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RETIREMENT SYSTEM, PUBLIC EMPLOYEES:

1. GENERAL ASSEMBLY—HAS POWER TO CHANGE BY AMENDMENT CONDITIONS UPON WHICH MEMBERS MAY RETIRE—RECEIVE ALLOWANCES PROVIDED BY LAW—SECTIONS 486-32 TO 486-75 G. C.
2. MEMBER WHO HAS ESTABLISHED MEMBERSHIP PRIOR TO AMENDMENT OF SECTIONS 486-33a, 486-47 G. C., SENATE BILL 57, 97 GENERAL ASSEMBLY, IS GOVERNED BY THOSE SECTIONS AS AMENDED AS TO HIS RIGHT OF RETIREMENT AND AS TO RETIREMENT ALLOWANCE HE MAY RECEIVE.
3. MEMBER WHO REACHES AGE OF SEVENTY YEARS IMMEDIATELY BEFORE OR SINCE AMENDMENTS AFORESAID IS SUBJECT TO THEIR PROVISIONS AS TO RIGHT OF RETIREMENT AND RETIREMENT ALLOWANCE.

SYLLABUS:

1. The General Assembly in establishing the public employes retirement system (Sections 486-32 to 486-75, inclusive, General Code) has power to change by amendment the conditions upon which members may retire and receive the retirement allowances provided by the law.

2. A member of the public employes retirement system who had established membership at any time prior to the amendment by the 97th General Assembly of Sections 486-33a and 486-67, General Code, is governed by the provisions of those sections as amended, as to his right of retirement and as to the retirement allowance which he may receive.

3. A member of said system who reaches the age of seventy years immediately before or since the amendments aforesaid, is subject to their provisions as to his right of retirement and as to the retirement allowance which he may receive.

Columbus, Ohio, December 24, 1947

Mr. Fred L. Schneider, Secretary, Public Employes Retirement System
Columbus, Ohio

Dear Sir:

I have before me your communication requesting my opinion and reading as follows:

“A number of questions have been raised in connection with the interpretation of recently amended Sections 486-33a and 486-47, General Code, by members of the System who have applied for, or who are planning to apply for a retirement allowance.

The first question relates to the eligibility of a member to retire and to receive prior service credit when the member either withdrew an exemption (in case an exemption was filed) or became a member of the Retirement System for the first time before these two sections were amended to require three years of contributing membership to be eligible for prior service credit, and/or for a retirement allowance. Would the fact that such member had established membership with the System before the amendment was enacted with the expectation of qualifying for a retirement allowance after one year of contributing membership, have any effect upon his eligibility for said prior service credit or a retirement allowance, or both, before completing three years of contributing membership? A still further question: Would the fact that such member had completed at least one full year of contributing membership before the law was amended to require three years, affect his status and eligibility for prior service credit and/or a retirement allowance?

Would the ruling in the above questions be affected by the fact that the member has attained the compulsory retirement age of seven years? This question relates to members who attained the compulsory retirement age immediately before or since the effective date of the recent amendment, that is, June 5, 1947."

Prior to its amendment by the 97th General Assembly Section 486-33a, General Code, in so far as pertinent, read as follows:

"Any employe who heretofore exempted himself from membership shall have the right to withdraw such exemption at any time prior to August 31, 1946, and to make such payments, with regular interest thereon, as he would have made if he had been a member continuously. Provided, however, such withdrawal of exemption shall not entitle a member to receive prior service credit for service prior to January 1, 1935, in any capacity which comes within the provisions of the public employes retirement act unless such member shall have made such payments, with regular interest thereon, as he would have made if he had been a member continuously. The retirement board shall have full power to determine the amount and manner of such payments."

As amended by Senate Bill No. 57 that section reads as follows:

"Any public employe who heretofore exempted himself from membership shall have the right to withdraw such exemption at any time prior to October 31, 1949, and to make such payments, with regular interest thereon, as he would have made if he had been a member continuously. Provided, however, such withdrawal of exemption shall not entitle a member to receive prior service credit for service prior to January 1, 1935, in any capacity which comes within the provisions of the public employes retirement act unless such member shall have made such payments, with regular interest thereon, as he would have made if he had been a member continuously, and provided, further, that an employe who withdraws an exemption and makes such payments shall not become eligible for a retirement allowance as provided in Sections 486-59, 486-60, 486-61, 486-62 or 486-63 of the General Code, until after having completed three years of contributing membership in this retirement system subsequent to the date of the withdrawal of such exemption. The retirement board shall have full power to determine the amount and manner of such payments."

It will be observed that in addition to opening up a new period for withdrawal of exemption, there is added a provision that a member who does withdraw such exemption and makes the payments stipulated should

not become eligible for a retirement allowance until after having completed *three years* of contributing membership in the system subsequent to the date of such withdrawal.

