

ing to include such payment. In Webster's New International Dictionary, among other definitions of the word "maintain," I find the following: "To bear the expense of ; to support ; to keep." In order for the township trustees to keep and maintain the forest, it is necessary that they retain title and possession of the lands in question and this can not be done unless the special assessments are paid. It therefore seems clear that payment of these special assessments falls within the meaning of the word "maintain" as used in the above quoted statute.

I therefore advise you, in specific answer to your question, that where the township trustees accept a donation of land suitable for forestry purposes, against which sewer and water line assessments have been levied, such township trustees are authorized to use the tax moneys levied and collected pursuant to the authority of Section 5650-1, General Code, to maintain such forests, to pay said special assessments.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

935.

PUBLIC EMPLOYES RETIREMENT SYSTEM—WHERE MEMBERS ENTITLED TO PARTICIPATE IN FIREMEN'S PENSION RELIEF AND PENSION FUND—EXEMPTED—NOT ELIGIBLE FOR MEMBERSHIP IN SUCH RETIREMENT SYSTEM—WHEN MEMBER OF RETIREMENT SYSTEM ELIGIBLE TO PARTICIPATE IN SAID PENSION FUND—DUTY RETIREMENT BOARD TO REFUND ACCUMULATED CONTRIBUTIONS—SECTIONS 4600, 486-33c, G. C.

SYLLABUS:

1. *Members of the public employes retirement system who become entitled to participate in a firemen's relief and pension fund established pursuant to the mandatory provisions of Section 4600 and related sections of the General Code are, by the terms of Section 486-33c, excepted from the provisions of the public employes retirement act and are not eligible for membership in the public employes retirement system.*

2. *When a member of the public employes retirement system becomes eligible to participate in the benefits of a firemen's relief and pension fund established pursuant to the mandatory provisions of Section 4600 and related sections of the General Code, it is the duty of the retirement board to refund the accumulated contributions of such member, which should be refunded when he comes within the provisions of the municipal firemen's relief and pension system.*

COLUMBUS, OHIO, July 25, 1939.

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

DEAR SIR: Your letter of June 30, 1939, requesting my opinion in the following language, duly received:

“The Retirement Board will appreciate your opinion upon the following question:

According to the provisions of the Retirement Act, employes of the various Police and Fire Departments in municipalities which had not created a Firemen’s Pension Fund or a Police Relief Fund were required to become members of this system. The General Assembly, just adjourned, enacted Amended Substitute Senate Bill No. 52 making it mandatory on all municipalities who had two or more firemen and policemen to establish a Firemen’s Relief and Pension Fund. While the provisions of Amended Substitute Senate Bill No. 52 do not cover policemen, I am informed that a separate act providing the same requirements was passed covering them. The Public Employes Retirement Act provides that members of Police or Firemen’s Pension Funds shall not be members of this system.

Therefore, the question is: First, will police and firemen who are members of this organization be compelled to drop their membership here and become members of a pension system to be established under the new law; and, second, should the Retirement Board refund the accumulated contributions to such police and firemen, and if the refunds are to be made, should they be made upon the effective date of the new legislation or should they be made after a municipality has actually established a Police and Firemen’s Pension Fund and deductions begun for such purpose?”

Examination of the acts passed at the recent session of the 93rd General Assembly discloses that no act was passed amending either Sections 4616 to 4631, General Code, inclusive, relating to “Police Relief Funds”, or to Sections 4632 to 4647, General Code, inclusive, making provision for “Sanitary Police Pension Funds”, so as to make mandatory the establishment of police relief or sanitary police pension funds, by all municipalities in this State. This part of your inquiry, therefore, requires no further consideration.

