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1. RETIREMENT SYSTEM, SCHOOL EMPLOYEES—MEMBER MAY BEFORE AGE OF SEVENTY ATTAINED TRANSFER TO PUBLIC EMPLOYEES RETIREMENT SYSTEM—NOT COMPULSORY THAT SCHOOL EMPLOYEES RETIREMENT SYSTEM RETIRE HIM AT END OF YEAR WHEN AGE SEVENTY ATTAINED—RETIREMENT MAY BE DEFERRED UNTIL EMPLOYEE ELECTS TO RETIRE OR IS FORCED TO RETIRE IN PUBLIC EMPLOYEES RETIREMENT SYSTEM—SERVICE CREDIT IN TWO SYSTEMS MAY BE COMBINED TO DETERMINE RETIREMENT ALLOWANCE.
2. WHERE MEMBER, PUBLIC EMPLOYEES RETIREMENT SYSTEM, UNDERSTATED AGE, CONTINUED IN SERVICE SEVERAL YEARS AFTER SEVENTY YEARS OF AGE, DATE TO COMPUTE RETIREMENT ALLOWANCE IS FROM JUNE 30 FOLLOWING DATE AGE OF SEVENTY ATTAINED.
3. MEMBER OF PUBLIC EMPLOYEES RETIREMENT SYSTEM MAY WITHDRAW APPLICATION FOR COMMUTED SUPERANNUATION ALLOWANCE AT ANY TIME BEFORE RETIREMENT ALLOWANCE HAS IN ANY PART BEEN PAID OR ACCEPTED—SECTION 486-61 G. C.

SYLLABUS:

1. A member of the School Employees Retirement System may before the age of seventy is attained, transfer to the Public Employees Retirement System, and it is not compulsory that the School Employees Retirement System retire him at the end of the year in which the age of seventy is attained. Such member's retirement may be deferred until he elects to retire or is forced to retire in the Public Employees Retirement System, and his service credit in the two systems may be combined for the purpose of determining his retirement allowance.

2. When it is disclosed that a member of the Public Employees Retirement System understated his age and was continued in the State service for several years after the age of seventy was attained, the date for computing his retirement allowance is from June 30th following the date on which the age of seventy was actually attained. The contributions which such member made to the System subsequent to that date should be returned, and the law in effect at that time should govern the computation.

3. A member of the Public Employes Retirement System may withdraw his application for commuted superannuation allowance filed under the provisions of Section 486-61, General Code, at any time before his retirement allowance has in any part been paid or accepted.

Columbus, Ohio, April 12, 1950

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen :

Your request for my opinion is as follows :

“The current examination of the records of the Public Employes Retirement System and the School Employes Retirement System disclosed an apparent conflict and disagreement over the interpretation of the laws governing the two systems.

“We are enclosing copies of three letters received from Mr. R. E. Kirk, Examiner in Charge of State Retirement System audits, which explain the situation in complete detail. Since the correct solution to problems arising out of the application of laws governing each of the respective retirement systems is highly technical as well as controversial, we are submitting the following questions for your consideration and respectfully request that you give us your formal opinion in answer thereto :

“1. When a member of the School Employes Retirement System, having attained the age 70 as of 9/17/47, continues in other public employment, and is a member of the Public Employes Retirement System, how shall such member be retired?

“2. Is it compulsory that such member accept retirement in the School Employes Retirement System on June 30, 1948, or may his retirement be deferred until June 30, 1949, the date he elected to retire in the Public Employes Retirement System, thereby permitting his service credit in the two systems to be combined for the purpose of determining his retirement allowance?

“3. When it is disclosed at the time of retirement that a member of the Public Employes Retirement System understated her age on the original personal history record, and such person upon filing application for retirement is found to be seventy-five years of age, how shall the retirement allowance be computed?

(A) As of the end of the quarter, and at her actual age, following the date application for retirement is filed ; or

(B) As of June 30 following the date she actually attained age seventy?

“If the answer to the above is (B) it will then be necessary to secure answers to the following questions:

B-1. Shall the retirement allowance be paid only from the end of the quarter following the date application for retirement was filed, with her annuity computed on the basis of age seventy, and if so

B-2. Is the member entitled to her annuity portion of the retirement allowance for the period from June 30 following the date she attained age seventy to the date the retirement allowance was begun?

B-3. If the retirement allowance is computed as of age seventy, which was attained on May 29, 1944, shall the retirement law governing the computation of the retirement allowance in effect on that date apply, or shall the retirement allowance be computed on the basis of the law in effect at retirement, June 30, 1949?

