

In view of the criminal penalties and civil sanctions imposed by Act 284, P.A. 1964, I am unwilling to subject the State of Michigan thereto in the absence of a clear mandate from the legislature.

The conclusion must follow that the intention of the legislature to include the State within Section 6 of Chapter 2 of Act 284, P.A. 1964, is not clearly manifest.⁷

Because of the foregoing reasons, it is my opinion that the State of Michigan is not included within the definition of the term "employer," as stated in Section 6 of Chapter 2 of Act 284, P.A. 1964.

FRANK J. KELLEY,
Attorney General.

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RETIREMENT SYSTEMS: State Police – Breach of Public Trust.
POLICE, STATE: Return of Pension Contributions – Breach of Public Trust.

Whether or not three described cases of misconduct constitute a "breach of the public trust" preventing a return of pension contributions, pursuant to § 3, Act 251, P.A. 1935, as amended, discussed and decided.

No. 4472

September 22, 1965.

Mr. Frederick E. Davids
Commissioner, Michigan State Police
East Lansing, Michigan

The Michigan department of public safety pension, accident and disability fund was created by Act 251, P.A. 1935 (C.L. 1948 § 28.101, et seq.; M.S.A. 1961 Rev. Vol. § 3.331, et seq.). Section 2 of the act places responsibility for administration of the fund in the Commissioner of the Michigan Department of Public Safety under the supervision of the State Administrative Board. Section 3 of the act defines membership and specifies the amount of contributions of members to be deducted from salary and paid to the State Treasury to the credit of the fund.

Section 3 of the act was amended by Act 91, P.A. 1958, which added the following:

"Any member of the public safety pension, accident and disability fund who resigns or is dismissed for reasons other than breach of the public trust from the Michigan department of public safety shall receive in a lump sum, payable to him or his legal representative, 100% of the contributions contributed by him into the fund."

⁷ See, also, for example: Sections 461 and 511 of Act 40, P.A. 1956, being C.L.S. 1961 §§ 280.461 and 280.511; M.S.A. 1960 Rev. Vol. §§ 11:461 and 11.1511, which expressly include the State of Michigan; and Section 1 of Act 167, P.A. 1933, as last amended by Act 214, P.A. 1964, M.S.A. Cur. Mat. § 7.521, in which the State of Michigan is expressly included within the definition of the term "person" in the Sales Tax Act.

Act 165, P.A. 1965, added the following language to Section 3:

"Any person who having once been a member of the fund has resigned, transferred or been dismissed for reasons other than breach of the public trust may apply for and shall receive in a lump sum, payable to him or his legal representatives, 100% of the contributions contributed by him into the fund. In the event of death or legal disability of the member, his legal representative may apply."

After the effective date of the 1958 amendment to Section 3, three officers were dismissed. Your predecessor described the three cases in substantially the following terms:

"Case 1. On May 2, 1963 a shortage of funds was discovered at our Detroit District Headquarters. The funds were being held as evidence in a number of cases and were in the custody of an officer who that same date admitted responsibility for the shortage. He was suspended at that time and charged with embezzlement under the penal code. On October 24, 1963, the date of his trial, his plea of guilty was accepted to a lesser charge of larceny by conversion. . . . He was dismissed from the department effective October 25, 1963.

"Case 2. On October 13, 1963 a purse containing \$40.00 was found by a citizen and turned in at our Houghton Lake Post. Records prepared at that time did not reflect the fact that the money was contained in the purse and another officer, handling the property as a part of his duties and apparently thinking that the presence of the money was unknown, removed the money. When it was later discovered the money was missing, an investigation was conducted and the officer concerned admitted taking the money and made restitution. He was suspended on October 23, 1963. No prosecution was instituted as the owner of the money refused to prosecute; however, the officer was ordered to appear before the State Police Trial Board. On October 31, 1963 this officer pleaded guilty to 'conduct unbecoming a police officer' and 'neglecting to turn over all property seized, found or taken in connection with police duties, and failure to make a proper report thereof without unnecessary delay.' Both of these charges are specifically contained within the rules and regulations of the department. Following the plea of guilty, the Trial Board took testimony from various officers concerned in the case and recommended the dismissal of the officer. The Commissioner ordered the officer dismissed effective October 30, 1963 (date set by Civil Service).

