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1. RETIREMENT SYSTEM, PUBLIC EMPLOYEES — PUBLIC EMPLOYEE, APPOINTIVE OR ELECTIVE, WHO CEASES TO BE MEMBER FOR CAUSE OTHER THAN DEATH OR RETIREMENT, MAY UPON DEMAND WITHIN TEN DAYS AFTER CESSATION OF SERVICE, BE PAID HIS ACCUMULATED CONTRIBUTIONS IN SAVINGS FUND—MEMBERSHIP CEASES.
2. FAILURE TO MAKE DEMAND FOR PAYMENT ACCUMULATED CONTRIBUTIONS—NEW PUBLIC EMPLOYMENT—FURTHER CONTRIBUTIONS TO FUND — MEMBERSHIP MAY NOT THEREAFTER BE DISCONTINUED OR CONTRIBUTIONS WITHDRAWN—SECTIONS 486-65, 486-65a G. C.

## SYLLABUS:

1. A public employe, whether appointive or elective, who has become a member of the public employes retirement system, and who ceases to be such employe for any cause other than death or retirement, pursuant to the provisions of Sections 486-65 and 486-65a, General Code, may, upon demand within ten years after such cessation of service, provided he has not returned to active duty as a public employe, be paid the accumulated contributions standing to the credit of his individual account in the public employes savings' fund, and thereupon his membership in said public employes retirement system shall cease.

2. Where a person who has been a contributing member of the public employes retirement system ceases to be such employe for any cause other than death or retirement, and fails to make demand for payment of the accumulated contributions standing to his credit in the public employes savings' fund, but accepts and enters upon a new public employment falling within the purview of the public employes retirement system, and makes further contributions to said fund, he may not thereafter, during his retention of such new employment, discontinue his membership in said retirement system or withdraw his contributions.

Columbus, Ohio, June 21, 1943.

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

Dear Sir:

I acknowledge receipt of your communication requesting my opinion, as follows:

“Under the Public Employes Retirement Act elective officials who are paid by a political subdivision are eligible for member-

ship in the retirement system upon application. In order to avoid difficult administrative problems and in line with what we believed to be the correct interpretation of the law, we have held that if an elective official applied for membership he must then continue such membership as long as he is upon the public payroll even though he may be transferred to another position by the electorate. We now have a case of a judge of the Common Pleas Court who applied for membership in the retirement system while occupying the position of Prosecutor, who was later elected judge and who continued his regular contributions for a period of four months after assuming the position on the bench and who now requests withdrawal from membership in the retirement system on the basis that he changed positions with a resultant separation.

We are enclosing copies of the letter from the judge and of our reply to him. We therefore request your opinion as to whether an elective official can apply for membership and after having established such membership withdraw at his discretion."

Accompanying your letter is a communication from the judge in question and I consider it proper to set forth that letter in order that we may have before us the entire argument from his standpoint:

"This will acknowledge receipt of your letter of April 29th. There is no hesitancy on my part to acknowledge that I made compliance for membership in the retirement system. While it may not concern the system and it was through negligence on my own part, I was led to believe that the amended act required that I become a member and that it was a compulsory proposition.

You cite that for the past four months deductions have been made. Of course I had no control over this matter since the deductions were made by the Auditor of the county, with the possible exception that I was negligent in voicing my desire to withdraw.

While it is a fact that I left the office of the Prosecuting Attorney to assume the duties of Common Pleas Judge, the other fact is unavoidable that there was an actual separation of employment during which time I occupied no office whatever.

It is doubtful in my own mind that one occupying a judicial office should be a member of the retirement system. It is equally doubtful in my mind that the act was ever intended to include judicial offices, as a judge is, under no circumstances, a public employe. Public employes, if not directly, by inference refer to persons connected with the executive department of governments and not the judicial or legislative branches.

It is doubtful in my own mind that when the act was drafted it actually intended to include anyone else other than those in the executive branch of the government. At least it is clear that the original act did not intend to comprehend elected officials and concerned itself only with those employees who have devoted years of service.

It must also be remembered that a county is nothing more than a political subdivision of the state. Its elected officials and public employes are only therefore executive agents of the state and it was both through convenience and necessity that county government was established.

I fully recognize the sincerity of the policy which you claim is established, and I make no claim that you are assuming a purely arbitrary attitude in my particular situation. I have my own personal reasons for desiring to withdraw and there is no occasion to burden you here with those reasons."

Your inquiry raises questions which, so far as I am able to find, have not been touched upon in any previous opinion or adjudication.

