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1. RETIREMENT SYSTEM, PUBLIC EMPLOYEES — WHERE MEMBER PAST AGE OF SIXTY YEARS APPLIES FOR RETIREMENT ACCOUNT OF DISABILITY, IT IS DUTY OF BOARD TO RETIRE SUCH MEMBER UPON SUPERANNUATION RETIREMENT—SECTION 486-62 G. C.
2. WHERE SUCH MEMBER SO RETIRES HE HAS RIGHT TO EXERCISE EITHER OPTION SET FORTH IN SECTION 486-67 G. C.—FAILURE TO EXERCISE EITHER OPTION—RETIREMENT ALLOWANCE GOVERNED BY SECTIONS 486-60, 486-47 G. C.
3. NOT INCUMBENT UPON BOARD TO REQUIRE EXERCISE OF CERTAIN OPTIONS — FAILURE OF BOARD TO REQUIRE CERTAIN OPTIONS WOULD NOT GRANT TO A MEMBER OR HIS HEIRS A LEGAL CLAIM AGAINST THE BOARD.

## SYLLABUS:

1. Where a member of the public employes retirement system, who has passed the age of sixty years, makes application for retirement on disability, it is the duty of the retirement board to retire such member upon superannuation retirement, as provided in Section 486-62, General Code.

2. A member of the public employes retirement system who is past sixty years of age and makes application for disability retirement, and is retired as upon superannuation retirement, has the right to exercise either of the options set forth in Section 486-67 as to the payment of his retirement allowance, and, in the event of his failure to exercise either of said options, he would receive the retirement allowance provided by Sections 486-60 and 486-47.

3. It is not incumbent upon the retirement board, when a member who is past the age of sixty years retires on superannuation, to require such member to exercise the option accorded him under the provisions of Section 486-67, and in case of failure of the Board to require said member to exercise such option, neither the member nor his heirs would have a legal claim against the retirement board for its failure to require such choice of option.

Columbus, Ohio, June 12, 1943..

Mr. Wilson E. Hoge, Secretary, Public Employes Retirement System, Columbus, Ohio.

Dear Sir:

I acknowledge receipt of your request for my opinion, reading as follows:

“A member of the Retirement System has applied for retirement because of physical disability and although past the superannuation retirement age of sixty years, insists that he be retired on disability with the right to return to service if disability ceases to exist.

The Retirement Board is uncertain of the proper interpretation of Section 486-62 as it pertains to the question.

It has been the habit of the Retirement Board, if a person asks for retirement because of physical disability and is past the age of sixty years, to retire him on a superannuation allowance and to ask him to select an option as provided under Section 486-67.

The question is, therefore, is it incumbent upon the Retirement Board when a member past the age of sixty years applies for retirement because of disability to require him to exercise an option under the superannuation retirement provisions. If it is not incumbent upon the Board to follow such a procedure, would such a member or his heirs have a claim against the Retirement Board for not having specifically required such a choice of option?”

The provisions of the statutes relative to the organization and administration of the Public Employes Retirement System are found in Sections 486-32 to 486-75, inclusive, General Code.

In order to arrive at the proper basis for answering your question, it is necessary to set out portions of several of the sections of the act, particularly those relating to retirement of members and the rights accruing to them upon retirement. Several of the sections to which I will refer have recently been amended by Senate Bill No. 89, passed March 24, 1943, which will become effective June 30, 1943. The amendments, however, are not of such character as to affect my reasoning or conclusion. In each quotation the emphasis employed is mine.

Section 486-59 reads 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. \* \* \* ”

It will be noted that under the provisions of Sections 486-60 and 486-62, two somewhat distinct types of retirement are provided for: (1) superannuation retirement and (2) disability retirement.

Section 486-60 reads as follows :

“Upon superannuation retirement, a state employe shall be granted a retirement allowance consisting of :

(a) An *annuity* having a reserve equal to the amount of the employe's accumulated contributions at that time, and, provided such employe shall not hold any remunerative office or employment in any federal, state, county or local government.

(b) A *pension of equivalent amount*, and

(c) An *additional pension*, if such employe is an original member, equal to one and one-third per centum of his average prior-service salary multiplied by the number of years of service in his prior-service certificate.”

