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1. RETIREMENT SYSTEM, PUBLIC EMPLOYES — PERSONS MAY NOT BE RE-EMPLOYED BY STATE, COUNTY OR LOCAL GOVERNMENT, WHO ATTAIN AGE OF SEVENTY YEARS AND RECEIVE SUPERANNUATION RETIREMENT ALLOWANCE.

2. THOSE WHO RETIRE BEFORE REACHING AGE OF SEVENTY MAY BE RE-EMPLOYED PRIOR TO ATTAINING SAID AGE, BY ANY FEDERAL, STATE, COUNTY OR LOCAL GOVERNMENT — ACCEPTANCE, RE-EMPLOYMENT DURING PERIOD SUCH EMPLOYMENT, WILL HOLD IN ABEYANCE PENSION PROVIDED, SECTION 486-60 GENERAL CODE.

SYLLABUS:

1. Persons receiving superannuation retirement allowances under the Public Employes Retirement System who have attained the age of seventy may not be re-employed by the state, county or local government.

2. Members of the Public Employes Retirement System, who retire from public employment before reaching the age of seventy years, may be re-employed, prior to attaining said age, by any federal, state, county or local government. The acceptance, however, of such employment, if the same is remunerative, will hold in abeyance the pension provided for in Section 486-60, General Code, during the period of such employment.

Columbus, Ohio, February 8, 1942.

Mr. Wilson E. Hoge, Secretary, Public Employes Retirement System, Columbus, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion, which reads as follows:

> "After an employe and a member of the Retirement System has accepted superannuation retirement, either on a voluntary or involuntary basis, is it legally possible, First: for such person to be reappointed to another branch of the state, county or municipal government: and, Second: If such person can be legally reappointed to some branch of the governmental service is the Retirement Board obligated to start his allowance again at the end of such term of public employment?

> The law is perfectly clear that during the period when a person is drawing remuneration from any branch of the state, county, municipal or federal service he could not receive also an allowance from this system. It is not clear, however, as to whether he can be reappointed or if he can be whether he is jeopardizing his standing in the Retirement System. We do want to direct your attention to the fact that for a person to return to service after he has once retired and to still retain the right to receive his pension at the end of his term of employment disturbs the correctness of the rates from an actuarial standpoint."

In an opinion rendered by me on July 13, 1939 (O.A.G. 1939, Page 1188), it was held as evidenced by the syllabus that:

> "Nothing in the Public Employes Retirement Act or any other provision of the General Code of Ohio makes ineligible for employment by a state department persons who are past the age of seventy years on the first day of their employment."

In the case of such employment, however, it is incumbent upon the Retirement Board to retire said employes at the end of the year in which they become a member of the system. While the foregoing conclusion extends to county and municipal departments of government in similar factual situations, it does not, however, serve as authority for the proposition that *retired* public employes, seventy years of age or over, may be re-employed or re-appointed in the state, county or local government. Reference to said opinion will disclose that the question considered therein concerned persons who are past the age of seventy years on the first day of their employment by one of the departments of state, and did not include retired employes, who prior to their retirement, were members of the system.

The Public Employes Retirement System contains many detailed provisions that need not be here considered; an appreciation of certain salient features is, however, necessary. With reference to voluntary retirement, superannuation retirement, service extensions and exceptions, Section 486-59, General Code, provides as follows:

> "On and after January 1, 1939, any member, except a new member with less than five years of service, who has attained sixty years of age, may retire by filing with the retirement board an application for retirement. The filing of such application shall retire such member as of the end of the quarter of the calendar year then current.

> At the end of the year in which he becomes a member the retirement board shall retire any state employe who was over seventy years of age at the time he became a member and shall retire all other members at the end of the year in which the age of seventy is attained, except elective officers and except state employes in the classified service holding positions on account of exceptional qualifications under the provisions of section 486-14 of the General Code. Provided, that until January 1, 1945, 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, and thereafter may be continued in service for periods of one year each, upon the filing of like application and approval.
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> In the event any retired pensioner, after such retirement, is elected to a full-time salaried office by the electors of the state or any political subdivision thereof at any election, such pensioner, by the acceptance of any such office shall not forfeit his pension but the same shall be held in abeyance during the period such pensioner so holds such office and receives the salary therefor."

