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SYLLABUS:

1. The law establishing the public employes retirement system, Section 486-32 et seq., General Code, being a pension law should be liberally construed, in the light of its evident purpose, in favor of the public employes who are its intended beneficiaries.

2. Under authority of Section 486-43a, General Code, the retirement board has authority to require a public employe upon becoming a member of the system to file a true statement giving among other matters, the precise date of his birth.

3. Pursuant to Section 486-59, General Code, it is the duty of the retirement board to retire any member of the system on the 30th day of June next following his attainment of the age of seventy years, unless his service is extended by the filing with the board of an application for extension, approved by the head of his department, board or institution, accompanied by the certificate of a physician as to the physical and mental fitness of such member.

4. When the retirement board finds that a member has passed the age of seventy years by understating his age and has thereby willfully misled his employing head into permitting him to remain in service beyond the age of compulsory retirement, it is the duty of the retirement board to retire such member as of the 30th day of June following the time when he actually reached the age of seventy, and to return to him the contributions which he has made since that date.

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.

6. When the service of a member has been extended beyond the age of compulsory retirement as provided by Section 486-59, General Code, such member, on the expiration of the last period of extension should be retired as of the end of the then current month.

Columbus, Ohio, February 5, 1952

Public Employes Retirement System

Columbus, Ohio

Gentlemen :

I have before me your request for my opinion, reading as follows :

“The retirement board has instructed me to request your opinion on the following questions regarding the status of certain members past the compulsory retirement age and as concerns the responsibilities of the Public Employes Retirement Board :

“1. When it is disclosed at the time of retirement that a member of the system understated his or her age on the original records filed with the system and such member upon filing the application for retirement is found to have attained the compulsory retirement age at an earlier date but did not file the application for continuation in service past the compulsory retirement age as provided for in Section 486-59 of the General Code, how shall the retirement allowance be computed?

(a) As of the end of the quarter and at his or her actual age, following the date application for retirement is filed; or

(b) As of June 30 following the date he or she actually attained age seventy; or

(c) On the next regular retirement date after the member's public service is terminated and the application for retirement filed?

"2. When a member is continued in public service by his employer beyond June 30 following the attainment of age seventy without filing the application for continuation provided for in Section 486-59 of the General Code or beyond the date specified on such application for continuation is the Public Employes Retirement Board authorized to accept such an application at a date beyond June 30, or in case such an application was filed then beyond the expiration date shown on such application?

"In part this question concerns a few members who neglected to file the application for continuation in service by June 30 following the attainment of age seventy, but did file such an application by June 30 in several succeeding years. In these cases the system continued to accept regular salary contributions and did not challenge the member's status or right to continue to contribute.

"Would the fact that the member admitted to his or her employer that the date of birth was earlier than the date reported to the retirement system (such admission having been made shortly before the June 30 following the attainment of age seventy) and the fact that the employer assured the member it was not necessary to admit the correct date of birth to the office of the retirement system nor to file an application for continuation in service past the compulsory retirement date modify your answer to either question No. 1 or No. 2 above?

"3. In case membership, through oversight or neglect by the employer, is not established until one or more years after age seventy is attained, does the retirement board at such later date have authority to accept an application for continuation in service which contains a medical certificate of physical and mental fitness and the approval of the appointing officer? This situation may involve a number of reasons why membership was not established at the time of appointment. In some cases the employer is reported to have refused (for a number of years) to make the regular retirement deductions from the employe's salary, disregarding the employe's requests. In other cases, there appears to have

been mutual agreements between the employe and the employer to disregard the mandatory provisions of Section 486-33 and 486-68, General Code. In other cases, the neglect to establish membership appears to have resulted from carelessness by the employer or jointly by the employer and the employe. In still other cases the employe transferred from another unit of government, and incorrectly reported to the new employer that previously he had claimed exemption from membership in the retirement system as provided for in Section 486-33, General Code.

