

1961 O. A. G.

OFFICIAL OPINION NO. 35

August 4, 1961

Mr. Walter J. Wolpert
Executive Secretary
Public Employes' Retirement Fund
501 State Office Building
Indianapolis, Indiana

Dear Mr. Wolpert:

This is in reply to the request for an Official Opinion submitted to this office at the direction of the Board of Trustees of the Public Employes' Retirement Fund, which letter of request reads, in part, as follows:

"I would respectfully request an Official Opinion regarding the status of certain employees of the various State Universities in relation to their participation under the Public Employes' Retirement Fund in the various categories as listed below.

"(a) Employees who have sufficient service and have attained sufficient age to qualify for benefits under the Public Employes' Retirement Fund who are in a position now covered by the Teachers Insurance and Annuity Association.

"(b) Employees who have sufficient creditable service but have not attained the required age to qualify for benefits under the Public Employes' Retirement Fund but who are now in positions covered by the Teachers Insurance and Annuity Association.

"(c) Employees who have not acquired sufficient creditable service to qualify for benefits under the Public Employes' Retirement Fund but whose positions are now covered by the Teachers Insurance and Annuity Association.

"The questions are:

"1. Are employees in category (a) listed above entitled to receive retirement benefits under the Public Employes' Retirement Fund and con-

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tinue working in a position covered by the Teachers Insurance and Annuity Association?

- "2. Are employees in category (b) entitled to start participation under the Teachers Insurance and Annuity Association and receive retirement benefits under the Public Employees' Retirement Fund when they attain the required age?
- "3. Are employees under category (c) entitled to a refund of their contributions to the Public Employees' Retirement Fund and continue to work in a position now covered under the Teachers Insurance and Annuity Association?"

The first group of employees about whom your request inquires are those who have sufficient creditable service under the Public Employees' Retirement Fund and who have also attained sufficient age to qualify for retirement benefits. The question presented is whether these employees are entitled to receive benefits under the Public Employees' Retirement Fund and also continue to work in positions now covered by the Teachers Insurance and Annuity Association (hereinafter referred to as TIAA).

The right of any public officer or employee to a pension or retirement benefit depends entirely upon statute, and therefore the right in this instance is determinable from the terms of the Public Employees' Retirement Act as such act has been amended, added to and supplemented. The Public Employees' Retirement Fund was created by the Acts of 1945, Ch. 340. The provisions of the act have been amended and added to numerous times, and in 1955 the Indiana Public Employees Social Security Integration and Supplemental Retirement Benefits Act was passed which provided for a supplemental system of retirement benefits for employees of the State and political subdivisions thereof who were members of certain existing retirement systems, including the Public Employees' Retirement Fund. In some instances provisions in the 1955 Act supplanted the terms of the 1945 Act; in other instances the original terms are still effective. In answering any question involving the Fund, both acts, as amended, must be construed together to arrive at a conclusion.

The Acts of 1945, Ch. 340, Sec. 4a, as added by the Acts of 1957, Ch. 232, Sec. 1, as amended, as found in Burns' (1961 Temp. Noncum. Supp.), Section 60-1604, defines who are employees for purposes of coverage under the Public Employees' Retirement Fund. That section reads, in part, as follows:

“ ‘Employee’ shall mean any person in the service or employ of the state * * * whose compensation is paid out of funds of the state, including * * * employees of any * * * institution of higher education; * * * but shall not include the following:

* * *

“(d) Employees who are members of other pension or retirement funds or plans, excepting the federal social security program, maintained in whole or in part by appropriations by the state or municipality, or who are presently eligible for membership, or who by reason of their employment will become eligible for membership, in such other pension or retirement funds or plans;”

In a recent case construing the rights of nonacademic university employees under TIAA, the Court said in *Pape v. Armstrong et al.* (1955), 47 Wash. (2d) 480, 287 P. (2d) 1018, 1020, that: “The TIAA is a large nonprofit corporation operating under a grant from the Carnegie Corporation engaged in the business of issuing life insurance and annuity contracts to members of the faculty and other employees of some six hundred schools and colleges.” It is my understanding that the various state universities in Indiana are contributing state appropriated funds to TIAA to meet the obligations under their agreements with TIAA. Therefore, one who is a member of TIAA is a member of a retirement plan maintained in part by appropriations by the State and is not eligible to participate as an active member in the Public Employees' Retirement Fund under the provisions of Burns' 60-1604, *supra*. However, the question for determination here is whether a current member of TIAA can receive benefits previously accumulated under the Public Employees' Retirement Fund.

