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- 1.. RETIREMENT SYSTEM, PUBLIC EMPLOYEES—PENDING ACTIONS — THOSE APPLICATIONS FOR RETIREMENT FILED WITH BOARD BY MEMBER PRIOR TO EFFECTIVE DATE OF SECTION 486-47 G. C.
2. PENSION STATUS—MEMBERS WHO FILE APPLICATION TO RETIRE AFTER MARCH 31, 1947—PRIOR TO JULY 1, 1947—BASED UPON PROVISIONS OF LAW IN EFFECT AT TIME APPLICATION FILED.
- 3.. MEMBER WHO WITHDREW ACCUMULATED CONTRIBUTIONS, RESTORED THEM PRIOR TO JUNE 5, 1947 AND SUBSEQUENTLY MADE APPLICATION FOR RETIREMENT IS ENTITLED TO PRIOR SERVICE CREDIT—PROVISO, HE HAS CONTRIBUTED TO SYSTEM FOR THREE YEARS AFTER JUNE 5, 1947—EFFECTIVE DATE OF AMENDMENT TO SECTION 486-57 G. C.—SEE O A G 513, July 11, 1951.

## SYLLABUS:

1. Pending actions are those applications for retirement filed with the public employes retirement board by a member of the public employes retirement system prior to the effective date of Section 486-47, General Code.
2. Pension status of members of the public employes retirement system, who file an application to retire after March 31, 1947, and prior to July 1, 1947, is based upon the provisions of law in effect at the time the application is filed.
3. A member of the public employes retirement system, who withdrew his accumulated contributions and restored same within the required number of years prior to June 5, 1947, and subsequent thereto makes application for retirement, is entitled to receive prior service credit only if he has been a contributing member of the system for three years after June 5, 1947, the effective date of the amendment to Section 486-57 of the General Code.

Columbus, Ohio, October 10, 1950

Bureau of Inspection and Supervision of Public Offices  
Columbus ,Ohio

Gentlemen:

This will acknowledge receipt of your request for my opinion, which reads as follows:

“We are resubmitting questions for your consideration and formal opinion, which were originally transmitted from this

office on November 3, 1948. A communication from Mr. Edgar L. Weinland dated November 27, 1948, relative thereto, advised that answers to the said questions would not be given until a decision was rendered by the Supreme Court of Ohio in the case of State, ex rel. West v. Waidner, et al., Retirement Board of Public Employes Retirement System, which, as he stated, would have a bearing on the answers to the aforesaid questions.

"Our letter of March 8, 1949, sought information relative to the questions submitted on November 3, 1948, and we were informally advised that the questions submitted to the former Attorney General could not be located at that time.

"The Supreme Court's decision in the said case, No. 31556, above referred to, was decided July 13, 1949, and sets forth in the syllabus thereof the following:

"1. Under the provisions of Section 486-47, General Code, 122 Ohio Laws, 97, as amended effective June 5, 1947, a minimum of three years of contributing membership in the Public Employes Retirement System of Ohio is necessary in order to entitle a member to receive "prior service credit" for services rendered prior to January 1, 1935.

"2. Such three year requirement is applicable to a member who obtained a leave of absence before the effective date of the amendment and was not allowed a pension until thereafter.'

"Also set forth in the said decision is the declaration that, '\* \* \* in the 1947 amendment the General Assembly employed the unmistakable language that, in order to receive credit for prior service, three years of contributing membership are necessary, any other provisions of law notwithstanding.'

"Also, it was further declared that, 'the change in the requirements was made before the relator's pension was granted \* \* \*.'

"From the Supreme Court's decision in the above-mentioned case, as well as former Attorney General Opinions in the matter, we get the impression that all applicants for retirement at June 30, 1947, are subject to the provisions of Section 486-47, General Code, as amended effective June 5, 1947, regardless of whether such applications were filed with the Public Employes Retirement System before or after June 5, 1947.

"However, there are several instances in which the provisions of said Section 486-47, General Code, as amended, were not complied with by the Retirement Board regarding the requirement of three years of contributing membership in order to receive prior service credit for service rendered prior to January 1, 1935, the said Board contending that said applications for retirement were filed before the effective date of the aforesaid amendment and should be considered as 'pending' actions cases according to Section 26, General Code.

"If the said Retirement Board has acted properly in the said instances, what consideration shall be given to other applications for retirement effective June 30, 1947, which also were filed with the Public employes Retirement System prior to the amendment of Section 486-47, General Code, effective June 5, 1947, but which were handled in accordance with the provisions of said section as amended?"

"Copies of the before mentioned questions, originally submitted November 3, 1948, together with the relevant material submitted therewith, are enclosed for your information. (Copies of letters dated November 3, 1948, October 30, 1948, November 9, 1948, November 12, 1948, and November 29, 1948.)"

