

OPINION NO. 75-022

Syllabus:

1. Any new employee who is commissioned as a sheriff or deputy sheriff after January 1, 1975, is automatically in the group eligible only for benefits under R.C. 145.33(B) and (C).

2. Pursuant to R.C. 145.33(D)(3), members with less than fifteen years service, in cases other than disability or survivorship, are only eligible to withdraw their employee contribution to the fund and cannot receive credit for such service.

3. With the exception of the special age and service requirements and computation of pension, retirees under the special benefits section for sheriffs and deputy sheriffs are entitled to all other benefits afforded retirees under the regular public employment retirement system. However, any credit accumulated by such member prior to becoming a sheriff or deputy sheriff is lost and does not become the basis of a separate benefit.

4. Members under R.C. 145.33(B) and (C) who purchase elective service credit pursuant to R.C. 145.201 or credit for service outside of Ohio pursuant to R.C. 145.293 may use such purchases as credit under R.C. 145.33(B) and (C).

5. If a peace officer covered under R.C. 145.33(C) completes fifteen years of credit and resigns, he qualifies for no benefits and is only entitled to withdraw his contribution as an employee to the fund for the period of such employment.

To: J. Douglass Peters, Executive Dir., Public Employees Retirement System
of Ohio, Columbus, Ohio

By: William J. Brown, Attorney General, March 26, 1975

I have before me your request for my opinion which reads in essence as follows:

Amended Substitute House Bill No. 1312, which became effective March 4, 1975, provides earlier eligibility and special benefits for sheriffs and deputies. The Public Employees Retirement Board, however, requests assistance in answering certain questions arising from portions of these new provisions.

1. Must a new employee commissioned as a sheriff or deputy sheriff after January 1, 1975 but before March 4, 1975, automatically be included in the group eligible only for benefits pursuant to R.C. 145.33(B) and (C)?

2. May a member who comes within the provisions of R.C. 145.33(D)(3) but has less than fifteen years

of credit as a sheriff or deputy sheriff receive any credit for service in this capacity?

3. If a member of the public employees retirement system who has accumulated service credit and membership rights for service which would make him eligible under R.C. 145.33(A) before January 1, 1975, thus qualifying for survivor benefit rights and disability protection, but who has not attained retirement age is commissioned as a deputy or sheriff on or after March 4, 1975, and continues in this capacity for two years, may he qualify for disability retirement if after that time he becomes disabled? In addition, may he qualify for survivor benefits rights after twenty-seven months? Finally, if such a member continues to retirement age, is the credit accumulated by such member before becoming a sheriff or deputy lost, or does it become the basis of a separate benefit?

4. If a member who as an elective official increases his service credit by thirty per cent through a purchase pursuant to R.C. 145.201, may such a purchase be used to qualify as credit under R.C. 145.33(B) or (C)?

5. If a sheriff or a deputy sheriff, commissioned after Amended Substitute House Bill No. 1312 became effective, purchases credit for service outside Ohio pursuant to R.C. 145.293, may such credit be applied under the provisions of R.C. 145.33(B) or (C)?

6. If a peace officer covered under R.C. 145.33(C) completes fifteen years of credit and resigns, does he qualify for benefits provided in R.C. 145.33(C), benefits under R.C. 145.33(A), or no benefits at all?

Amended Substitute House Bill No. 1312, effective March 4, 1975, reads in pertinent part as follows:

"Sec. 145.33. (A) A member, other than a member who qualifies for and elects to receive benefits under Division (B) or (C) of this section, with at least five years of total service credit who has passed his sixtieth birthday or who has thirty-two years of total Ohio service credit may apply for age and service retirement * * *.

"(B) A member who has at least twenty-five years of total service credit, including credit for military service under Division (D) (2) of this section, while serving as a sheriff or deputy sheriff and who has passed his fifty-second birthday, may apply for an age and service retirement benefit which shall consist of an annual single lifetime allowance equal to the sum of two and one-half per cent of his final average salary multiplied by the first twenty years of his total service plus one and one-half per cent of his final average salary multiplied by the number of years of his total service credit in excess of twenty years, except that no allowance shall exceed sixty-six per cent of his final average salary.

