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TEACHERS RETIREMENT SYSTEM—MEMBER WHO FILED APPLICATION FOR COMMUTED SUPERANNUATION RETIREMENT, MAY BEFORE RETIREMENT ALLOWANCE HAS IN ANY PART BEEN PAID AND ACCEPTED, WITHDRAW APPLICATION—SECTION 7896-36 G. C.

SYLLABUS:

A member of the teachers retirement system who has filed his application for commuted superannuation retirement under Section 7896-36, General Code, may before his retirement allowance has in any part been paid and accepted, withdraw such application.

Columbus, Ohio, September 21, 1945

Mr. George M. Pogue, Secretary, State Teachers Retirement System
Columbus, Ohio

Dear Sir:

I have before me your request for my opinion reading as follows:

“On August 30, 1945, a member of this retirement system filed his application for commuted superannuation retirement under the provisions of Section 7896-36 of the General Code of Ohio. He was fully qualified for retirement under the provisions of said statute.

On September 10, 1945, he filed a written request for the withdrawal of his application. The application for retirement

has not been acted upon by the Retirement Board and no allowance has been paid.

He states that he applied for retirement after he was advised that he would not be reassigned to a position in the school district where employed during the school year 1944-1945. He has since learned his rights under the Teachers Tenure Act or Continuing Contract Law, and does not now wish his retirement to become effective.

May the Retirement Board grant an applicant's request for withdrawal of an application for superannuation retirement?

If so, within what period of time must such request be made?

It occurs to me that the decision of the Supreme Court in *Poehls vs. Young*, 144 O. S., may have a bearing on these questions."

Section 7896-36, General Code, to which you refer, reads as follows:

"Any teacher who has completed thirty years of total service and who has attained fifty-five years of age, may retire, if a member, on a commuted superannuation allowance by filing with the retirement board an application for such form of allowance. Upon retirement on a commuted superannuation allowance, which shall be effective as of the thirty-first day of August next following application, a teacher shall be granted a retirement allowance consisting of:

(a) An annuity having a reserve equal to the amount of the teacher's accumulated contributions at that time; and

(b) A pension of equivalent amount; and

(c) An additional pension, if such teacher has prior service credit, the reserve for which, based upon regular interest and the service tables approved by the retirement board, shall be the present worth of the reserve required for the payment of the prior service pension provided by Section 7896-35 of the General Code of Ohio, after either age sixty or thirty-six years of service credit, whichever can be first attained. The annual prior service pension shall be determined by the amount of such commuted reserve divided by the superannuation annuity rate for the attained annuity age at retirement. Provided, however, that no teacher retiring after thirty-six years of service shall receive less than forty-five dollars per month as a total retirement allowance, except that if such teacher also shall have attained the age of sixty at retirement his total retirement allowance shall be not less than fifty dollars per month. Effective as of September 1,

1945, the above minimum superannuation retirement allowance shall be paid from said date to all persons who retired on or before August 31, 1942, who are still on the retirement list and who met the above requirements for such allowances. A year of service for the purpose of applying the minimum retirement allowance is defined as a complete year of full-time employment, or the equivalent thereof. The retirement board shall be the final authority in determining the eligibility of a teacher for such minimum allowance."

By the provisions of Section 7896-1, General Code, being also a part of the act establishing the state teachers retirement system, it is provided:

"The year for the administration of this act shall mean the school year and shall begin September 1st and end with August 31st next following."

Prior to its amendment by the 96th General Assembly, the first paragraph of said Section 7896-36, General Code, read as follows:

"Any teacher who has completed thirty-six years of total service may retire, if a member, on a commuted superannuation allowance by filing with the retirement board an application for such form of allowance. *The filing of such application shall retire such member as of the end of the school year then current.* Upon retirement on a commuted superannuation allowance, a teacher shall be granted a retirement allowance consisting of: * * *."

The words emphasized which have now been eliminated, might well have been construed to mean that the very filing of the application was a final and conclusive act which was binding upon both the teacher and the retirement board, and that the retirement having been automatically brought about, there could be no retraction by the teacher and no escape from the consequences of his act, no matter under what circumstances he had been led into filing the application. I do not believe it would have had that effect, even as the law then stood, but in view of the change, for which there must have been some motive on the part of the general assembly, I believe the present form of the section eliminates the possibility of such conclusion.

It appears from your communication that the teacher in question had been notified by his board of education that he would not be re-employed, that he was not advised of his rights under the statutes relative to teachers' tenure and the continuing contract law; that he therefore

filed his application for retirement on August 30, 1945, which would have had the effect of entitling him to retirement as of August 31, 1945. It further appears that upon being advised of his rights, he very promptly, to-wit, on September 10, 1945, filed with the retirement board a written request for the withdrawal of his application.

