

1951.

STATE EMPLOYEES RETIREMENT BOARD—WHERE MEMBER OF SYSTEM, AGED SEVENTY YEARS, FILED WITH BOARD “APPLICATION FOR CONTINUATION IN ACTIVE SERVICE, PAST COMPULSORY RETIREMENT AGE”—HEAD OF DEPARTMENT OR INSTITUTION WHO APPROVED SAME CANNOT OBTAIN PERMISSION FROM BOARD TO WITHDRAW SUCH APPROVAL.

SYLLABUS:

In the case where a member of the State Employees Retirement System who has reached the age of seventy years, and before the end of the year has filed with the State Employees Retirement Board his “Application for Continuation in Active Service Past Compulsory Retirement Age” approved by the head of his department or institution, the head of the department or institution can not request the State Employees Retirement Board to permit him to withdraw such approved application after January first.

COLUMBUS, OHIO, February 18, 1938.

HON. WILSON E. HOGUE, *Secretary, State Employees Retirement Board, Columbus, Ohio.*

DEAR SIR: This will acknowledge receipt of your recent communication which reads as follows:

“According to Sec. 486-59 G. C., a number of members of the Retirement System have filed applications to continue in service for one more year, such applications having the approval of the head of the department. Such applications have not been acted upon to date by the State Employees Retirement Board.

The question arises as to whether the department after having approved such applications for continuation in active service and filed them with the Retirement Board can withdraw them and compel the member to retire effective January 1, 1938.

We will appreciate your advice as to whether this Board can legally allow such a procedure either before official action by the Board or after such action.”

By way of a supplemental letter I am informed—that, under the date of October 25, 1937, a letter was mailed to each member of the system who had attained the age of seventy years on or before December

31, 1937, containing an application for retirement and an "application for Continuation in Active Service Past Compulsory Retirement Age" and with the instruction in the letter that "one or the other of these forms must be in this office on or before December 31, 1937"; that, the applications for continuance in active service, in question herein, that were approved by the head of the department and which the head of the department on January 5, 1938, requested permission from the State Employees Retirement Board to withdraw, were filed with the board on or before December 31, 1937; that, all of the members, except four, whose approved applications for continuance in active service were asked to be withdrawn, were permitted to return to work after January 1, 1938, received compensation for their services and the head of the department deducted from the compensation of such members their contributions for payroll periods subsequent to January 1, 1938; that, the State Employees Retirement Board has adapted no rule or regulation providing that an approved "Application for Continuation in Active Service Past Compulsory Retirement Age" cannot be requested withdrawn after a certain date, in order to prevent any interference with a member's right to receive his superannuation allowance from January 1st; and that, the only rule and regulation adopted by the board concerning applications for continuation in active service is as follows:

"That the Secretary be instructed to mark as they are received by this office all Applications for Continuation in Active Service Past Compulsory Retirement Age as having been received, accepted, and filed."

Sections 486-59 and 486-68, General Code, read as follows:

"Sec. 486-59. 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 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 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, 1942, any member having reached the age of seventy years may, upon written applica-

tion, 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."

"Sec. 486-68. Beginning January 1, 1935, each state employe who is a member of the state employes retirement system, shall contribute four per centum of his earnable salary or compensation, not exceeding two thousand dollars per annum, to the state employes' savings fund. The head of the department shall deduct from the compensation of each contributor on each and every payroll of such contributor for each and every payroll period subsequent to the date upon which such contributor became a member, an amount equal to four per centum of such contributor's earnable salary or compensation, provided that the amount of a contributor's earnable salary or compensation in excess of two thousand dollars per annum shall not be considered. In determining the amount earnable by a contributor in a payroll period, the retirement board and the head of the department may consider the rate of compensation payable to such contributor on the first day of the payroll period, and deductions may be omitted from such compensation for any period less than a full payroll period, if a state employe was not a contributor on the first day of the payroll period; and to facilitate the making of deductions, the deduction required of any contributor may be modified in any payroll period by an amount not exceeding ten cents."