“4. What is the meaning of the phrase and the responsibility of the retirement board as concerns the phrase ‘the retirement board shall retire’ in the first sentence, second paragraph, of Section 486-59 of the General Code? We might explain that as a service to both the over age member and his employer we have attempted in years past to notify both of them of the provisions of the section and of the necessity to file an application for continuation in service before June 30, in case it was the mutual intent of both that the member be continued in service beyond that date. Also, it has been our understanding that the phrase ‘the retirement board shall retire’ relates to the date beyond which no further retirement equity may be developed by and allowed the member. By the same token, we have assumed that the retention of and the payment of salary or wages to the employe was a matter of local concern and responsibility of the appointing official. Therefore, if a member was continued on the payroll beyond the June 30 date without having filed the application for continuation in service we could not start his retirement allowance until he filed an application for retirement and was removed from the payroll and that we should refund as unauthorized any salary contributions made beyond the June 30 date (when the employer ceased making such payroll deductions.)”

Each of these questions turns upon a construction of the provisions of Section 486-59, General Code, the pertinent portion of which reads as follows :

“* * * 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 competent 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.*

* * *

(Emphasis added.)

1. The answer to your first question may seem to be very clear, upon a reading of the first sentence of the above quotation. There it is provided that *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. Your question does not state whether the member in question was over seventy years of age at the time he became a member, but if he was, and took no action to obtain an extension of his service, then clearly the retirement board should retire him on the June 30th following that date. If, however, after serving for a period, he reached the age of seventy years and did not file an application for continuation as provided by the section in question, then the second portion of the first sentence would apply to his case, it being there provided that "the retirement board *shall retire* all other members, excepting elective officers, on the June 30 following the date upon which the age of seventy is attained."

In either case, there is no authority for retiring such member at the end of the quarter following the date *application* for retirement is filed for the reason among others, that there is *no provision in the law for filing an application for retirement under such circumstances*. Retirement under the section in question is not a voluntary act of the employe; his retirement is the duty of the board and the statute is very plain in stating that this duty is to be performed on June 30 following the date upon which he *reaches the age of seventy years*.

My immediate predecessor had substantially the same question before him in Opinion No. 1646, Opinions of the Attorney General for 1950, page 210, where he held, as disclosed by the second branch of the syllabus:

"When it is disclosed that a member of the Public Employes Retirement System understated his age and was continued in the State service for several years after the age of seventy was attained, the date for computing his retirement allowance is from June 30th following the date on which the age of seventy

was actually attained. The contributions which such member made to the System subsequent to that date should be returned, and the law in effect at that time should govern the computation."

That opinion seems to me to be substantially correct, if we are to construe and apply the statute very strictly and without consideration of the history and underlying purposes of the system. It should be borne in mind that the manifest purpose of the law was to provide something by way of financial support to those who had served the state or its subdivisions for a considerable number of years, and by reason either of advanced age or physical disability, were no longer able to serve efficiently.

A review of the legislation by which the present law was developed will disclose a distinct purpose to permit a public employe to remain in service as long as he is able, and as long as the employer is willing to retain him, at the same time fixing an age limit beyond which he cannot remain in service unless his employer does so consent. To that end, Section 486-59 supra has been in the law from the beginning in terms quite similar to the present form, with a provision for retirement at age seventy, but with an extension from year to year with the approval of the employer. At every session of the general assembly since the passage of the original law in 1933, this section has been amended, extending the period within which this extension may be granted for another period of two years. It may also be noted that the retirement board has nothing to do with such extension, it being a matter entirely between the employe and his employer.

As Section 486-59 now reads, this application for year by year extension with the approval of the employer may be filed up to June 30, 1952, which would result in a possible extension of service to June 30, 1953.

With the idea in mind that the legislature was not undertaking to prevent or discourage continuation in service beyond the arbitrary age of seventy, I come to consider the effect of a misstatement by the employe of his age at the time he becomes a member of the retirement system. It is to be noted in this connection that membership is compulsory for all employes of the public agencies who are within the scope of the law. The head of each department is required by Section 486-68, General Code, to report his payroll regularly to the retirement board, and to deduct from the salary or compensation of every employe the required percentage

and pay it in to the retirement system. Without compliance with these requirements the board can have no knowledge that any given employe is on the public payroll.

Section 486-43a, General Code, provides:

“Each public employe, upon becoming a member, shall file a detailed statement of all his previous service as a public employe and shall furnish such other facts of personal history as the retirement board may require for the proper operation of the retirement system.”

In addition to this, Section 486-44, General Code, places upon the head of each department the duty to notify the board of the name, sex, date of birth, and compensation of every employe in his department.

