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LIBRARY, TOLEDO PUBLIC :

1. BOARD OF TRUSTEES—CONTRACTS OF INSURANCE—PREMIUMS PAID OUT OF ITS FUNDS—ANNUITY CONTRACTS, GROUP LIFE INSURANCE, HEALTH AND ACCIDENT INSURANCE, SURGICAL CARE—SECTIONS 7635 THROUGH 7640-1, 7889, G. C.—NOW SUPERSEDED BY SECTIONS 4840-1 THROUGH 4840-5, G. C.
2. EFFECT OF REPEAL OF SECTION 7889, G. C.—VESTED RIGHTS—BOARD NOT AUTHORIZED TO ENTER INTO NEW CONTRACTS OF INSURANCE COVERING MEMBERS OF STAFF.

3. RETIREMENT SYSTEM PROVIDED IN 1936 BY LIBRARY—EMPLOYES CONTRIBUTIONS UNDER SECTION 486-33c, G. C.—STATUS AS TO DISABILITY ALLOWANCE—NOT AMENABLE TO PUBLIC EMPLOYES RETIREMENT ACT.
4. STATUS, EMPLOYES NOT CONTRIBUTING TO SYSTEM ON BASIS OF MAXIMUM SALARY—NOT RECEIVING DISABILITY ALLOWANCE—AMENABLE TO PUBLIC EMPLOYES RETIREMENT SYSTEM—STATUS OF NEW EMPLOYES SINCE SEPTEMBER 16, 1943—EMPLOYES AS DEFINED BY PUBLIC EMPLOYES RETIREMENT ACT.

SYLLABUS:

1. The board of trustees of the Toledo Public Library organized under Sections 7635 to 7640-1, General Code, now superseded by Sections 4840-1 to 4840-5, General Code, was authorized under former Section 7889, General Code, to enter into contracts of insurance and to pay out of its funds a portion of the premiums therefor providing for annuity contracts, group life insurance, health and accident insurance and surgical care, covering members of its staff during the time former Section 7889, General Code, was in force and effect.

2. After the repeal of Section 7889, General Code, the board of trustees of the Toledo Public Library may continue to pay out of its fund a portion of the premiums for and continue in force an annuity contract entered into for the benefit of its employes while that section was in force and effect, this being a contract under which the employes have built up substantial equities and under which they have acquired vested rights; but said board is not authorized to renew or enter into any new contracts with reference to group life insurance, health and accident and surgical care covering members of its staff.

3. (a) Those employes of the Toledo Public Library for whom a retirement system had been provided in 1936 by that library, and who contributed on the basis of the amounts set forth in Section 486-33c, General Code, and who are now contributing on the basis of the maximum salary set as a limitation by that system, or who are receiving a disability allowance, are not amenable to the Public Employes Retirement Act.

Conversely, such employes who are not contributing to such other system on the basis of the maximum salary set as a limitation by that system, and who are not receiving a disability allowance from that system are amenable to the Public Employes Retirement Act and may be included in the membership of the Public Employes Retirement System to the extent of any further compensation up to the maximum set by the other system.

(b) New employes, that is, those employed by the Toledo Public Library after the effective repeal date of former Section 7889, General Code, namely, September 16, 1943, being employes for whom the Toledo Public Library is, after that date, not authorized to provide a retirement plan, are amenable to the Public Employes Retirement Act, being employes so defined therein.

Columbus, Ohio, November 15, 1951

Hon. Joseph T. Ferguson, Auditor of State
Columbus, Ohio

Dear Sir :

Your request for my opinion reads as follows :

“Some time ago, various questions arose relative to contributions from public funds made by the Toledo Public Library on premiums for insurance for members of the staff of such library, which are of general interest in reference to public libraries.

“The above library has been contributing from its funds on premiums for an annuity for its staff with a life insurance company for its staff members who were employed prior to the time such employes were eligible for membership in the Public Employes Retirement System; and part of the cost of a group life, surgical and physicians' attendance contract with a life insurance company. On April 30, 1950, the Library cancelled the Surgical and Physicians' Attendance with the life insurance company, and joined the local Blue Shield Surgical Plan. The Library has continued to contribute to the surgical plan, and has continued to contribute to the life insurance with the life insurance company.

“In the light of the foregoing, your opinion is requested as to whether a public library may contribute its funds, or may enter into contracts for such purpose, to pay the premiums, or a portion thereof, for annuity insurance, life insurance, health and accident insurance, and surgical care insurance, covering members of its staff.

