

Said contract and bond and all other papers submitted in connection therewith have been filed with the auditor of state.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2217.

APPROVAL, BONDS OF BELMONT COUNTY IN THE AMOUNT OF \$105,000, ROAD IMPROVEMENT.

COLUMBUS, OHIO, June 30, 1921.

Industrial Commission of Ohio, Columbus, Ohio.

2218.

APPROVAL, BONDS IN THE AMOUNT OF \$105,000, BELMONT COUNTY, ROAD IMPROVEMENT.

COLUMBUS, OHIO, June 30, 1921.

Industrial Commission of Ohio, Columbus, Ohio.

2219.

APPROVAL, DEFICIENCY BONDS OF THE CITY OF BELLEFONTAINE IN THE AMOUNT OF \$11,450.

COLUMBUS, OHIO, June 30, 1921.

Industrial Commission of Ohio, Columbus, Ohio.

2220.

STATE TEACHERS' RETIREMENT SYSTEM—WHERE BOARD OF EDUCATION HAS NEGLECTED OR REFUSED TO LEVY TAX TO MEET FINANCIAL REQUIREMENTS OF SAID SYSTEM—HOW FUNDS PROVIDED.

1. *A board of education which has neglected or refused to levy a tax to meet the financial requirements of the state teachers' retirement system, in accordance with the provisions of section 7896-55 G. C. may not create a retirement fund out of which to pay the normal and deficiency contributions due from each board of education under the teachers' retirement act, by transferring to such retirement fund any money available in other funds, unless such board of education has been granted authority to make such transfer by an order of the common pleas court, on an appli-*

tion duly made in compliance with the requirements of section 2296 et seq. General Code.

2. The tuition fund or the contingent fund of a board of education may not be used by such board to pay the required contribution to the state teachers' retirement system, unless a transfer of moneys in such funds is made under the provisions of section 2296 et seq. General Code.

3. The normal contribution and the deficiency contribution due from a board of education to the state teachers' retirement system are valid, existing and binding obligations, and where a board of education has neglected or refused to levy a tax to pay such contributions, in the manner provided for in section 7896-55 General Code, and a transfer of moneys from other funds of the board of education is not possible under section 2296 et seq. G. C., such board of education may borrow money or issue bonds under authority of section 5656 G. C. to meet such obligations.

COLUMBUS, OHIO, July 1, 1921.

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

DEAR SIR:—Acknowledgment is made of the receipt of your request upon the following questions:

"1. In the event that a board of education neglected or refused to levy a tax to meet financial requirements of the state teachers' retirement system for 1920-21, in accordance with the provisions of section 7896-55 G. C., may such board of education create a 'Retirement Fund' out of which to pay the normal and deficiency contributions by transferring to the 'Retirement Fund' any money available in other funds?

2. Or may the contribution to the state teachers' retirement system be paid from the tuition or from the contingent fund in the event special provision was not made for 1920-21 in accordance with the provisions of section 7896-55 G. C.?

3. Or in what manner shall such payment be made by the board of education and from what fund shall it be taken?"

The authority and mandate for the creation of a fund to pay the contributions from a board of education to the state teachers' retirement system, appears in section 7896-55 G. C., which reads as follows:

"Employers who obtain funds directly by taxation are hereby authorized and directed to levy annually such additional taxes as are required to provide the additional funds necessary to meet the financial requirements imposed upon them by this act (G. C. 7896-1 to 7896-63) and said tax shall be placed before and in preference to all other items except for sinking fund or interest purposes."

Bearing upon the question that the funds necessary for a board of education to meet its obligations to the state teachers' retirement system must appear in a separate and independent tax levy, your attention is invited to Opinion No. 1245, issued on May 14, 1920, to Hon. Vernon M. Riegel, superintendent of public instruction, the following language occurring therein:

"The levy provided for by section 7896-55 G. C. is a separate and independent tax levy, not to be included within any of the four

designations mentioned in section 7587 G. C., which are: tuition, contingent, building and sinking funds. This conclusion is rather clear from the face of section 7896-53 G. C. as you quote it. The taxes therein referred to are designated as 'additional taxes.' Again it is referred to as 'said tax,' importing that it is not merely a charge on the proceeds of a tax already provided for but a new and independent levy. Still further, it is given preference over 'all other items except for sinking fund or interest purposes.' Here it is compared with the levies for interest and sinking fund purposes, which are independent levies.

Were there no provision for a special levy, but the board of education were merely required to provide out of their revenues for the financial burdens imposed by the teachers' retirement system law, it is believed that it would still be impossible to reach the conclusion that such expenditures might lawfully be made from the tuition fund.

