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RETIREMENT SYSTEM, PUBLIC EMPLOYES—TO DETERMINE "FINAL AVERAGE SALARY" OF MEMBER, RETIREMENT BOARD MUST DETERMINE ACTUAL NUMBER OF YEARS AND FRACTIONS OF YEAR EMBRACED IN PERIOD OF EMPLOYMENT WITHIN TEN YEAR PERIODS MENTIONED IN SECTION 486-32, PARAGRAPH 14, G. C., WITHOUT REGARD AS TO FULL TIME OR PART TIME BASIS OF EMPLOYMENT.

SYLLABUS:

In determining the "final average salary" of a member of the public employes retirement system, under paragraph 14 of Section 486-32 General Code, the retirement board must determine the actual number of years and fractions of a year embraced in the period of employment within the ten year periods mentioned in said section, regardless of whether the employment was on a full time or part time basis.

Columbus, Ohio, January 24, 1946

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

Dear Sir:

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

> "At its regular monthly meeting on December 13 the Retirement Board instructed its secretary to request an opinion of your office covering certain aspects involving the interpretation of the phrase 'final average salary' as defined in Section 486-32, Subsection 14 of the General Code.
>
> A particular question at issue at this time involves a portion of the definition 'divided by the actual number of years and fractions of a year employed within the ten-year period considered'. It appears that certain members of the Retirement System who are now contemplating superannuation retirement have been employed during the ten calendar years last past but on a part-time basis during each of the twelve months of the various calendar years. At least one of these employes has been employed on a half-time basis and another on a third-time basis. Apparently in some governmental units and particularly in the public library, the situation is not at all unusual and we suspect that the practice has

been followed by many other governmental units during the manpower shortage growing out of the war.

If the total earnings during the ten-year period are divided by the round number ten, then a substantially smaller final average salary is developed than would be the case if the actual or fractional part of each calendar year that the employe is actually on the payroll were considered. In passing may I respectfully point out that apparently the situation as involves prior service credit is covered in Section 486-33b in sentence two."

Paragraph 14 of Section 486-32 General Code, prior to its amendment by the last session of the General Assembly read as follows:

" 'Average prior-service salary' shall mean the total earnings of a member within and during the five-year period immediately preceding January 1, 1935, divided by the actual number of years and fractions of a year employed within that period. Provided, however, that if a member had no actual earnings within and during the five-year period immediately preceding January 1, 1935, 'average prior-service salary' shall mean the total earnings of such member within and during the five-year period immediately preceding the last day such member was actually employed preceding January 1, 1935, divided by the actual number of years and fractions of a year employed within the five-year period considered. No average prior-service salary shall exceed two thousand dollars."

By the passage of Amended Senate Bill 187 by the last general assembly, said Section 486-32 was so amended that paragraph 14 was made to read as follows:

" 'Final average salary' shall mean the total earnings of a member within and during the ten-year period immediately preceding the date of retirement, divided by the actual number of years and fractions of a year employed within that period. Provided, however, that if a member had no actual earnings within and during the ten-year period immediately preceding the date of retirement, final average salary shall mean the total earnings of such member within and during the ten-year period immediately preceding the last day such member was actually employed preceding the date of retirement, divided by the actual number of years and fractions of a year employed within the ten-year period considered. No final average salary shall exceed two thousand dollars."

It will be noted that aside from changing "average prior service salary" to "final average salary", and changing the reference to the five

year period immediately preceding January 1, 1935 to the ten year period immediately preceding the date of retirement, there is little substantial change in this paragraph. The evident purpose of this amendment was to provide that the basis upon which prior service pension is to be computed is to be the average earnings within a limited period immediately prior to retirement instead of the average earnings within a limited period prior to January 1, 1935, when the retirement system first became operative.

So far as reflecting on the question you raise as to what is meant by the "actual number of years and fractions of a year employed," the amendment referred to appears to have no effect. Whatever these words meant before the amendment they still mean. "Years and fractions of a year," in my opinion refers to the lapse of a period of twelve months or a certain fraction thereof—such as a half or third of that period. When we say that "A" became clerk of the village in 1910, and was so employed for twenty years", we mean that his service continued until 1930, regardless of the fact that his duties may have required only one or two hours of each working day, or one or two days in each week. And likewise, if it is said that he began work on January 1, and was employed one and one half years, we must conclude that he was employed until July 1 of the year following, regardless of the time per day or week he actually worked. Giving to the language used, as we must, its ordinary meaning, I do not see how we can give to this provision any other interpretation than that above indicated.