“May the library continue to contribute on annuity insurance contracts which were in existence in 1943, at which time General Code Section 7889 was repealed? Such contracts had been entered into in 1936, pursuant to authority granted by such Code Section. After the repeal of such section, were all employes of the Library subject to the provisions of the Public Employes Retirement System, and required to contribute to such system, or could they continue under their existing annuity contracts, subject to contribution by the Library?”

I have also been supplied with the following pertinent facts: The Toledo Public Library has employed, and is employing more than seventy-five people; that such library was organized, and existed under former Sections 7636 to 7640, inclusive, of the General Code, which sections have now been superseded by Sections 4840-1 to 4840-5, General Code; that

the board of education of the city school district of Toledo established a public library and elected a board of trustees under former Sections 7636 to 7640, General Code, then in effect, and that thereupon the City of Toledo in 1922 transferred the property of the City of Toledo used for library purposes, to the board of library trustees appointed by the board of education and that the Toledo Public Library has continued to be operated since that time under the supervision of the Toledo Board of Education.

I have also been informed that an insurance company entered into a group annuity contract, and also entered into a group life insurance contract with the board of trustees of the Toledo Public Library for the benefit of its employes on May 1, 1936.

Section 7889, General Code, referred to in your request, was enacted in 1927, and was repealed without any saving clause on September 16, 1943. This section read as follows:

“The governing board of any public library, created or existing, under the provisions of sections 7635 to 7640-1, inclusive, or sections 14993 to 15005, inclusive, or section 15060, of the General Code, which has not less than 75 full time employes, may provide for the retirement with annuities, insurance, or other provision of employes of any such library. The library board of such library may provide for a system of retirement, insurance, or other provision for its employes and may appropriate and pay the board's portion provided in such system or plan out of the funds received to the credit of such board by taxation or otherwise. Each employe of such library who is to be included in a system of retirement shall contribute to the retirement fund not less than four per centum of his salary from the time of his eligibility to join the retirement system to the time of his retirement. If a group insurance plan is installed by any such library, not less than fifty per centum of the cost of such insurance shall be borne by the employes included in such plan.”

Your request presents three basic questions, the first one being as follows:

Is a board of trustees of the Toledo Public Library organized under former Sections 7635 to 7640-1, General Code, now superseded by Sections 4840-1 to 4840-5, General Code, authorized under former Section 7889, General Code, to enter into contracts of insurance and to pay out of its funds a portion of the premium therefor providing for annuity contracts,

group life insurance, health and accident insurance and surgical care covering members of its staff during the time former Section 7889 was in force and effect.

It would seem to be apparent, from a reading of former Section 7889, General Code, that this section was broad enough to authorize the trustees of a public library organized under Sections 7635 to 7640-1, inclusive, General Code, during the period of time that this section was in effect, that is, between 1927 and 1943, to contribute part of its funds toward the payment of premiums on all of the various types of insurance and annuities mentioned in your request and we so hold.

It should, however, be noted in regard to group life insurance, that while such insurance was recognized by the Division of Insurance of the State of Ohio, prior to the effective date of the group life statutes, namely, September 2, 1935, there was no recognition by, nor regulation of such insurance by the legislature until the group life act was passed. At the time the act was passed, Section 9426-2(6) then read in part, and continues to so read, as follows:

“Except as provided in this act, it shall be unlawful to make a contract of life insurance covering a group in this state.”

The legislature in 1939 amended Section 9426-1(2) by adding (g), which provides in part as follows:

“Life insurance covering employes of a political subdivision or district of the state of Ohio, or an educational or other institution supported in whole or in part by public funds, or of any class or classes thereof, determined by conditions pertaining to employment, or of the state of Ohio or any department or division thereof written under a policy issued to such political subdivision, district or institution, or the proper official or board of such state department or division which shall be deemed to be the employer for the purpose of this act, the premium on which is to be paid by such employes for the benefit of persons other than the employer; *provided, however, that nothing herein contained shall permit the state of Ohio or any of the political subdivisions enumerated herein to pay any premiums stated in this section;*
* * *” (Emphasis added.)

After its amendment, it became unlawful for a political subdivision to enter into a group contract whereby the political subdivision paid any part of the premiums. Little difficulty is found in determining that the Toledo

School District represented by the board of education and the library trustees elected by the board of education is a political subdivision or, in any event, "an educational or other institution supported in whole or in part by public funds." Such board of education was authorized to levy a tax for library purposes under former Section 7639, General Code, and under present Section 4840-3, General Code, and the proceeds of such levy were authorized to be paid direct by the county treasurer to the treasurer of the board of library trustees.