Section 486-74, General Code, reads as follows:

“Any person who shall knowingly make any false statement, or shall falsify or permit to be falsified any record or records of this retirement system in an attempt to defraud such system as a result of such act, shall be guilty of a misdemeanor and shall upon conviction thereof be fined not less than ten nor more than one thousand dollars.”

Obviously, the requirement of the statute that the board be furnished with the date of birth of every public employe who becomes a member of the retirement system is absolutely necessary to a correct administration of the system and to its actuarial soundness. Section 486-50, General Code, requires the board at least every five years, to employ a competent actuary who shall make a “complete evaluation of the present and prospective assets and liabilities of the various funds.” Certainly the ages of the members and their life expectancy are among the elements which he must consider, and he has no source of information upon which he may rely other than the statements submitted by them.

Accordingly, I must conclude that any misstatement of age by a member should not be allowed to give him an advantage in the system which may not be enjoyed by those who tell the truth. It appears to me that *overstatement* as well as *understatement* might enable an employe to take an unfair advantage of the system. By an overstatement one might advance the time of permissible retirement, and increase the basis on which his annuity and matching pension are computed. By understatement, **an employe might deceive his employer into permitting him to remain in**

service beyond the lawful age of compulsory retirement. If the board finds upon the facts in any case that a member has by any such misrepresentation gained an advantage which the law does not give him, it would be the right and duty of the board to take such action as to place such member in the position to which the law would consign him. In a case where such member by such misrepresentation has misled his employer and by such means has passed the age of compulsory retirement without having been continued in service in the manner prescribed by Section 486-59 supra, then the rule laid down by my predecessor in the opinion cited should be applied, and the member should be retired as of the June 30 following his attainment of the age of seventy.

On the other hand, a misstatement of the age of a member, due to a mistake or otherwise, might be corrected by prompt action, so as to save the member's rights and do no harm to the system. That may be the situation as to the employe mentioned in your second question. If, as stated, after reaching the age of seventy but before the June 30 next following, she informed her employer of her previous understatement, his right to refuse to sanction her extension would not have been impaired and no advantage would have been taken of the system.

2. Your second question as stated, assumes that the member has reached the age of seventy, without filing the application for continuation as provided in Section 486-59 supra. Inasmuch as this application, if it is the first, is to be filed when the member has passed age sixty-nine, I assume that he has possibly already had one year's extension under the provisions of that section and has now reached age seventy, and is eligible for a second continuation. In that case his application for this second extension should be filed on or before the June 30 following the expiration date of the first extension, which was for one year.

The language of this section in reference to continuation in service of a member who has reached age sixty-nine, is not altogether clear. Closely analyzed, it appears that when a member has reached age sixty-nine, and faces compulsory retirement on June 30 following the date when he will reach age seventy, he must take some action, if he desires to continue in service, and that action is by filing an application for such continuation approved by the head of his department and accompanied by a physician's certificate as to his physical and mental fitness. The statute says: "*such application, if approved to expire on the June 30 following the date upon which it was filed.*"

The phrase just quoted, is a little difficult to understand. Just what the legislature meant by "such application to expire," is not clear. It certainly cannot mean that the period of extension of service is to expire on the June 30 next following, since it is obvious that his application might be filed on the 29th of June and I cannot believe that it was intended that a member might take all the steps indicated and acquire only one day of extension of service. It appears to me that this limitation is intended to apply only to the *filing of the application* and *not to the term* which it seeks to extend. Accordingly, June 30 is the last day upon which the application may be filed for the extension of one year which would then follow.

