

3151.

STATE TEACHERS RETIREMENT SYSTEM—MEMBERS INDUCTED INTO MILITARY OR NAVAL FORCES OF UNITED STATES—PUBLIC RESOLUTION 96, 76TH CONGRESS, S. J. RESOLUTION 286—SELECTIVE TRAINING AND SERVICE ACT—SUCH MEMBER PREVENTED FROM MAKING CONTRIBUTIONS TO SAID SYSTEM—MAY NOT HAVE CONTRIBUTIONS MADE FOR HIM WHEN ABSENT—SAID SYSTEM MAY NOT RECEIVE REMITTANCES AND CREDIT THEM TO ACCOUNT OF SUCH MEMBER.

WHERE MEMBER OF SAID SYSTEM UNDER CONTRACT IS PREVENTED FROM MAKING CONTRIBUTIONS BY REASON OF ILLNESS, ACCIDENT OR OTHER REASON, STATE TEACHERS RETIREMENT BOARD MAY MAKE DEDUCTIONS AND TRANSMIT AMOUNT TO SAID SYSTEM—AUTHORITY LIMITED TO ONE YEAR—SECTION 7896-43 G. C.

SYLLABUS:

1. *A member of the State Teachers Retirement System who has been inducted into the military or naval forces of the United States for training or service either by authority of Public Resolution No. 96—76th Congress (S. J. Res. 286), approved August 27, 1940, or the Selective Training and Service Act of 1940, approved September 16, 1940, and thereby is prevented during his term of service and training from making or having made his contributions to the Teachers Savings Fund of the Teachers Retirement System, may not have those contributions made for him from the compensation of persons employed to substitute for him during his absence and boards of education and other employers of such members have no power under the law to make such deductions from the compensation of substitutes and remit the same to the Teachers Retirement System, nor does the Teachers Retirement Board possess the power to receive such remittances and credit them to the account of the member.*

2. *By authority of Section 7896-43, General Code, as amended by the 93rd General Assembly, an employer of a member of the State Teachers Retirement System under contract, who, by reason of illness, accident or other reason which may be approved by the Teachers Retirement Board, is prevented from making his contributions to the Retirement System for any*

payroll period or periods, may make such deductions, for other payroll periods, if any, during the same year that lapses in making the deductions had occurred, and transmit such deductions to the Retirement System. The authority to make and transmit such deductions does not extend beyond the year wherein the member is prevented from making his contributions for the reasons stated.

Columbus, Ohio, December 19, 1940.

Mr. George M. Pogue, Secretary,
Ohio State Teachers Retirement System,
Ohio State Savings Building,
Columbus, Ohio.

Dear Sir:

I am in receipt from your office, of the following request for my official opinion:

“At the present time, a considerable number of men teachers in Ohio are going into army service, either through the National Guard, enlistment or the draft. We understand that the Federal legislation in regard to this provides that these men shall be returned to their original positions when their term of army service is over.

In order to protect their standing in the Retirement System during the school year 1940-41,

(a) Under provisions of Section 7896-43, General Code of Ohio, may they have their contributions sent in by their Board of Education while a substitute performs their duties, said contribution being made from the part of the money that would otherwise be paid the substitute?

(b) Would the Board of Education have the authority to make these contributions out of school funds while members are in army service?

At a meeting of the retirement board, held September 20, 1940, the following resolution was unanimously adopted:

RESOLVED: That this Board, acting under the provisions of Section 7896-43, approve army service as being a good and sufficient reason for a teacher having contributions sent in to the Retirement System, in the manner provided by the said section of law, for the period during which he is absent from his school duties.

The retirement board and officials are desirous of extending every help possible under the law to these people who are called from their regular employment into army service and would appreciate your consideration of the questions as listed above."

The Ohio State Teachers' Retirement System established by Act of the Legislature of Ohio, in 1919, is designed to provide a state-wide system of allowances and other benefits for teachers in the public schools who are members of the system, and others who become members under provisions of law, referred to in the Act in some places as "teachers" and in others as "contributors," and their beneficiaries, upon their retirement either on account of disability or upon the attainment of a prescribed age or of an accumulation of years of service as provided in the Act. This Act is codified as Sections 7896-1 to 7896-62, inclusive, of the General Code of Ohio.

Section 7896-3 of the General Code, provides that the general administration and management of the said retirement system and the making effective of the provisions of law with respect thereto are vested in a retirement board the creation and personnel of which are provided for in the Act. This board is given authority by the above mentioned statute to make rules and regulations not inconsistent with the law, to carry into effect the provisions of the law.

Provision is made in the Act for the creation and maintenance of a fund from which retirement allowances and other benefits are paid. This fund is known as the "annuity and pension reserve fund," and consists of reserves which have been transferred from the "teachers' savings fund" or the "employers' accumulation fund," both being funds for the accumulation, preservation and maintenance of which provision is made in the law. The "teachers' savings fund" is defined in Section 7896-56, General Code, as the "fund in which shall be accumulated contributions from the compensation of contributors for the purchase of annuities."

