

1103

RETIREMENT SYSTEM, PUBLIC EMPLOYEES—EMPLOYEE OF COUNTY OR OTHER SUBDIVISION—CEASED EMPLOYMENT PRIOR TO JULY 1, 1938—HAD PRIOR SERVICE PRIOR TO JULY 1, 1938—HAD PRIOR SERVICE PRIOR TO JANUARY 1, 1935—NO RIGHT TO RECEIVE PENSION BASED ON SUCH PRIOR SERVICE—SECTIONS 486-59, 486-60 G. C.

SYLLABUS:

An employe of a county or other subdivision coming within the scope of the public employes retirement system who ceased to be such employe prior to July 1, 1938, and has not since been in the public service, but who had, prior to January 1, 1935, been employed in public service which would constitute prior service, has no right to receive from the public employes retirement fund a pension based on such prior service, as contemplated by Sections 486-59 and 486-60 of the General Code.

Columbus, Ohio, July 24, 1946

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

Dear Sir:

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

“We have received an application for superannuation retirement from two former public employes, one of a county and the other of a municipality, neither of whom has been in the public service since June 30, 1938. In other words, both applicants terminated their public service on or before June 30, 1938. Neither has made any savings contributions to the Retirement System, since such contributions did not start until July 1, 1938.

We kindly request your opinion whether these persons are eligible for a retirement allowance as provided in Section 486-59 Section 486-60.”

In order to arrive at a correct interpretation of the retirement law as it applies to the question which you have raised, it will be helpful to examine the beginning of the system as found in 115 Ohio Laws, page 614. By the act passed on June 8, 1933, and effective October 20, 1933, a system was set up as the “state employes’ retirement system” limited to state employes. The acts comprised Sections 486-32 to 486-75, General Code. In its inception provision was made for contributions by each employe member out of which such member was entitled to a retirement allowance consisting of an annuity. There was no further pension of any sort provided for and it was expressly provided in Section 486-73, General Code, that the State of Ohio should not pay any money to any fund provided for in the act. All of the expenses of the system as well as the retirement allowances were to be met by way of deductions from the salary or compensation of the employes. However, “prior service” was mentioned and was defined as meaning all services as a state employe rendered before January 1, 1935. Provision was made for a contribution of four percent up to a maximum annual salary of two thousand dollars to be taken from each employe’s payroll beginning *January 1, 1935*, which should constitute the fund out of which annuities were paid. Provision was also made for an additional deduction from the employe’s salary in the sum of one dollar per year which should constitute an expense fund.

This deduction was to be made at the *first payroll period after the act took effect*, to-wit, *October 20, 1933*.

In that act "original member" was defined as follows:

"'Original member' of the state employees' 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, and who *shall become a member* of the retirement system on or before December 31, 1934. (Emphasis added.)

"New member" was defined as follows:

"'New member' of the state employes' retirement system shall mean a state employe *who shall have become a state employe* and a member of a retirement system at a date subsequent to December 31, 1934. (Emphasis supplied.)

That act further provided in Section 486-33 that membership in the system should be *compulsory* and should "consist of *all state employes either as original members or as new members* upon being regularly appointed." It would seem to follow from the statement just quoted that all persons who were state employes at any time after the act took effect and up to the 31st day of December, 1934, were ipso facto members of the system, being by the terms of the definition above given "original members." If they were not employes during that period but became such on or after January 1, 1935, then they were "new members." The question then might have arisen as to the status of those who were original members but whose employment entirely ceased before the first day of January, 1935, and who therefore never had a chance to contribute and never did contribute in the least to the annuity fund and could not under any circumstances receive the retirement allowance contemplated by the act, but we are not here concerned with that question. The status of those employes is here mentioned in order that we may observe the contract with the provisions whereby county employes were later brought in.

It appears to me however, that the general assembly must have contemplated that in order to avail themselves of the privileges of membership in the original system these persons must have continued to be public employes at least on the first day of January, 1935. It would follow that their classification as "original members" could have no force or meaning

unless they did continue their employment and consequently their membership into January 1, 1935, because they could receive no benefit unless they began their contributions after that date.

By an amendment to the law found in 117 Ohio Laws, page 57, passed March 11, 1937, and effective June 25, 1937, a pension based on prior service was injected into the system. Then, and then only, did the status of original membership have any meaning, because by amendment of Section 486-60, there was introduced for the first time the matching pension to be provided by the employer and also the additional pension based upon prior service and this prior service pension was limited to those who were called "original members."

The same session of the general assembly which enacted the amendment last mentioned passed another act found in 117 Ohio Laws, page 743. The title of this act was "To promote efficiency and economy in the public service by providing for the inclusion of county, municipal, conservancy, health and public library employes * * *."

