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PUBLIC EMPLOYEES RETIREMENT SYSTEM, BENEFITS AND RIGHTS, TO ONE WHO UNDERSTATED AGE—§145, R.C.

SYLLABUS:

Under Chapter 145., Revised Code, a member of the Public Employees Retirement System who knowingly or otherwise understated his age when applying for membership, is entitled, upon retirement, to all of the retirement rights based upon his actual age just as any other member with the same age and service qualifications, and such member may not be penalized by the system for such misstatement.

Columbus, Ohio, January 21, 1960

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

Dear Sir:

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

"A considerable amount of confusion and a definite difference of opinion exists as concerns the interpretation of the second paragraph of Section 145.32 of the Revised Code.

"Over the years your predecessors have issued various opinions covering various phases of the over-all problem. The primary problem at present concerns the status of a member who understated or misrepresented his age when he secured employment and when he became a member of the System. As a result his true age was not discovered until he applied for benefits and was required to submit evidence to establish his age. Such evidence of age is required because in part the amount of his benefit is dependent upon his attained age at the time he applies for an allowance.

"Two of the opinions of the Attorney General which deal with this situation are Opinion No. 1646, dated April 12, 1950, and Opinion No. 1124, dated February 5, 1952.

"In the second syllabus of the earlier opinion it was held:

'When it is disclosed that a member of the Public Employees Retirement System understated his age and was continued in the state service for several years after the age of 70 was attained, the date for computing his retirement allowance is from June 30th following the date on which the age of 70 was actually attained. The contributions which such member made to the System subsequent to that date

should be returned and the law in effect at that time should govern the computation.'

"In the fourth syllabus of the later opinion the conclusion reached is basically the same as in the second syllabus of the earlier opinion as concerns understatement of age and 'thereby wilfully misled his employing head into permitting him to remain in service.' In part and as concerns this particular point your predecessor in 1952 stated:

'Accordingly, I must conclude that any misstatement of age by a member should not be allowed to give him an advantage in the system which may not be enjoyed by those who tell the truth.'

"However, he goes a step further to deal with those cases where it is disclosed that the member did not wilfully mislead the employer and in the fifth syllabus of the later opinion it was held:

'When the retirement board finds that a member has continued in service beyond the age of compulsory retire- with the provision of Section 486-59, General Code, the board may notify such member and his employing head that unless the procedure required by said statute as to extension of service is complied with by a named day, such employe will be immediately retired; and if such notice is complied with, the board would be justified in accepting a proper application for extension; but if not complied with, the board should retire such member as of the date so limited, or, if his service is terminated at such earlier date, then as of the date of such termination.'

"At the same time it should be pointed out that subsequent to these Opinions the language of the second paragraph of Section 145.32, Revised Code, was amended by Am. Sub. H. B. No. 324, effective as of October 2, 1953. The primary purpose of the amendment was to eliminate the responsibility that 'the retirement board shall retire' an employee-member past seventy years of age and make such retirement permissive with the employer providing a medical certification of physical and mental competency is presented.

"In the case presently under consideration (Mr. A.A.S.) the employee gave the same date of birth to his employer that he gave to the retirement system, namely, five years younger that the date recently established by evidence. As a result the employer had no knowledge of the five year differential. Further, we have on file statements from the employer that the required medical examination and certificate was not secured until the year 1958.

"Under these circumstances and in view of the confusion and difference of opinion the retirement board has instructed me to request a formal opinion of you on the following question:

> 'What are the retirement rights of an employee who understated his age when applying for membership in the Public Employees Retirement System which fact the Retirement Board did not discover until the member files his application for retirement and submits evidence of his date of birth?' "

As you have stated, the question asked herein has been answered by this office on prior occasions. However, a reading of Opinion No. 1646, Opinions of the Attorney General for 1950, page 210 and Opinion No. 1124, Opinions of the Attorney General for 1952, page 77, clearly indicate that the conclusions reached therein were based upon the provisions of Section 486-59, General Code, requiring the Retirement Board to retire a member of the retirement system who had reached age 70 years. Since this provision is no longer in the law, the conclusions reached in these former opinions must be reconsidered in light of the law as it exists today.