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The Acts of 1955, Ch. 329, Sec. 16, as amended and found in Burns' (1959 Supp.), Section 60-1927, prescribes the conditions for retirement which must be met in order to receive benefits from the Public Employees' Retirement Fund. That section reads as follows:

“(a) An employee who has attained age sixty-five [65] and who has at least ten [10] years of creditable service is eligible for normal retirement.

“(b) An employee who has attained age fifty [50] and who has at least fifteen [15] years of creditable service is eligible for early retirement.

“(c) Whenever it becomes certain that an employee cannot complete ten [10] years of creditable service before attaining age seventy [70] he may cease to be a member of the system of which he has been a member and may receive the amount of his contributions together with any interest credits thereon which shall be paid in a lump sum.

“(d) A member who is eligible for retirement may elect to receive the retirement benefits to which he is entitled commencing on a date fixed by him, to be known as his ‘retirement date,’ which date shall be *after cessation of service* and shall be the first day of a calendar month.” (Our emphasis)

The Acts of 1955, Ch. 329, Sec. 17, as amended and found in Burns' (1959 Supp.), Section 60-1928, provides:

“(a) An employee subject to the supplemental benefit provisions of this act *who retires* after he has reached age sixty-five [65] years and completed at least ten [10] years of service will be entitled to receive monthly retirement income payments which will be guaranteed for five [5] years and as long thereafter as he lives, consisting of the sum of (1) a pension provided by the contributions of the employer, and (2) an annuity provided by the employee's contributions.
* * *

“(b) An employee, subject to the provisions of this act, who *retires* in accordance with section 16(b) be-

fore age sixty-five [65] shall receive retirement income payments * * *." (Our emphasis)

The sections quoted above refer to one who "retires" and to selecting a "retirement date, which date shall be after cessation of service." 2 R. S. 1852, Ch. 17, as found in Burns' (1946 Repl.), Section 1-201, requires that words and phrases in statutes shall be taken in their plain, or ordinary and usual, sense. Webster's New International Dictionary (2d ed.) defines "retire" to mean "to withdraw from office, a public station, business, or the like." Synonyms for the word include leave, depart. Antonyms include stay and remain. Therefore, in order to receive a retirement benefit, a claimant must show that he has met the requirements as to age and length of service and that he has retired and ceased to be in a position covered by the Public Employees' Retirement Fund.

It has been determined in other jurisdictions that where a retirement statute does not contain any provision that a pension is forfeited or suspended upon subsequent employment or re-entry into public service, the acceptance of another employment, or the election to office, by a retired public servant receiving pension payments has no effect on his right to a pension, unless he is found to have waived such right, and such re-entry does not operate as a revocation or suspension of the pension granted.

Maybury v. Coyne (1958), Ky., 312 S. W. (2d) 455;

Currigan v. Flor *et al.* (1956), 134 Colo. 92, 299 P. (2d) 1098;

Lamb v. City of Boone *et al.* (1946), 237 Iowa 273, 21 N. W. (2d) 462, 162 A. L. R. 1465;

Homan v. Mackey *et al.* (1929), 295 Pa. 82, 144 Atl. 897.

In some instances double pensions from two different pension systems, covering the identical period of service, have been recognized and approved, the court stating that no statute was found which forbade membership in two state funds. See: State *ex rel.* James v. Rapport (1949), 136 Conn. 177, 69 A. (2d) 645.

