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PUBLIC EMPLOYEE'S RETIREMENT—TERMINATION OF EMPLOYMENT SEPARATE FROM RETIREMENT—EMPLOYEE MAY GO ON "LEAVE OF ABSENCE" AND "RETIRE" AT HIS PLEASURE—§§145.32, 145.41 R.C.

SYLLABUS:

1. A member of the Public Employees Retirement System who has attained the age of seventy or will do so within the current calendar year and whose employment for that reason is terminated by his employer under the authority provided in Section 145.32, Revised Code, is not thereby retired as a member of such system without his consent, but such member, if he elects to do so, may withhold his application for retirement allowances to such future date as he may choose, being deemed in the interim to be on leave of absence as provided in Section 145.41, Revised Code.
2. The retirement rights of members of the Public Employees Retirement System, including those whose employment is terminated as provided in Section 145.32, Revised Code, and who elect to defer application for retirement to a future date, should be determined as provided in the statutes in effect at the effective date of such retirement following such application therefor.

Columbus, Ohio, June 4, 1959

Hon. Fred L. Schneider, Executive Secretary
Public Employees Retirement System, Columbus, Ohio

Dear Sir :

Your request for my opinion reads as follows :

“Because of the 1953 changes in Section 145.32 of the Revised Code and the further amendments to this section in 1955 some questions have arisen whether retirement is now compulsory and the determination of the date benefits become payable automatic for a member seventy or more years of age ; or whether the change in the language in this section makes it merely a matter of termination of employment with the member retaining the right to file an application for benefits at some later date selected by him.

“Because of these changes and questions we would appreciate an answer to the following questions :

“(1) Is the time for filing the application for his retirement benefits discretionary with the member who will be seventy or more years of age on June 30, 1959 or who will become seventy years of age on or before December 31, 1959 and whose employment is terminated by his employer, pursuant to the terms of existing Section 145.32 of the Revised Code?

“(2) Are the retirement allowances of such a member to be determined in accordance with the provisions of Section 145.33 of the Revised Code in effect at the time the member files an application for benefits, or in accordance with the statute in effect at the time of the termination of his employment by his employer?”

Section 145.32, Revised Code, to which you refer, reads as follows :

“On and after September 30, 1951, any member, who has passed his sixtieth birthday and has five or more years of total service credit, or has twenty-five or more years of total service credit and has attained his fifty-fifth birthday, or has thirty-six or more years of total service credit, regardless of age, may retire by filing with the public employees retirement board his application for retirement. The filing of such application shall retire such member as of the end of the month then current, provided his public service has terminated by that date.

“*An employer may, as of the thirtieth day of June of any year, terminate the employment of any member who has attained*

the age of seventy years, or who will attain the age of seventy years by the following thirty-first day of December. Any such employee whose employment is not so terminated shall be required to present a certification prior to the thirtieth day of June of each year by a physician licensed to practice in the state of Ohio, which physician is mutually acceptable to the employee and his employer, that the member is physically and mentally competent to perform the duties of the particular position which he occupies. Any member who accepts an allowance under section 145.32, 145.33, or 145.34 of the Revised Code, or who on or after October 31, 1953, is *compelled to retire* and who withdraws his accumulated contributions in lieu of accepting a retirement allowance is ineligible for regular re-employment in any capacity which comes within sections 145.01 to 145.57, inclusive, of the Revised Code.

“A member may at the time of his retirement by written designation duly executed and filed with the public employees retirement board designate a beneficiary to receive any installment which may remain unpaid at the time of his death. After the date of his retirement such nomination shall not be changed if the member elects to receive his retirement allowance computed as Option 1 or Option 2, provided in section 145.46 of the Revised Code.” (Emphasis added)

The first paragraph of Section 145.32, *supra*, provides for *voluntary* retirement of certain members of the Public Employees Retirement System, such retirement being accomplished by the *filing of an application for retirement*. The second paragraph of said Section provides for the *forced termination of employment*, as of the thirtieth day of June, of any member who has attained the age of seventy years, or who will attain the age of seventy years by the following thirty-first day of December.

