

duties imposed upon his office by virtue of Section 284, General Code, compensation for which is provided in Sections 287 and 288, General Code.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

832.

PUBLIC EMPLOYEES RETIREMENT SYSTEM—MEMBERSHIP—EXEMPTION—WHERE ORIGINAL MEMBER DESIRES EXEMPTION—MUST FILE WRITTEN APPLICATION WITHIN THREE MONTHS AFTER ACT WENT INTO EFFECT—SECTION 486-33 G. C.—LITIGATION—CLAIM WRONGFUL DISCHARGE OR POSITION ABOLISHED—DOES NOT RELIEVE FROM NECESSITY OF FILING SUCH APPLICATION.

SYLLABUS:

1. *By the express terms of the first proviso of Section 486-33, General Code, when a public employee, who is an original member of the public employees retirement system, desires to be exempted from membership, he must have filed a written application for such exemption with the retirement board within three months after the act in which said section was enacted went into effect.*

2. *The fact that such a member was engaged in litigation during said three months period, for the purpose of determining whether he had been wrongfully discharged from his position as a public employee, or determining whether or not his position had been unlawfully abolished, does not relieve him from the necessity of filing a written application for exemption from membership with the retirement board within three months after the effective date of the act in case he desires to be exempted, nor does such fact extend the three months period fixed by the Legislature within which such written application for exemption must have been filed with the retirement board.*

COLUMBUS, OHIO, June 29, 1939.

MR. WILSON E. HOGE, *Secretary, Public Employes Retirement System, Columbus, Ohio.*

DEAR SIR: Your recent request for my opinion reads as follows:

“When the various employe groups were granted eligibility to membership in the Public Employes Retirement System, the law provided that every employe in the service at that time could claim exemption from participation in the Retirement System if

he did so by written application to the Board within three months after the effective date of the law.

A number of cases have arisen in which the employes had been discharged from their positions or their positions had been abolished and the question of the employer's right to so discharge them was in the process of litigation at the time the Retirement Law became effective. After some months of litigation the court decisions have been in favor of the employes and the employes have been reinstated to their former positions with or without remuneration for the period during which they were not actually employed.

The question is, therefore: Does the reinstatement by the court entitle the employes to the right to claim exemption from participation in the Retirement System even though the three-month period specifically provided for by the Retirement Law has elapsed?

Your advice on the above question will be appreciated."

While you do not expressly so state, since you refer to employes who "had been discharged from their positions or their positions had been abolished" and state that "the employes have been reinstated to their former positions with or without remuneration for the period during which they were not *actually employed*," it seems apparent that the employes in question were and are in the classified service under the state civil service law.

By the terms of Section 486-17a, General Code, "the tenure of every officer, employee or subordinate in the classified service of the state, * * * shall be during good behavior and efficient service," and when you speak of "reinstatement *by the court*" it is assumed that you mean that the court found that the attempted order of removal, or the attempted abolishment of the position, was contrary to law and absolutely null and void and of no effect. As stated in 7 O. Jur. 605, (except in the case of removal of a chief of police or chief of the fire department of a municipality)

"* * * the courts of Ohio have no jurisdiction to review, affirm, reverse or modify an order of removal made by an officer or board acting within the scope of its authority, and in compliance with the statute both as to grounds and procedure. On the other hand, the courts may interfere and compel the reinstatement, *or rather the recognition of the continued incumbency*, of one against whom a *wholly illegal order of discharge has been issued*."

In contemplation of law, therefore, the persons to whom you refer were never in fact separated from their positions, and no valid reason

exists why the limitation fixed by the Legislature in Section 486-33, General Code, *infra*, should not apply even though there was an attempt to remove them from their positions. Indeed, the basis of the court action to effect what is commonly referred to as reinstatement is the contention of the employee that he was not lawfully removed from his position. This being true, his failure to file a written application for exemption with the retirement board within three months after the effective date of the act cannot be excused because litigation was pending to determine whether or not he was still an employe. However, it is not necessary to rest the decision of your question on the legal status of the employes in question.

Section 486-33, General Code, reads in part as follows:

"A state employes retirement system is hereby created for the employes of the state of Ohio. 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. And provided further, that the board shall have authority to exempt from *compulsory membership* in the retirement system, classes or groups of employes engaged in work of a temporary, casual, or exceptional nature, but individuals in any such class or group so exempted may become members by making application therefor, subject to the approval of the retirement board; *provided, however, that any employe who is, or who becomes, a member must continue such membership as long as he is a state employe, even though he may be in or transferred to an exempted class or group.*" (Italics ours.)

