

OPINION 65-4

Syllabus:

Under Section 145.32, Revised Code, an employer may ter-

minate the employment of an employee who has attained the age of seventy, and who has failed to submit a certificate of physical and mental competency, on the June thirtieth following his attainment of age seventy and at any time thereafter.

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To: Harry Friberg, Lucas County Pros. Atty., Toledo, Ohio
By: William B. Saxbe, Attorney General, January 12, 1965

Your request for my opinion reads as follows:

"Your opinion is sought regarding the following matter:

"Section 145.32 of the Revised Code, provides, in part, that an employer may, as of June 30th of any year, terminate the employment of any member who has attained the age of 70 years. This Section further provides that any employee whose employment is not terminated shall be required to present a doctor's certificate prior to the 30th day of June of each year stating that said employee is physically and mentally competent to perform the duties of his job.

"Where an employee has attained the age of 70 years prior to the 30th day of June but where neither the employer has terminated the employment nor the employee presented a doctor's certificate prior to that date, must the employee be retained until the following June 30th or may he be terminated at any time?"

Section 145.32, Revised Code, provides to the extent material:

"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. 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, * * *
(Emphasis added)

The language emphasized is cumbersome. It may be construed as giving authority to an employer to terminate employment as of June thirtieth following attainment of seventy years, and at any time thereafter, or it may be interpreted as authorizing termination of employment on June thirtieth following the attainment of seventy years or on any anniversary date thereafter. The language itself gives little in-

sight into the intention of the legislature and no appreciable help may be gotten from the legislative history of this statute. It was concluded in Opinion No. 2076, Opinions of the Attorney General for 1950, as evidenced by the third branch of the syllabus, that:

"3. A member of the public employee's retirement system having reached the age of sixty-nine years or more, who fails to file the written application and physician's certificate described in syllabus No. 1 prior to June 30, 1950 is required to be retired as follows: (a) a member who was over seventy years of age at the time he became a member of the system on June 30th following the date upon which he became a member: (b) all other members on June 30th following the date upon which age seventy is attained."

This conclusion is expressed in the language of the statute at that time. A more interpretative conclusion is that of the fifth branch of the syllabus of Opinion No. 1124, Opinions of the Attorney General for 1952. It is provided therein:

"5. When the retirement board finds that a member has continued in service beyond the age of compulsory retirement without fraud on his part, but without compliance with the provision of Section 486-59, General Code, the board may notify such member and his employing head that unless the procedure required by said statute as to extension of service is complied with by a named day, such employe will be immediately retired; and if such notice is complied with, the board would be justified in accepting a proper application for extension; but if not complied with, the board should retire such member as of the date so limited, or, if his service is terminated at such earlier date, then as of the date of such termination."

At the time of the 1952 opinion the statute (Section 486-59, General Code) provided in pertinent part:

"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 June 30, 1952 any member having reached the age of sixty-nine years or more may, upon written application approved by the head of his department, board, authority or institution, and upon certification by a physician licensed to practice in the state of Ohio that the member is physically and mentally compe-

tent to perform the duties of the particular position which he occupies, be continued in service for a period of one year or any part thereof, such application, if approved, to expire on the June 30 following the date upon which it was filed unless renewed from year to year on or before the expiration date.

* * *"

It was concluded in The State, ex rel. Wilson v. Young, 170 Ohio St. 74, 75, in a per curiam opinion:

"* * * * * * * *"

"The provisions of Section 145.32, Revised Code, relative to voluntary and compulsory retirement, clearly and unequivocally repose in the respondent a discretion to retain or not to retain an employee who has attained the age of 70 years.

"* * * * * * * *"

In this case an employee challenged the uniform state-wide policy established by the, then, Governor requiring retirement on June 30, 1959, of all employees who had attained or would attain the age of seventy by the end of the current year.

This decision does not of course answer the precise question you have raised; it does, however, indicate that under this statute wide discretion is to be given employers in the matter of terminating employees who have reached the age of seventy. With this judicial construction as a guide, I am persuaded that it was intended by the legislature to authorize employers to terminate the employment of persons on the June thirtieth following attainment of age seventy or at any time thereafter. While the emphasized language in Section 145.32, Revised Code, above, is ambiguous, I am of the opinion that it should be read "an employer may as of the thirtieth day of June of the year in which a member attains age seventy, terminate the employment of such member."

In specific answer to your question, therefore, I am of the opinion that under Section 145.32, Revised Code, an employer may terminate the employment of an employee who has attained the age of seventy, and who has failed to submit a certificate of physical and mental competency, on the June thirtieth following his attainment of age seventy and at any time thereafter.