If, therefore, a member attained sixty-nine years of age on the first day of May, 1951, he would have the right to file his application for continuation of service up to June 30, 1951, and the filing of that application bearing the approval of his superior and accompanied by the medical certificate aforesaid, would automatically continue him in service for one year from June 30, 1951, or for a lesser period if limited by the approved application. If the member in question had previously obtained a continuation of one year he would then, of course, be beyond the age of seventy, and the application would be for a renewal of his extension of service. This in my opinion is the significance of the phrase contained in the statute above quoted, "any member having reached the age of *sixty-nine years or more.*" The words, "or more" were not intended by the legislature to open the way for a member to be retained in the service by his employer, without any application for extension, to an age beyond *seventy* years and then permit the filing of an *original* application for continuation. Prior to 1949, Section 486-59 had been in effect in substantially its present language, for a number of years, except that instead of the present "sixty-nine years or more," it read "seventy years." We cannot disregard this change. If by collusion or misrepresentation, or even by mistake or mere neglect, a person has been continued in the service until he reaches the age of, say, seventy-five, he would not be eligible under a strict construction of the law then to file his first application for a further year's continuation. However, it appears to me that there are circumstances under which your board would be justified in adopting a more liberal attitude toward employes who have devoted a large part of their lives to public service and are approaching the time for compulsory retirement. It is to be borne in mind that the whole purpose of the retirement law is to provide in part at least, a

means of subsistence for public employes who might otherwise become objects of public charity. It takes the place of the social security system provided for employes of private industry.

It is a well recognized principle of statutory construction that pension laws are to be given a liberal construction. It is stated in Crawford on Construction of Statutes, page 719:

“Pension statutes should be liberally construed in favor of the intended beneficiaries. As a result, the literal terms of the statute do not need to be followed since it is the spirit of the statute that controls its interpretation.”

Many cases are cited in support of the above proposition. The title of the original act (115 O. L. p. 614) whereby the public employes retirement system was established, lends color to the conclusion that it was intended to produce better service for the state by holding out a promise of benefits for those employes who should become incapacitated either by reason of old age or physical disability. It was entitled:

“An act to promote efficiency and economy in the public service by providing for the establishment of a retirement system for superannuated or incapacitated state employes.”

Another principle which I deem applicable to the question we are considering, is that provisions of a statute which relate only to procedural steps and not to the essential purpose of a statute may be considered as directory only, and not mandatory. In the case of *State ex rel. Jones v. Farrar*, 146 Ohio St., 467, the court had under consideration a statute which authorized a municipal council to declare vacant the office of any person elected or appointed to an office, unless he took the required oath and gave bond within ten days after notification of his appointment or election. In holding this provision as to time to be directory only, the court stated in the syllabus:

“2. As a general rule, statutes which relate to the essence of the act to be performed or to matters of substance are mandatory, and those which do not relate to the essence and compliance with which is merely a matter of convenience rather than substance are directory.

“3. As a general rule, a statute providing a time for the performance of an official duty will be construed as directory so far as time for performance is concerned, especially where the statute fixes the time simply for convenience or orderly proce-

ture; and, unless the object or purpose of a statutory provision requiring some act to be performed within a specified period of time is discernible from the language employed, the statute is directory and not mandatory.”

To like effect, see *Bauman v. Guckenberger*, 148 Ohio St., 292.

It appears to me that the essence of the retirement law lies in its provisions giving members of the System the right to receive certain benefits, and to continue in service so long as the employer approves, and that the procedure by which such approval is obtained and evidenced may be regarded as merely directory.

If, therefore, an employe has been carried on the payroll beyond the age of compulsory retirement without applying for an extension of service as required by Section 486-59 supra, but *with the knowledge* and tacit consent of his employer, I should be disposed to hold that his failure to comply literally with the procedure prescribed for extensions is not necessarily fatal to his rights and that he may obtain further extensions provided he now can and does comply with the law as to the certificate of health and the approval of the employing head. In reaching that conclusion, I am conscious that we are not applying the statute rigorously, but are giving effect to the factual situation as amounting to a substantial compliance with the intent of the law.

Your letter indicates that in many cases the failure to comply literally with the law as to procedure in securing an extension is due to the neglect or indifference of the employer or possibly to a failure of the employer or employe or both, to fully understand the law. In view of the complexity of the retirement law and the difficulty of understanding it even by those whose duty it is to administer it, I should be inclined to be lenient to the average public employe who fails to appreciate its technical provisions and to follow them rigorously particularly when, as indicated in the example given in your statement, the failure to comply precisely with the law was due to the advice or action of the employer. In such case where the required contributions have been made by the employe and accepted without protest by the system, I see no reason why the retirement allowance should not be computed as of the time of his actual cessation of service. However, we should not indulge in leniency to the extent of permitting a flagrant or continued disregard of the law. Accordingly, it would be my advice that your board upon discovering that any

employe is being continued on the payroll after passing the age of compulsory retirement, or after the expiration of a former extension, should advise the employe and employer that unless the proper application is filed within a time limited, the employe will be retired.

