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RETIREMENT SYSTEM, PUBLIC EMPLOYES—MEMBER RETIRED ON SUPERANNUATION—CANNOT DESIGNATE BENEFICIARY TO RECEIVE FINAL PAYMENT OF ALLOWANCE ACCRUING BETWEEN TIME OF LAST PAYMENT AND DATE OF DEATH—BOARD REQUIRED TO MAKE FINAL PAYMENT TO EXECUTOR OR ADMINISTRATOR—WHERE PROBATE COURT DISPENSED WITH ADMINISTRATION OF ESTATE, PAYMENT SHOULD BE MADE TO PERSON OR PERSONS FOUND ENTITLED TO SAME BY PROBATE COURT—SECTION 486-60 G. C.

SYLLABUS:

A member of the public employes retirement system who is retired on superannuation, pursuant to the provisions of section 486-60, General Code, cannot designate a beneficiary who shall receive the final payment of his retirement allowance accruing between the time of the last payment to such retired member and the date of his death, but the retirement board is required to make such final payment to the executor or administrator, if any, of such deceased member; or, if administration of his estate is dispensed with by order of the probate court, then to such person or persons said court shall find entitled thereto.

Columbus, Ohio, August 12, 1943.

Mr. Fred L. Schneider, Secretary, Public Employes Retirement System,
Columbus, Ohio.

Dear Sir:

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

"We shall appreciate your opinion on the following question:

Does the Public Employes Retirement Board have the authority to recognize a beneficiary named at the time of retirement by a member retired under the provisions of section 486-60, assuming that the member retired on a straight life annuity allowance payable only until his death?

The average retirement allowance paid by the Public Employes Retirement System to those persons retiring from public service is approximately \$35.00 per month. The allowance is always released at the end of the month. Consequently in case of death it is necessary to make a final adjustment involving the payment of the allowance of the deceased pensioner to the date of death. In the first year that retirement allowances were paid by the system, namely 1938, there were a large number of outstanding cases involving deaths among pensioners during that year, most of which are still outstanding. These cases involved situations where death occurred during the early part of the month for which the final adjustment was less than the cost of the required court order and the death certificate. Such outstanding amounts must be carried as open accounts for ten years before being credited to the guarantee fund.

As a result of the large number of outstanding cases resulting from death among pensioners in the year 1938, a policy was established early in 1939 to provide that the retiring member could designate some person or persons, or his estate, to whom the final adjustment could be refunded in the same manner as death refunds are handled as provided by section 486-66 of the General Code of Ohio. There seems to have been some feeling that some authority for this action was held in section 486-67. This policy has proven beneficial to the retirement system in eliminating the odd amounts as outstanding open accounts. We feel that in the average case the beneficiary has found the policy very satisfactory in eliminating extra expense and inconvenience."

I understand from your letter that to meet the situation presented by the circumstances outlined, your board has established a practice since

1939 whereby the retiring member has been permitted to designate some person or persons to whom the final payment of his retirement allowance could be made without putting his family to the expense of having an administration of his estate or obtaining from the probate court a certificate that the estate was under \$500.00, and an order to pay it to a person designated by the court. However laudable the purpose in adopting such practice or making a rule to that effect, I have been unable to find in the public employes retirement law any basis for such action. It is, of course, fundamental that the retirement board, being purely a creature of the Legislature, can have only such powers as are conferred by law. Among its powers is that found in a portion of Section 486-40, which provides:

“The retirement board shall perform such other functions as are required for the proper execution of the provisions of this act, and shall have authority to make all rules and regulations necessary therefor.”

This power, as you will note, is only to make such rules and regulations as are necessary for performing the duties imposed upon the board by the law and cannot be construed as adding anything to its power.

In regard to the accumulated contributions of a member of the system, it is provided by Section 486-55, General Code, that a contributor who ceases to be a public employe for any cause other than death or retirement, may, upon demand within ten years after such cessation of service receive payment of the accumulated contributions standing to his individual credit. Section 486-66 of the General Code reads as follows:

“Should a contributor die before retirement his accumulated contributions shall be paid to his estate or to such person as he shall have nominated by written designation duly executed and filed with the retirement board. If no legal representatives can be found, his accumulated contributions shall be forfeited to the retirement system and credited to the guarantee fund.”

Here the Legislature has specifically authorized the contributing member to designate in writing the person who shall have a right to receive his accumulated contribution in the event he dies before retirement. That provision, however, applies solely to the accumulated contributions of the member and affords no authority whatever to make similar disposition of any installment of his annuity or retirement allowance which may remain unpaid at his death. It would have been within the power of the Legislature to make some specific provision for the designation by the member of someone who was to receive the uncollected installment of his

retirement allowance after his death, but the Legislature has not seen fit to make such provision, unless, as suggested in your letter, some authority may be found in Section 486-67, General Code. That section reads 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 lesser pension, or a lesser retirement allowance, payable throughout life, with the provision that,

Option 1. Upon his death, his annuity, his pension, or his retirement allowance shall be continued through 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 retirement board at the time of his retirement.

Option 2. Upon his death, one half of his annuity, his pension, or his retirement allowance, shall be continued through the life of such person, having an insurable interest in his life, as he shall nominate by written designation duly acknowledged and filed with the retirement board at the time of his retirement.

Option 3. Some other benefit or benefits shall be paid to the beneficiary or to such other person or persons as he shall nominate, provided such other benefit or benefits, together with such lesser annuity, or lesser pension, or lesser retirement allowance, shall be certified by the actuary engaged by the retirement board to be of equivalent actuarial value to his annuity, his pension, or his retirement allowance, and shall be approved by the retirement board.”

It will be observed that the above section provides in effect four choices which a member who is retiring on a superannuated allowance may exercise, and that such choice must be exercised before he receives his first payment. He may in the first place elect to receive such benefit in a retirement allowance payable throughout his life, or he may if he chooses elect as between the three remaining options set forth in the statute.

The first option contemplates that he may stipulate that upon his death his annuity, pension or retirement allowance in a reduced amount shall be continued through the life of and paid to some person whom he designates and who has an insurable interest in his life. The second option allowed is that one-half of his annuity, pension or retirement allowance shall be continued through the life of the person so designated.

It seems plain that neither of these could be construed to include an arrangement such as is suggested in your letter, viz., the designation of some person to receive the portion of his last month's allowance which accrues up to the date of his death.

With some degree of plausibility it might be argued that option number three could be construed so as to allow him to enjoy the full amount of his retirement allowance monthly up until his death and, pursuant to his written designation made at the beginning of his retirement, the payment accruing in the fragment of the month in which he dies should be paid to the person designated. That arrangement might be construed as falling within the phrase "some other benefit". This, however, would be a forced construction, and a careful study of the language of the paragraph in which it occurs leads one to the conclusion that the Legislature had no such intention. I find no other provision in the statutes relating to the public employes retirement system which could be construed as conferring the authority your board seeks to exercise. Until the Legislature provides specific authorization for such procedure, it is my opinion that the sums in question, however small, can only be paid by the retirement board to the executor or administrator, if any, of the deceased member, or, if there is no administration of his estate, to the person designated by the probate court to receive the same.

Respectfully,

THOMAS J. HERBERT,
Attorney General.