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1. PUBLIC EMPLOYES RETIREMENT SYSTEM—PERSONS, WITHIN PROVISIONS, ANY OTHER RETIREMENT SYSTEM “ESTABLISHED UNDER STATE LAW OR CHARTER”, NOT REQUIRED TO BECOME MEMBERS—THOSE NOT REQUIRED TO CONTRIBUTE TO SYSTEM—PUBLIC LIBRARIES, SCHOOL DISTRICT EMPLOYEES—LAWS DEFINING PENSION, GROUP INSURANCE, ANNUITY, RETIREMENT SYSTEM—SECTIONS 486-33c, 7889 G. C.
2. “ANY OTHER RETIREMENT SYSTEM” ESTABLISHED UNDER LAWS, STATE OR CHARTER—MEMBERS ACTUALLY EMPLOYED—NEW EMPLOYEES—SCHOOL DISTRICT PUBLIC LIBRARY.
3. PUBLIC EMPLOYES RETIREMENT SYSTEM MEMBERS, REQUIRED TO REMAIN MEMBERS, WHEN EMPLOYED BY SUCH LIBRARY WHERE A RETIREMENT SYSTEM ESTABLISHED.

**SYLLABUS:**

1. *By the express terms of Section 486-33c, General Code, persons who come within the provisions of any other retirement system “established under state law or charter” are not required to become members of the Public Employes Retirement System, nor is an employer, which has so established a retirement system, or the employes thereof, required to contribute to such system, and this includes school district public libraries and their employes, which under and pursuant to the provisions of Section 7889 of the General Code have established a retirement system. Whether or not a retirement system has been established under such section by a school district public library employing not less than seventy-five full time employes is a question of fact to be determined by the application of the well settled principles of law defining what is a pension group insurance; annuity; or a retirement system.*

2. *The phrase “said term (public library employe, among others) shall not include those persons who come within the provisions of any*

*other retirement system established under the provisions of the laws of this state or of any charter" includes not only those members who are actually employed at the time of the passage of the public employes retirement act but also those new employes who are not members of the public employes retirement system, who might after the passage of the act be hired by such school district public library.*

3. *Persons who are members of the Public Employes Retirement System who are hired by a school district public library having a retirement system established under the provisions of Section 7889, General Code, are required to remain members of the Public Employes Retirement System (Sections 486-33 and 486-33c).*

Columbus, Ohio, August 13, 1941

Public Employes Retirement System,  
Columbus, Ohio.

Gentlemen:

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

"Under the provisions of the Public Employes Retirement Act, all public library employes who did not claim exemption within three months after the act became effective must become members of the Retirement System unless they are members of some other Retirement System established under the laws of the State of Ohio or by City Charter.

Under the provisions of Section 7889 of the General Code, certain libraries in the State of Ohio and their employes have entered into annuity retirement plans with insurance companies whereby their employes contribute and are to be retired after a required number of years of service or after having attained a certain age.

The question is: Would the employee of a library having thus entered into a group insurance or a group retirement plan with an insurance company, or having established their own plan be exempt from the compulsory membership provisions of the Public Employes Retirement Act?"

Your original request was supplemented by a later letter reading in part as follows:

"On checking with the Cleveland Library I find that the situation there is very similar to that in Toledo. In both cases the employes pay at least four per cent of their salaries, with the

employer matching their contributions and exceeding them. Deductions are made as payroll deductions by the library and are for retirement purposes only. In addition to these deductions they have another deduction which is for life insurance purposes. The insurance deductions, however, are entirely separate and distinct from the retirement provisions.

After finding this additional information I am somewhat of the personal opinion that both of the libraries qualify as a retirement system. If this is true, the main question with this office would be future employees hired by the library as new employees to the field or those transferred from other libraries where they have been members of this system."

Section 486-33, General Code, provides in part as follows:

"A state employes retirement system is hereby created for the employes of the state of Ohio. *Membership in the state employes retirement system shall be compulsory and shall consist of all state employes, either as original members or as new members upon being regularly appointed.* 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; and any new member over the age of fifty years may be exempted from membership by filing written application for exemption with the retirement board within three months after being regularly appointed as a state employe. \* \* \* provided, however, *that any employe who is, or who becomes a member must continue such membership as long as he is a state employe, even though he may be in or transferred to an exempted class or group.*"

(Emphasis mine.)

