

received the benefit of the work and is under a moral obligation to pay for it. (See the case of State ex rel. Hunt vs. Fronizer, 77 O. S., 7).

As to the source of funds with which to make payment, your letters indicate that the county has on hand as the accruals of a levy under section 6926 G. C. more than enough to pay both of the items mentioned. No reason appears why payment should not be made by the county, in the first instance, out of the accruals of said levy under section 6926. Of course, distribution as between county, township and property owners will finally be made in accordance with the proportions mentioned in your letters. As a condition precedent, however, to the payment of the two items in question, the county auditor should first make his certificate to the commissioners of the fact that the funds are on hand, which certificate should be filed with the commissioners and recorded as provided in section 5660; and thereupon the commissioners should pass a resolution appropriating the specific sum which is to be applied in payment of the two items in question.

By freight refunder, you doubtless mean reimbursement of contractor for "excess freight charges" as provided for by Act 108 O. L. (Pt. I) p. 548. By the terms of section 5 of that act, counties, townships and municipalities are authorized under certain conditions to reimburse contractors for additional freight charges paid out as the result of freight rate increases ordered by the United States government. Among other things, said section provides:

"Payments shall be made from any fund available for the construction, improvement, maintenance or repair of roads, highways, streets or bridges created by general taxation and against which no contractual obligations exist."

This language taken in connection with the general tenor of said section 5, indicates plainly that the reimbursement, if made, is to be at the expense of the subdivision as a whole, and is not to be treated as an expense item of a particular improvement. No authority is found in the act in question for the issuing of bonds for the purpose of providing funds; and indeed the quotation just above made negatives the idea of any such authority.

Respectfully,

JOHN G. PRICE,
Attorney-General.

1145.

STATE TEACHERS' RETIREMENT SYSTEM—TEACHERS ELIGIBLE.

1. *A teacher who had not taught for one or more years prior to September 1, 1920, would not be eligible to membership in the state teachers' retirement system and have the status of "present teacher," even though teaching during the school year of 1920-21, unless such teacher was teaching at the beginning of the school term starting in the school year beginning on September 1, 1920.*

2. *The state teachers' retirement system is for the benefit of teachers regularly employed as such and under the provisions of section 7896-50 G. C. each employer shall certify to the state retirement board the names of all teachers to whom the act applies and at such times as the state retirement board may require.*

3. *Where a substitute teacher is regularly employed and carried on the payroll as one of the teaching force, such substitute teacher is entitled to the provisions of the teachers' retirement system law.*

4. *Under authority of section 7896-3 G. C. the retirement board can and should*

make all necessary rules and regulations for the proper administration of the state teachers' retirement system law.

5. Under the provisions of section 7896, where teachers are in a class (a) whose compensation is only partly paid by the state, or (b) who are not serving on a per annum basis, or (c) who are on a temporary basis, or (d) who are not required to have a teachers' certificate, it is for the state retirement board to say which classes shall be denied membership; but such retirement board may, in its discretion, make optional with teachers in any such classes their individual entrance into membership.

COLUMBUS, OHIO, April 9, 1920.

HON. W. E. KERSHNER, *Secretary Ohio State Teachers' Retirement System, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your letter in which you request an opinion upon the following statement of facts:

"Section 7896-1 G. C. defines a teacher as 'any teacher or other person regularly employed in the public schools of the state of Ohio, who is required by law to have a teachers' certificate.'

There are many former teachers in Ohio who have not taught for one or more years past and who probably would not again teach, were it not for the establishment of the retirement system. These teachers have rendered many years of good service and from reports that are coming to me, many of them will again seek appointment as teachers and then retire as soon as possible.

Will a teacher who had not taught for one or more years prior to September 1, 1920, be eligible to membership and to the status of present teacher if teaching in 1920-21?

If such teachers would be eligible may they be appointed simply as substitute teachers or must they be regularly appointed teachers for full time?"

