

OFFICIAL OPINION NO. 36

November 7, 1969

Hon. Adam Benjamin, Jr.
504 Broadway, Suite 828
Gary, Indiana 46402

Dear Representative Benjamin:

I am in receipt of your letter asking several questions concerning one aspect of the laws regulating firemen's pensions.

Firemen's pensions are regulated by Acts of 1937, Chapter 31, as amended. Section 11 of that Act specifies the amount to be received by a pensioned fireman. Prior to 1967, that section, as found in Burns' (1963 Repl.), Section 48-6528, provided that all pensioned firemen would receive a benefit of fifty-five per cent (55%) of the monthly wage received by a fully paid first-class fireman, no matter whether the pensioned fireman was receiving a retirement benefit after having completed twenty-five years service or a disability benefit not dependent on years of service. That section was amended by Acts of 1967, Chapter 208, Section 7, as found in Burns' (1968 Supp.), Section 48-6528 so as to increase the completion of service benefit to sixty per cent (60%) of the aforementioned salary but leave unchanged the disability benefit.

Your questions are concerned with certain firemen who, prior to 1967, had completed more than twenty-five years service and were, therefore, eligible for retirement benefits but who chose instead to receive disability benefits for one reason or another, usually under the belief that their choice would result in certain tax benefits. Your specific questions present hypothetical variations in the processes through which those firemen were placed on disability, but for clarity they can be summed up in one general question:

May a fireman who was eligible to retire on completion of service pension but who instead retired on a disability pension subsequently change his status from a disabled pensioner to a retired pensioner?

The Fireman's Pension statutes make no provision for automatic change from disability status to retirement status upon reaching a given age. Such a provision would not have served

OPINION 36

any purpose under the law as originally enacted inasmuch as the benefits under disability and under retirements were the same. (Nor for that matter, did the Fireman's Pension Law, as originally enacted contain any provision for either compulsory or involuntary retirement upon reaching a certain age. Section 6 of the 1967 amendatory Act provides for involuntary age at 65.)

In the case of the City of Muncie v. Horlacher (1944), 222 Ind. 302, 306, 53 N.E. (2d) 631, the statutes controlling the retirement of firemen prior to 1967 were evaluated thusly:

“As pointed out by this Court in *Board of Trustees of the Firemen's Pension Fund, et al., v. the State, ex rel. Stuck, Guardian* (1935), 208 Ind. 117, 194 N. E. 623, when a fireman is retired, he is not discharged and he does not, by reason of his retirement, cease to be a member of the fire force. A member is retired by the chief of the fire force. * * * But, it (is) only the Board of Public Works and Safety of the Appellant City which (has) the power to discharge the Appellee.

“ * * *

“In the case of a member retired for disability, the statute expressly provides that the board of trustees of the pension fund shall have the right to have such retired member examined, at any time, and if he be found to be physically able to again be placed back in active service, such fact shall be certified to the appointing authority which shall replace such retired member back in active service as soon as the first vacancy occurs * * * Thus, a member of the fire force may be taken out of active service, and thereafter certified back into active service without the Board of Public Works and Safety taking any action concerning such member, except to assign him to the first vacancy occurring.”

Thus, a person who is retired from the fire force, whether by disability or completion of length of service, remains a member of the fire force. A fireman retired on a disability retirement may be called back into active duty with that force, whereas a fireman who has retired after completing the re-

1969 O. A. G.

quired years of service cannot be called back to active duty. The firemen with which your question is concerned, therefore, remain subject to recall as long as they remain on *disability* retirement.

If those firemen have satisfied all the statutory requirements for permanently retiring from the active fire force and yet are still subject to recall to active duty, it is my opinion that upon proper application they are entitled to retire completely from the possibility of active duty and would then be entitled to the pension associated with such permanent retirement.