"(C) A member with at least fifteen years of total service credit, including credit for military service under Division (D)(2) of this section, while serving as a sheriff or deputy sheriff and who is discharged from his position for any reason except his retirement under this chapter, his death, dishonesty, cowardice, intemperate habits, or conviction of a felony, may apply for an age and service retirement benefit which shall consist of an annual single lifetime allowance equal to one and one-half per cent of his final average salary multiplied by the number of years of his total service credit. The allowance shall commence at the end of the calendar month in which the application is filed with the Public Employees Retirement Board on or after the attainment by the applicant of age fifty-five.

"(D) * * * * *

"(2) Notwithstanding Sections 145.01 and 145.30 of the Revised Code, no more than four years of military service credit granted under Section 145.30 of the Revised Code and three years of military service credit purchased under Section 145.301 of the Revised Code shall be used in calculating service as a sheriff or deputy sheriff, or the total service credit of such person.

"(3) Any person who is originally commissioned and employed as a deputy sheriff by the sheriff of any county, or who is originally elected sheriff, on or after January 1, 1975 shall only be eligible for benefits under Divisions (B) and (C) of this section for his service as a deputy sheriff or sheriff. All sheriffs and deputy sheriffs who are members of the Public Employees' Retirement System on or before December 31, 1974, shall indicate to the Public Employees' Retirement System, on forms supplied to all such members by the system, their choice of benefit plans under Division (A) of the section, or under Divisions (B) and (C) of this section. The Public Employees' Retirement System shall supply said forms to the members by December 31, 1974. Said members shall indicate, on the forms, their choice of benefit plans on or before April 1, 1975. If no designation of choice has been made by that date by a member, he shall no longer be eligible for benefits under Divisions (B) and (C) of this section."

Your first question is directed toward the situation of new employees commissioned as sheriffs or deputy sheriffs after January 1, 1975, but before the March 4, 1975, effective date of the legislation at hand. R.C. 145.33(D)(3), states that such persons who are employed after January 1, 1975, "shall only be eligible for benefits under Divisions (B) and (C) of this section for his service as a deputy sheriff or sheriff."

The language is clear and unambiguous; however, the statute

forces persons into a new benefit class prior to its effective date, thus appearing to have a retroactive effect. Article II, Section 28 of the Ohio Constitution provides that the "general assembly shall have no power to pass retroactive laws * * *." A retroactive law may be defined as every statute which takes away or impairs vested rights, acquired under existing laws, or creates a new duty, or attaches a new disability, in respect to transactions or considerations already past. Rairden v. Holden, 15 Ohio St. 207 (1864); Michaels v. Morse, 165 Ohio St. 599 (1956).

As a general rule, pensions of public officers are usually regarded as gratuitous in nature which do not become vested, and, therefore, may usually be revoked at the will of the legislative body. United States v. Teller, 107 U.S. 64 (1883); Rafferty v. United States, 210 F.2d 934 (1954). If on the other hand, all of the conditions for a pension have been met by a pensioner, and he is entitled to a pension, it cannot be taken away by legislative action as his right therein is vested. See Lage v. Marshalltown, 212 Iowa 53, 235 N.W. 761 (1931).

Thus, R.C. 145.33(D)(3) is procedurally retrospective in that it establishes a criteria for inclusion in the newly created class which is a date in time prior to the effective date of the legislation. As the application is prospective, however, it does not deprive any member of the class of any vested rights as such rights cannot accrue until after the effective date. See 1974 Op. Att'y Gen. No. 74-087.

Therefore, any new employee who is commissioned as a sheriff or deputy sheriff after January 1, 1975, is automatically in the group eligible only for benefits under R.C. 145.33(B) and (C).

Your second question queries whether a sheriff or deputy sheriff with less than fifteen years of credit may receive any credit for service in this capacity. R.C. 145.33(B) states, in part, that a member covered by its provisions may retire at the age of fifty-two if he has twenty-five years credit while R.C. 145.33(C) states that if a member covered by its provisions is discharged under conditions other than those specified in the section, that at the age of fifty-five he may qualify for the benefits provided he has completed fifteen years of credit. R.C. 145.33(D)(3) provides that such a person "shall only be eligible for credit under Divisions (B) and (C) of this section for his service as a deputy sheriff or sheriff."

