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PUBLIC EMPLOYES RETIREMENT BOARD — PUBLIC EMPLOYES RETIREMENT SYSTEM — DUTY TO ALLOW MEMBER CREDIT, FULL YEAR, PRIOR SERVICE FOR EACH YEAR SERVED IN ANY POSITION OR OFFICE WHERE SERVICE MAY BE LEGALLY CREDITED—APPOINTIVE POSITION—ELECTED TO OFFICE — TIME — YEAR OR YEARS — SALARY — RULE APPLIES EVEN THOUGH SUCH EMPLOYE OR OFFICER DID NOT SERVE FULL TIME — NO AUTHORITY FOR BOARD TO OTHERWISE RULE OR REGULATE.

SYLLABUS:

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.

Columbus, Ohio, July 2, 1942.

Mr. Wilson E. Hoge, Secretary, Public Employes Retirement System, Columbus, Ohio.

Dear Sir:

I am in receipt of your request for my opinion which reads as follows:

> "Under the Retirement Act prior-service credit is given all members of the system for service prior to January 1, 1935, as an employe as defined by the Act. Under those provisions of law, we have granted full credit in any one calendar year for full-time work if the employes were paid on a monthly basis and if they were paid on an hourly or daily basis, provided they reached or exceeded the number of hours required to make up the work year. An employe who was paid on an hourly or daily basis has been given credit for the actual number of hours or days worked in relation to a work-year, regardless of the amount of earnings he may have had. For example, since two thousand (2000) hours constitute the average work-year. if an employe worked one thousand (1000) hours, he would be given one-half year's credit, even though he may have earned as much as two thousand dollars $(2,000.00). A problem now arises, particularly in county and municipal service, which is important from the standpoint of equity among members.
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> That problem may be set forth by the following example. We now have a member applying for credit as village councilman of a small village where the salary was one dollar ($1.00) per year; further credit as village clerk where the salary was fifty dollars ($50.00) per year; and further credit for service as mayor of the village at one hundred dollars ($100.00) per year. Naturally, we know that the village councilman, village clerk, or mayor, at a salary of one dollar, or fifty dollars, or one hundred dollars, per year, did not give full time to his public position. In most cases, such people held other full-time jobs and the amount of time given to the public service, although varying between municipalities, would be comparatively minor.
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> The question therefore is: Is it incumbent upon the Board to give a full year's credit to an employe who claims service as a village councilman, or a village clerk, at one dollar, or fifty dollars per year, even though we realize it could not have been full-time service; or does the Board have the authority to make a regulation which would attempt to define the approximate amount of time spent in such positions and therefore determine the percentage of a year's credit to be given in such instances?
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> In considering that question we have borne in mind that the years 1930 and 1934, inclusive, determine the average prior-service salary. Thus, if an employe earned $2,000.00 per

year in those years and this Board were to allow full credit for the type of service in question rendered prior to 1930, he would get an identical allowance with that of the person who worked full time.

Your opinion on this question at your earliest opportunity will be appreciated inasmuch as certain retirement cases are now being held, pending such determination."

In 1935, there was created by act of the legislature what was then known as the "State Employes Retirement System," the purpose of which was to provide a retirement system for superannuated or incapacitated state employes and to provide retirement allowances for such employes upon their retirement from the public service (115 O.L. 614). This act was codified as Sections 486-32 to 486-75 inclusive, of the General Code of Ohio. The general administration and management of the State Employes Retirement System was by force of Section 486-34, General Code, vested in a board to be known as the "State Employes Retirement Board," the personnel of which to be as provided therein. From time to time since 1935, legislation has been enacted materially changing this law as it was first enacted. In 1939, Sections 486-33a and 486-33b, General Code, each of which contain provisions of some pertinence with respect to your inquiry, were enacted. (117 O.L. 843). Section 486-33a, as then enacted provides in part:

"The state employes' retirement system created by section 486-33, General Code, shall hereafter be known as the public employes' retirement system, and the state employes' retirement board shall hereafter be known as the public employes' retirement board. * * * * * * Beginning July 1, 1938, in addition to the present membership of said retirement system, there shall be included therein all county, municipal, park district, conservancy, health and public library employes as defined herein, and such county, municipal, park district, conservancy, health and public library employes, except as otherwise provided herein, shall have all the rights and privileges and be charged with all the duties and liabilities provided for in the laws relating to said retirement system as are applicable to state employes. * * *"

Section 486-33b, General Code, reads 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' savings fund an amount equal to the full additional liability assumed by such fund on account of the crediting of such years of service. The retirement board shall have final authority to determine and fix the amount and manner of payment that any such county, municipal, park district, conservancy, health or public library employe shall pay on account of such service between January 1, 1935, and June 30, 1938, who desires to claim credit therefor. Such payment together with the regular interest as defined by section 486-32, General Code, shall be refunded in the event of the death or withdrawal from service of the member prior to retirement under the same conditions and in the same manner as refunds are made under sections 486-65 and 486-66, General Code, from the employes' savings fund."

In 1939, Section 486-34, General Code, was amended (118 O. L., 108). As so amended it provided in substance that a board of seven members with a personnel as fixed therein, to be known as the Public Employes Retirement Board, should be substituted for the State Employes Retirement Board theretofore created, with the power to administer and manage the Public Employes Retirement System. At the same time Section 486-40, General Code, was amended (118 O.L. 109) to read as follows:

"The retirement board shall elect from its membership a chairman, and shall appoint a secretary, an actuary, and such medical, clerical and other technical and administrative employes as may be necessary for the transaction of the business of the retirement system. The compensation of all persons so appointed shall be fixed by the retirement board. The retirement board shall perform such other functions as are required for the proper execution of the provisions of this act, and shall have authority to make all rules and regulations necessary therefor."

