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1. RETIREMENT SYSTEM, PUBLIC EMPLOYEES—ELECTIVE OFFICIAL—MEMBER WHO PAYS INTO EMPLOYEES SAVINGS FUND AMOUNT EQUAL TO ACCUMULATED CONTRIBUTIONS HE WOULD HAVE PAID WERE HE A MEMBER BETWEEN JANUARY 1, 1935 AND JUNE 30, 1941 PURSUANT TO PROVISIONS, SECTION 486-48 G. C.—NOT ENTITLED TO ADDITIONAL PENSION, SECTION 486-60, PARAGRAPH c, G. C.—TO RECEIVE PRIOR SERVICE PENSION, MUST HAVE BEEN CONTRIBUTING MEMBER FOR AT LEAST ONE YEAR—SECTION 486-47 G. C.
2. ELECTIVE OFFICIAL—COMPLIANCE WITH SECTION 486-48 G. C.—PAYMENT REQUIRED—ENTITLED TO CREDIT FOR PERIOD COVERED BY SERVICE AND PAYMENT BETWEEN JANUARY 1, 1935 AND JUNE 30, 1941 ON REQUIREMENT FIVE YEARS SERVICE AS CONDITION TO RETIREMENT—SECTION 486-59 G. C.

SYLLABUS:

1. An elective official who becomes a member of the public employes retirement system, and who pays into the employes savings fund an amount equal to the accumulated contributions which he would have paid had he been a member between January 1, 1935, and June 30, 1941, pursuant to the provisions of Section 486-48, General Code, does not by such payment become entitled upon retirement to the additional pension provided by paragraph (c) of Section 486-60, General Code, based on prior service; such member, in order to be entitled to such prior service pension must, under the provisions of Section 486-47, General Code, have been a contributing member of such system for at least one year.

2. An elective official, who has complied with the provisions of Section 486-48, General Code, by making the payment thereby required, is entitled to credit for service to the extent of the period covered by his service and payment between January 1, 1935, and June 30, 1941, on the requirement of five years' service as a condition to retirement under Section 486-59, General Code.

Columbus, Ohio, November 19, 1943.

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

Dear Sir:

This will acknowledge receipt of your request for my opinion, reading as follows:

"Paragraph two of Section 486-48 of the General Code of Ohio provides, 'credit for service between January 1, 1935, and June 30, 1941, may be secured by such elective official provided he shall pay into the employes savings fund an amount equal to the accumulated contributions of such member had he been a member during such period.'

May we have your opinion on the following questions?

Does an elective official who becomes a member of the Public Employes Retirement System meet the one year of contributing membership requirement provided in Section 486-47 of the General Code of Ohio and qualify for prior service credit by making such a payment into the employes savings fund?

Does such an elective official fulfill the five years service requisite as provided in Section 486-59 of the General Code of Ohio to be eligible for a retirement allowance by making such back payment providing the back period covers at least five years and further providing he is sixty years or more of age?"

A brief resume of the legislative development of the retirement system will, I believe, help to make clear the answer to your inquiry and the reasons underlying. The pertinent statutes have been codified as Sections 486-32 to 486-75, General Code. The system as originally inaugurated pertained only to state employes, not elective. In the original act passed June 8, 1933 (115 O. L. 614), an "original member" was defined by Section 486-32 as follows:

"'Original member' of the state employes' retirement system shall mean a state employe who was at any time a state employe prior to the 31st day of December, 1934, whether or not such employment has been continuous, who shall become a member of the retirement system on or before December 31, 1934."

In the original act there was no provision for the payment of any retirement benefit to a contributing member of the system except an annuity based on his own contribution. Section 486-60 then read:

"Upon superannuation retirement, a state employe shall be granted a retirement allowance consisting of an annuity having a reserve equal to the amount of the employe's accumulated contributions at that time."

"Prior service" was defined in the act as follows:

"'Prior service' shall mean all service as a state employe as defined by this act, rendered before January 1, 1935."

Through the several amendments of the act, that date, January 1, 1935, has been retained as marking the limit of "prior service".

By an act passed March 11, 1937 (117 O. L. 57), many sections of the retirement act were amended, and there was introduced into Section 486-32 a definition of "average prior service salary" as follows:

" 'Average prior-service salary' shall mean the total earnings of a member within and during the five year period immediately preceding January 1, 1935, divided by the actual number of years and/or fractions of a year employed within that period. No average prior-service salary shall exceed two thousand dollars."