It is obvious from the language employed in Section 486-59, supra:--- that, it is compulsory for the State Employees Retirement Board to retire "at the end of the year," all members, who have attained the age of seventy years in that year and all members who were seventy years of age previous to 1937, except state employes in the classified service holding positions of exceptional qualifications as specified, or, those who having reached the age of seventy years have been approved by the head of the department or institution for continuance in "service for a period of one year"; that, the language used negatives any action whatsoever on the part of the State Employees Retirement Board if an "Application for Continuation in Active Service Past Compulsory Retirement Age" has been filed with the Board, in fact, it is notice to the board that it must not take any action to retire that member, and that, the status of a member who has been approved for continuation in service for a year is the same in the State Employees Retirement System as the status of any other member who has not attained the age of seventy years.

It is important to further observe:—that, the State Employes Retirement Board is not authorized to retire on superannuation allowance at any other time than “at the end of the year”; and that, payment of superannuation allowance must begin at the beginning of the year following the “end of the year” in which the board has retired the member.

There is no question but that, on January first a member of the State Employes Retirement System, who was, or who, in the year preceding such January first, reached the age of seventy years is entitled to one of two privileges, either (1) to have his superannuation allowance commence to run on January first and receive his monthly allowance for such month of January on the date that the board has determined such January allowance shall be payable, or (2) he is entitled to commence his employment on January first for a period of a year by reason of having had approved his application for continuance in service.

The question then presents itself, that, if on January first by reason of the member having filed his application and the head of the department having approved the same, it has been determined that the member is to continue in service for the period of that year, can the head of the department or institution on January first or thereafter withdraw his approval and thereby deprive the member of his privilege of working for that year?

It is to be noted that by the provisions of Section 486-59, supra, that it is entirely within the discretion of the head of the department or institution to determine whether or not to approve an “Application for Continuation in Active Service Past Compulsory Retirement Age.” In approving such an application the head of the department is left to his own judgment and discretion. It therefore can be said that in approving such an application the head of the department is performing a judicial act. Judicial acts are defined, as acts that “involve the investigation and determination of a state of facts, an act of choice or discretion or judgment as to the propriety of actions to be taken in reference to the facts thus ascertained.” (32 O. J., 952; 10 O. N. P. (N. S.) 565, *The Board Education of Washington Township vs. The Board of County Commissioners, et al.*)

The approval of the application being a judicial act, the question then is, that, if the power has been given by law to an officer to perform an act of choice or discretion or judgment and he has performed such act, can such officer subsequently reverse his decision or determination thereto, or is his decision binding upon him?

The law seems well established that if an official is given authority to determine whether or not one shall be entitled to a certain benefit or privilege, and the official gives his approval for such privilege, that the official cannot withdraw or revoke such approval. On this proposition

the case of *Noble vs. Union River Logging R. R. Company*, 147 U. S., 165, is very much in point. The facts therein were:—that in January, 1889, the company in question, desiring to avail itself of an act of Congress of March 3, 1875, granting to railroads a right of way through public lands of the United States, filed all necessary papers and the same were transmitted to the Secretary of the Interior, by whom they *were approved in writing*, and ordered to be filed. They were accordingly filed at once and the plaintiff notified thereof. In 1890, the successor in office to the Secretary of the Interior attempted *to revoke such approval*. The court held:—

“A decision of the Secretary of the Interior, in exercise of the powers conferred upon him by the act of March 3, 1875, c. 152 Stat. 482, that a designated railroad company is entitled to a right of way over public land, cannot be revoked by his successor in office.

Whether a railroad company applying for such a grant is a company which the statute authorizes to receive a grant of a right of way is a quasi judicial question, which, when once determined by the Secretary, is finally determined so far as the executive is concerned.”

To the same effect is the case of *State, ex rel. Weiss vs. Kcifer et al.*, Civil Service Commissioners, 3 O. App., 426, wherein it was held:

“Where the commission has once determined that a member of the police force is eligible for promotion and promotion is duly made after competitive examination, it is without power to subsequently reverse its decision with respect thereto, and a subsequent board is bound by such former action.”

