

847.

BONDS—PERRY RURAL SCHOOL DISTRICT, LAKE COUNTY,
\$11,000.00.

COLUMBUS, OHIO, July 7, 1939.

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

GENTLEMEN :

RE: Bonds of Perry Rural School District, Lake County,
Ohio, \$11,000.

The above purchase of bonds appears to be part of a \$45,000 issue of schoolhouse bonds of the above rural school district dated September 1, 1920. The transcript relative to this issue was approved by this office in an opinion rendered to the State Employees Retirement Board under date of September 15, 1937, being Opinion No. 1147.

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

Respectfully,

THOMAS J. HERBERT,
Attorney General.

848.

PUBLIC EMPLOYEES RETIREMENT SYSTEM—"PUBLIC EMPLOYEE" DEFINED—SEE SECTIONS 486-32 AND 486-33c G. C.—WHEN TOWNSHIP TRUSTEES EMPLOY EMPLOYEE TO MAINTAIN CEMETERY—NOT "PUBLIC EMPLOYEE"—EXPENDITURE TOWNSHIP FUNDS TO BE PAID BY MUNICIPALITY—CONTRIBUTION TO SUCH RETIREMENT SYSTEM NOT LAWFUL—MUNICIPALITY OBLIGATED TO CONTRIBUTE TO WORKMEN'S COMPENSATION FUND.

SYLLABUS:

1. *Employees employed by township trustees for the purpose of maintaining cemeteries are not public employees within the public employees retirement law. Nor are employees employed for such purpose by the board of trustees of a union cemetery; employees within the meaning of the act in question being limited to state employees, and the employees of a county, municipality, park district, conservancy district, sanitary dis-*

trict, health district and public libraries, as such employees are defined by such law, including Sections 486-32 and 486-33c, General Code.

2. Township trustees may not lawfully expend township funds for the purpose of contributing to the public employes retirement system funds required to be paid by a municipality.

3. Township trustees may not lawfully enter into an agreement with a municipality whereby such trustees assume liability for making contribution to the public employes retirement system.

4. The question as to whether or not certain cemetery employees are eligible for membership in the public employes retirement system in no wise affects the obligation of a municipality to contribute to the public insurance fund under the workmen's compensation law, including Sections 1465-60, 1465-62, and cognate sections of the General Code.

COLUMBUS, OHIO, July 7, 1939.

HON. WARD C. CROSS, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR: Your letter of recent date requesting my opinion is as follows:

"For a long period of time it has been the custom of the city of Ashtabula to contribute two-thirds of the costs of maintaining cemeteries in Ashtabula Township. This cost includes the salaries paid to a force of approximately twenty people.

Since the passage of the Public Employees Retirement System law, several questions have arisen with reference to the rights of these employees to participate in the fund. We would like your opinion on the following questions:

1. Whether or not an employee who is hired by the township trustees, but whose salary is paid in part by a municipality, is entitled to participate in the benefits of the Retirement System.

2. Whether or not the township trustees who employ a person who does participate in the Retirement System, because of such salary payment by a municipality, may legally contribute to the fund for the benefit of such employees.

3. If such contribution by the township trustees may be made, may they enter into an agreement with the municipality assuming for themselves full liability for such contribution to the Retirement System?

4. Assuming that such cemetery employees are placed under the Retirement System, because of their employment as set forth above, would the municipality's liability to contribute under the Workmen's Compensation Act be any different than it now is

when it is contributing two-thirds of the salaries and the employees do not come under the Retirement System?"

From the nature of your inquiry I assume that the cemeteries referred to in your communication are public cemeteries, although you do not so state. Nor do you state whether these cemeteries are municipal cemeteries, township cemeteries or union cemeteries. However, since it is difficult to see how your question could arise if these cemeteries were owned and controlled by the City of Ashtabula, I am proceeding on the assumption that they are not cemeteries of the municipality and that the employees in question are not in any sense municipal employees. I am also forced to the conclusion that such cemeteries are not township cemeteries, for I know of no provision of law whereby a municipality may use municipal funds for the purpose of making a donation to township trustees to be used by such township trustees to pay a part of the cost of maintaining township cemeteries.