3. Your third question is as to the status of a public employe who has reached the age of seventy years without having established his membership in the retirement system as required by the law. In answering that question the same principle of liberal construction above referred to, may well be applied. The employe is always more or less under the domination of the employer and cannot control his action. It would therefore appear to me that the employe ought not to suffer in respect to his pension or retirement allowance by reason of the neglect or refusal of his employer to perform the duty placed upon him in making certain deductions from the employe's salary as required by Section 486-68 General Code, and in making the required contributions from the public funds. It is true that the law also places upon the employe the obligation to make the required contributions but the almost invariable practice of having them made by his employer by deductions from his salary may readily cause him to overlook the obligation on his part. I should therefore, hold that if he acted promptly on discovering the neglect of his employer, he should be given the status of membership and become entitled to its benefits. This, however, could only be accomplished by his payment of the deferred contributions on his part and the payment by his employer of the amounts which he should have paid, together in both cases with interest at a rate to be fixed by the board.

If, however, the failure or delay in establishing membership was the result, as your letter suggests, of collusion between the employer and employes to defeat the law which makes membership in the system compulsory (Section 486-33, General Code) I can see no right or reason for indulgence on the part of the board, and the employe should be refused a belated admittance to the system. I do not feel called upon to discuss the effect on his status as a public employe, as that is not a matter which would concern your board.

4. Your fourth question is as to the meaning of the phrase, "the retirement board shall retire," as used in the first sentence of the portion of Section 486-59, which I have quoted. What has already been said perhaps furnishes the answer to that question. Apparently, if the member

reaches the age of seventy, and his employer has not approved an application for his continuation in service, your duty to retire him as of the June 30 next following, would be clear and mandatory. What I have already said is intended to relieve the severity of that mandate in those cases where, without fault on his part, the employe has, with the silent acquiescence or active encouragement of his employer, continued to serve and to make his contributions to the system, without strict compliance with the prescribed procedure, in which case the member should not be penalized by having his retirement dated back to the 30th of June which followed his actual attainment of the age of seventy, nor should the determination and payment of the allowance be postponed until the 30th of June following his actual cessation of service. When he finally quits his service, possibly in the summer or winter, and the board is informed of that fact by notice either from him or his employer, there would be no reason to delay the determination of his retirement allowance until that date. Rather, the fair and practical procedure would seem to be to follow the provisions of Section 486-59 General Code, as to the voluntary retirement of a superannuate, which reads :

“The filing of such application shall retire such members as of the end of the month then current, providing his public service has terminated by that date.”

In further explanation of the meaning of the words “the retirement board shall retire,” it may be said that the board has no authority or duty to terminate the service of an employe or to remove him from the payroll; its duty being limited to a determination of the time when his equity in the retirement system becomes static and a determination of the amount of retirement allowance to which he is then entitled.

In specific answer to the questions submitted, it is my opinion, and you are advised :

1. The law establishing the public employes retirement system, Section 486-32 et seq., General Code, being a pension law should be literally construed, in the light of its evident purpose, in favor of the public employes who are its intended beneficiaries.

2. Under authority of Section 486-43a, the retirement board has authority to require a public employe upon becoming a member of the system to file a true statement giving among other matters, the precise date of his birth.

3. Pursuant to Section 486-59, General Code, it is the duty of the retirement board to retire any member of the system on the 30th day of June next following his attainment of the age of seventy years, unless his service is extended by the filing with the board of an application for extension, approved by the head of his department, board or institution, accompanied by the certificate of a physician as to the physical and mental fitness of such member.

4. When the retirement board finds that a member has passed the age of seventy years by understating his age and has thereby wilfully misled his employing head into permitting him to remain in service beyond the age of compulsory retirement, it is the duty of the retirement board to retire such member as of the 30th day of June following the time when he actually reached the age of seventy, and to return to him the contributions which he has made since that date.

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 the 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.

6. When the service of a member has been extended beyond the age of compulsory retirement as provided by Section 486-59, General Code, such member, on the expiration of the last period of extension should be retired as of the end of the then current month.

Respectfully,

C. WILLIAM O'NEILL

Attorney General