At the same time Section 486-60 was amended to its present form, reading as follows:

"Upon superannuation retirement, a state 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, provided such employe shall not hold any remunerative office or employment in any federal, state, county or local government.

(b) A pension of equivalent amount, and

(c) An additional pension, if such employe is an original member, equal to one and one-third per centum of his average prior-service salary multiplied by the number of years of service in his prior-service certificate."

It will thus be noted that in addition to the annuity provided by the original act, based on the retiring member's contribution, the Legislature has granted two pensions which are pure gratuities. And it will further be observed that so far as this section is concerned the benefit of this prior-service pension is confined to "original members", who at the time of the enactment just referred to were those who became members prior to December 31, 1934.

At the same session of the Legislature, by act passed on December 22, 1937 (117 O. L. 743), the system was extended to include employes, not elective, of counties, municipalities and other subdivisions. The definition of "original member" was altered to the extent of providing that employes of these newly added subdivisions who became members of the system prior to June 30, 1938, should be considered as original

members, leaving the original date of December 31, 1934, as to state employes.

In this connection let it be noted that by subsequent amendment (118 O. L. 104) the qualifying date for original members as to state employes, as well as those of the subdivisions, was fixed at June 30, 1938, where it now remains. The Legislature has thus shown a consistent purpose to preserve certain distinctions between original members and those who came into the system later, and to give, as I believe, certain special advantages and benefits to those who have been contributing to the system for a considerable time.

On April 21, 1941, the Legislature, by an act found in 119 O. L. 150, enacted two new sections, 486-47 and 486-48, which directly bear upon the subject of your communication. They were given the code numbers of two former repealed sections not relevant to the new provisions. Section 486-47, General Code, as then enacted, 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.

Upon presentation of an honorable discharge and subject to such rules and regulations as may be adopted by the retirement board, any member of the retirement system who was or is out of active service as a state, county, municipal, park district, conservancy district, health district or public library employe by reason of having become a member of the land or naval forces of the United States on active duty or service shall have such service considered as the equivalent of prior service. Average prior service salary for new members shall be the salary received by the employe for the fiscal year preceding his call to active duty or service into the land or naval forces of the United States, provided such salary credit does not exceed \$2,000.00. Any member of the retirement system or any one who becomes a new member who is employed for essential national defense work by any employer as defined in this act shall have the right to make regular contributions to the retirement system even though his salary is paid from federal funds, provided, however, that his salary is disbursed by an employer as defined in this act.” (Emphasis added.)

The slight amendment of this section by the 95th General Assembly did nothing but extend its provisions to township employes.

Here we find manifested a disposition on the part of the Legislature to relax to some extent the provision of Section 486-60 which would strictly limit the right to a pension based on prior service, to original members, that is, to those who had been contributing members since June 30, 1938, and to extend that benefit to newer members who have been in the system long enough, however, to have been contributing members *for at least one year*. This was a very substantial concession. It reduced the required period of contributing membership from three years to one year. And having been enacted in the same act by which elective officers were permitted to come into the system, it may be assumed that it was intended, in part at least, as a concession to them.

Section 486-48 provides:

“Any other provisions of law notwithstanding, on and after June 30, 1941, any elective official of the state of Ohio or of any political subdivision thereof having employes in the public employes retirement system shall be considered as an employe of the state of Ohio or such political subdivision, and may become a member of the public employes retirement system upon application to the retirement board, with all the rights, privileges and obligations of membership. Service as any such elective official by any member of the retirement system *prior to January 1, 1935, shall be included as prior service.*”

Credit for service between January 1, 1935, and June 30, 1941, may be secured by such elective official provided he shall pay into the employes savings fund an amount equal to the accumulated contributions of such member had he been a member during such period. The retirement board shall determine the amount and manner of payment of such contributions.”

(Emphasis added.)

Observe that this section does not purport to grant to an elective official any prior service pension; nor does it in any way undertake to enlarge for his benefit the right to prior service pension enjoyed by the other members of the system. The only reference in the entire section to prior service rights is that contained in the last sentence of the first paragraph, whereby it is stipulated that *any* member (not merely the elective official who is joining) may count his service as such an elective official prior to January 1, 1935, as a part of his prior service. This provision is an enlargement of the right of all members and not in any degree a special favor to the newly admitted elective official member. This statement is grounded upon the fact that except for the provisions of Section 486-48, there is nothing in the entire act relating to the system that recognizes elective officials for any purpose or previous service as an elective official as constituting “prior service”. On the contrary, elective state

officials are expressly excluded by Section 486-32 and elective officials of the various subdivisions are expressly excluded by Section 486-33c.