Provision is made in Section 7896-43, General Code, for the accumulation of the "teachers' savings fund." In so far as the terms of Section 7896-43, General Code, are pertinent to your inquiry, they read as follows:

"Each teacher who is a member of the retirement system shall contribute four per centum of his compensation not exceeding two thousand dollars per annum, to the teachers' savings fund. Such contributions, by direction of the retirement board, shall be deducted by the employer in either or both of two ways:

- (a) Each employer may deduct from the compensation of

each contributor on each and every payroll of such contributor for each and every payroll period subsequent to the date upon which such contributor became a member an amount equal to four per centum of such contributor's compensation provided that the amount of a contributor's compensation in excess of two thousand dollars per annum shall not be considered, or

(b) Each employer may deduct contributions provided for in this act on any salary or salaries earned during any payroll period or periods without regard to the maximum salary provisions for said payroll period, provided deductions cease entirely for the remainder of the school year if and when the total contributions deducted from the teacher's salary for teachers' savings fund for such school year equal four per centum of his salary of not to exceed two thousand dollars.

Any teacher under contract, who, because of illness, accident, or other reason which may be approved by the retirement board, is prevented from making his contribution to the retirement system for any payroll period or periods may have such deductions made from other payrolls during the year and the employer shall transmit such deductions to the retirement system. * * *

It will be observed from the terms of the last paragraph of the above quotation, that authority is extended to an "employer" which is defined in Section 7896-1, General Code, as, "the board of education, school district or other agency within the state of Ohio by which a teacher is employed or paid, to deduct and transmit from *other* payrolls *during the year* any contribution which a teacher who is under contract had been prevented from making by reason of illness, accident or other reason which may be approved by the retirement board. Under this provision, if there are no other payrolls for the teacher during the year wherein he had missed making contributions on account of illness, accident or other causes, there could manifestly not be any deductions made. No power is extended by this statute or any other to make deductions during any other year than the one in which the teacher had been prevented from making his contributions on account of the reasons stated.

Adverting to the first paragraph of your letter and the observations contained therein with respect to the federal legislation pertaining to the induction of men into federal military service at this time, either through membership in the Ohio National Guard, the selective service draft or voluntary enlistment, some comment is necessary to correct the impression this leaves, as your inquiry as well as the resolution of the Teachers Retirement Board of September 20, 1940, quoted in your letter, are both

predicated, to some extent, I believe, on a misunderstanding regarding the federal law on this subject.

The Federal legislation providing for the mobilization of the armed forces of the United States for the national defense during the present emergency does not purport to provide that public employes, such as teachers in the public schools, if inducted into the Federal service, must be restored to their positions upon their return.

In the Act of Congress, known as "The Selective Training and Service Act of 1940," approved by the President September 16, 1940 (Public No. 783—76th Congress—S 4164) entitled "An Act to provide for the common defense by increasing the personnel of the armed forces of the United States and providing for its training" contains the following provisions in Section 8, subdivisions (A) and (B) thereof:

"(A) Any person inducted into the land or naval forces under this act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under Section 3 (B) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained.

In addition * * * * *

(B) In the case any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within forty days after he is relieved from such training and service—

(A) * * * *

(B) * * * *

(C) If such position was in the employ of any state or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should be restored to such position or to a position of like seniority, status and pay.

(C) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (B) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on

furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration."

Similar provisions are contained in Public Resolution No. 96—76th Congress (S. J. Res. 286) approved August 27, 1940, as amended in The Selective Service and Training Act of 1940. This aforesaid resolution is entitled:

"Joint Resolution to strengthen the common defense and to authorize the President to order members and units of reserve components and required personnel of the Regular Army into active military service."

From the foregoing it is apparent that no attempt has been made so far as Federal legislation is concerned to control the action of employer boards of education by imposing upon them a definite duty to restore employes who had been inducted into the military or naval forces of the United States for training and service in the present emergency, upon their return therefrom. Congress goes no further in that respect than to express its sense of the fitness of such restitution. The provision that when employes are so restored they should lose no rights with respect to seniority or participation in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employes on furlough or leave of absence in effect with the employer at the time such person was ordered into such service has no application except by inference to employes of state and political subdivisions thereof.

Granting that the suggestion of Congress as to the restitution of employes of the state and political subdivisions thereof to their former position or positions of like seniority, status and pay, at the end of their term of service and the retention for them during their absence of seniority rights and their present status as to right to participate in insurance and other benefits, is wholesome, it nevertheless can be given only such force as the law which governs the actions of state and local agencies will permit.

