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RETIREMENT SYSTEM, PUBLIC EMPLOYES—ONE WHO UNDER FORMER STATUTE, NOW REPEALED, WAS AN “ORIGINAL MEMBER” AND ENTITLED UPON SUPERANNUATION RETIREMENT, TO PRIOR SERVICE PENSION—MUST HAVE BEEN CONTRIBUTING MEMBER FOR AT LEAST THREE YEARS PRIOR TO RETIREMENT IN ORDER TO QUALIFY FOR SUCH PRIOR SERVICE PENSION—SECTIONS 486-47, 486-60 G. C.

SYLLABUS:

One who under the provisions of a former statute, now repealed, was defined as an “original member” of the public employes retirement system, and by virtue of that status was entitled, upon superannuation retirement, to a prior service pension, must, under Sections 486-47 and 486-60, General Code, have been a contributing member of such system for at least three years prior to retirement in order to qualify for such prior service pension.

Columbus, Ohio, January 29, 1948

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:

“The 97th General Assembly deleted from Section 486-32, General Code, the definition of new and original member. Section 486-59, General Code still refers to the requirement that new members must have at least five years of contributing membership.

“In Opinion No. 2457, it was held that to be eligible for prior service credit, a member must have at least three years of contributing membership subsequent to the date on which membership was established. Will you kindly indicate whether we must follow this requirement of three years of contributing membership to qualify a member for prior service credit even though the member may have qualified as an original member of the System under the original definition? In other words, in applying the three year contributing requirement can any distinction be made between original and new members?”

Prior to the recent amendment of Section 486-32, General Code, to which you refer, that section contained the definition of "original member," reading as follows:

"'Original member' of the public employes retirement system shall mean a state, county, municipal, park district, conservancy, health, township or public library employe who was at any time a state, county, municipal, park district, conservancy, health, township or public library employe prior to the thirtieth day of June, 1938, whether or not such employment has been continuous and who became a member of the retirement system on or before June 30, 1938."

Paragraph 23, of the same section defined "new member" as meaning one who became such employe and a member of the retirement system subsequent to June 30, 1938.

Under the laws relating to the public employes retirement system as originally enacted and as continued for a number of years, there was an important distinction as to the rights of an "original member" in that, "prior service pension" allowed by Section 486-60, General Code, was limited to one who was an original member. However, in 1941 Section 486-47, General Code, was enacted providing in part, as follows:

"Any other provisions of law notwithstanding, one year of contributing membership in the retirement system shall entitle a member to receive prior service credit for services prior to January 1, 1935, in any capacity which comes within the provisions of the public employes retirement act, provided that such member has not lost membership at any time by the withdrawal of his accumulated contributions upon separation."

This provision greatly enlarged the right to prior service credit, by extending it to all members who have contributed to the fund for one year, regardless of whether they were original members or new members.

As you state, the 97th General Assembly has deleted the definition of "new member" and "original member" from Section 486-32, and I find in the present law no provision that appears to grant any special right to one who was formerly defined as an original member. Prior to the amendments contained in Senate Bill No. 57, Section 486-60, General Code, read in part, as follows:

"Upon superannuation retirement, a state employe shall be granted a retirement allowance consisting of: * * *

“(c) An additional pension, *if such employe is an original member*, equal to two per centum of his final average yearly salary multiplied by the number of years of service in his prior-service certificate.” (Emphasis added.)

As amended, the corresponding portion reads:

“Upon superannuation retirement, a member shall be granted a retirement allowance consisting of: * * *

“(c) An additional pension, if such member can qualify for prior service, equal to two per centum of his final average salary multiplied by the number of years of such prior service credit, * * *.”

I am not able to find in the present law any reference whatever to “original member.” This same act amended Section 486-47, General Code. This amendment, so far as we are here concerned, consisted in requiring *three* years of contributing membership instead of *one* as formerly, as a condition to the right to receive prior service credit.

In my opinion No. 2457, rendered December 4, 1947, I had before me the question as to whether this change in Section 486-47, extending from one to three years the required length of contribution as a condition to the right of prior service credit, would operate to affect the rights of a member who had complied with the one year provision before the law was changed but did not have three years of contributing service to his credit. There was presented the further question as to whether a member who came into the system late, and having reached the age of seventy years may therefore be compelled by the provisions of Section 486-59, General Code, to retire before he could have contributed for three years, and thereby be deprived of his right to enjoy the benefits of his prior service. It was held as shown in the first paragraph of the syllabus:

“The General Assembly in establishing the public employes retirement system (Sections 486-32 to 486-75, inclusive, General Code) has power to change by amendment the conditions upon which members may retire and receive the retirement allowances provided by the law.”

Applied to the two cases above stated, it was held that it was within the power of the legislature to make the change and that it might defeat the right of a member to receive prior service credit in each case, in the event he could not satisfy the requirements of the law as to the three

years of contributing service. It was pointed out in that opinion that the prospect of receiving a certain allowance was not a fixed right which the General Assembly was powerless to change or withdraw by subsequent legislation. The case of *Mell v. State ex rel. Fritz*, 130 O. S., 306, was cited in support of the proposition which was discussed by the court in that case, that a pension granted by public authorities is not a contractual obligation but is in the nature of a gratuitous allowance even where the pension fund is maintained in part by compulsory contribution of the beneficiaries thereof.

Furthermore, as was pointed out in that opinion, nothing in the statutory change referred to proposed to take away from any member of the retirement system any benefits which he had begun to enjoy. Attention was called to the fact that the act amending Section 486-47, carried with it also largely increased benefits to members of the system upon retirement, and it was pointed out that this change in the law merely postpones somewhat the right of a member to receive a larger benefit than he had previously had the right to expect. Furthermore, it may be noted that the prior service pension is a pure gratuity to which the member has contributed nothing.

In a more recent opinion, No. 2641, under date of January 23, 1948, in construing the statutes relative to police and fire pension systems, it was held:

“Notwithstanding the provisions of Sections 4612-1 and 4628, General Code, providing that granted pensions shall constitute vested rights, it was within the power of the General Assembly to enact Sections 4612-4 and 4628, General Code, suspending the payment of all pensions and disability payments from the firemen’s relief and pension fund and the police relief and pension fund, respectively, so long as the recipient is holding a full time salaried position under the state or any political subdivisions.”

It will be noted that in the matter there under consideration, a policeman or fireman had already retired on a pension and that the statutes declared that a pension once granted, should be a vested right. Nevertheless, it was held that the General Assembly was not stripped of its power to modify, suspend or even abrogate such pension. It was pointed out in that opinion that a vested right cannot consist in the expectation of the continuation of existing legislation, but must be a present property right.

It appears to me that in the case you present, since the legislature has seen fit to wipe out the definition of an "original member" and thereby to leave no provision in the law according to such original member any special rights, one who was formerly denominated an "original member" is subject to the present provision of Section 486-47, General Code, which requires three years of contributing membership as a condition to the right to prior service credit.

Respectfully,

HUGH S. JENKINS,
Attorney General.