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Acts of 1955, Ch. 329, Sec. 18, as amended and found in Burns' (1959 Supp.), Section 60-1929, provides:

“(a) If a member who is receiving retirement income payments under this act becomes reemployed in a position covered by this act, his retirement benefit payments shall cease after thirty [30] consecutive school days or working days of such reemployment
* * *”

However, one covered by TIAA would not be considered to be re-employed in a position covered by “this act” as one in such a position is expressly excluded from participation in the Public Employes' Retirement Fund under the terms of Burns' 60-1604, *supra*. In addition, TIAA is not subject to Burns' 60-1929, *supra*, or to any of the supplemental benefit provisions, inasmuch as the Acts of 1955, Ch. 329, Sec. 4a, as found in Burns' (1959 Supp.), Section 60-1915, expressly refers to “any retirement system established by any state institution of higher learning which is a body corporate and politic of this state,” and provides as follows:

“* * * Notwithstanding any provision of this act no retirement system to which this section 4a is applicable shall be deemed a retirement system within the meaning of sections 12 to 25, inclusive, of this act and no provision contained in such sections shall be applicable thereto.”

There are no other provisions in the Retirement Act concerning suspension of the retirement benefit in the event the recipient returns to work.

In answer to your first question, it is my opinion that the employees in category (a) of your letter are entitled to receive retirement income payments from the Public Employes' Retirement Fund and at the same time be employed in positions covered by TIAA if such employees in fact resigned their positions and retired and ceased to be in service covered by the Public Employes' Retirement Fund and were then subsequently re-employed in positions covered by another state tax-supported retirement plan. The subsequent re-employment in such positions would not operate to suspend or revoke the benefits vested in the recipients upon their retirement.

The second question presented by your letter of request asks whether employees who have sufficient creditable service but who have not attained the required age to qualify for benefits under the Public Employes' Retirement Fund are entitled to start participation under TIAA and then later begin receiving retirement benefits under the Public Employes' Retirement Fund when they have attained the required age.

Membership in the Public Employes' Retirement Fund is compulsory for those employees who are eligible for coverage, and all members are required to contribute to the Fund. [Acts of 1955, Ch. 329, Sec. 13, as amended and found in Burns' (1959 Supp.), Section 60-1924(a).] The conditions which must be met before one is eligible to receive a retirement benefit from the Fund are found in Burns' 60-1927, *supra*, and have been set out earlier in this Opinion. The Public Employes' Retirement Act was construed in 1947 O. A. G., page 280, No. 56. In determining that the 1947 amendment to the Act, which changed the amount of the employer's pension contributed by the State, did not unlawfully deprive any pensioner of any vested rights, Attorney General Foust stated on page 281:

“It is the established rule in this State as well as the other States that a pension granted by public authority is not a contractual obligation but a gratuitous allowance on the conditions of which the pensioner has no vested right, but that it may be changed or terminated at will by the authority bestowing it.

Kearn, Mayor v. State *ex rel.* Bess (1927), 212 Ind. 611;

Johnson v. State Employees' Retirement Assn. (1940), 208 Minn. 111, 292 N. W. 767, 137 A. L. R. 251;

United States v. Teller (1882), 107 U. S. 64, 68;

Frisbie v. United States (1895), 157 U. S. 160;

In re Hoag (1915), 227 Fed. 478;

Pennie v. Reis (1889), 132 U. S. 464;

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Ann., 137 A. L. R. 249;

40 Am. Jur., page 981.

“In the case of *Kearn, Mayor v. State ex rel. Bess, supra*, the Indiana Supreme Court stated the rule as follows:

“* * * The pension fund is accumulated by taxation, by contributions and awards of various sorts, and by enforced contribution by members of the police force. It is established by the great weight of authority in other jurisdictions, including the Supreme Court of the United States, that such pensions are gratuities; that they involve no agreement of the parties and create no vested rights, notwithstanding compulsory contributions by the parties in the form of allotted sums retained out of the member's pay. * * *”

More recently, a growing number of courts, including Indiana, have viewed rights in pension systems calling for contributions on a compulsory basis as being nonvested only during the period prior to an employee's fulfillment of the requirements for grant of the pension; upon fulfillment of those conditions, the pension rights are deemed to vest, thereafter being immune from abolition, if not from adverse change of any kind. 52 A. L. R. (2d) 440, 442.