This act undertook to accomplish that purpose by changing the name of the system to the "public employes' retirement system" and amending a number of the sections of the original act. This new act became effective April 19, 1938. A new section known as Section 486-33a provided as follows:

"* * * Beginning July 1, 1938, in addition to the present membership of said retirement system, there shall be included therein all county, municipal, conservancy, health and public library employes as defined herein, and such county, municipal, conservancy, health and public library employes, except as otherwise provided herein, shall have all the rights and privileges and be charged with all duties and liabilities provided for in the laws relating to said retirement system as are applicable to state employes. Provided, however, that any original member may be exempted from membership by filing written application for such exemption with the retirement board within three months after this act goes into effect; * * *"

It will be noted that the effect of this was to make membership by all of the employees of the counties, etc., practically compulsory, provided that any original member might exempt himself from membership by filing written application for exemption within three months after the act

went into effect. In the same act the definitions of "original member" and "new member" were so modified that the date line was fixed at June 30, 1938. These definitions in so far as they related to local subdivisions were found in paragraphs 22 and 23 of Section 486-32 as then amended, and read as follows:

"* * * As applied to county, municipal, conservancy, health and public library employes 'original member' of the public employes retirement system shall mean a county, municipal, conservancy, health or public library employe who was at any time a county, municipal, conservancy, health or public library employe prior to the thirtieth day of June, 1938, whether or not such employment has been continuous, and *who shall become a member* of the retirement system on or before June 30, 1938."
(Emphasis supplied.)

"* * * As applied to county, municipal, conservancy, health or public library employes 'new member' of the public employes retirement system shall mean a county, conservancy, health or public library employe who shall have become a county, municipal, conservancy, health or public library employe and a member of the retirement system at a date subsequent to June 30, 1938."

The difficulty involved in the question which you present grows out of the apparent inconsistency between the definition of "original member" and the provisions of Section 486-33a above quoted whereby it is provided:

*"Beginning July 1, 1938, in addition to the present membership of said retirement system there shall be included therein all county * * * employes."*
(Emphasis supplied.)

The question we have to resolve is whether a county employe could have been a member of the system and as such entitled to retirement and prior service pension since his employment had entirely ceased before July 1, 1938, when for the first time county employes were eligible to membership. Furthermore, he has never made any contribution to the system. There is a seeming contradiction in the two sections in that apparently a county employe was classed as an original member when he was not entitled to membership and when county employes were not a part of the system.

We are here confronted with two statutory provisions which were enacted as a part of the same act, and are seemingly contradictory. It is a well established principle of construction that such statutes must be reconciled if possible, also that regard should be had to the apparent purpose which the general assembly was seeking to accomplish.

I have already called attention to the purpose as expressed in the title of the act whereby county and other local employes were brought into the system, viz: "to promote efficiency and economy in the public service." It is significant that that was the identical expression of purpose contained in the original act founding the system. Giving reasonable force to those expressions, we certainly would have difficulty in concluding that the general assembly intended to establish a system whereby public employes whose last connection with public service had ceased many years before the system was founded were to be given substantial pensions. That might be a beneficent act but certainly a different and more just method would have been employed. Such a pension system could certainly not now "promote efficiency and economy in the public service." Furthermore the expense of operating the public employes retirement system is cast entirely on those who are employed as public servants *after* the effective date of the act, and the funds which go to pay the prior service pensions are exacted only from the present and future employers and cannot under any circumstances be levied against the employers of the past.

What then was meant by providing in Section 486-32 that original members, who alone were to be entitled to the prior service pension, included a "county employe who became a member of the retirement system on or before June 30, 1938," in view of the statement of Section 486-33a that "beginning July 1, 1938, in addition to the present membership of the retirement system there shall be included therein all county * * * employes"? My conclusion is that the first is merely a statement of qualification or the description of the status of a *prospective* member of the system. When the day arrived when county employes were eligible to be members of the system, those who on that day were in the employ of the county and had been in the service prior to that date and therefore had the qualification of original membership automatically became "original members," and entitled to the benefits which pertained to original membership, including the right, on retirement, to a prior service

pension, while a county employe who became such on or after July 1, 1938, was a "new member" and not entitled on retirement to a prior service pension.

There is a sharp contrast between the provisions of the statute whereby county and other local employes were to be included in the system "beginning July 1, 1938," and the provision of the original law whereby it was declared that membership in the system should "consist of all state employes either as original members or as new members." Furthermore, the words used in Section 486-32 as defining "original members," wherein it is stated that he "shall become a member * * * on or before June 30, 1938," are meaningless, since there is not a word in the law suggesting any act or proceeding whereby he could or should *become* a member. In this connection and as further supporting my conclusion, we should note that provision of Section 486-33a as originally enacted, and which I have already quoted, to this effect:

"Provided however that any original member may be *exempted from membership* by filing written application for such exemption with the retirement board within three months after this act goes into effect."

As heretofore stated, the act went into effect on April 19, 1938, and the potential "original member" had until July 19, 1938 to decide whether he would, by filing such application, prevent the law from sweeping him into actual "original membership." But there was nothing whatever that he had to do or could do toward *becoming* a member.

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

"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 supplied.)

Section 486-60, General Code, provides:

"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 employes' accumulated contributions at that time, and pro-

vided 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 two per centum of his final average salary multiplied by the number of years of service in his prior-service certificate.”

The word “additional” used in the above statute appears to me to have significance. It strengthens my opinion that the general assembly assumed that an employe must have been a *contributing* member and therefore entitled to an annuity based on his contributions, before he can become eligible to the “additional” pension based on prior service.

In specific answer to your question, it is my opinion that an employe of a country or other subdivision coming within the scope of the public employes retirement system who ceased to be such employe prior to July 1, 1938, and has not since been in the public service, but who had, prior to January 1, 1935, been employed in public service which would constitute prior service, has no right to receive from the public employes retirement fund a pension based on such prior service, as contemplated by Sections 486-59 and 486-60 of the General Code.

Respectfully,

HUGH S. JENKINS,
Attorney General