It seems quite natural that a teacher under a variety of circumstances might conclude that he was no longer to have the opportunity of teaching in the public schools and, acting, perhaps hastily, under a mistake as to a factual situation or a misapprehension or confusion as to his legal rights, might deem it to his interest to retire and have the immediate benefit of the retirement allowance provided by law. Immediately after filing his application, the situation might clear or a new opportunity present itself, and he realizes that his contemplated retirement was a serious mistake and he desires to withdraw his application.

There is nothing in the teachers retirement act that contemplates an acceptance on the part of the board of the offer of a teacher to retire. There is no discretion given to the board to prevent or delay his retirement if he has the qualifications set out in the statute. Your communication raises the question as to whether the teacher, having decided to retire and having notified the retirement board to that effect, can for any reason change his mind and withdraw his notice of such intention. This calls for a consideration of the general purposes which underlie the enactment of laws relating to this and similar retirement systems. It may be observed at the outset that while under the teachers retirement system as established by the statutes of Ohio (Sections 7896-1 to 7896-63, inclusive, of the General Code) the teacher is required to contribute a certain percentage of his salary out of which he will upon retirement receive an annuity, these contributions are to a much larger extent supplemented by public funds contributed by the school district in which he is employed, and his pension or retirement allowance therefore is to a great extent a gratuity. It may also be asserted as a general proposition that all laws providing for pensions for disabled or old age benefits are construed liberally for the benefit of the persons who are entitled to receive the benefits of such laws. Laws providing for pensions or retirement allowances for retiring public employes are entitled to the same liberal construction.

Looking, therefore, at the provision in regard to retirement, it may be observed that retirement under Section 7896-34 or 7896-36, General Code, above referred to, whether upon reaching the age of sixty, or upon attaining thirty years of total service, is purely voluntary on the part of the teacher. The only condition under which the retirement board is given the right to insist upon a teacher's retirement is found in Section 7896-34, General Code, which reads as follows:

“At the end of the school year in which they become members the retirement board shall retire all teachers who were over seventy years of age at the time they became members and shall retire all other members at the end of the school year in which the age of seventy is attained, provided in each case the consent of the employer is secured.”

In other words, the law provides that a teacher who has had five or more years of service and has reached the age of sixty years, *may retire* if he desires, by filing an application for retirement, and that a teacher who has completed thirty-six years of total service *may retire* if he desires, although he may not have reached the age of sixty years. Furthermore, that when he reaches the age of seventy years, the board shall retire him, whether he desires to retire or not, provided the consent of his employer is secured.

Having in mind, then, that retirement, at least prior to reaching the age of seventy years, is purely a *right granted to the teacher* to avail himself of the benefits of retirement, and that the retirement system has no interest in his retirement and no right to insist upon it until he reaches the age of seventy, what possible reason could there be for holding that a teacher who has concluded to retire and has indicated his desire to the board, should not have the right under certain circumstances to recall that decision and continue his membership and his contributions to the retirement fund? No rights except his own have been affected by his election to retire. No burden has been cast upon the retirement fund, at least until payments of retirement allowance have commenced. As a matter of fact, the system has much to gain and nothing to lose if he continues his membership until his death since in that case the system has no obligation except to return his accumulated contributions to his estate or his designated beneficiary. See Section 7896-41, General Code.

The situation is somewhat analagous to that of a public employe who decides to tender his resignation and later concludes, for reasons satisfactory to himself, to recall his resignation. As to his right to do so there appears to be some difference of opinion in the authorities. In the case of *State, ex rel. vs. Board of Education*, 23 O. C. C. (n.s.) 98, it was held by the Circuit Court of Cuyahoga County:

“1. It is not necessary that a resignation from a public office be couched in any particular words; it is only necessary that the incumbent evince a purpose to relinquish the office; that this purpose be communicated to the proper authority; and that this resignation be accepted, either in terms, or something tantamount thereto.

2. A resignation from office, to become effective at some future time, can not be withdrawn without the consent of the accepting party.”

The court in that case seemed to place its decision on the proposition that the resignation had been duly accepted by the board of education, and therefore could not be withdrawn. The court, however, indicated in the opinion that but for such acceptance, the resignation could have been withdrawn. It will be noted that in the matter we are here considering, there is no provision of law whereby the retirement board has the right or duty to accept the offer of the teacher to retire.

In a later case, decided by the Court of Appeals of Cuyahoga County, to wit, *State, ex rel. vs. Lakewood*, 47 Oh. App. 519, the court held:

“2. Liberality should be exercised toward former municipal employee requesting restoration to eligible list for position in classified service within statutory time after his resignation therefrom (Section 486-16, General Code).