Section 486-33a, General Code, provides inter alia that:

"The state employes retirement system created by section 486-33, General Code, shall hereafter be known as the public employes retirement system, and the state employes retirement board shall hereafter be known as the public employes retirement board. \* \* \* Beginning July 1, 1938, in addition to the present membership of said retirement system, there shall be included therein all county, municipal, park district, conservancy, health and *public library employes as defined herein*, and such county, municipal, park district, conservancy, health and public library employes, except as otherwise provided herein, shall have all the rights and privileges and be charged with all the 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; and any new member over the age of fifty years may be exempted from membership by filing written application for exemption with the retirement board within three months after being regularly appointed as a county, municipal, park district, conservancy, health or *public library employe*.”  
(Emphasis mine.)

Section 486-33c, General Code, reads in part as follows:

“For the purposes of this act, \* \* \* ‘Public library employe’ shall mean any person holding a position in a public library, in the state of Ohio, and/or paid in full or in part by the board of trustees of a public library. *But said term shall not include those persons who come within the provisions of any other retirement system established under the provisions of the laws of this state or of any charter*, nor shall the provisions of this act in any manner apply to a police relief fund or a fireman’s pension fund established under provisions of law. No employe except an employe who comes within the provisions of a police relief fund or a firemen’s pension fund shall be excluded from membership in the retirement system because of membership in any other retirement system established under the provisions of the laws of this state or of any charter unless such employe is contributing to such other retirement system on the basis of two thousand dollars per annum or is receiving a disability allowance from such other retirement system. \* \* \* provided, however, that any county, municipal, park district, conservancy, health or public library employe who is, or who becomes, a member must continue such membership as long as he is such employe, even though he may be in or transferred to an exempted class or group. \* \* \* ”

(Emphasis mine.)

Section 486-33, *supra*, provides in unmistakable terms that membership in the State Employees Retirement System shall consist of all state employes, either as original members or as new members, with the proviso that any original member might have been exempted from such membership by filing written application for such exemption with the retirement board within three months after the act containing this section became effective, the section also providing that any new member over the age of fifty years may be exempted from membership by filing written application with the retirement board within three months after being regularly employed as a state employe.

As you shall have noted, by the terms of Section 486-33a, General Code, the benefits and obligations of the State Employees Retirement

System were changed so as to include public employes as defined in Section 486-33c, General Code.

You will observe that Section 486-33c, supra, provides that "public library employe" shall mean any person holding a position in a public library in the state of Ohio, who is paid in full or in part by the board of trustees of such public library. You will also note that by the express provisions of Section 486-33c, supra, those persons "*Coming within the provisions of any other retirement system established under the provisions of the laws of this state or of any charter*" are not included in the public employes retirement system and that such provisions shall not "in any manner apply to a police relief fund or a firemen's pension fund established under the provisions of law."

Section 7889, General Code, referred to in your request, reads as follows:

"The governing board of any public library, created or existing, under the provisions of sections 7635 to 7640-1, inclusive, or sections 14993 to 15005, inclusive, or section 15060, of the General Code, which has not less than 75 full time employes, may provide for the retirement with annuities, insurance, or other provision of employes of any such library. The library board of such library may provide for a system of retirement, insurance, or other provision for its employes and may appropriate and pay the board's portion provided in such system or plan out of the funds received to the credit of such board by taxation or otherwise. Each employe of such library who is to be included in a system of retirement shall contribute to the retirement fund not less than four per centum per annum of his salary from the time of his eligibility to join the retirement system to the time of his retirement. If a group insurance plan is installed by any such library, not less than fifty per centum of the cost of such insurance shall be borne by the employes included in such plan."

Sections 7635 to 7640-1, General Code, referred to in the above section, make provision for the establishment and maintenance of public libraries by the board of education of any city, village or rural school district, while Sections 14993 to 15005, and Section 15060, General Code, had application only to the public library of the city of Cincinnati. For this reason, the latter named sections were held unconstitutional in the case of *Brown et al., Comnrs., et al., v. State ex rel.*, 120 O.S. 297, 166 N.E. 214 (1929), the third branch of the syllabus of this case reading:

“Sections 14993 to 15005, inclusive, Section 15060 and Sections 2434-1 to 2434-4, inclusive, General Code, are laws of a general nature, but have local application only in the county of Hamilton in the state of Ohio. They are therefore violative of Section 26, Article II of the Constitution, and void.”

