873.

PUBLIC EMPLOYES RETIREMENT SYSTEM — EMPLOYE — CITY WATER DEPARTMENT—WORDS AND PHRASES—"OFFICE" AS USED IN PHRASE "HOLDING A * * * MUNICIPAL OFFICE, NOT ELECTIVE, IN THE STATE OF OHIO"—CONSTRUED IN BROAD SENSE—ANY POSITION OR PLACE IN EMPLOYMENT OF MUNICIPALITY—NOT LIMITED TO NON-ELECTIVE MUNICIPAL PUBLIC OFFICE.

SYLLABUS:

*1. The word "office", as used in the phrase "holding a * * * municipal office, not elective, in the state of Ohio" should be construed in the broad sense of meaning any position or place in the employment of the municipality, and not limited in its application to non-elective municipal public offices as that term is understood in the usual legal acceptation of that term.*

2. An employe in the water department of a city is a municipal employe within the meaning of the Public Employes Retirement Law, even though he is merely employed by the municipality as distinguished from holding a non-elective municipal office.

COLUMBUS, OHIO, July 12, 1939.

MR. WILSON E. HOGE, *Secretary, Public Employes' Retirement System, Columbus, Ohio.*

Dear Sir: I have your recent request for my opinion, in which you state in substance that on July 1, 1938, one S. became a member of the Retirement System and has been contributing four per centum of his remuneration of ninety dollars per month, which he received from the city by which he was employed.

You refer to certain communications from the Commissioner of Water of the city in question, from which it appears that in 1938, and for many years prior thereto, S. was an employe in the city water department; that the position occupied by S. and the amount of his compensation or pay were created and fixed in legislation passed by the city council; and that S. was an employe and not an officer.

You ask: Was S. an employe of the city "as defined by the laws covering the Retirement System, therefore eligible to membership in the system as of April 18, 1938?"

The act, creating and providing for the administration of the "*State* Employes Retirement System" (115 v. 615, effective October 19, 1933), was subsequently amended so as to broaden the scope of the system by creating a "*Public* Employes Retirement System" and extending the pro-

visions of the law to county, municipal, park district, conservancy, health and public library employes (117 v. 840, 743).

By the express terms of the amending act, it was provided that, as applied to such employes, the term "new members" of the public employes retirement system should mean "a county, municipal, park district, conservancy, health or public library employe who shall have become a county, municipal, park district, conservancy, health or public library employe and a member of the retirement system *at a date subsequent to June 30, 1938.*" See Section 486-32, General Code, sub-paragraph 23, which was amended by the 93rd General Assembly (Am. S. B. No. 54; effective June 30, 1939); but the changes are not here material.

By the terms of this section, S. was eligible to become a "new member" of the Retirement System if he were a "municipal employe" within the meaning of the act.

Municipal employes are defined by Section 486-35c of the General Code. That part of this section (117 v. 840, 743; effective June 14, 1938) here pertinent reads as follows, the words italicized having been added by the 93rd General Assembly (Am. S. B. No. 54; effective June 30, 1939):

> "For the purposes of this act, 'county or municipal employes' shall mean any person holding a county or municipal office, not elective, in the state of Ohio, and/or paid in full or in part by any county or municipality in any capacity whatsoever. 'Park district employe shall mean any person holding a park district office not elective in the state of Ohio or any person in the employe of a park district and/or paid in full or in part by a park district created by law. 'Conservancy employe' shall mean any person holding a conservancy office not elective in the state of Ohio and/or paid in full or in part by a conservancy district. *For the purposes of this act a sanitary district shall be considered a conservancy district and employes of any such sanitary district shall be considered as conservancy employes, and the retirement board shall have authority to grant to any such employes who were employes of any such sanitary district between the dates of April 18, 1938, and June 30, 1938, both dates inclusive, all rights and privileges of original members, including a period of three months after the effective date of this act during which such employes may be permitted to claim exemption from participation in the retirement system.* 'Health employe' shall mean any person holding a health office not elective, in the state of Ohio and/or paid in full or in part by any county, municipal or other health district created by law. 'Public Library employe' shall mean any person holding a position in a public library, in the state of Ohio, and/or paid in full or in part by the board of trustees of a public library. * * *"

