

1970

1. RETIREMENT SYSTEM, PUBLIC EMPLOYEES—INCREASED ALLOWANCE PROVIDED BY SECTION 486-59b G.C. TO MEMBERS WHO RETIRED PRIOR TO APRIL 2, 1947 EFFECTIVE JUNE, 1947, PAYABLE AS PART OF ALLOWANCE FOR JULY, 1947.
2. TO DETERMINE AMOUNT OF INCREASE ALLOWANCE, CONSIDER TOTAL NUMBER OF YEARS AND FRACTIONS TO THE CREDIT OF SUPERANNUATE.
3. PUBLIC EMPLOYEES RETIREMENT BOARD HAS AUTHORITY TO MAKE RULES NOT INCONSISTENT WITH LAW TO ESTABLISH BASIS TO DETERMINE "TOTAL SERVICE CREDIT" OF ANY MEMBER OR PENSIONER—SECTIONS 486-30 to 486-75, 486-34 G.C.
4. SIX MONTHS' CONTRIBUTION—TO CLAIM BENEFIT OF INCREASED ALLOWANCE, MEMBER ENTITLED TO INCLUDE PERIOD COVERED BY BACK PAYMENTS MADE PURSUANT TO SECTIONS 486-33b—486-59b G. C.
5. WHEN SUPERANNUATE AT TIME OF RETIREMENT HAS SELECTED OPTION, INCREASED RETIREMENT ALLOWANCE SHALL BE ALLOCATED BETWEEN PENSIONER AND DESIGNATED BENEFICIARY IN SAME PROPORTION AS STIPULATED IN ORIGINAL ELECTION—SECTIONS 486-67, 486-59b G. C.
6. BENEFICIARY UNDER OPTION SELECTED BY FORMER MEMBER, DECEASED PRIOR TO ENACTMENT OF SECTION 486-59b G. C. CAN RECEIVE NO BENEFIT FROM EXTRA ALLOWANCE UNDER THAT SECTION.

## SYLLABUS:

1. The increased allowance provided by Section 486-59b, General Code, to members of the public employes retirement system who had retired prior to April 2, 1947, becomes effective as of the end of June, 1947, and therefore will begin to be payable as a part of the allowance for July, 1947.

2. In determining the amount of such increase of allowance, the total number of years and fractions of years which the superannuate has to his credit should be considered.

3. The public employes retirement board has authority under Section 486-34, General Code, to make all rules and regulations necessary for carrying out and making effective the purposes of the public employes retirement law (Sections 486-30 to 486-75, General Code), and in furtherance of that purpose, may make rules, not inconsistent with law, establishing the basis for determining the "total service credit" of any member or pensioner.

4. In computing the six months for which a retired member of the public employes retirement system must have contributed in order to claim the benefit of the increased allowance provided by Section 486-59b, General Code, such member is entitled to include the period covered by back payments made pursuant to Section 486-33b, General Code.

5. When a superannuate at the time of retirement had selected an option as authorized by Section 486-67, General Code, the increased retirement allowance provided by Section 486-59b shall be allocated between the pensioner and his designated beneficiary in the same proportion as stipulated in his original election.

6. The beneficiary under an option selected by a former member, deceased prior to the enactment of Section 486-59b, General Code, can receive no benefit from the extra allowance provided by that section.

Columbus, Ohio, June 13, 1947

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

Dear Sir:

I have before me your two letters requesting my opinion on several questions arising under Section 486-59b, General Code, enacted by the 97th General Assembly. The section in question, is a part of Substitute Senate Bill No. 57, which became effective June 5, 1947. That act is a somewhat complete revision of the public employes retirement law (Sections 486-32 to 486-75, inclusive, of the General Code). The questions which you raise are as follows:

"1. By regulation of the Board the monthly allowance is always released at the end of the month. For example, the warrants for the month of June will be released on June 30. Will the

increase apply for the first time to the June, July or August allowance?

