2186.

PUBLIC EMPLOYES RETIREMENT SYSTEM — LEGISLATIVE HISTORY: STATE EMPLOYES RETIREMENT SYSTEM — "STATE EMPLOYE" — "ALL OTHER MEMBERS" — "PUBLIC EMPLOYE"—"ALL MEMBERS OF THE PUBLIC EMPLOYES RETIREMENT SYSTEM" — SECTION 486-59 G. C. — MANDATORY DUTY OF RETIREMENT BOARD TO RETIRE MEMBERS WHO ATTAIN AGE, SEVENTY YEARS — EXCEPTION — PUBLIC EMPLOYE WHO DESIRES TO CONTINUE IN ACTIVE SERVICE — WRITTEN APPLICATION ON OR BEFORE DECEMBER 31st IN YEAR AGE OF SEVENTY YEARS ATTAINED — LEAVE OF ABSENCE GRANTED EMPLOYE BECAUSE OF SICKNESS DOES NOT EXTEND SUCH STATUTORY REQUIREMENTS.

SYLLABUS:

1. *In view of the legislative history of Section* 486-59 *of the General Code, and giving due consideration to the intention of the Legislature to be gathered from the sections of the General Code creating the original State Employes' Retirement System and the amendments thereto, converting the*

"State Employes Retirement System" into the "Public Employes Retirement System," the words "state employe" and the phrase "all other members," as used in Section 486-59, *General Code, should be respectively read as "public employe" and "all members of the Public Employes Retirement System."*

2. *Since there is no provision in Section* 486-59, *General Code, providing that a public employe, who desires to be continued in active service, must, prior to the time he attains the age of seventy years, or within any other period of time, file his written application to be continued in active service, and since such section expressly provides that "any member having reached the age of seventy years may, upon written application, approved by the head of his department or institution, be continued in service" in accordance with the terms of such section, such an application may be filed by a public employe provided he file such an application on or before December* 31*st of the year in which he attains the age of seventy, Section* 486-59, *General Code, making it the mandatory duty of the Retirement Board to retire all members "at the end of the year in which the age of seventy is attained", except as in such section provided.*

3. *The fact that a public employe is granted a leave of absence because of sickness does not in anywise affect the provisions of Section* 486-59, *General Code, as above interpreted and construed, or serve to toll the time within which such application may be filed.*

Columbus, Ohio, April 12, 1940.

The Industrial Commission of Ohio,
Columbus, Ohio.

Dear Sirs:

Receipt is acknowledged of your recent request for the opinion of this office reading as follows:

> "Ohio General Code Section 486-59 provides:
>
> '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.
>
> At the end of the year in which he becomes a member the retirement board *shall retire* any state employe who was over sev-

enty years of age at the time he became a member and shall retire all other members at the end of the year in which the age of seventy is attained, except state employes in the classified service holding positions on account of exceptional qualifications under the provisions of section 486-14 of the General Code. Provided, that until January 1, 1942, any member having reached the age of seventy years may, upon written application, approved by the head of his department or institution, be continued in service for a period of one year, and thereafter may be continued in service for periods of one year each, upon the filing of like application and approval.'

The syllabus of Ohio Attorney General Opinion No. 721 of 1938 provides:

'The members of the State Employes Retirement Board must retire, at the end of the year 1937, all state employes who were over seventy years of age at the time they became members and all state employes who attained the age of seventy years at the end of the year 1937, unless any such state employe is in the classified service holding a position on account of exceptional qualifications under the provisions of Section 486-14, General Code, or any such state employe has had approved by the head of his department or institution his application for continuance in service for a period of one year.'

An employe of the Industrial Commission of Ohio was seventy years old September 2, 1939. Said employe for the purpose of the Industrial Commission records and Civil Service Commission records was in the classified service, Examiner Grade IV-B (Claims Reviewer), salary $2,000.00 per annum. Due to illness said employe has been granted leaves of absence from time to time during the period June 16, 1939, to March 1, 1940. The last leave of absence was granted by the Civil Service Commission of Ohio at the request of the Industrial Commission of Ohio and covered the period November 4, 1939, to March 1, 1940. As above stated, said employe has been absent from his duty due to illness June 16, 1939, to March 1, 1940, with the exception that he reported for duty October 23, 1939, and worked up to and including November 3, 1939.

