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EMPLOYEE OF PUBLIC LIBRARY MEMBER OF PUBLIC EMPLOYEES RETIREMENT FUND WHO WAS A MEMBER OF LOCAL RETIREMENT PLAN—LIABILITY OF AN EMPLOYER TO PAY INTO THE RETIREMENT FUND—COMPUTATION OF RETIREMENT ALLOWANCE—WITHDRAWAL FROM LOCAL RETIREMENT PLAN AND ENTRANCE INTO PUBLIC EMPLOYEES RETIREMENT PLAN—AMEND. H.B., 776, OL G.A., 117, OL, 743, §§486-33c, 145.44, 486-65c G.C.

SYLLABUS:

1. A member of the Public Employees Retirement System who, prior to January 1, 1935, was employed by a public library which had a local retirement plan, and who joined said plan on July 1, 1938, and is presently receiving benefits therefrom, is not entitled to make the contributions and receive service credit provided for in Section 145.44, Revised Code, and may not receive prior service credit provided for in Section 145.01 (E) Revised Code.

2. The full liability required of an employer under the provisions of Section 145.44, Revised Code, must be paid before an employee is entitled to the full benefits of retirement under Chapter 145., Revised Code, for the service for which said full liability is calculated; however, there being no provision in the law imposing a duty upon the employer to make said full liability payment, such employer is not required to make such payment.

3. A retirement allowance under the Public Employees Retirement System is computed based upon the provisions of law in effect at the effective date of such allowance, which effective date is determined in accordance with the provisions of Section 145.32, Revised Code.

4. If an employee of a public library, who on July 1, 1938, had joined the local retirement plan of the library, withdraws from said plan and completely abandons it, and subsequently becomes a member of the Public Employees Retirement System, such employee may purchase service credit pursuant to the provisions of Section 145.44, Revised Code, and upon the payment of the full liability of the employer as set forth in said section, such employee would be entitled to all of the benefits provided for in Chapter 145. Revised Code, including benefits calculated upon prior service credit as set forth in Section 145.01 (E), Revised Code.

Columbus, Ohio, July 26, 1962

Hon. John T. Corrigan, Prosecuting Attorney
Cuyahoga County, Cleveland, Ohio

Dear Sir:

I have your request for my opinion which reads as follows:

“Mrs. R. was first employed (full time) by the Cleveland Public Library on October 8th, 1921, and on September 1st,

1928, said Library started an approved Prudential Insurance Company local retirement plan which Mrs. R. refused then to join. On July 1st, 1938, the Ohio state retirement plan was expanded to include libraries and on that date Mrs. R. refused to join the state retirement plan but *did* then join the Prudential retirement plan. On January 1st, 1944, Mrs. R. ceased full time employment with said library and became a part time employee thereof at which time she took out a paid up policy in Prudential Insurance covering her work period from July 1st, 1938, to January 1st, 1944, and thereafter paid no more into the Prudential retirement plan. Then, on August 1st, 1954, Mrs. R. joined the P.E.R.S. and has ever since made her payments therein up to June 30th, 1959, when she quit working entirely.

“Mrs. R. now want to make back payments with interest under R.C. 148.28 or 145.44 for the periods from October 8th, 1921, to July 1st, 1938, and from July 1st, 1938, to August 1st, 1954, to establish P.E.R.S. membership for those two periods or as much of them as she is entitled to if proper payments are made by her. Note that Mrs. R. did not give up her Prudential retirement plan rights for the period from July 1st, 1938, to January 1st, 1944, and is now drawing retirement pay for said period from Prudential Insurance Company.

“Our questions are:

“1. For how much, if any, of the two periods aforesaid is Mrs. R. entitled to make back P.E.R.S. payments and thus increase her P.E.R.S. retirement payments (of which she has not yet drawn any)?

“2. If Mrs. R. is entitled to make such payments for these two periods, or any part thereof, which code section would govern: R.C. 145.44 or 148.28, or is there a choice?

“3. Under R. C. 145.44, if a public employee fully complies with this statute, what if any legal duty or obligation rests upon the employer to match the employee’s payments or is payment by the employer only voluntary under said code section?

