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1. RETIREMENT SYSTEM, SCHOOL EMPLOYEES—BENEFICIARY OF DECEASED MEMBER MAY ELECT TO RECEIVE RETIREMENT ALLOWANCE—JOINT SURVIVOR ALLOWANCE—AMOUNT MEMBER WOULD HAVE RECEIVED HAD HE RETIRED AS OF LAST DAY OF MONTH OF DEATH AND HAD HE SELECTED JOINT SURVIVOR PLAN—SECTIONS 3309.45, 3309.46 RC.
2. MEMBER OF SYSTEM DECEASED IN JUNE, 1955—BENEFICIARY ENTITLED TO RECEIVE ALLOWANCE COMPUTED AS JOINT SURVIVOR ALLOWANCE—AMOUNT MEMBER WOULD HAVE RECEIVED HAD HE RETIRED JUNE 30, 1955 AND SELECTED JOINT SURVIVOR PLAN—SECTION 3309.45 (A) RC—COMPUTATION IN ACCORDANCE WITH AM HB 744, 101 GA, EFFECTIVE JUNE 29, 1955.

SYLLABUS:

1. Pursuant to Section 3309.45, Revised Code, the duly designated and qualified beneficiary of a deceased member of the School Employees Retirement System, may, in lieu of accepting payment of the member's accumulated account, elect to receive a retirement allowance computed as the joint survivor allowance designated as Option 1 in Section 3309.46, Revised Code, which the member would have received had he retired as of the last day of the month of death and had he at that time selected said joint survivor plan.

2. Where a member of the School Employees Retirement System died in June, 1955, his duly designated and qualified beneficiary, in electing to receive the benefit provided for in Section 3309.45 (A), Revised Code, is entitled to receive the retirement allowance computed as the joint survivor allowance which the member would have received had he retired on June 30, 1955 and had he on that date selected said joint survivor plan. The retirement allowance which the member would have received had he selected said joint survivor plan on June 30, 1955, should be computed in conformity with the provisions of Amended House Bill No. 744, passed by the 101st General Assembly, which became effective June 29, 1955.

Columbus, Ohio, March 21, 1956

Hon. Ward Ashman, Executive Secretary
School Employees Retirement System, Columbus, Ohio

Dear Sir:

I have your request for my opinion which reads as follows:

"Mrs. A. W., a member, died on June 14, 1955. At the time of death, the member was fifty-seven years of age, and had 27.250 years of service credit. The beneficiary designated by the member was her husband, F. W., aged fifty-eight.

"Section 3309.45 of the Revised Code provides benefits for survivors of members who die prior to retirement. In this particular, the beneficiary had the right to take, 1) the accumulated contributions of the member, 2) a retirement allowance computed as a joint-survivor allowance, or 3) a monthly allowance beginning at age sixty-five. The beneficiary selected the allowance computed as a joint-survivor annuity.

"Section 3309.45 of the Revised Code was originally enacted as Section 7896-107a of the General Code, effective June 14, 1951. It has been twice amended, the latest amendment becoming effective June 29, 1955.

"The benefits paid under the provisions of Section 3309.45, Revised Code, were increased effective June 29, 1955, and the pertinent question here is whether the amount of the benefit payable as a joint-survivor annuity should be determined by the formula in effect on the date of the member's death, June 14, 1955, or the formula effective on June 30, 1955.

"Paragraph (A) of Section 3309.45, Revised Code, was unchanged by the amendment effective June 29, 1955, and is as follows:

'(A) If the deceased member was eligible for a superannuation or commuted superannuation retirement allowance as provided in sections 3309.36 and 3309.38 of the Revised Code, such nominated beneficiary may elect to receive a retirement allowance computed as the joint survivor allowance designated as option 1 in section 3309.46 of the Revised Code, which the member would have received had he retired as of the last day of the month of death and had he at that time selected said joint survivor plan, and such payment shall begin with the subsequent month;'

"We are hereby requesting your opinion as to whether the amount of the allowance payable under the provisions of Paragraph (A) of Section 3309.45, Revised Code, should be determined, in the case of a member who died on June 14, 1955, by the formula in effect on June 14, 1955, or the formula in effect on June 30, 1955.