On November 29, 1939, the Industrial Commission of Ohio made application to the Civil Service Commission for leave of absence for said employe November 4, 1939, to March 1, 1940. This application was approved by the Civil Service Commission in letter of December 28, 1939. From said letter we quote the last paragraph:

'Extension of leave of absence approved for ————————, Examiner, Grade IV-B, (Claim Reviewer) salary $166.66 per month, to March 1, 1940."

No written application has been filed with or approved by the head of this Department (The Industrial Commission of Ohio),

for employe to be continued in service for a period of one year after arriving at the age of seventy years.

On November 13, 1939, and December 16, 1939, the Public Employes Retirement System notified said employe in part as follows:

'Our records disclose that you were notified on November 13, 1939, that since you were over seventy years of age as disclosed by your personal history record on file in this office, you would be retired automatically as of December 31, 1939, unless an application to continue in active service past compulsory retirement age was on file in this office prior to that date. The application to continue in service has not been received, and you have therefore been retired automatically on December 31, 1939, as required by law.'

Please furnish this department with your opinion on the following:

Will the granting of the leave of absence November 4, 1939, to March 1, 1940, by the Civil Service Commission at the request of the Industrial Commission be permitted to take the place of the application 'to continue in service for a period of one year' within the contemplation of General Code Section 486-59?

On arriving at the age of seventy years September 2, 1939, and being absent from duty on leave granted by the Civil Service Commission of Ohio December 28, 1939, on application by the Industrial Commission of Ohio of November 27, 1939, extending from November 4, 1939, to March 1, 1940, no written application approved by head of his Department to continue in service for a period of one year being on file and he having been advised by the Public Employes Retirement System under date of November 13, 1939, and December 16, 1939, that said employe would be retired as of December 31, 1939, is it the duty of the Public Employes Retirement System to retire said employe?"

You correctly quote Section 486-59, General Code, and the syllabus of Opinion No. 1721 (not 721), Opinions, Attorney General, 1938, Vol. I, p. 33. It is recognized, of course, that the words emphasized in the quotations contained in your request are yours.

In Opinion No. 1721, returned under date of January 6, 1938, my immediate predecessor in office said as follows at page 35:

"There is nothing in the State Employes Retirement System Act that can be interpreted or construed as permitting the board to take into consideration the number of years that any state employe has been employed, or to exercise any discretion whatsoever in determining whether an employe should or should not be retired.

If the employe has attained seventy years of age and is not in the classified service holding a position on account of exceptional qualifications under the provisions of Section 486-14, General Code, the board must retire that employe. If the employe has attained seventy years and is within the exception under the provisions of Section 486-14, General Code, or the head of the department or institution has approved the application of the employe for another year of service, the retirement board cannot retire such an employe. The board cannot exercise any discretion. Its authorized action is compulsory."

Section 486-59, General Code, was first enacted in "An Act — To promote efficiency and economy in the public service by providing for the establishment of a retirement system for superannuated or incapacitated *state* employes (emhasis the writer's), passed on June 8, 1933. See 115 v. 614. As then enacted, the act, a part of which is here under consideration, related to and made provision for a Retirement System for state employes only, Section 486-32, as then enacted, including subparagraphs (4), (5) and (7), providing in part as follows:

"That the following words and phrases as used in this act, unless a different meaning is plainly required by the context, shall have the following meanings:

* * *

(4) 'State employe' shall mean any person holding a state office, not elective, under the state of Ohio, and/or employed and/or paid in whole or in part by the state of Ohio in any capacity whatsoever. But the term 'state employe' shall not include those persons who come within the provisions of the state teachers' retirement system ***.

* * *

(5) 'Members shall mean any person included in the membership of the retirement system as provided in this act.

* * *

(7) 'Employer' for the purposes of this act shall mean the state of Ohio.