The difficulties encountered in construing this section were adverted to in Opinion No. 848 of this office, rendered to the Prosecuting Attorney of Ashtabula County on July 7, 1939, in which it was said:

> "While the answer to this question is attempted to be given in Section 486-33c, General Code, supra, because of its patent ambiguity, we must endeavor as best we may to ascertain the intention of the Legislature. At least two difficulties are engendered by the wording of this section; first, in the use of that confusing hybrid 'and/or', and, second, in providing that employes within the meaning of the act (1) shall be persons holding office, not elective, in the case of a county, municipality, conservancy district or health district; (2) shall be persons holding office, not elective, or *in the employ* of the district, in the case of a park district (as in the case of a state employe—Section 486-32, G. C.); and (3) shall be persons 'holding a position in a public library' in the case of public libraries. To add to the confusion the recent amendment to Section 486-33c, General Code, provides that for the purpose of the act 'a sanitary district shall be considered a conservancy district and *employes* of any such sanitary district shall be considered as *conservancy employes,* and this, notwithstanding the fact that a "conservancy employe" is defined as "any person *holding a conservancy office* not elective."'" (Italics ours.)

In reaching the conclusion arrived at in Opinion No. 848, it was expressly pointed out that it was unnecessary there to determine whether "the phrase 'any person holding a * * * municipal office, not elective,' is broad enough to include a municipal employe, who is not an officer." This question must now be determined, for from the context of your letter it is apparent that S. did not hold a "municipal *office,* not elective," although employed and paid by the city.

In its strict sense, a public office has been said to exist "where, by virtue of law, a person is clothed not as an incidental or transient authority but for such time as denotes duration and continuance, with independent power to control the property of the public, or with public functions to be exercised in the supposed interest of the people, the service to be compensated by a stated yearly salary and the occupant having a designation or title, * * *." See the discussion by Judge Spear at page 37, et seq., in State ex rel v. Brennan, 49 O. S. 33 (1892). As stated in 32 O. Jur. 860, one "of the distinguishing characteristics of a public office is that the incumbent, in an independent capacity, is clothed with some part of the sovereignty of the state, to be exercised in the interest of the public as required by law." But, in its broader sense, the term "office" has a much more inclusive or universal meaning, and, as stated at page 854 of

the same authority, "each case should be decided upon its particular facts and a consideration of the legislative intent in framing the particular statute, by which the position, whatever it may be, is created."

From the context of your letter and from additional information furnished by you, I am satisfied that S. did not hold a public or municipal office within the strict legal acceptation of that term. However, I am of the opinion that the Legislature did not use the phrase "municipal office" in the retirement act in the narrow sense above suggested, but intended to include all municipal employes, other than elective officers, paid in full or in part by the municipality in any capacity whatsoever; that is the word is used in the wider sense defined in Webster's New International Dictionary, as meaning "any position or place in the employment of the government."

In 46 O. J., 922, it is said:

> "'Office', in the sense of public office, may be defined broadly as a *public station or employment* conferred by the appointment of government, * * *." (Italics ours.),

and it must be in this broad sense that the phrase here under consideration was used in Section 486-33c.

It is, of course, difficult to see why the Legislature used the phrase "holding a state office, not elective * * * *or employed*" by the state, when defining a state employe; the phrase "holding a park district office, not elective * * * or any person *in the employ* of a park district", in defining a park district employe; the phrase "holding a *position* in a public library" when defining a public library employe, and then limited the definition of a county employe, a municipal employe, a conservancy or sanitary district employe, or health district employe, to a person "holding office, not elective." No reason for any such distinction is apparent; and to limit the application of the beneficent provisions of the act in the case of county, municipal, conservancy, sanitary and health employes to those comparitively few who hold non-elective offices in the narrow sense of the term, would serve only to defeat the obvious intention of the Legislature to provide for an efficient public employes' retirement system, to the end that aged or infirm public employes may retire in financial security.