On the principle laid down the following conclusions are reached:

(1) The levy provided for by section 7896-55 G. C. is not a part of any of the four principal levies of a school district. It is accordingly not included within the tuition levy, which to the extent of one mill is subject only to the fifteen mill limitation of the Smith one per cent law by virtue of the provisions of House Bill No. 615 (108 O. L., Part II) but with other local school levies must be brought within the limitation of three mills provided by section 5649-3a G. C., as amended in said bill.

(2) The board of education in making up its annual budget must designate the levy under section 7896-55 not as a special item of some other fund but as a separate levy. The budget commission in acting upon the school levies is not at liberty to reduce this levy unless such reduction is compelled by the fact that the levy itself, without consideration of contingent and building fund levies and so much of the tuition fund levy as is in excess of one mill, will exhaust the three mill limitation of section 5649-3a G. C. or with other levies applicable in the same district will cause the ten mill limitation of section 5649-2 to be exceeded; but if the electors of the district approve additional levies under sections 5649-4 and 5649-5 et seq. G. C. the levy provided for by section 7896-55 may be included within the levies that may be thus made outside of all limitations.

In other words, section 7896-55 G. C. provides for an independent levy co-ordinate in dignity, so to speak, with the four levies mentioned in section 7587 G. C., and subject to all the limitations of the Smith one per cent law unless removed from the operation thereof by a vote of the electors."

This opinion was issued in time for the various boards of education to have knowledge of the same in the making up of their June budget for all school expenses in June, 1920, and it must be presumed that it was properly promulgated to the various boards of education throughout the state. It would appear that there are some boards of education which have either neglected or refused to levy the tax for retirement system purposes provided for in section 7896-55 G. C., and you desire to know whether such boards of education may create a retirement fund out of which to pay the normal and deficiency contributions due, by transferring to such retirement fund any money available in other funds.

Section 2296 G. C. reads as follows:

"The county commissioners, township trustees, the board of education of a school district or the council or other board having the legislative power of a municipality, may transfer public funds, except the proceeds or balances of special levies, loans or bond issues, under their supervision, from one fund to another, or to a new fund created under their respective supervision, in the manner hereafter provided, which shall be in addition to all other procedure now provided by law."

Bearing upon this section your attention is invited to opinion No. 290, appearing at page 562, Opinions of the Attorney-General, Vol. I, 1915, the syllabus of which reads as follows:

"If the board of education of a school district finds that there is a surplus in its tuition fund, resulting from the local tax levy for said fund, which will not be needed for any of the purposes of said fund, and that it is necessary to transfer said surplus to its building fund to be used in the construction of a school building which the board of education finds necessary for the proper accommodation of the pupils of its district, such board may, upon the order of the common pleas court, on an application duly made in compliance with the requirements of section 2296, et seq. G. C. transfer said surplus from said tuition fund to the building fund for the purposes above named."

Coming to your second question you desire to know as to whether a contribution from a board of education to the state teachers' retirement system may be paid from the tuition fund or from the contingent fund in the event special provision was not made for the year 1920-21, in accordance with the provisions of section 7896-55 G. C. That the tuition fund might not be used for this purpose is apparent from the following statement appearing in Opinion 1245, Opinions of the Attorney-General, Vol. I, 1920, page 560, to wit:

"Were there no provision for a special levy, but the board of education were merely required to provide out of their revenues for the financial burdens imposed by the teachers' retirement system law, it is believed that it would still be impossible to reach the conclusion that such expenditures might lawfully be made from the tuition fund."

As to paying such contribution from the contingent fund, attention is invited to the fact that the payment by a board of education of these contributions to the state teachers' retirement system is a matter for which specific provision has been made by statute, as 7896-55 G. C. directs each board of education to create a retirement fund, the levy for which "shall be placed before and in preference to all other items except for sinking fund or interest purposes." The effect of this is that the levy for retirement fund purposes takes precedence over the (1) tuition fund, (2) the building fund, and (3) the contingent fund provided for in Sec. 7587 which reads in part as follows:

"Such levy shall be divided by the board of education into four funds: First, tuition fund; second, building fund; third, contingent fund; fourth bonds, interest and sinking fund. A separate levy must be made for each fund."

