

230

RETIREMENT SYSTEM, PUBLIC EMPLOYES:

1. MEMBERS WHO ARE HIRED BY PUBLIC BODY HAVING RETIREMENT SYSTEM OF ITS OWN, NOT REQUIRED TO REMAIN MEMBERS OF SUCH SYSTEM—SECTIONS 486-33, 486-33c, 486-65a G. C.—THIRD BRANCH OF SYLLABUS, OPINION 4065, OPINIONS ATTORNEY GENERAL, 1941, PAGE 718, OVERRULED.
2. WHERE MEMBER ENTERS EMPLOY OF POLITICAL SUBDIVISION OR OTHER AUTHORITY HAVING ITS OWN RETIREMENT SYSTEM, ESTABLISHED PURSUANT TO LAW OR CHARTER, SUCH MEMBER MAY WITHDRAW ACCUMULATED CONTRIBUTIONS AND TERMINATE MEMBERSHIP—MAY GO ON LEAVE OF ABSENCE AND LEAVE CONTRIBUTIONS ON DEPOSIT.
3. IF PERSON BECOMES MEMBER OF SUCH OTHER SYSTEM AND MAKES CONTRIBUTIONS ON BASIS OF TWO THOUSAND DOLLARS PER ANNUM OR RECEIVES DISABILITY ALLOWANCE, MEMBERSHIP IN PUBLIC EMPLOYES RETIREMENT SYSTEM AUTOMATICALLY CEASES.

SYLLABUS:

1. Persons who are members of the Public Employes Retirement System, who are hired by a public body having a retirement system of its own established under the provisions of the General Code or of a charter, are not required to remain members of the Public Employes Retirement System. (Sections 486-33, 486-33c and 486-65a, General Code.) Third branch of the syllabus, Opinion 4065, Opinions Attorney General, 1941, page 718, overruled.

2. In the event a member of the Public Employes Retirement System enters the employ of a political subdivision or other authority having a retirement system of its own established pursuant to law or charter, such member may elect to withdraw his accumulated contributions and thereby terminate his membership in the Public Employes Retirement System, or to leave such contributions on deposit and go on leave of absence; provided, however, that if he becomes a member of such other system and contributes thereto on a basis of two thousand dollars per annum or receives a disability allowance from such other system, his membership in the Public Employes Retirement System automatically ceases.

Columbus, Ohio, April 16, 1945

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

Dear Sir:

Your request for my opinion reads as follows:

"On August 13, 1941, in Opinion No. 4065 it was held:

'3. Persons who are members of the Public Employes Retirement System who are hired by a school district public library having a retirement system established under the provisions of Section 7889, General Code, are required to remain members of the Public Employes Retirement System (Sections 486-33 and 486-33c).'

Will you please give us your opinion whether we are still required to follow the provisions of this opinion as relates to members of the Public Employes Retirement System who enter the employ of political subdivisions maintaining a pension system recognized by the State Act? In the event your opinion is in the negative is it required that membership in the Public Employes Retirement System for such persons must terminate and must the Public Employes Retirement System refund the accumulated contributions of such member?

In a letter dated March 26, 1945, copy of which is enclosed, from the Assistant Solicitor of the City of Cincinnati, Ohio, it is contended that members of the Public Employes Retirement Sys-

tem 'who take employment with a political subdivision maintaining a pension system recognized by the State Act may, if they desire, transfer to such local system, either by withdrawing from the state system entirely or by freezing their current status in the state system and entering the local system from the time of last employment.' "

Section 486-33, General Code, reads:

"A state employees retirement system is hereby created for the employes of the State of Ohio. Membership in the state employes retirement system shall be compulsory and shall consist of all state employes, either as original members or as new members upon being regularly appointed. Provided, however, that any original member may be exempted from membership by filing written application for such exemption with the retirement board within three months after this act goes into effect. *And provided further, that the board shall have authority to exempt from compulsory membership in the retirement system, classes or groups of employes engaged in work of a temporary, casual, or exceptional nature, but individuals in any such class or group so exempted may become members by making application therefore (therefor) subject to the approval of the retirement board;* provided, however, that any employe who is, or who becomes, a member must continue such membership as long as he is a state employe, even though he may be in or transferred to an exempted class or group."

