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1. RETIREMENT BOARD, PUBLIC EMPLOYEES—WRITTEN APPLICATION FOR RETIREMENT NOT REQUIRED TO BE FILED BY MEMBERS UNDER AGE OF SEVENTY YEARS—SECTION 486-59 G. C.
2. WRITTEN APPLICATION REQUIRED OF MEMBERS SUBJECT TO RETIREMENT AT AGE OF SEVENTY YEARS—NECESSARY FOR CONTINUANCE IN SERVICE.
3. COMPULSORY RETIREMENT AGE IS SEVENTY YEARS.
4. BOARD IS WITHOUT AUTHORITY TO REFUSE CONTRIBUTIONS FROM ANY EMPLOYEE MEMBER UNDER SEVENTY YEARS OF AGE WHO FAILED TO FILE WRITTEN APPLICATION FOR CONTINUANCE IN SERVICE.

SYLLABUS:

1. Written applications, as provided for in Section 486-59 of the General Code, are not required to be filed with the Public Employees Retirement Board by those members under the age of seventy years.
2. Written application, as provided for in Section 486-59 of the General Code, is applicable to those members who are subject to retirement at the age of seventy years, if such members wish to be continued in service.
3. The compulsory retirement age for a member of the Public Employees Retirement System, as provided for in Section 486-59 of the General Code, is the age of seventy years.
4. The Public Employees Retirement Board is without authority to refuse contributions from any employee member under seventy years of age who has failed to file with the Board a written application for continuance in service.

Columbus, Ohio, October 20, 1949

Mr. Fred J. Morr, Chairman, Public Employes Retirement Board
Columbus, Ohio

Dear Sir:

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

"As a result of the enactment of Amended House Bill No. 45, two questions of interpretation have been raised. We, therefore, kindly request your opinion:

"(1) Whether or not under the provisions of the present Section 486-59 of the General Code, an application for continuation in the public service covered by the Public Employes Retirement System, which carries a certificate of physical and mental fitness to perform the duties of the position held, must be signed by the appointing officer or authority and filed with the Public Employes Retirement Board not later than June 30, 1949, to enable a member of the system to continue in public service after June 30, 1949, in case the member has attained the age of sixty-nine (69) years before said June 30, 1949, and will not attain age seventy (70) years until on or after July 1, 1949?"

"(2) In the event such an application, approved by the appointing officer is not filed with the Public Employes Retirement Board by June 30, 1949, is the member retired automatically from public service on that date, and if not retired automatically may this Board accept further member savings contributions?"

Section 486-59 of the General Code, as amended by House Bill No. 45, effective March 30, 1949, 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.

"On June 30 following the date upon which he becomes a member the retirement board shall retire any employe who was over seventy years of age at the time he became a member and shall retire all other members, except elective officers, on the June 30 following the date upon which the age of seventy is attained. *Provided, that until June 30, 1950, any member having reached the age of sixty-nine years or more may, upon written application*

approved by the head of his department, board, authority or institution, and upon certification by a physician licensed to practice in the State of Ohio that the member is physically and mentally competent to perform the duties of the particular position which he occupies, be continued in service for a period of one year or any part thereof, such application, if approved, to expire on the June 30 following the date upon which it was filed unless renewed from year to year on or before the expiration date. Any member who accepts an allowance under Sections 486-59, 486-60 or 486-61 of the General Code, or who is compelled to retire and who withdraws his accumulated contributions in lieu of accepting a retirement allowance shall be ineligible for regular re-employment in any capacity which comes within the provisions of the public employes retirement act.

“Any former member who is receiving a monthly retirement allowance as provided in Section 486-60, General Code, and providing such former member was seventy or more years of age at the time of retirement, shall have his retirement allowance adjusted to become effective as of the end of the quarter of the calendar year next following the date the public service of such member was terminated.

“In the event any retired pensioner, after such retirement, is elected to a full-time salaried office by the electors of the state or any political subdivision thereof at any election, such pensioner, by the acceptance of any such office shall forfeit his pension during the period such pensioner so holds such office and receives the salary therefor.” (Emphasis added.)