It appears to me that it is immaterial whether or not the head of the department or institution refuses to permit the employe to return to work after January first. The basic principle is, that the head of the department does not have authority to withdraw such an approval after January first. Refusing to permit the employe to return to work does not have the effect of vesting in the head of the department the power to withdraw the approval. However, it must be said that the provisions of the State Employes Retirement System Act prevent the withdrawal of the approval of an “Application for Continuation in Active Service Past Compulsory Retirement Age,” when the head of the department permits the members to return to work after January first and receive compensation for their services, and in accordance with the provisions of

Section 486-68, *supra*, he deducts from the compensation of each of such members, the member's contribution for each and every payroll period subsequent to January first.

As stated hereinabove, on January first the member was entitled to be retired or permitted to work by reason of his approved application. When the member commenced to work on or after January first by consent of the head of his department, the board was not authorized to retire such member as of the end of the preceding year.

It is compulsory that superannuation allowance be commenced as of January first. To permit the head of the department to withdraw the approved application after the member had been permitted to work subsequent to January first would be permitting the member to receive compensation for his employment subsequent to January first and also his superannuation allowance for the month. This is contrary to the provisions of Section 486-60, General Code, which by the proviso, "provided such employe shall not hold any remunerative office or employment in any federal, state, county or local government," expressly prohibits payment of superannuation allowance if the member is receiving compensation for employment by the state. Another factor to be considered is that if under such circumstances the withdrawal of the approved application were permitted and superannuation allowance were allowed, the state could not recover the amount that the member had been paid for his employment which had been permitted by the head of the department after January first, and, the member would be deprived of receiving a refund of any contribution that had been deducted from his compensation subsequently to January first, or, to receive credit for the same in the computation of his superannuation allowance. There is no authority in the State Employes Retirement System Act that permits the board to refund to the member such a contribution. I must say that I see no distinction between a case where a member, by reason of having his application for continued service approved, is permitted by the head of the department to work after January first, and the head of the department on January 6th requests a withdrawal of the approved application, and, a case where the member has worked after January first by reason of an approved application for continued service and at a later date, for instance, June 6, 1938, the head of the department requests withdrawal of such approved application. It is evident in the latter case such approved application could not be withdrawn. It is just as evident that if withdrawal were permitted on January 6, 1938, the member would be deprived of the same right or privilege, that is deprived of the right to secure a superannuation allowance for the year 1938.

Therefore, in specific answer to your question it is my opinion that, in the case where a member of the State Employes Retirement System

who has reached the age of seventy years and before the end of the year has filed with the State Employees Retirement Board his "Application for Continuation in Active Service Past Compulsory Retirement Age" approved by the head of his department or institution, the head of the department or institution can not request the State Employees Retirement Board to permit him to withdraw such approved application after January first.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

1952.

PROSECUTING ATTORNEY—FUND CREATED BY SECTION 3004 G. C. DESIGNATED FOR HIS USE AND EXPENSES NOT OTHERWISE PROVIDED FOR—"EQUIPMENT AND SUPPLIES" UNDER SECTION 2419 G. C. FOR USE OF SHERIFF AND DEPUTIES—STATUS CAMERA, POLICE SIREN, FINGER PRINT RECORD, HIGH POWERED RIFLE.

SYLLABUS:

A camera, police siren and high powered rifle for the use of the sheriff and his deputies are items properly included under the "equipment and supplies" provided for in Section 2419, General Code, and therefore may not be purchased from money appropriated under Section 3004, General Code, as the fund created by this section is designated for use of the prosecuting attorney and only for his expenses not otherwise provided for.

COLUMBUS, OHIO, February 19, 1938.

HON. THEODORE TILDEN, *Prosecuting Attorney, Ravenna, Ohio.*

DEAR SIR: This will acknowledge the receipt of your recent communication. Your request for an opinion reads as follows:

"May the Prosecutor's office buy a camera for the purpose of taking finger-prints in the procuring of evidence out of the money appropriated under Section 3004 of the General Code? This camera will be used by one of the Deputy Sheriffs who specializes in finger-print work.