From a most cursory reading of this and related sections, it is apparent that in keeping with modern trend of social legislation, it was the policy of the Legislature to create an effective public employees retirement system to the end that aged or infirm public employees might retire in financial security. One of the means adopted to attain this end is the requirement that, with certain specially enumerated exceptions, under specified conditions, membership in the retirement system shall be compulsory.

Clauses beginning with the word "provided" are called "provisos", and are "engrafted on a preceding enactment for the purpose of restraining or modifying the enacting clause, or of excepting something from its operation which otherwise would have been within it." See 59 C. J. 1087. As stated in the same authority at page 1089:

“A proviso which follows and restricts an enacting clause general in its scope should be strictly construed, so as to take out of the enacting clause only those cases which are fairly within the terms of the proviso, and the burden of proof is on one claiming the benefit of the proviso. * * *”

In Note II, page 118, of Potter's *Dwarris on Statutes* it is said :

“The office of a proviso, generally, is either to except something from the enacting clause, to restrain its generality, * * * *Mimis v. United States*, 15 Peters, 423; *Wyman v. Southard*, 10 Wheat. 1-30.

A proviso in a statute is to be strictly construed; it takes no case out of the enacting clause which is not fairly within the terms of the proviso. *U. S. v. Dickson*, 15 Pet. 141. * * *”

In the case of *Bruner v. Briggs*, 39 O. S. 478 (1883) it was said at page 484 of the opinion :

“This proviso is a limitation or exception to a right conferred by the general provision of the section. Its effect is to be limited to cases clearly falling within its term.”

Having in mind then the purpose and policy of the Legislature, and construing the proviso under consideration in accordance with the well settled rule of strict construction above set forth, I have no hesitancy in holding that in order to obtain exemption from membership in the public employes retirement system, any original member must have filed a written application for such exemption with the retirement board within three months of the effective date of the act. No exceptions to this requirement were prescribed by the Legislature. And the mere fact that a public employee, who was an original member, was engaged in litigation for the purpose of determining whether or not he were still a public employee does not serve to extend the time of the three months period fixed by the Legislature.

In specific answer to your question it is my opinion that, for the reasons stated :

1. By the express terms of the first proviso of Section 486-33, General Code, when a public employee, who is an original member of the public employes retirement system, desires to be exempted from membership, he must have filed a written application for such exemption with the retirement board within three months after the act in which said section was enacted went into effect.

2. The fact that such a member was engaged in litigation during said three months period, for the purpose of determining whether he had

been wrongfully discharged from his position as a public employee, or determining whether or not his position had been unlawfully abolished, does not relieve him from the necessity of filing a written application for exemption from membership with the retirement board within three months after the effective date of the act in case he desires to be exempted, nor does such fact extend the three months period fixed by the Legislature within which such written application for exemption must have been filed with the retirement board.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

833.

LEASE—CANAL LAND, STATE TO ROY ZELLER, DESIGNATED PORTION, ABANDONED MIAMI AND ERIE CANAL AND SIDNEY FEEDER CANAL, VILLAGE OF LOCKINGTON, SHELBY COUNTY.

COLUMBUS, OHIO, July 1, 1939.

HON. CARL G. WAHL, *Director, Department of Public Works, Columbus, Ohio.*

DEAR SIR: This is to acknowledge the receipt of your recent communication with which you submit for my examination and approval a canal land lease executed by you as Superintendent of Public Works and as Director of said department, to one Roy Zeller, of Piqua, Ohio.

By this lease, which is one for a stated term of fifteen years and which provides for an annual rental of \$6.00, there is leased and demised to the lessee above named the right to occupy and use for lawn, garden and agricultural purposes that portion of the abandoned Sidney Feeder Canal, located in the Village of Lockington, Shelby County, Ohio, and described as follows:

“Beginning at the point of intersection of the southerly line of the said Sidney Feeder Canal and a line drawn at right angles to the transit line, through Station 3+10, of W. H. Gaffney’s Survey of said canal property, said right angle line being the westerly line of a lease granted to H. P. Bailey, under date of August 2nd, 1926, and running thence westerly parallel with said transit line one hundred and ten (110’) feet to a point opposite Station 2 of said Gaffney Survey; thence southwesterly with the southerly line of said feeder and canal property, fifty-two (52’) feet, more or less, to a point in the easterly line of Lot