It will be noted that the foregoing section explicitly provides that the Retirement Board shall retire all other members at the end of the year in which the age of seventy is attained. Elective officers and persons with exceptional qualifications are excepted. The only method by which a member of the system, other than those excepted, may continue in service upon attaining the age of seventy is by written application approved by the head of the department or institution.

The privilege of continuing in service must, of course, be granted before actual retirement for upon that event membership in the system ceases.

Our problem is the ascertainment of the meaning of the mandatory provision that the Retirement Board shall retire members at the end of the year in which the age of seventy is attained. Did the Legislature thereby render such persons legally incapable of holding office by subsequent appointment or employment? It is my opinion that such was the intent of the Legislature.

In the case of Haag v. City of New York, *22* N.Y.S. 676 (1926), a question identical to that now under consideration was before the court. The retirement system provided for by the Greater New York Charter is the same to all intents and purposes as the Public Employes Retire-

ment System now operated in Ohio. Because of this similarity and the analogy to be drawn therefrom, I quote at length from the New York decision:

> "The actual controversy involved the construction and application of Sections 1700 to 1724 of the City Charter * * * entitled: 'An act to amend the Greater New York Charter, by providing for a retirement system for officers and employees whose compensation in whole or in part is payable out of the treasury of the City of New York.' * * *
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> The city * * * urges that the effect of the act is to make ineligible for city service any member of the retirement system who has attained the age of 70, unless he be continued as provided in Section 1710, which proviso may be dismissed from consideration because the course therein prescribed was not observed in this case. * * *
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> * * * Plaintiff's initial contention before me is that the word 'retirement' is not an apt term to describe legal incapacity to hold office, and it is urged in this connection that, were the latter intended the purpose might readily have been expressed in some phraseology akin to that contained in Article VI, Section 12 of the constitution:
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> > 'No person shall hold the office of judge or justice of any court longer than until and including the last day of December next after he shall be seventy years of age.'
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> The argument is not intended to be conclusive but merely persuasive. It loses its force, however, when it is recalled that the legislation wholly excluded from its compulsory effect all the employes in the service at the time of its passage and all other employes not in the competitive or labor classes. Any all-inclusive statement of incapacity to hold office after a certain age would, therefore, have been out of place — in fact, impossible.
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> The question then recurs: What is meant by the word 'retirement'? It seems to me that the context well-nigh construes the language: Each member in city service who has attained the age of 70 'shall be retired.' He may, however, 'be continued in the public service,' and finally 'in no case shall public service be continued after the age of 80.' * * *
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> I find my general interpretation of the purpose and meaning of the act confirmed by two outstanding considerations:
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> First, in the corresponding law applicable to state employes * * * there is a provision almost identical with Section 1710 in the feature under consideration. In 1921 * * * the Legislature amended the state statute by adding:

> 'This provision shall not apply to judges or justices of any court, or to elective officers holding their offices either by election or appointment to fill vacancies or to official referees.'

This exception has been continued with slight occasional amendment. To my mind it indicates the understanding of the Legislature that the words 'shall be retired' mean discontinuance in and incapacity to hold appointive office. There is no other condition from which the officials named could conceivably be excepted. * * *

Second, the contemporaneous literature which accompanied the passage of these laws points out their dual function, namely: (a) to provide for the support of faithful public officials after they attain the traditional age of 'three score and ten' (or their intermediate accidental incapacity); and (b) by rendering removal automatic, to relieve the appointing power from the dilemma either of removing the ordinarily superannuated employee, thus leaving him without means of support, or of allowing him to continue in the service out of humanitarian motives to the manifest detriment of the service.

Plaintiff is impressed only with the first of these purposes. That the advocates and framers of the statute had both in mind, however, is clear from official publications of the time. In the March 30, 1920 report to the Legislature of the state commission on pensions * * * at page 14 occurs the significant sentence: 'Certain funds offered employes inducement to retire in the prime of life, whereas other funds did not provide *to the service* adequate relief from superannuation.'

