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RETIREMENT AND PENSIONS: Policemen and firemen pensions

OFFICERS AND EMPLOYEES: Public Employees Relations Act

WORDS AND PHRASES: "Appropriate recognized bargaining agent"

Where the policemen and firemen retirement act authorizes a municipality's legislative body or its electors to increase pension benefits "if so provided in a collective bargaining agreement entered into between a municipality . . . and the appropriate recognized bargaining agent," administrative personnel not within a recognized bargaining unit may not receive the increased benefit.

If, however, the administrators form a recognized bargaining unit and enter into a collective bargaining agreement providing for the increased benefit, such administrative personnel may receive the increased benefit.

The term "appropriate recognized bargaining agent" as used in the firemen and policemen pension act refers to the use of that term in the public employees relations act.

Opinion No. 5029 June 30, 1976.

Honorable Jeffrey D. Padden
State Representative
The State Capitol
Lansing, Michigan 48901

Honorable Alfred Sheridan
State Representative
The State Capitol
Lansing, Michigan 48901

Honorable James DeSana
State Senator
The State Capitol
Lansing, Michigan 48901

You have, in separate letters, requested my opinion on several questions concerning 1937 PA 345, as amended by 1975 PA 147; MCLA 38.551 *et seq;* MSA 5.3375(1) *et seq.*

1. "Can the legislative body of a municipality give to its administrative personnel, not within a recognized bargaining unit, the benefits of averaging the three highest years' annual compensation (under the last ten years of service) under P.A. 147 of 1975 without the necessity of being in a bargaining unit?

2. "If the answer to No. 1 above is affirmative, must the municipality give the same benefits to the union members in a bargaining unit who are still under an existing contract?

3. "If the answer to No. 1 above is no, can the three year averaging factor be given to administrative police and/or fire personnel if they formally form a bargaining unit?

"What constitutes a bargaining unit under Section 6(1) (e)?"

1937 PA 345, *supra,* provides for the establishment and operation of a retirement system for the police and firemen of cities, villages, and municipalities, which have full-time police and fire departments.

Membership in a 1937 PA 345, *supra,* retirement system "shall include all policemen and firemen employed by the city, village or municipality."[1] MCLA 38.562; MSA 5.3375(12). For the purposes of the act, 1937 PA 345, *supra,* makes no distinction between policemen and firemen.

Retirement benefits are, as a general rule, payable to members of the retirement system once they are 55 years of age or older and have 25 or more years of credited service. MCLA 38.556(1) (a); MSA 5.3375(6) (1) (a). Upon retirement:

> ". . . a member shall receive a regular retirement pension payable throughout his life of 2% of his *average final compensation* multiplied by the first 25 years of service credited to him, plus 1% of his *average final compensation* multiplied by the number of years, and fraction of a year, of service rendered by him which are in excess of 25 years. . . ." (Emphasis added)

The municipality's legislative body or electors may increase the percentage of payment from 2% up to a maximum of 2.5%.

The term "average final compensation" is defined by MCLA 38.556(1) (e); MSA 5.3375(6) (1) (e). That provision, as amended by 1975 PA 147, states:

> " 'Average final compensation' shall mean the average of the highest annual compensation received by a member during a period of 5 consecutive years of service contained within his 10 years of service immediately preceding his retirement, or leaving service, *or, if so provided in a collective bargaining agreement entered into between a municipality under this act and the appropriate recognized bargaining agent, may mean the average of the 3 years of highest annual compensation received by a member during his 10 years of service immediately preceding his retirement or leaving service.* If he has less than 5 years of service, then average final compensation shall mean the annual average compensation received by him during his total years of service." (Emphasis added)

As the Supreme Court reaffirmed in *Dussia* v *Monroe County Employees Retirement System,* 386 Mich 244, 249; 191 NW2d 307, 310 (1971):

> " 'It is a cardinal rule that the legislature must be held to intend the meaning which it has plainly expressed, and in such cases there is no room for construction, or attempted interpretation to vary such meaning.' "

The words of the statute are clear. A member's "average final compensa-

[1] Volunteer firemen, privately employed policemen and firemen, persons temporarily employed during emergencies, and civilian employees of police and fire departments except certain transferred policemen and firemen are, however, excluded from membership in the retirement system. MCLA 38.562; MSA 5.3375(12).

tion" may be based upon his or her "3 years of highest annual compensation" when "so provided in a collective bargaining agreement entered into between a municipality under this act and the appropriate bargaining agent."

