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1. RETIREMENT SYSTEM, STATE TEACHERS—RETIREMENT BOARD AUTHORIZED TO USE TOTAL SERVICE CREDITED IN PUBLIC EMPLOYEES RETIREMENT SYSTEM AS BASIS TO DETERMINE ELIGIBILITY AND TOTAL RETIREMENT ALLOWANCE OF MEMBER—SUPERANNUATION RETIREMENT—PROVISIONS SECTION 7896-36b G. C. MANDATORY—TOTAL SERVICE CREDIT.
2. IF SERVICE CREDIT TO WHICH RETIRING MEMBER IS ENTITLED IN EACH SYSTEM IS LESS THAN TEN YEARS BUT TOTAL IN TWO OR MORE SYSTEMS EQUALS OR EXCEEDS TEN YEARS, MEMBER ENTITLED TO RECEIVE ADDITIONAL BASIC ANNUAL PENSION PROVIDED BY PARAGRAPH c, SECTION 7896-35 G. C.
3. APPORTIONMENT OF COST OF SUCH BASIC PENSION TO SYSTEMS INVOLVED—PROPORTION, PERIOD OF SERVICE CREDIT.
4. MEMBER WHO HAS A SERVICE CREDIT OF TEN YEARS IN EACH OF TWO OR MORE RETIREMENT SYSTEMS—ENTITLED TO RECEIVE BASIC PENSION FROM EACH OF SUCH SYSTEMS.

SYLLABUS:

1. The provisions of Section 7896-36b, General Code, authorizing the retirement board of the state teachers retirement system to use the total service credited in the public employes retirement system and the school employes retirement system as a basis for determining the eligibility and the total retirement allowance of a member for the purpose of superannuation retirement, are mandatory, and a member applying for retirement is entitled to have such total service credit so used.

2. If the service credit to which such retiring member is entitled in each system is less than ten years, but the total in two or more systems equals or exceeds ten years, he is entitled to receive the additional basic annual pension provided by paragraph (c) of Section 7896-35, General Code.

3. In such case, the apportionment of the cost of such basic pension to the systems involved should be in proportion to the period of service credit to which such member is entitled, in making up such total of ten or more years.

4. In case such member has a service credit of ten years in each of two or more of said retirement systems, he is entitled to receive the basic pension from each of such systems.

Columbus, Ohio, November 29, 1948

Mr. L. D. Shuter, Secretary, State Teachers' Retirement System
Columbus, Ohio

Dear Sir:

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

"Will you please provide me with your opinion in reply to the following questions:

"1. Is a contributing member of the State Teachers' Retirement System of Ohio entitled to receive service credit for any year or years for which he was also a contributing member of the School Employes' Retirement System of Ohio?

"2. If so, is he entitled to full credit?

"3. If he is not entitled to full service credit, what basis should be used to determine the fractional credit to which he is entitled?

"4. If the credit to which he is entitled in each system is less than ten years but the total in both systems exceeds ten years, is he entitled to receive the additional basic pension provided by Section 7896-35 of the General Code?

"5. If entitled to receive such additional basic pension, what basis should be used to determine the amount to be paid by each system?

"6. If his service credit totals ten years in each system, is he entitled to receive the annual basic pension from each system?"

"A member retired on superannuation by this System in 1935 returned to regular teaching service under the provisions of Section 7896-36a of the General Code during the four-year period 1943-1947. He completed 4 full years of service during this period and during the same years served as clerk of a board of education and contributed to the School Employes' Retirement System. As of August 31, 1948 his credit in this System was 4 years and his credit in the School Employes' Retirement System was 7.479 years. Therefore, the total credit was 11.479 years of which 4 years represented duplicated credit for identical years of service."

By the provisions of Section 7896-1, General Code, "total service" and "total service credit" are defined as follows:

"'Total-service' or 'total-service credit' shall mean all service of a member of the retirement system since last becoming a

member and, in addition thereto, all his prior-service and all military service credit, computed as provided in this act and also all purchased service credit as provided in section 7896-30, except that credit purchased subsequent to the twenty-fifth day of June, nineteen hundred and forty-five for other than Ohio service shall not be included in 'total-service' or 'total-service credit' except for the purpose of qualifying for superannuation or commuted superannuation retirement."

