

ficiency bonds dated July 1, 1937, bearing interest at the rate of $4\frac{1}{2}\%$ per annum.

From this examination, in the light of the law under authority of which these bonds have been authorized, I am of the opinion that bonds issued under these proceedings constitute a valid and legal obligation of said school district.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

859.

TEACHER ON LEAVE OF ABSENCE—4% REDUCTION FOR
MEMBERSHIP IN STATE TEACHERS RETIREMENT SYS-
TEM—MAY NOT BE PAID.

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.

COLUMBUS OHIO, July 9, 1937.

HON. E. W. KERSHNER, *Secretary, Ohio State Teachers Retirement System, Gay and Third Streets, Columbus, Ohio.*

DEAR SIR: This will acknowledge receipt of your recent communication which reads as follows:

"A city board of education in Ohio granted a teacher a leave of absence for the school years 1923-24 and 1924-25, to go to China as a missionary teacher. While this leave of absence was in effect for two years, the teacher did not receive a salary from the city board of education, and consequently made no deposits in the Retirement System. At the expiration of the

leave, the teacher returned to public school service in Ohio, and is still in service.

In case a teacher is on leave of absence, would it be possible later for the teacher to pay in the amount of the 4% deduction she would have paid in, had she been in active service in Ohio, provided the board of education or the teacher also pays to the Employers Accumulation Fund the amount it would have paid had the teacher been in active service? I shall be very glad to have your opinion on this question."

The sections of the General Code pertinent to the answer of your question provide, in part, as follows:

"Sec. 7896-43. Each teacher who is a member of the retirement system shall contribute four per centum of his earnable compensation not exceeding two thousand dollars per annum, to the teachers' savings fund. Each employer shall 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 earnable compensation provided that the amount of a contributor's earnable compensation in excess of two thousand dollars per annum shall not be considered. In determining the amount earnable by a contributor in a payroll period, the retirement board and the employer may consider the rate of compensation payable to such contributor on the first day of the payroll period as continuing throughout such payroll period and deductions may be omitted from compensation for any period less than a full payroll period, if a teacher was not a contributor on the first day of the payroll period; and to facilitate the making of deductions, the deduction required of any contributor may be modified in any payroll period by an amount not exceeding ten cents. The deductions provided herein shall be made notwithstanding that the minimum compensation provided for by law for any member shall be reduced thereby. * * *"

"Sec. 7896-44. Each employer of a teacher who is a member of the retirement system shall pay to the employers' accumulation fund a certain per centum of the earnable compensation of each such teacher to be known as the 'normal contribution,' and a further per centum of the earnable compensation of each such teacher to be known as the 'deficiency contribution.' The rates per centum of such contributions shall be fixed on the basis

of the liabilities of the retirement system and shall be certified to the employers by the retirement board after each actuarial valuation. * * *

"Sec. 7896-47. Each employer shall pay annually into the employers' accumulation fund, in such monthly or less frequent installments as the retirement board shall require, an amount certified by the retirement board which shall equal the per centum of the total compensation, earnable by all contributors during and preceding school year, which is the sum of the two rates per centum hereinbefore described and required to be computed, to wit, the sum of the normal contribution rate plus the deficiency contribution rate. * * *

"Sec. 7896-52. Each employer shall cause to be deducted on each and every payroll of a contributor for each and every payroll period, subsequent to the first day of September, nineteen hundred and twenty, the contribution payable by such contributor as provided in this act. (O. C. Sections 7896-1 to 7896-63). Each employer shall certify to the treasurer of said employer on each and every payroll a statement as voucher for the amounts so deducted and for the amount of the normal contribution and the deficiency contribution payable by the employer as provided in this act. * * *

It will be observed from a reading of the above sections: that, by the provisions of Section 7896-43 and 7896-52, supra, each employer on each and every payroll period must deduct from the compensation of each teacher who is a member of the retirement system an amount equal to *four per centum of such teacher's earnable compensation* to be paid to the teachers' savings fund; that, by the provisions of Sections 7896-44 and 7896-47, supra, each employer must pay annually into the employers' accumulated fund a certain per centum of *the earnable compensation of each teacher* for the "normal contribution" and a further per centum of *the earnable compensation of each teacher* for the "deficiency contribution"; that the rates of the "normal" and "deficiency" contributions to be paid by the employer are fixed on the basis of the liabilities of the retirement system; and that, *therefore the moneys paid to the State Teachers' Retirement System are based on the earnable compensation of each teacher.*

It is obvious that during this teacher's leave of absence for two years, no contract existed between the teacher and the board of education whereby she was to render services as a teacher and receive therefor from the board of education "earnable compensation." In other words, during those two years there was not in existence any

"earnable compensation" that can be used as a basis on which to compute the amounts that would be paid into the "teachers' savings fund" and the "employers' accumulative fund."

Your inquiry is, "would it be possible for the teacher to pay in the amount of the 4% deduction she would have paid in had she been in active service in Ohio?" The question arises, on what salary or amount is the 4% deduction to be computed? The answer is that, during these two years, the teacher was not in active service, she was not receiving any "earnable compensation," and therefore, there is no amount of "earnable compensation" which can be used as a basis on which to compute and thereby determine the amount to be paid into each of the funds, as provided for in Sections 7896-43, 7896-44, 7896-47 and 7896-52, *supra*. The question as to legality of using the amount of salary that a teacher received for the year previous to "inactive service" was discussed in an opinion of a former Attorney General, in Opinions of the Attorney General for 1921, Vol. I, page 349, where it was said at page 351:

"It would thus appear that the meaning of the expression 'earnable compensation' would be the compensation which a person would be 'able to earn.' But, as used in this act, the ability to earn must be further defined. Thus a teacher who receives \$1,000 as compensation in a certain year might be presumed to be 'able to earn' \$1,000 during the succeeding year, that being in a sense the teacher's 'earnable capacity.' But, the \$1,000 in the second year would not be earnable unless an employing party had placed that value for that time upon the services of the teacher and had entered into a contractual relation that clearly established that the teacher was capable of earning \$1,000 in the succeeding year. The mere statement that a person would be able to earn a given amount because he had, at some time prior, received an equal amount in the same vocation, is not in itself conclusive. He might throw his labor upon the market and it might not be accepted, in which event of course, his earning capacity for that particular period would not have the same value as where it had actually been paid for through a contractual relation in the year before."