Section 486-60 provides :

“Medical examination of a member for disability retirement shall be made upon the application of the head of department or upon the application of the member or of a person acting in his behalf stating that said member is physically or mentally incapacitated for the performance of duty and ought to be retired, provided that the said member was a state employe as defined in this act for not less than ten years preceding his retirement and was a member in each of such ten years which were subsequent to the year 1935. If such medical examination, conducted by a competent disinterested physician, or physicians, selected by the retirement board, shows that the said member is physically or mentally incapacitated for the performance of duty and ought to be retired, the examining physician, or physicians, shall so report to the *retirement board and it shall retire the said member on a disability allowance forthwith if he is under the superannuation retirement age, or on a superannuation allowance if he has attained or passed such age, except that no retirements for disability shall be made prior to January 1, 1938.*”

Section 486-63 sets out the benefits which an employe retired on disability retirement shall receive. In view of the conclusion which I reach, I do not deem it necessary to set out these provisions.

It is worthy of note, however, that Section 486-64, which relates to disability retirement, in effect places a disability beneficiary, at least for the first five years, rather on a leave of absence than on a positive retirement. This section provides in part as follows:

“A disability beneficiary, notwithstanding the provisions of this act, *shall be considered on leave of absence during his first five years* on the retired list and shall retain his membership in the retirement system. Once each year during said period, the retirement board shall require any disability beneficiary under the minimum age for superannuation retirement to undergo medical examination, said examination to be made at the place designated by the retirement board. Upon completion of such examination by an examining physician, or physicians, selected by the retirement board, the examiner shall report and certify to the board whether said beneficiary is physically and mentally capable of resuming service similar to that from which he was retired. If the retirement board concur in a report by the examining physician, or physicians, that the said disability beneficiary is capable of resuming service similar to that from which he was retired, the board shall so certify to the civil service commission, in case he is employed in the classified service, and if not, to his last employer before retirement and said civil service commission or employer, by the first day of the next succeeding year shall restore said beneficiary to his previous position and salary or to a position and salary similar thereto. \* \* \* ”

By reference to the provisions of Section 486-62, above quoted, it appears that in case the medical examination of an applicant for disability retirement shows that the member is physically or mentally incapacitated for the performance of duty and ought to be retired and the examining physician so certifies to the retirement board, it becomes the duty of the board to retire said member on a *disability allowance* if he is *under the “superannuation retirement age”*, but in case he has attained or passed said superannuation retirement age, then he must be retired on a *superannuation allowance*, in which latter case he would receive the benefits set forth in Section 486-60, hereinabove quoted. If, therefore, such employe has passed the superannuation retirement age, the provision of Section 486-63 as to his retirement allowance and Section 486-64 as to his annual physical examination and possible restoration to his position, would have no application.

“Superannuation retirement age”, referred to in Section 486-62, is defined by Section 486-32 (par. 19) as follows:

“ ‘Superannuation retirement age’ shall mean, as applied to employes, seventy years of age until January 1, 1939; then and thereafter ‘superannuation retirement age’ shall mean *sixty years of age.*”

Since your letter states that the employe in question had passed the age of sixty years, it would follow that the board has no discretion but to retire him on a superannuation basis. The fact that this employe insists that he be retired on disability, with the right to return to service if disability ceases to exist, can have no bearing on the question. The law in this respect is mandatory and the action of the board is not dependent in any degree on the desire of the retiring employe. The board has no choice in the matter but must follow the plain terms of the law.

Assuming then that the employe in question has been retired on superannuation allowance, we come to a consideration of Section 486-67, which 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.”

Taken in connection with the provisions of Section 486-60, which sets out the character of the retirement allowance to which one retiring

upon superannuation is entitled, it would appear that unless the beneficiary who has been retired pursuant to that section sees fit to exercise one of the options set forth in Section 486-67, his retirement allowance would take the form set forth in Section 486-60.

Turning again to Section 486-32, which deals with definitions, we find that "retirement allowance" means pension plus annuity. We also find that "pension" means annual payments for life derived from appropriations made by the employer, and payable to the beneficiary monthly, whereas "annuity" means payments for life derived from contributions made by the contributing member, and payable monthly. Accordingly, in case the employe has been retired on a superannuation basis, he would receive throughout the remainder of his life the retirement allowance specified in Section 486-60, payable monthly.