The act (House Bill 359), to provide a state-wide retirement system for teachers in schools supported wholly or in part by public funds, was passed by the present general assembly April 16, 1919, and was filed in the office of the secretary of state May 9, 1919, becoming effective during August, 1919. Such act is new legislation treating upon a subject which has not been covered by any prior statutes enacted in this state. Therefore, there are no court decisions or any former opinions of the attorneys-general that may be used as a guide in construing what was the intent in the act which provided for a state-wide retirement system for teachers. The seeming intent of the law is to care for those teachers who have spent a life time in school work and deserve consideration at the hands of the state, as well as holding out to those who enter the teaching profession and those who have been in it a limited time, legislative provision that they shall be assisted financially in their declining years and when they give up active service as teachers. It must be remembered that if the retirement law was loosely conducted as regards the making up of its retirement list of teachers, liabilities would be created which would load heavily upon the law in its very beginning, since the rates prescribed in the law were made on the basis of the present teaching force of the state. In whatever year a state-wide pension system might be started, it would necessarily work out that there would be those who had taught for many years who would feel that they were entitled to a teacher's pension and yet they might lack the particular status of teacher that is necessary in the starting off of any law of this kind.

This statement would be true had the system been started ten years ago or ten years hence, for there would be necessarily a number of ex-teachers who would have to be disappointed because of not being able to comply at the time of the initiation of the system with the legal requirements which are absolutely necessary for the future financial success of the system.

The purpose of the new law is stated in the following language:

"Sec. 7896-2: A state teachers' retirement system in hereby established for the teachers of the public schools of the state of Ohio. * * *

This does not say for the ex-teachers or the former teachers, but for the teachers of the public schools of the state of Ohio. As to who shall constitute the membership of the retirement system, attention is invited to section 7896-22, which reads in part as follows:

"The membership of the retirement system shall consist of the following: (a) all teachers in service on the first day of September, nineteen hundred and twenty, except teachers who have filed with their employer a statement in writing requesting exemption from membership or teachers who are excluded from the provisions of this act. (b) All teachers who became teachers or who were re-appointed as teachers after the first day of September, nineteen hundred and twenty, except teachers who are excluded by the provisions of this act. (c) (Refers to teachers, in schools, colleges and institutions) * * * Service in such schools, colleges or other institutions shall be then considered in every way the same as service in the public schools so far as the purposes of this act are concerned, and (d) all other teachers who become contributors under the provisions of this act."

As to what is meant by the word "teacher" as used in the act in question, is defined in section 7896-1, which reads:

"Teacher" shall mean any teacher or other person regularly employed in the public schools of the state of Ohio, who is required by law to have a teachers' certificate; * * *

The same section of the law defines a "present-teacher" as follows:

"Present-teacher" shall mean any person who was a teacher, as defined by this act, before the first day of September, nineteen hundred and twenty; whose membership in the retirement system has been continuous; and

(a) who became a member on said date, or on the date of his first service as a teacher after said date and within one year after his last day of service previous to said first day of September, nineteen hundred and twenty; or

(b) who was a teacher of a school or college or other institution on said date * * * ; or,

(c) who was a member of a local district pension system on said date, or on the date of his first eligibility to such membership after said date and within one year after his last day of membership therein previous to said first day of September, nineteen hundred and twenty, and who continued thereafter to be a member until he, with the membership of such local district pension system, became a member of the retirement system."

As regards the teachers in the public schools, (the status of those teachers in institutions not being treated in this opinion) in condensing the language of the law as to a "present teacher" in the public schools, such present teacher then would be one of the following:

1. Who was a teacher (that is, a person regularly employed in the public schools of the state of Ohio, who is required by law to have a teacher's certificate) before the first day of September, 1920.
2. Who became a member of the state teacher's retirement system on that date (September 1, 1920).
3. Who became a member on the day of his first service as teacher after said date (September 1, 1920) and within one year after his last day of service previous to said first day of September, 1920.
4. Teachers in public schools who belonged to a local district pension system, which local system became merged in the state retirement system.

Your first question is,

"Will a teacher who had not taught for one or more years prior to September 1, 1920, be eligible to membership and to the status of present teacher if teaching in 1920-21?"

