In other words, the sentence does not declare that the making of a tender of "any amount" shall, in the event the tender is not accepted, preclude the assessment of a penalty because of the nonpayment of the correct amount; it merely declares that the making of a tender shall, even without acceptance, preclude the charging of a penalty on the amount covered by the tender.

Inasmuch as this is the limited effect of the clause prohibiting the attaching of the penalty, and inasmuch as the other clauses of the statute which have been examined authorize the imposition of the penalty on the basis of the final determination, *nunc pro tunc,* the conclusion is reached that in case the amount finally determined in the so-called "proceedings in error" under section 5611-2 et seq. of the General Code is greater than the amount on which the tender was based, the complainant must pay, not only the difference in principal sums, but also the penalty thereon, computed upon such difference.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2753.

BOARD OF EDUCATION—WHEN AUTHORIZED TO PROVIDE FOR PAYMENT OF AUTOMOBILE MILEAGE TO OFFICERS AND EMPLOYES USING PRIVATE AUTOMOBILES IN PERFORMANCE OF OFFICIAL DUTIES—WHETHER OR NOT TEN CENTS PER MILE FAIR, QUESTION OF FACT.

1. *Boards of education are impliedly authorized under the provisions of sections 7620 and 4750 G. C. to expend and provide for the payment of automobile mileage to officers and employes using their private automobiles in the performance of official duties, when such transportation services are required by said board, and deemed necessary for the best interests of the schools under their jurisdiction.*

2. *The question of whether or not ten cents per mile is a fair and reasonable remuneration to be paid for the use of such privately owned automobiles is one of fact, depending upon local conditions, and within the discretionary powers of the board of education to determine.*

COLUMBUS, OHIO, December 31, 1921.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Receipt is acknowledged of your letter of recent date reading as follows:

"We respectfully request your written opinion upon the following matters:

Statement of Facts

The board of education of the city of Cleveland, Ohio, owns and maintains about twenty automobiles for certain of their employes, besides this they pay automobile mileage at the rate of ten cents per mile, to forty-eight superintendents, assistant superintendents, principals, teachers, custodians, director of law to director of schools, director of schools, architects, truant officers, etc. This mileage is paid to the owners of their own cars, supposedly to include only the number of miles run in the performance of their duty. For the year ending

August 31, 1921, $10,740.26 was paid to the owners for the use of their own cars. In the past two years this expense has nearly doubled.

Question 1: May the board of education legally pay such mileage?"

It is believed that a determination of the question presented by your inquiry, depends largely upon the extent of power vested in boards of education, to expend generally for school purposes the funds under their control.

Section 2, Article VI of the Ohio Constitution provides:

"The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; but no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state."

Section 3 of the same article provides:

"Provision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds; provided, that each school district embraced wholly or in part within any city shall have the power by referendum vote to determine for itself the number of members and the organization of the district board of education and provision shall be made by law for the exercise of this power by such school districts."

It is noted that these sections of the constitution expressly provide for the organization, administration and control of the public school system of the state, and in manner mandatory, imposes upon the general assembly the duty of providing for the same by "taxation or otherwise," in order that a thorough and efficient system of common schools may exist throughout the state. By the provisions of section 3 quoted, supra, each school district embraced wholly or in part within any city is empowered to determine by referendum vote, the number of members and the organization of the district board of education.

Section 7, Article 1 of the constitution provides in part as follows:

"* * * It shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to *encourage schools, and the means of instruction.*"

Viewed in the light of such constitutional provisions, it is apparent that the framers of the constitution intended that a policy of favor and encouragement should prevail throughout the administration generally of the public school system of the state, mindful no doubt in the adoption of such a policy of encouragement, of the best interests of the children and pupils acquiring under such a system the benefits and privileges of an education.

Without attempting to detail the duties as defined by law of the various officials and employes mentioned in your communication, it is assumed for the purposes of this opinion, that the services in question as performed by such officers and employes, are such as are required for actual school purposes, and that the automobile mileage or transportation service is necessary to the proper functioning of the schools in question. It is also assumed that the

agreement, contract or rule allowing the officers and employes in question, mileage at the rate of ten cents per mile for such services has been lawfully provided for by rule or regulation of the board of education formally authorizing such expenditure.

In connection with the discussion of such assumed premises, it may also be briefly pointed out that in the absence of provision to the contrary, the law does not generally prohibit payment to officers and employes in the performance of official duties, a remuneration for the use of such private automobiles, when there is express or implied statutory authority for such use, and when the official and public use may be separated and determined apart from that of the private or individual use of the owner. It is believed that in many cases such a conclusion is reasonably reached from the necessity and convenience afforded by the use of such automobiles, together with a recognition of the fact that in a majority of cases the similar expense of transportation might be greater, if contracted for otherwise. Viewed in such a light, therefore, economy and convenience may be said to be the reasons for the policy of the law in such cases.

