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RETIREMENT SYSTEM, STATE EMPLOYES' — WHERE STATE EMPLOYE RETIRED ON SUPERANNUATION BASIS, PRIOR TO AMENDMENT TO INCLUDE PUBLIC EMPLOYES, CERTAIN POLITICAL SUBDIVISIONS AND BODIES, IN PUBLIC EMPLOYES' RETIREMENT SYSTEM, SUCH RETIRED STATE EMPLOYE NOT ENTITLED TO CREDIT FOR PRIOR SERVICE AS COUNTY EMPLOYE OR AS PUBLIC EMPLOYE AS DEFINED IN AMENDED STATUTES.

## SYLLABUS:

Where a state employe, who was a member of the State Employes' Retirement System, retired on a superannuation basis, prior to the amendment of the pertinent sections of the General Code, so as to change the State Employes' Retirement System to the Public Employes' Retirement System, and include in such Public Employes' Retirement System the public employes of certain political subdivisions and bodies, such retired state employe is not entitled to credit for prior service rendered as a county employe, or as a public employe as defined in the statutes as amended.

Columbus, Ohio, May 9, 1942.

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

Dear Sir:

Your request for my opinion duly received. Your letter reads:

“On January 1, 1938, E.E., former employe of the state

Auditor's office, retired on an allowance from this system. At that time only state employes, as defined by the act, were members of the Retirement System and only service as state employes was eligible for credit as prior-service.

Effective April 18, 1938, the Retirement Act was amended by legislative action to include all county and municipal employes of the state, the definition of prior-service then being amended to permit the granting of prior-service credit for employes of the counties and municipalities within the state.

The said Mr. E. has requested the Retirement Board for prior-service credit as a county employe. He has been consistently refused such credit on the basis of the provisions of Section 486-33b, which in effect says that the service as a county or municipal employe shall be included as prior-service provided such persons are present employes. We have also taken into consideration the provisions of Section 486-65a, which states specifically: '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 \* \* \*.' The Retirement Board, until now, has been of the opinion that the amendments effective April 19, 1938, could apply only to those employes who were members of the system at that time and, since Mr. E. retired effective January 1, 1938, his membership as such in the Retirement System had ceased.

However, the Retirement Board desires your opinion on this question. Is Mr. E. entitled to credit for county and municipal service in view of his retirement on January 1, 1938?"

The following sections of the General Code are pertinent to your inquiry, viz., Sections 486-33b, 486-47, 486-55, 486-58 and 486-65a. These sections need not be quoted in full. In part they read or provide as follows:

Section 486-58:

"At retirement the total service credited a state employe shall consist of all his service as state employe since he last became a member, and, if he has a prior-service certificate which is in full force and effect, all service certified on such prior-service certificate."

Section 486-33b:

"The service of all such county, municipal, park district, conservancy, health and public library employes, including their service as county, municipal, park district, conservancy, health, public library and/or state employes prior to January 1, 1935, shall be included as prior-service, provided such persons are

present county, municipal, park district, conservancy, health or public library employes. Credit for service between January 1, 1935, and June 30, 1938, may be secured by any such county, municipal, park district, conservancy, health or public library employe, provided he or she shall pay into the employes' savings fund an amount equal to the full additional liability assumed by such fund on account of the crediting of such years of service. \* \* \* Such payment together with the regular interest as defined by section 486-32, General Code, shall be refunded in the event of the death or withdrawal from service *of the member prior to retirement* under the same conditions and in the same manner as refunds are made under sections 486-65 and 486-66, General Code, from the employes' savings fund." (Emphasis mine.)

Section 486-47:

"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 1, 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. \* \* \*"

Section 486-55:

"Subject to such rules and regulations as the retirement board shall adopt, said board shall issue to each original member of the retirement system a certificate certifying to the aggregate length of all his prior-service as defined in this act. Such certificate shall be final and conclusive for retirement purposes as to such service, unless modified by the retirement board upon application made by the member or upon its own initiative."

