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RETIREMENT SYSTEM, PUBLIC EMPLOYEES—EMPLOYEE CLAIMED EXEMPTION FROM MEMBERSHIP—PERIOD OF YEARS PRECEDING INDUCTION INTO ARMED FORCES OF UNITED STATES—UPON DISCHARGE AND RETURN FROM ARMED FORCES RESUMED PUBLIC EMPLOYMENT—MADE BACK PAYMENTS, WITH REGULAR INTEREST IN AMOUNT EQUAL TO PAYMENTS HE WOULD HAVE MADE DURING ABSENCE—EMPLOYEE ENTITLED TO MILITARY SERVICE CREDIT—SECTION 486-33a, 486-47 GC.

SYLLABUS:

Where a public employe claimed exemption from membership in the Public Employes Retirement System over a period of years immediately preceding his induction into the armed forces of the United States, and upon his discharge and return from the armed forces promptly resumed his public employment, elected to become a member of the system, and made the back payments, with regular interest, to the system, pursuant to Section 486-33a, General Code, equaling the amount he would have paid into the system had he been a member of the system during the period for which he claimed exemption, such employe is entitled, pursuant to Section 486-47, General Code, to the military service credit therein provided.

Columbus, Ohio, May 8, 1953

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

Dear Sir:

I have before me your request for my opinion which reads as follows:

“Section 486-47 of the General Code (section 145.30 of the Revised Code) provides for the allowance of service credit to members of the Retirement System who have served with the armed forces.

“At the last meeting of the Retirement Board the writer was instructed to secure your opinion on the following question:

“Is a present member of the System entitled to credit for military service in case membership in the Retirement System was established subsequent to the return from military service?”

The memorandum attached to your letter of request indicates that a county employe claimed exemption from membership in the Public Employes Retirement System in 1938. This employe entered the military service several years later, and upon his discharge from the service in 1945, asked that his exemption be withdrawn. The exemption from membership was withdrawn and on December 31, 1945, the initial contribution to the system was made. Early in 1946 the employe made the back payment covering the amount he would have paid into the system over the years the exemption was in effect. The member now claims he is entitled to credit for his years of military service, pursuant to Section 486-47, General Code. His claim appears to be based upon the fact that though he did not actually become a member of the system until after his return from the military service, he did in 1946 make the back payments covering the amount he would have paid into the system as a county employe had he been a member of the retirement system during the period for which he claimed exemption (i. e. from 1938 to the time he entered the service). Thus, he is in effect claiming membership in the system, dating back to the period before his induction into the military service.

The back payment was made pursuant to Section 486-33a, General Code, which read at the time, early in 1946, in part as follows:

“* * * Any employe who heretofore exempted himself from membership shall have the right to withdraw such exemption at any time prior to August 31, 1946, and to make such payments, with regular interest thereon, as he would have made if he had been a member continuously * * *.”

In the early years of the Public Employes Retirement System, a public employe was permitted under the law to claim exemption from membership in the system. Today, membership in the system is compulsory. Section 486-33a, General Code, supra, was designed to allow a person who claimed exemption to become a member of the system retroactively as well as prospectively. The employe is thus placed upon the same footing as one who had been a member of the system over the same period, so long as he makes the payments, with interest, as he would have made had he been a member continuously. The employer, of course, must then match these contributions, for the purpose of building up his retirement benefits.

The statute which provides for military service credit for public employes is Section 486-47, General Code, which reads in material part as follows:

“* * * Upon re-employment in the public service as covered by this system, the state teachers retirement system or the state school employes retirement system, within two years after an honorable discharge the presentation of an honorable discharge and subject to such rules and regulations as may be adopted by the retirement board, *any member of this retirement system who maintained his membership in this retirement system as provided by section 486-65a of the General Code, and who was or is out of active service as a public employe by reason of having become a member of the armed forces of the United States on active duty or service shall have such military service, not in excess of seven years, considered as the equivalent of prior service.*”
(Emphasis added.)

It will be observed that this section allows military service credit, as the equivalent of prior service, in a situation where a member of the retirement system maintained membership in the system upon becoming a member of the armed forces of the United States.

The military service credit statute, Section 486-47, General Code, supra, speaks of maintaining membership in the system “as provided by Section 486-65a, General Code * * *.” This latter section, which defines when membership in the system shall cease, also governs the procedure to be followed in obtaining a leave of absence. The section provides, in substance, that a member who separates from his service as a public employe for any reason other than death or retirement may leave his accumulated contributions on deposit with the retirement board and, for the purpose of the system, be considered on a leave of absence for a period of five years.

Reading Section 486-47, General Code, *in isolation*, the statute’s technical and literal interpretation would appear to be one whereby only those public employes who in fact were *members* of the retirement system at the instant of induction into the armed forces, are entitled to veterans’ military service credit. Such employes most assuredly are entitled to military service credit, since they held membership in the system at the time, and left their contributions on deposit with the system in pursuance of Section 486-65a, General Code. In my opinion, however, the legislature, by enacting Section 486-47, General Code, did not intend

to limit veterans' service credit to the case of actual contributing membership in the system at the moment of the employe's induction into the armed forces.