Some light may be thrown on the legislative intention by examination of changes made in Section 486-33b General Code. Up to the time of the amendment to which I shall refer, that section read 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."

Section 486-60 General Code, as it then stood, allowed a special pension based on prior service in an amount equal to 1⅓% of his *average*

prior service salary multiplied by the number of years in his prior service certificate. If, therefore, part time service was to count as the equivalent of full time service, it might easily happen that an employee whose average prior service salary was quite large, perhaps up to the maximum of $2,000, might be allowed prior service pension on that basis for a number of years during which he actually worked only a very small fraction of the day or week.

Accordingly, my immediate predecessor was called upon to construe the law, particularly with reference to the sentence in Section 486-33b which I have just quoted, and it was held in an opinion found in 1942 Opinions, Attorney General, page 441, as follows:

> "It is the duty of the Public Employes Retirement Board to allow a member of the Public Employes Retirement System credit for a full year of prior service for each year that such member served in any position or office for which prior service may be legally credited, if such member was employed in the position on an annual basis or if he was appointed to such position or elected to such office for a year or years and his salary fixed accordingly, regardless of the amount of such salary and regardless of the fact that the service rendered may not have required the full time of such employe or officer. There is no authority in such board to adopt and apply any rule or regulation providing otherwise."

The question which he was called upon to consider was quite similar to the one which you present, except that it related specifically to the part time service rendered during the period upon which the average prior service salary was to be computed. It was said in the course of the opinion:

> "The law definitely contemplates in my opinion, that the service to be credited as prior service for members of the retirement system, should be computed and credited on the basis of years, and there will be found no place in the law where it is provided or even suggested that a full year of service should not be allowed either as prior service or current service, to an elected official for each year of a term for which he is elected and serves, even though as a matter of fact, he may not devote his entire time to the office. The same is true of any employe who by the terms of the Public Employes Retirement Law, is a member of the Public Employes Retirement System, if his salary is fixed and paid by the year, or, for that matter, if the salary is fixed

and paid by the month or week, if he renders service for twelve months or fifty-two weeks in a year, as the case may be."

At the next session of the legislature the above quoted portion of Section 486-33b was changed slightly and a new provision added, so that it now reads as follows:

> "The service of all such county, municipal, park district, conservancy, and township, 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, township or public library employes. Provided, however, that if the public retirement board shall determine that a position as such employe in any one calendar year was a part time position, the retirement board shall have the authority to determine what fractional part of a year's credit shall be given."

The amendment was in all probability induced by the opinion to which I have referred, and grew out of a feeling that it would be unfair to the system to allow prior service pension on the basis of years of service during which the employe actually only worked a small fraction of his time in his public employment, also giving him equality with an employe whose prior service had been on a full time basis.

The 96th general assembly in dealing with paragraph 14 of Section 486-32 supra, certainly had before it the example of its immediate predecessor in putting the new provision above quoted in Section 486-33b, and if it had desired to confer upon the retirement board some similar discretion and authority in fixing the final average salary on a more equitable basis it presumably would have done so in amending paragraph 14 above referred to. The fact that it did not do so, seems to compel the conclusion that the language there used is to be construed in the same way that the provisions of Section 486-33b and related statutes were construed by my predecessor, namely, that a year of employment means a period of twelve months of employment regardless of whether the employee was engaged one day or six days a week, or whether he worked full days or only a small fraction of each day. If this conclusion results in hardship in any case or seeming unfairness, the remedy must lie with the legislature.

In specific answer to your inquiry it is my opinion that the "actual number of years and fractions of a year" to be employed in determining

"final averege salary" under paragraph 14 of Section 486-32 General Code, means the number of years or fractions of a year during which the member was employed, regardless of whether the position called for full time service or part time service, and that your board would have no authority by any rule or regulation to provide any other basis of computation.

Respectfully,

HUGH S. JENKINS,

Attorney General.