Here it will be noted that the General Assembly has provided that, with the approval of the head of the employing department and a certificate from a physician, an employe who has reached the age of sixty-nine years or more may be continued in service. The question is what, in the light of the above legislative provision, is the age of retirement so far as said legislation affects the Public Employes Retirement System.

Upon examining House Bill No. 45, I find that Section 3 of the bill states the necessity for the enactment of same, such necessity being as follows:

“* * * The reason for such necessity lies in the fact that there are approximately fifteen hundred public employees whose tenure of office will expire on June 30, 1949, unless otherwise provided.”

Who are those public employes whose tenure of office will expire on June 30, 1949? Are they those employes who are sixty-nine years of age

or more, or are they those employes who are seventy years of age or more? In order to answer those questions, it becomes necessary to look to Section 486-59 of the General Code as it existed prior to the enactment of House Bill No. 45. Former Section 486-59 of the General Code provides in part:

“* * * Provided that until September 1, 1948, 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, or any part thereof, such applications to expire on the June 30 following the date upon which they were filed unless renewed on or before the expiration date. On and after September 1, 1948, no such applications for continuation in service shall be approved, * * *.”

In an opinion of my predecessor, found in 1947 Opinions of the Attorney General, at page 608, the syllabus reads:

“Under the provisions of Section 486-59, General Code, as amended by Senate Bill No. 7, of the 97th General Assembly, the latest date on which a member of the public employes retirement system who is over seventy years of age, may make application for continuation in service, is the 31st day of August, 1948, and the latest time to which such service may be continued, is June 30, 1949.”

In view of the above it becomes obvious that the sole intent of the Legislature in enacting House Bill No. 45 was to permit those members seventy years of age or over to continue in service, providing such members receive the written approval of the appointing authority, meet the physical and mental requirements as evidenced by a physician's certificate and file same with the Public Employes Retirement Board not later than June 30, 1949. If such is not done by those subject to retirement by the board, the board has no alternative other than to retire them.

In Sutherland Statutory Construction, Volume II, at page 340, it is said:

“* * * Thus if the statute specifically declares its intention and meaning all other provisions of the act are controlled by it and the policy section will be given primary importance in interpreting the remainder of the law.”

I am unable to see how the proviso in House Bill No. 45 in any way affects the management of the fund and the retirement of the members by

the Public Employes Retirement Board so far as the age of sixty-nine is concerned. The board's only duty is to retire members who have reached the age of seventy years unless the written application, as provided for in Section 486-59, is filed with the board no later than June 30, 1949.

In Crawford Statutory Construction, "Interpretation of Laws", at page 605, it is said:

"As a general rule, however, the operation of a proviso should be confined to that clause or portion of the statute which directly precedes it in the statute. This position, as suggested in *Clay Center State Bank v. McKelvie* (19 Fed. (2) 308), is in accord with the rules of grammatical construction:

'Its grammatical and logical scope is confined to the subject-matter of the principal clause. . . . While it is sometimes used to introduce independent legislation, the presumption is that it is used in accordance with its primary purpose and refers only to the provision to which it is attached.'

It is further said in Crawford, *supra*, at page 608:

"And the possible effect of extending the scope of a proviso is pointed out in *Dunn v. Bryan* (77 Utah 604, 299 Pac. 253):

'Since the office of a proviso is not to repeal the main provisions of the act but to limit their application, no proviso should be so construed as to destroy those provisions.'

In view of the foregoing, it is, therefore, my opinion that:

1. Written applications, as provided for in Section 486-59 of the General Code, are not required to be filed with the Public Employes Retirement Board by those members under the age of seventy years.
2. Written application, as provided for in Section 486-59 of the General Code, is applicable to those members who are subject to retirement at the age of seventy years, if such members wish to be continued in service.
3. The compulsory retirement age for a member of the Public Employes Retirement System, as provided for in Section 486-59 of the General Code, is the age of seventy years.
4. The Public Employes Retirement Board is without authority to refuse contributions from any employe member under seventy years of

age who has failed to file with the board a written application for continuance in service.

Respectfully,

HERBERT S. DUFFY,
Attorney General.