In *Klamm et al. v. State of Indiana ex rel. Carlson* (1955), 235 Ind. 289, 291, 126 N. E. (2d) 487, the Court said:

“The constitutionality of statutes establishing a pension system has been sustained by our courts on the grounds that the primary object is public, not private, interest; that the annuities are in the nature of compensation for services previously rendered. It virtually is pay withheld to induce long continued service. Its purpose is to hold out to those who adopt such service as a career some assurance (sic) of income upon retirement because of age or disability. This is an expectation that more competent persons will be attracted to such positions. (Citations)

* * *

“While the police pension fund here in question is accumulated by taxation, by contributions, and awards of various sorts, and by enforced contribution by members of the police force, the great weight of authority holds that such pensions are gratuities; that they involve no agreements of the parties and create no vested rights, notwithstanding compulsory contributions from the member’s pay. Until retirement, the police officer has no vested right in pension payments. (Citations)

“Where the statutory conditions for retirement existing when the application is made have been met, and the award of the pension has been made, or as of right should have been made, the pensioner’s interest becomes vested and takes on the attributes of a contract, which, in the absence of statutory reservations, may not legally be diminished or otherwise adversely affected by subsequent legislation. (Citations)”

In other jurisdictions, courts have determined that reaching the age for retirement as prescribed by the statute is an essential requirement for retirement, and an individual who had been a member of a retirement fund the required number of years but who had not reached the required age did not have a vested right to retirement, but had a mere inchoate or imperfect right subject to change at the will of the Legislature.

Tait et al. v. Freeman et al. (1953), 74 S. D. 620, 57 N. W. (2d) 520.

It is my opinion that the right to receive a retirement benefit from the Public Employes’ Retirement Fund is dependent not only on the member serving the required number of years, but also attaining the age prescribed by statute. However, I do not believe that it is necessary for the member to have reached retirement age while in active service, it being sufficient if he has the required creditable service and then reaches the required age after leaving active service. *Ryan v. Minneapolis Police Relief Assn.* (1958), 251 Minn. 250, 88 N. W. (2d) 17, is a case from another jurisdiction supporting this proposition.

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It should be pointed out that some jurisdictions have construed statutes with different wording to require one to be in active service at the time of attaining the required age in order to receive the retirement benefit. However, it is my understanding that the Board of Trustees of the Public Employees' Retirement Fund has interpreted the retirement statute to permit a member to begin receiving retirement benefits when he reaches the required age, although this event occurs after the member has left active service. Under this administrative interpretation, when a member leaves employment with ten years of service, but he is under the age of sixty-five, the member is requested to file an application at the time he leaves the covered employment, and then his retirement benefits begin automatically when he has reached age sixty-five. General Bulletin No. 1, dated November 1, 1959, issued by the Public Employees' Retirement Fund, discusses withdrawal of funds, and on page 4 reads as follows:

"3. Vested Rights.

"a. Employees with over 10, but less than 15 years of service have already qualified for a retirement benefit at age 65 and are in a position to receive far more than the amount of contributions they will receive in the withdrawal.

"b. Employees with over 15 years of creditable service and who are under age 50 are in the same position and may elect to retire at age 50 and again are in a position to receive far more than their contributions even with the reduced retirement benefits.

"NOTE: All employees in either 'a' or 'b' above, that choose to leave their account intact in order to qualify for future benefits should file a regular retirement application with the Public Employees' Retirement Fund office when they leave the payroll."

In answer to your second question, it is my opinion that the rights of the employees described in category (b) to receive retirement benefits from the Public Employees' Retirement

ment Fund will depend upon the statutes in force at the time such employees reach the age of eligibility to receive benefits. At that time, each member must meet all the requirements for retirement, as prescribed by statute. Each case must be considered independently at the time all the statutory conditions for retirement are met. It should be noted that although the pension supported by the State's contributions may be subject to some legislative changes and alterations between the time the member leaves the service and attains retirement age, still the annuity payable to such member from his own contributions to the Fund cannot be adversely affected by subsequent legislation. By statute, a member has a vested interest in his contributions to the Fund. [See: Acts of 1945, Ch. 340, Sec. 25, as amended and found in Burns' (1951 Repl.), Section 60-1625.] It is further to be noted that a member who has met all the retirement requirements as to length of service and age for early retirement and who elects to begin receiving his retirement benefits at a later date would have his benefits determined under the law in effect at the time he makes such election and would not be penalized by lesser benefits subsequently prescribed by the Legislature, although he would be entitled to additional benefits if so prescribed by the Legislature.

