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RETIREMENT SYSTEM, PUBLIC EMPLOYEES—MEMBER WHO ATTAINS SEVENTIETH BIRTHDAY PRIOR TO JUNE 30, 1948 —FILED APPLICATION FOR CONTINUANCE IN SERVICE PAST COMPULSORY RETIREMENT AGE—WHEN APPROVED BY APPOINTING AUTHORITY MEMBER AUTHORIZED TO TRANSFER TO AND CONTINUE IN EMPLOY OF ANOTHER APPOINTING AUTHORITY--SECTION 486-59, PARAGRAPH 2, G. C.

SYLLABUS:

A member of the public employes retirement system who attains his seventieth birthday prior to June 30, 1948, and who had filed an application for continuation in active service past the compulsory retirement age, approved by the appointing authority as provided in paragraph 2, Section 486-59, General Code as amended, is authorized to transfer to and continue in the employ of another appointing authority.

Columbus, Ohio, March 2, 1949

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

Dear Sir:

Your request for an opinion dated January 14, 1949, and corroborated by a telephone conversation of January 20, 1949, is as follows:

“The Retirement Board has instructed me to request your opinion upon the following question:

“Is a member of the retirement system who had attained his seventieth birthday prior to June 30, 1948 and who had filed an application for continuation in active service past the compulsory retirement age, approved by the appointing authority, as provided for in paragraph two of Section 486-59, General Code, authorized to transfer to and continue in employ of another appointing authority?”

“Perhaps it should be added that the application to continue in service provided a termination date, June 30, 1949, although the term of office of the appointing authority who approved the application terminated January 10, 1949.”

The opinion of the Attorney General dated February 18, 1938, No. 1951, states that where a member of the State Employes Retirement System has reached the age of seventy years and before the end of the year has filed with the State Employes Retirement Board his "Application for Continuance in Active Service Past Compulsory Retirement Age" approved by the head of his department or institution, the head of the department or institution cannot request the State Employes Retirement Board to permit him to withdraw such approved application after January 1.

The reasons set out in the above mentioned opinion and which are equally applicable to the present situation are as follows:

1. The compulsory language of the statute, Section 486-59 and Section 486-68 of the General Code (as it existed at that time,) required that the Retirement Board must retire "at the end of the year" all members who have attained the age of seventy years in that year and all members who were seventy years of age previous to 1937, except state employes in the classified service holding positions of exceptional qualifications as specified or, those who having reached the age of seventy years have been approved by the head of the department or institution for continuance in "service for a period of one year."

The language used negatives any action whatsoever on the part of the State Employes Retirement Board if "Application for Continuation in Active Service Past Compulsory Retirement Age" has been filed with the board, in fact, it is notice to the board that it must not take any action to retire that member (*and that the status of a member who has been approved for continuation in service for a year is the same in the State Employes Retirement System as the status of any other member who has not attained the age of seventy years*). (Emphasis mine.)

2. Also it is important to note that the State Employes Retirement Board is not authorized to retire on a superannuation allowance at any other time than "at the end of the year" and that payment of the superannuation allowance must begin at the beginning of the year following the "end of the year" in which the board has retired the member.

3. Thus a member of the State Employes Retirement System who was, or who, in the year preceding such January 1, reached the age of seventy years, is entitled to one of two privileges, either, (1) to have his

superannuation allowance commence to run on January 1 and receive his monthly allowance for such month of January on the date that the board has determined such January allowance will be payable, or (2) he is entitled to commence his employment on January 1 for a period of a year by reason of having had approved an application for continuation of service.

4. It is to be noted that by the provision of Section 486-59, General Code (as it then existed,) it is entirely within the discretion of the head of the department or institution to determine whether or not to approve an "Application for Continuation in Active Service Past the Compulsory Retirement Age." In approving such application the head of the department is left to his own judgment and discretion. It therefore can be said that in approving such application the head of the department is performing a judicial act. Judicial acts are defined as those acts that "involve the investigation and determination of a state of fact, an act of choice or discretion of judgment as to the propriety of actions to be taken in reference to the facts thus ascertained." 32 O. Jur. 952, citing 10 O. N. P. (ns) 505, *The Board of Education of Washington Twp. v. The Board of County Commissioners, et al.*