You mean by this the case of a person who was not teaching, for instance, during the school year of 1919-1920, and therefore was not teaching "prior to September 1, 1920," and you desire to know if such person were teaching during the coming school year of 1920-21, would such person be eligible to membership in the state teachers' retirement system?

The answer to this question would appear to be in paragraph (a) of section 7896-1 heretofore quoted, wherein it is provided that such a person would have the status of a "present teacher" if (1) He became a member of the state retirement system on September 1, 1920, or, (2) after September 1, 1920, on the date of his first service as a teacher, provided that such first service was within one year after his last date of service prior to September 1, 1920. If the teacher did not teach during any part of 1919-1920, then clearly there could be no date after September 1, 1920, on which the teacher could start teaching again which would be within one year of the last day of service.

This leaves the avenue only of becoming a member on September 1, 1920, to those persons who had no prior service which took place during the school year 1920-1921.

Your second question reads:

"If such teachers would be eligible, may they be appointed simply as substitute teachers or must they be regularly appointed teachers for full time?"

Section 7896-1 says that teacher shall mean "any teacher or other person regularly employed in the public schools of the state of Ohio who is required by law to have a teachers' certificate." It is pointed out that there are a number of boards of education in Ohio which appoint substitute teachers and they are regularly employed and of course it is the contemplation of the law that they must have a teachers' certificate in order to draw pay. In the larger cities the board of education will appoint a list of regular substitutes at a regular monthly wage, such substitutes to be available for work in the place of teachers regularly assigned to some

particular school. Substitutes of this class come within the words "other person regularly employed" at least, because they might put in as many days as a substitute teacher in the district as a regular teacher who taught in one room during the whole term, for such substitute teacher might be one day here and another day at another school and at the end of the term would have to her credit a number of days of actual labor performed as a teacher equal to that of a teacher regularly assigned in some particular school room. Persons employed in this manner as teachers, although assigned to substitute work, that is, taking the place of others in emergencies, might appear upon a list of appointees known as substitute teachers and yet they are teaching in the schools of the state, they are regularly employed and they are certificated as required by law. It would seem, therefore, that due regard should be had for the rights of substitute teachers who are in the full sense of the word regular employes of the board of education, that is, persons who consider teaching to be their profession, and who do not spend the major part of their time in some other work. The following things are necessary in order to constitute the elements involved in a true definition of teachership:

1. Qualification—holding a legal certificate.
2. Employment—due appointment by legal authorities.
3. Service—performance of the duties supposed to belong to the employed teacher.
4. Compensation—pay at the legal rate made by the due action of a board of education.

We can eliminate qualification from consideration, because the substitute must have a certificate; the element of employment can be eliminated because if there is any substitution at all, there must be employment. This leaves then the elements of service and compensation and what constitutes each according to the intent of the teachers' retirement system act.

Nothing is found in the law which settles the rights of substitute teachers except in those paragraphs of the law which treat upon its administration by the state retirement board.

Section 7896-3 reads in part as follows:

" * * * The retirement board * * * shall have authority to make all necessary rules and regulations not inconsistent with the provisions of this act, to carry into effect the provisions thereof."

But the widest authority of the retirement board is found in section 7896-24, which, it will be noted, follows all the previous law heretofore cited, and contains the following language:

"The retirement board, *notwithstanding the foregoing provisions*, may deny the right to become members to any class of teachers, whose compensation is only partly paid by the state, or who are not serving on a per annum basis, or who are on a temporary basis, or who are not required to have a teacher's certificate, and it may also, in its discretion, make optional with teachers in any such class their individual entrance into membership."

Section 7896-27 reads in part:

"If official records are not available as to the length of service, salary or other information required for the administration of this act, the board is hereby empowered to use its discretion as to the evidence to be accepted."

It is perfectly apparent that any teacher would desire to have the status of what the law calls a "present teacher," because if such status is not acquired under the law and the rules of the retirement board, then such teacher is a "new entrant," for paragraph (c) of section 7896-1, defining the meaning of certain terms occurring in the act, says:

"'New-entrant' shall mean any teacher who is a member *except a present-teacher.*"

It is important to any teacher which of these two classes he shall be placed in, because of the computation of prior service credit. As another clear indication that the retirement board shall have some leeway in establishing certain administrative details in the teachers' retirement system, attention is invited to section 7896-28, which reads as follows:

"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 beginning on or about the first day of September and ending on or about the thirty-first day of August following, and shall fix and determine by appropriate rules and regulations how much credit shall be given for parts thereof, but in computing such service, or in computing final compensation, it shall credit no time during which a member was absent without pay, and it shall credit not more than one year for all service rendered in any school year."