* * * "

As originally enacted, Section 486-59 of the General Code read in part as follows:

" *** At the end of the year in which they become members the retirement board shall retire all state employes who were over seventy years of age at the time they became members and shall retire all other members at the end of the year in which the age of seventy is attained except state employes in the classified service

> holding positions on account of exceptional qualifications under the provisions of section 486-14 of the Generel Code. Provided, that any member having reached the age of seventy years may, upon written application, approved by the head of his department or institution be continued in service for a period of one year, and thereafter may be continued in service for periods of one year each, upon the filing of like application and approval."

On March 11, 1937, the 92nd General Assembly passed an act amending certain sections of the General Code "relative to the *state* employes retirement system", including Sections 486-32 and 486-59, General Code (117 v. 57, 65). Sub-paragraph (4) of Section 486-32 was changed so as to omit therefrom the word and mark "and/" between the words "the state of Ohio", and "or employed and/or paid". No changes were made in sub-paragraphs (5) and (7). In so far as the instant question is concerned, with the exception of certain changes in phraseology, the only important amendment to Section 486-59 was the addition of the phrase "until January 1, 1942", after the words "provided, that" and before the words "any member having reached", etc.

On December 22, 1937, the 92nd General Assembly passed "An Act—To promote efficiency and economy in the public service by providing for the inclusion of county, municipal, conservancy, health and public library employes not included in any other retirement system in the membership of the retirement system created by section 486-33, General Code, to be hereafter known as the public employes' retirement system, ***."

In the first section of this act (Sec. 486-33a, G. C.) it was provided:

> "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. ***"
> (Emphasis ours.)

And sub-paragraph (7) of Section 486-32 was amended to read as follows, the words emphasized being added to the section:

> "(7) 'Employer' for the purpose of this act shall mean the state of Ohio, *county, municipality, conservancy district, health district or public library, as the case may be.*"

Section 486-33c, General Code, as enacted in this act, read in part as follows:

> "For the purpose of this act, 'county or municipal employes' shall mean any person holding a county or municipal office,

not elective, in the state of Ohio, and/or paid in full or in part by any county or municipality in any capacity whatsoever. 'Conservancy employe' shall mean any person holding a conservancy office not elective in the state of Ohio and/or paid in full or in part by the conservancy district. 'Health employe' shall mean any person holding a health office not elective, in the state of Ohio and/or paid in full or in part by any county, municipal or other health district created by law. '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. *** "

Section 486-59, supra, was not in anywise amended by the act of December 22, 1937.

The same General Assembly again amended certain sections of the Code relating to the Retirement System on February 28, 1938. Sub-paragraph (7) of Section 486-32 was changed by the addition of the words "park district" after the word "municipality". Section 486-33c was amended by adding the words below emphasized:

"For the purpose of this act, 'county or municipal employes' shall mean any person holding a county or municipal office, not elective, in the state of Ohio, and/or paid in full or in part by any county or municipality in any capacity whatsoever. *'Park district employe' shall mean any person holding a park district office not elective in the state of Ohio or any person in the employe of a park district and/or paid in full or in part by a park district created by law.* *** "

The last amendments to the Public Employes' Retirement System were made by the 93rd General Assembly in Amended Senate Bill No. 54, effective June 30, 1939. Sub-paragraph (4), (5) and (7) of Section 486-32 were left unchanged. To Section 486-33c were added these words:

" *** For the purpose of this act a sanitary district shall be considered a conservancy district and employes of any such sanitary district shall be considered as conservancy employes, and the retirement board shall have authority to grant to any such employes who were employes of any such sanitary district between the dates of April 18, 1938, and June 30, 1938, both dates inclusive, all rights and privileges of original membership, including a period of three months after the effective date of this act during which such employes may be permitted to claim exemption from participation in the retirement system. *** "

While the first paragraph of Section 486-59 was amended as indicated

by the words emphasized in the following quotation, the second paragraph was left unchanged.

> "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."