What are known as union cemeteries are provided for in Sections 4183 to 4201, General Code, to which your attention is directed. It is unnecessary here to quote or summarize these sections. Suffice it to say, these sections authorize and provide for the uniting by the councils of two or more municipal corporations or of one or more such corporations and the trustees of a township or townships in the establishment and management of a cemetery.

Concerning the control and management of union cemeteries, it is said as follows in 7 O. Jur. 26:

"A union cemetery may, at the option of the councils of the municipalities and the trustees of the townships which together own and operate them, be controlled and managed directly by the joint action of such councils and boards of trustees, as provided in G. C. Section 4189, or such management and control may be entrusted to a board of cemetery trustees to be elected as provided by G. C. Section 4193-1. In the former case the authority and the duties of the council or councils and board or boards of trustees acting jointly are the same as though the cemetery were the exclusive property of a single corporation; provision is made for joint meetings of such councils and boards at which each member of the councils and each trustee shall have one vote in determining all questions, for the purpose of fixing the rate of taxation for cemetery purposes, and of making joint rules and regulations for the government of the cemetery, or of changing them, and of making such orders as may be found necessary for the application of moneys arising from the sale of lots, taxes, or otherwise.

Any such joint meeting, however, may, by a majority vote

of those present, elect a board of cemetery trustees consisting of three members, of whom one or more must be a member of each of the separate boards of township trustees and municipal councils comprised in the union cemetery association represented by such joint meeting."

It further said in the same authority at page 27 that :

"Such a board of trustees is entirely separate and distinct from each branch of local government represented and is neither a township nor a municipal board. It has all the powers and is obligated to perform all the duties exercised and performed by directors of public service of municipalities under G. C. Sections 4161 to 4168 inclusive and may also create a permanent endowment fund for the purpose of keeping the cemetery clean and in good order. The director of public service of a municipal corporation which is one of the joint owners of such a cemetery has no authority whatever to manage or control it."

But the answer to your question depends on not by whom the employees in question are employed but upon whether or not they are "municipal employees" within the meaning of what is known as the "Public Employes Retirement Act", which has been certified as Sections 486-32 to 486-72, inclusive, of the General Code.

Section 486-32, General Code, which contains definitions, provides in part that :

"Sec. 486-32. That the following words and phrases as used in this act, unless a different meaning is plainly required by the context, shall have the following meanings :

* * *

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* * *

(4) 'State employe' shall mean any person holding a state office, not elective, under the state of Ohio, or employed and/or paid in whole or in part by the state of Ohio in any capacity whatsoever. But the term 'state employe' shall not include those persons who come within the provisions of the state teachers' retirement system, as provided for in the General Code (sections 7896-1 to 7896-63).

In all cases of doubt the retirement board shall determine whether any person is a state employe as defined in this paragraph, and its decision shall be final.

(5) 'Member' shall mean any person included in the membership of the retirement system as provided in this act.

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(7) 'Employer' for the purposes of this act shall mean

the state of Ohio, *county, municipality, park district, conservancy district, health district or public library, as the case may be.*
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(22) 'Original member' of the public employes retirement system as * * * applied to county, municipal, park district, conservancy, health and public library employes 'original member' of the public employes retirement system shall mean a *county, municipal, park district, conservancy, health or public library employe who was at any time a county, municipal, park district, conservancy, health or public library employe prior to the thirtieth day of June, 1938, whether or not such employment has been continuous, and who shall become a member of the retirement system on or before June 30, 1938.*

(23) 'New member' of the public employes' retirement system as * * * applied to county, municipal, park district, conservancy, health or public library employes 'new member' of the public employes retirement system *shall 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.*

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(Italics ours.)