2. Should fractional parts of a year be considered when making the adjustments? For example, suppose a member had twelve years and nine months of total service credit. Would he be entitled to an adjustment of \$12.75 or an even \$12 per month?

3. Does the Public Employes Retirement Board have the authority to establish the basis for determining the 'total service credit' of any member or pensioner?

4. Is it required that a retired member have contributed to the System for at least six months subsequent to the date that membership was established and can a back payment (covering the period from January 1, 1935 to June 30, 1938, provided for in Section 486-33b, General Code) be included?

5. In the case of a present pensioner (now living) who selected one of the options provided by Section 486-67, General Code, is the allowance increase subject to the same factors of allowance reduction that applied when the allowance under the option was calculated originally?

6. Is the beneficiary (member now deceased) under one of the options permitted by Section 486-67, General Code, eligible for the increased allowance?"

Section 486-59b reads as follows:

"Any former public employe as defined in Section 486-32, General Code, who made the regular salary contributions provided in Sections 486-33e and 486-68, General Code, for at least six months prior to the date of retirement and who retired on a monthly retirement allowance as provided by Sections 486-60, 486-61 and 486-63, General Code, prior to April 2, 1947, shall have that allowance increased in an amount equal to *one dollar per month for each year of total service* as defined in Section 486-32, General Code, *the increased allowance to become effective as of the end of the month after this act becomes law.* Provided, however, in no case shall total service in excess of twenty-five years be considered in granting such increase nor shall the increased portion of the retirement allowance exceed the sum of the monthly benefits received by the retired member prior to the enactment of this section." (Emphasis added.)

1. With respect to the construction of statutes and particularly as affecting the time when a statute is to be operative, it is said in 50 Am. Jur., p. 521:

"The general rules for the interpretation of statutes are ap-

plicable to statutory provisions designating the time when a statute is to go into effect. In such case, as in any case of statutory interpretation, the primary rule is to ascertain the intention of the legislature. A court may not, by construction, for the purpose of correcting defective legislation, substitute a time at which a statute is to take effect other than that declared by the legislature. The intent of the legislature may be gathered from the context of the act, from the circumstances surrounding its enactment, from the hardship or inconvenience which each construction would impose upon those affected thereby, and the existence or non-existence of constitutional provisions which would conflict with a literal construction of the enactment."

In enacting this section the General Assembly, while providing more adequate retirement benefits for those members of the system who may retire in the future, was attempting also to grant an increased allowance to those who have heretofore retired. I think that it is reasonable to ascribe to the General Assembly a desire to put this increased allowance to superannuates into effect with reasonable promptness without working an undue hardship on the administrative staff of the system in recomputing the allowance of such superannuates.

In providing that "the increased allowance is to be effective as of the end of the month after this act becomes law", the General Assembly may well be presumed to have known that the act would become effective, if at all, at some time intermediate between the beginning and the end of a month and possibly late in the month.

If the act had been silent as to when this increased allowance should become effective, it would seem to follow as a matter of course that it would become effective from and after the time when the act became law, and that would call for a refiguring of the retirement allowance and probably for an allocation of a fractional portion of the new allowance to cover the balance of the month of June. If, therefore, we assume that the act should have become effective on the 25th of June, there would remain but five days before the time for payment of the regular retirement allowance for the month of June, a time which certainly would not be sufficient to enable the retirement board to recompute the allowance of the several thousand who have retired. To prevent this, and to make the law workable, the General Assembly saw fit to say that the "increased allowance" should become effective not at the instant the act becomes effective, but "at the end of the month after the act becomes law."

Now, let us inquire, what is the *end of the month* after the law becomes effective. I cannot resist the conclusion that it is the end of June. It appears to me as a matter of common sense that since the law actually became effective on the 5th of June, and the end of the month arrives as it does, the midnight of the 30th, then that would be the time when the new allowance is to become effective.