Referring to Section 486-47, General Code, as it read prior to the amendment by the recent General Assembly, the portion pertinent to your inquiry read as follows:

“Any other provisions of law notwithstanding, *one year* of contributing membership in the retirement system shall entitle a member to receive prior service credit for services prior to January 1, 1935, in any capacity which comes within the provisions of the public employes retirement act, provided that such member has not lost membership at any time by the withdrawal of his accumulated contributions upon separation. And further provided that members who have withdrawn an exemption shall receive the prior service credit provided for under the conditions of this section only in the event such member shall have made such payments, with regular interest thereon, as he would have made if he had been a member continuously.”

(Emphasis added.)

As amended by Senate Bill No. 57, the provision above quoted was made to read as follows:

“Any other provisions of law notwithstanding, *three years* of contributing membership in this retirement system *subsequent to the date that membership is established* shall entitle a member to receive prior service credit for services prior to January 1, 1935, in any capacity which comes within the provisions of the public employes retirement act, provided that such member has not lost membership at any time by the withdrawal of his accumulated contributions. And further provided that members who have withdrawn an exemption shall receive the prior service credit provided for under the conditions of this section, only in the event such member shall have made such payments, with regular interest thereon, as he would have made if he had been a member continuously.”

(Emphasis added.)

This is the section which explicitly controls the right to receive prior service credit, looking to an additional pension which the member may receive upon retirement. The effective change that was made was to increase the period of contributing service from one year to three years, in order to entitle a member to the benefits of prior service credit.

As the act creating the retirement system was originally worded (115 O. L., 616), Section 486-33, General Code applying then only to state employes, provided that any state employe who was such prior to the 31st day of December, 1934, could within three months after the act took effect, exempt himself from membership in the retirement system. Subsequently, when the act was amended to include employes of the various subdivisions of the state, effective as of July 1, 1938, a similar provision was inserted in the law authorizing such employes within three months of the effective date to exempt themselves from membership. Thereafter, by successive acts, certain limited periods were established wherein such employes could withdraw such exemption and become members of the system.

The question therefore arises whether employes who did exercise that right of exemption but have since withdrawn the exemption and have become contributing members are to be affected and limited in their right to retire and their claim for prior service credit by the amendments of the law above noted, which increase the period of required contribution from one year to three years. Stated in another form, the question might be presented whether their withdrawal of exemption and participation in contributions to the fund in reliance on the provisions of law then in force, gave them any vested right to claim the benefits that were prescribed at the time of their withdrawal of exemption under the conditions then existing, or whether the General Assembly could impose additional restrictions and conditions.

It is to be noted, particularly when we examine the provisions of the law relating to retirement allowances to which its members may become entitled, that by far the larger portion of such retirement allowances in the usual case consists of pure gratuities given to the member by contribution from the funds assessed upon the various employers, to wit, the state and its subdivisions. It is to be further noted that the General Assembly has from time to time seen fit greatly to enlarge the amount of these contributions on the part of the employers and to increase the retirement allowances, not only as to members who have already retired, but as to those who may retire in the future. The recent session of the General Assembly which imposed the added burdens above noted, provided in the same act for substantially larger retirement allowances. It is also worthy of note that the law does not under any circumstances impose upon

a member a forfeiture as to any contributions which he may have made to the retirement fund, such right, together with interest on his contributions being preserved to him in case he quits public service and elects to withdraw his contributions or in case of his death before retirement.

There would seem to me to be no fixed or vested right in any such member and no apparent equitable principle which would put it beyond the power of the General Assembly to add to the conditions upon which he may attain to the full right of receiving these retirement allowances.

In the case of *Mell v. State, ex rel. Fritz*, 130 O. S. 306, the court had under consideration a pension which had been granted a retired fireman and which was later reduced by the pension board. It was held:

“1. A pension granted by public authorities is a gratuitous rather than a vested or contractual right.

2. An existing board of trustees of a pension fund has discretionary power to modify pension awards theretofore made by it or by predecessor boards, by increasing or reducing the amount thereof, providing the same is done reasonably and not arbitrarily.”

Commenting on the nature of pensions, the court, in its opinion, said:

“The unquestioned rule is that a pension granted by the public authorities is not a contractual obligation but a gratuitous allowance, in the continuance of which the pensioner has no vested right; and that a pension is accordingly terminable at the will of the grantor, either in whole or in part.” 21 Ruling Case Law, 242.
* * *

And this is so even where a pensioner has made compulsory contributions to the fund.

‘In some instances pension funds are maintained in part by compulsory contributions of the beneficiaries thereof. This is generally true where the beneficiaries are policemen or firemen; and in such a case the statute creating the fund ordinarily authorizes the proper official to retain weekly or monthly a certain percent of the prospective pensioner’s pay. By the great weight of authority the fact that a pensioner has made such compulsory contribution does not give him a vested right in the pension.’ 21 Ruling Case Law, 243.”