There is nothing in Section 486-67, or elsewhere in the law, which makes it the duty of the retirement board to require a member to exercise any option as contemplated by that section. Accordingly neither such member nor his heirs could have a legal claim against the retirement board for not having specifically required such a choice of option. However, it would seem highly proper that the board should keep members of the system advised of their rights under the law, and particularly of the rights which they might exercise by way of option upon their retirement, which I am advised is the regular practice of the board.

One more change in the law should be noted as bearing on the total retirement allowance to which a member retired on superannuation is entitled. It will be recalled that Section 486-60, as hereinabove quoted, appears to limit the right to a "prior service" pension to one who was an original member. But by the later enactment of Section 486-47 (119 O.L. 150), effective August 1, 1941, this benefit was extended. That section provides in part:

*"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, 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."*

Specifically answering your questions, it is my opinion:

1. Where a member of the public employes retirement system, who has passed the age of sixty years, makes application for retirement on

disability, it is the duty of the retirement board to retire such member upon superannuation retirement, as provided in Section 486-62. General Code.

2. A member of the public employes retirement system who is past sixty years of age and makes application for disability retirement, and is retired as upon superannuation retirement, has the right to exercise either of the options set forth in Section 486-67 as to the payment of his retirement allowance, and, in the event of his failure to exercise either of said options, he would receive the retirement allowance provided by Sections 486-60 and 486-47.

3. It is not incumbent upon the retirement board, when a member who is past the age of sixty years retires on superannuation, to require such member to exercise the option accorded him under the provisions of Section 486-67, and in case of failure of the Board to require said member to exercise such option, neither the member nor his heirs would have a legal claim against the retirement board for its failure to require such choice of option.

While not directly bearing on the question you have submitted, the provisions of Section 486-63b, as enacted by the 95th General Assembly, and which will become effective June 30, 1943, appear to furnish a method whereby the employe referred to in your communication may be re-employed in case he recovers from his present disability. This section provides:

“Until July 1, 1945, any employer, as defined by this act, may employ any person or persons receiving retirement allowances under the provisions of sections 486-59, 486-60 and 486-61 of the General Code, such retired persons hereinafter to be referred to as superannuates, provided such employer shall formally declare that an emergency exists, and shall file with the retirement board a copy of such declaration, together with the name or names of the superannuates who are to be employed. In any case of employment of such superannuates without having filed the aforesaid declaration and notice of employment, such employer shall pay to the retirement board an amount equal to the portion of the retirement allowance paid to such superannuates subsequent to the date of employment from funds provided by the employer. The retirement allowances being paid to such superannuates shall cease within a maximum period of thirty days following such acceptance of re-employment. In case of the death of a superannuate during a period of re-employment, the retirement board shall pay to the estate or beneficiary of such deceased superannuate the total of all suspended annuity payments to which such superannuate was entitled from his accumulated contributions with interest on such deferred amount at such rate as the retirement board shall determine.

When a superannuate is re-employed as provided herein, he

shall become a new member of the retirement system and shall have all rights and privileges and be charged with all obligations of such membership.

If a superannuate thus re-employed again ceases to be an employe, the retirement board shall resume within thirty days of such separation the exact retirement allowance to which such person was formerly entitled. In addition thereto, the retirement board shall pay in one sum the total of all suspended annuity payments to which such superannuate was entitled from his accumulated contributions, with interest on such deferred amount at such rate as the retirement board shall determine.

The retirement board shall have authority to make rules and regulations, not inconsistent with the provisions of this section, to carry into effect the provisions thereof and to prevent abuse of the rights granted."

In an opinion which I rendered on February 8, 1942, it was held:

"1. Persons receiving superannuation retirement allowances under the Public Employes Retirement System who have attained the age of seventy may not be re-employed by the state, county or local government.

2. Members of the Public Employes Retirement System, who retire from public employment before reaching the age of seventy years, may be re-employed, prior to attaining said age, by any federal, state, county or local government. The acceptance, however, of such employment, if the same is remunerative, will hold in abeyance the pension provided for in Section 486-60, General Code, during the period of such employment."

The new section 486-63b, General Code, above quoted, would appear to be consistent with my holding in the second branch of that syllabus, and to extend to superannuated employes who had been retired when past seventy years of age a similar right to obtain a new employment in the public service up to July 1, 1945.

Of course, if the employe who is the subject of your inquiry should recover from his disability and be re-employed, it would not be in any sense a reinstatement of his former position but would be a new employment permitted by the statute last above referred to.

Respectfully,

THOMAS J. HERBERT,  
Attorney General.