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OFFICIAL OPINION NO. 20

March 15, 1954

Mr. Cecil Bolinger
Executive Secretary
Public Employes' Retirement Fund
707 Board of Trade Building
Indianapolis, Indiana

Dear Mr. Bolinger:

Your letter has been received with reference to an employee described as "Smith."

I understand that Smith was a municipal government employee at all times herein involved. Your letter reads in part as follows:

"He was employed from February 1, 1925 to January 1, 1948. On January 1, 1948 his employer became a participating unit under the Public Employes' Retirement Fund Law. At that time Smith was over seventy years old. He was granted prior service credit of 23 years by the Secretary of the Public Employes' Retirement Fund. On January 29, 1948 Smith filed an application for extended employment beyond the compulsory retirement age, and same was recorded by the Board of Trustees of the Public Employes' Retirement Fund. Smith contributed for six months, or to June 30, 1948, and then ceased to pay as he claimed he was not liable for further payments. He is still employed, but now he wishes to pay for all membership since July 1, 1948, claiming the Public Employes' Retirement Fund granted him membership service under Rule No. 1, approved by the Governor and Attorney General on September 4, 1947.

"Can Smith pay for membership credit from July 1, 1948 to date of retirement, and if he does so, must the Trustees of the Public Employes' Retirement Fund give him additional pension credit of 1% per year of his average salary not in excess of \$1,800.00 per year for each year employed after July 1, 1948 in computing his pension on retirement?"

The Public Employes' Retirement Act was enacted by the General Assembly of 1945, Ch. 340, and was amended in 1947, 1951 and 1953, all as found in Burns' Indiana Statutes (1951 Repl.), Section 60-1601 *et seq.* Section 4 of said Act, as amended, *supra*, same being Burns' Indiana Statutes (1951 Repl.), Section 60-1604, provides in part as follows:

“*Effective Date*’ in the case of a department shall mean January 1, 1946, or *in the case of a municipality, shall mean the date on which the municipality becomes a participant in the Fund.*

“‘Department’ shall mean any department, institution, board, commission, office, court, agency, institution of higher education, or any division of the state government receiving state appropriations and having power to certify payrolls authorizing payments of salary or wages against appropriations made by the general assembly from any state fund, or against trust funds held by the treasurer of the state including any departments receiving salaries or wages from state appropriations, or any board including the office of the State Adjutant General in the operation of all branches of the National Guard authorized by law to operate a state property independently of appropriations or funds held and disbursed by the state treasurer. (Our emphasis)

* * *

“‘Member’ shall mean any person qualifying for membership under Section 5 (Section 60-1605) of this act.”

Section 19 of said Act, as amended, *supra*, being Burns' Indiana Statutes (1951 Repl.), Section 60-1619, provides as follows:

“* * * The *effective date of participation of any municipality* as to the original group of employees designated, or as to any additional group of employees subsequently covered, *shall be January 1 or July 1, next following date of approval of membership* of any group of employees by the board, whichever date is earlier, provided that sufficient time shall be allowed for the

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filing of waivers as provided in Section 5 (a) (Section 60-1605) hereof. * * *” (Our emphasis)

Section 9 of said Act, as amended, *supra*, being Burns' Indiana Statutes (1951 Repl.), Section 60-1609, provides as follows:

“On July 1 of the year next following the *effective date* as herein defined, any member who shall have attained age seventy (70) years, and who shall have completed at least fifteen (15) years of service, shall be retired compulsorily and shall be entitled to the normal retirement benefit herein provided. After that date, a member shall be retired compulsorily and shall be entitled to a normal retirement benefit upon attainment of the age of seventy (70) provided the member shall have completed at least fifteen (15) years of service. If fifteen (15) years of service shall not have been completed by the member upon the attainment of age seventy (70), retirement of the member shall occur upon completion of fifteen (15) years of service or upon the attainment of age seventy-five (75), whichever event shall first occur, and the member shall be entitled to receive a normal retirement benefit.

“Provided, however, that any such employee who does not desire to retire may file a petition for permission to continue his present employment, which petition if approved by his immediate employer shall be filed with the board, and such approved petition so filed shall allow said employee to continue in his present employment at his discretion or until said employer shall cancel his consent to the continuation of such employment and file notice of this action with the board. Any employee remaining with the employer under such condition of employment shall not be required to make further contributions to the fund and after attaining age seventy (70) the retirement benefits of said employee shall not be subject to further annual accretions. No benefits shall be paid to such member until he shall be separated from the service of the employer.” (Our emphasis)

It is apparent that the "effective date" as used in said Act, with reference to Smith, is January 1, 1948. Smith's employer was a municipality which, according to your letter, became a participant in the fund on January 1, 1948, and consequently the time for compulsory retirement of Smith was July 1, 1949. This, you will note, is because Section 9 of the Act, *supra*, provides that on July 1 of the year next following the "effective date" as herein defined, "any member who shall have attained the age of seventy (70) years and who shall have completed at least fifteen (15) years of service, shall be retired compulsorily." July 1 of the year next following the "effective date" for Smith would be July 1, 1949; "next following" in Section 9 qualifies "year," not "July"; see: *Commonwealth v. Langley* (1911), 233 Pa. 222, 82 A. 56. As a result, the time for Smith's compulsory retirement was July 1, 1949, and Smith's membership in the fund required contributions from his salary to July 1, 1949. Therefore, it follows, in answer to the first part of your question, that Smith not only can but must pay for membership credit from the beginning of his membership to July 1, 1949, which was the date of his compulsory retirement. If your question was intended to raise the query as to whether contributions to the fund may be made from Smith's salary as a municipal employee after July 1, 1949, my answer must be in the negative. Section 20 of the Act, as amended, *supra*, the same being Burns' Indiana Statutes (1951 Repl.), Section 60-1620 contains two grammatical paragraphs; the first grammatical paragraph provides in part as follows:

"Beginning as of the effective date of his membership, each employee who is a member of the fund shall contribute five (5) per cent of his earnable compensation accruing on and after said date. This contribution shall be made in the form of a deduction from compensation * * *."