5. The approval of the application being a judicial act, such officer may not subsequently reverse his opinion or determination thereto. The opinion is binding upon him. See 147 U. S. 165, and more especially 3 O. App. 426, *State ex rel. Weiss v. Keefer, et al., Civil Service Commissioners.*

No distinction exists between a case where a member, by reason of having his application for continued service approved, is permitted by the head of the department to work after January 1, and the head of the department on January 6 requests a withdrawal of the approved application, and where a member worked after January 1 by reason of his approved application for continued service and at a later date, for instance June 6, 1948, the head of the department withdraws such approved application. It is evident in the latter case such approved application could not be withdrawn. The same reasoning applies to the former.

Other reasons assigned by the opinion need not be considered in the determination of this question, since they are not applicable by reason of the amendments set out below.

Section 486-59, General Code, as amended now reads :

"On and after January 1, 1939, any member, except a new member with less than five years of service, who has attained sixty years of age, may retire by filing with the retirement board an application for retirement. The filing of such application shall retire such member as of the end of the quarter of the calendar year then current.

"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. Provided, that until September 1, 1948, any member having reached the age of seventy years may, upon written application approved by the head of his department or institution, be continued in service for a period of one year, or any part thereof, such applications to expire on the June 30 following the date upon which they were filed unless renewed on or before the expiration date. On and after September 1, 1948, no such applications for continuation in service shall be approved, and any member who accepts an allowance under sections 486-59, 486-60 or 486-61 of the General Code, or who is compelled to retire at the age of seventy years and who withdraws his accumulated contributions in lieu of accepting a retirement allowance shall be ineligible for regular reemployment in any capacity which comes within the provisions of the public employes retirement act.

"Any former member who is receiving a monthly retirement allowance as provided in section 486-60, General Code, and providing such former member was seventy or more years of age at the time of retirement, shall have his retirement allowance adjusted to become effective as of the end of the quarter of the calendar year next following the date the public service of such member was terminated.

"In the event any retired pensioner, after such retirement, is elected to a full-time salaried office by the electors of the state or any political subdivision thereof at any election, such pensioner, by the acceptance of any such office shall forfeit his pension during the period such pensioner so holds such office and receives the salary therefor."

Section 486-68, General Code, as amended now reads :

"Beginning October 1, 1945, each public employe who is a member of the public employes' retirement system shall contribute

five per centum of his earnable salary or compensation, not exceeding three thousand dollars per annum, to the employees' savings fund. The head of the department shall deduct from the compensation of each member on each and every pay roll of such member for each and every pay roll period subsequent to the date upon which such employe became a member, an amount equal to five per centum of such member's earnable salary or compensation, provided that the amount of a member's earnable salary or compensation in excess of three thousand dollars per annum shall not be considered. Provided further, if the member is contributing to one or more other state retirement systems during a given calendar year while also contributing to this system, he shall not be allowed to contribute to this system during the same calendar year an amount greater than the ratio that the salary on which the contributions to this system bears to the total salary received on which his contributions to all state retirement systems is based. The retirement board may accept contributions provided for in this act on any salary or salaries earned during any pay roll period or periods without regard to the maximum salary provisions, provided deductions cease entirely for the remainder of the calendar year if and when the total contributions deducted from the member's salary for the employees' savings fund for such calendar year equal five per centum of the actual salary received but in no case shall the salary on which such contributions are made exceed three thousand dollars. In determining the amount of salary earned by a member in a pay roll period, the retirement board and the head of the department may consider the rate of compensation payable to such member on the first day of the pay roll period, and deductions may be omitted from such compensation for any period less than a full pay roll period, if an employe was not a member on the first day of the pay roll period."

The question presented is whether the two sections as amended are *in pari materia* with the two sections as they existed at the time the above mentioned opinion was written.

It will be noted that the first paragraph of Section 486-59, General Code, as amended, says "as of the end of the *quarter* of the calendar year then current." (Emphasis mine.) This is a departure from the original section. Also the first sentence of the second paragraph of said section states "On *June 30* following the date upon which he becomes a member * * *." (Emphasis mine.) There then follows a proviso about electing members and it continues that "On and after September 1, 1948,

no such applications for continuation in service shall be approved, * * *." Section 486-68, General Code, has been changed in several unimportant provisions. The date has been changed to read October 1, 1945; the percentage of contributions has been changed to five per centum; and the maximum amount upon which contribution is based has been changed from \$2000 to \$3000. Other such changes in the section are not important.