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. \* \* \*"

Section 486-64, General Code, referred to in Section 486-55, supra, has to do with employes retired because of disability and need not be further noticed in this opinion.

It will be noted that Section 486-58, supra, became effective on October 20, 1933 (115 v. 623); Section 486-33b, supra, in its present

form became effective on June 14, 1938 (117 v. 840); Sections 486-55 and 486-65a, as they now read, became effective on June 30, 1939 (118 v. 104); while Section 486-47 became the law on August 1, 1941 (119 v. 150). With the exception of Section 486-58, *supra*, therefore, these sections were all amended after the retirement of Mr. E.; and, as stated in your letter, at the time of Mr. E.'s retirement, the benefit of the Retirement System was limited to state employes only.

As suggested in your request, it is expressly provided in Section 486-33b, *supra*, that the service of all "county, municipal, park district, conservancy, health and public library employes," including their service as such public "or state employes, prior to January 1, 1935, shall be included as prior service, provided such persons are *present*" public employes of the kind named in the section. I see no way to interpret or construe the section other than to hold that the word "present" means public employes on and during the effective date of the section. One of the definitions of the word "present," given in the New Century Dictionary, is:

" \* \* \* being, existing, or occurring at this time or now \* \* \* .",

while the first definition contained in Webster's New International Dictionary is as follows:

"1. Present time; the time being or contemplated; as at this present." \* \* \*

Certainly this word may not be read out of the statute; and the interpretation and construction here adopted is almost made imperative by the specific provisions of Section 486-65a, *supra*, to the effect that membership shall cease "upon retirement except as provided in Section 486-64 of the General Code relative to disability retirement."

And the soundest of reasons exists as to why the conclusion herein adopted is correct. It must be remembered that the Public Employes Retirement Fund is a trust fund for the benefit of the members of the system. It is operated upon an actuarial basis. And were the mounts payable to those who have retired to be increased from the existing fund, created and maintained upon the basis of actuarial computations, based upon experience, the fund might soon become seriously depleted, if not insolvent.

In this connection, your attention is directed to the unreported opinion of Judge Randall, of the Court of Common Pleas of Franklin County, on July 10, 1941, in the case of *Newsome v. Public Employees Retirement Board of Ohio*. In this opinion, Judge Randall said as follows:

“The relationship between the Public Employees Retirement Fund and one of its members is not unlike the relationship between an insurance company and the policyholder. When the member takes out an annuity such as was granted to plaintiff's decedent in this case he in a sense makes a wager with the fund that he will live long enough to consume all of the moneys which he has contributed to the fund, or more. If the member does not happen to guess right, the fund wins and is enriched because of his untimely death. The solvency of the fund is maintained and forecast on an actuarial basis. By experience the fund knows through its actuaries that a certain number of men who have attained a certain age will die shortly and that others may live for a longer period of time. If after annuities have been taken out on a certain basis which proves to be of benefit to the fund because of the untimely death of one to whom the annuity is being paid, the wife succeeds in making a new contract which would tend to reduce the fund, it would seem that the members of the fund would be adversely affected and that they have not only equal but superior equities which must be considered before the court could reform the contract made by the deceased member.”

Since the reasons above given seem to me to be more than ample to support the conclusions herein reached, I forbear to discuss Section 28, Article II of the Constitution of Ohio, which provides inter alia that the “General Assembly shall have no power to pass retroactive laws.”

In view of the foregoing, and in specific answer to your question, it is my opinion that:

Where a state employe, who was a member of the State Employees' Retirement System, retired on a superannuation basis, prior to the amendment of the pertinent sections of the General Code, so as to change the State Employees' Retirement System to the Public Employees' Retirement System, and include in such Public Employees' Retirement System the public employes of certain political subdivisions and bodies, such retired state employe is not entitled to credit for prior service rendered as a county employe, or as a public employe as defined in the statutes as amended.

Respectfully,

THOMAS J. HERBERT  
Attorney General.