“4. When do retirement rights under P.E.R.S. become fixed?

“5. If Mrs. R. had withdrawn all her payments to the Prudential retirement system and had fully abandoned said system when or before she first became a P.E.R.S. member what effect would that have had on her rights under R.C. secs. 145.44 and 148.28?

“Question 4 exists in a number of cases now before us.”

As you have pointed out in your request, membership in the Public Employees Retirement System became available to employees of public

libraries of the State of Ohio on July 1, 1938. This was as a result of the enactment by the 92nd General Assembly of Amended House Bill No. 776, 117, Ohio Laws, 743. Section 3 of said Amended House Bill No. 776 became Section 486-33c, General Code, which section read, in part, as follows:

“* * * ‘Public library employee’ shall mean any person holding a position in a public library, in the state of Ohio, and/or paid in full or in part by the board of trustees of a public library. But said term shall not include those persons who come within the provisions of any other retirement system established under the provisions of the law of this state or of any charter, nor shall the provisions of this act in any manner apply to a police relief fund or a fireman’s pension fund established under provisions of law. * * *”

It will be noted from the above quotation that since the employee mentioned in your request, Mrs. R., was employed by the Cleveland Public Library on July 1, 1938, at which time said library had a retirement system established under the provisions of the laws of Ohio (with the Prudential Insurance Company), said employee did not come within the definition of a public library employee as set forth in Section 486-33c, *supra*, and was, therefore, not entitled to membership in the Public Employees Retirement System. Accordingly, while your letter states that she refused to join said system, it would appear that had she desired to join said system at that time, she could not have done so under the provisions of law above quoted. It is therefore apparent that Mrs. R. could not have, in July of 1938, exempted herself from membership in the Public Employees Retirement System.

In your request you refer to the provisions of Section 145.28, Revised Code, as being possibly applicable to a payment for service credit to said employee. That section of law deals with the right of an employee who has exempted himself to withdraw his exemption and make a payment provided therein. Since Mrs. R. could not have exempted herself, it is apparent that the provisions of Section 145.28, Revised Code, cannot be applicable to her.

Coming now to the service credit which Mrs. R. desires to receive, it will be noted that credit for service prior to January 1, 1935, which is defined in Section 145.01 (E), Revised Code, may be received by a person who was employed in any capacity covered by a system other

than the Public Employees Retirement System upon meeting the conditions set forth in Section 145.44, Revised Code. See Section 145.01 (E), Revised Code, and Opinion No. 3025, Opinions of the Attorney General for 1962, issued May 24, 1962.

Section 145.44, Revised Code, presently reads as follows:

“Members of the public employees retirement system who, prior to the date membership was established in said system, were employed by the state or any of the several local authorities mentioned in section 145.01 of the Revised Code, which state or local authority has a local retirement system established under the laws of this state for its employees, shall be permitted to pay into the employees’ savings fund of the public employees retirement system the amount, with interest as determined by the public employees retirement board, said members would have paid through regular salary deductions had they been members of the public employees retirement system continuously since January 1, 1935.

“In case a given member did not enter the employ of the governmental unit having its own retirement system until a date subsequent to January 1, 1935, the payment shall be computed on the salary earned from the date of appointment to the date membership was established in the public employees retirement system, *provided such members have not received and are not eligible for benefits from the retirement system of said state or local governmental unit.* By such payment such member shall become eligible for the benefit provided in division (A) only of sections 145.33, 145.34, or 145.36 of the Revised Code and such member shall not become eligible for the other benefits provided by the remaining divisions of those sections until after such governmental unit has paid into the public employees retirement system fund the full liability, as determined by the actuary engaged by the board to cover such services and payments. ‘Full liability’ as used in this section means an amount which when added to the payment made by the member will provide the remaining portion of the pension reserve on such service.”

(Emphasis added)

Any member who was employed by a governmental unit having its own retirement system after January 1, 1935, clearly may not make a payment provided in Section 145.44, *supra*, if such member is receiving or is eligible for benefits from such other retirement system. In the instant case, however, the member was employed by the local governmental unit prior to January 1, 1935, and it therefore becomes necessary

to determine whether the *proviso* found in the first sentence of the second paragraph of Section 145.44, *supra*, is applicable with equal force to the provisions of the first paragraph of said section.