Proceeding to the consideration of the principal question submitted, it is thought the following sections of the General Code are pertinent:

Section 4680 G. C. provides:

> "Every city, together with the territory attached to it for school purposes, and excluding the territory within its corporate limits detached for school purposes, shall constitute a city school district."

Section 4749 G. C. provides:

> "The board of education of each school district, organized under the provisions of this title shall be a body politic and corporate, and, as such, capable of suing and being sued, contracting and being contracted with, acquiring, holding, possessing and disposing of real and personal property, and taking and holding in trust for the use and benefit of such district any grant or devise of land and any donation or bequest of money or other personal property and of exercising such other powers and privileges as are conferred by this title and the laws relating to the public schools of this state."

The first section cited provides for the classification of the city school districts, while the second confers upon boards of education corporate powers generally.

Section 7620 G. C. provides:

> "The board of education of a district may build, enlarge, repair and furnish the necessary school houses, purchase or lease sites therefor, or rights of way thereto, or purchase or lease real estate to be used as playgrounds for children or rent suitable schoolrooms, either within or without the district, and provide the necessary apparatus and make all other necessary provisions for the schools under its control. It also shall provide fuel for schools, build and keep in good repair fences enclosing such school houses, when deemed desirable plant shade and ornamental trees on the school grounds, and make all other provisions necessary for the convenience and prosperity of the schools within the subdistricts."

It may be noted that section 7620 G. C. after setting forth the powers and duties of a board of education, proceeds in the following language:

> "And provide the necessary apparatus, and make *all other necessary provisions* for the schools under its control. * * * It also * * * shall make *all other provisions* necessary for the convenience and prosperity of the schools within the subdistricts."

It is believed that the powers granted boards of education under the provisions of this section, are very broad, and that it was the legislative intent, from the purport of the language used in the italicized phrases quoted, to cast a broad mantle of power and discretion upon the boards of education in the matter of control and supervision over the respective schools under their jurisdiction.

Thus it seems apparent that the power delegated to boards of education by the provisions of this section is a general one, unlimited, and is thought to extend to *all provisions* necessary for the convenience and prosperity of the schools within the subdistricts.

It may be asked then, if the payment or expenditure of the automobile mileage in question is such a provision as is necessary for the convenience and prosperity of the schools in the instance indicated. If the facts under the circumstances should warrant an affirmative answer, it is thought to be only reasonably concluded that lawful authority exists for such an expenditure implied from the general terms used by the provisions of this section.

It may be said to be true, on the other hand, that a board of education is primarily a creature of the statutes, and may only exercise such powers as are expressly granted or fairly implied, and it has also been held as a definite policy of the law to strictly construe the powers delegated to such governmental bodies, and to limit the exercise of the same to those clearly and distinctly granted. See Board of Education vs. Best, 52 O. S. 152; State ex rel. Locher vs. Menning, 95 O. S. 97; also a recent decision of the Supreme Court of Ohio, styled "The State of Ohio on relation of H. D. Clarke vs. W. H. Cook as Auditor of Ashtabula County, Ohio," decided November 22, 1921.

Applying, however, the principle of a strict construction as the cited authorities would require, to section 7620 G. C. under consideration, it would seem that the result obtained is practically the same as that attainable under a liberal construction, obviously apparent for the reason that the general powers granted under its provisions are so broad and general as to include "*all things*" necessary and convenient for the prosperity of the schools in question.

It is believed then, that the provisions of section 7620 G. C. would under the existence of the facts assumed, authorize the payment by the board of education of mileage at the rate of ten cents per mile to those officials and employes delegated by said board to perform such duties wherein such transportation users of the automobiles in question are required, provided that the same are necessary and convenient for the prosperity of the schools under consideration, and that the board of education has likewise determined the reasonableness of the rate of mileage to be allowed in such cases.

In addition to the powers conferred upon boards of education by the provisions of section 7620 G. C., section 4750 G. C. also provides:

> "The board of education shall make such rules and regulations as it deems necessary for its government and the government of its em-

ployes and the pupils of the schools. No meeting of a board of education, not provided for by its rules or by law, shall be legal, unless all the members thereof have been notified, as provided in the next section."

By the provisions of this section the board of education is clearly authorized to make such rules and regulations as it deems necessary for its government, and the government of its employes and the pupils of the schools. The section does not state what such rules in themselves are to be, or limit the same to any particular subject, hence it is thought to be not improperly concluded that under the provisions of this section, a board of education would be lawfully authorized in adopting a reasonable rule of compensation or remuneration as a standard for the payment of transportation incurred by certain officers and employes in the discharge of their duties and to define the same in the terms of mileage, if deemed necessary by them to do so, and likewise to provide for the payment thereof as of other claims or debts in conformity to the provisions of section 4752 G. C.