3. To constitute complete and operative resignation of public officer, there must be intention to relinquish part of term, accompanied by act of relinquishment.

4. Officer's written resignation, delivered to board or officer authorized to receive it, is prima facie, but not conclusive, evidence of his intention to relinquish office.

5. Officer's resignation to take effect in future may be withdrawn before effective date thereof even against will of body which has accepted it.”

In the case of *Babbitt vs. Shade*, 60 Oh. App., 100, the Court of Appeals of Franklin County reviewed both the cases last cited, and in finding that the case of *State, ex rel. vs. Lakewood* was a more logical statement of the principles which the court thought should be adhered to, held as follows:

“The resignation of a civil service employee, which is to become effective at a future date, may be withdrawn before that date, although it has been accepted by the appointive board, and that board is opposed to the employee’s continuance in office.”

I recognize that these cases relating to resignation of a public employe are not strictly in point, but they do indicate the attitude of the courts in dealing with the right of one who holds a position from which he desires to resign, to change his mind and withdraw his resignation before any final action is taken that would be of necessity inconsistent with his continuation in the employment.

In the case of *Poehls vs. Young, et al.* 144 O. S., 604, it appears that the plaintiff, who was a teacher in the schools of Youngstown, sent to the teachers retirement board a letter dated August 27, 1941, with which she enclosed a formal application for superannuation retirement. She stated in her letter that she might want to withdraw it. She indicated that she refused to recognize the right of the board of education to insist upon her retirement, that she wanted to hold her job but was taking this action to protect herself against the risk of losing her pension, which would begin the last of September. On September 27, 1941, the retirement board advised her by letter that they were deferring “formal action” on her application for retirement, that if she was to retire the effective date would be August 31, 1941, and that if she was not to retire she must withdraw her application. On October 2, 1941, plaintiff wrote to the retirement board saying that her decision to retire was final. Thereafter, in June, 1942, plaintiff filed an action in mandamus in the Common Pleas Court of Mahoning County against the board of education, praying that the board be required to tender her a continuing contract and re-employ her. The board answered and set up as a defense that prior to September 1, 1941, the plaintiff had retired, and therefore had no right to demand of the board a continuing contract as a teacher. The court was not impressed with that defense and entered judgment in that action, granting her a peremptory writ of mandamus requiring the board

to give her a continuing contract. Thereafter, in 1943, plaintiff filed an action against the board for the recovery of her salary for the school year 1941-1942, and secured a judgment which upon appeal reached the Supreme Court and was decided and reported in 144 O. S., 604. The Supreme Court pointed out that the judgment of the Common Pleas Court in the mandamus case *was a determination that the plaintiff had not actually elected to retire* prior to September 1, 1941, and that that matter was *res adjudicata*. The court in its opinion said:

"We agree with counsel for appellant that plaintiff did not file an unqualified application for retirement until October 2, 1941, and we have little difficulty in arriving at the conclusion that even then she did not voluntarily elect to retire but what she did was due to actions of the board in wrongfully refusing her a continuing contract and an assignment to teach in the school year 1941-1942. This is clearly evidenced by the letter accompanying the application in which she said:

'I have refused to recognize their (the board) letter asking for my retirement.

'I want my job * * *!'"

The retirement board was not a party to any of this litigation and it can not therefore be said that the Supreme Court has definitely decided the question of the right of a teacher to withdraw his application for retirement. However, we submit that on the facts as stated, the language of the court rather clearly implies that it considered that a teacher in filing an application for retirement under the law could so condition it or so reserve the right to withdraw it as to cause it to be ineffectual, notwithstanding in terms the application itself was unconditional.

Under the provisions of Section 7896-1, General Code, the retirement allowance to which a teacher would be entitled upon retirement, either upon superannuation or commuted superannuation would be payable in monthly installments and the first payment, therefore, in the case you present would be at the end of the month of September, 1945. Until that payment is made and accepted by the teacher, nothing has taken place which would appear in the slightest degree to affect the retirement system.

Accordingly, it appears to me that the only thing your board could insist upon if a teacher has proposed to retire and has filed his application

for retirement, but thereafter changes his mind, would be that such change should be communicated to the board promptly and before any action has been taken by way of payment of the retirement allowance, that is, before the first installment of the allowance has been paid and accepted.

Specifically answering your question it is my opinion that a member of the teachers retirement system who has filed his application for commuted superannuation retirement under Section 7896-36, General Code, may before his retirement allowance has in any part been paid and accepted, withdraw such application.

Respectfully,

HUGH S. JENKINS

Attorney General