The second grammatical paragraph of said last cited section contains a permission to members to deposit, in the fund, multiples of \$100.00. Under such section and under the second paragraph of Section 9 of the Act, *supra*, no contributions are required after the time of compulsory retirement is reached. While permissive deposits in multiples of \$100.00 are author-

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ized at the option of the member, these deposits are not deductible contributions from his compensation. For this reason Smith's contributions to the fund as a member must cease as of July 1, 1949. It is further apparent that under the facts as stated in your letter, Smith's application on January 29, 1948 for permission to extend his employment beyond the compulsory retirement age was premature inasmuch as his time for compulsory retirement was July 1, 1949. The remainder of your question is whether the Trustees of the Public Employes' Retirement Fund must give Smith additional pension credit of 1% per year of his average salary not in excess of \$1,800.00 per year for each year employed after July 1, 1948, in computing his pension. The answer to your question must be in the affirmative, subject, however, to this important qualification: Smith may not receive such additional pension credit of 1% for the period beginning with July 1, 1949, which was the date of his compulsory retirement. Section 8 of the Act, as amended, *supra*, the same being Burns' Indiana Statutes (1951 Repl.), Section 60-1608, provides that the amount of a member's normal retirement benefit consists of several factors, one of which is as follows:

“(2) An employer's membership pension equal to one (1) per cent of the employe's average compensation for each completed year of membership service, plus the sum of ten dollars (\$10.00) for each year of creditable service not in excess of fifteen (15); and
* * *”

However, Section 9 of the Act, *supra*, provides that any employee who has reached the time of compulsory retirement may file a petition for permission to continue his employment; if such an employee is thus permitted to continue in his employment, said section provides “Any employee remaining with the employer under such condition of employment shall not be required to make further contributions to the fund and after attaining age seventy (70) the retirement benefits of said employee shall not be subject to further annual accretions.” Analyzing this sentence with the remainder of Section 9, indicates that the last quoted sentence prohibits any further annual accretions of 1% of the employee's average compensation when the following two factors have occurred:

1. The employee has reached the time of compulsory retirement and has been permitted pursuant to a petition to continue in his employment; and

2. The employee has attained the age of seventy (70).

Since Smith did not reach the time for compulsory retirement until July 1, 1949, he was entitled to additional pension credit of 1% per year until that date; after that date, since both factors above described became present, he was thereby entitled to no further annual accretions.

I have noted Rule No. 1 of the Rules and Regulations of the Board of Trustees of the Public Employees' Retirement Fund. This Rule reads as follows:

"Beginning July 1, 1947, all members of the fund who have 15 or more years of creditable service shall be required to retire on or before June 30th of the year following their 70th birthday, or on the 30th day of June succeeding their completion of 15 years of service if this occurs after their 70th birthday. In no case shall membership extend later than June 30th following their 75th birthday, except in cases where a petition properly approved for an extension of employment has been filed."

I am of the opinion that said Rule makes an unfounded assumption as to the meaning of the words "effective date" as contained in the first sentence of Section 9 of the Act, *supra*; said first sentence of such section provides that "On July 1 of the year next following the effective date as herein defined, any member who shall have attained the age of seventy (70) years, and who shall have completed at least fifteen (15) years of service, shall be retired compulsorily * * *." Your Rule and Regulation No. 1 assumes that the expression "effective date" invariably means January 1, 1946; consequently your Rule interprets the phrase "on July 1 of the year next following the effective date" to mean July 1, 1947. Sections 4 and 19 of the Act, as amended, *supra*, as above quoted, however, indicate that the effective date in the case of a municipality means the date on which the municipality became a participant of the fund. In the instant case the municipality became a participant in the fund on January 1, 1948. Therefore, using

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January 1, 1948 as the effective date with regard to Smith, Smith's time for compulsory retirement under the law was July 1, 1949. The Rules and Regulations of the Board of Trustees of the Public Employes' Retirement Fund cannot advance the time of compulsory retirement as established by the Act. Under Section 14 of the Act, as amended, *supra*, the same being Burns' Indiana Statutes (1951 Repl.), Section 60-1614, the Board of Trustees may establish Rules and Regulations for the administration of the fund and for the transaction of its business *consistent with law* as it deems necessary to carry out the Act. Consequently, a Rule and Regulation is not valid which either advances or extends the time for compulsory retirement except as specifically provided by the Act. It is therefore suggested that you modify Rule No. 1 of your Rules and Regulations so that the same will read, in substance, as follows:

"Beginning July 1, 1947, in the case of an employee of a department, or beginning July 1 of the year next following the effective date as defined in the Act in the case of an employee of a municipality or participating unit of a municipality, all members * * *" *et seq.*

OFFICIAL OPINION NO. 21

March 18, 1954

Mr. Horace E. Abbott, Member
Board of Trustees
Public Employes' Retirement Fund
707 Board of Trade Building
Indianapolis 4, Indiana

Dear Mr. Abbott:

Your letter has been received in which you request an Official Opinion and reads as follows:

"Pursuant to Rule 32 adopted by the Teachers' Training and Licensing Commission of the Indiana State Board of Education, Secretaries to Boards of Education and personal secretaries to Superintendents of Schools in school cities have been made eligible for par-