

2423.

STATE EMPLOYEES RETIREMENT BOARD—MUNICIPAL EMPLOYEES, CINCINNATI, WHO ARE NOT ENTITLED TO MEMBERSHIP IN CITY RETIREMENT SYSTEM, MUST BECOME MEMBERS OF STATE EMPLOYEES RETIREMENT SYSTEM, UNLESS EXEMPT FROM SUCH MEMBERSHIP OR WITHIN PURVIEW OF POLICE RELIEF FUND OR FIREMEN'S PENSION FUND—STATUS OF PRIOR SERVICE CREDIT—STATUS OF COUNTY EMPLOYEE—CITY MUST PAY INTO SAID SYSTEM "NORMAL CONTRIBUTION" AND "DEFICIENCY CONTRIBUTION"—SEE OPINION 2411, MAY 7, 1938.

*SYLLABUS:*

1. *The municipal employes of the City of Cincinnati, who are not entitled to membership in the Retirement System of the City of Cincinnati, must become members of the State Public Employes Retirement System, unless they become exempted from such membership, or, come within the provisions of a police relief fund or a firemen's pension fund established under provisions of law.*

2. *A present municipal employe of the City of Cincinnati who is excluded from, or does not come within the provisions of the Retirement System of the City of Cincinnati, is entitled to prior service credit for all service rendered as a municipal employe of the City of Cincinnati prior to January 1, 1935.*

3. *A present employe of Hamilton County, who is a member of the Public Employes Retirement System is entitled to prior service credit for services rendered as a municipal employe of the City of Cincinnati prior to January 1, 1935, regardless of whether or not the position in which such service was rendered for the City of Cincinnati comes within the provisions of the Retirement System of the City of Cincinnati.*

4. *The City of Cincinnati must pay to the employers' accumulation fund the "normal contribution" and "deficiency contribution" for each employe member of the Public Employes Retirement System employed by the City of Cincinnati.*

COLUMBUS, OHIO, May 9, 1938.

*State Employes Retirement Board, Columbus, Ohio.*

GENTLEMEN: This will acknowledge receipt of your recent communication, which reads as follows:

"Under the provisions of Amended House Bill No. 776, approved by the Governor on January 14, 1938, all employes of counties, municipalities, conservancy districts, health districts, and public libraries are included in the membership of this system except elective officials, members of the State Teachers Retirement System, those who exempt themselves within 90 days of the effective date of this act, and new members over the age of 50 at the time of entrance to public service. However, in Section 3 of the above bill it is stated that the term 'county or municipal employes shall not include those persons who come within the provisions of any other retirement system established under the provisions of the laws of this state or of any charter.'

The City of Cincinnati established by charter provides a retirement system for employes of that city, the members of which system would, of course, not be included in the definition of county and municipal employes as given in this act. However, the provisions setting up the retirement system for the City of Cincinnati do not include all employes of such city. The question is, therefore: Will all employes of the City of Cincinnati who are not actually members of that retirement system come under the provisions of this act?

The question also arises in regard to the allowance of credit for service rendered prior to December 31, 1934. Such question is an important one, inasmuch as many employes of Hamilton County have prior service for the City of Cincinnati. The question is: Can this Board allow credit for prior service rendered as an employe of the City of Cincinnati whether or not the position in which such service was rendered now comes under the provisions of the City Retirement System? It would seem that under the law if any employes of the City of Cincinnati may become members of the State Retirement System or if any credit is allowed for prior service as an employe of that city the City of Cincinnati would have to be assessed the regular rate per centum for the payment of the deficiency and normal contribution as all other governmental units will pay. Could this Board assess the City of Cincinnati regardless of the fact that the city has a retirement system of its own?"

In an opinion rendered by me on May 7, 1938, and numbered 2411, I stated in the body thereof, as follows:

"A charter city in the exercise of its powers of local self-government may provide for the establishment of a retirement system for its employes, unless it is prohibited from doing so by the provisions of its charter."

From your communication, I take it that the City of Cincinnati established a retirement system for its employes, which does "not include all employes of such city."

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

"For the purpose of this act 'county or municipal employes' shall mean any person holding a county or municipal office, not elective, in the State of Ohio, and/or paid in full or in part by any county or municipality in any capacity whatsoever. \* \* \* But said term shall not include those persons who come within the provisions of any other retirement system established under the provisions of the laws of this state or of any charter, nor shall the provisions of this act in any manner apply to a police relief fund or a firemen's pension fund established under provisions of law. \* \* \*"

It is to be observed from a reading of the above quoted part of Section 486-33c, *supra*, that an employe of a municipality is expressly excluded from membership in the Public Employes Retirement System, if such municipal employe comes "within the provisions" of a retirement system of a city charter. It therefore must be said that if a municipal employe is entitled to membership in the Retirement System of the City of Cincinnati he cannot come under the provisions of, or be entitled to membership in the Public Employes Retirement System and that, the fact whether or not a municipal employe of the City of Cincinnati is *actually a member* of such city's Retirement System is immaterial, since the all important factor is whether or not he is entitled to membership in such city's Retirement System.