Paraphrasing what I deem to be the determinative part of Section 7889, *supra*, you will note that the *governing board* of what is commonly called a “school library”, employing “not less than 75 full time employes”, may provide for the retirement of the employes of such library, the sentence immediately following more specifically and definitely providing that the library board of such a library may provide “for a system of retirement,” i.e., a public retirement system, as that phrase is known to the law; may provide for insurance; and may appropriate and pay the board’s portion provided for, either in such retirement system or required by any other plan adopted, “out of the funds received to the credit of such board by taxation or otherwise.” That the line of demarcation and plain distinction between an employes’ retirement system and a group insurance plan was clearly recognized by the Legislature is shown by the provisions of the last two sentences of Section 7889, *supra*, the first sentence making it mandatory that each employe “contribute not less than four per centum per annum of his salary from the time of his eligibility to join the *retirement system* to the time of his retirement,” while if a group insurance plan were to be installed, “not less than fifty per centum of the cost of each insurance” is required to be borne by all employes included in such plan.

The law is well settled that a pension means one thing; a *retirement system* or system of retirement connotes another; and that insurance, or group insurance, or annuities, purchased from private organizations are something entirely different.

In the case of Retirement Board of Allegheny County vs. McGovern, et al., Commissioners, Appellants, 316 Pa. St. 161, 171 A. 400 (1934), it was held as stated in branches 1, 2 and 13 of the syllabus:

“1. Retirement pay is adjusted compensation presently earned, together with contributions from employes, payable in the future.

2. A pension is a bounty or a gratuity, given for services that were rendered in the past. \* \* \*

3. Where an employee contributes a part of his salary or wages with a sum from the state or county under a contractual relationship with the municipality or state to create a contributed reserve retirement system, a retirement pay made therefrom is not a pension."

Generally speaking, in this state as elsewhere, insurance is effected by the purchase and issuance of an insurance policy. As defined by the Supreme Court of Ohio, in the case of *The Ohio Farmers Insurance Co. v. Cochran*, 104 O.S. 427 (1922), an insurance policy "is a contract between the insured and the insurer, whereby for an agreed premium one party undertakes to compensate the other for loss on a specified subject by specified perils." In 29 Am. Jur. 52, it is said as follows with reference to annuity contracts:

"Contracts for annuities differ materially from ordinary life insurance policies, and are not generally regarded as such. A contract for annuity is distinguishable from insurance in that it is payable yearly during the life of the annuitant rather than upon any future contingency, and in many instances is paid for in a single payment which is not generally regarded as a premium. \* \* \* "

With the possible exception of workmen's compensation, there is no public insurance in Ohio, and certainly no *public corporation* making contracts of insurance or for the payment of annuities or like benefits. On the other hand there are, and for some several years have been, public retirement systems established by law, as for example the Teachers Retirement System; the Public School Employes Retirement System; the Retirement System of the City of Cincinnati; and the many Firemen's Pension Funds and Police Relief Funds.

Before the receipt by this office of the letter supplementing your original request, additional information furnished by you was to the effect that of the public libraries authorized to act under the provisions of Section 7889, *supra*, all except the Cleveland Public Library and the Toledo Public Library are complying in full with the terms of the Public Employes Retirement Law, as are their employes, the Toledo Public Library complying in part in that what are termed its "maintenance employes" and members of the public employes system.

I have ascertained from the statistics on file in the office of the State Librarian, Ohio State Library, that there are only seven public libraries in Ohio having not less than seventy-five full time employes,

viz., the Akron, Cincinnati, Cleveland, Columbus, Dayton and Toledo Public Libraries, and the Reuben McMillan Free Library of Youngstown. Of these seven, the Cincinnati Public Library is a county district library; the Columbus Public Library is a municipal library; the public library at Youngstown is an "association library" (See Opinion No. 4271, Opinions, Attorney General, 1935, Vol. I, p. 586), while the remaining four public libraries were established and are controlled and maintained by virtue of the provisions of Sections 7635 to 7640-1, inclusive, of the General Code, named in Section 7889, *supra*. And since the Akron and Dayton libraries and their employes are members of the public employes system, and since, according to the information contained in your supplementary letter, the Cleveland Public Library and the Toledo Public Library have retirement systems of their own rather than group insurance plans, it seems to me that the question asked in your original request has become moot. And this is especially true since, as above pointed out, the provisions of Section 7889, *supra*, apply only to public libraries established by school districts having "not less than 75 full time employes", all other public libraries in the state being subject to the requirements of the Public Employes Retirement Law.