The question to be decided in the instant case is whether a termination of employment of a member under the second paragraph of Section 145.32, *supra*, also retires said member under the Public Employees Retirement System law. If so, then there is no authority under said paragraph for an application to retire, and retirement allowances are determined by the date of termination of employment (June 30).

Under former Section 486-59, General Code, (now Section 145.32, Revised Code) there was no question about the retirement date of such 70 year old members as the law then stated definitely that the *Retirement Board* should *retire* such members as of June 30. In this regard, Section 486-59, General Code, read in part:

“* * * On June 30 following the date upon which he becomes a member *the retirement board shall retire* any employee 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 attached. * * *” (Emphasis added)

In 1953, Section 486-59, General Code, was amended (125 Ohio Laws, 273), and as thus amended was thereafter recodified as Section 145.32, Revised Code (125 Ohio Law, 254). As amended, the pertinent language of the second paragraph was changed to read:

“* * * Prior to June 30, 1955, *an employer may*, as of the thirtieth day of June of any year, *terminate the employment of any member* who has attained the age of seventy, or who will attain the age of seventy by the following thirty-first day of December. * * *” (Emphasis added)

Thus, the authority to retire a 70 year old member was taken from the Retirement Board, and instead the *employer* was given the right to *terminate the employment* of such a member.

In the prior statute it was plainly provided that the *retirement board* should *retire* the member concerned, and this plainly implies that such member's employment was thereby terminated. In the later statute this authority of the board *to retire* a member without his consent was deleted, and his *employer* was authorized merely *to terminate* the member's employment. A member of the retirement system does not, of course, automatically cease to be such member upon mere termination of his employment. See Section 145.41, Revised Code.

There being this plain distinction between (1) the power to “retire” a member without his consent, and (2) a power “to terminate the employment” of a member, some effect must be given to this deliberate choice of language by the General Assembly, and the only effect which can be logically given it is that it was thereby intended to delete from the law the power to retire a member without his consent.

It is true, of course, that there remains in Section 145.32, Revised Code, a reference to “any member who * * * is compelled to retire”. While this may be thought to *imply* the existence elsewhere in the statute of a power to compel retirement, this language itself does not *provide* such power, and, as we have noted above, the language which formerly provided such power was deleted by legislative action. This reference to a

“member who * * * is compelled to retire” must accordingly be regarded as having been retained in the statute by inadvertence on the part of the legislative draftsmen concerned, but however this may be it cannot be regarded as supplying a power which was plainly deleted by the amendment of 1953 to which we have referred. At most, the retention of this language can be regarded as introducing an ambiguity into the statute. In welfare legislation generally, and, of course, in the case of pension statutes, a liberal construction in favor of the beneficiaries, where ambiguity is found, is the commonly accepted rule. 40 American Jurisprudence, 963, Section 4.

I conclude, therefore, that members of the system whose employment is terminated by the employer as provided in Section 145.32, Revised Code, are not thereby retired. In such a case, absent an application for retirement, or for withdrawal of his accumulated contributions, a member is deemed to be on leave of absence as provided in Section 145.41, Revised Code, and may thereafter, in his discretion, either elect under the provisions of the initial paragraph of Section 145.32, Revised Code, to retire or to withdraw his contributions as provided in Section 145.40, Revised Code. Should such member elect at some future date to be retired as provided in Section 145.32, Revised Code, his rights to retirement allowances would be ascertained by the statutes in effect at the effective date of such retirement, i.e., at “the end of the month then current” in which his application therefor is filed.

In specific answer to your query, therefore, it is my opinion and you are advised:

1. A member of the Public Employees Retirement System who has attained the age of seventy or will do so within the current calendar year and whose employment for that reason is terminated by his employer under the authority provided in Section 145.32, Revised Code, is not thereby retired as a member of such system without his consent, but such member, if he elects to do so, may withhold his application for retirement allowances to such future date as he may choose, being deemed in the interim to be on leave of absence as provided in Section 145.41, Revised Code.

2. The retirement rights of members of the Public Employees Retirement System, including those whose employment is terminated as provided in Section 145.32, Revised Code, and who elect to defer applica-

tion for retirement to a future date, should be determined as provided in the statutes in effect at the effective date of such retirement following such application therefor.

Respectfully,

MARK McELROY

Attorney General