

2284.

STATE PUBLIC EMPLOYEES RETIREMENT SYSTEM — ASSISTANT CUSTODIAN, MEMBER OHIO STATE PUBLIC SCHOOL EMPLOYEES RETIREMENT SYSTEM, WHEN APPOINTED CUSTODIAN—COMPULSORY THAT HE BECOME MEMBER OF CUSTODIANS' PENSION FUND.

SYLLABUS:

If an assistant custodian is a member of the State Public Employes Retirement System, and thereafter is appointed custodian, it is compulsory that he become a member of the custodians' pension fund upon his acceptance of such appointment as custodian.

COLUMBUS, OHIO, April 12, 1938.

Ohio State Public Employes' Retirement System, 508 Ohio State Savings Building, Columbus, Ohio.

GENTLEMEN: This will acknowledge receipt of your recent communication, which reads as follows:

"There seems to be a conflict between the Custodians' Pension Law and the Ohio State Public School Employes' Retirement Law in the matter of membership. At present a Custodians' Pension System is in operation in the Cleveland Public Schools. The membership is composed of the custodians. The assistant custodians upon being appointed custodians are eligible for membership. Since the School Employes' Retirement Act was passed these assistant custodians are eligible for membership in this System by virtue of the definition of an employe under Section 7896-64 G. C., since they are not members of the State Teachers Retirement System or any other retirement system established under the laws of this state.

The conflict therefore arises in that an assistant custodian who is a member of the Public School Employes' Retirement System upon his appointment as custodian, under Section 7883 he '* * * shall become a member (of the Custodians' Pension System) and pay like assessments, and his acceptance of such appointment (as custodian) shall be deemed an acceptance of this Act and the rules of the board of trustees'.

The question therefore arises: If an assistant custodian is a member of the Ohio State Public School Employees' Retirement System and he is appointed custodian, must he join the local custodians' pension system at the time of his appointment?"

An employe of the State Public School Employees' Retirement System is defined in Section 7896-64, General Code, as follows:

"'Employe' shall mean any person regularly employed in the public schools of the state of Ohio other than members of the state teachers' retirement system or any other retirement system established under the laws of this state; and any employe, not a member of the state teachers' retirement system, or of any other retirement system established under the laws of this state, in any school or college or other institution wholly controlled and managed, and wholly or partly supported by the state or any subdivision thereof, the board of trustees or other managing body of which shall accept the requirements and obligations of this act. In all cases of doubt the retirement board shall determine whether any person is an employe, as defined in this paragraph, and its decision shall be final."

Section 7896-87, General Code, reads as follows:

"The membership of the retirement system shall consist of the following:

(a) All employes in service on the first day of September, nineteen hundred and thirty-seven, except employes who have filed with their employer a statement in writing requesting exemption from membership or employes who are excluded by the provisions of this act.

(b) All employes who became employes or who were reappointed as employes after the first day of September, nineteen hundred and thirty-seven, except employes who are excluded by the provisions of this act."

From the provisions of the foregoing sections, it is to be observed that membership in the State Public School Employees' Retirement System is compulsory by all public school employes unless the public school employe is a member of the State Teachers' Retirement System or any other system established under the laws of the State of Ohio, or a state public school employe has filed with

his employer a statement in writing requesting exemption from membership, or such an employe is excluded by the provisions of this act.

Section 7896-88, General Code, excludes from membership in the State Public School Employes' Retirement System, members of a local district pension system. This section provides in part:

"Members of a local district pension system maintained under the laws of the State of Ohio from appropriations or contributions made wholly or in part by any employer and existing at the time this bill becomes a law are hereby excluded from membership in this retirement system. * * *"

However, the provisions of this section are not applicable in the case of an assistant custodian. By the express language of Section 7883, General Code, membership in the Custodians' Pension Fund is limited to *custodians*. This section reads as follows:

"As soon as the board of trustees shall meet and organize they shall order and assess each member of such custodians' pension fund a sum equal to four (4) per cent of the annual salary of each custodian in so far as such annual salary does not exceed \$2,000.00, which contribution shall be returnable to him under the same conditions as are provided for the return of contributions to teachers under the state teachers' retirement system, as provided in Section 7896-40 of the General Code. Said payments shall be made in the manner ordered by the board of trustees. Each custodian who shall thereafter become a member of the custodians' fund, shall be assessed in like manner as those joining the pension fund and each custodian appointed after the establishment of said fund, shall become a member and pay like assessments, and his acceptance of such appointment shall be deemed an acceptance of this act and of the rules of the board of trustees."

From the foregoing, it must be said that since, by the provisions of Section 7883, supra, an assistant custodian is not entitled to become a member of the custodians' pension fund, he cannot be excluded from membership in the State Public School Employes' Retirement System under the provisions of Section 7896-88, supra, and therefore, membership in the State Public School Employes' Retirement System is compulsory, unless he has requested exemption as provided for.