This section was amended by the 93rd General Assembly in Amended Senate Bill No. 54, effective June 29, 1939, such paragraphs (22) and (23), among others, being amended to read as follows:

"(22) 'Original member' of the public employes retirement system shall mean a state, county, municipal, park district, conservancy, health or public library employe who was at any time a state, county, municipal, park district, conservancy, health or public library employe prior to the thirtieth day of June, 1938, whether or not such employment has been continuous, and who became a member of the retirement system on or before June 30, 1938.

(23) 'New member' of the public employes retirement system shall mean a state, county, municipal, park district, conservancy, health or public library employe who shall have become a state, 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."

Section 486-33a, General Code, provides in part as follows:

"The state employes retirement system created by section 486-33, General Code, shall hereafter be known as the public employes retirement system, and the state employes retirement board shall hereafter be known as the public employes retirement board. * * * Beginning July 1, 1938, in addition to the present membership of said retirement system, there shall be included therein all *county, municipal, park district, conservancy, health and public library employes as defined herein, and such county, municipal, park district, conservancy, health and public library employes*, except as otherwise provided herein, shall have all the rights and privileges and be charged with all the duties and liabilities provided for in the laws relating to said retirement system as are applicable to state employes. * * *

Section 486-33b, General Code, relates to prior service and how credit therefor may be secured. Like the other sections quoted and referred to herein it specifically refers to the service of all (1) county, (2) municipal, (3) park district, (4) conservancy, (5) health and (6) public library employes.

Section 486-33c, General Code, provides in part:

"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 employ 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. '*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. * * * *In all cases of doubt the retirement board shall determine whether any person is a county, municipal, park district, conservancy, health or public library employe as defined herein, and its decision shall be final.*

'The head of the department' as applied to county, municipal, park district, conservancy, health or public library employes

shall mean the elective or appointive head, as the case may be, of the several administrative, legislative and judicial departments, institutions, boards and commissions of the county or municipal government, as the same are created and defined by the General Code, or in case of a charter government, by such charter.” (Italics ours.)

This section was also amended in Amended Senate Bill No. 54, one of the two amendments being the addition of the following words after the provision that “‘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, 1939, both dates inclusive, all rights and privileges of original membership, 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.”

This amendment was probably due to the holding of my immediate predecessor in office in Opinion No. 2422, O. A. G., 1938, to the effect that:

“An employe of the Mahoning valley sanitary district can not qualify as a conservancy employe within the meaning of G. C. Section 486-33c because of the distinction between a conservancy district and a sanitary district.”

Section 486-33e, General Code, requires that each (1) county, (2) municipal, (3) park district, (4) conservancy, (5) health or (6) public library employe, who is a member of the retirement system, shall contribute to the retirement funds.

Section 486-33f, General Code, reads:

“*Each county, municipality, park district, conservancy district, health district and public library shall pay to the employers’ accumulation fund the same rates percentum of the compensation of each employe member employed by it for the normal contribution and for the deficiency contribution as the state will be required to pay for its employes in pursuance of the provisions of sections 486-68a to 486-68e, both inclusive. The rates per-*

centum of such contributions shall be certified by the retirement board to the fiscal officer of each county, municipality, park district, conservancy district, health district and public library at the same times that they are certified by said board to the state.” (Italics ours.)

Section 486-33g, General Code, provides:

“The retirement board shall prepare and submit to the commissioners of each county and to the executive head of each municipality, park district, conservancy district, health district and to the board of trustees of each public library, prior to July 15 of each year, an itemized statement of the amounts necessary to pay the obligation of each county, municipality, park district, conservancy district, health district or public library accruing during the year beginning January 1 of the following year, and shall submit to the budget commission of each county a copy of such statement for said county and for each municipality and public library within such county. The amount so certified to each county, public library and municipality shall be included in its budget and allowed by the budget commission.

