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RETIREMENT SYSTEM, PUBLIC EMPLOYES—MEMBER WHO ON JUNE 30, 1946, OR ANY SUBSEQUENT TIME RETIRED BECAUSE OF HAVING REACHED AGE OF SEVENTY YEARS—ELECTED TO WITHDRAW ACCUMULATED CONTRIBUTIONS—SECTION 486-59 G. C.—THEREAFTER INELIGIBLE FOR REGULAR REEMPLOYMENT IN ANY CAPACITY—PROVISIONS, PUBLIC EMPLOYES RETIREMENT ACT—SECTIONS 486-2 THROUGH 486-74 G. C.

## SYLLABUS:

A member of the public employes retirement system who on June 30, 1946 or at any subsequent time was compelled to retire because of having reached the age of seventy years, and who elected, as provided in Section 486-59, General Code, to withdraw his accumulated contributions, is thereafter ineligible for regular reemployment in any capacity which comes within the provisions of the public employes retirement act, Sections 486-32 to 486-74, General Code.

Columbus, Ohio, October 6, 1948

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

Dear Sir:

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

“A question has been raised whether a former member of the Public Employes Retirement System who left public service

after having attained the compulsory retirement age of seventy years and elected to accept a refund of contributions rather than a retirement allowance is, under the provisions of the last sentence of paragraph two of Section 486-59, General Code, eligible to return to public service and to membership in the Retirement System at a date subsequent to the refund.

“The particular case in question involves a man who left the public service on June 30, 1946. He returned to public service in July, 1948. Would his status have been any different, had he returned to service since August 31, 1948?”

Section 486-65a, General Code, states the circumstances under which membership in the retirement system ceases. This section provides in part as follows:

“Membership shall cease upon refund of accumulated contributions or upon retirement except as provided in Section 486-64 of the General Code, relative to disability retirement.”

In the case you present, the member in question having reached the age of seventy years, left his public service and elected to accept a refund of contributions rather than a retirement allowance. This of course resulted in his ceasing to be a member of the retirement system.

Section 486-59, General Code, contains a paragraph which relates to the status of members of the retirement system who were either over seventy years of age at the time they became members or who thereafter attained to that age. This section reads in part 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 September 1, 1948, any member having reached the age of seventy years may, upon written application approved by the head of his department or institution, be continued in service for a period of one year, or any part thereof, such applications to expire on the June 30 following the date upon which they were filed unless renewed on or before the expiration date. On and after September 1, 1948, no such applications for continuation in service shall be approved, and any member who accepts an allowance under Sections 486-59, 486-60 or 486-61 of the General Code, or *who is compelled to retire at the age of seventy years and who withdraws his accumulated contributions in lieu of accepting a retirement allowance shall be*

*ineligible for regular reemployment in any capacity which comes within the provisions of the public employes retirement act."*  
(Emphasis added.)

Here, it will be noted that any employe coming within the purview of the retirement system who has ceased to be a member of the system either by accepting a retirement allowance, or who has been compelled to retire at the age of seventy years and who has elected to withdraw his accumulated contributions in lieu of accepting a retirement allowance, shall be ineligible for regular reemployment thereafter.

Section 486-63b, General Code, contains a provision which would appear to constitute an exception to this exclusion from reemployment, so far as concerns a member who *has been retired and is receiving a retirement allowance*. This provision, so far as pertinent, is as follows:

*"Until September 1, 1948, any employer, as defined by this act, may employ any person or persons receiving retirement allowances under the provisions of Sections 486-59, 486-60, and 486-61 of the General Code, such retired persons hereinafter to be referred to as superannuates, provided such employer shall formally declare that an emergency exists, \* \* \*"*  
(Emphasis added.)

This section in similar terms has been in effect for a number of years, the only difference being that prior to its amendment by the 97th General Assembly, June 30, 1947, was the time limit for reemployment, and as fixed in a still earlier form, the time limit was June 30, 1945. It should be noted that the right here given is not as a privilege or indulgence to the *employe*, but is clearly a grant of power to the *employer*, based upon his declaration that an emergency exists.

