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RETIREMENT ACT, PUBLIC EMPLOYES'—WHERE PERSON IS "EMPLOYE" OF TWO GOVERNMENTAL UNITS, OBLIGATION TO CONTRIBUTE TO EMPLOYER'S ACCUMULATION FUND RESTS UPON BOTH EMPLOYERS—PROPORTION—AMOUNTS PAID BY EACH EMPLOYER TO SUCH EMPLOYE —SECTION 486-68 G. C.

SYLLABUS:

Where a person is an "employee" within the definitions contained in the Public Employes' Retirement Act, of two governmental units, the obligation to contribute to the employer's accumulation fund, as provided in Section 486-68, General Code, rests upon both employers in proportion to the amounts paid by them respectively to such employe.

Columbus, Ohio, April 3, 1946

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

Dear Sir:

Your request for my opinion reads as follows:

> "The Retirement Board has instructed its Secretary to request your opinion as to the manner in which the Board is to issue the Employer Billings covering members of the Judiciary and various other public employes who are paid by more than one Governmental unit.

The Statutes provide that the salaries of the Judges of the Municipal, Common Pleas, Appellate and perhaps other Courts are to be paid in part by certain Governmental units, and in part by one or more other Governmental units. The same condition exists with respect to the Clerk of the Municipal Court, the Police Prosecutor, Judges of the Court of Domestic Relations and the Juvenile Court, and various other appointees of Counties, Municipalities and perhaps other Governmental units. This situation presents a problem in issuing the Employer Billings provided for in Section 486-68a, General Code. For this reason the Public Employes Retirement Board wishes your opinion as to how and to whom these Employer Billings are to be issued."

In Section 486-32, General Code, we find a series of definitions of words and phrases used in the Public Employees' Retirement Act, which is comprised in Sections 486-32 to 486-75 of the General Code. Paragraph 4 of Section 486-32 reads, in part, as follows:

" 'State employe' shall mean any person *holding a state office,* not elective, *under the state of Ohio, or employed and paid in whole or in part by* the state of Ohio in any capacity whatsoever." (Emphasis added.)

Section 486-33c reads, in part, as follows:

"For the purposes of this act, 'county or municipal employees' shall mean any person *holding a county or municipal office,* not elective, in the state of Ohio, *or paid in full or in part by any county or municipality in any capacity whatsoever."* (Emphasis added.)

It will be observed that in these definitions a person is a state employe or a county or municipal employe under two named circumstances: (1) by holding a state, county or municipal office, not elective, or (2) by being paid in full or in part by the state or by any county or municipality. In other words, although he may not be holding a state office, he may fall within the classification of state employe if he is paid in full or in part by the state. By like reasoning, one may for the purpose of the Act be classed as a municipal employe although he may not be holding a municipal office, provided his compensation is paid in part or in full by the municipality. While it may seem to involve a contradiction of terms to hold that one should be called a municipal employe who is not employed by the municipality, still it must be borne in mind that the definitions contained in an act are designed by the legislature

for the interpretation of that particular act and are, in a sense, arbitrary, and may not necessarily follow the ordinary definition of words or phrases. The general assembly apparently had a distinct purpose in broadening the definition of "state employe" or "county and municipal employe" for the purpose of the act in the manner and to the extent which I have indicated.

The words "not elective" may be disregarded in view of the comparatively recent enactment of Section 486-48, General Code, permitting elective officials, at their own option, to become members of the system.

In Section 486-68, General Code, we find provisions relative to the contribution to be made by a member of the system to the employes savings fund, as a basis for his annuity upon retirement. That section reads, in part, as follows:

> "Beginning October 1, 1945, each state employe who is a member of the state employes retirement system shall contribute five per centum of his *earnable salary or compensation,* not exceeding three thousand dollars per annum, to the employes savings fund. *The head of the department shall deduct from* the compensation of *each contributor on each and every payroll* of such contributor for each and every pay-roll period subsequent to the date upon which such contributor became a member, an amount equal to five per centum of such contributor's earnable *salary* or *compensation,* provided that the amount of a contributor's earnable salary or compensation in excess of three thousand dollars per annum shall not be considered."
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> (Emphasis added.)

While the above quoted section is limited in its terms to "state employe" it must be borne in mind that by the provisions of Section 486-33a, et seq., General Code, all of the provisions of the original state employes' retirement act were broadened to include the employes of the various subdivisions, including counties and municipalities. It appears, therefore, that it is made the duty of the head of *each department* to deduct from the compensation of each contributor *on each and every payroll* the percentage specified in the statute. It will be noted that the amount of the contributor's earnable salary or compensation in excess of three thousand dollars per annum shall not be considered.

The words "head of the department" are defined in paragraph 6 of said Section 486-32, General Code, as follows:

> "'Head of the department,' as applied to state employes, shall mean the elective or appointive head, as the case may be, of the several executive, judicial and administrative departments, state institutions, boards and commissions of the state government as the same are created and defined by the General Code."