It is clear that if the general assembly desired that the obligations of a

board of education to the state teachers' retirement system should be taken from the contingent fund, *very often depleted*, then there would be no occasion for the specific language appearing in Sec. 7896-55 G. C., importing that obligations to the teachers' retirement system by a board of education are subordinate only to the obligations due the sinking fund and interest charges against the district. Thus the levy for retirement fund purposes is placed second in importance in the specific levies which a board of education may make. The item for retirement fund purposes "is a separate and independent tax levy, not to be included within any of the four designations (tuition, building, contingent and sinking fund) mentioned in section 7587 G. C." (Opinion 1245, May 14, 1920.) If provision for retirement fund obligations cannot be included in the contingent fund levy, when such levy is made, that is, in the very first instance, surely the fund arising from the contingent levy could not later be used for the regularly occurring payments due to the state teachers' retirement system. When a board of education sets the amount necessary for its contingent fund, it has certain contingent items in mind which make up the sum required, and it has been previously held that the item of teachers' retirement fund contributions cannot be one of the items included in such computations, as are fuel, small repairs, tuition paid out (7736 G. C.), etc. The provision of the state teachers' retirement law that each board of education shall contribute to the retirement fund (at present 5.57 per cent on the whole pay roll of teachers) is mandatory and fixed, and known in advance, for Sec. 7896-44 G. C. reads:

"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 amount paid by an employer on account of the deficiency contribution shall after the first payment be at least three per centum greater than the amount paid by him during the preceding year. 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. Until the first such certification, the normal contribution shall be two and eight-tenths per centum of the members' salaries and the deficiency contributions shall be two and seventy-seven hundredths per centum of the members' salaries."

Here it will be noted that the "deficiency contribution (now 2.77 per cent of members' salaries) shall after the first payment be at least three per centum greater than the amount paid by him (employer) during the preceding year" and provision for the necessary fund to pay this increasing amount (deficiency contribution) occurs specifically in 7896-55 G. C. supra. Under the provisions of 7896-20 G. C. the "actuarial valuations" referred to in 7896-44 G. C. shall be made "at least once within the first three years of the operation of this act, and once in each quinquennial period (five years) thereafter." To leave to the whim of a board of education, as to whether these obligations due from the board of education to the retirement system should be paid promptly when due, or not at all, after the clerk has held out the teachers' contribution, would be manifestly unfair to the teacher (who is a co-contributor by law) and a blow at the retirement system itself. Each general assembly has passed in recent years tax laws of a temporary nature, permitting

boards of education to fund the deficiencies existing in their contingent fund, because such action was absolutely necessary if the schools were to continue. Evidently the law-making body intended that a board of education after deducting the teachers' four per cent monthly, should always be in position to match the teachers' money withheld and paid in, without delay, hence the provision that the board's obligation to the state retirement system should be cared for with a specific levy "placed before and in preference to all other items except for sinking fund or interest purposes." (7896-55 G. C.) To all appearances it is an obligation higher in importance than "contingent fund" purposes and not subordinate to, or a part of the latter. Paying this retirement fund obligation from the contingent fund would be a bad precedent, for many boards would plead, as they are doing today, that the contingent fund is not large enough or is exhausted. Yet, if the board has the money in its contingent fund (or any other fund) to do so, the provision for legal transfer of funds set forth in 2296 et seq. G. C. is ample.

It is entirely possible that some boards of education not having provided for the creation of a retirement fund (7896-55 G. C.), may have been paying these obligations from either the tuition fund or the contingent fund, or both, in which event such expenditures would be "overdrafts" on such funds, and upon this condition, if existing, your attention is invited to Opinion 1303, appearing at page 879, Opinions of the Attorney-General, Vol. I, 1918, the syllabus of which reads as follows:

"Moneys belonging in one fund of a school district, but expended for the purposes of another fund and treated as 'overdrafts' in such other fund, may not be subsequently transferred to the fund for the purposes of which the expenditures have been made, unless by nunc pro tunc order of the common pleas court under section 2296 et seq. G. C., as to which query.

Authority to transfer funds is limited to funds represented by actual cash in the treasury to the credit of the proper funds.

As to actual balances, however, there may be a transfer under section 2296 et seq. of General Code from a sinking fund of a school district to another fund, when the school district has no outstanding bonds."

Speaking of these overdrafts from other funds, in order to pay the obligations existing against another fund, the then Attorney-General said:

"* * * it is obvious that in the face of section 5649-3d and other statutes equally applicable the so-called 'overdraft' was wholly illegal. When there is no money in a school district fund there would be no authority, even in the absence of the Smith law, for the drawing or payment of a warrant on that fund. Overdrafts, save in the case of county warrants issued under favor of former laws (still unrepealed save by implication arising from the Smith law) and marked 'not paid for want of funds' from the very nature of the case are and always have been illegal.

