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RETIREMENT ALLOWANCE, MAXIMUM — PUBLIC SCHOOL EMPLOYES RETIREMENT SYSTEM — COMPUTATION — SECTION 7896-103 G. C. — TO DETERMINE ALLOWANCE TO WHICH ENTITLED, HAD RETIREMENT BEEN DEFERRED TO AGE OF SIXTY ASSUME MEMBER CONTINUED EMPLOYMENT AND PAID CONTRIBUTIONS TO FUND — BASIS, COMPENSATION HE WAS RECEIVING AT TIME OF PROPOSED DISABILITY RETIREMENT.

SYLLABUS

In computing the maximum retirement allowance which a member of the public school employes retirement system could receive upon disability retirement under Section 7896-103, General Code, it should be assumed for the purpose of determining the retirement allowance to which he would have been entitled had retirement been deferred to the age of sixty, that the member continued in his employment and continued to make his contributions to the employes' saving fund until he had reached the age of sixty, based on the compensation he was receiving at the time of his proposed retirement.

Columbus, Ohio, January 17, 1944

Mr. T. G. O'Keefe, Secretary, School Employes Retirement System
Columbus, Ohio

Dear Sir:

I acknowledge receipt of your communication requesting my opinion, and reading as follows:

> "The retirement board wishes your opinion upon the proper procedure to be followed in determining a disability retirement allowance under the provisions of Section 7896-103 G. C., which reads as follows:
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> 'Upon disability retirement, a member shall receive a retire-- ment allowance which shall consist of:
>
> (a) an annuity having a reserve equal to the amount of the employe's accumulated contributions at the time of retirement;

and

(b) a pension which, together with his annuity, shall provide a retirement allowance of one and one-fifth per centum of his average salary received during the last ten years or fraction thereof immediately preceding his retirement, multiplied by the number of his years of total service, but not less than 30 per centum of said average salary, with the exception that in no case shall the retirement allowance exceed nine-tenths of the allowance to which he probably would have been entitled had retirement been deferred to the age of sixty. Any member on disability retirement whose allowance was granted prior to the effective date of this amendment shall have his retirement allowance recalculated as of July 1, 1943.'

The question we wish to raise is what is the correct procedure in determining the maximum retirement allowance that is provided for in the language, 'with the exception that in no case shall the retirement allowance exceed nine-tenths of the allowance to which he probably would have been entitled had retirement been deferred to the age of sixty'.

In determining what the employe's probable retirement allowance would be, we can do one of two things. We can assume that the employe, if he had continued in service until the age of sixty, would have contributed no less during each succeeding year than the amount he contributed during his last year of service; or, on the other hand, we could assume that there would have been no additional contributions and that his accumulations should be accumulated at the maximum rate of interest at four per centum and his probable retirement allowance on this basis determined at the age of sixty.

The two methods can best be illustrated by this concrete example. A male employe becomes disabled at the age of thirty-five. He has ten years of service credit and has contributed the maximum of $80.00 per year. If we assume that his probable retirement allowance at the age of sixty is predicated on the fact that had he continued in service and continued to contribute $80.00 per year until the age of sixty, then his probable retirement allowance would have amounted to $1,134.86 per year. Therefore, since nine-tenths of the estimated allowance due him at the age of sixty would be $1,021.32 per year, the employe would be entitled to receive the minimum benefit of thirty per centum of his average salary of $2,000.00 per year, or $600.00 per year.

If, however, we simply accumulate the contributions that the employe had at the time he became disabled at the maximum rate of interest of four per centum, his annual retirement allowance at the age of sixty would amount to $493.20 per year. Therefore, since nine-tenths of this estimated allowance of $493.20 would be $443.88 per year, he would not be entitled to receive the minimum benefit of thirty per centum of his salary, or $600.00 per year. His annual allowance would be $443.88 per year under this method of calculation.

> We would appreciate receiving your opinion as to which method of calculating the disability retirement allowance follows the intent of the law."

The answer to the question which you have submitted is, in my opinion, to be found mainly in Section 7896-103, General Code, which you have quoted. It was amended to its present form by the 95th General Assembly. That section is a part of the act establishing the School Employes' Retirement System originally enacted in 1937 and codified as Sections 7896-64 to 7896-129. It may, however, be helpful to note the provision of Section 7896-64, General Code, which defines certain terms as used in the act, as follows:

> " 'Annuity' shall mean payments for life derived from contributions made by a contributor and paid from the annuity and pension reserve fund as provided in this act. All annuities shall be paid in twelve equal monthly installments.
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> 'Pension' shall mean annual payments for life derived from appropriations made by an employer and paid from the employers' accumulation fund or the annuity and pension reserve fund as provided in this act. All pensions shall be paid in twelve equal monthly installments.
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> 'Total-service' shall mean all service of a member of the annuity.
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> 'Total-service' shall mean all service of a member of the retirement system since last becoming a member and in addition thereto, all his prior-service, computed as provided in this act."