"We call your attention to Opinion No. 816 of the Attorney General, under date of October 15, 1951, the State Teachers Retirement System, the Syllabus of which is as follows:

"Where a member of the State Teachers Retirement System has, pursuant to the provisions of Section 7896-41,

General Code, duly designated a beneficiary to receive his accumulated contributions in case of his death before retirement, and said member dies before the effective date of the enactment of Section 7896-41a, General Code, such beneficiary will not be entitled to the benefit of the options provided by said Section 7896-41a.'

"The question there involved the rights of qualified beneficiaries to survivor benefits provided in Section 7896-41, General Code (now Section 3307.48, Revised Code), effective June 14, 1951, where the member died prior to June 14, 1951. Section 3307.48, Revised Code is similar to Section 3309.45, Revised Code."

Section 3309.45, Revised Code, provides in material part as follows :

"In lieu of accepting the payment of the accumulated account of a member who dies subsequent to June 14, 1951, and before retirement * * * the surviving spouse if nominated as a beneficiary * * * may elect to forfeit such payment and to substitute certain other benefits either under division (A) or division (B) of this section. * * *

"(A) If the deceased member was eligible for a superannuation or commuted superannuation retirement allowance as provided in sections 3309.36 and 3309.38 of the Revised Code, such nominated *beneficiary may elect to receive a retirement allowance* computed as the joint survivor allowance designated as option 1 in section 3309.46 of the Revised Code, *which the member would have received had he retired as of the last day of the month of death and had he at that time selected said joint survivor plan*, and such payment shall begin with the subsequent month. * * * (Emphasis added.)

I think it is important to recognize that *under the facts presented*, it is more nearly correct to say that survivor benefit amounts *as such* were not increased by the recent enactment of Amended House Bill No. 744, but rather, the amount which the deceased member would have received had he retired as of June 29, 1955, would be an increase over what he would have received had he retired, let us say, as of May 31, 1955.

The surviving spouse, in lieu of accepting the payment of the accumulated account of the deceased, had the right to elect to receive a retirement allowance (joint survivor allowance, option 1) which the member would have received had he retired as of the last day of the month of death and had he *at that time* selected such joint survivor plan. This right exists only where the deceased member himself was *eligible* for retirement at the time of his death.

Had the deceased member who died on June 14, 1955, retired as of the last day of the month of death (June 30, 1955), she would have been eligible for retirement under the benefits provided in the new enactment, since Amended House Bill No. 744, enacted by the 101st General Assembly, became effective on *June 29, 1955*.

The surviving spouse is therefore entitled to elect to receive the joint survivor allowance which the member would have received, if she had retired on June 30, 1955. The amount which the survivor might elect to receive, would be governed by the amount which the member, had she lived and retired, might have elected to receive.

In reaching this conclusion, I am in no way construing the law so as to render it retrospective in operation. The survivor benefit provision which I have discussed reads exactly the same, after the passage of Amended House Bill No. 744, as it read before the passage of the bill.

Section 3309.46, Revised Code, relative to retirement options available to a member going on retirement, provides in pertinent part as follows:

“Until the first payment on account of any benefit is made, the beneficiary may elect to receive such benefit in a retirement allowance payable throughout life, or the beneficiary may then elect to receive the actuarial equivalent at that time of his annuity, his pension, or his retirement allowance, in a lesser annuity, or a lesser pension, or a lesser retirement allowance, payable throughout life with any one of the following:

(A) Option 1. Upon his death, his annuity, his pension, or his retirement allowance, shall be continued throughout the life of and paid to such person, having an insurable interest in his life, as he shall nominate by written designation duly acknowledged and filed with the school employees retirement board at the time of his retirement. * * *

The foregoing statute describes the “Option 1” to which reference is made in the survivor benefit section. The language quoted above was not changed by the 101st General Assembly. What did change was the retirement allowance itself. The legislature provided a new formula in Section 3309.36, Revised Code, to be utilized in computing retirement allowances.