It further must be said that if by the provisions of the Retirement System of the City of Cincinnati a municipal employe of the City of Cincinnati is excluded from, or does not come within the provisions of the Retirement System of the City of Cincinnati, then so far as that municipal employe is concerned, the exception contained in Section 486-33c, General Code, is not applicable, and the status of such municipal employe is as though the City of Cincinnati had not established a retirement system. This being the situation, such municipal employes of the City of Cincinnati who are not entitled to membership in the Retirement System of the City of Cincinnati must become members of the State

Public Employes Retirement System, unless they become exempted from such membership. In other words, such municipal employes would come within the ruling set forth in my opinion No. 2411 wherein I held:

"It is compulsory for an employe of a charter city that has not established a retirement system for its employes to become a member of the Public Employes Retirement System, unless such employe becomes 'exempted from membership, by filing written application for such exemption with the Retirement Board within three months after the Act goes into effect,' or, such employe is a new member over the age of fifty years, and becomes exempted by filing written application for exemption within three months after being regularly appointed an employe or, such employe comes within that class or group that the board has authority to exempt from compulsory membership, as provided in Section 486-33, supra, or, such employe comes within the provisions of any other retirement system established under the laws of this state or, such employe comes within the provisions of a police relief fund or a firemen's pension fund established under provisions of law."

Paragraph 8, of Section 486-32, General Code, reads as follows:

"'Prior service' shall mean all service as a state employe, county employe, municipal employe, park district employe, conservancy employe, health employe or public library employe rendered before January 1, 1935, provided that if the employe served as an employe in any two or all of said capacities, 'prior service' shall mean the total combined service rendered in said capacities prior to January 1, 1935."

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

"The service of all such county, municipal, park district, conservancy, health and public library employes, including their service as county, municipal, park district, conservancy, health, public library and/or state employes, prior to January 1, 1935, shall be included as prior service, provided such persons are present county, municipal, park district, conservancy, health or public library employes. Credit for service between January 1, 1935, and June 30, 1938, may be secured by any such county, municipal, park district, conservancy, health or public library employe, provided he or she shall pay into the employes' sav-

ings fund an amount equal to the full additional liability assumed by such fund on account of the crediting of such years of service."

It is obvious from a reading of Paragraph 8, of Sections 486-32 and 486-33b, *supra*, that "prior service credit" is dependent upon being a member of the Public Employees Retirement System. Therefore, if a *present* municipal employe of the City of Cincinnati, who is excluded from, or, does not come within the provisions of, the Retirement System of the City of Cincinnati, becomes a member of the Public Employees Retirement System, such municipal employe by the express provisions of Paragraph 8, of Section 486-32, and Section 486-33b, *supra*, is entitled to prior service credit for all service rendered as a municipal employe of the City of Cincinnati prior to January 1, 1935, and, if prior to January 1, 1935, such municipal employe rendered service in any two or all of the following capacities, to wit:—state employe, county employe, municipal employe, park district employe, conservancy employe, health employe, or public library employe, he is entitled to "prior service credit" for the total combined service rendered in said capacities prior to January 1, 1935. By the same reasoning it must be concluded that a present employe of Hamilton County, who becomes a member of the Public Employees Retirement System, is entitled to "prior service credit" for services rendered as a municipal employe of the City of Cincinnati prior to January 1, 1935, regardless of whether or not the position in which such service was rendered for the City of Cincinnati, comes within the provisions of the Retirement System of the City of Cincinnati.

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

"Each county, municipality, park district, conservancy district, health district, and public library shall pay to the employers' accumulation fund the same rates per centum of the compensation of each employe member employed by it for normal contribution and for the deficiency contribution as the state will be required to pay for its employes in pursuance of the provisions of Sections 486-68a to 486-68e, both inclusive. \* \* \*"

The language employed in Section 486-33f, is clear, in mandatorily requiring a municipality to pay to the employers' accumulation fund for "each employe member" of the Public Employees Retirement System, employed by the municipality, the "normal contribution" and "deficiency contribution." Such payments by the municipality are not dependent upon whether or not the municipality has established a retirement system of its own, but is dependent upon whether or not there is employed by the

municipality an employe member of the Public Employes Retirement System.

In opinion No. 2411, *supra*, discussing the state's authority to mandatorily require payment by a municipality of the "normal contribution" and "deficiency contribution" for each municipal employe, I held:

"It may impose upon the municipality certain duties and payment of funds in order that the employes of the municipality may share in the benefits of such retirement system."

This same conclusion must be reached in the case of a municipal employe of the City of Cincinnati who is not eligible to membership in the city's retirement system, but who becomes a member of the Public Employes Retirement System.

Therefore, in specific answer to your questions it is my opinion that:

1. The municipal employes of the City of Cincinnati who are not entitled to membership in the Retirement System of the City of Cincinnati, must become members of the State Public Employes Retirement System, unless they become exempted from such membership, or, come within the provisions of a police relief fund or a firemen's pension fund established under provisions of law.

2. A present municipal employe of the City of Cincinnati who is excluded from, or does not come within the provisions of the Retirement System of the City of Cincinnati, is entitled to prior service credit for all service rendered as a municipal employe of the City of Cincinnati prior to January 1, 1935.

3. A present employe of Hamilton County, who is a member of the Public Employes' Retirement System is entitled to prior service credit for services rendered as a municipal employe of the City of Cincinnati prior to January 1, 1935, regardless of whether or not the position in which such service was rendered for the City of Cincinnati comes within the provisions of the Retirement System of the City of Cincinnati.

4. The City of Cincinnati must pay to the employers' accumulation fund the "normal contribution" and "deficiency contribution" for each employe member of the Public Employes Retirement System employed by the City of Cincinnati.

Respectfully,

HERBERT S. DUFFY,

*Attorney General.*