A like interpretation is by the terms of Section 486-33c, General Code, to be given to the "head of the department" as applied to the various political subdivisions which have been brought within the scope of the law. It will be noted that this obligation to make a deduction from the employe's compensation is not limited to the head of the department to which the employe primarily belongs but extends to every head of department whose duty it may be to make out a payroll including the name of the person in question. Manifestly, an employe of a municipality upon whom the law casts some duty by way of service to the county or state for which the county or state is to pay a salary or compensation direct to the employe, will have his name on the payroll not only of the municipality but also on the payroll of the county or state, and the duty to make this deduction falls equally upon both the municipality of which he is primarily an employe and upon the county or state which has the obligation to pay him a certain compensation. The fact that a certain officer chosen by the electors of a city may be denominated, for the purposes of general law, an officer of that city and not an officer of the state, does not prevent him, in the light of the statutes which I have quoted, from being, for the purpose of the retirement act, an employe both of the municipality and of the state. Thus, while it has been held that a municipal judge is a municipal officer, so far as his nomination and election is concerned (State ex rel v Bernon, 127 O. S. 204), yet since the statute creating a municipal court usually gives it jurisdiction coextensive with the county, over certain matters of criminal character, we find in the several municipal court acts provisions requiring the payment to the judge of a salary both by the city and the county. Typical of this is the provision of Section 1558-48, General Code, relating to the municipal court of Columbus, which provides, in part, as follows:

> "Judges of the municipal court shall receive such compensation payable out of the treasury of Franklin County, not less than one thousand dollars per annum in monthly installments, as the county commissioners may prescribe, and such further compensation not less than two thousand five hundred dollars per annum, payable in monthly installments out of the treasury of the

city of Columbus, as the council may prescribe. The presiding judge shall receive such compensation, not less than three thousand dollars, payable in monthly installments out of the treasury, as the council may prescribe and such further compensation payable out of the treasury of Franklin County, not less than one thousand dollars per annum in monthly installments, as the county commissioners may prescribe."

It appears too clear to require discussion, that the municipality, in the case of such municipal judge, could only deduct from his municipal salary the prescribed percentage of the compensation shown on its own payroll. If, therefore, we take a case where the employe thus serving two employers is only receiving $2,000.00 from the one and $1,000.00 from the other, then his total deduction and total contribution would be limited to five percent of $2,000.00, or $100.00, if his employment by the city alone is to be considered, whereas it is the plain intent of the law that he is allowed and required to contribute up to a maximum of five percent of $3,000.00, if he earns that much.

In addition to the employe's contribution on which his annuity is based, the employer is required to make certain contributions to the fund, for the purpose, first, of matching his annuity and, second, to provide the prior service pension to which he may be entitled. Section 486-66a provides, in part:

"Beginning January 1, 1939, each county, municipality, park district, conservancy district, health district and public library as employers, and beginning January 1, 1945, the state of Ohio, as employer, and beginning October 1, 1943, each township as employer, shall pay to the employer's accumulation fund a certain per centum of the compensation of each employe member, to be known as the 'normal contribution' and a further per centum of the earnable compensation of each such member to be known as the 'deficiency contribution,' * * *. In computing the contributions of each county, municipality, park district, conservancy district, health district, township and public library, as herein provided, the amount of a contributor's earnable salary or compensation in excess of two thousand dollars per annum shall not be considered. Beginning January 1, 1938, and until January 1, 1945, the state shall pay to the retirement board into such funds as the board may designate, the amount necessary to pay the state's share of the retirement allowance of such state employee who may be retired during that period, and any unexpended balance in such appropriation existing on December 31, 1944, shall lapse into the fund from which such moneys are appropriated."

Plainly, the interpretation which we have applied to "employe" applies equally to "employer." The employe, on retirement, cannot receive the full benefit to which the law entitles him, unless each of his employers makes its proper share of the contribution required.

It will be noted that in this section dealing with the employer's contribution, the ceiling is fixed at $2,000.00 on the employe's salary. This variation from the $3,000.00 limitation on the salary for the purpose of fixing the employe's contribution has no effect in arriving at the allocation as between two employers.

In determining the amount to be deducted by each in remitting the employe's contribution, it should be allocated to each in proportion to the amount of the employe's salary paid by each. The excess over $3,000.00 should be deducted from his total compensation before making the allocation.

As to your billing to the employers for their contributions, it should follow the same formula as above indicated in respect to the deduction from the employe's salary. I see no other possible procedure that would be fair to the two employers whose payments are intended to contribute to the maintenance of the retirement fund in proportion to the amount of compensation which they pay to their employes.

Respectfully,

HUGH S. JENKINS,
Attorney General