The provisions of Section 145.44, *supra*, were first enacted as Section 486-65c, General Code, by the 98th General Assembly in Amended Senate Bill No. 149, 123, Ohio Laws 487. Section 486-65c, General Code as then enacted read, in part, as follows:

“Members of the public employees retirement system who, prior to the date membership was established in said retirement system, were employed by the state of Ohio or any of the several local authorities mentioned in Section 486-32 of the General Code, which state or local authority has a local retirement system established under the laws of Ohio for its employees, shall be permitted to pay into the employes’ saving fund of the public employees retirement system the amount, with interest as determined by public employees retirement board, said members would have paid through regular salary deductions had they been members of the public employees retirement system continuously since January 1, 1935.

“In case a given member did not enter the employ of the governmental unit having its own retirement system until a date subsequent to January 1, 1935, the payment shall be computed on the salary earned from the date of appointment to the date membership was established in the public employees retirement system.

“Provided, however, such members have not received and are not eligible for benefits from the retirement system of said state or local governmental unit. * * *”

The *proviso* found in the first sentence of the third paragraph of Section 486-65c, *supra*, was carried into the Revised Code in Section 145.44 by the Code Revision of 1953, Amended Senate Bill No. 1 of the 100th General Assembly, substantially in the same position in said statute as it is now found. Under the provisions of Section 1.24, Revised Code the intent of the General Assembly in enacting the Revised Code was to continue the meaning and application of the existing statutory provisions under the General Code. In accordance with said Section 1.24 therefore, I am of the opinion that the meaning of the *proviso* now found in the second paragraph of Section 145.44, *supra*, must be determined as if it were found in a separate sentence as it existed prior to the code revision.

Whether a *proviso* in a statute is to be construed to apply to provisions found in said statute other than those which immediately precede it depends upon the intent of the legislature in enacting the same, Volume 2, *Sutherland Statutory Construction*, 3rd Edition, Section 4921, page 448; 50 Ohio Jurisprudence 2nd, 307, Statutes, Section 324 *et seq.* As I have pointed out earlier herein, the *proviso* in question in the present Section 145.44, *supra*, is clearly applicable to members whose employment covered by another retirement system began subsequent to January 1, 1935; however, an examination of Section 486-65c, General Code clearly shows that at the time of its enactment the legislature intended that the proviso should apply to persons whose employment with such employer began both prior to January 1, 1935 and subsequent thereto. I am therefore of the opinion that such intent must govern in the instant case.

Accordingly, since Mrs. R. was employed prior to January 1, 1935, with an employer who had established a retirement system and since she is receiving benefits from said retirement system, I am of the opinion that she is precluded from establishing credit in the public employees retirement system under the provisions of Section 145.44, Revised Code. Since she cannot comply with said section, she is therefore not entitled to prior service credit for service rendered prior to January 1, 1935, under the provisions of Section 145.01 (E), Revised Code.

As a result of the above conclusion, your second question need not be answered.

Your third question deals with the legal duty or obligation of the employer to match an employee's payment under the provisions of Section 145.44, *supra*. It will be noted that the last sentence of said Section 145.44 defines full liability as used in said section to mean the amount which when added to the payment made by the *member* will provide the remaining portion of the pension reserve for such service. Under such a definition it is clear that the amount which would have to be contributed by the employer would not merely be an amount matching the contribution of the member, but would be an amount that would be the difference between the amount paid by the member and the aggregate amount which the member would receive, which aggregate amount would be determined by an actuarial computation of the obligation that the retirement system would have to the particular member. Such amount, under existing conditions, would undoubtedly be considerably greater than the amount paid by the

member. It may also be noted that as a result of the addition of the last sentence in Section 145.44 *supra*, Opinion No. 1601, Opinions of the Attorney General for 1952, page 501, is no longer applicable.

