OPINION 38

OFFICIAL OPINION NO. 38

November 17, 1967

PUBLIC EMPLOYEES—Retirement Program—Police Pension Fund as Having Power to Refund Assessments to Members When Employment is Terminated.

Opinion Requested by Mr. Richard L. Worley, Chief Examiner, State Board of Accounts.

I am in receipt of your recent letter concerning pension funds in which you inquire:

> "1. Does Chapter 51, Acts of 1925, as amended, Burns' 48-6401 et seq., permit the police pension fund board to establish rules and regulations providing for the refund of assessments to police officers regardless of the reason for termination of employment?
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> "2. Would your answer be the same in regard to firemen's pension funds operating pursuant to Chapter 129, Acts of 1905, as amended, Burns' 48-6501 et seq., or Chapter 31, Acts of 1937, as amended, Burns' 48-6518 et seq."

Retirement programs for public employees are divided into two categories, those providing for a pension and those providing for an annuity. The distinction between the two classes was well described in the opinion in *Raines v. Board of Trustees,* 365 Ill. 610, 7 N.E. 2d 489 (1937), which opinion was quoted extensively and with approval in the Indiana case of *Jensen v. Pritchard,* 120 Ind. App. 439, 91 N.E. 2d 846 (1950). The Illinois Court said, at 7 N.E. 2d 490, 491:

> "The whole difficulty in this case arises from a failure to distinguish between a pension fund and an an-

nuity fund derived in part from voluntary contributions made under a statutory option to contribute or refrain from contributing. A 'pension' is in the nature of a bounty springing from the appreciation and graciousness of the sovereign, and may be given, withheld, distributed, or recalled at its pleasure. People v. Retirement Board, 326 Ill. 579, 158 N.E. 220, 54 A.L.R. 940; Porter v. Loehr, 332 Ill. 353, 163 N.E. 689; Pecoy v. City of Chicago, 265 Ill. 78, 106 N.E. 435. For this reason it is held that a pensioner has no vested right in a pension fund. It has also been held that the character of a pension fund is not changed by compulsory contributions by way of exactions from the salaries or wages of public officers and employees. It is said that such payments into the fund are not in fact payments by the officer or employee, and the employment is accepted with knowledge that certain amounts will be deducted each month and placed in the pension fund; that the money is not first segregated from the public fund so as to become private property and then turned over to the pension fund, but is set aside or transferred from one public fund to another, and remains public money over which the person from whose salary it is deducted has no control, and in which he has no right. Pecoy v. City of Chicago, *supra*; Hughes v. Traeger, 264 Ill. 612, 106 N.E. 431; Pennie v. Reis, 132 U.S. 464, 10 S. Ct. 149, 33 L. Ed. 426; State v. Board of Trustees of Policemen's Pension Fund, 121 Wis. 44, 98 N.W. 954.

"Because of these principles, we have held that policemen from whom compulsory contributions had been exacted by statute for a police pension fund, and who had retired on a pension, were not entitled to an increase thereof under a statutory amendment adopted after their retirement. Porter v. Loehr, *supra*; People v. Abbott, 274 Ill. 380, 113 N.E. 696, Ann. Cas. 1918D, 450. We pointed out that such an increase is an appropriation of public funds for the benefit of individuals and a gift or gratuity having for its sole basis or justi-

fication the services rendered prior to their retirement; and that such an allowance violates section 19 of article 4 of the Constitution prohibiting extra compensation, fee or allowance to any public officer, agent, or servant, after the service is rendered. Such holdings are predicated upon the nature of the fund as being purely a pension fund unchanged in its nature by complusory so-called contributions. Such a fund remains at all times public money to be dispensed as a gratuity or withdrawn at will devoid of any right in the pensioner.

"There is a wide difference between voluntary contributions to a fund under a statutory elective right and being compelled to suffer deductions without any such right. In the latter case the officer or employee has no voice in determining whether or not he will suffer such exactions. They are imposed by the statute and deducted even if against his will. In the other case it is wholly a matter of choice with him. He may elect to come within the terms of the act and receive its benefits, or he may forego that privilege at his option, with no other effect than to deprive him of participating in the fund. If he does not elect to contribute, he receives and retains the full amount of his salary or wages. If he elects to contribute, the amounts are deducted by his direction. The effect is the same as if his full salary were paid to him and after it became his private means he in turn contributed to the retirement fund. In such case there is neither reason nor authority to hold that the fund remains public money in which he has no right or interest."