That assumption, however, would not lead to the conclusion that the annuitants are entitled on or about the 30th day of June when the June checks are issued, to receive an additional allowance covering the month of June. Since the right to the additional allowance does not begin to accrue until the moment that the month of June ends, there would, of course, be nothing to pay by way of extra benefit. The act does not say that the additional allowance shall be *paid* at the end of the month but rather that it shall *become effective* as of the end of the month. At the instant June ends, the new month of July begins. At that instant the increased allowance becomes effective, that is to say, it begins to accrue to the benefit of the superannuate, and if he is living at the end of the month of July when the time comes for the payment of the retirement allowance for that month, he would have added to his check this increased allowance, to the extent of one dollar for each year of total service for which he has credit. If the General Assembly had intended to make this benefit retroactive—to reach back to a time prior to the enactment of the law, it could have said so in unmistakable language.

It might be argued that the end of the “month after the act becomes law”, means the end of July, to wit, midnight of the 31st of July, and that the extra allowance begins to accrue only from that moment, and would therefore be payable at the end of August. In my opinion this would be giving undue emphasis to the word “month” and not sufficient force to the phrase “end of the month”, and it is my opinion that that would be a strained interpretation of the act, and not wholly consistent with its manifest purpose.

The General Assembly, in my opinion, desired to avoid splitting months for the purpose of putting this new allowance into effect, and at the same time wished to put it into effect with reasonable promptness, and so provided that it should begin to accrue or to become effective immediately upon the close of the current month during which the act becomes law.

2. As to your second question, bearing on the computation of this increased allowance, you will note that it is to be "one dollar per month for each year of total service, as defined in Section 486-32, General Code." "Total service" is defined in paragraph 11, of that section, as meaning "all service credited to a member of the retirement system since January 1, 1935, and in addition thereto, all prior service, if any, computed as provided in this act." The first element contained in the foregoing definition is further defined in paragraph 24 of the same section, which reads in part as follows:

" 'Contributing service' shall mean all service credited to a member of the retirement system since January 1, 1935. Provided, however, that if the retirement board shall determine that a position of any member in any one calendar year was a part-time position, the retirement board shall have the authority to determine what fractional part of a year's credit shall be allowed."

A reading of that section shows that a member may have credit for contributing service since January 1, 1935, in fractions of years as well as whole years.

"Prior service" is defined in paragraph 8, of the same section, but nothing is said about years or fractions of years. However, in Section 486-33b we find a similar provision to that above noted, authorizing the retirement board in case of part time positions, to determine what fractional part of a year's credit shall be given. Accordingly, since a member's total service may be made up of these two elements, both of which are by the terms of the law capable of being stated in terms not of even years but in terms of whole years plus fractions, it appears to me that the new provisions of Section 486-59b, General Code, which we are considering, must have been framed with those facts in mind, and that a person who has a certain number of years of total service, together with a substantial fraction of another year, would not be receiving his full measure of additional compensation unless that fraction were taken into consideration. Independent of these express provisions, I see no reason why a member should not be entitled in computing the amount of this additional allowance to credit for his full time of service, including fractions of years.

The provisions of Section 486-60, General Code, relative to the computation of the prior service pension also contains the same general language as to number of years of service without mentioning fractional

years, and since the amount of a member's prior service pension might be materially affected by having a substantial fractional part of a year's prior service added to his credit, it appears to me he could not be denied the right to have it considered, and if considered in that computation, it is certainly to be considered for like reason in construing the section to which you have called attention, relating to the new increased retirement allowance.

3. As to the authority of the retirement board to establish the basis for determining the "total service credit" of a member or pensioner, I have already pointed out the specific provisions of the law as to "part-time positions." There are also other situations that plainly call for some adjustment. For instance, those departments, wherein the work of a full-time employe is more or less irregular and subject to frequent short layoffs, or he is employed on a daily basis. In such case, it is obvious that some method be resorted to, to reduce his service to years or definite fractions of years, in order that he may have his proper share of the responsibilities and benefits of the system.