This definition becomes important in determining not only the amount of the retirement allowance which a member may obtain upon superannuation retirement but also in determining his right to retire. Section 7896-35, General Code, confines the right of retirement to a member who has at least five years of service credit. The same section gives him the right upon retirement, to a retirement allowance consisting of (a) an annuity based on his accumulated contributions, (b) a pension of equivalent amount, (c) a pension based on his prior service and (d) an additional basic annual pension equal to one hundred eighty dollars, providing he has ten or more years of total service credit, excluding credit purchased subsequent to June 25, 1945, for other than Ohio service.

The statutes relative to the public employes retirement system and the school employes retirement system contain quite similar provisions defining "total service." (Sections 486-32 and 7896-64, General Code). In so far as they differ in detail, those differences are not important here. In each case, total service credit includes both contributing service and prior service. In each system there is a provision requiring at least five years of service credit as a condition for retirement and providing substantially the same elements that go to make up the retirement allowance as those above indicated. Section 7896-36b, General Code, being part of the law relating to your system, provides as follows :

"Any other provision of law to the contrary notwithstanding the total service credited in either the public employes retirement system or the school employes retirement system, or both, *may be used* in determining the eligibility and the total retirement allowance of a member for the purpose of superannuation retirement as provided in sections 7896-34, 7896-35, and 7896-36 of the General Code, and also for the purpose of indefinite extension of membership as provided in section 7896-35 of the General Code. Upon application the retirement board shall retire any such non-contributing member effective as of the end of the quarter of the calendar year then current. The total retirement allowance if paid by this system shall equal the combined retirement allow-

ances payable by all of the above named state retirement systems. At least annually each such state retirement system *shall pay* to this system its share of such total allowance, or sufficient reserves may be transferred at retirement from one state retirement system to another for the purpose of paying such allowance thereafter." (Emphasis added.)

A quite similar provision relative to the public employes retirement system is found in Section 486-63a, General Code, reading as follows:

"(c) The total service credited in all state retirement systems *may be used* in determining the eligibility and the total retirement allowance of a member for the purpose of superannuation retirement as provided in sections 486-59, 486-60, and 486-61 of the General Code. The retirement board *may retire* such member provided the largest retirement allowance is payable by this system. The total retirement allowance *may equal* the combined retirement allowance payable by all of the state retirement systems. At least annually each state retirement system *may pay* to this system its share of such total allowance." (Emphasis added.)

In Section 7896-99a, General Code, a provision to like effect is found. That section reads as follows:

"Any other provisions of law to the contrary notwithstanding, the total service credited in all state retirement systems *may be used* in determining the eligibility and the total retirement allowance of a member for the purpose of superannuation retirement as provided in sections 7896-99, 7896-100, and 7896-101 of the General Code. Upon application the retirement board *may retire* such member provided the largest retirement allowance is payable by this system. The total retirement allowance shall equal the combined retirement allowances payable by all of the state retirement systems. At least annually each state retirement system shall pay to this system its share of such total allowance." (Emphasis added.)

It will be observed that in each of these statutes it is provided that the "total service credited" in all of these retirement systems "may be used" in determining the eligibility and the total retirement allowance of a member for the purpose of superannuation retirement. Obviously, a member of one of these systems might not have sufficient service credit to meet the five year requirement and entitle him to retire unless his service credit in one of the other systems were added. If we should give to the word "may" a construction that would place the absolute discretion

in the hands of the board to use or not to use the service credit in the other systems, it would place in the board the opportunity for unlimited discrimination. Two members might have precisely the same service credit in that system and also the same service credit in another system, yet the board might grant retirement to one and refuse it to the other. The question, therefore, arises whether it was the legislative intent in conferring this power, to leave it to the discretion or whim of the board, whether or not to give the teacher or other employe member the benefit of it.

