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A MEMBER OF THE PUBLIC EMPLOYEES RETIREMENT FUND SYSTEM WHO CONTRIBUTED TO THE SYSTEM SINCE JANUARY 1, 1935, CAN CONSIDER PRIOR SERVICE FOR CREDIT WITHOUT FURTHER CONTRIBUTION EVEN THOUGH HE WAS ESTABLISHED BY LAW—§486.32, G.C., 118 O.L. 104, 122 O.L., 192-3, OPINION 1319 OAG 1949, 124 O.L. 617, §145.01, R.C., 126 O.L. 1047, §145.44 R. C.

SYLLABUS:

A member of the public employees retirement system, who has contributed into such system since January 1, 1935, has, by such contributions, complied with the provisions of division (E) of Section 145.01, Revised Code, and is entitled to prior service credit for service rendered prior to such time as an employee of an employer without further contribution to the public employees retirement system even though in such earlier employment said member was covered by some other retirement system established by law.

Columbus, Ohio, May 24, 1962

Hon. John T. Corrigan, Prosecuting Attorney  
Cuyahoga County, Cleveland, Ohio

Dear Sir:

I have your request for my opinion which request reads as follows:

“Mrs. H. started working for the Cleveland Public Library on September 1st, 1929 and on September 1st, 1930 she became a member of the Prudential Insurance Company’s retirement system, then lawfully in force covering such employees of said library as wished to join it and paid the established contributions thereto. Mrs. H. remained a contributing member of said Prudential system until January 1st, 1935 at which time she left the employ of the Cleveland Public Library, withdrew from the Prudential retirement system and received back all the money she had paid into it. Also on January 1st, 1935 Mrs. H. joined the Ohio Public Employees Retirement System and has been a full time contributing member ever since up to the date of her retirement on September 30th, 1961, as an employee of the Cuyahoga County Public Library.

“The question here involved is whether or not Mrs. H. is entitled to ‘prior service credit’ for the time from September 1st, 1929 to January 1st, 1935 and how much, if anything, must she pay to P.E.R.S. to obtain such credit.

“Revised Code Section 145.01 par. (E) defines ‘prior service credit,’ and it seems to us that under that definition Mrs. H. is in the same position that she would have been in had she never joined the library’s Prudential retirement system prior to January 1st, 1935 because she totally withdrew from that system and received no benefit from it and therefore was not ‘covered by such system after such system was established’ as a matter of finality.

“The P.E.R.S. system has suggested in this case that Mrs. H. could qualify for the time she worked for the Cleveland Public Library under R.C. Sec. 145.44, but since Mrs. H. began her P.E.R.S. membership on January 1st, 1935 it appears to us that neither of the two paragraphs of said section 145.44 can apply to Mrs. H. and that Mrs. H. is now entitled to full ‘prior service credit’ for all the time she worked for the Cleveland Public Library without doing or paying anything more into the P.E.R.S. system. As we understand it there never has been any question under the Ohio law that all periods of public service which occurred prior to January 1st, 1935, automatically qualify for what is known as ‘prior service credit’ unless the concerned public em-

ployee was and remains covered by some other retirement system authorized by law. In other words that the State of Ohio has undertaken to pay the cost of funding all benefits referable to periods of service prior to January 1st, 1935, if same are not covered by some legally authorized retirement system, without requiring back payments from either employees or employers."

A retirement allowance is computed based upon the provisions of law in effect at the effective date of a retirement allowance following the time when an allowance is filed, Opinion No. 567, Opinions of the Attorney General for 1959, page 288. For analogous reasoning in part, see *State, ex rel. Pincombe vs. Board of State Teachers Retirement System*, 172 Ohio St., 219, and *Jenkins vs. Public Employees Retirement System of Ohio*, 87 Ohio Law Abs., 45.

The statutory definition of "prior service" as used in the public employees retirement system law has changed through the years. As of January 1, 1935, "prior service" meant all service as a state employee rendered before January 1, 1935 (Section 486-32, General Code, 115 Ohio Laws, 614).

Former Section 486-32 (8), General Code, was broadened in 1938, 117 Ohio Laws, 746, to provide:

" 'Prior service' shall mean all service as a state employe, county employe, municipal 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." (Underlined language added by amendment).