"The answers to questions submitted November 3, 1948, are necessary before the correct status of certain superannuate members can be finally determined and their pension allowances approved. Since these matters have been pending over a long period of time we will appreciate an early consideration of and your opinion in answer to the foregoing questions restated, and again submitted herewith."

"1. As relates to applications for retirement in the Public Employes Retirement System, effective June 30, 1947, what constitutes 'pending action'? Or, in other words, what are the conditions preceding retirement June 30, 1947, wherein an application for a retirement allowance would be construed as 'pending action'?"

"2. In view of the provisions of the Public Employes Retirement Law, making superannuation retirement mandatory at quarterly intervals, to wit: March 31, June 30, September 30, and December 31 for members who can qualify for retirement, how, and under what provisions of the law should the pension status of those persons declaring their intention to retire, after March 31, 1947, and prior to July 1, 1947, be determined?"

"3. If a member of the Public Employes Retirement System leaves public service, withdrawing his contributions in August 1937, thereby forfeiting his service credit and annuity rights, and returns to service on March 1, 1939, but does not repay his withdrawn contributions until December, 1944, as of what date is his membership restored for the privilege of receiving prior service credit at retirement June 30, 1947?"

Section 486-47 of the General Code, effective June 25, 1945, read 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.* And further provided that members who have withdrawn an exemption shall receive the prior service credit provided for under the conditions of this section, only in the event such member shall have made such payments, with regular interest thereon, as he would have made if he had been a member continuously. \* \* \*

(Emphasis added.)

Section 486-47 of the General Code, effective June 5, 1947, reads in part as follows:

“Any other provisions of law notwithstanding, three years of contributing membership in this retirement system subsequent to the date that membership is established 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 contribution.* And further provided that members who have withdrawn an exemption shall receive the prior service credit provided for under the conditions of this section, only in the event such member shall have made such payments, with regular interest thereon, as he would have made if he had been a member continuously. \* \* \*”

(Emphasis added.)

The question before me is, what effect does the present law, as amended June 5, 1947, have on applications for superannuation retirement filed prior to June 5, 1947, said application being filed pursuant to the law in effect at the time.

Section 486-59 of the General Code reads in part as follows:

“On and after January 1, 1939, any member, except a new member with less than five years of service, who has attained sixty years of age, may retire by filing with the retirement board an application for retirement. The filing of such application shall retire such member as of the end of the quarter of the calendar year then current. \* \* \*”

The above portion of Section 486-59, General Code, has been in effect since April 4, 1945. It is quite clear that before an allowance may be paid an application must be filed. Furthermore, that in order for an application to be filed by a member entitling him to superannuation allowance, he must be able to satisfy the law in effect at the time the applica-

tion is filed. I am unable to see what effect the time for payment of the allowance has to do with the qualifications required by law for the member who submits his application. In other words, the application is filed pursuant to the law in effect at the time said application was submitted. The allowance is paid pursuant to said application even though the computing and payment of same is actually made subsequent to the effective date of the new law. Much has been said about the case of *State ex rel West vs. Waidner, et al., Retirement Board of Public Employes Retirement System*, 152 O.S. 109, but it must be observed that no application was filed by relator until four months after the effective date of the law. Chief Justice Weygandt, at page 113, in commenting on cited cases, said:

“\* \* \* But the situation in the instant case is simplified by the fact that, in contrast with the cited cases, the change in the requirements was made *before* the relator’s pension was granted and, furthermore, *nearly four months before the application was filed.*”  
(Emphasis added.)

The above statement leaves no doubt in my mind that if the application had been filed prior to the effective date of the law, the decision in 152 O.S. 109, *supra*, would have been different.

It may be true that there was no specific action taken by the board concerning Section 26 of the General Code, as stated in the communication dated November 3, 1948, from examiner R. E. Kirk. However, the approval by the board of applications filed prior to June 6, 1947, clearly indicates that Section 26 of the General Code was considered. Section 26 of the General Code reads as follows:

“Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions, or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions or proceedings, unless so expressed, nor shall any repeal or amendment affect causes of such action, prosecution, or proceeding, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act.”

In discussing Section 26, *supra*, it is said in 37 O. Jur., at pp. 430, 431, that:

Section 180:

“\* \* \* This section is to be read as a saving clause in all

statutes which amend or repeal prior legislation, in the absence of an express provision therein; or, as it is sometimes stated, the new statute must be construed in connection with the General Saving Law.”