While at the first blush it would seem that the words "state employe", as used in the first sentence of the second paragraph of Section 486-59, supra, refers only to persons employed by or paid in whole or in part by the state of Ohio and that the words "all other members" have reference to public employes other than state employes, that is, employes of a county, municipality, park district, conservancy district, sanitary district and health and public library employes, the history of this section cleary indicates that such a construction would be incorrect. As may be noted, this sentence reads in part that at "the end of the year in which he becomes a member, the retirement board shall retire any *state employe* who was over seventy years of age at the time he became a member and shall retire *all other members* at the end of the year in which the age of seventy is attained". It is patent from the history of this and other sections as set forth above that the phrase "all other members" was in apposition to and meant the same as the words "state employe". At the time Section 486-59 was first enacted, only state employes were members of the Retirement System and it of necessity follows that the words "all other members" could only refer to state employes. That is to say, the words "state employe" and the phrase "all other members" are used interchangeably and mean the same thing. It follows that when, in the amendment of December 22, 1937, the Legislature enlarged the scope of the Retirement System so as to include the public employes therein designated and made provision for certain public employes other than state employes, it was clearly intended that Section 486-59 should apply to all members of the Public Employes Retirement System, whether state employes or otherwise. In other words, that part of the first sentence of the second paragraph of Section 486-59, above quoted, should be read as though written:

> "At the end of the year in which he becomes a member the retirement board shall retire any *'public employe'* who was over seventy years of age at the time he became a member and shall retire all other *'public employes'* at the end of the year in which the age of seventy is attained, except *'public employes'*", etc.

Relative to examining the history of a statute when endeavoring to ascertain its true meaning, it is said as follows in 37 O. Jur. 588:

> "The history of legislation on the subject involved may assist in the interpretation of a particular statute, and therefore, resort may be had to the various forms in which such earlier statutes had been enacted by the legislature. *** The history in legislation of a particular phrase or clause used in the statute under consideration may also be helpful. Moreover, the history of statutory law on the subject involved may show the general policy of the state, which is useful as an aid in the construction of the later statute. On the other hand, it is to be borne in mind that the provisions of prior acts may be resorted to for the purpose of clearing up, not of creating, an ambiguity."

See also the case of In re Allen, 91 O. S. 315 (1915), in which at page 321 the court quotes with approval from the case of In the Matter of the Estate of Prime, 136 N. Y. 347, in the following language:

> " *** When the amendatory act reenacts provisions in the former law, either *ipsissimus verbis* or by the use of equivalent through different words, the law will be regarded as having been continuous, and the new enactment, as to such parts, will not operate as a repeal, so as to affect a duty accrued under the prior law, although, as to all new transactions, the later law will be referred to as the ground of obligation. *** "

Clearly the Legislature, in the act of December 22, 1937, supra, intended to extend and did extend the benefits of the Retirement System to all the public employes of the kind and classes enumerated in such act and later amendments thereof. This is convincingly shown by the title of the act above quoted and by the first sentence of Section 486-33a, in which the Legislature expressly converted the *State* Employes Retirement System into the *Public* Employes Retirement System. And even though, as above pointed out, the second paragraph of Section 486-59 has not been amended since its first enactment, in view of the changes in the cognate sections, the words "state employe" in such paragraph should and must be read "public employe."

As a corollary to the proposition that the Legislature intended the public employe enumerated in the existing law to have the benefits of the Retirement System, it follows that such employes must assume the obligations required by the retirement act, and, excepting where there is a clear distinction expressly made between public employes of one kind from public

employes of another, those provisions which impose certain duties and obligations should apply with equal force to all public employes as well as the beneficial provisions. Moreover, it seems to me manifest that this construction serves clearly to ascertain, declare and give effect to the intention of the Legislature which seems obviously to have been to enlarge the scope and extend the benefits of the then existing Retirement System to the many public employes in the state not already members of other retirement systems, which is, of course, the primary and paramount rule of statutory interpretation and construction. See 37 O. Jur. 407.

Having thus determined that the provisions of Section 486-59 apply to all public employes, it remains to consider whether or not an application to be continued in service, as provided in such section, must be filed prior to the time the member reaches the age of seventy years, and whether or not the fact that such a public employe is on sick leave affects the time when such application should be filed.