“4. When a member of the Public Employes Retirement System has made application for disability retirement, may such member withdraw his application for disability retirement at any time before his retirement allowance has been paid and accepted?”

Questions numbers one and two may be answered together. The facts which prompted the questions are, as I understand them, as follows:

X, a member of the Public Employes Retirement System, was born September 17, 1877 and was retired on June 30, 1949, with 7.543 years of contributing service during the period from February, 1939 to November, 1944, and from August, 1947 to April, 1949. During the period of December, 1944 to July, 1947 he was a member of the School Employes Retirement System. X attained the age of seventy on September 17, 1947.

Your question, then, is whether X must accept compulsory retirement in the School Employes Retirement System at the end of the year in which the age of seventy is attained, or whether his retirement may be deferred until June 30, 1949, the date he elected to retire in the Public Employes Retirement System, thereby permitting his service credit in the two systems to be combined for the purpose of determining his retirement allowance.

In passing, I should like to comment on the fact that in the School Employes Retirement System a member is to retire at the end of the

year in which the age seventy is attained, while in the Public Employes Retirement System a member is retired on June 30th following the date upon which the age of seventy is attained unless he is continued in service under the exception contained in Section 486-59. Your request does not contain facts indicating that the member was continued in service under said exception and therefore this discussion is limited in its scope to normal retirement situations.

Section 7896-99, General Code, relating to the School Employees Retirement System reads, in part, as follows:

*“ * * * At the end of the year in which they become members the retirement board shall retire all employes who were over seventy years of age at the time they became members and shall retire all other members at the end of the year in which the age of seventy is attained.”* (Emphasis added.)

Under the provisions of Section 7896-99, X, having attained the age of seventy on September 17, 1947, should have been retired at the end of 1947. However, in August, 1947, he apparently became a member of the Public Employes Retirement System. It is necessary at this point to examine Section 7896-90, General Code. This section reads, in part, as follows:

“An indefinite leave of absence may be granted under the following conditions:

“Any member who withdraws from school service and, who, before the expiration of his membership, becomes a member of the state teachers' retirement system or the public employes' retirement system of Ohio, or any other state retirement system established under the laws of Ohio, and who does not withdraw his accumulated contributions in this system, shall be considered as on indefinite leave of absence, so long as he retains such membership, until such time as he elects to retire or is forced to retire under the retirement provisions of the retirement act under which he is an active member at the time of retirement. Members on such leave of absence shall retain all rights and privileges of membership in the retirement system.”

In the instant case, X has withdrawn from school service before the expiration of his membership and has become a member of the Public Employes Retirement System. He has not withdrawn his accumulated contributions in the School Employees Retirement System and he is there-

fore under the provisions of Section 7896-90 supra, considered on an indefinite leave of absence, so long as he retains such membership, until such time as he elects to retire or is forced to retire under the provisions of the Public Employes Retirement System. He also retains all of the rights and privileges of membership in the School Employes Retirement System.

Therefore, in specific answer to your first two questions, it is not compulsory that such member be retired at the end of 1947, in the School System, but his retirement may be deferred until he retires in the Public Employes System and under the provisions of Sections 7896-99a and 486-63a(c), General Code, his service credit in the two systems may be combined for the purpose of determining his retirement allowance.

Your next question is as follows:

“When it is disclosed at the time of retirement that a member of the Public Employes Retirement System understated her age on the original personal history record, and such person upon filing application for retirement is found to be seventy-five years of age, how shall the retirement allowance be computed?”

Section 486-59, General Code, reads in part as follows:

“* * * 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. * * *”

The above quoted portion of Section 486-59 supra, reads the same today as it did in 1944. The language used is mandatory and it is therefore my opinion that the proper procedure for computing retirement allowance is as of June 30th following the date on which age seventy was actually attained. The application filed is of no force and effect because of the provisions of Section 486-59 supra.

The contributions by the member subsequent to June 30th following the date age seventy was attained, should be returned, and the law in effect at this time should govern the computation of the retirement allowance for the reason that if the present day law were used, it would have retroactive operation.

Your next question is as follows :

“When a member of the Public Employees Retirement System has made application for disability retirement, may such member withdraw his application for disability retirement at any time before his retirement allowance has been paid and accepted?”