Then in 1939 the legislature amended former General Code Section 486-32 (8), 118 Ohio Laws, 104 (105) to provide:

" '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, and all service as an employe of any employer who comes within the provisions of the state teachers' retirement system or of any other retirement system established under the laws of Ohio rendered prior to January 1, 1935, if the employe claiming such service did not contribute to or receive benefits from any retirement system for such service, 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.”  
(Underlined language added by amendment)

In 1949, 122 Ohio Laws, 192, 193, former General Code Section 486-32 (8) was amended to read:

“‘Prior service’ shall mean all service as a *public* employe rendered before January 1, 1935, and all service as an employe of any employer who comes within the provisions of the state teachers retirement system or of the state public school employes retirement system or of any other retirement system established under the laws of Ohio rendered prior to January 1, 1935, if the employe claiming such service did not contribute to or receive benefits from any retirement system for such service, 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. *In addition thereto, ‘prior service’ shall mean all service credited for active duty with the armed forces of the United States as provided in section 486-47, General Code.*” (Underlined language added by amendment)

In construing the 1949 language, one of my predecessors held in the syllabus of Opinion No. 1319, Opinions of the Attorney General for 1949, page 965:

“A present member of the public employes retirement system is not entitled to receive prior service credit for that period of time in which he was a member and contributed to the Cincinnati Retirement System.”

In 1951 the legislature again amended former General Code Section 486-32, 124 Ohio Laws, 617 (618) to read:

“‘Prior service’ shall mean all service as a public employe rendered before January 1, 1935, and all service as an employe of any employer who comes within the provisions of the state teachers retirement system or of the state public school employes retirement system or of any other retirement system established under the laws of Ohio rendered prior to January 1, 1935, if the employe claiming such service did not *become a member of such system or systems*, 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. In addition thereto, ‘prior service’ shall mean all service credited for active duty with the armed forces of the United States as provided in section 486-47, General Code.” (Underlined language added by amendment)

In 1953 code revision bill, Section 486-32 (8), General Code, became Section 145.01 (E), Revised Code. In 1955, 126 Ohio Laws, 1047 (1048), Section 145.01 (E), Revised Code, was amended to read:

“(E) ‘Prior service’ means all service as a public employee rendered before January 1, 1935, and all service as an employee of any employer who comes within the state teachers retirement system or of the state public school employees retirement system or of any other retirement system established under the laws of this state rendered prior to January 1, 1935, *provided that if the employee claiming such service \* \* \* was employed in any capacity covered by such system after such system was established, credit for such service may be allowed by this system only under the conditions of section 145.44 of the Revised Code.* ‘Prior service’ also means all service credited for active duty with the armed forces of the United States as provided in section 145.30 of the Revised Code.” (Underlined language added by amendment)

Section 145.01 (E), Revised Code, presently reads as amended in 1955, and as set forth immediately above.

While determination of the rights of the member involved in your question must be based upon the law in effect at the time the application for retirement is effective, as aforesaid, the foregoing statutory amendments are of benefit in ascertaining the intention of the legislature in enacting the section as it presently exists.

As noted, when the public employees retirement system law was first enacted, “prior service” meant *all* service as a state employee rendered before January 1, 1935. The provision was later extended to employees other than state employees.

The 1939 legislation narrowed the definition of “prior service” by excluding employees who had contributed or received benefits from another retirement system. It was this language which was construed in the 1949 attorney general opinion discussed earlier.

The 1951 legislation changed the language to exclude employees who were *members* of such another retirement system.

In enacting Section 145.01 (E), Revised Code, 126 Ohio Laws, 1047 (1048) in its present form, the legislature has provided recognition for service rendered by an employee to an employer who established a retirement system under the laws of Ohio when the employee was “in

any manner covered." The word "cover" is defined in Webster's 3rd International Dictionary as:

"to afford protection or security to typically by means of some stated provision: insure against a specified risk:."