Using the language above as background we can now examine Acts 1925, ch. 51, as amended, the same being Burns §§ 48-6401 through 48-6406, the subject of your first question. The second section of that Act, as last amended by Acts 1955, ch. 77, § 1, provides in part:

"(a) Such board of trustees shall have full charge and control of the police pension fund of such city, which shall be derived from the following sources: . . .

> "Third. Every member of the police force who has been accepted and designated as a beneficiary of the police pension by said board of trustees shall be assessed a part of his salary, to be fixed by the by-laws of such police pension fund, which assessment shall be equal to three per cent per annum of the salary paid a first-class patrolman and which shall be deducted each month from the pay of each such member of the police department. The secretary of the board of trustees shall prepare a roll of each of such assessments, and place opposite the name of every member of such police force the amount of the assessment against him; and the treasurer of such board shall deduct and retain out of the salary paid to such officer the amount of such assessment, and place the same to the credit of such police pension fund.
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> "Every person becoming a member of the police force shall from that time be liable to the payment of such assessments, 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."

(The passage above has been amended several times, but such amendments have not changed the last sentence.)

The statute above clearly involves non-voluntary "contributions" (accurately labeled "assessments" by the statute) from policemen. Thus the retirement program involved is a pension and the "contributors" have no vested rights in the money contributed.

While I can find no case in an Indiana court of appeal that involves the return of "contributions" to policemen who resign from the police force, there are several opinions that involved the police pension fund. In those decisions the court uses language that supports the conclusion that contributors have no vested rights in the fund.

In *Kern v. State ex rel. Bess,* 212 Ind. 611, 614, 10 N.E. 2d 915 (1937), a case involving an earlier police pension statute that required non-voluntary contributors, the court said:

"It is contended by appellee that since the statute of 1919 went into effect after Bess became a member of the pension fund and had made payments thereto, he had a vested right which could not be changed or abrogated by a change in the statutory provision concerning payment from the fund. The pension fund is accumulated by taxation, by contributions and awards of various sorts, and by enforced contribution by members of the police force. It is established by the great weight of authority in other jurisdictions, including the Supreme Court of the United States, that such pensions are gratuities; that they involve no agreement of the parties and create no vested rights, notwithstanding compulsory contributions by the parties in the form of allotted sums retained out of the member's pay. In a case involving this question, the Supreme Court of the United States said concerning contributions to the fund by way of deduction from the compensation of the officer: 'Notwithstanding, therefore, in this case, the petitioner avers that the deceased police officer contributed out of his salary two dollars a month, pursuant to the law in question, and, in substance, that the fund which was to pay the one thousand dollars claimed was created out of like contributions of the members of the police, the court, looking to the statute, sees that, in point of fact, no money was contributed by the police officer out of his salary, but that the money which went into that fund under the act of April 1, 1878, was money from the State retained in its possession for the creation of this very fund, the balance—one hundred dollars—being the only compensation paid to the police officer. Though called part of the officer's compensation, he never received it or controlled it, nor could he prevent its appropriation to the fund in question. He had no such power of disposition over it as always accompanies ownership of property. . . . There was no contract on the part of the State that its disposition should always continue as originally provided. Until the particular event should happen upon which the money or a

> part of it was to be paid, there was no vested right in the officer to such payment.' *Pennie v. Reis* (1889), 132 U.S. 464, 470, 471, 10 S. Ct. 149. See, also, cases collected, 54 A.L.R. 943 and 98 A.L.R. 505."

A later case under the present statute, *Klamm v. State ex rel. Carlson,* 235 Ind. 289, 126 N.E. 2d 487 (1955), relies on *Kern* and *Pennie, inter alia,* as authority for these statements:

> "While the police pension fund here in question is accumulated by taxation, by contributions, and awards of various sorts, and by enforced contributions by members of the police force, the great weight of authority holds that such pensions are gratuities; that they involve no agreements of the parties and create no vested rights, notwithstanding compulsory contributions from the member's pay. Until retirement, the police officer has no vested right in pension payments. (Citations omitted.)
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> "Where the statutory conditions for retirement existing when the application is made have been met, and the award of the pension has been made, or as of right should have been made, the pensioner's interest becomes vested and takes on the attributes of a contract, which, in the absence of statutory reservations, may not legally be diminished or otherwise adversely affected by subsequent legislation. (Citations omitted.)"