Your question, however, concerns administrative personnel, who are not within a recognized bargaining unit. Such persons obviously do not fall within the specific language of MCLA 38.556(1) (e); MSA 5.3375 (6) (1) (e).

Where powers are specifically conferred by statute they may not be extended by implication. No other or greater power was given than that which the statute assigns. *Eikhoff* v *Detroit Charter Commission,* 176 Mich 535; 142 NW 746 (1913). OAG, 1973-1974, No 4811, p 126, 127 (February 12, 1974).

It is, therefore, my opinion that administrative personnel not within a recognized bargaining unit, are not entitled under MCLA 38.556(1) (e); MSA 5.3375(6) (1) (e) to have their "average final compensation" based upon their "3 years of highest annual compensation".

My answer to your first question obviates the need to respond to your second question.

In your third question, you ask whether the three year averaging rule could be applied to the administrative personnel of the police and fire departments, if the administrators formed a recognized bargaining unit. In that regard, you also ask what constitutes a bargaining unit under MCLA 38.556(1) (e); MSA 5.3375(6) (1) (e).

To reiterate, MCLA 38.556(1) (e); MSA 5.3375(6) (1) (e), in pertinent part, provides:

> " 'Average final compensation' . . . if so provided in a collective bargaining agreement entered into between a municipality under this act and the appropriate recognized bargaining agent, may mean the average of the 3 years of highest annual compensation received by a member during his 10 years of service immediately preceding his retirement or leaving service. . . ."

No express definition of "appropriate recognized bargaining agent" is given. There is, however, substantial legal precedent as to the meaning of the term.

The legislature has enacted the Public Employees Relations Act [PERA], 1965 PA 379; MCLA 423.201 *et seq;* MSA 17.455(1) *et seq,* to resolve labor disputes involving public employees. PERA covers all public employees in Michigan with the sole exception of the classified state civil service. *Regents of the University of Michigan* v *Employment Relations Commission,* 389 Mich 96, 110; 204 NW2d 218, 224-225 (1973). See also, *City of Escanaba* v *Labor Mediation Board,* 19 Mich App 273; 172 NW2d 836 (1969).

As stated in its preamble, PERA seeks to "declare and protect the rights and privileges of public employees." This policy has been effectuated by allowing public employees to engage in collective bargaining. Specifically, MCLA 423.209; MSA 17.455(9) provides:

> "It shall be lawful for public employees to organize together or to

> form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, or to negotiate or bargain collectively with their public employers through representatives of their own free choice."

The public employer must in turn "bargain collectively with the representatives of its employees as defined in Section 11 and is authorized to make and enter into collective bargaining agreements with such representatives. . . ." MCLA 423.215; MSA 17.455(15).

Public employees may bargain collectively only "in a unit appropriate for such purposes". MCLA 423.211; MSA 17.455(11). The Michigan Employment Relations Commission [MERC] has been empowered to decide what constitutes an "appropriate bargaining unit". MCLA 423.201(b); MSA 17.455(1) (b). MCLA 423.213; MSA 17.455(13). When a valid petition is filed, MERC will designate the appropriate bargaining unit, hold an election, and certify a labor organization, if a majority of the employees in the unit approve, as the recognized bargaining representative, or "agent". MCLA 423.212; MSA 17.455(12).

PERA does not bar supervisory personnel from joining or forming a labor organization and engaging in collective bargaining. *School District of the City of Dearborn* v *Labor Mediation Board,* 22 Mich App 222; 177 NW2d 196 (1970). Accord, *Hillsdale Community Schools* v *Labor Mediation Board,* 24 Mich App 36; 179 NW2d 661, leave to appeal denied, 384 Mich 779 (1970). Supervisory personnel may not, however, be included in a bargaining unit containing nonsupervisory employees. *School District of the City of Dearborn, supra.*

One exception to that rule is made by MCLA 423.213; MSA 17.455(13), which, in pertinent part, states:

> ". . . Provided, That in any fire department, or any department in whole or part engaged in, or having the responsibility of, fire fighting, no person subordinate to a fire commission, fire commissioner, safety director, or other similar administrative agency or administrator, shall be deemed to be a supervisor."

As the Court in *School District of the City of Dearborn, supra,* 22 Mich App at 229; 177 NW2d at 199, explained:

> ". . . This section simply allows the MLMB to include in a bargaining unit with nonsupervisory personnel those persons in a fire department who might otherwise be classified as supervisors. Fire departments are usually organized on quasi-military lines and there are numerous persons involved in the chain of command. The legislature has determined that in fire departments these persons shall not be deemed supervisors and thus are not required to have separate bargaining units. . . ."