Section 181 :

“The General Saving Law has been declared to be a rule of interpretation. However, it has the advantage of not merely being a rule of certainty in construction, but also of exciting the attention of the legislature and begetting an inquiry as to the propriety of applying a given amendment or repeal in pending matters. It operates to make applicable in the designated situations the law as it existed before the amendment or repeal. However, it has been held to have no application where there was involved neither a pending action nor a right or cause of action, prosecution, or proceeding existing at the time of the amendment or repeal. It does not prevent the new statute from being applicable to causes of action which arise after the effective date of the statute.”

It is my opinion that the applications filed prior to the effective date of the new law were pending matters, and the law in effect at the time of filing the applications should be observed.

Additional information concerning Question No. 3 was required and upon my request you advised that said question referred to membership Nos. 4653 and 4686. The files of the Public Employes Retirement System reveal that both members were state employes who did not file exemptions and each made contributions to the system, and that subsequent thereto and prior to the establishment of an employers' accumulation fund each withdrew his contributions, restoring same within the required number of years pursuant to Section 486-57 of the General Code after having accepted a public position. Section 486-57 of the General Code then read :

“Should a state employe who separates from his service as a state employe and relinquishes his membership in the retirement system through withdrawal of his accumulated contributions, return within five years, and restore to the employes' savings fund, his accumulated contributions as they were at the time of his separation, together with regular interest thereon (from) the date of withdrawal to the date of redeposit, the annuity rights forfeited by him at the time of separation shall be restored and his obligations as a member of the retirement system shall resume.”

Subsequent to the redeposit of the employees' contributions, each of these members went on an indefinite leave of absence. While on indefinite leave of absence each attained the age of retirement and made application for retirement allowance. It is significant to note that at the time redeposits were made by said members, they were not entitled to prior service credit by virtue of Section 486-47, supra.

On June 5, 1947, Section 486-57 was amended to read as follows:

"Should a member who separates from his service as a public employe and relinquishes his membership in the retirement system through withdrawal of his accumulated contributions, return to public service and to membership in this retirement system within seven years of the date of withdrawal and within the same period restore to the employees' savings fund, his accumulated contributions as they were at the time of withdrawal, together with regular interest thereon from the date of withdrawal to the date of redeposit, the annuity rights provided in sections 486-60, 486-61, or 486-63, General Code, which were forfeited by him at the time of separation shall be restored. In addition to restoring his annuity rights such a member may restore prior service credit forfeited by such withdrawal by paying into the employers' accumulation fund an additional amount equal to fifty per centum of the employers' total contribution during the period of contributing membership prior to such withdrawal, together with regular interest thereon from the date of withdrawal to the date of payment. The retirement board shall have final authority to determine and fix the amount and manner of such payment.

*"Provided however, that no member shall be entitled to such restored prior service credit until after he has completed at least three years of full time contributing membership or the equivalent thereof, since restoration of membership.* Provided further, that in the event of a termination of membership by the withdrawal of his accumulated contributions, the member, or in the event of his death, his beneficiary, or in case a beneficiary was not named then his estate shall, upon application, be refunded in addition to such accumulated contributions the principal amount of the payment which he has made as hereinbefore provided, to the employers' accumulation fund. Provided further, however, forfeited service credit either for service before or after January 1, 1935, may not be restored as provided herein more than one time.

"Until May 31, 1948, any present member who has heretofore forfeited his membership by withdrawal of his accumulated contributions may make the payments and receive the credits provided in this section regardless of the date of withdrawal."

(Emphasis added.)

It is apparent that the intent of the legislature, irrespective of Section 486-47, supra, was to provide for restoration of prior service credit by those who lost it by withdrawing their accumulated contributions. But in order for one to qualify, the legislature, in addition to requiring redeposits of withdrawals, also required that the members, for the purpose of restoration of prior service credit, should have completed at least three years full time of contributing membership since restoration of membership. Restoration of membership, for the purpose of receiving prior service credit, could only mean that a member must have three years of contributing membership since the effective date of amended Section 486-57, June 5, 1947.

In view of the foregoing, and based on facts set forth in your communication, it is my opinion that :

1. Pending actions are those applications for retirement filed with the public employes retirement board by a member of the public employes retirement system prior to the effective date of Section 486-47, General Code.

2. Pension status of members of the public employes retirement system, who file an application to retire after March 31, 1947, and prior to July 1, 1947, is based upon the provisions of law in effect at the time the application is filed.

3. A member of the public employes retirement system, who withdrew his accumulated contributions and restored same within the required number of years prior to June 5, 1947, and subsequent thereto makes application for retirement, is entitled to receive prior service credit only if he has been a contributing member of the system for three years after June 5, 1947, the effective date of the amendment to Section 486-57 of the General Code.

Respectfully,

HERBERT S. DUFFY,  
Attorney General.