Therefore, the pension fund created by Acts 1925, ch. 51, as amended, to use the language of the court in *Raines v. Board of Trustees, supra,* "is in the nature of a bounty springing from the appreciation and graciousness of the sovereign, and may be given, withheld, distributed, or recalled at its pleasure." The sovereign has provided for the distribution of the fund (or the vesting of rights in the fund) upon the occurrence of certain events. Section 3 of the Act, Burns § 48-6403, provides that the fund "shall be used and devoted" to provide temporary benefits for policemen who have suffered physical or mental disability; to provide a pension for policemen who become physically unfit to continue in service; to

provide pensions for policemen who are separated from the force involuntarily or involuntarily after 20 years' service; and to provide funeral benefits for, and benefits to the dependents of, active or retired members of the police force who suffer death. No provision is made for the return of "contributions" upon separation from the police force no matter when or for what reason the separation occurs; the Act does not contemplate the return of contributions to policemen who resign or are dismissed from the force prior to the completion of twenty years' service.

Your question was specifically concerned with the authority of the police pension fund board, an administrative agency, to establish rules and regulations for the refund of assessments. The powers of the police pension fund board are set out as part of the first section of the Act, Burns § 48-6401, as follows:

> ". . . Such board shall have the power to make all necessary by-laws for meetings of the trustees, the manner of their election, the counting and canvassing of the votes therefor, the collection of all moneys and other property due or belonging to such fund, and all matters connected with the care, preservation and disbursement of the same, as well as all other matters connected with the proper execution of the purposes and provisions of this act in relation to such police fund."

The power of administrative agencies to adopt rules and regulations was delineated in *Department of State Revenue v. Colpaert Realty Corp.*, 231 Ind. 463, 479, 109 N.E. 2d 415 (1952), thusly:

> "An administrative board has the undoubted right to adopt rules and regulations designed to enable it to perform its duties and to effectuate the purposes of the law under which it operates, when such authority is delegated to it by legislative enactment. *Blue v. Beach* (1900), 155 Ind. 121, 56 N.E. 89; *Albert v. Milk Control Board of Indiana* (1936), 210 Ind. 283, 200 N.E. 688; *McCreery v. Ijams* (1945), 115 Ind.

> App. 631, 59 N.E. 2d 133. But it may not make rules and regulations inconsistent with the statute which it is administering, it may not by its rules and regulations add to or detract from the law as enacted, nor may it by rule extend its powers beyond those conferred upon it by law. *McCreery v. Ijams, supra*; 73 C.J.S., Public Administrative Bodies and Procedure, §§ 93 and 94."

Therefore, the police pension fund board is without authority to adopt a rule or regulation authorizing the distribution of money from the pension fund for any purpose not authorized by statute. Since, as noted above, Acts 1925, ch. 51, as amended, does not authorize a return of assessments, it follows that the board is without authority to permit such returns.

To examine the Act relating to firemen's pension funds involved in your second question (Acts 1905, ch. 129; Acts 1937, ch. 31) in great detail would unduly extend this opinion. It should suffice to note that both Acts require non-voluntary assessments (see Burns §§ 48-6504 and 48-6525), both specify the conditions under which distributions from the fund can be made (see Burns §§ 48-6506, 48-6507, 48-6527, 48-6528 and 48-6529), and neither provide for the return of assessments. The reasoning used and the conclusion reached in connection with the police pension fund applies with equal force to each of the Acts pertaining to firemen's pension funds.

In conclusion, then, it is my opinion that pension fund boards established pursuant to either Acts 1925, ch. 51 (police), Acts 1905, ch. 129 (firemen), or Acts 1937, ch. 31 (firemen), do not have the authority to adopt rules and regulations providing for the refund of assessments to those beneficiaries of the fund who resign, or are dismissed for other than medical reasons, from service prior to completion of the years of service that would qualify them to receive retirement benefits.