In a letter accompanying your request you cite an opinion by my predecessor, being opinion No. 461, page 586, Opinions of the Attorney General for 1945. In that opinion the then Attorney General was asked whether a member of the State Teachers Retirement System who had filed his application for commuted superannuation retirement under Section 7896-36, General Code, may withdraw his application before his retirement allowance had in any part been paid or accepted. The then Attorney General's answer was in the affirmative.

I presume that in the case to which you refer, the application was tendered under the provisions of Section 486-61, General Code, and that there was no application made by the head of the department or other person on the basis of physical or mental incapacity, nor was there any medical examination under the provisions of Section 486-62, General Code. If the latter is true, the board must in all probability retire him.

Section 486-61, General Code, reads, in part, as follows :

“Any member who has completed thirty years of total service and has attained age 55 years, or has completed thirty-six years of service regardless of age may retire on a commuted superannuation allowance by filing with the retirement board an application for such form of allowance. *The filing of such application shall retire such member as of the end of the quarter of the calendar year then current.* Upon retirement on a commuted superannuation allowance, a member shall be granted a retirement allowance consisting of: * * *” (Emphasis added.)

Section 7896-36, General Code, at the time the 1945 opinion was rendered, read, in part, as follows :

“Any teacher who has completed thirty years of total service and who has attained fifty-five years of age, may retire, if a member, on a commuted superannuation allowance by filing with the retirement board an application for such form of allowance. Upon retirement on a commuted superannuation allowance, which

shall be effective as of the thirty-first day of August next following application, a teacher shall be granted a retirement allowance consisting of: * * *”

Prior to its amendment by the 96th General Assembly, the first paragraph of Section 7896-36 read as follows:

“Any teacher who has completed thirty-six years of total service may retire, if a member, on a commuted superannuation allowance by filing with the retirement board an application for such form of allowance. *The filing of such application shall retire such member as of the end of the school year then current.* * * *”
(Emphasis added.)

In 1945 the then Attorney General speaking of the portion of Section 7896-36 emphasized above, said on page 588:

“The words emphasized which have now been eliminated, might well have been construed to mean that the very filing of the application was a final and conclusive act which was binding upon both the teacher and the retirement board, and that the retirement having been automatically brought about, there could be no retraction by the teacher and no escape from the consequences of his act, no matter under what circumstances he had been led into filing the application. *I do not believe it would have had that effect, even as the law then stood*, but in view of the change, for which there must have been some motive on the part of the general assembly, I believe the present form of the section eliminates the possibility of such conclusion.”
(Emphasis added.)

In my opinion I do not believe that the emphasized words of Section 486-61, General Code, have the effect of prohibiting a withdrawal of the application. My reasons are essentially the same as those of my predecessor, namely that:

(1) There is nothing in the Public Employees Retirement Act which contemplates an acceptance on the part of the board of the offer of the employe to retire.

(2) All laws providing for pensions for disabled or old age benefits are construed liberally for the benefit of the persons who are entitled to receive the benefits of such laws.

(3) Retirement, at least prior to reaching age seventy, is purely a right granted to the employe to avail himself of the benefits of retirement, and no rights except his own are affected by his election to retire.

(4) Until payment has been made and accepted, nothing has taken place which would appear in the slightest degree to affect the retirement system.

In the light of the foregoing, it is my opinion that a member of the Public Employes Retirement System may withdraw his application for commuted superannuation allowance filed under the provisions of Section 486-6I, General Code, at any time before his retirement allowance has in any part been paid and accepted.

In summary and conclusion it is my opinion that :

(1) A member of the School Employes Retirement System may before the age of seventy is attained, transfer to the Public Employes Retirement System, and it is not compulsory that the School Employes Retirement System retire him at the end of the year in which the age of seventy is attained. Such member's retirement may be deferred until he elects to retire or is forced to retire in the Public Employes Retirement System, and his service credit in the two systems may be combined for the purpose of determining his retirement allowance.

(2) When it is disclosed that a member of the Public Employes Retirement System understated his age and was continued in the State service for several years after the age of seventy was attained, the date for computing his retirement allowance, is from June 30th following the date on which the age of seventy was actually attained. The contributions which such member made to the System subsequent to that date should be returned, and the law in effect at that time should govern the computation.

(3) A member of the Public Employes Retirement System may withdraw his application for commuted superannuation allowance filed under the provisions of Section 486-6I, General Code, at any time before his retirement allowance has in any part been paid or accepted.

Respectfully,

HERBERT S. DUFFY,
Attorney General.