Prior to the passage of Section 486-48, General Code, as part of the act known as the public employes retirement system (Sections 486-32 to 486-75, inclusive, General Code), the system included only employes of the state and the several political subdivisions thereof, other than elective officers. This new section, which was enacted in 119 O. L., 151, became effective August 1, 1941, and reads as follows:

"Any other provisions of law notwithstanding, on and after June 30, 1941, *any elective official* of the state of Ohio or of any political subdivision thereof having employes in the public employes retirement system *shall be considered as an employe* of the state of Ohio or such political subdivision, and *may become a member* of the public employes retirement system upon application to the retirement board, with all the rights, privileges and obligations of membership. Service as any such elective official by any member of the retirement system prior to January 1, 1935, shall be included as prior service.

Credit for service between January 1, 1935, and June 30, 1941, may be secured by such elective official provided he shall pay into the employes savings fund an amount equal to the accumulated contributions of such member had he been a member during such period. The retirement board shall determine the amount and manner of payment of such contributions." (Emphasis mine.)

Accordingly, it is clear that the officer in question, when he was

elected prosecuting attorney, did not automatically become a member of the retirement system and he only became such member because, as appears from your letter and his own statement, he made application for membership. We therefore must look to the statutes to determine under what circumstances, if at all, having once become a member he may sever his connection with the system.

It is to be noted that as to all appointive officers and employees, membership is in general compulsory. In Section 486-33, a part of the original act, it was provided:

“ \* \* \* Membership in the state employes retirement system shall be compulsory and shall consist of all state employes, either as original members or as new members upon being regularly appointed. Provided, however, that any original member may be exempted from membership by filing written application for such exemption with the retirement board within three months after this act goes into effect; and any new member over the age of fifty years may be exempted from membership by filing written application for exemption with the retirement board within three months after being regularly appointed as a state employe. \* \* \*”

Section 486-33a, in extending the system to public employes generally, makes almost identical provision limiting the right of a member to obtain exemption to a period of three months after his appointment.

Section 486-65, General Code, reads as follows:

“A contributor who ceases to be a state employe for any cause other than death or retirement, upon demand, within ten years after such cessation of service, shall be paid the accumulated contributions standing to the credit of his individual account in the state employes' savings fund. Ten years after such cessation of service, if no previous demand has been made, any accumulated contributions of a contributor shall be returned to him or to his legal representative. If the contributor or his legal representatives cannot then be found, his accumulated contributions shall be forfeited to the retirement system and credited to the guarantee fund.”

The reference in the above section to “state employe” is to be read as “public employe” in view of the provisions of Section 486-33a, which extended the system to include the employes of counties and other political subdivisions. Standing alone, it would appear from Section 486-65 that an elective official, whose term is definitely fixed by law and who serves out his term of office or resigns therefrom, ceases to be a public employe

“for a cause other than death or retirement.” The law therefore gives him the right upon demand at any time within ten years after cessation of service to be paid the accumulated contributions standing to his credit. There is nothing in this section, however, that indicates that his cessation of *employment* shall, ipso facto, terminate his *membership* in the retirement system. However, it is my opinion that he would have a right to terminate it in such case by immediately withdrawing his contributions, or by indicating his intention to do so.

The above noted Section 486-65 is a part of the original act and became effective October 20, 1933. Section 486-65a, which was subsequently added, is plainly supplementary thereto and is to be read in connection with Section 486-65. In my opinion, it sheds additional light on the situation. Section 486-65a reads:

“*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. A member who separates from his service as a public employe for any reason other than death or retirement may leave his accumulated contributions, if any, on deposit with the retirement board and, for the purposes of the retirement system, be considered on a leave of absence for a period of five years, at the end of which period, if such member has not returned to active service as a public employe, the retirement board may, upon application, grant such additional leave as the retirement board may deem proper, providing that such additional leave shall not exceed a period of five years. A member who ceases to be a state, county, municipal, park district, conservancy, health or public library employe and who does not withdraw the accumulated contributions standing to his credit in the employes savings fund and who subsequently becomes eligible and accepts membership in any other retirement system established under the provisions of the laws of this state or of any charter shall be considered for retirement purposes as being on an indefinite leave of absence as long as such member retains membership in such other retirement system. Members on such leaves of absence shall retain all rights and privileges of membership in the retirement system. Members who separated from the state service subsequent to October 20, 1933, and prior to January 1, 1935, shall be considered upon such leave.*” (Emphasis mine.)