It is significant that while this privilege of rehiring has been granted to employers as to superannuates receiving retirement allowances, no such authority has been granted as to those who have forfeited their membership by electing to receive a refund of their contributions.

Attention, however, should be called to Section 486-57, General Code, which provides in part as follows:

*"Should a member who separates from his service as a public employe and relinquishes his membership in the retirement system through withdrawal of his accumulated contributions, return to public service and to membership in this retirement system within*

seven years of the date of withdrawal and within the same period restore to the employes' savings fund, his accumulated contributions as they were at the time of withdrawal, together with regular interest thereon from the date of withdrawal to the date of redeposit, the annuity rights provided in Sections 486-60, 486-61, or 486-63, General Code, which were forfeited by him at the time of separation shall be restored. \* \* \*

(Emphasis added.)

There are further provisions as to the conditions upon which he may restore prior service credit.

Your letter does not suggest that the member in question did upon returning to public service on June 30, 1946, comply or offer to comply with the conditions set forth in the section last quoted. The question still remains whether or not in view of the fact that he was compelled to retire at the age of seventy years he could still avail himself of the provisions of Section 486-57 and by restoring his contributions obtain the right to reemployment and to renewal of his membership in the system. Plainly, the section has no application, if he was completely barred from returning to public service as a regular employe.

It appears to me that it would be contrary to the manifest spirit and intent of Section 486-59, *supra*, to allow the member in question to restore his membership in the system under the circumstances stated. Section 486-59 proceeds upon the assumption that as a general proposition a public employe who falls within the scope of the retirement system should be retired not later than June 30 following the date upon which he reaches the age of seventy years. The provision of this section authorizing an extension of his service beyond that time was not intended as a favor to the employe, but rather as a privilege of the employer. It was manifestly based on the shortage of persons available to carry on the work of the several offices. This is distinctly expressed in the title and text of the successive amendments of the section as found in 121 O. L., 37 and 122 O. L. p. 187, both of which were predicated on the "shortage of man power in the government of the State of Ohio and its political subdivisions" and passed as emergency measures on that stated ground.

The provision barring from reemployment a member who has withdrawn his contributions is contained in a sentence which relates solely to one who "*is compelled to retire* at the age of seventy years", and in so far as this provision may seem to be in conflict with the general provision of

Section 486-57, supra, the special provision would control. It is quite possible to give full effect to both provisions by considering Section 486-59 as constituting an exception to 486-57.

The situation is not affected by the fact that the member referred to in your letter withdrew his contributions on June 30, 1946. Nor can I see that any different conclusion could be reached, if as you suggest, the member withdrew his contributions after August 31, 1948. That date has no significance, except as establishing the dead-line beyond which an employer may not, by his approval, extend the service of an employe who is beyond seventy years of age, and in the cases here presented the employer has evidently failed to exercise his right to continue the service of the employe, and he is therefore "compelled to retire."

It should be observed that the inhibition in Section 486-59, supra, is against "regular" reemployment. The retirement act contains no definition of "regular employment". However, Section 486-33, General Code, provides in part:

"Membership in the public employes retirement system shall be compulsory and shall consist of all public employes upon being regularly appointed. Provided, 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; \* \* \*

In view of this provision it appears that "regular employment" would cover all public employes who are compulsorily members of the system. By Section 486-32, par. 4, General Code, the retirement board is given authority, in case of doubt to determine whether any person is a "public employe."

I am accordingly of the opinion that a member of the public employes retirement system who on June 30, 1946, or at any subsequent time was compelled to retire because of having reached the age of seventy years, and who elected, as provided in Section 486-59, General Code, to withdraw his accumulated contributions, is thereafter ineligible for regular reemployment in any capacity which comes within the provisions of the public employes retirement act, Sections 486-32 to 486-74, General Code.

Respectfully,

HUGH S. JENKINS,  
Attorney General.