The commissioners of each county, *the legislative body of each municipality*, the board of commissioners of any park district, the board of directors of any conservancy district, the fiscal officers of any health district and the board of trustees of each public library *shall appropriate sufficient funds to provide for such obligations of such county, public library or municipality.”* (Italics ours.)

Section 486-71, General Code, which read in part:

“The head of such department shall transmit promptly to the secretary of the retirement board at the end of each and every payroll period a copy of the original payroll voucher showing thereon all deductions for the retirement system made from the earnable salary or compensation of each member in his department together with warrants or checks covering the total of such deductions * * *”

was also amended to provide as follows:

“The head of each state department and the fiscal officer of each county, municipality, park district, conservancy district, health district and public library shall transmit promptly to the secretary of the retirement board at the end of each and every

payroll period a copy of the original payroll voucher or such other payroll report as the retirement board may require showing thereon all deductions for the retirement system made from the earnable salary or compensation of each member employed in the department, county, municipality, park district, conservancy district, health district and public library, together with warrants or checks covering the total of such deductions. * * *

As above stated the determination of the questions asked by you depends upon whether or not the cemetery employes in question are "municipal employes" within the retirement act.

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 employers 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 purposes 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."

If the "or" in the "and/or" in the sentence under consideration were to be given the effect that might be claimed for it, this sentence would read as follows:

"For the purposes of this act, 'county or municipal employes' shall mean any person paid in full or in part by any county or municipality in any capacity whatsoever."

I cannot believe this to have been the intention of the Legislature. In the first place, the act under consideration embraced only state employes. It was first amended in this respect in 1938, so as also to include employes of counties, municipalities, park districts, conservancy districts, health districts and public libraries. After the opinion of my immediate predecessor in 1938 the Legislature again amended the law so as to include sanitary districts, and it is difficult to see why the Legislature would expressly and specifically limit the provisions of the act first to six and then seven particular public agencies, and then provide that any person

“paid in full or in part” by any of these agencies, no matter by whom employed, should be an employe of such agency. It will be noted that throughout the act, and particularly in the sections above quoted, the six subdivisions or public agencies first mentioned in sub-paragraphs (22) and (23) are meticulously referred to. Certain sections of the act clearly show that the Legislature contemplated that the employe should be under the employer, that is, subject to the direction and control of the one of the particular agencies enumerated. For example, Section 486-33f, *supra*, provides that each municipality or other agency “shall pay to the employers accumulation fund the same rates percentum of the compensation of each employe member “employed by it” and that the “rates percentum of such contributions shall be certified by the retirement board to the fiscal officer of each” municipality, or other agency. Section 486-33g, *supra*, prescribes that the “commissioners of each county, the legislative body of each municipality,” etc., shall appropriate sufficient funds to provide “for such obligations of such county, * * * or municipality.” Section 486-71, *supra*, as amended, requires the fiscal officer of each county, municipality, etc., to “transmit promptly to the secretary of the retirement board at the end of each and every payroll period a copy of the original payroll voucher or such other payroll report as the retirement board may require showing” all deductions for the retirement system from the earnable salary or compensation of each member employed in the department, county, municipality, etc.

Since union cemeteries are controlled and managed by the joint board provided for in Section 4192, General Code, or a board selected by them as provided in Section 4193-1, General Code, the acts and things referred to in the sections just mentioned would be performed and done by the proper officers of the union cemetery and not by the officers of the municipality.

Moreover, if Section 486-33c, *supra*, is to be read as above set forth the Legislature has used exactly fourteen meaningless words, viz.:

“* * * holding a county or municipal office, not elective in the state of Ohio, and * * *”

As stated in 37 O. Jur., 616, “a construction is not favored which would render a part of a statute superfluous, or a work of supererogation.”