Taking all of these sections together, the conclusion appears inescapable that where a member of the system, who was eligible for retirement, died on June 14, 1955, her surviving spouse, if designated as her bene-

fiary, is entitled to elect to receive a retirement allowance computed as the joint survivor allowance designated as option 1 in Section 3309.46, which the member would have received had she retired on June 30, 1955, and had she at that time selected the joint survivor plan. The amount of that allowance would be governed by the law in effect on June 30, 1955. This means that the formula provided for in Amended House Bill No. 744, effective June 29, 1955, should be utilized.

You have directed my attention to Opinion No. 816, Opinions of the Attorney General for 1951, page 598, as possibly having some bearing upon this problem. In that opinion I held as disclosed by the syllabus:

“Where a member of the State Teachers Retirement System has, pursuant to the provisions of Section 7896-41, General Code, duly designated a beneficiary to receive his accumulated contributions in case of his death before retirement, and said member dies before the effective date of the enactment of Section 7896-41a, General Code, such beneficiary will not be entitled to the benefit of the options provided by said Section 7896-41a.”

The event which occasioned that request was the passage by the 99th General Assembly of the initial survivor benefit section. Section 7896-41a, General Code, relating to the payment of survivor benefits upon the death of a contributing member of the State Teachers Retirement System, became effective June 14, 1951.

Under the facts presented in that opinion a member of the teachers retirement system died some time prior to June 14, 1951. The death may not even have occurred in the month of June, 1951, as I recall the facts.

Section 7896-41a, General Code, introduced an entirely new benefit provision into the retirement law. It commenced:

“In lieu of accepting the payment of the accumulated account of a member *who dies* before retirement * * *.”

(Emphasis added.)

The section then proceeded to enumerate certain benefits which certain survivors might elect to receive. I then made the following statement on page 604 of that opinion:

“* * * bearing in mind that this section became effective on June 14, 1951, and speaks only from that date, it must be observed that the section does not refer to the accumulated account of a member who *died*, but to a member who *dies*. A person, already dead on June 14, 1951, is not, in my opinion, ‘a member

who dies.' It should also be observed that a former member who had died before June 14, 1951 would not on that date appear to be a member * * *."

Hence, my 1951 opinion turned upon the proposition that in order for a survivor to qualify for the new benefit at all, there must be a showing that the member died after the effective date of the enactment which made provision for the benefits. The wording and the present tense employed in the act dictated the conclusion that Section 7896-41a, allowed survivor benefits only in those cases where the member dies on or after June 14, 1951.

It will be noted that the retirement acts of all *three* retirement systems, public employees, school employees, and teachers, now specifically recite:

"In lieu of accepting the payment of the accumulated account of a member * * * *who dies subsequent to June 14, 1951* * * *"
(Emphasis added.)

Thus, the question which I passed upon in the 1951 opinion has, since that time, been clearly answered by the legislature. There is no question but that the member involved in the instant case, died after June 14, 1951. Therefore, there is no valid analogy to be drawn between the facts and law under consideration in the 1951 opinion and the facts and law now being considered. There is no question in the instant case but that the surviving spouse is entitled to survivor benefits, the only query being what formula is to be utilized in determining the retirement allowance which the deceased member would have received had she lived to the end of June, 1955, and had she selected Option 1.

Accordingly, it is my opinion that:

1. Pursuant to Section 3309.45, Revised Code, the duly designated and qualified beneficiary of a deceased member of the School Employees Retirement System, may, in lieu of accepting payment of the member's accumulated account, elect to receive a retirement allowance computed as the joint survivor allowance designated as Option 1 in Section 3309.46, Revised Code, which the member should have received had he retired as of the last day of the month of death and had he at that time selected said joint survivor plan.

2. Where a member of the School Employees Retirement System died in June, 1955, his duly designated and qualified beneficiary, in

electing to receive the benefit provided for in Section 3309.45 (A), Revised Code, is entitled to receive the retirement allowance computed as the joint survivor allowance which the member would have received had he retired on June 30, 1955 and had he on that date selected said joint survivor plan. The retirement allowance which the member would have received had he selected said joint survivor plan on June 30, 1955, should be computed in conformity with the provisions of Amended House Bill No. 744, passed by the 101st General Assembly, which became effective June 29, 1955.

Respectfully,

C. WILLIAM O'NEILL

Attorney General