In the syllabus of that opinion it was held:

"Where a teacher desiring to retire at the close of the year 1920-1921 was out of active service as a teacher for two

years during the last ten calendar years prior to retirement, and her salary for the school year 1916-1917 was \$1,000, and her salary for the school year 1919-1920 was \$1,200, to compute her compensation 'earnable as a teacher' as \$1,000 during the two years she was out of service as a teacher, would be incorrect, for her compensation earnable as a teacher during such two years would be the amount paid by the employing board of education during such two years. Unless the person was employed as a teacher and received compensation therefor during such period of two years, such person would have no compensation earnable as a teacher during that two years."

That it was the intention of the Legislature not to provide for a situation whereby a teacher that had obtained a leave of absence for two years, could later pay in what she would have paid in had she been in service, can readily be inferred from certain provisions contained in some of the statutes relating to the State Teachers' Retirement System.

Section 7896-25, General Code, provides, among other things, that, membership in the retirement system shall cease if a teacher "withdraws his accumulated deductions" or that "if in any four year period after he last became a member, he shall render less than two years of service as a teacher" unless the board "shall grant a longer period of absence from active service as a teacher without the loss of his status as a member"; and that, the "retirement board may reinstate a teacher who has withdrawn his accumulated deductions if he repay to the retirement board the amount he has withdrawn and interest at 4% from the date of withdrawal to the date of reinstatement on or before June 30, 1936." It therefore can be said that since the Legislature permitted under the provisions of this statute a two year leave of absence, if it so desired it could have made provisions for the teacher after her return to service to repay what she would have paid in had she been in service during those two years the same as it had specifically provided for in case of reinstatement and repayment of withdrawn accumulated deductions plus interest.

Section 7896-28, General Code, provides that "the retirement board shall credit a year of service to any teacher who is employed in a school district for the number of months the regular day schools of such district were or shall be in session in said district within any year," but that, "in computing such service, or in computing final compensation, it shall credit no time during which a member was absent without pay." It is obvious: that if a teacher were permitted

to pay in for the period of time during which such teacher was on a leave of absence, that such amounts paid in by the teacher would increase the teacher's "accumulated contributions" account; and that, therefore, in computing final compensation it would be giving the teacher credit for such payments, contrary to the provisions of the statute.

Section 7896-30, General Code, makes provision for a teacher claiming additional credit for similar service as a teacher in the public day schools, in state universities, state normal schools, and other state institutions of a character similar to the state supported schools of Ohio in which membership in the retirement system is allowed, of another state of the United States or of any territory or possession of the United States provided the teacher pay such amount as determined and fixed by the retirement board together with interest at four per centum, compounded annually.

Section 7896-32, General Code, provides that a teacher who has been out of service for two years or more subsequent to September 1, 1920, may by being in active service in the public schools thereafter for a period of not less than one school year be granted the status of present teacher by the retirement board.

Section 7896-40a, General Code, permits a teacher who has withdrawn his accumulated contributions to be restored to his status as a present teacher by re-depositing the amount withdrawn plus interest.

Thus it is to be observed from the provisions of Sections 7896-25, 7896-28, 7896-32 and 7896-40a, supra, that the legislature made specific provisions: for repayment in the case of reinstatement of a teacher that had withdrawn his or her accumulated deductions; for payment in case of a teacher receiving additional credits; and for payment in case of a teacher being restored to his status of a present teacher. Therefore, it can be said that the Legislature could have specifically provided for payment by the teacher for the period of time during which such teacher was on leave of absence, either on the basis of the salary the teacher received while out of service in other employment, or, made the same provision as is contained in Section 7896-30, supra, to-wit: "The retirement board shall have final authority to determine and fix the amount that any teacher shall pay on account of such service outside of the state;" and that an intentional failure to make such a provision bars a teacher who has obtained a leave of absence for two years from later paying in what she would have paid in had she been in service.

In specific answer to your question it is, therefore, my opinion: that a teacher who has been on leave of absence for two years, and did not receive a salary from an employer having membership in

the State Teachers Retirement System, and consequently, made no deposit in the retirement system, cannot, at the expiration of such a leave and returning to public school service in Ohio, pay in the amount of four per centum deduction that she would have paid in had she been in active service in Ohio.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

860.

APPROVAL—BONDS OF HARRISON RURAL SCHOOL DISTRICT, PERRY COUNTY, OHIO, \$3,853.00.

COLUMBUS, OHIO, July 10, 1937.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

GENTLEMEN :

RE: Bonds of Harrison Rural School Dist., Perry
County, Ohio, \$3,853.00.

I have examined the transcript of proceedings relative to the above bonds purchased by you. These bonds comprise all of an issue of deficiency bonds dated June 25, 1937, bearing interest at the rate of 4% per annum.

From this examination, in the light of the law under authority of which these bonds have been authorized, I am of the opinion that bonds issued under these proceedings constitute a valid and legal obligation of said school district.

Respectfully,

HERBERT S. DUFFY,
Attorney General.