However, Section 486-59, General Code, has been changed materially. It will be noted that instead of reading "at the end of the year," the amended section reads that the board shall retire "at the end of the *quarter of the calendar year then current.*" This at first blush would seem to change the reasoning of the above opinion. As it will be noted the opinion stresses the words "at the end of the year"; it must also be noted that upon written application the member may be continued in service "for a period of one year" the same as in the previous section, but with the addition "or any part thereof." From this language it will be noted that the head of the department may at his *discretion* approve an application for a year *or any part thereof*. This is the same as in the former statute with the exception of the language "or any part thereof." But it must also be called to attention that while the first part of the paragraph of reason No. 1 does not apply, still the second paragraph contains good statutory construction that may be applied to both the original and the amended section. The language used still negatives any action on the part of the board. The approved application is still notice to the board that it must not take any action to retire such member, and that the status of a member who has been approved for continuation in service for a year ("or any part thereof" under the amended statute) is the same, and that a member of the Public Employes Retirement System has the status of any member who has not yet attained the age of seventy.

Reason No. 2 in the opinion clearly does not apply to the amended section unless the words "at the end of the year" are deleted and the words "at the end of the quarter of the calendar year then current" are substituted. Thus applying the same reasoning by substituting the above words we note that the logic of the reasoning used follows in the same order except that the time when the member may retire has been changed.

Reason No. 3 assigned in the original opinion presents two alternatives. The first alternative still applies and the second applies if the

words "or any part thereof" are inserted after the words "for a period of a year."

Therefore all the reasons assigned in the original opinion apply to the present section of the statute if the above mentioned words are inserted in their proper place. Thus if we were to stop here and not examine the other reasons it would appear that on March 31, 1949 the member in the instant case would be eligible to retire unless his application approved by the head of his department was for a year or any part thereof. It will be noted that by the terms of the section as amended he must retire on June 30, 1949, as the statute provides that the applications above mentioned are suspended as of September 30, 1948, such date having passed. However, it will be noted that where the application was filed within the proper time as required by the statute and said application was approved for a period of *one year*, what then is the effect of such approval?

In my opinion it is at this point that the two statutes can be considered in *pari materia* and that the reasoning of the above opinion is equally applicable to the present situation. I take such a position because of reason No. 4 in the opinion above, which describes the head of the department approving such applications as an officer acting in a judicial capacity, and as stated in reason No. 5, such department head acting in a judicial capacity may not subsequently reverse his own opinion or the opinion of his predecessor. Since acting in a judicial capacity the department head who approves the member's application for a period of a year, which by the terms of both the old and the new section he is permitted to do, neither he, nor his successor, may revoke such approval during or before such yearly period.

Since the approval of said application was a judicial act it is not reversible unless such judicial action is clearly beyond such officer's jurisdiction. There is no doctrine better established in law that the acts of an officer, within the scope of his power and authority, are presumed to be rightfully and legally performed; that is, the action of a public officer or board, within the jurisdiction conferred by law, is presumed to be not only valid but also in good faith and in the exercise of sound judgment. Before a court will take cognizance of a claim that the action of such officer or board is unlawful, arbitrary, unreasonable or of such a character as to constitute an abuse of discretion, facts must be set forth

which warrant such conclusions. 32 O. Jur. 953, citing numerous cases therein.

Here the action performed was clearly within the jurisdiction of such officer or head of the department, since such jurisdiction is clearly established by the statute. The statute clearly says that the head of the department may approve an application for a *year* or any part thereof.

Therefore, in specific answer to your question, I am of the opinion that a member of the public employes retirement system who attains his seventieth birthday prior to June 30, 1948 and who had filed an application for continuation in active service past the compulsory retirement age, approved by the appointing authority as provided in paragraph 2, Section 486-59, General Code as amended, is authorized to transfer to and continue in the employ of another appointing authority.

Respectfully,

HERBERT S. DUFFY,
Attorney General.