It follows that primarily the officers of the district responsible for the present condition are liable to the district for the amount of the overdrafts. They have taken money belonging to the sinking fund and applied it to unauthorized purposes, and they and their bondsmen personally owe the sinking fund these amounts. * * *

* * * If public officials would keep clearly in mind the legal

impossibility of 'overdrafts' and their own personal liability arising therefrom, evils of the sort described by you would be less frequent than they are.

If upon the exhaustion of the tuition and contingent fund application had been promptly made for the transfer of the then existent moneys in the sinking fund, and the court had allowed the transfer, the transaction would have been regular and legal; and as I have said, if the court should decide that it has jurisdiction to order a transfer *nunc pro tunc* so as to validate that which is already done, such action would be likewise effectual. I do not feel that I ought to say, however, that the common pleas court has this power nor that it should exercise it under the circumstances in this case, if it has it."

In your third question you desire to know in what manner these payments shall be made, being due from certain boards of education for the teachers' retirement system, and from what fund it shall be taken in those cases where the board of education has neglected or refused to carry out the provisions of section 7896-55 G. C., providing that a levy shall be made for the support of the state teachers' retirement system.

Section 5656 G. C. reads as follows:

"The trustees of a township, the board of education of a school district and the commissioners of a county, for the purpose of extending the time of payment of any indebtedness, which from its limits of taxation such township, district or county is unable to pay at maturity, may borrow money or issue the bonds thereof, so as to change, but not increase the indebtedness in the amounts, for the length of time and at the rate of interest that said trustees, board or commissioners deem proper, not to exceed the rate of six per cent per annum, payable annually or semi-annually."

The following is the fourth branch of the syllabus of Opinion 1753, appearing on page 1230, Opinions of the Attorney-General for 1920, Vol. 2:

"A board of education may borrow money under section 5656 G. C. for the purpose of extending the time of payment of any indebtedness whatever, regardless of the fund in which the indebtedness exists."

There can be no question but what the contributions due from boards of education to the state teachers' retirement system are valid, binding and existing obligations, because in various sections of the state teachers' retirement system law they are made obligations upon each and every board of education in the state. Again, a contractual relation exists between the teacher and the board of education and the teacher is compelled to consider the provisions of the state teachers' retirement act as a part of his contract, for section 7896-49 G. C. 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 (G. C. 7896-1 to 7896-63) as a part of the contract."

If the obligations put upon the teacher by the state teachers' retirement act are a part of the contract between the teacher and the board of education, then the obligations put upon the board of education in such retirement law are equally binding upon the board of education. Thus, with the beginning of the school year the clerk of the board of education takes from the teacher's salary each and every month an amount equal to four per cent of the amount paid to such teacher, and it is understood that these payments from teachers (deducted from the pay rolls) are received regularly by your office and are a large part of the accumulated fund of the state teachers' retirement system, having been invested in bonds which are in the custody of the state treasury. It is imperative that the board of education having withheld a portion of the money due to the teacher under the provisions of the state teachers' retirement act, should therefore pay its own contribution, a total of 5.57 per cent of the pay roll, to the state teachers' retirement system, and such contribution required of the board of education is a valid, existing and binding obligation.

This being true, if the board of education has not properly provided for a levy to take care of this contribution, then the board could have recourse to the provisions of section 5656 G. C., as above indicated.

In reply to your specific questions you are therefore advised that it is the opinion of the Attorney-General:

1. A board of education which has neglected or refused to levy a tax to meet the financial requirements of the state teachers' retirement system, in accordance with the provisions of section 7896-55 G. C., may not create a retirement fund out of which to pay the normal and deficiency contributions due from each board of education under the teachers' retirement act, by transferring to such retirement fund any money available in other funds unless such board of education has been granted authority to make such transfer by an order of the common pleas court, on an application duly made in compliance with the requirements of section 2296 et seq. General Code.

2. The tuition fund or the contingent fund of a board of education may not be used by such board to pay the required contribution to the state teachers' retirement system, unless a transfer of moneys in such funds is made under the provisions of section 2296 et seq. General Code.

3. The normal contribution and the deficiency contribution due from a board of education to the state teachers' retirement system are valid, existing and binding obligations, and where a board of education has neglected or refused to levy a tax to pay such contributions, in the manner provided for in section 7896-55 General Code, and a transfer of moneys from other funds of the board of education is not possible under section 2296 et seq. G. C., such board of education may borrow money or issue bonds under authority of section 5656 G. C. to meet such obligations.

Respectfully,
JOHN G. PRICE,
Attorney-General.