Endlich in his Interpretation of Statutes says at page 29:

“A construction which would leave without effect any part of the language, would be rejected, unless justified on similar grounds. And the fact that a given construction would make a word redundant is some reason for its rejection; for, it being presumed, wherever such a presumption can be sustained, that the Legislature meant precisely what it said, no word in it is

to be treated as unmeaning, if a construction can be legitimately found which will preserve it and make it effectual. And the same rule forbids the rejection, as meaningless or superfluous of any sentence or clause of a statute. * * *

This principle of construction has been repeatedly applied by the courts of Ohio, as is shown by the long list of cases cited in the footnote at page 616 of 37 O. Jur.

For the reason then that effect should and must be given to the words "holding a * * * municipal office, not elective," in the state of Ohio, and especially since, as above shown, the language of this clause is consistent with the context of the entire act, it is my opinion that to be a municipal employe within the meaning of the retirement act, a person must be holding a municipal office, not elective, and paid in full or in part by such municipality. And having reached this conclusion it is unnecessary here to determine whether, in view of the peculiar wording of Section 486-33c, above pointed out, the phrase "any person holding a * * * municipal office, not elective, is broad enough to include a municipal employee, who is not an officer.

I am aware that the conclusion herein reached is in apparent conflict with the holding of my immediate predecessor in Opinion No. 1328, O. A. G., 1937, Vol. III, p. 2269, the second branch of the syllabus reading:

"District health commissioners, public health nurses and clerks of general or city health districts which receive state funds pursuant to appropriation by the General Assembly in accordance with and under the circumstances provided by Section 1261-39, General Code, are 'state employes' within the meaning of the term as used in the State Employes' Retirement Act during such years as such districts receive state aid."

With reference to this opinion, it is sufficient to say that in reaching the conclusion therein arrived at, consideration was not given to the reasoning above set forth, and the express inclusion of health districts by the Legislature in the later amendments of the retirement act, which became effective on June 14, 1938, and June 30, 1939, would indicate that such districts were not originally included.

1. This brings me to a consideration of your questions, which will be answered in the order asked.

From what has been said the employes referred to by you as being "hired by the township trustees" are not municipal employes, because they do not hold a municipal office, not elected. If they are employed by the trustees of a union cemetery, they are employes of such trustees, and

their status is not affected by the fact that a part of the funds are derived by a levy on the property within the municipality.

2. From the resume of the sections above quoted, it will be seen that township employes are not included among the employes enumerated in the public employes retirement act, and township trustees are not authorized to use township funds for the purpose of making contributions to a municipality for the benefit of municipal employes.

3. This being true, obviously no agreement of the kind mentioned in your third inquiry can be entered into by the township trustees.

4. In so far as your fourth question is concerned, it is not apparent what effect the fact that the cemetery employees referred to by you are, or are not, eligible to become members of the public employes retirement system has upon the municipalities' duties under the "workmen's compensation law." A municipality's obligation to contribute to the public insurance fund is determined by Sections 1465-60, 1465-62 and related sections, to which your attention is invited.

Specifically answering your questions, in so far as the nature of the inquiry will permit of a specific answer, it is my opinion that, for the reasons stated:

1. Employees employed by township trustees for the purpose of maintaining cemeteries are not public employees within the public employes retirement law. Nor are employees employed for such purpose by the board of trustees of a union cemetery; employees within the meaning of the act in question being limited to state employees, and the employees of a county, municipality, park district, conservancy district, sanitary district, health district and public libraries, as such employees are defined by such law, including Sections 486-32 and 486-33c, General Code.

2. Township trustees may not lawfully expend township funds for the purpose of contributing to the public employes retirement funds required to be paid by a municipality.

3. Township trustees may not lawfully enter into an agreement with a municipality whereby such trustees assume liability for making contribution to the public employes retirement system.

4. The question as to whether or not certain cemetery employees are eligible for membership in the public employes retirement system in no wise affects the obligation of a municipality to contribute to the public insurance fund under the workmen's compensation law, including Sections 1465-60, 1465-62, and cognate sections of the General Code.

Respectfully,

THOMAS J. HERBERT,
Attorney General.