And at pages 58 and 59 it said:

> 'The commission believes that to attain the highest level of efficiency, the governmental service of the state requires a system for the retirement of superannuated and disabled employees. Without a retirement system the tendency is for department heads to retain on the payroll superannuated and disabled employees, rather than to dismiss them after long and faithful service; the avenues of promotion become blocked and the younger and more efficient employees are tempted to leave the service for positions where individual initiative and energy receive more tangible recognition.' * * *

Other similar expressions might be cited, but I have adduced enough to illustrate the underlying motives for the legislation, which I think compel the interpretation that, unless continued in service upon affirmative request of a superior officer (as provided in Section 1710) a member of the retirement system is excluded from the public service upon arriving at the age of 70. * * *

> Finally, some reference has been made to the effect Section 1560 of the New York City Charter, which provides that one enjoying a pension and simultaneously holding office shall not receive the pension during the time of his enjoyment of the salary. From this it is sought to draw the implication that the Legislature contemplated, at least as to the City of New York, that a pensioner may hold office. * * * If such assumption were justified, the Retirement Act affords ample opportunity for the application of Section 1560 in respect of members between the age of 60, the age of voluntary retirement, and 70, that of compulsory removal. * * * "

The facts under consideration in the above case are identical with those hereinunder considered, and it, therefore, seems to me that the conclusions reached therein may not be disregarded.

The Ohio Public Employes Retirement System, as amended, is similar to the New York City Employment System in that it provides that persons shall receive a pension provided they shall not hold any remunerative office or employment in the federal, state, county or local government. This proviso is contained in Section 486-60, General Code, which reads as follows:

> "Upon superannuation retirement, a state employe shall be granted a retirement allowance consisting of:
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> (a) An annuity having a reserve equal to the amount of the employes accumulated contributions at that time, and, provided such employe shall not hold any remunerative office or employment in any federal, state, county or local government.
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> (b) A pension of equivalent amount, and
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> (c) An additional pension, if such employe is an original member, equal to one and one-third per centum of his average prior-service salary multiplied by the number of years of service in his prior-service certificate."

The inference that may be drawn from the foregoing section of the General Code, to-wit, that a pensioner may be re-appointed or re-employed in public employment providing he forfeits his pension, is not strong enough to overcome the declared intention of the Legislature that the Board *shall retire* members at the end of the year in which the age of seventy is attained and thereby rendering such persons legally incapable of holding office or employment in the state, county or local government except by election thereto. Such an inference would destroy the com-

pulsory effect of the act and defeat its very purpose. To give the proviso meaning and to harmonize it with the above declaration it must be concluded that it has application only to persons between the age of sixty and seventy. In other words, members of the system who have voluntarily retired upon attaining the age of sixty may be re-employed in the interim between sixty and seventy if they wish to forego their pension allowance.

The exception contained in Section 486-59, supra, with respect to elected officials, which holds in abeyance their pension allowance during the period such pensioner so holds office, indicates that the holding of any other remunerative office or employment by appointment thereto in any federal, state, county or local government would result in a complete forfeiture of pension allowance and not simply an abeyance thereof. By implication, therefore, pensioners between the age of sixty and seventy who accept re-employment in the federal, state, county or local government would forfeit forever their right to receive the pension allowances granted upon their prior retirement. Such interpretation through mere implication can not, however, be countenanced. Generally speaking, statutes are construed strictly against forfeiture. To work a forfeiture explicit language is required, it can not be done by implication. Lewis' Sutherland, Statutory Construction (2ed) Vol. II, page 1020; The Steamboat Ohio v. Stunt, 10 O.S. 582.

It follows that the language in Section 486-59, supra, which provides that the pension allowances to elected officials shall be held in abeyance during the period such pensioner holds office, and that the language of Section 486-60, supra, granting a pension providing such employe shall not hold any remunerative office or employment in any federal, state, county or local government, should, if possible, be construed so as to prevent a forfeiture. Any re-employment, therefore, by governmental departments would result in a withholding of the pension allowance only during the period of employment.

In specific answer to your inquiry, it is my opinion that:

1. Persons receiving superannuation retirement allowances under the Public Employes Retirement System who have attained the age of seventy may not be re-employed by the state, county or local government.

2. Members of the Public Employes Retirement System, who re-

tire from public employment before reaching the age of seventy years, may be re-employed, prior to attaining said age, by any federal, state, county or local government. The acceptance, however, of such employment, if the same is remunerative, will hold in abeyance the pension provided for in Section 486-60, General Code, during the period of such employment.

Respectfully,

THOMAS J. HERBERT
Attorney General.