"Case 3. On November 21, 1963 a bank was held up in Royal Oak and later that same date a member of this department was arrested for that robbery. He was immediately suspended. . . . On February 28, 1964 the officer appeared before Judge Wade McCree in Federal District Court in Detroit and entered a plea of guilty. He was represented at this hearing by appointed counsel. On March 11, 1964 the officer was dismissed in accordance with Civil Service Rules and he was advised of this dismissal by letter on March 26, 1964. No Trial

Board proceedings were held due to the officer being held in custody without bond and none was demanded.

"On May 20, 1964 the officer appeared before Judge Ralph Freeman in Federal District Court in Detroit, again with appointed counsel, at which time he was sentenced to five years' imprisonment."

Requests for return of contributions to the pension fund have been received in Cases 2 and 3. Such a request may also be made in Case 1. Thus the question asked was the following:

Were any of the three officers dismissed for reasons other than the breach of the public trust so that they might receive a return of contributions made to the Michigan department of public safety pension, accident and disability fund?

The position of State police officer is established by Act 59, P.A. 1935 (C.L. 1948 § 28.1, et seq.; M.S.A. 1961 Rev. Vol. § 4.431, et seq.) creating the State Police which, in section 1, defines "officer" as any member of the Michigan State Police executing the constitutional oath of office. Section 4 of that act prescribes qualifications for such officers, and section 6 sets out their powers and duties. A relative permanency is given to the position by sections 4 and 12 of the act placing restrictions on dismissal. The Commissioner is made the superior of such an officer by section 2. A State Police officer thus possesses the attributes of a public officer. (*Meiland v. Wayne Probate Judge*, 359 Mich. 78; *Kent County Register of Deeds v. Kent County Pension Board*, 342 Mich. 548).

Such an officer is distinguished from a "civilian employee" by section 1, which defines that designation to mean one not executing the constitutional oath of office. Such a distinction in a city charter has led to the holding that a city patrolman was an officer. (*Olson v. City of Highland Park*, 312 Mich. 668. Whether a city policeman is an officer or employee depends on the provisions of the city charter).

A State police officer is a particular type of public officer known as a conservator of the peace (Act 59, P.A. 1935, section 6), or as a peace officer (*People v. Bissonette*, 327 Mich. 349, 354).

A public office is a public trust and public officers are trustees for the public.

Frey v. Michie, 68 Mich. 323;

Wright v. City of Lorain, 70 Ohio App. 337, 46 N.E. 2d 325 (1942);

Jersey City v. Hague, 18 N.J. 584, 115 A 2d 8 (1955);

See, also, *Throop v. Langdon*, 40 Mich. 673, and Michigan Constitution of 1963, Art. XI, section 1.

The significance of being a public trustee is illustrated by *Jersey City v. Hague, supra*, where it was held that the city was a proper party to bring suit to recover from former city officials funds they had forced city employees to pay in order to obtain or retain their employment. As public trustees, the defendants could be made to account to the city for their extortions even though the profit they received was not directly at the city's expense. The position of public trustee was described by the court (page

11) by a quote from *Driscoll v. Burlington-Bristol Bridge Co.*, 8 N.J. 433, 86 A 2d 201 (1952):

“ . . . They stand in a fiduciary relationship to the people whom they have been elected or appointed to serve. (citations omitted) As fiduciaries and trustees of the public weal they are under an inescapable obligation to serve the public with the highest fidelity. In discharging the duties of their office they are required to display such intelligence and skill as they are capable of, to be diligent and conscientious, to exercise their discretion not arbitrarily but reasonably, and above all to display good faith, honesty and integrity (citations omitted) . . . ”

Public servants breach their duty as fiduciary for the public in taking public funds or funds entrusted to their care for their own use. (*Anderson County v. Griffin*, 164 So. Car. 75, 161 S.E. 875 (1932)).