As stated in your inquiry, mileage of ten cents per mile is paid to the owners of their own cars, supposedly to include only the number of miles run in the performance of their duty. Whether or not ten cents per mile is a fair and reasonable payment for such transportation services, is under the circumstances thought to be a matter of fact, most properly within the discretion of the board of education to determine, who in the absence of evidence to the contrary, are presumed to have knowledge of the local conditions and fairly and honestly fixed the standard of payment for the same in conformity thereto.

In the case of the Board of Education of New Antioch Special School District vs. Eva Paul, 7 O. N. P. 61, the court laid down the following doctrine, and a partial quotation from the decision is herewith given;

> "The policy of the law is to vest in boards of education large powers in adopting rules and regulations for the government of the schools under their control. Their motives are not open to question or investigation by the courts. They are responsible only to their consciences and their constituents. With such large powers go equally large responsibilities. If the powers are to be exercised with care and consideration commensurate with their importance, it is best that members of such boards understand that they must take the full responsibility for the acts they do.
>
> The members of a board of education are public officers charged with the performance of important public duties. They are bound under the solemn obligations of an oath 'to perform faithfully the duties of the office.' In selecting such officers, the electors of each district are presumed to exercise judgment and discretion and the members chosen are presumed to understand the local conditions and the interests of the schools committed to their control and to act with intelligence and fairness in the performance of their duties."

Upon such considerations, therefore, it is the opinion of this department that the board of education in question is authorized by law to pay such mileage for the use of privately owned automobiles, indicated in your communication, provided such uses are deemed requisite and necessary by the board of education in the transaction of official business, and not such as may be con-

templated privately in the transportation of the employes and officials designated, to or from their homes to their places of assigned duties, as a matter of personal advantage and convenience.

As a matter of precaution against unwarranted application and extension of the rule provided in this opinion, perhaps it should be added that in invoking the implied power of such boards, there must necessarily occur border line cases which must depend upon the facts in each case, and for which it is difficult if not impossible to make a general rule. It may be added that while much is left in such matters to the discretion of the board of education and that discretion will not be interfered with generally, yet it is also the rule that in cases of clear abuse of their discretion, or such unreasonable exercise thereof as to impute fraud or collusion, the courts will correct or prevent such abuse.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2754.

STATE TEACHERS' RETIREMENT SYSTEM—NO PROVISION FOR REINSTATEMENT AS AN ACTIVE TEACHER OF PENSIONER BY BOARD OF EDUCATION—EXCEPTION, DISABILITY BENEFICIARIES—NO PROVISION FOR REINSTATEMENT OF PENSIONER OF LOCAL DISTRICT PENSION SYSTEM WHICH HAS MERGED WITH STATE SYSTEM—WHERE LOCAL SYSTEM HAS MERGED WITH STATE SYSTEM BENEFICIARIES IN LOCAL SYSTEM SHALL BE PAID SAME AMOUNT BY STATE SYSTEM—A PENSIONER IN EITHER STATE OR LOCAL SYSTEM MAY NOT BE REINSTATED AS AN ACTIVE TEACHER BY DISCONTINUING PENSION DURING SUCH PERIOD OF ACTIVE TEACHING.

1. *There is no provision in the act providing for the creation of local district pension systems for teachers* (7875 to 7896 G. C.) *for the reinstatement of a beneficiary or pensioner as an active teacher in that district.*

2. *There is no provision in the state teachers' retirement system law* (7896-1 to 7896-64) *for the reinstatement as an active teacher of a beneficiary or pensioner by a board of education, the sole exception being in the case of disability beneficiaries who may be restored to active service, as provided in section* 7896-39 G. C.

3. *A pensioner of a local district pension system which has merged with the state teachers' retirement system, cannot be reinstated as an active teacher, either with or without the continuation of his pension payments, while in active service.*

4. *Where a local district pension system has merged with the state teachers' retirement system, the pensions paid to beneficiaries in the local district pension system shall thereafter be paid in the same amount by the state teachers' retirement system, since these pensions have been accepted by the state teachers' retirement system as a liability in an exact amount at the time of evaluation.*

5. *A pensioner of the state teachers' retirement system may not be reinstated as an active teacher by discontinuing his pension during such period of active teaching.*

COLUMBUS, OHIO, December 31, 1921.

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

DEAR SIR:—Acknowledgment is made of the receipt of your request for the opinion of this department upon the following questions: