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RETIREMENT SYSTEM, PUBLIC EMPLOYES—WHERE CITY ESTABLISHED SUCH SYSTEM, ANY EMPLOYES, MEMBERS THEREOF WHO CONTRIBUTED ON BASIS LESS THAN \$3,000.00, ANNUAL SALARY, AND WHO DO NOT RECEIVE DISABILITY ALLOWANCE, ARE PROPERLY INCLUDED IN MEMBERSHIP, PUBLIC EMPLOYES RETIREMENT SYSTEM—EXTENT, ANY FURTHER COMPENSATION UP TO MAXIMUM FOR BOTH SYSTEMS OF \$3,000.00 PER ANNUM—SECTION 486-33c G. C.—OPINION 4065, O. A. G. 1941 PAGE 718 MODIFIED.

SYLLABUS:

Where a city, pursuant to the provisions of its charter has established a retirement system for certain of its employes, any employes of that city who are members of that system and who contribute thereto on a basis of less than \$3,000 salary per annum, and who are not receiving a disability allowance therefrom are, under the provisions of Section 486-33c, General Code, properly included in the membership of the public employes retirement system to the extent of any further compensation up to a maximum for both systems of \$3,000 per annum. Opinion 4065, O. A. G. 1941, page 718 modified.

Columbus, Ohio, May 20, 1946

Mr. Fred L. Schneider, Secretary, Public Employes Retirement System
Columbus 15, Ohio

Dear Sir:

I have before me your communication requesting my opinion, reading as follows:

"In July 1936, the City of Hamilton, by Ordinance, contracted with a certain Life Insurance Company for a retirement system for all employes of the Utility Department, making it mandatory that all employes of the Utility Department join that retirement system. At the present time, there are ten employes of the City of Hamilton, who because of the nature of their work, are paid partly from Utilities Funds and partly from General Government Funds. Because of their connection with the Utilities Department these employes were included in the retirement system of the Insurance Company for that portion of the salary paid from Utility Funds. They do not, however, receive any benefits from any retirement system for that portion of their salary paid from the General Funds.

These ten employes have petitioned the Public Employes Retirement Board for inclusion in the Public Employes Retirement System for that portion of their salary paid by the General Government Funds. It has been indicated that the matter was considered and informally approved by Council of the City of Hamilton at one of its regular meetings and while taking no formal action, stated that it would pass any Legislation necessary to qualify these ten employes under the benefits of the Public Employes Retirement System for that portion of their salary not covered at present by any retirement plan.

At its regular monthly meeting on April 18 the Public Employes Retirement Board reviewed the situation in general, including the Petition of the employes involved, and instructed its Secretary to request an Opinion from your Office whether it is permissible for the Board to grant the request of coverage to these ten employes of the Utilities Department of the City of Hamilton.

A copy of the Ordinance covering the establishment of the retirement system with the Insurance Company is enclosed for your consideration."

Section 486-33a, General Code, undertakes to impose compulsory membership in the Public Employes Retirement System upon all employes

of the various political subdivisions of the state. That section reads in part as follows:

“Beginning July 1st, 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 and beginning October 1, 1943, there shall be included therein all township employes as defined herein.
* * *.”

Section 486-33c, General Code, defines the various types of employes of the subdivisions subject to the provisions of the Act and who are to be regarded as members of the Retirement System, and makes certain exceptions. The second paragraph of that section reads, in part, as follows:

“‘Township employe’ shall mean any person holding a position in a township, not elective, in the state of Ohio, or paid in full or in part by such township. 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 firemen’s pension fund established under provisions of law.”

(Emphasis supplied.)

From the form of the above statement it might be supposed that the second sentence related only to township employes. An examination, however, of the whole section indicates that the words “said term” relate to “employe” and refer to each of the several employes who have been mentioned in the section. It is to be noted therefore that the term “employe” is not to 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.”

Read alone, the above provision would seem to exclude entirely those persons who come within the provisions of any other retirement system. However, a further provision of the same section makes an exception. Section 486-33c, provides as follows:

“*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 three thousand dollars per annum or is receiving a disability allowance from such other retirement system.”

(Emphasis supplied.)

The effect of this provision is that only those employes who come within the provisions of another system who are contributing to that system on the basis of \$3,000 or more or are on disability, are to be excluded from the class of employes who fall within the membership of the public employes retirement system. Accordingly, if there be employes of the City of Hamilton who are paid from the public utilities fund \$3,000 or more, and are contributing to that fund on the basis of \$3,000 per annum or are receiving a disability allowance from that fund, then they are entirely excluded from your system. If, on the other hand, such employes are contributing to the local fund on a basis of less than \$3,000 per annum and are not receiving a disability allowance, they would be within the membership requirement of the public employes retirement system at least as to the excess of their salary up to the maximum contemplated by the law relating to your system.

Inasmuch as the maximum of contributions permitted by the public employes retirement system is \$3,000, I would take it to be within the intent of the General Assembly to hold to that maximum in enacting Section 486-33c supra, and in applying that statute to the situation here under consideration where employes are contributing to a local system, and are still entitled to and required to contribute to your system. If we should hold that an employe of the City of Hamilton who is receiving a salary only a little under \$3,000 from the public utility fund of that city but is receiving a salary of \$3,000 or more from the general fund, should participate in your system on a basis of \$3,000, then manifestly there would be placed not only upon the employe but also upon the employer a double burden, and it would also be giving to the employe an opportunity to acquire an extraordinary retirement allowance beyond that permitted to any other public employes who come within the purview of the public employes retirement system.

There remains, however, the question whether the City of Hamilton has established a retirement system within the contemplation of the law. There is no provision of law of the State whereby a municipality is au-

thorized to set up a retirement system of its own. The question, therefore, to be determined, is whether the system which you mention as having been established by the City of Hamilton by ordinance could be said to be a system established "under the provisions of a charter" and would therefore have the effect of excluding from the public employes retirement system either totally or partially, those employes of the City of Hamilton who are made members of the retirement system of said city.

I have before me the charter adopted by the electors of the City of Hamilton in 1926. Assuming for the purpose of this opinion that the provisions of that charter have not been changed or added to, I do not find in it any specific provision establishing a retirement system. However, it is provided by Section 3 of said charter, as follows:

"Except as otherwise provided in this charter *all legislative and executive powers of the city shall be vested in a council of seven members nominated and elected from the city at large in the manner hereinafter provided.*" (Emphasis added.)

Here it will be noticed that there is vested in the council all legislative and executive powers of the city. Having thus reposed in the council all of the legislative powers of the city, it appears to me that we must conclude that when the council so empowered enacted an ordinance providing for a retirement system for certain employes, that system would be properly said to have been established "under the provisions of the charter." The Constitution of Ohio, in Section 1 of Article II provides that "the legislative power of the state shall be vested in a general assembly." Certainly there can be no doubt that the acts of the General Assembly are passed "under the provisions" of the Constitution. Likewise, the General Code in Section 4206 says that "the legislative power of each city shall be vested in and exercised by a council," and certainly no one could doubt that actions of the council are taken "under the provisions" of the statute.

A city charter adopted pursuant to the Home Rule Provisions of Article XVIII, Section 7 of the Constitution, is not in itself an instrument whereby power is conferred on the municipality. It has been described by our Supreme Court as being "only the mode provided by the Constitution for a new delegation or distribution of the powers already granted in the Constitution." *Perrysburg v. Ridgeway*, 108 O. S. 245. I have no

hesitancy in finding that the retirement system of Hamilton was adopted under the provisions of its charter.

My immediate predecessor, in Opinion No. 4065, rendered on August 13, 1941, and found in 1941 Opinions Attorney General, page 718, had before him the provisions of Section 486-33c, General Code, and held as disclosed by a portion of the first branch of the syllabus:

“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.
* * *”

That holding did not take account of the exception contained in said section, to which I have called attention, whereby it is stated that “no employe * * * 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 \$2,000 per annum or is receiving a disability allowance from such other retirement system.” In the opinion in question, emphasis was placed upon the words of general exclusion but no attention appears to have been given to the exception. I must therefore modify that former opinion to the extent that it is inconsistent with my conclusion.

It is accordingly my opinion, in specific answer to your question, that where a city, pursuant to the provisions of its charter has established a retirement system for certain of its employes, any employes of that city who are members of that system and who contribute thereto on a basis of less than \$3,000 salary per annum, and who are not receiving a disability allowance therefrom, are under the provisions of Section 486-33c, General Code, properly included in the membership of the public employes retirement system to the extent of any further compensation up to a maximum for both systems of \$3,000 per annum.

Respectfully,

HUGH S. JENKINS
Attorney General