But it must be remembered that at the time this particular group life contract was made, namely, May 1, 1936, the legislature had specifically authorized the library board under Section 7889, General Code, then in effect, to enter into group life contracts and to pay a portion of the premium therefor, as provided for in that section, so that the validity or legality of such group life contract cannot be questioned at the time said contracts were made.

The second question presented by your request is as follows :

Is the board of trustees of the Toledo Public Library authorized to continue to pay out of its funds a portion of the premiums for annuity contracts, group life insurance, health and accident insurance and surgical care covering members of its staff and to enter into new contracts for such purposes after the repeal of Section 7889 General Code.

It seems elementary to state that the repeal of Section 7889, General Code, in 1943, without any saving clause, withdrew from the library board any authority to enter into any new contracts of insurance for the benefit of its employes or to make any contribution toward the paying of any premium for any such new insurance contracts.

The various kinds of insurance set forth in your request, other than the annuity contracts, are written on a yearly basis, are cancellable by either party thereto, do not provide for the building up of equities on the part of the employes and are contracts under which the parties have no vested rights. (I am assuming that the group life contracts are written on the usual one-year term basis.)

With reference to these contracts, since they are terminable and severable, the board of trustees is not authorized to continue to contribute its money toward the payment of premiums to renew the old contracts or enter into new ones after the repeal of former Section 7889, General Code.

The annuity contracts are, however, different. Such contracts are written to continue over a long period of time, are cancellable by the company only for failure to pay premiums, and are contracts under which the employes have built up substantial equities and vested rights. To hold the present group annuity contract invalid as covering the employes of the Toledo Public Library would be clearly to impair the obligation of contracts and to take away vested rights and property without due process.

I am not unaware of the general rule that a pension by the government is a mere gratuity at all times subject to the will of the donor; that it is a creature of law rather than of contract; that the pensioner has no vested right in the continuance of a gratuity allowance, and that this is so even though the pensioner has made compulsory contributions to the fund. See *Mahl v. State*, 130 Ohio St., 306, and also annotations found in 54 A. L. R., 943; 98 A. L. R., 505; 112 A. L. R., 99.

But we are not here concerned with a pension or pension rights granted by the state legislature but with a contract validly entered into by and between the library board and the insurance company, for the benefit of the library board employes under a statute granting authority to such library board to enter into such a contract and to pay a portion of the cost thereof, and we are further concerned with the effect of the repeal of Section 7889, General Code, upon such contract.

In the circumstances with which we are here confronted, the annuity contract fixes the terms and provisions, the fund is created by the premium payments contributed by the library board and the employes. In the case of pension funds, the funds are administered by a board of trustees and are public funds. Under the public library contract there are no pensions paid, created or controlled by a public agency or by trustees of a pension fund, but payments are made entirely by the insurance company under its written agreement fixing the rights of the parties. This distinction is clearly indicated in the cases of *Bell v. Fritz*, 130 Ohio St., 306; *State v. McCarthy*, 139 Ohio St., 654; *State v. McIntosh*, 145 Ohio St., 107; *State v. Trustees*, 150 Ohio St., 377, and *State v. Waidner*, 152 Ohio St., 112.

The case of *Lynch v. United States*, 292 U. S., 571, is, I believe, in point. In that case the Supreme Court of the United States held that United States Government life insurance covered by policies of yearly renewable term insurance issued under the War Risk Insurance Act, are

not gratuities but are contracts of the United States, and being valid contracts of the United States, are property, and the rights of private individuals arising out of them are protected by the Fifth Amendment, and Congress is without power to reduce expenditures by repudiating and abrogating the contractual obligations of the United States. The court held that the provision of the so-called "Economy Act" that repealed "all laws granting or pertaining to yearly renewable term insurance" are invalid in that they would abrogate valid contracts.

The Supreme Court in its opinion, at page 576 said:

"War Risk Insurance, while resembling in benevolent purpose pensions, compensation allowances, hospital and other privileges accorded to former members of the army and navy or their dependents, differs from them fundamentally in legal incidents. Pensions, compensation allowances and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress. *United States v. Teller*, 107 U. S., 64, 68; *Frisbie v. United States*, 157 U. S., 60, 166; *United States v. Cook*, 257 U. S., 523, 527. On the other hand War Risk policies, being contracts, are property and create vested rights. The terms of these contracts are to be found in part in the policy, in part in the statutes under which they are issued and the regulations promulgated thereunder."