Obviously, the General Assembly could not anticipate and provide specifically for every such situation, and so provided in Section 486-34, General Code:

"The general administration and management of the public employes retirement system and the making effective of the provisions of this act are hereby vested in a board to be known as the 'public employes retirement board,' which shall consist of seven members as follows:"

In addition to various provisions of the law as to the powers and duties of the board, the General Assembly gave it this sweeping grant of authority, as found in Section 486-40, General Code:

"The retirement board shall perform such other functions as are required for the proper execution of the provisions of this act, and shall have authority to make all rules and regulations necessary therefor."

In my opinion this is abundant authority for the making of a rule not in conflict with the law for the determination of the "total service credit" of a member or pensioner of the system.

4. The first sentence of Section 486-59b supra, contains the following limitation as to the superannuates who are to benefit by the extra retirement allowance. It reads:

“Any former public employe as defined in Section 486-32, General Code, *who made the regular salary contributions* provided in Sections 486-33e and 486-68, General Code, *for at least six months* prior to the date of retirement and who retired on a monthly retirement allowance as provided by Sections 486-60, 486-61 and 486-63, General Code, prior to April 2, 1947, shall have that allowance increased,” etc. (Emphasis added.)

You raise the question whether a back payment made under Section 486-33b, General Code, can be considered in making up the six months of contribution. The provision of Section 486-33b referred to reads as follows:

“Credit for service between January 1, 1935, and June 30, 1938, may be secured by any such employe member \* \* \* provided he or she shall pay into the employes' savings fund an amount equal to the full additional liability assumed by such fund on account of the crediting of such years of service.”

The section last quoted gives specific authority to a member of the system who had served as a public employe between January 1, 1935 and June 30, 1938, but who had not made contributions to the employes' savings fund by reason of the fact that he was not then eligible to membership, to *secure credit for service* during such period, by making the prescribed payment. Clearly, when he has thus purchased “credit for service” he is entitled to have it counted in determining his eligibility for the additional allowance provided by Section 486-59b supra.

This conclusion might appear to be in conflict with the decision in the case of State, ex rel. Horky v. Retirement Board, 144 O. S., 344, where it was held that the requirement of Section 486-47, General Code, that a new member in order to be entitled to “prior service pension” must have made contributions *over an actual period of one year* before retirement, means that he could not purchase that right by making back payments. It will be seen by examining said Section 486-47 that it made no provision for obtaining service credit as the basis for such prior service pension, but made such pension strictly dependent on payment of contributions for a period of at least one year. Therefore, that case may readily be distinguished.



5. Section 486-67, General Code, relates to options which a member may select, upon retirement, as to the payment of his retirement allowances. Briefly stated, he may elect either to receive his full retirement allowance during his own life, or to have such allowance reduced during his lifetime and continued after his death to a named beneficiary. Such option must be exercised before he receives his first monthly payment, and when exercised is irrevocable. Your question is whether the increased allowance is subject to the same factors of allowance reduction that applied when the original calculation was made.

It appears to me that the answer must be in the affirmative. The retired member has made his original choice as to the portion of his retirement allowance he will use during his lifetime and the portion he will leave to his beneficiary. This choice is not subject to change. The additional allowance provided by the section under consideration merely swells the amount of the total retirement allowance, and there seems to be no ground or basis for changing the original apportionment.

6. As to the right of the beneficiary under an option, of a member now deceased to claim the benefit of the increase provided by the new law, plainly, the answer is in the negative. The language of the section, omitting unnecessary words is: "Any former employe \* \* \* who retired on a monthly allowance \* \* \* shall have that allowance increased \* \* \*." This language refers to no one but a superannuate, and assumes that he is living, and in no way suggests a person whom he has designated to succeed him after his decease.

Respectfully,

HUGH S. JENKINS,  
Attorney General.