It is a familiar principle of statutory construction that the words "may" and "shall" are frequently to be used interchangeably. This principle is thus stated in 37 O. Jur., page 327:

"The literal meaning of the words 'may' and 'shall' is not always conclusive in the construction of statutes in which they are employed; and one should be regarded as having the meaning of the other where the manifest sense and intent of the statute require one to be substituted for the other or where such substitution is required to give effect to other language found in the statute or to carry out the purpose of the legislature as it may appear from a general view of the statutes under consideration.

"The word 'may,' under proper circumstances, may be interpreted to impose an imperative obligation. This is particularly true where the statute confers authority to perform an act the performance of which the public interest demands—that is, in cases where the public are interested, or where a matter of public policy, and not merely of private right, is involved, or where the statute directs the doing of a thing for the sake of justice or the public good."

To like effect see Sutherland on Statutory Construction (3rd Ed.), Section 5801 et seq. This author quotes from the opinion of Mr. Justice Swayne in *Board of Supervisors v. U. S.*, 71 U. S., 435, 446, as follows:

"The conclusion to be deduced from the authorities is, that where power is given to public officers . . . whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory."

In *State ex rel. Myers v. Board of Education*, 95 O. S., 367, it was held:

"The literal meaning of the words 'may' and 'shall' is not always conclusive in the construction of statutes in which they are employed; and one should be regarded as having the mean-

ing of the other when that is required to give effect to other language found in the statute, or to carry out the purpose of the legislature as it may appear from a general view of the statute under consideration."

In *Railway Co. v. Mowatt*, 35 Ohio St., 284, it was declared:

"Where authority is conferred to perform an act which the public interest demands, *may* is generally regarded as imperative." (Emphasis by the court.)

See also *Board of Education v. Briggs*, 114 O. S., 415; *Stanton v. Realty Co.*, 117 O. S., 345; *Miller v. Lakewood Housing Co.*, 125 O. S., 152.

Inasmuch as laws providing for retirement allowances for public employes are based on the purpose to procure better public service, it appears to me that the rule above stated is properly applicable to the statutory provisions which we are here considering.

Coupled with this, we also note the principle of law which is well established, that a liberal construction is to be given to statutes granting pensions to public officers. This principle is stated by Sutherland on *Statutory Construction*, Section 7209, as follows:

"Statutes granting pensions to public officers, including veterans, policemen, firemen and other public employes, were enacted to stimulate governmental efficiency by encouraging continued and loyal public service, and as a reward for the hardships and hazards suffered by the soldiers in our armies. Although this type of legislation constitutes a form of public grant, nevertheless it has as its purpose the promotion of the general welfare, and for that reason pension statutes are liberally construed to accomplish their objectives. Thus in determining the beneficiaries entitled to pensions, the qualifications of the pensioner, and the time of service required for obtaining a pension, the courts should not resort to technicalities."

1. In the light of the foregoing principles and upon the authorities cited, which could be greatly amplified, and having in mind the unfair results which could follow from an opposite interpretation, I am drawn to the conclusion that the General Assembly in granting this power to these boards, intended to couple with it the duty to give the employe member the benefit of these provisions as affecting not only his eligibility to retire, but also the retirement allowances to which he will be entitled.

One other consideration strengthens my conclusion in this matter. It will be observed that by the latter part of Section 7896-36b, *supra*, "the total retirement allowance if paid by this system shall equal the combined retirement allowance payable by all of the above named state retirement systems." Then follows the provision that "at least annually each such state retirement system shall pay to this system its share of such total allowance." I cannot believe that the general assembly could have intended to confer upon any one of these boards the discretion to impose or not to impose on the other systems this charge, depending on its action or non-action in cumulating the service of the applying member.

2. The answer to your second question seems to follow readily from a consideration of the statutory provision just referred to. Following the words of the statute, he is entitled to have credited "the total service credited in either the public employes retirement system or the school employes retirement system or both," and of course this is in addition to the credit attained in the teachers' system. Then, as already noted, the total retirement allowance is to be the combined allowance payable (under their respective laws) by all three systems. Accordingly, answering your question, he is entitled to full credit.