At the outset, it should be said that there is nothing in Section 486-59 or any other section of the General Code which tolls the operation of this section or grants to a public employe on sick leave privileges to which he would not otherwise be entitled.

You will note that there is nothing in Section 486-59 which prescribes when a public employe shall file his written application for a continuance in service, or provides that if such written application be not filed within a certain time the right to apply for a continuance in service must be denied. Certainly there is nothing in the section that requires that such application be filed and approved prior to the date on which the public employe reaches the age of seventy years. On the contrary, the statute provides that "any member *having reached* the age of seventy years may" apply as therein provided. Ordinarily, directions contained in a statute as to when a thing may or may not be done, are to be construed to be directory unless by the express terms of the statute the direction as to time is mandatory, or unless such statute operates to confer jurisdiction upon a court or other tribunal or board if certain steps be taken within the time named in the statute. If there be no requirement as to the time within which a thing should be done, whether the statute be directory or mandatory, it would seem that such steps may be taken within such reasonable time as may be determined by the administrative bodies charged with the duty of administering the law. Under the wording of the proviso of Section 486-59, it seems clear that a written

application for a continuance in service may be filed after the public employe filing the same *has reached the age of seventy years,* provided, however, that the granting of such application would not injuriously affect the rights of others, or disturb the financial condition of the retirement fund. To support this position, your attention is invited to Section 486-33, which provides in substance that a written application for exemption from membership in the retirement system must be filed "within three months after being regularly appointed as a state employe." This provision has already been held by this office to be mandatory or jurisdictional. See Opinion No. 832, rendered to the Public Employes' Retirement Board, under date of June 29, 1939.

In so far as provisos are concerned, it is the rule that "a statute is to be construed as a whole and given such interpretation as will give effect to every word, phrase and clause in it and that such rule is also applicable to the construction of a proviso in a statute." Accordingly, a proviso is to be given force and effect and is not to be ignored, construed away, or rendered entirely nugatory. See 37 O. Jur. 786. The proviso contained in Section 486-59 therefore should be reasonably construed to effect the intention of the Legislature, and I find nothing therein, or in any other section of the General Code, requiring that an application for a continuance in service be filed prior to the attainment of seventy years of age. Indeed, the very words "having reached" the age of seventy years seem clearly to provide that such an application may be made after a public employe becomes seventy years old. I am inclined, therefore, to the view that a member of the Public Employes Retirement System may file an application to be continued in service after he becomes seventy years of age, provided he file such application on or before the end of the year then current, that is, on or before December 31st of the year in which the member attains the age of seventy. This is, of course, in keeping with the mandatory character of the language used in Section 486-59, supra, and is the administrative construction which has been placed upon the act since it became a part of the law of Ohio.

In view of the foregoing, and for the reasons given, it is my opinion that:

1. In view of the legislative history of Section 486-59 of the General Code, and giving due consideration to the intention of the Legislature to be gathered from the sections of the General Code creating the original State Employes' Retirement System and the amendments thereto, converting the

"State Employes Retirement System" into the *"Public* Employes Retirement System", the words "state employe" and the phrase "all other members", as used in Section 486-59, General Code, should be respectively read as "public employe" and "all members of the Public Employes Retirement System."

2. Since there is no provision in Section 486-59, General Code, providing that a public employe, who desires to be continued in active service, must, prior to the time he attains the age of seventy years, or within any other period of time, file his written application to be continued in active service, and since such section expressly provides that "any member *having reached* the age of seventy years may, upon written application, approved by the head of his department or institution, be continued in service" in accordance with the terms of such section, such an application may be filed by a public employe after such employe reaches the age of seventy years, provided he files such application on or before December 31st of the year in which he attains the age of seventy, Section 485-59, General Code, making it the mandatory duty of the Retirement Board to retire all members "at the end of the year in which the age of seventy is attained", except as in such section provided.

3. The fact that a public employe is granted a leave of absence because of sickness does not in anywise affect the provisions of Section 486-59, General Code, as above interpreted and construed, or serve to toll the time within which such an application may be filed.

Respectfully,

THOMAS J. HERBERT,
Attorney General.