.

In 1935 Section 160 of the said 1905 Act (Section 48-6105 Burns' 1945 Supp.) was amended to read in part as follows:

“Every member of the fire and police forces, including police radio operators and police signal and fire alarm operators, appointed by the mayor, the commissioners of public safety or the board of metropolitan police commissioners, shall hold office until they are removed by said board. * * *”

It then provided for removal for cause, hearing and court review.

This section of the original 1905 Act related to “Every member of the fire and police forces” and provided for removal for cause and hearing. The changes made by amendment were in the method and procedure.

We have seen, *supra*, that prior to 1925 this section applied to cities of the fifth class, but that a 1925 Act removed its application to the police force in fifth class cities. The question therefore arises as to whether its reenactment and amplification by amendment in 1933 and 1935 restored its application to the police force of a fifth class city.

In the case of *Public Service Commission v. City of Indianapolis* (1922), 193 Ind. 37 at page 49 the court said:

“* * * And where a later statute merely reenacts the provisions of an earlier one, it does not repeal an intermediate act which has qualified or limited the earlier one, but such intermediate act will be deemed to remain in force, and to qualify or modify the new act in the same manner as it did the first. 1 Sutherland, *Statutory Construction* (2d ed.) § 273; Endlich, *Interpretation Statutes* § 194.”

See also: *City of New Albany v. Lemon* (1926), 198 Ind. 127, 137.

It would seem that since the 1925 Act qualified and limited Section 160 of the 1905 Act by removing from its application the police force of cities of the fifth class, that its reenactment with amplifications of the procedure of removal in 1933 and 1935 would not under the above authority restore the

police forces of fifth class cities to its application. Under this construction the basis of the opinion of the court in the Harrell case would not be present in the question of determining whether the chief of police of a fifth class city was eligible to membership in the pension fund. As to the intention of the legislature, we point out that at the first session of the legislature after the decision in the Harrell case it passed an act providing that the chief of the fire force in cities of the fifth class "shall be conclusively deemed to be a member of the fire force of such cities." Chapter 136, Acts 1947. This act was doubtless the direct result of the above decision holding the fire chief not to be a member of the fire force in fifth class cities.

The 1935 amendment to Section 160 of the Acts of 1925 is not too helpful in determining the question for it, like the original section, uses the term "member of the fire and police forces" without definition and is therefore not very helpful in determining whether the police chief is a "member" of the force for the purpose of construing the Pension Fund Act as applied to cities of the fifth class.

Taking all of the foregoing into consideration, it seems to me that the most logical construction of the Police Pension Fund Act as applied to cities of the fifth class is that the chief of police is eligible to membership therein.

In answer to your third question, section 4 of the 1925 Act (Burns' 1933 Section 48-6404) provides in part:

"* * * Provided, further, however, That in no event shall a pension be paid to an employee of the police department who at the time of his appointment was over thirty-five (35) years of age,
* * *"

The provisions of Chapter 185 of the Acts of 1935 (Burns' 1933 Section 48-6401 *et seq.*) as amended do not apply to cities of the fifth class and the provisions therein relating to persons over thirty-five do not apply to the police pension fund in cities of the fifth class.