The final question presented by your letter asks whether employees who have not acquired sufficient creditable service to qualify for benefits under the Public Employees' Retirement Fund but whose positions are now covered by TIAA are entitled to a refund of their contributions from the Public Employees' Retirement Fund. The Acts of 1955, Ch. 329, Sec. 20, as amended and found in Burns' (1959 Supp.), Section 60-1931, concerns withdrawing from the Fund and provides that an employee "who ceases to be in service" may elect to suspend his membership, and upon suspension of membership, the amount of his contributions with any interest credits thereon shall be paid to him.

A question almost identical to the one presented here was considered by me in 1954 O. A. G., page 74, No. 21. In that Opinion, I determined that a refund of contributions could be paid by the Public Employees' Retirement Fund to one who had recently become eligible for membership in the Teachers'

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Retirement Fund, although such employee was not withdrawing from public service. That Opinion states on page 77:

“It is therefore necessary to discuss the right of said teacher-clerk, who, for the purpose of retirement, has the same classification on licensure as a teacher, to withdraw such accumulated funds from the Public Employes’ Retirement Fund upon becoming a member of the Teachers’ Retirement Fund. In this connection, it is pertinent to note that said statutes do not authorize such a person to be an active member of each of said funds at the same time. Each of said statutes require a person holding the classifications therein defined to be a member of one or the other of such funds, as a person’s classifications may require. It is clear that the Public Employes’ Retirement Act exempts teachers who are members of the Teachers’ Retirement Fund from membership in said Public Employes’ Retirement Fund. (See definition ‘Employee’ Burns’ Indiana Statutes [1951 Repl.], Section 60-1604.)

“From the foregoing, and in answer to your question number 1, I am of the opinion that a teacher-clerk, upon becoming licensed under said Rule 32, *supra*, ceases to be in a classification subject to membership in the Public Employes’ Retirement Fund, and is required to be a member of the Teachers’ Retirement Fund; that while it is true the provision made for a right to withdraw accumulated funds from the Public Employes’ Retirement Fund is set out in Section 12 of said Act, same being Burns’ Indiana Statutes (1951 Repl.), Section 60-1612, the basis of the withdrawal of such funds being ‘withdrawal from service,’ I am of the opinion that when such a teacher-clerk so changes her classification as to ineligibility for further participation as an active member of the Public Employes’ Retirement Fund, that she would be entitled to consider herself ‘withdrawn from service’ as used in the Public Employes’ Retirement statute for the purpose of making a withdrawal of accumulated funds from the Public Employes’ Retirement Fund.”

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In view of the foregoing, it is my opinion that a university employee who has become eligible for TIAA, and who thereby cannot continue to participate in the Public Employees' Retirement Fund, would be entitled to consider himself as one "who has ceased to be in service" as that term is used for Retirement Fund purposes, and is therefore entitled to a refund of his accumulated contributions from the Public Employees' Retirement Fund.

In conclusion, and by way of summary, it is my opinion that:

1. Employees of the various state universities who have sufficient service and have attained sufficient age to qualify for benefits under the Public Employees' Retirement Fund are entitled to receive retirement income payments from the Fund and at the same time be employed in positions covered by TIAA if such employees have in fact resigned their positions and retired and ceased to be in service covered by the Fund. Subsequent re-employment in positions covered by TIAA would not operate to suspend or revoke the retirement benefits vested in the retirees.

2. The rights to retirement benefits of state university employees who have sufficient creditable service but have not attained the required age to qualify for benefits under the Public Employees' Retirement Fund will depend upon the statutes in force at the time each such employee reaches the age of eligibility to receive such benefits. Such an employee does not have a fully vested right to benefits until he has met every requirement prescribed by statute for retirement.

3. State university employees who have not acquired sufficient creditable service to qualify for benefits under the Public Employees' Retirement Fund and who are now required to be members of TIAA are entitled to a refund of their contributions from the Public Employees' Retirement Fund.