The principle of law that administrative boards created by statute are limited in the exercise of their powers, both as to extent and manner, to such only as are expressly granted by statute or necessarily implied to carry out the powers so expressly granted, is so well settled as to not merit the citation of authority or admit of argument. Many authorities, including

the courts of this state and elsewhere and former Attorneys General in numerous opinions apply this principle to boards of education and it has been noted as being applicable to the State Teachers Retirement Board in at least one opinion of a former Attorney General. (See Opinions of the Attorney General for 1933, page 1163.)

There can be no doubt but that boards of education and other employers of members of the State Teachers Retirement System have the power under the law to restore such members to their original positions upon their return from United States military or naval service brought about by reason of the immediate crisis. Whether they may be restored to the same status so far as existing contracts are concerned is another question which it is not necessary to decide so long as your present inquiry is concerned. With respect to the payment of the regular contributions by such members to the teachers savings fund of the State Teachers Retirement System, both the employers in making such payments and the Teachers Retirement Board in receiving the contributions on behalf of the Retirement System, are bound by the laws of Ohio, and so far as the law with respect thereto remains as it is, the matter can be handled in no other way than as directed, regardless of how desirable it might be to do otherwise. It has sometimes been said that beneficent aims, however laudable and well directed can never serve in lieu of power. See *Morrill v. Jones*, 106 U. S. 466; *Carter v. Carter Coal Company*, 298 U. S., 238.

The Retirement Board may, by authority of Section 7896-25, General Code, adopt rules and regulations whereby a member of the retirement system may be granted a leave of absence extending beyond the two years granted by the statute itself, for the duration of the period of service and training on account of having been inducted into the military or naval forces of the United States in pursuance of the Selective Service and Training Act of 1940 or Public Resolution No. 96 of the 76th Congress approved August 27, 1940. During the time such member would be on a leave of absence even though it covered more than the two year period mentioned in Section 7896-25, General Code, the member would by virtue of the statute retain all rights and privileges of membership in the Retirement System.

However, nowhere in Sections 7896-43, 7896-52, 7896-53 and 7896-53a of the General Code of Ohio, which sections are controlling in the premises, will be found any power extended to employers of members in the Teachers Retirement System to pay or cause to be paid the member's regular contri-

butions to the Teachers Savings Fund for payroll periods when the member receives no compensation, nor is there any authority extended by the law for the Retirement Board to receive such contributions from the member himself or from anyone for him during such time and credit such contributions to the teachers' savings fund except as such authority appears in Section 7896-43, General Code, as quoted above.

As hereinbefore noted, this statute goes no further than to authorize deductions from payrolls to make up for those lost during the same year the losses occurred. If there are no payrolls in which the member participates during the year in which he is prevented from making contributions because of illness or other causes covered by the statute, the authority to make deductions and remit them to the retirement system is the same as though Section 7896-43, General Code, had not been amended by the General Assembly to provide as it does. The extent of this authority is noted in an opinion of the then Attorney General in 1937, which opinion will be found in Opinions of the Attorney General for that year at page 1553. In this opinion it is held as stated in the syllabus:

“A teacher that was granted a leave of absence for two years, and received no compensation earnable as a teacher from an employer having membership in the State Teachers Retirement System during such period of leave of absence, and consequently made no deposit in the retirement system, cannot upon returning to public school teaching in Ohio at the expiration of such leave of absence, pay in to the state teachers' retirement system for the period of time during which such teacher was on a leave of absence the amount of the 4% deduction she would have paid in had she been active, public school teaching service in Ohio during said period of two years.

Nor may the result sought to be accomplished be brought about indirectly by paying the contributions from the compensation of some other person substituting for the teacher, for the reason that no authority exists for so doing.

I am therefore of the opinion that:

1. A member of the State Teachers Retirement System who has been inducted into the military or naval forces of the United States for training or service either by authority of Public Resolution No. 96—76th Congress (S. J. Res. 286) approved August 27, 1940, or the Selective Training and Service Act of 1940, approved September 16, 1940, and thereby is prevented during his term of service and training from making or having made his

contributions to the Teachers Savings Fund of the Teachers Retirement System, may not have those contributions made for him from the compensation of persons employed to substitute for him during his absence and boards of education and other employers of such members have no power under the law to make such deductions from the compensation of substitutes and remit the same to the Teachers Retirement System nor does the Teachers Retirement Board possess the power to receive such remittances and credit them to the account of the member.

2. By authority of Section 7896-43, General Code, as amended by the 93d General Assembly, an employer of a member of the State Teachers Retirement System under contract, who, by reason of illness, accident or other reason which may be approved by the Teachers Retirement Board, is prevented from making his contributions to the Retirement System for any payroll period or periods, may make such deductions for other payroll periods, if any, during the same year that lapses in making the deductions had occurred, and transmit such deductions to the Retirement System. The authority to make and transmit such deductions does not extend beyond the year wherein the member is prevented from making his contributions for the reasons stated.

Respectfully,

THOMAS J. HERBERT,
Attorney General.