R.C. 1.49(A) states that the object of a statute may be considered in construing it. The Court in Packer v. Board of Retirement of Los Angeles County Peace Officers Retirement System, 35 Cal. 2d 212, 217 P.2d 660 (1950), said that statutes granting pensions to public officers, including policemen, firemen and other public employees, were enacted to stimulate governmental efficiency by encouraging continued and loyal public service. Such would appear to be the purpose of Amended Substitute House Bill No. 1312 as well. By requiring fifteen years minimum service in order for a sheriff or deputy sheriff to retire under the provisions of R.C. 145.33(B) or (C), a policy of furthering the goal of hiring, electing, and retaining a professional staff would be accomplished. In addition, this provision is similar to R.C. 742.37(C)(6) which relates to the Police and Firemen's Disability and Pension Fund and provides:

"(6) A member of the fund who has served fifteen or more years as an active member of the police or fire department of a municipal corporation or a fire department of a township and who voluntarily resigns or is discharged from such department for any reason other than dishonesty, cowardice, intemperate habits, or conviction of a felony, shall receive an annual pension, payable in twelve monthly installments, in an amount equal to one and one-half per cent of his average annual salary for the three years during which his total annual salary as a member of said police or fire department was the greatest multiplied by the number of full years he was in the active service of the department. Such pension payments shall not commence until the member has attained the age of fifty-two years and until twenty-five years have elapsed from the date on which he became a full-time regular policeman or fireman in the department." (Emphasis added.)

The only provision in the Police and Firemen's Disability and Pension Fund which applies to members with less than fifteen years credit in cases other than disability or survivorship is R.C. 742.37(G) which reads:

"(G) A member of the fund who voluntarily resigns or is removed from active service in a police or fire department of a municipal corporation or a fire department of a township is entitled to receive an amount equal to the sums deducted from his salary and credited to his account in the police and firemen's disability and pension fund."

R.C. 145.33(C) uses language similar to R.C. 742.37(C)(6) and both apply to the same topic of retirement benefits. Thus, it is not unreasonable to assume that R.C. 145.33(C) seeks the same objective and contemplates a similar procedure.

In addition, 1947 Op. Att'y Gen. No. 301 states in the third branch of the syllabus:

"A member of the public employment retirement system who is by reason of a change in the law brought within the provisions of a firemen's relief and pension fund, is entitled to have a refund from the public employees retirement system of his accumulated contributions to such system."

Therefore, I must conclude that the legislative intent of R.C. 145.33(D)(3) is to make members with less than fifteen years service, in cases other than disability or survivorship, only eligible to withdraw their employee contribution to the fund as they have no vested retirement rights and cannot receive any credit for such service.

Your third question pertains to disability coverage and survivor benefit rights of which R.C. 145.33(B) and (C) make no provision for its members and R.C. 145.33(D) states that their credit qualifies only under (B) and (C).

It is difficult to conceive of a public pension plan which intended to totally exclude such benefits from its members. It has been said that the purpose of pension statutes is the humane

one of caring for people. State ex rel. Hanrahan v. Zupnik, 161 Ohio St. 43 (1954). Basic to such a proposition are disability benefits to the member and surviving benefits to his wife and children. Also, it is a general rule that pension statutes are to be construed liberally. State ex rel. Hanrahan v. Zupnik, supra; State ex rel. Schoedinger v. Lentz, 132 Ohio St. 30 (1936).

Thus, since such benefits are available under the Public Employment Retirement System to members under R.C. 145.33(A) pursuant to R.C. 145.39 and R.C. 145.45, rules of statutory construction provide that provisions in an act which are omitted in another act relating to the same subject matter will be applied in a proceeding under the other act, when not inconsistent with its purposes. United States v. Fixico, 115 F.2d 389 10th Cir. 1940); Jewish Hospital of Brooklyn v. Doe, 252 App. Div. 581, 300 N.Y.S. 1111 (1937).