(Emphasis added.)

By the provisions of Section 486-33a et seq., enacted in 1937, the State Employees Retirement System was extended to include employes of municipalities and other local subdivisions, and such employes were made subject to all the rights and privileges that were applicable by the terms of the law to state employes.

Section 486-33c in so far as pertinent reads as follows:

"For the purposes of this act, 'county or municipal employes' shall mean * * *. 'Park district employe' shall mean * * *. 'Conservancy employe' shall mean * * *. For the purposes of this act a sanitary district shall be considered * * *. 'Health employe' shall mean * * *. 'Public library employe' shall mean * * *.

'Township employe' shall mean any person holding a position in a township in the State of Ohio, and/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. 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 two thousand dollars per annum or is receiving a disability allowance from such other retirement system. *The board shall have authority to exempt from compulsory membership in the retirement system classes or groups of employes engaged in work of a temporary, casual or exceptional nature, but individuals in any such class or group may become members by making application therefor, subject to the approval of the retirement board;* provided, however, that any county, municipal, park district, conservancy, health, township or public library employe who is, or who becomes a member must continue such membership as long as he is such employe, even though he may be in or transferred to an exempted class or group. In all cases of doubt the retirement board shall determine whether any person is a county, municipal, park district, conservancy, health, township or public library employe as defined herein, and its decision shall be final. * * *"

The structure of this section beginning a new paragraph beginning with, "Township employe", immediately followed by the words, "But said term shall not include", etc., might lead to the conclusion that "said term" referred only to township employes. It is obvious, however, upon an examination of the entire section that the legislature had in mind a purpose to define "employes" generally, who are covered by the section and included within the purview of the enlarged system.

It will be noted that membership in the system is compulsory as to all the enumerated classes of employes excepting, however, that the board is given authority to exempt from compulsory membership certain "classes or groups." These classes or groups which the board may exempt are defined as being of a "temporary, casual or exceptional nature." It is further provided that any employe of any of the subdivisions covered by the act who is or becomes a member of the system must continue in such membership so long as he is such employe even though he may be in or may be transferred to an exempted class or group. By the terms of this section the word "employe" is not to include those persons who come with-

in the provisions of any other retirement system established pursuant to law or to any charter, nor are the provisions of the act in any way to apply to a police relief fund or a firemen's pension fund. It seems to me perfectly clear that the provision of the statute giving the board authority to exempt certain classes or groups was not intended to refer to those employes who by the terms of the statute itself are not to be included.

Upon a study of the opinion of my predecessor to which you call my attention, I am compelled to conclude that he did not give consideration to those portions of Sections 486-33 and 486-33c, General Code, which I have emphasized in quoting them, relating to the power of the board to exempt those certain classes or groups. It is notable that in quoting those two sections he omitted and indicated by stars those very provisions which, as it seems to me, should have furnished the key to the question he was considering. Section 486-33c says at the outset that the term "employes", for the purpose of the act 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. Accordingly, for the purpose of construing the sentences which follow we may consider that such persons are out of the picture. Then follows a sentence which qualifies that exclusion partially. To that I will refer later. Then follows the provision giving the board the right to exempt certain named classes or groups, to wit: "temporary, casual or exceptional" employes who, however, may individually come in if they desire. Then, in the same sentence comes the provision that "any * * * employe who is or who becomes a member must continue such membership so long as he is such employe, *even though he may be in or transferred to an exempted class or group.*"

The plain meaning of this last quoted clause is that an employe who is in a group or class which the board had exempted and who has of his own volition come into the system, as well as a regular member who has been transferred to one of those exempted groups, must remain in the system so long as he is an "employe" within the purview of the state system.