Those parts of Amended Substitute Senate Bill No. 52, effective August 10, 1939, which are necessary to a consideration of your ques-

tions are contained in Sections 4600 and 4612-6, General Code, which respectively provide in part as follows:

“Section 4600. In all municipal corporations having fire departments supported in whole or in part at public expense, and employing two or more full time regular members, there shall be established and maintained a firemen’s relief and pension fund.
* * *”

“Section 4612-6. This act shall apply to all municipalities which operate fire departments employing less than two full time regular members, when the council of any such municipality declares the necessity of providing for relief and pensions for members of its fire department. Upon the declaration of such necessity by the council all the provisions of this act shall apply to the municipality for which the council acts.

This act shall be construed as preserving to volunteer, or part time firemen all rights to receive the pension provided for under existing laws relating to the firemen’s pension fund.”

The provisions of the Retirement Act referred to in your letter are contained in Section 486-33c, General Code, defining public employes other than state employes, as amended by the 93rd General Assembly (Am. S. B. 54; Eff. 6/30/39). The pertinent part of this section reads, that part in italics being the amendment referred to:

“* * * But said term shall not include those persons who come within the provisions of any other retirement system established under the provisions of the laws of this state or of any charter, nor shall the provisions of this act in any manner apply to a police relief fund or a firemen’s pension fund established under provisions of law. *No employe except an employe who comes within the provisions of a police relief fund or a firemen’s pension fund shall be excluded from membership in the retirement system because of membership in any other retirement system established under the provisions of the laws of this state or of any charter unless such employe is contributing to such other retirement system on the basis of two thousand dollars per annum or is receiving a disability allowance from such other retirement system.* * * *” (Italics ours.)

It will be seen that the above section, after providing that said term, that is the term “municipal employe” (or one of the other public employes enumerated), shall not include those persons who come within the provisions of any other retirement system established under state laws or any charter and that the retirement act shall not “in any manner apply to a

police relief fund or a firemen's pension fund established under provisions of law," the section provides that no employe *except an employe who comes within the provisions of a police relief fund or a firemen's pension fund*, shall be excluded from membership in any other retirement system established under state laws or under any charter unless such employe is contributing to such other retirement system on the basis of two thousand dollars per annum or is receiving a disability allowance from the other system. Reading the section conversely (1) an employe who comes within the provisions of a police relief fund or a firemen's pension fund, or (2) an employe contributing to another retirement system established under state laws or any charter on the basis of two thousand dollars per annum or (3) who is receiving a disability allowance from such other retirement system, shall be excluded. It is, of course, easy to understand the reason for this provision with reference to police relief funds and firemen's pension funds when it is remembered that such funds have been firmly established in many of our municipalities for many years. Apparently it was the intention of the Legislature to except from the definition of municipal employe, employes coming within the provisions of police relief or firemen's pension funds, just as it is provided by Section 486-32, General Code, sub-paragraph (4) that "the term 'state employe' shall not include those persons who come within the provisions of the state teachers' retirement system", also long and well established.

In this connection, your attention is directed to Opinion No. 2683, rendered by my immediate predecessor in office to the Prosecuting Attorney of Franklin County, Ohio, rendered under date of July 11, 1938, in which it was said:

" * * * It is clear from the language therein that it was the intention of the legislature in the enactment of the exception (in section 486-33c as it then read) to preserve the firemen's and policemen's relief funds and the pensionable status of beneficiaries of such funds, existing under the provisions of law prior to the enactment of section 486-33c; * * * "

Amended Substitute Senate Bill No. 52 amending Sections 4600 and 4612-6, *supra*, so as to contain mandatory provisions, and Amended Senate Bill No. 54 amending Section 486-33c in the particular above set forth, were passed at the same session of the General Assembly. The three sections relate to same subject matter, are in *pari materia* and must be construed together so as to give effect to all. So construing them, I have no difficulty in holding that when a municipal employe, who is a member of the Retirement System, comes within the provisions of a firemen's relief and pension fund established pursuant to provisions of Section 4600 or Section 4612-6, General Code, he must be excluded from membership in the public employes retirement system.