It is noted in the above section that provision is made for giving credit for portions of time less than a school term, as these words would indicate, to-wit:

"how much credit shall be given for parts thereof,"

and under this section the retirement board could give credit for a mere fraction of a school term and the giving of such credit by the state retirement board would thereby be creating for the person to whom the credit was given the status of an active teacher. This section is also important because it deviates in its language from any hard and fast rule as to the first day of September, because it speaks in terms of "on or about the first day of September," meaning, of course, the actual beginning of a school term in the school year, which begins on September 1st.

In the inaugurating of a new state-wide teachers' retirement system, the prime purpose of the legislature was that the system should be a success, and such success in a very large degree depends upon the administration of the law, and it must necessarily follow that in the details not covered by the law, the retirement board should have and is expected to have rules which will cover points not made clear in the law.

Section 7896-49 reads as follows:

"Each employer, before employing any teacher to whom this act may apply, shall notify such person of his duties and obligations under this act as a condition of his employment.

"Any such appointment or reappointment of any teacher in the public day schools of the state on or after the first day of September, nineteen hundred and twenty, or service upon indefinite tenure after that date shall be conditioned upon the teacher's acceptance of the provisions of this act, as a part of the contract."

In this section appears the words "or service upon indefinite tenure after that date," that is, after the first day of September, 1920, and thus the law takes cognizance of the fact that there could be during the school year 1920-1921 a service that could be upon indefinite tenure during that school term and after September 1, 1920, which service of indefinite tenure might be that performed by a substitute teacher.

It is important to note the language of section 7896-50, which reads :

"During September of each year, or at such other time as the retirement board shall approve, each employer shall certify to the retirement board the names of all teachers to whom this act applies."

Under this section the names of all teachers to whom the teachers' retirement act applies must be certified by an employer, that is, a board of education or trustees of some institution which later avails itself of the provisions of the state teachers' retirement system. It would appear, therefore, that no teacher would have any primary status as a member of the teachers' retirement system until such teacher, under the provisions of section 7896-50, had been certified by an employing board of education as one to whom the act would apply.

The teachers' retirement law, as indicated in section 7896-1, *supra*, is for the benefit of teachers who are "regularly employed" and if they are regularly employed, it must follow that they must have an employer whose duty it is to certify, under section 7896-50, his or her name as an employe engaged in teaching under that particular employer or board of education.

It is therefore the opinion of the attorney-general:

1. A teacher who had not taught for one or more years prior to September 1, 1920, would not be eligible to membership in the state teachers' retirement system and have the status of "present teacher," even though teaching during the school year of 1920-1921, unless such teacher was teaching at the beginning of the school term starting in the school year beginning on September 1, 1920.

2. The state teachers' retirement system is for the benefit of teachers regularly employed as such and under the provisions of section 7896-50 G. C. each employer shall certify to the state retirement board the names of all teachers to whom the act applies and at such times as the state retirement board may require.

3. Where a substitute teacher is regularly employed and carried on the payroll as one of the teaching force, such substitute teacher is entitled to the provisions of the teachers' retirement system law.

4. Under authority of section 7896-3 G. C., the retirement board can and should make all necessary rules and regulations for the proper administration of the state teachers' retirement system law.

5. Under the provisions of section 7896, where teachers are in a class (a) whose compensation is only partly paid by the state, or (b) who are not serving on a per annum basis, or (c) who are on a temporary basis, or (d) who are not required to have a teachers' certificate, it is for the state retirement board to say which classes shall be denied membership; but such retirement board may, in its discretion, make optional with teachers in any such classes their individual entrance into membership.

Respectfully,

JOHN G. PRICE,
Attorney-General.