I find it necessary, therefore, to overrule the third branch of the syllabus of Opinion No. 4065 as found in 1941 Opinions Attorney General, page 718.

The circumstances under which a member of the Public Employes Retirement System may withdraw his contributions and terminate his membership are set forth in Sections 486-65 and 486-65a, General Code, which provide as follows:

“Section 486-65. A contributor who ceases to be a state employe for any cause other than death or retirement, upon demand, within ten years after such cessation of service, shall be paid the accumulated contributions standing to the credit of his individual account in the state employes' savings fund. Ten years after such cessation of service, if no previous demand has been made, any accumulated contributions of a contributor shall be returned to him or to his legal representative. If the contributor or his legal representatives cannot then be found, his accumulated contributions shall be forfeited to the retirement system and credited to the guarantee fund.”

“Section 486-65a. Membership shall cease upon refund of accumulated contributions or upon retirement except as provided in Section 486-64 of the General Code, relative to disability retirement. A member who separates from his service as a public employe for any reason other than death or retirement may leave his accumulated contributions, if any, on deposit with the retirement board and, for the purposes of the retirement system, be considered on a leave of absence for a period of five years, at the end of which period, if such member has not returned to active service as a public employe, the retirement board may, upon application, grant such additional leave as the retirement board may deem proper, providing that such additional leave shall not exceed a period of five years. A member who ceases to be a state, county, municipal, park district, conservancy, health, township, or public library employe and who does not withdraw the accumulated contributions standing to his credit in the employes savings fund and who subsequently becomes eligible and accepts membership in any other retirement system established under the provisions of the laws of this state or of any charter shall be considered for retirement purposes as being on an indefinite leave of absence as long as such member retains membership in such other retirement system. Members on such leaves of absence shall retain all rights and privileges of membership in the retirement system. Members who separated from the state service subsequent to October 20, 1933, and prior to January 1, 1935, shall be considered upon such leave.”

It will here be noted that a member of the system who ceases to be a public employe has the option either to withdraw his accumulated contributions, in which case his membership will cease, or to leave them with

the Retirement Board and take a leave of absence from membership. Section 486-65a, General Code, contemplates the possibility that one who has thus ceased to be a "public employe" within the scope of the Public Employes Retirement System but has not withdrawn his contributions may subsequently receive an appointment in some subdivision which has a retirement system of its own and may accept membership in such other retirement system, in which case he shall be considered for retirement purposes as being on an indefinite leave of absence, thereby holding his membership in both systems.

We must, however, note one exception to this conclusion. We are obliged to read in connection with this section and give effect to that provision of Section 486-33c supra, which reads:

"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 two thousand dollars per annum or is receiving a disability allowance* from such other retirement system."

(Emphasis added.)

The converse of that provision is that if one becomes a member of another system and contributes to it on the basis of a two thousand dollar salary, or receives a disability allowance from such other system, he is automatically excluded from or dropped from the Public Employes Retirement System, in which case he may, of course, withdraw his accumulated contributions.

Specifically answering your inquiries it is my opinion:

1. Persons who are members of the Public Employes Retirement System who are hired by a public body having a retirement system of its own established under the provisions of the General Code or of a charter are not required to remain members of the Public Employes Retirement System. (Sections 486-33, 486-33c and 486-65a General Code.) Third branch of the syllabus Opinion No. 4065, Opinions Attorney General, 1941, page 718, overruled.

2. In the event a member of the Public Employes Retirement System enters the employ of a political subdivision or other authority having a retirement system of its own established pursuant to law or charter, such member may elect to withdraw his accumulated contributions and thereby terminate his membership in the Public Employes Retirement System or to leave such contributions on deposit and go on leave of absence; provided, however, that if he becomes a member of such other system and contributes thereto on a basis of two thousand dollars per annum or receives a disability allowance from such other system, his membership in the Public Employes Retirement System automatically ceases.

Respectfully,

HUGH S. JENKINS

Attorney General