Therefore, I must find that with the exception of the special age and service requirements and computation of pension as provided in R.C. 145.33, retirees under the special benefits section for sheriffs and deputies are entitled to all other benefits afforded retirees under the regular public employment retirement system as it is inconceivable that the legislature intended for members pursuant to R.C. 145.33(B) and (C) to be totally without them.

While it seems clear that the legislature did not intend for such members to be without these benefits, I find it equally clear that the intention was for the member to receive only one such benefit. Thus, any credit accumulated by such member before becoming a sheriff or deputy is lost and does not become the basis of a separate benefit.

Questions four and five ask whether certain purchases of service credit qualify as credit under R.C. 145.33(B) or (C). R.C. 145.33(D)(2) provides for the inclusion of certain military service credit in calculating the total service credit of a sheriff or deputy sheriff. There is no mention, however, of elective official credit or credit for service outside of Ohio.

R.C. 145.201 reads in part as follows:

"Any member of the public employees retirement system who is or has been an elected official of the state or any political subdivision thereof may at any time prior to retirement purchase additional service credit in an amount not to exceed thirty per cent of the service credit, other than military service and part-time service, allowed him for the period of service as an elected official subsequent to January 1, 1935. * * *"

R.C. 145.292 states:

"Any member, in addition to service as a public employee in the state of Ohio, may purchase credit for similar service as a public employee of another state of the United States, or of any unit of local government within the other state, or of any territory or possession of the United States or of the District of Columbia or for service as an employee of the United States government."

As stated previously in this opinion, as a general rule

pension statutes are to be construed liberally, and when provisions in an act are omitted in another act relating to the same subject matter, they will be applied in a proceeding under the other act when not inconsistent with its purpose. Thus, since members who qualify under R.C. 145.33(A) are eligible for elective official credit or credit for service outside of Ohio, R.C. 145.33(B) and (C) must be construed liberally to allow such credit as well.

Your final question concerns peace officers covered under R.C. 145.33(C) who resign. R.C. 145.33(C) makes provision for those members with at least fifteen years of total service credit and who are discharged from their positions for reasons other than those enumerated. Blacks Law Dictionary, Revised Fourth Edition, defines discharge in this context as a release or removal from employment while resignation is defined as the formal relinquishment of an office. The former denotes an action on the part of the employer while the latter pertains to a voluntary act of the employee. Thus, resignation would not be the same as discharge within the purview of R.C. 145.33(C). And while R.C. 742.37(C)(6) of the Police and Firemen's Disability and Pension Fund specifically mentions resignation as well as discharge, R.C. 145.33(C) only refers to discharge which is a further indication that the legislative intent is to exclude resignation as a method of obtaining retirement benefits.

Thus, if a peace officer covered under R.C. 145.33(C) completes fifteen years of credit and resigns, he qualifies for no benefits and is only entitled to withdraw his contribution as an employee to the fund for the period of such employment.

In specific answer to your questions, it is my opinion and you are so advised that:

1. Any new employee who is commissioned as a sheriff or deputy sheriff after January 1, 1975, is automatically in the group eligible only for benefits under R.C. 145.33(B) and (C).

2. Pursuant to R.C. 145.33(D)(3), members with less than fifteen years service, in cases other than disability or survivorship, are only eligible to withdraw their employee contribution to the fund and cannot receive credit for such service.

3. With the exception of the special age and service requirements and computation of pension, retirees under the special benefits section for sheriffs and deputy sheriffs are entitled to all other benefits afforded retirees under the regular public employment retirement system. However, any credit accumulated by such member prior to becoming a sheriff or deputy sheriff is lost and does not become the basis of a separate benefit.

4. Members under R.C. 145.33(B) and (C) who purchase elective service credit pursuant to R.C. 145.201 or credit for service outside of Ohio pursuant to R.C. 145.293 may use such purchases as credit under R.C. 145.33(B) and (C).

5. If a peace officer covered under R.C. 145.33(C) completes fifteen years of credit and resigns, he qualifies for no benefits and is only entitled to withdraw his contribution as an employee to the fund for the period of such employment.