In your second question you ask whether or not the retirement board should refund the accumulated contributions of such firemen as become members of the firemen's relief and pension funds established pursuant to Sections 4600, et seq., General Code, and if refunds are to be made, whether they shall be made as of the effective date of Amended Substitute Senate Bill No. 52, namely, August 10, 1939, or after a municipality has actually established such a relief and pension fund and deductions begun for such purpose.

An examination of the acts relating to the retirement system (Sections 486-32 to 486-71, inclusive) discloses that no express provision has been made to cover this kind of case.

Your attention is, however, directed to Section 486-65a, which reads as follows:

“Membership shall cease upon refund of accumulated contributions or upon retirement except as provided in section 486-64 of the General Code, relative to disability retirement. A member who separates from his service as a public employe for any reason other than death or retirement may leave his accumulated contributions, if any, on deposit with the retirement board, and, for the purposes of the retirement system, be considered on a leave of absence for a period of five years, at the end of which period, if such member has not returned to active service as a public employe, the retirement board may, upon application, grant such additional leave as the retirement board may deem proper, providing that such additional leave shall not exceed a period of five years. A member who ceases to be a state, county, municipal, park district, conservancy, health or public library employe and who does not withdraw the accumulated contributions standing to his credit in the employes savings fund and who subsequently becomes eligible and accepts membership in any other retirement system established under the provisions of the laws of this state or of any charter shall be considered for retirement purposes as being on an indefinite leave of absence as long as such member retains membership in such other retirement system. Members on such leaves of absence shall retain all rights and privileges of membership in the retirement system. Members who separated from the state service subsequent to October 20, 1933, and prior to January 1, 1935, shall be considered upon such leave.”

You will observe that by the provisions of the above section a member who separates from the service as a public employe for any reason other than death or retirement is given the privilege of leaving his accumulated contributions on deposit with the retirement board and being considered

on a leave of absence for a period of five years, renewable as in the section provided, the section further providing that a member who ceases to be a municipal employe and who does not withdraw his accumulated contributions and who subsequently accepts membership in any other retirement system under the laws of this state or of any charter shall be considered for retirement purposes as being on an indefinite leave of absence as long as such member retains membership in the other retirement system.

This section, however, can have no application to firemen who become members of a firemen's relief and pension system pursuant to the provisions of Section 4600, et seq., General Code, because, as above pointed out, members of a municipal firemen's relief and pension system are ineligible to be or to remain members of the public employes retirement system. In other words, the provisions of Section 486-65a and the privileges granted thereby do not apply to any person coming within the provisions of a firemen's pension fund who are specifically excluded from membership in the retirement system by Section 486-33c, *supra*.

This being true, the retirement board should refund the accumulated contributions to the firemen becoming members of a municipal relief and pension system.

Obviously, these refunds should be made not as of the effective date of Amended Substitute Senate Bill No. 52, but only when such members actually become members of a municipal firemen's relief and pension fund in view of the wording of that part of Section 486-33c excepting from the public employes retirement system employes who come "within the provisions of a police relief fund or a firemen's pension fund." Until such a fund is established it is manifest that one cannot come within its provisions.

Specifically answering your questions, it is my opinion that, for the reasons stated :

1. Members of the public employes retirement system who become entitled to participate in a firemen's relief and pension fund established pursuant to the mandatory provisions of Section 4600 and related sections of the General Code are, by the terms of Section 486-33c, excepted from the provisions of the public employes retirement act and are not eligible for membership in the public employes retirement system.

2. When a member of the public employes retirement system becomes eligible to participate in the benefits of a firemen's relief and pension fund established pursuant to the mandatory provisions of Section 4600 and related sections of the General Code, it is the duty of the retirement board to refund the accumulated contributions of such member, which should be refunded when he comes within the provisions of the municipal firemen's relief and pension system.

Respectfully,

THOMAS J. HERBERT,

Attorney General.