A delay in turning over funds of a prisoner or funds entrusted to an officer has been sufficient cause for dismissal and has been described as a neglect of duty. (*Martin v. Civil Service Commission of City of Chicago*, 7 Ill. App. 2d 128, 129 N.E. 2d 248 (1955); and *Hodapp v. Cole*, 80 Ohio App. 401, 72 N.E. 2d 461 (1947)).

Here such funds were actually taken by the officers involved in Cases 1 and 2 for their own use. Certainly such defalcations constituted dishonesty in the performance of the public trustees' duties. Instead of performing their duty with honesty, the two officers betrayed the public confidence by appropriating to their own personal use funds in their protective custody. Both Cases 1 and 2 thus clearly involved breaches of the public trust.

As previously mentioned, section 6 of Act 59, P.A. 1935, imposes usual police duties on State police officers. They can be summarized as the prevention and discovery of crimes, the apprehension of criminals and the preservation of law and order. It has been stated that the commission of crime or solicitation thereof by a police officer is a breach of duty because an officer is supposed to prevent crime—not commit a crime. (*State v. Cohen*, 32 N.J.L., 158 A 2d 497 (1960)).

Additionally, the commission of a felony has been regarded as sufficient cause for removal of a police officer or denial of pension rights even where the crime was not directly related to duty. (*State ex rel. Harvey v. City of Knoxville, et al.*, 166 Tenn. 530, 64 S.W. 2d 7 (1933); and *State ex rel. Beckman v. Bowman, et al.*, 38 Ohio App. 237, 175 N.E. 891 (1930)).

Therefore, Case 3 must be regarded as a breach of the public trust as well. An officer's duty to uphold the law is breached by his serious and intentional violation of the law. It goes without saying that the fairness of such a result cannot be disputed. Certainly the perpetrator of the serious crime involved in Case 3 is no more deserving of a return of contributions because the funds criminally taken were not in public custody.

A statute prohibiting the return of pension fund contributions in the case of misconduct is not without precedent. In *Connelly v. Municipal Employees Pension Commission of City of Newark*, 130 N.J.L. 101, 31 A 2d 488 (1943), a statute disallowed a refund of contributions where one was dis-

charged and was not eligible for reappointment. One convicted of crime was not eligible, and therefore, could not recover the contributions.¹

The question posed must, therefore, be answered in the negative. It is my opinion that each of the officers in the cases described was dismissed for a reason that is properly classified as a breach of the public trust.

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SCHOOLS: Districts – Reorganization.

School districts, except as provided in Sec. 4(a) of the act, which operate grades kindergarten through twelve, are subject to reorganization under Act 289, P.A. 1964.

No. 4442

October 4, 1965.

Mr. Alexander J. Kloster
Acting Superintendent of Public Instruction
Prudden Building
Lansing, Michigan

You have requested my opinion on the following question:

“Are school districts which operate grades kindergarten through twelve subject to reorganization under Act 289, P.A. 1964?”

Act 289, P.A. 1964, being M.S.A. Cur. Mat. §§ 15.2299(1) et seq., provides for the reorganization of school districts and for elections to accomplish this purpose. Sec. 2 of the act creates a state committee for reorganization. Certain powers and duties are reposed in the state committee for reorganization, as set forth in Sec. 4, and it is pertinent to your question to quote the following portion thereof:

“The state committee shall:

“(a) Within 12 months after the effective date of this act, develop policies, principles and procedures for a statewide school district reorganization program planned so that all areas may become part of a school district operating or designed to operate at least 12 grades. In no case can an intermediate district committee plan be submitted under this act which would require the merger of 2 or more school districts of the third class or higher. There shall be created no less than 500 school districts operating 12 grades.”

¹ Also of interest are two cases where a return of pension contributions was disallowed when police officers were discharged for cause. The reasons given were that the statute did not provide for such a return and such contributions were never part of the officers' salary. (*Reagan v. Board of Firemen, Policemen and Fire Alarm Operators Pension Fund Trustees of San Antonio*, 307 S.W. 2d 958 (Texas 1957); and *Fraser v. City of Norwich*, 137 Conn. 43, 75 A 2d 60 (1950)).