Although the intent and purpose of retirement laws have been stated many times, however simple and obvious they may be, they must be kept in mind to permit an intelligent consideration of the question to be answered. There can be no doubt that these laws, passed in the interest of society as a whole, are intended to provide a means of livelihood to the members of the retirement system in their old age. It is well to note that each member is required to contribute to the retirement system from his personal funds. I quote with approval the following statement beginning on page 85 of Opinion No. 1124, Opinions of the Attorney General for 1952, page 77:

> "* * * It is to be borne in mind that the whole purpose of the retirement law is to provide in part at least, a means of subsistence for public employees who might otherwise become objects of public charity. It takes the place of the social security system provided for employees of private industry.
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> "It is a well recognized principle of statutory construction that pension laws are to be given a liberal construction. It is stated in Crawford on Construction of Statutes, page 719:
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> > 'Pension statutes should be liberally construed in favor of the intended beneficiaries. As a result, the literal terms of the statute do not need to be followed since it is the spirit of the statute that controls its interpretation.'
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> "Many cases are cited in support of the above proposition. The title of the original act (115 O.L. p. 614) whereby the public employees retirement system was established, lends color to the

conclusion that it was intended to produce better service for the state by holding out a promise of benefits for those employees who should become incapacitated either by reason of old age or physical disability. It was entitled:

> 'An act to promote efficiency and economy in the public service by providing for the establishment of a retirement system for superannuated or incapacitated state employees.' "

The provisions of Section 145.32, Revised Code, pertaining to the question herein, read as follows:

> "An employer may, as of the thirtieth day of June of any year, terminate the employment of any member who has attained the age of seventy years, or who will attain the age of seventy years by the following thirty-first day of December. Any such employee whose employment is not so terminated shall be required to present a certification prior to the thirtieth day of June of each year by a physician licensed to practice in the state of Ohio, which physician is mutually acceptable to the employee and his employer, that the member is physically and mentally competent to perform the duties of the particular position which he occupies. Any member who accepts an allowance under section 145.32, 145.33, or 145.34 of the Revised Code, or who on or after October 31, 1953, is compelled to retire and who withdraws his accumulated contributions in lieu of accepting a retirement allowance is ineligible for regular re-employment in any capacity which comes within sections 145.01 to 145.57, inclusive, of the Revised Code."

This section was the subject of a recent opinion of this office dated June 14, 1959, Opinion No. 567, Opinions of the Attorney General for 1959, the syllabus of which reads as follows:

> "1. A member of the Public Employees Retirement System who has attained the age of seventy or will do so within the current calendar year and whose employment for that reason is terminated by his employer under the authority provided in Section 145.32, Revised Code, is not thereby retired as a member of such system without his consent, but such member, if he elects to do so, may withhold his application for retirement allowances to such future date as he may choose, being deemed in the interim to be on leave of absence as provided in Section 145.41, Revised Code.
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> "2. The retirement rights of members of the Public Employees Retirement System, including those whose employment is terminated as provided in Section 145.32, Revised Code, and who elect to defer application for retirement to a future date, should be determined as provided in the statutes in effect at the effective date of such retirement following such application therefor."

From this opinion and Section 145.32, Revised Code, it is clear that the retirement system has no control over the continued employment of its members who are over age 70. The fact that an employee member reaches age 70 places no duty whatsoever upon such employee to the retirement system.

Your request and the former Attorney General Opinions cited therein indicate a belief that the fact that an employee member has willfully misrepresented his age should have an effect upon his standing before the Public Employees Retirement Board. The reason for this belief seems to be that a willful misstatement by a member was, in effect, a fraud or deceit upon the retirement system from which such member should not benefit. While this may have been true when it was the duty of the Public Employees Retirement Board to "retire" an employee member who had reached age 70, it is not true today.