Subsequent to the decision in the above case, the General Assembly enacted Section 4612-1, General Code, providing that a pension when granted should become a vested right.

It appears to me that that case went a great deal farther than we need to go in the matter here under consideration. Nothing in the statutes which I have quoted proposes to take away from any member of the retirement system a benefit which he has begun to enjoy. At most, it postpones somewhat his right to receive a larger benefit than he has previously had a right to expect.

Up to this point, I have discussed the rights of a member who has voluntarily come into the retirement system, by withdrawing his previously exercised right of exemption. The status of a public employe who becomes a member of the system not by reason of having withdrawn an exemption but by virtue of his appointment, is quite different, at least as to his right to retire and to receive a retirement allowance. Section 486-33a, General Code, it will be noted, refers to no one excepting an employe who has exempted himself and later withdrawn his exemption. Therefore, an employe who becomes a member by compulsion, as a result of his appointment, has the right on reaching the retirement age, to retire and to receive such retirement allowance as the law sets forth, provided he has the requisite years—not of *contributing service*—but of *total service*.

Section 486-59, General Code, provides in part as follows:

“On and after January 1, 1939, any member, except a new member with less than five years of service, who has attained sixty years of age, may retire by filing with the retirement board an application for retirement. The filing of such application shall retire such member as of the end of the quarter of the calendar year then current.”

Section 486-60, General Code, sets forth the items which will enter into the retirement allowance which such employe upon retiring is entitled to receive. These items are (a) and annuity based on his accumulated contributions, (b) a matching pension of equivalent amount, (c) “an additional pension if such member can qualify for prior service,” and (d) a basic annual pension equal to \$180.00, provided he has ten or more years of *total service credit*.

It is important to notice that the prior service pension is payable only if he can qualify for prior service. Section 486-47, General Code, already quoted, sets forth that qualification, to wit, three years of *contributing*

membership in the retirement system *subsequent to the date when membership is "established."* Obviously, membership may be established either by withdrawing a previous exemption or by accepting a public position, which under the present law makes membership compulsory. Accordingly, if this new member whom we are considering reaches the age of superannuation, he may retire, if he has the required service credit, regardless of the length of his contributing service, but he may not receive the prior service pension unless he is qualified, by having had three years of contributing membership since his membership in the system was established.

Coming to your question as to the member who has attained the compulsory retirement age of seventy years immediately before or since the effective date of the recent amendments above referred to, to wit June 5, 1947, I am unable to see that his status is any different from that of any other member. A further provision of Section 486-59, General Code, is as follows:

"On June 30 following the date upon which he becomes a member the retirement board shall retire any employe who was over seventy years of age at the time he became a member and shall retire all other members, except elective officers, on the June 30 following the date upon which the age of seventy is attained."

This is followed by a provision that he may be retained from year to year for a limited period, if his employer consents. If he has come into the system as a new appointee either before or after reaching the age of seventy years, he must as a condition precedent to the right of receiving a retirement allowance, have five years of total service credit, as required by Section 486-59 *supra*, and in order to receive the prior service pension, he must have been a contributing member for three years.

If he has heretofore claimed exemption from membership and seeks to bring himself within its benefits by withdrawing his exemption, he is subject to the provisions of Section 486-33a, and cannot become eligible for a *retirement allowance* until after he has completed three years of contributing membership subsequent to such withdrawal. The fact that he may have withdrawn his exemption shortly before the enactment of this recent amendment which introduced the three year requirement does not save him, and he loses entirely his right to receive a retirement allowance.

The statute does not appear to give him any advantage over the

younger member, in case he comes into the system either by appointment or by withdrawal of exemption. The fact that the statutes have been amended shortly before or since he reached the age of seventy does not appear to give him any advantage.

If he lacks the qualification for receiving any retirement allowance, then his only remaining right is the return of his accumulated contributions as provided in Section 486-65, General Code.

Specifically answering your questions it is my opinion :

1. The General Assembly in establishing the public employes retirement system (Sections 486-32 to 486-75, inclusive, General Code) has power to change by amendment the conditions upon which members may retire and receive the retirement allowances provided by the law.

2. A member of the public employes retirement system who had established membership at any time prior to the amendment by the 97th General Assembly of Sections 486-33a and 486-47, General Code, is governed by the provisions of those sections as amended, as to his right of retirement and as to the retirement allowance which he may receive.

3. A member of said system who reaches the age of seventy years immediately before or since the amendments aforesaid, is subject to their provisions as to his right of retirement and as to the retirement allowance which he may receive.

Respectfully,

HUGH S. JENKINS,
Attorney General.