As to any legal duty on the part of the employer to make the payment of the full liability described in Section 145.44, *supra*, I have been unable to find any specific statutory provisions which require that such payment be made. The general provisions for the payment of the obligations imposed by Chapter 145., upon the employer, are found in Section 145.51, Revised Code. An examination of said section discloses that there is therein contained no language which would require the employer to make the payment here in question. It should also be noted that the employee is not entitled to full benefits under Chapter 145., Revised Code, for his payment made under Section 145.44, *supra*, until such time as the employer has made the contribution required to satisfy the full liability imposed upon him therein. Accordingly, it would appear that based upon the existing statutory law, there is no specific duty imposed upon the employer to make the full liability payment described in Section 145.44, *supra*, even though the Public Employees Retirement System is not obligated to pay to the employee the full retirement benefits set forth in Chapter 145. until such full liability is made.

Coming now to your fourth question dealing with when retirement rights under the Public Employees Retirement System became fixed, your attention is called to Opinion No. 567, Opinions of the Attorney General for 1959, page 288, wherein it is held that a retirement allowance is computed based upon the provisions of law in effect at the effective date of the retirement allowance. Said effective date is, pursuant to Section 145.32, Revised Code, either as of the first day of the month following the date that the application for retirement is received by the retirement board or the first day of the month following the time when the member terminates his service, whichever is the latest.

In your fifth question you ask as to the rights of Mrs. R. had she fully abandoned the Prudential Retirement plan. It is, of course, apparent from the foregoing that Mrs. R. would have no right under the provisions of Section 145.28, Revised Code, which pertains to the withdrawal of the exemption. Furthermore, her right to receive prior service credit for service rendered prior to January 1, 1935, would exist, under the provisions of Section 145.01 (E) Revised Code, conditioned upon her meet-

ing the provisions of Section 145.44, *supra*. As has been pointed out earlier herein, the *proviso* of said Section 145.44 is directed to members who are eligible to receive or who are receiving benefits from the other retirement system. If Mrs. R. had completely withdrawn from said other system she would not be entitled to receive benefits and presumably would not be receiving benefits, and accordingly, the *proviso* which now bars her would not be applicable. However, even under such conditions the member would not be entitled to receive full benefits under Chapter 145., Revised Code, unless the employer paid the full liability as described in Section 145.44, *supra*. If such full liability were not paid, the employee's benefits for said contributions would be limited to those provided in division (A) of Sections 145.33, 145.34 or 145.36, Revised Code, which provisions provide merely for an annuity computed upon the amount contributed by the member. Similarly, even though under Section 145.01 (E), Revised Code, the employee would be entitled to prior service credit for service rendered prior to January 1, 1935, upon the payment of the amount required under Section 145.44, *supra*, such prior service credit would be of no avail in enhancing the retirement allowance until such time as the full liability were paid by the employer.

In summary, I am of the opinion and you are advised:

1. A member of the Public Employees Retirement System who, prior to January 1, 1935, was employed by a public library which had a local retirement plan, and who joined said plan on July 1, 1938, and is presently receiving benefits therefrom, is not entitled to make the contributions and receive service credit provided for in Section 145.44, Revised Code, and may not receive prior service credit provided for in Section 145.01 (E) Revised Code.

2. The full liability required of an employer under the provisions of Section 145.44, Revised Code, must be paid before an employee is entitled to the full benefits of retirement under Chapter 145., Revised Code, for the service for which said full liability is calculated; however, there being no provision in the law imposing a duty upon the employer to make said full liability payment, such employer is not required to make such payment.

3. A retirement allowance under the Public Employees Retirement System is computed based upon the provisions of law in effect at the effective date of such allowance, which effective date is determined in accordance with the provisions of Section 145.32, Revised Code.

4. If an employee of a public library, who on July 1, 1938, had joined the local retirement plan of the library, withdraws from said plan and completely abandons it, and subsequently becomes a member of the Public Employees Retirement System, such employee may purchase service credit pursuant to the provisions of Section 145.44, Revised Code, and upon the payment of the full liability of the employer as set forth in said section, such employee would be entitled to all of the benefits provided for in Chapter 145., Revised Code, including benefits calculated upon prior service credit as set forth in Section 145.01 (E), Revised Code.

Respectfully,

MARK McELROY

Attorney General