The facts stated in your request indicate that the employee in question contributed to the retirement system established by the Cleveland Public Library and although she later withdrew her membership, she was at the time covered by the employer's system. In considering the evolution of the definition of "prior service," it seems that the legislature realized the inequity of granting credit for prior service to individuals who had contributed to or were members of an existing system. The exclusion of such service, however, obviously created great hardship to persons who did not retain such membership, and thus in 1955 an equitable method was provided whereby employees could obtain recognition for service rendered an employer prior to January 1, 1935, when they were covered by an existing retirement system.

Admittedly, the present language of Section 145.01 (E), Revised Code, is no gem of clarity. Particularly confusing is the language reading:

"\* \* \* provided that if the employee claiming such service was employed in any capacity covered by such system after such system was established, credit for such service may be allowed by this system only under the conditions of section 145.44 of the Revised Code. \* \* \*"

The big question as to this language is what is meant by the words "such system," which words appear in two places. It might be argued that these words refer to the "other retirement system" established under the laws of this state as found earlier in the language of division (E); however, since a person could not be a member of a system which has not been established, this interpretation would not relieve the confusion. The more logical interpretation in my opinion is to construe the words of the proviso to read, "provided that if the employee claiming such service was employed in any capacity covered by such other system after the public employees retirement system was established, credit for such service may be allowed by the public employees retirement system only under the conditions of Section 145.44, Revised Code."

Strengthening my conclusion that the latter interpretation should be followed is the actual context of Section 145.44, *supra.* That section reads in pertinent part as follows:

“Members of the public employees retirement system who, prior to the date membership was established in said system, were employed by the state or any of the several local authorities mentioned in section 145.01 of the Revised Code, which state or local authority has a local retirement system established under the laws of this state for its employees, shall be permitted to pay into the employees’ saving fund of the public employees retirement system the amount, with interest as determined by the public employees retirement board, said members would have paid through regular salary deductions had they been members of the public employees retirement system continuously since January 1, 1935.

“In case a given member did not enter the employ of the governmental unit having its own retirement system until a date subsequent to January 1, 1935, the payment shall be computed on the salary earned from the date of appointment to the date membership was established in the public employees retirement system, provided such members have not received and are not eligible for benefits from the retirement system of said state or local governmental unit. \* \* \*”

Obviously, since said Section 145.44 does not apply to service rendered prior to January 1, 1935, the words of the proviso of Section 145.01 (E), *supra*, do not apply to a person who became a member of the public employees retirement system on January 1, 1935.

In this regard, I believe that the proviso is intended to apply to persons who were covered by another retirement system before and after January 1, 1935; and in order for such persons to get credit for service prior to that date, they must make the payments prescribed by Section 145.44, *supra*, for service after that date while covered by such other retirement system.

Applying the facts stated in your letter of request to the foregoing reasoning, I am of the opinion that the individual designated therein is entitled, under the provisions of Section 145.01 (E), Revised Code, to receive prior service credit for the time from September 1, 1929 to January 1, 1935, regardless of the proviso of the section above discussed.

Further, the same result would be reached even if it were determined that the proviso should apply.

It will be seen from an examination of Section 145.44, Revised Code, that the amount required to be paid by an employee is that which he would have paid from January 1, 1935 until membership, plus interest. While the member mentioned in your request was, prior to membership in the system, a member of a "local retirement system," all of such local membership was prior to January 1, 1935, on which date membership in the public employees retirement system was established. Since that date said member has contributed continuously to the public employees retirement system and, therefore, under the provisions of Section 145.44, Revised Code, said member is required to pay the system nothing.

And, finally, even though the language here construed is not entirely clear as to the exact intention of the legislature, it must be remembered that the provisions of law dealing with pensions are to be liberally construed in favor of the member (42 Ohio Jurisprudence 2nd, page 355, Pensions, Section 3).

In conclusion, therefore, it is my opinion and you are advised that a member of the public employees retirement system, who has contributed into such system since January 1, 1935, has, by such contributions, complied with the provisions of division (E) of Section 145.01, Revised Code, and is entitled to prior service credit for service rendered prior to such time as an employee of an employer without further contribution to the public employees retirement system even though in such earlier employment said member was covered by some other retirement system established by law.

Respectfully,

MARK McELROY

Attorney General