Membership in the State Public School Employees' Retirement System entitles a state public school employe to certain privileges and benefits. Upon becoming a member of the system he enters into a contractual relationship whereby he is to contribute four per centum of his earnable compensation, not exceeding two thousand dollars per annum, and thereupon, by virtue of contributions paid by the state, he becomes entitled to certain benefits and rights. One benefit he is to receive is "prior service" credit for service as an employe rendered before September 1, 1937. By virtue of the provisions of Section 7896-99, General Code, if such employe is not a new entrant with less than five years of service, he may retire upon attaining the age of sixty years or be retired by the board upon reaching the age of seventy years. Upon being retired, either upon his own application after sixty years of age, or, by action of the board, he becomes entitled to a payment of superannuation allowance, computed not only upon his own accumulated contributions, but also the state's contribution for his benefit, and which by the provisions of Section 7896-100, General Code, is payable as follows:

"Upon superannuation retirement, an employe shall be granted a retirement allowance consisting of:

- (a) An annuity having a reserve equal to the amount of the employe's accumulated contributions at that time; and
- (b) A pension of equivalent amount; and
- (c) An additional pension, if such employe is a present-employe, equal to one and one-third per centum of his final average salary multiplied by the number of years of service certified in his prior-service certificate."

Section 7896-103, General Code, provides for payment of an allowance upon disability computed upon his own accumulated contributions and also upon the state's contribution for his benefit. This section reads as follows:

"Upon disability retirement, a member shall receive a retirement allowance which shall consist of:

- (a) an annuity having a reserve equal to the amount of the employe's accumulated contributions at the time of retirement; and
- (b) a pension equal to an annuity as provided in (a); and
- (c) an additional pension, if such member is a present-employe, which shall be equal to fifty per centum of the

prior-service pension, as computed in Section 37* (c) of this act.”

Likewise, Section 7896-101, General Code, makes provision for an employe to receive the benefits of a superannuation allowance for completing thirty-six years of service computed upon his own accumulated contributions and the state’s contribution.

It is important to observe that from the provisions of Sections 7896-99, 7896-100, 7896-103 and 7896-101, supra, that a State Public School Employee’s right to share in the benefits of a superannuation retirement allowance is dependent upon the state public school employe being retired either upon his own application after sixty years of age, or, by the board at the age of seventy years, or, after completion of thirty-six years of service; that, to share in a disability retirement allowance the state public school employe must become disabled. In other words, he has no vested right to share in what the State has contributed for his benefit to meet any payments that he may be entitled to for superannuation allowance, or disability allowance, or “prior service” credit.

It is obvious that a state public school employe like any other state employe has no vested right to the benefit of retaining his employment. He serves at the pleasure of the appointing power, unless he is within civil service, and then “during good behavior and efficient service.”

If a state public school employe loses his employment before he is entitled to any of the above benefits of superannuation retirement allowance or disability retirement allowance by the provisions of Section 7896-105, General Code, he is entitled to receive his accumulated contributions and interest thereon. This section reads as follows:

“Where two statutes as irreconcilable the one last enacted must prevail, and where there is a conflict between a general law and a special act the special act will prevail.”

If the assistant custodian has chosen to accept the appointment, he may withdraw his accumulated deductions and, thereupon, by virtue of Section 7896-99, General Code, his membership in the Public School Employes’ Retirement System ceases. As stated above, it is for him to decide which position will be for his greater benefit. Upon acceptance of the appointment of custodian, he becomes a member of the custodians’ pension fund, and the law does not give any consideration to the fact that a hardship will result

to the assistant custodian upon his withdrawal from membership in the State Public School Employes' Retirement System by reason of being deprived of any and all rights and benefits in such system, except the right to have refunded to him his accumulated contributions, plus interest thereon. This principle of law is well stated in the case of *The State, ex rel. Nimber et al., vs. Bushnell, et al., Board of Education, et al.*, 95 O. S., 203:

"When the meaning of the language employed in a statute is clear, the fact that its application works an inconvenience or accomplishes a result not anticipated or desired should be taken cognizance of by the legislative body, for such consequence can be avoided only by a change of the law itself, which must be made by legislative enactment and not by judicial construction."

Therefore, in specific answer to your question it is my opinion that, if an assistant custodian is a member of the State Public School Employes' Retirement System, and thereafter is appointed custodian it is compulsory that he become a member of the custodians' pension fund upon his acceptance of such appointment as custodian.

Respectfully,

HERBERT S. DUFFY,

Attorney General.

2285.

APPROVAL.—AGREEMENT, STATE OF OHIO, THROUGH DIRECTOR OF HIGHWAYS, WITH THE BALTIMORE AND OHIO RAILROAD COMPANY, ELIMINATION OF GRADE CROSSING, S. H. No. 291, MEDINA-NORWALK ROAD AS DESIGNATED, MEDINA, MEDINA COUNTY, OHIO.

COLUMBUS, OHIO, April 12, 1938.

HON. JOHN JASTER, JR., *Director of Highways, Columbus, Ohio.*

DEAR SIR: You have submitted for my consideration a form of agreement by and between the State of Ohio, acting by and through John Jaster, Jr., Director of Highways, and the Baltimore and Ohio Railroad Company, providing for the elimination of a grade crossing,