In this case, it should be noted that the War Risk Insurance Act set up a specific trust fund created by the premiums payments and that the war hazard and administration costs of this insurance are borne by the Government and the bare insurance costs by the insureds.

I am therefore of the opinion that the board of trustees of the Toledo Public Library after the repeal of former Section 7889, General Code, may continue to pay out of its funds a portion of the premium for and continue in force the annuity contract, but may not renew, or enter into new contracts with reference to group life insurance, health and accident insurance and surgical care covering members of its staff.

The third question presented by your request is as follows:

After the repeal of Section 7889, General Code, were all employes of the Toledo Public Library subject to the provisions of the Public Employes Retirement System?

Before 1938, the employes of a public library were not included in the membership of the Public Employes Retirement System. Effective in that year (see 117 O. L. 743) the Public Employes Retirement Act was amended by adding Section 486-33a, which reads in part as follows:

“* * * Beginning July 1, 1938, in addition to the present membership of said retirement system, there shall be included therein all * * * public library employes as defined herein, and such * * * public library employes, except as otherwise provided herein, shall have all the rights and privileges and be charged with all the duties and liabilities provided for in the laws relating to said retirement system as are applicable to state employes.”

At the same time Section 486-33c, General Code, was added, which provided in part as follows:

“‘Public library employe’ shall mean any person holding a position in a public library in the State of Ohio and/or paid in full or in part by the board of trustees of a public library. But said term shall not include those persons who come within the provisions of any other retirement system established under the provisions of the laws of this state or of any charter, nor shall the provisions of this act in any manner apply to a police fund or firemen’s pension fund established under the provisions of law.”

These two amendments resulted in bringing into the Public Employes Retirement System library employes who did not come within the provisions of “any other retirement system established under the provisions of the laws of this state.” The board of trustees of the Toledo Public Library having established, under authority of Section 7889, General Code, a retirement plan in 1936, which was in effect in 1938 when the above mentioned amendments were added, such employes were not at that time amenable to the Public Employes Retirement Act.

In 1939 Section 486-33c was again amended (118 O. L. 107) by adding immediately following the portion of that section previously quoted, the following:

“No employe except an employe who comes within the provisions of a police relief fund or a firemen’s pension fund shall be excluded from membership in the retirement system because of membership in any other retirement system established under the provisions of the laws of this state or of any charter unless such employe is contributing to such other retirement system on the basis of two thousand dollars per annum or is receiving a disability allowance from such other retirement system.”

In 1945 the legislature amended Section 486-33c by changing the basis on which contribution was to be paid from \$2,000.00 to \$3,000.00 per annum, and so it remained until the last session of the legislature when said section was again amended in so far as now pertinent, to read as follows :

“* * * unless such employe is contributing to such other retirement system on the basis of the maximum salary set as a limitation by such other retirement system if any or is receiving a disability allowance.”

Section 486-33c, General Code, as it existed in 1946, was considered by a former Attorney General with reference to city employes for whom a retirement system had been provided. See Opinions of the Attorney General for 1946, No. 941, page 343. The syllabus of that opinion reads as follows :

“Where a city, pursuant to the provisions of its charter has established a retirement system for certain of its employes, any employes of that city who are members of that system and who contribute thereto on a basis of less than \$3,000 salary per annum, and who are not receiving a disability allowance therefrom are, under the provisions of Section 486-33c, General Code, properly included in the membership of the public employes retirement system to the extent of any further compensation up to a maximum for both systems of \$3,000 per annum. Opinion 4065, O. A. G. 1941, page 718 modified.”

I find myself in accord with the law as expressed in the syllabus of the above opinion.

I am of the opinion that those employes of the Toledo Public Library for whom a retirement system had been provided in 1936 by the Toledo Public Library, and who contributed on the basis of the amounts set forth in the above statute, and who are now contributing on the basis of the maximum salary set as a limitation by that system, or who are receiving a disability allowance, are not amenable to the Public Employes Retirement Act. Conversely, such employes who are not contributing to such other system on the basis of the maximum salary set by such system, and who are not receiving disability allowance from that system are amenable to the Public Employes Retirement Act and may be included in the membership of the Public Employes Retirement System, to the extent of any further compensation up to the maximum set by the other system.

New employes, that is, those employed by the library board after the effective repeal date of former Section 7889, General Code, namely, September 16, 1943, being employes for whom the Toledo Public Library is after that date not authorized to provide a retirement plan, are amenable to the Public Employes Retirement Act, being public employes as defined therein.

Respectfully,

C. WILLIAM O'NEILL
Attorney General