It is, therefore, my opinion that the administrative police and/or fire personnel may join or form a labor organization and engage in collective bargaining. Police administrators may not, however, be included in a bargaining unit with non-supervisory employees. MCLA 423.213; MSA

17.455(13) controls the composition of bargaining units for fire departments. The three year averaging rule may then be applied to the administrative police and/or fire personnel, "if so provided in . . . [their] collective bargaining agreement". MCLA 38.556(1) (e); MSA 5.3375(6) (1) (e).

4. "Do you have to pay the same pension benefits to fire departments and police departments or may the pension benefits be different between the departments?"

Assuming that your fourth question does not concern the three year averaging provision of MCLA 38.556(1) (e); MSA 5.3375(6) (1) (e), the operative language of OAG 4811, *supra,* pp 127-128, remains controlling:

> "In plain and unambiguous terms the legislature has commanded that members of such retirement system, provided they are 55 years of age or older and with 25 or more years of service, shall receive retirement benefits of not less than 2% of the average final compensation multiplied by the first 25 years of service credited to the member, plus 1% of the average final compensation multiplied by the number of years, and fraction of a year, of service in excess of 25 years. Upon approval by the legislative body of a city, village or municipality or electors thereof under the provisions of 1937 PA 345, § 6, as amended by 1970 PA 230, the statutory formula may be increased to a maximum of 2.5%, and 'once the increase is approved, it shall not be reduced for members under the system at the time of the increase'. This clear grant of authority confers no power to adopt two rates of increase, one for firemen and one for policemen. The rate may be increased for members of the system, both firemen and policemen.
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> "It is a well established rule of statutory construction that where powers are specifically conferred they cannot be extended by implication. No other or greater power was given than that which the statute specifies. *Eikhoff* v *Charter Commission of the City of Detroit,* 176 Mich 535; 142 NW 746 (1913).
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> "Therefore, it is the opinion of the Attorney General that the legislative body or the electors of a city with a retirement system for firemen and policemen, as set forth in 1937 PA 345, *supra,* may increase the percentage of payment of retirement benefits from 2% up to a maximum of 2.5% for its members, both firemen and policemen, but the legislative body or the electors of a city may not adopt two rates, one for firemen and one for policemen."

The mandate of OAG 4811, *supra,* that the same percentage rate for retirement benefits be applied to police and firemen is based strictly on statutory interpretation. The legislature is, of course, free to alter that result by amending 1937 PA 345, *supra.* Similarly, the legislature need not require that the retirement benefits for police and firemen be computed in an identical manner.

5. "If fire and police negotiating agreements expire at different

times, does the inclusion of pension benefits (based on the last three years method) into a newly negotiated agreement with one department, whose contract is up, require the benefits to be given automatically to the department who is under an existing contract, or can you wait until that collective bargaining agreement expires?"

Just as in OAG 4811, *supra,* the answer to your question rests on the wording of the statute. MCLA 38.556(1)(e); MSA 5.3375(6)(1)(e) provides:

> " 'Average final compensation' shall mean the average of the highest annual compensation received by a member during a period of 5 consecutive years of service contained within his 10 years of service immediately preceding his retirement, or leaving service, or, if so provided in a collective bargaining agreement entered into between a municipality under this act and the appropriate recognized bargaining agent, may mean the average of the 3 years of highest annual compensation received by a member during his 10 years of service immediately preceding his retirement or leaving service. . . ."

The three year averaging provision may be applied to individual police officers or firemen only when "so provided in a collective bargaining agreement entered into between a municipality under this act and . . . [their] appropriate recognized bargaining agent". No statutory requirement is imposed that three year averaging be included in any agreement. Three year averaging, thus, is merely a subject for collective bargaining. The municipality and its employees may, of course, reach a final collective bargaining agreement without any reference in the agreement to three year averaging.

It is, therefore, my opinion that the inclusion of three year averaging in a collective bargaining agreement with either the fire or police departments does not require the inclusion of the same provision in the collective bargaining agreement with the other department.

FRANK J. KELLEY,
Attorney General.

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SCHOOLS AND SCHOOL DISTRICTS: Authority to direct establishment of school for juvenile court wards.

COUNTIES: Authority to direct establishment of school for juvenile court wards.

The decision to establish a school for juvenile court wards rests with the intermediate school district board rather than the county board of commissioners.

If the intermediate district board deems a school for juvenile court wards unnecessary such children attend the local schools of the district where the juvenile home is located.