It will be observed that paragraph (a) of Section 7896-103, General Code, gives to a member of the system who is retired because of disability an annuity based on his accumulated contributions at the time of retirement. The amount of this annuity would be readily determinable. However, in view of the provision of paragraph (b) of the same section, there would seem to be no occasion to compute the annuity, except to determine the portion of the total retirement allowance that is to be paid out of the "annuity pension reserve fund". paragraph (b) provides for a "retirement allowance", the amount of which is to be computed as therein stated, viz., by ascertaining the average yearly salary which the employe has received during the last ten years or fraction thereof immediately preceding his retirement, taking one and one-fifth per centum of the same and multiplying it by the number of his years of total service. It will be noted that this retire-

ment allowance embraces the annuity, together with a further amount by way of pension. The statute then proceeds to fix both a minimum and a maximum for the retirement allowance.

By way of minimum, such allowance shall be not less than thirty per centum of said "average salary". The maximum is introduced as an *exception,* it being provided that "in no case shall the retirement allowance exceed nine-tenths of the allowance to which he *probably* would have been entitled had retirement been deferred to the age of sixty."

If the member had not applied for disability retirement, and had continued in service until he reached the age of sixty, the age at which under Section 7896-99, General Code, he would have been entitled to retire, he would, not only "probably" but certainly, have contributed four per cent of his salary or compensation not exceeding two thousand dollars, as required by Section 7896-109, General Code. This leads to the conclusion that in arriving at this maximum you should consider what would have been the status of the member on arriving at the age of sixty and his retirement allowance at that time, on the assumption that he had continued at the same compensation he was then receiving and had made his contributions to the fund on the basis of that compensation.

I realize that this may in some cases result in a substantial increase of the retirement allowance to a disabled member, and it may and may not represent the precise intention of the author of the amendment, who certainly led the Legislature into the use of vague language to express its intention.

It is not easy to find the meaning of "probably" as used in this amendment. It is worthy of note that in the same act (120 O. L. S. 89, p. 40), Section 486-63, General Code, being a part of the public employes retirement act, was amended in substantially identical words. It should further be noted that in the teachers' retirement act the corresponding section, relating to disability retirement, had already provided a somewhat similar rule in language quite as confusing. Section 7896-38, General Code, reads as follows:

> "Upon disability retirement, a member shall receive a retirement allowance which shall consist of: * * *
>
> (b) a pension which, together with his annuity, shall provide a retirement allowance of one and one-fifth per centum

> of his final average salary multiplied by the number of his years of total-service, but not less than thirty per centum of said final average salary, with the exception that in no case shall the rate per centum of final average salary to which said retirement allowance amounts exceed nine-tenths of the rate per centum of final average salary to which he probably would have been entitled had retirement been deferred to the age of sixty."

"Final average salary" in that system is defined as meaning the average compensation, not exceeding two thousand dollars "earnable" during the ten years immediately preceding his retirement. I get the impression from the above provision as to teachers, that the Legislature probably intended the teacher's hypothetical contributions, continuing up to the age of sixty, to be taken into consideration in arriving at the maximum, and believe there is some basis for the assumption that the Legislature was endeavoring in the recent legislation to place members of the public school employes retirement system and the public employes retirement system on substantially the same basis, which somewhat strengthens me in the conclusion I have announced in answer to the question you have propounded.

I can see no basis for the alternative suggestion that the contributions should be assumed to have stopped when the member applied for disability retirement, and that interest should be added and his allowance be determined on that basis at the age of sixty. There is nothing in the law that makes it possible for a member to cease paying at thirty-five and then retire at sixty, and hence no basis for calculating what his rights would be if he attempted to do so.

It might be argued that in adopting that alternative one could give some meaning to the word "probably", on the theory that the final computation might vary according to the rate of interest that would be allowed on the accumulated contributions of the member. Confusion on this proposition may have arisen from the fact that both the school employes and the public employes retirement acts originally provided for a variable rate. But there is no present basis for this for the reason that the member's contribution now bears a flat interest rate of four per centum, compounded annually. (Section 7896-64, General Code.)

If the members contribution is to be computed on the basis of the amount contributed by him up to the time of his disability retirement, projected forward to the age of sixty by adding interest at the

rate of four per cent compounded annually, the problem becomes one of simple mathematics and "probably" could have no place in the solution. On the other hand, some meaning may be found for the word if we follow the course I have indicated, in that the employe's compensation, in case he had continued to serve until he reached the age of sixty, might conceivably have been lowered or increased, but lacking certainty on this point we must assume that it would "probably" maintain at least its *status quo*.

It will, of course, be borne in mind that the computation which I have been discussing in no way determines the retirement allowance. The only effect it has is in establishing a ceiling beyond which the allowance computed as stated in the statute cannot rise.

Respectfully,

THOMAS J. HERBERT
Attorney General