3. Your third question need not be considered in view of the answer to question No. 1.

4. If his combined credits in the three systems amount to ten years, then the provisions of Section 7896-35 would clearly entitle him to the "additional basic pension" provided by that section. This section, after setting out the other elements which enter into the retirement allowance, proceeds as follows:

"An additional basic annual pension equal to one hundred eighty dollars, providing a member has ten or more years of total service credit, * * *."

A similar provision as to the public employes' retirement system is contained in Section 486-60, General Code, and as to the school employes' retirement system, in Section 7896-100, General Code.

Note that the member is entitled to this additional pension providing he "has ten or more years of *total service credit* and we have already concluded that this total credit is to be arrived at by adding together his service credits in all the systems. If the general assembly had intended

that he must have this ten year credit in the one system granting him retirement it could easily have said so. But it saw fit to predicate this particular benefit on his *total* credits. We need not criticise the law for this provision, because the manifest purpose of inserting it in the statutes relating to all three of these systems was to reward in a special way a person who had spent a considerable number of years in the public service, and this provision thus interpreted accomplishes that purpose.

5. As to the distribution of this charge among the systems involved I turn again to Section 7896-36b: "Each such system shall pay to this system its share of such total allowance." If as your question assumes, the ten years total involves service under two or more systems, it appears to me that they must contribute in direct proportion to the service credit in each. In the specific case you present in your letter, the teacher has four years credit in your system and seven years in the school employes system. Accordingly, there should be charged to the school employes system seven-elevenths of the cost of the basic pension, the balance being borne by your system.

6. Your sixth question is as to the member's right to receive the annual basic pension from each system, in case his total credit in each system amounts to ten years. The answer appears to me obvious. The law as to each system gives him that benefit, provided he has ten years of service credit. If he retires separately in each system he can certainly claim that special pension from each system. The only effect of Section 7896-36b supra, is to permit him to retire as a teacher, getting the benefit of his combined years of service, and making the teachers retirement system the medium through which his retirement is accomplished and the disbursing agent for the other system or systems involved with the right of reimbursement.

In your letter you state that the teacher in question had four years of overlapping service, in that, while holding the position of regular teacher he was also serving as clerk of a board of education. Whether these two positions are legally compatible is questionable, but we need not decide that question in this connection. I see no legal or practical objection to his rendering services to two employers during the same period. The work of a clerk of a board of education might be performed entirely outside of school hours. Many of the positions which fall within the purview of the school employes retirement system involve only a portion of the time

of the employe and the law governing that system makes no reference to part time or full time employment, but allows full service credit for the period of employment, regardless of the working time involved.

However, in this connection, I consider it proper to call your attention to the fact that in the public employes retirement system there are provisions in the law authorizing the board of that system to determine as to part time service what fraction of a year should be credited, and that fact should be considered in determining the total allowance to be made and the allocation, in case your board should grant a retirement such as is contemplated by Section 7896-36b supra.

Specifically answering your questions it is my opinion :

1. The provisions of Section 7896-36b, General Code, authorizing the retirement board of the state teachers retirement system to use the total service credited in the public employes retirement system and the school employes retirement system as a basis for determining the eligibility and the total retirement allowance of a member for the purpose of superannuation retirement, are mandatory, and a member applying for retirement is entitled to have such total service credit so used.

2. If the service credit to which such retiring member is entitled in each system is less than ten years, but the total in two or more systems equals or exceeds ten years, he is entitled to receive the additional basic annual pension provided by paragraph (c) of Section 7896-35, General Code.

3. In such case, the apportionment of the cost of such basic pension to the systems involved should be in proportion to the period of service credit to which such member is entitled, in making up such total of ten or more years.

4. In case such member has a service credit of ten years in each of two or more of said retirement systems, he is entitled to receive the basic pension from each of such systems.

Respectfully,

HUGH S. JENKINS,
Attorney General.