The elements of an actionable fraud or deceit are set forth in 24 Ohio Jurisprudence, 2d, page 634, Fraud and Deceit, Sec. 20, which reads in part as follows:

> "* * * The grounds of the action of deceit are fraud and damage, and when both concur the action will lie. Moreover, both must concur to constitute actionable fraud. Neither fraud without damage nor damage without fraud is sufficient to support an action. The essential elements required to sustain an action for deceit are, generally speaking, actual or implied representations or concealment of a matter of fact which relates to the present or past, and which is material to the transaction; made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; *with the intent of misleading another into relying upon it; and reliance upon it by the other person with a right to so rely; with resulting injury as the consequence of such reliance.* All of these ingredients must be found to exist, and the absence of any one of them is fatal to a recovery." (Emphasis added)

It will be noted that there must be damage or injury caused to a person in order to have an actionable fraud or deceit. Naturally I do not condone intentional misstatements, but, under the terms of Section 145.32, Revised Code, as it now exists, I fail to see how the retirement system can be injured by such misstatement. Such an employee makes the same contribution to the retirement system as a truthful member. Without such injury there is no actionable fraud or deceit.

Let us consider the possibility that this willful misstatement of age was fraudulent as to the employer, thereby causing the contract of employment to be void *ab initio,* and causing the employee member to lose his right to a retirement allowance based on such employment. Such a harsh conclusion clearly cannot be said to be within the spirit for which the retirement systems were established. I again quote with approval from Opinion No. 1124, Opinions of the Attorney General for 1952, beginning at page 86:

> "Another principle which I deem applicable to the question we are considering, is that provisions of a statute which relate only to procedural steps and not to the essential purpose of a statute may be considered as directory only, and not mandatory. In the case of *State ex rel. Jones v. Farrar,* 146 Ohio St., 467, the court had under consideration a statute which authorized a municipal council to declare vacant the office of any person elected or appointed to an office, unless he took the required oath and gave bond within ten days after notification of his appointment or election. In holding this provision as to time to be directory only, the court stated in the syllabus:
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> > '2. As a general rule, statutes which relate to the essence of the act to be performed or to matters of substance are mandatory, and those which do not relate to the essence and compliance with which is merely a matter of convenience rather than substance are directory.
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> > '3. As a general rule, a statute providing a time for the performance of an official duty will be construed as directory so far as time for performance is concerned, especially where the statute fixes the time simply for convenience or orderly procedure; and, unless the object or purpose of a statutory provision requiring some act to be performed within a specified period of time is discernible from the language employed, the statute is directory and not mandatory.'
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> "To like effect, see *Bauman v. Guckenberger,* 148 Ohio St., 292.
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> "It appears to me that the essence of the retirement law lies in its provisions giving members of the System the right to receive certain benefits, and to continue in service so long as the employer approves, and that the procedure by which such approval is obtained and evidenced may be regarded as merely directory.
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> "If, therefore, an employee has been carried on the payroll beyond the age of compulsory retirement without applying for an extension of service as required by Section 486-59 *supra,* but *with the knowledge* and tacit consent of his employer, I should be disposed to hold that his failure to comply literally with the

> procedure prescribed for extension is not necessarily fatal to his rights and that he may obtain further extensions provided he now can and does comply with the law as to the certificate of health and the approval of the employing head. In reaching that conclusion, I am conscious that we are not applying the statute rigorously, but are giving effect to the factual situation as amounting to a substantial compliance with the intent of the law."

In conclusion, even though a public employee may have understated his age to the retirement system and may not have obtained a medical examination and certificate as provided in Section 145.32, Revised Code, such person was still a public employee and a member of the retirement system. Moreover, there is no provision of law prohibiting a person of 70 years or older from being a member of the retirement system. As noted earlier, present Section 145.32, Revised Code, does not authorize the retirement system to terminate the employment of any member, such power being invested in the employer alone. The authority of the retirement system, therefore, is limited to determining the retirement rights of the particular employee, at the time of retirement, and such system is not authorized to penalize a member for such understatement of age or failure to conform to medical requirements.

Answering your question, therefore, I am of the opinion and you are advised that under Chapter 145., Revised Code, a member of the Public Employees Retirement System who knowingly or otherwise understated his age when applying for membership, is entitled, upon retirement, to all of the retirement rights based upon his actual age just as any other member with the same age and service qualifications, and such member may not be penalized by the system for such misstatement.

Respectfully,

MARK MCELROY

Attorney General