According to the title of the amendatory act filed in the office of the Secretary of State on January 17, 1938 (117 v. 743), the object of the act was:

> "To promote efficiency and economy in the public service by providing for the inclusion of county, municipal, conservancy, health and public library employes not included in any other retirement system * * *."

Thus we have a legislative declaration of the intention and purpose to include *municipal employes* without limitation.

It is fundamental that in the interpretation or construction of statutes, the primary and paramount object is to ascertain, declare and give effect to the intention of the law-making body. As stated in 37 O. Jur., 548, et seq.:

> "It often happens that the true intention of the lawmaking body, though obvious, is not expressed by the language employed in a statute when that language is given its literal meaning. In such cases, the carrying out of the legislative intention, which, as we have seen, is the prime and sole object of all rules of construction, can only be accomplished by departure from the literal interpretation of the language employed. The manifest purpose and intent of the legislature will prevail over the literal import of the words. Hence, the courts are not always confined to the literal or strict meaning of statutory terminology—especially where there is also a more comprehensive sense in which the term is used. The letter of a law is sometimes restrained, sometimes enlarged, and sometimes the construction is contrary to the letter. * * * Every statute, it has been said, should be expounded, not according to the letter, but according to the meaning, for he who considers merely the letter of an instrument goes but skin deep into its meaning. * * *"

Moreover, in the interpretation and construction of statutes, no construction will ever be adopted which leads to an absurdity. See 37 O. Jur. 643, et seq., and cases cited. As above suggested, a construction of Section 486-33c, which limits the provisions of the retirement to persons holding non-elective public offices in the narrow sense of this term, in the case of certain subdivisions or public agencies embraced within its terms, and includes employes or persons holding positions in the case of other public agencies, if not leading to an absurd result, would at least be most unreasonable especially where no reason for such discrimination is manifest.

For these reasons, I conclude that S. was a municipal employe and eligible to participate in the benefits of the retirement system on July 1, 1938, the date upon which you state he became a member.

It is therefore my opinion, and you are accordingly advised, that:

1. The word "office," as used in the phrase "holding a * * * municipal office, not elective ,in the state of Ohio" should be construed in the broad sense of meaning any position or place in the employment of the municipality, and not limited in its application to non-elective municipal public offices as that term is understood in the usual legal acceptation of that term.

2. An employe in the water department of a city is a municipal employe within the meaning of the Public Employes Retirement Law, even though he is merely employed by the municipality as distinguished from holding a non-elective municipal office.

Respectfully,
THOMAS J. HERBERT,
Attorney General.

874.

BONDS—CITY OF CLEVELAND, CUYAHOGA COUNTY, $1,000.

COLUMBUS, OHIO, July 12, 1939.

Retirement Board, School Employes' Retirement System, Columbus, Ohio.

GENTLEMEN:

RE: Bonds of the City of Cleveland, Cuyahoga County, Ohio, $1,000. (Unlimited.)

The above purchase of bonds appears to be part of an $800,000 issue of public hall bonds of the above city dated March 1, 1919. The transcript relative to this issue was approved by this office in an opinion rendered to the State Teachers Retirement Board under date of August 21, 1935 being Opinion No. 4565.

It is accordingly my opinion that these bonds constitute valid and legal obligations of said city.

Respectfully,
THOMAS J. HERBERT,
Attorney General.

875.

EASEMENT—PUBLIC FISHING GROUNDS, TO STATE BY WILLIAM J. CONKLE, ET AL., LAND, FALLS TOWNSHIP, HOCKING COUNTY.

COLUMBUS, OHIO, July 12, 1939.

HON. D. G. WATERS, *Commissioner, Conservation and Natural Resources, Columbus, Ohio.*

DEAR SIR: You have submitted for my examination and approval a certain grant of easement, No. 2784, executed to the State of Ohio by William J. Conkle, J. M. Conkle and O. M. Conkle, conveying to the