Coming now to the questions asked in your supplementary request, your attention is invited to that part of Section 486-33a, *supra*, which provides that the term "public library employe" (among others eligible and required to be members) shall "not include those persons who come within the provisions of any other retirement system established under the provisions of the laws of this state or of any charter." I am persuaded that by the use of this language, the Legislature intended to exempt from compulsory membership in the Public Employes Retirement System not only such employes as might *actually* be members of another retirement system, but also those persons who might come within the employ of the political subdivision or public organization or body in the future. That is to say, the phrase "those persons who come within the provisions of any other retirement system" seems to me to mean persons who are eligible to become members of another retirement system as well as those who were members at the time of the passage of the act under consideration. Any other construction would necessarily lead to the complete abolishment of those public library retirement systems created under section 7889, *supra*, for the very obvious reason that, as such members of the existing public retirement systems retire or die, the system would soon pass out of existence



if there were no new members to carry on. Had the Legislature intended to wipe out of existence any public library retirement system duly established under the provisions of Section 7889, supra, certainly it would have expressly so provided rather than to have permitted the absurdity of having a public library retirement system with a gradually decreasing membership until such system was comprised of only one or two members and finally passed out of existence. And this construction finds emphatic support in the fact that the provisions of Section 7889, supra, by its terms had application only to libraries having not less than seventy-five full time employes. I therefore conclude that any new employes, not members of the Public Employes Retirement System, hired by the Cleveland Public Library or the Toledo Public Library, may become members of the retirement system established by such libraries and are not required to become members of the Public Employes Retirement System.

In so far as the employment of new employes who are already members of the Public Employes Retirement System by either the Cleveland Public Library or the Toledo Public Library is concerned, it is my opinion that such new members must continue as members of the Public Employes Retirement System. You will note that Section 486-33 provides "that any employe who is, or who becomes a member must continue such membership as long as he is a state employe, even though he may be in or transferred to an exempted class or group." As above pointed out, Section 486-33a incorporates by reference the provisions of the law creating and providing for the original State Employes Retirement System and extends the benefits to, and places the duties and obligations on, the members of the Public Employes Retirement System as created in the amendments to the original act. Moreover, Section 486-33c expressly provides that any "public library employe who is, or who becomes, a member must continue such membership as long as he is such employe, even though he may be in or transferred to an exempted class or group." These provisos are so plain as to require neither interpretation or construction, and it is my opinion that it was the manifest intention of the Legislature to provide that any person becoming a member of the Public Employes Retirement System must continue as such member as long as he remains a public employe, as defined by Section 486-33a, supra.

In view of the foregoing, and in specific answer to your questions, it is my opinion that:

1. By the express terms of Section 486-33c, General Code, persons who come within the provisions of any other retirement system "established under state law or charter" are not required to become members of the Public Employes Retirement System, nor is an employer, which has so established a retirement system, or the employes thereof, required to contribute to such system, and this includes school district public libraries and their employes, which under and pursuant to the provisions of Section 7889 of the General Code have established a retirement system. Whether or not a retirement system has been established under such section by a school district public library employing not less than seventy-five full time employes is a question of fact to be determined by the application of the well settled principles of law defining what is a pension; group insurance; annuity; or a retirement system.

2. The phrase "said term (public library employe, among others) shall not include those persons who come within the provisions of any other retirement system established under the provisions of the laws of this state or of any charter" includes not only those members who are actually employed at the time of the passage of the public employes retirement act but also those new employes who are not members of the public employes retirement system, who might after the passage of the act be hired by such school district public library.

3. Persons who are members of the Public Employes Retirement System who are hired by a school district public library having a retirement system established under the provisions of Section 7889, General Code, are required to remain members of the Public Employes Retirement System (Sections 486-33 and 486-33c).

Respectfully,

THOMAS J. HERBERT,  
Attorney General.