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RETIREMENT SYSTEM, PUBLIC EMPLOYEES—MEMBER—
SERVICE PRIOR TO JANUARY 1, 1935—PERSON APPOINTED
OR EMPLOYED BY SUPERINTENDENT OF BANKS—TO AS-
SIST IN LIQUIDATION OF BANKS—PAID OUT OF LIQUIDA-
TION PROCEEDS—NO PRIOR SERVICE CREDIT ALLOWABLE
—SECTION 710-94 G. C.

SYLLABUS:

Service prior to January 1, 1935 by a person appointed or employed by the superintendent of banks pursuant to Section 710-94 General Code, to assist in the liquidation of banks and paid out of the proceeds of liquidation can not be allowed as prior service credit to a member of the public employes retirement system.

Columbus, Ohio, October 5, 1945

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 kindly request your opinion whether prior service credit can be granted for services rendered as an employe for The Bureau of Bank Liquidations under the jurisdiction of the State Superintendent of Banks.

An opinion was originally requested in 1938, but through some misunderstanding, it appears that the request was either withdrawn or otherwise disposed of without the issuance of an official opinion. As we now have a member contemplating retirement who has several years of service in The Bank Liquidation Bureau, he is again raising the question."

Section 486-32, General Code, in paragraph 8, defines "prior service" as follows:

" 'Prior service' shall mean all service *as a state employe*, county employe, municipal employe, park district employe, conservancy employe, health employe, township employe or public library employe rendered before January 1, 1935, and all service as an employe of any employer who comes within the provisions of the state teachers retirement system or of the state public school employes retirement system or of any other retirement system established under the laws of Ohio rendered prior to January 1, 1935, if the employe claiming such service did not contribute to or receive benefits from any retirement system for such service, provided that if the employe served as an employe in any two or all of said capacities, 'prior service' shall mean the total combined service rendered in said capacities prior to January 1, 1935." (Emphasis added.)

The same section, in paragraph 4, defines "state employe" as follows:

" 'State employe' shall mean any person holding a state office, not elective, under the state of Ohio, *or employed and paid* in whole or in part by the state of Ohio in any capacity whatsoever. But the term 'state employe' shall not include those persons who come within the provisions of the state teachers retirement system, as provided for in the General Code (Sections 7896-1 to 7896-63).

In all cases of doubt the retirement board shall determine whether any person is a state employe as defined in this paragraph, and its decision shall be final." (Emphasis added.)

It will be noted that the definition last quoted mentions (1) any person holding a state office, not elective, under the State of Ohio, and (2) any person *employed and paid* in whole or in part by the State of Ohio, in any capacity whatsoever. The persons referred to in your letter evidently fall within the second class, to wit, "employees", as distinguished

from officers. The controlling words, as I view the matter, are "employed and paid."

The word "and" as here used, has especial force inasmuch as that paragraph in its former wording used the words "and/or paid". That phraseology was carried through successive amendments of the act until this section was amended by the 95th General Assembly, at which time "or" was stricken out, no other change being made in said paragraph 4.

But for this change, it might well have been contended that employes of the bureau of liquidation under the jurisdiction of the superintendent of banks would fall within the definition of state employes and that the service in that capacity before January 1, 1935, would entitle members of the retirement system to prior service credit. That contention would rest on the assumption that they were at least employes of the state whether or not they were paid by the state.

Section 710-89, General Code, sets forth the circumstances under which the superintendent of banks is authorized to take possession of a bank, and the sections following relate to the procedure for the liquidation of such bank. Section 710-94, General Code, provides in part as follows:

"The superintendent of banks may appoint one or more special deputy superintendents of banks as agent or agents to assist him in the duty of liquidation and distribution of the assets of one or more banks of whose business and property the superintendent of banks shall have taken possession pursuant to the provisions of Section 710-89 of the General Code. * * *

The superintendent of banks may also employ such assistants, agents, clerks, auditors and examiners as he may deem necessary in connection with the liquidation and distribution of the assets of any such bank. * * *"

Two of my predecessors held that persons so employed were, in fact, employes of the state, but they were not called upon to consider whether such employes were paid in part or in whole by the state. See 1936 Opinions Attorney General, page 98; 1937 Opinions Attorney General, page 2381. Assuming for the moment that those holdings were sound, let us examine the statutes relating to liquidation of banks, to determine whether such employes are or were paid by the state.

Section 710-96, General Code, provides that the moneys collected by the superintendent in the liquidation of a bank are to be deposited by him in one or more banks, subject to his order. It will be observed, therefore, that these moneys do not find their way into the treasury of the state but as provided in subsequent sections, they are to be paid out by the superintendent pursuant to the order of the Common Pleas Court in payment of expenses and claims.

Section 710-97, General Code, reads in part as follows :

“The expenses incurred by the superintendent of banks in the liquidation of any bank in accordance with the provisions of this act, shall include the compensation and expenses of special deputies (,) assistants, agents, clerks, auditors and examiners so employed and expenses necessary and incident to proper supervision, together with reasonable attorney fees for counsel employed by the attorney general to render legal services in connection therewith. *Such compensation and expenses shall be fixed and allocated to each liquidation proceeding, as occasion may require.*” (Emphasis added.)

This section also provides that the expense of maintaining an office in Columbus necessary for such liquidation processes is to be a part of such expense and be prorated among the banks which are under liquidation.

Section 710-98, General Code, provides in part :

“As soon as practicable after the expiration of the date fixed for the presentation of claims, the superintendent of banks may, out of the funds remaining in his hands *after the payment of expenses*, declare one or more dividends.” (Emphasis added.)

It appears, therefore, quite clearly that the persons employed in the department of bank liquidation are not paid by the state either in whole or in part, and that such employes serving before January 1, 1935, can not be considered as coming within the definition of “state employes” as set forth in Section 486-32, paragraph 4, supra. The statutes to which I have referred relative to the liquidation of banks were all in effect in their present form prior to the enactment of the act creating the public

employes retirement system, so that there has been no change in the nature of their duties or the source of their compensation since that time.

The case of *State, ex rel. v. Board of Review*, 142 O. S. 628, decided March 8, 1944, dealt with the status of an employe of the superintendent of building and loan associations acting in his capacity of liquidator of a building and loan company. Said employe, having been dismissed, sought compensation under the Unemployment Compensation Act. That act provided that "employment" which would bring an employe within the purview of the act should not include service performed in the employ of any governmental unit. The court held that the employe in question was not an employe of the state, but of the superintendent as liquidator, and therefore was entitled to compensation under the act. The court in its opinion said:

"B. was working exclusively on the affairs of the company and can not fairly be classed as an employe of the state, performing governmental functions. He was not under civil service and his compensation came from the funds of the company. Upon dismissal, through no fault of his, he qualified for relief under the act."

The law relating to the powers and procedure of the superintendent of building and loan associations is so similar to that relating to the kindred duties of the superintendent of banks that the principles announced in the above case may be taken as decisive of the question which you present.

Specifically answering your question, it is my opinion, therefore, that service by an employe in the bureau of liquidation of the division of banks prior to January 1, 1935, can not be allowed as prior service credit to a member of the public employes retirement system.

Respectfully,

HUGH S. JENKINS

Attorney General