From this it would seem clear that a member who separates from the service as a public employe for any reason other than death or retirement, and who does not exercise his right to withdraw his contribution and to terminate his membership, is to be considered as retaining his membership and as being on a leave of absence, which may extend for a period of five years. It is further provided that if within said period of five years a member “has not returned to active service as a public employe,” the

retirement board may upon application grant an additional leave not exceeding five years. The further provision of this section to the effect that an employe member who does not withdraw his contributions but who accepts a position whereby he becomes a member in any other retirement system of the state shall be considered on an indefinite leave of absence as long as such member retains membership in such other retirement system, is suggestive of the legislative intent that his membership continues even though he has finished the employment which brought him into membership. Section 486-65a further provides:

“Members on such leaves of absence shall retain all rights and privileges of membership in the retirement system.”

From the above noted provisions of Sections 486-65 and 486-65a, it seems clear to me that it is the intention of the law that one who has become a member of the retirement system, either by the provisions of the act itself in case of a non-elective employe or by his own volition in the case of an elected officer, and who upon his cessation of that public service does not exercise his right to terminate his membership and withdraw his contribution, does thereby retain his membership in the system with all of the privileges *and all of the obligations* pertaining thereto. If he does return to public service during his leave of absence, his leave terminates and he assumes his status as an active member.

Sections 486-65 and 486-65a make no distinction between an employe who became a member by reason of the compulsory features of the act, and one who became a member on his own application. In either case he is a member and can retire from membership only under the conditions set forth in the statute. If it be claimed that Sections 486-65 and 486-65a, which we have been considering, were enacted prior to the passage of Section 486-48, and therefore did not contemplate or include elective officials, it may be answered that the Legislature in enacting Section 486-48, giving elective officials the right to enter the system, had before it the provisions of those earlier sections and expressly provided that an elective official “shall be considered an *employe* of the state of Ohio or such political subdivision, and may become a member of the public employes retirement system upon application to the retirement board, with all the rights, privileges *and obligations* of membership.”

This leads me to a consideration of the question of the effect of the election of this employe to the position of judge of the court of common pleas and his entrance upon the duties of that office shortly after termination of his duties as prosecuting attorney. In this connection I note from the copy of your letter to the judge in question that he left the office of prosecuting attorney on December 30, 1942, and assumed his

duties as common pleas judge on January 1, 1943. I do not consider that the brevity of this interval has any bearing on the question, nor would it in my opinion have made any difference if his retirement from one position and his entrance upon the other had been simultaneous. In either case he would have had a right to terminate his membership and would have had the option again to become a member on his own volition upon assuming the position of judge. However, it appears both from your letter and the letter of the judge that upon entering into the new office he permitted a deduction from his salary as judge to be made for a period of four months without protest and without taking any steps to terminate his membership in the retirement system. It is true he would have had a right to allow his contribution to remain in the fund for a period of ten years without forfeiting his right to the same, but it is also true had he done so the provisions of Section 486-65a, above quoted, would have held him a member of the system, on leave, unless he should in the meantime return to active service as a public employe, in which event the effect of that statute would have been to restore him without any further action on his part to active membership.

It may be said that four months is not a long time for the official in question to delay action, but it can hardly be said it was not long enough time to call his attention to the provisions of the law with which presumably he must already have been familiar and of which as a general principle of law he is charged with knowledge. This deduction from his judicial salary could easily have been stopped by notice to the auditor. The doctrine of laches or undue delay in asserting one's rights does not enter into the question at all; we are merely construing the express terms of the statute. If, therefore, he could go on his new employment as a member of the system, making his contribution for a period of four months before deciding to withdraw, there would be no reason why he could not have continued in the same manner for four years with an equal right to claim the privilege of withdrawing from membership. During the period he was thus holding over, he was entitled to all the rights and privileges of membership, and if within that time he had become physically or mentally disabled, or had reached the age of voluntary retirement, he would have had all the rights and benefits which the law provides in either such contingency.

Accordingly, it is my opinion in specific answer to your question:

1. A public employe, whether appointive or elective, who has become a member of the public employes retirement system, and who ceases to be such employe for any cause other than death or retirement, pursuant to the provisions of Sections 486-65 and 486-65a, General Code, may, upon

demand within ten years after such cessation of service, provided he has not returned to active duty as a public employe, be paid the accumulated contributions standing to the credit of his individual account in the public employes savings' fund, and thereupon his membership in said public employes retirement system shall cease.

2. Where a person who has been a contributing member of the public employes retirement system ceases to be such employe for any cause other than death or retirement, and fails to make demand for payment of the accumulated contributions standing to his credit in the public employes savings' fund, but accepts and enters upon a new public employment falling within the purview of the public employes retirement system, and makes further contributions to said fund, he may not thereafter, during his retention of such new employment, discontinue his membership in said retirement system or withdraw his contributions.

Respectfully,

THOMAS J. HERBERT,  
Attorney General.

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