It is an undeniable fact that the employe, in the case you recite, held no membership card in the retirement system at the date of his induction into the armed forces. It is nevertheless possible under the law to attain retrospective membership in the public employes retirement system, as demonstrated earlier in this opinion. An exempted public employe may withdraw his exemption and become a member of the retirement system not only prospectively, but also retrospectively, if he makes the back payments. The statute, as already noted, deems such an employe, once he pays the backlog, as a member of the system continuously. Hence, there is no question but that the county employe, herein involved, by paying in 1946 the backlog for the years from 1938 to the year he entered the armed forces, could claim membership in the retirement system for that past period. Does the fact that he was called into the armed forces for several years deny him membership in the system for the war years, for the purpose of claiming veterans' military service credit? I think not.

For the purpose of focusing the fact picture presented by your request, and for the purpose of gaining insight into the applicable law, allow me to draw upon a hypothetical set of facts. Let us suppose that two men, A and B enter the public employment on the same day in 1938. A immediately elects to become a member of the retirement system. B chooses to assert his right of exemption from membership in the system. A, of course, makes the regular contributions to the system. On the same day in 1942 A and B are drafted into the army. They both come back to their public employment in 1945, on the same day. B decides to withdraw his exemption from membership, and pays in the amount he would have paid for the period from 1938 to 1942, with interest. Both A and B are now members of the retirement system; both have paid in exactly the same amount; both served in the armed forces. Has the legislature manifested an intent to allow military credit only to A, the employe who had contributed over a period of years, while denying the same credit to B who contributed the same amount, though in one lump sum? In my opinion the legislature has provided nothing of the sort.

In the alternative, let us examine another hypothetical situation. Let us suppose that both A and B elect to remain exempt from membership

in the system until 1946, whence both decide to withdraw the exemption and become members. Let us further suppose that A was not called into the armed forces, but that B was drafted in 1942. A, in 1946, pays in an amount equal to the amount he would have paid in to the system had he been a member during the period 1938-1945, inclusive. B, in 1946, pays in the amount he would have paid in to the system had he been a member during the period 1938-1942, inclusive, the latter being the date of induction into the armed forces. Can it be said that B is denied any sort of credit for the four years he served his country? I think not.

In short, I am of the opinion that the pervading intent of the legislature as related to the entire public employes retirement law is to sanction, in proper cases, the application of a *nunc pro tunc* doctrine with regard to membership in the system. This can be seen in Section 486-33a, General Code, relative to withdrawing one's exemption from membership in the system, and by making back payment, becoming a member thereof retrospectively. The same intent can be seen in Section 486-47, General Code, which, in effect, considers an employe as a member of the system during his military service years, thus granting him the benefits of including those war years in the computation of total years of service when the time arrives for payment of retirement benefits.

The legislative attitude is further revealed in Section 486-16a, General Code, which section concerns restoration to office or position and civil service rating after military service. The third paragraph of this section reads as follows:

"Whenever the time or period of employment in the classified service affects the status, rank, rating, increments or qualifications in any respect of any person who has served in the armed services of the United States, * * * such person shall be given credit for the period in which he served in such armed services as though such time were served in the course of his regular employment."

Though this section is aimed at securing for a civil servant his rating and rank even though he was or is called into service, and is, therefore, not immediately concerned with the calculation of a public employe's retirement benefits, it points the way toward a liberal and generous outlook by the legislature in the field of public employes who are veterans. Further evidence of the legislative intent in this area appears in the form of Section 5266-1, et seq., General Code. These sections have as their object

the restoration to the same or similar position of a public employee who left the public employment on or subsequent to June 27, 1950.

I am brought to the conclusion that for the purpose of being entitled to military service credit, as provided for in Section 486-47, General Code, an individual who claimed exemption from membership in the public employes retirement system down to the date of induction into the armed forces of the United States, may be considered as a member of the system at the time of his induction by withdrawing that exemption upon return from the service if he pays into the system an amount equal to that which he would have paid into the system, with regular interest, had he been a member of the system at the date of call to the service; it being the legislative intent to authorize retrospective membership in the public employes retirement system. In other words, an individual who was not in fact a member of the system on a certain date, is nevertheless looked upon in the eyes of the law as a member of the system on that date, if he fulfills certain obligations owing to the system.

Accordingly, it is my opinion that where a public employe claimed exemption from membership in the Public Employes Retirement System over a period of years immediately preceding his induction into the armed forces of the United States, and upon his discharge and return from the armed forces promptly resumed his public employment, elected to become a member of the system, and made the back payments, with regular interest, to the system, pursuant to Section 486-33a, General Code, equaling the amount he would have paid into the system had he been a member of the system during the period for which he claimed exemption, such employe is entitled, pursuant to Section 486-47, General Code, to the military service credit therein provided.

Respectfully,

C. WILLIAM O'NEILL

Attorney General