In 1941, Sections 486-47 and 486-48, General Code, were enacted (119 O.L. 150). The pertinent parts of the last two mentioned sections read as follows:

Section 486-47:

"Any other provisions of law notwithstanding, one year of contributing membership in the retirement system shall entitle a member to receive prior service credit for services prior to January 1, 1935, in any capacity which comes within the provisions of the public employes retirement act, provided that such

member has not lost membership at any time by the withdrawal of his accumulated contributions upon separation. * * * "

Section 486-48.

"Any other provisions of law notwithstanding, on and after June 30, 1941, any elective official of the state of Ohio or of any political subdivision thereof having employes in the public employes retirement system shall be considered as an employe of the state of Ohio or such political subdivision, and may become a member of the public employes retirement system upon application to the retirement board, with all the rights, privileges and obligations of membership. Service as any such elective official by any member of the retirement system prior to January 1, 1935, shall be included as prior service. * * * "

"Prior service," as the term is used in the Public Employes Retirement Law, is defined in paragraph 8, of Section 486-32, General Code, 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, 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."

"Total service," as therein defined (paragraph 11), means "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."

Paragraph 14, of the said Section 486-32, General Code, reads:

" '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/or 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/or fractions of a year employed within the five-year period considered. No average prior-service salary shall exceed two thousand dollars."

Section 486-55, General Code, reads as follows:

"Subject to such rules and regulations as the retirement board shall adopt, said board shall issue to each original member of the retirement system a certificate certifying to the aggregate length of all his prior-service as defined in this act. Such certificate shall be final and conclusive for retirement purposes as to such service, unless modified by the retirement board upon application made by the member or upon its own initiative."

Section 486-58, General Code, reads as follows:

"At retirement the total service credited a state employe shall consist of all his service as a state employe since he last became a member, and, if he has a prior-service certificate which is in full force and effect, all service certified on such prior-service certificate."

Although the definitions of "prior service" and "total service" as contained in the law wherein it speaks of "all service" are somewhat indefinite as to the units in which such service is to be considered and expressed, it is manifest from other provisions of the law that "years of service" is the proper measure of such service and that "all service" means the number of years that the service covers. This is manifest upon a consideration of the definition of "average prior-service salary" as contained in paragraph 14, of Section 486-32, supra, and of the provisions of Section 486-33b, General Code, where credit for prior service is provided for under certain conditions. The service there mentioned is spoken of as, "years of service." Also, in Section 486-60, General Code, where provision is made for superannuation retirement allowance, it is provided that an additional pension shall be allowed under certain circumstances, which shall be one and one-third per centum of his average prior-service salary multiplied by the number of years of service in his prior service certificate.

"Year" means a period of time that is not dependent upon the amount of salary earned or paid. Whether the salary is one dollar or more, if it is fixed on the basis of a year and the service covers a year of

time it should be credited as such, unless there is some express or implied provision of the contract of hire that the employe is to put in part time only, as for instance, one or more days a week or month for a year, in which case of course, the total time covered by the employment could be computed as constituting a fraction of a year, regardless of whether or not the salary is fixed on the basis of a year or otherwise, and obviously, if the employe is employed by the hour, day, week or month, and is paid on that basis, the number of hours or days that service was rendered during a year would constitute the basis to determine what fraction of a year should be used in computing "prior service" and "average prior service salary."

In concrete cases such as you mentioned, mayors and members of council are elected for a year or number of years and their salaries are fixed on the basis of a year. In some cases perhaps, the compensation of councilmen is fixed on the basis of the number of meetings per year, to be not more than a fixed number of meetings in each year. We have no means of knowing just how much time these officials put in although we may know as a matter of fact that they do not devote their entire time to the office. There is no justification, however, for saying as a matter of law that they are not on duty at all times. Rather, there is justification for saying that these officials are on duty at all times, and oftentimes they put in considerable time outside of regular business hours in consultation with their constituents or making investigations of one kind or another, that they may fulfill the duties which the law fixes for their respective positions. Such positions in a sense are comparable to that of a life guard at a swimming pool or bathing beach; they may not have anything to do, but no one would say they do not have a full time job. The mere fact that, as you suggest, many of such officials have other jobs or positions which perhaps take most of their time is not controlling.

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.

Upon examination of the Public Employes Retirement Law, I find no provision either express or implied, authorizing the Public Employes Retirement Board to adopt a rule such as outlined in your question. Certainly, neither the authority extended by Section 486-40, General Code, supra, to make rules for the proper execution of the provisions of the Public Employes Retirement Law, nor the provisions of Section 486-55, General Code, with respect to the issuance of an official and conclusive certificate of prior service will permit it. This conclusion is fortified by a recent pronouncement of the Supreme Court of Ohio, wherein Judge Zimmerman speaking for the court, in the case of Creig v. Board of Education, 139 O. S., 428, said on page 442, after referring to a rule of the Cleveland City Board of Education: "Such rule cannot override the statute."

I am therefore of the opinion that 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.

Respectfully,

THOMAS J. HERBERT
Attorney General.