The second paragraph of Section 486-48 has no reference whatever to prior service or prior service benefit. By its clear terms, the "credit for service" that may be procured by payment of back contributions is limited to the period "between January 1, 1935, and June 30, 1941". By favor of this provision, the elective official who chooses to come into the retirement system and to pay an amount that would equal the contributions which he would have made if he had been a contributing member during that period, puts himself in a position not only to receive upon retirement an annuity based on his own contribution, but also a pension of like amount, wholly contributed by his employer, under Section 486-60, paragraph (b).

But there is no language in either of the sections last discussed which could by any process of reasoning be construed so as to confer on the *elective* official, who is now granted the privilege of coming into the system, a right superior to that enjoyed by employes who were in the system from the first and have contributed to it from one to six and one-half years. And we may search in vain for any provision in the entire law that would give an *appointive* officer or employe any right to receive the extra pension based on prior service, unless and until he had been a contributing member for at least one year. Nor is there any reason, so far as I can conceive, why an elective official should be thus preferred.

Plainly, the payment of a lump sum equal to what he would have paid had he been a member for one year making contributions from month to month, does not satisfy the requirement of the explicit language of Section 486-47. To be a "contributing member" for one year one must certainly have been a "member" for at least that period; and one could hardly claim to have been a member one year who joins today and retires tomorrow. The Legislature could easily have said that an employe should have a pension based on prior service "either after being a contributing member for one year or, in lieu thereof, paying in an amount equal to what he would have paid had he been a contributing member during that period"; but it said nothing of that kind. It evidently intended to make at least a reasonable period of active, contributing membership a condition to the right to claim the pension.

Nor does the language of the last sentence of Section 486-48 change my opinion in this matter. It is there said:

"The retirement board shall determine the amount and manner of payment of such *contributions*." (Emphasis added.)

If it be argued that the Legislature, in referring to the lump sum to be paid as "such contributions" intended thereby to make this lump sum take the place of one year's contributing membership, for the purpose of securing to the official a prior-service pension, the answer is that the whole paragraph in which this sentence occurs deals with getting credit for contributions which might have been made from January 1, 1935, to June 30, 1941, for the purpose primarily of setting up his rights to the annuity and the pension in an equivalent amount given him by paragraphs (a) and (b) of Section 486-60, both of which are based on his contributions, and it deals not at all with prior service.

A further purpose of the provision of the second paragraph of Section 486-48, relative to "credit for service between January 1, 1935, and June 30, 1941", which an elective official may secure by making the stipulated payment, is to be found in Section 486-59, which is also involved in the second branch of your inquiry. That section, so far as pertinent, reads 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." (Emphasis added.)

It is evident from a reading of this provision that an elective official who comes into the system after the effective date of Section 486-48 (July 1, 1941), being a new member, could not retire under the five year limitation of this section prior to July 1, 1946; at least he could not do so if his prior service consisted of service as an elected official. "Total service" is defined by paragraph 11 of Section 486-32 as meaning "all service of a member of the retirement system since last becoming a member, and, in addition thereto, all his prior service computed as provided by this act." The Legislature, therefore, saw fit to favor him to the extent of providing that his payment should entitle him to credit for "service" between January 1, 1935, and June 30, 1941, which furnishes another reason and perhaps the clearest explanation of the meaning and intent of that provision of the statute.

This also answers the second branch of your inquiry, for it becomes evident that an elective official does fulfill the requirement of Section 486-59 as to five year service requisite for retirement, by making the payment stipulated by Section 486-48, providing of course that his period of service up to the time of his retirement, amounts to five years.

Specifically answering your inquiries, I am of the opinion:

1. An elective official who becomes a member of the public employes retirement system, and who pays into the employes savings fund an amount equal to the accumulated contributions which he would have paid had he been a member between January 1, 1935, and June 30, 1941, pursuant to the provisions of Section 486-48, General Code, does not by such payment become entitled upon retirement to the additional pension provided by paragraph (c) of Section 486-60, General Code, based on prior service; such member, in order to be entitled to such prior service pension must, under the provisions of Section 486-47, General Code, have been a contributing member of such system for at least one year.

2. An elective official, who has complied with the provisions of Section 486-48, General Code, by making the payment thereby required, is entitled to credit for service to the extent of the period covered by his service and payment between January 1, 1935, and June 30, 1941, on the requirement of five year service as a condition to retirement under Section 486-59, General Code.

Respectfully,

THOMAS J. HERBERT,
Attorney General.