

2034.

STATE TEACHERS' RETIREMENT SYSTEM—HOW TO COMPUTE "FINAL AVERAGE SALARY" AS DEFINED IN SECTION 7896-1 G. C.—TOTAL EARNED COMPENSATION AS AN EMPLOYED TEACHER DURING TEN CALENDAR YEARS PRECEDING RETIREMENT SHOULD BE DIVIDED BY NUMBER OF YEARS IN WHICH SUCH COMPENSATION AS A TEACHER WAS EARNED AND RECEIVED—OTHER RELATED QUESTIONS ANSWERED.

1. In computing the "final average salary" (7896-1 G. C.) as defined in the teachers retirement act, the total earned compensation as an employed teacher during the ten calendar years preceding retirement should be divided by the number of years in which such compensation as a teacher was earned and received.

2. Where a teacher was on leave of absence or out of active service as a teacher for two years during the period of the last ten calendar years, prior to the date of retirement, the total of the compensation received as a teacher during such ten calendar years should be divided by eight, the number of years in which such compensation as a teacher was actually earned and received.

3. Where a teacher desiring to retire at the close of the year 1920-1921 was out of active service as a teacher for two years during the last ten calendar years prior to retirement, and her salary for the school year 1916-1917 was \$1,000, and her salary for the school year 1919-1920 was \$1,200, to compute her compensation "earnable as a teacher" as \$1,000 during the two years she was out of service as a teacher, would be incorrect, for her compensation earnable as a teacher during such two years would be the amount paid by the employing board of education during such two years. Unless the person was employed as a teacher and received compensation therefor during such period of two years, such person would have no compensation earnable as a teacher during that two years.

4. In computing final average salary under the teachers retirement act, the retirement board should credit the teacher with all the compensation received as a teacher during the preceding ten calendar years and the total of such compensation, when divided by the number of years in which compensation is earned as a teacher, would be the final average salary, but where such final average salary exceeds \$2,000, such excess above \$2,000 cannot be considered.

5. Where a teacher asks retirement at the middle of the school year, such retirement is effective as of August 31 following, unless in case of disability retirement, and in computing final average salary the salary earned and received during the year 1920-1921 should be counted as her earnable compensation received as a teacher during that year.

COLUMBUS, OHIO, April 28, 1921.

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

DEAR SIR:—Acknowledgment is made of the receipt of your recent request for the opinion of this department as follows:

"The retirement board of the state teachers retirement system desires an official opinion on the definition of final average salary as given in section 7896-1 (c) G. C., as follows:

"Final average salary" shall mean the average annual compensation, not exceeding two thousand dollars, earnable as a teacher by a member during the ten years immediately preceding his date of retirement.'

"The following are suggested as special problems coming before the retirement board in connection with the administration of the retirement law:

"(1) The intent of the law is undoubtedly to base the prior service pension on a fair average salary and instead of basing the prior service pension on the salary for the last year, it is based upon the salary for the ten years preceding retirement. Would it be legal for the retirement board to base the final average salary on the salary of the teacher for the ten years of service immediately preceding retirement, or must the total earned compensation as a teacher for the ten years preceding retirement be divided by ten to find the average?

"(2) Would it be legal for the retirement board to disregard any period within the ten years preceding retirement that a teacher was not in active service? For example, if a teacher were on leave of absence or out of active service on account of illness for two years during the last ten years prior to retirement would it be legal to divide the total salary earned in the remaining eight years by eight, instead of by ten?

"(3) If a teacher desiring to retire at the close of the year 1920-21 should have been out of active service for two years during the last ten years, for example 1917-18 and 1918-19, and her salary for 1916-17 was \$1,000, and her salary for 1919-20 was \$1,200, would it be legal in finding the final average salary to regard her compensation "earnable as a teacher" as \$1,000 during the two years she was out of service? That would be regarded her salary for 1916-17 as the amount she would have earned in each of the next two years or during the time she was out of active service.

"(4) In computing final average salary may any amount of salary in excess of \$2,000 be considered? In other words does the phrase 'not exceeding two thousand dollars' modify 'compensation' or does it modify 'average annual compensation'? For example, if a teacher's salary during the ten years immediately preceding retirement is \$1,500 for five years and \$2,500 for five years, her average salary would be \$2,000, if the phrase 'not exceeding two thousand dollars' refers to 'average annual compensation' and it would be \$1,750 if it refers to the word 'compensation' only.

"(5) If a teacher asks for retirement, say at the middle of the school year, her retirement is effective as of the end of the year. If a teacher should apply for retirement in January, 1921, her retirement would be effective August 31, 1921, and her pension would begin in September, 1921. In computing final average salary would her contract salary for 1921 be considered for the entire year or would her final average salary be based on her salary for the ten years preceding the date of her request, or would the part of her salary earned during 1920-21 be counted as her annual salary for that year?"

Referring first to the definition of "final average salary" as given in section 7896-1 General Code, and quoted above, it is found that three outstanding expressions appear therein. These portions of the definition deserving of the most careful consideration in order to arrive at the meaning of the sentence as a whole, are:

1. "During the ten years immediately preceding his date of retirement."
2. "Earnable as a teacher."
3. "Average annual compensation as a teacher."

The use of the expression "during the ten years immediately preceding his date of retirement" undoubtedly means the time comprised in the ten calendar years just

prior to the date of retirement, and no other ten years than the ten calendar years immediately preceding the date of retirement can be used.

The next outstanding expression to be considered in the sentence is (2) "earnable as a teacher." A careful examination of the various standard dictionaries, including the law dictionaries, shows that the word "earnable" does not appear therein and is not defined. This being true, it is necessary to establish a meaning for the word "earnable," growing out of its root and any termination that may have been attached to such root.

Webster defines the word "earn" as follows:

1. To merit or deserve by labor; to do that which entitles to reward, whether reward is received or not.
2. To acquire by labor, service or performance; to deserve or receive as compensation.

"Earnable" is a combination of the word "earn" and the termination "able," and the latter is defined in Webster's Dictionary as follows:

"Able.—A common termination of English adjectives, especially of those based on verbs. To the base to which it is added it generally adds the notion of capable of, worth of, and sometimes, full of, causing; as *obtainable*, capable of being obtained; *tolerable*, capable of being borne; *laudable*, worthy of praise."

It would thus appear that the meaning of the expression "earnable compensation" would be the compensation which a person would be "able to earn." But, as used in this act, the ability to earn must be further defined. Thus a teacher who receives \$1,000 as compensation in a certain year might be presumed to be "able to earn" \$1,000 during the succeeding year, that being in a sense the teacher's "earnable capacity." But, the \$1,000 in the second year would not be earnable unless an employing party had placed that value for that time upon the services of the teacher and had entered into a contractual relation that clearly established that the teacher was capable of earning \$1,000 in the succeeding year. The mere statement that a person would be able to earn a given amount because he had, at some time prior, received an equal amount in the same vocation, is not in itself conclusive. He might throw his labor upon the market and it might not be accepted, in which event, of course, his earning capacity for that particular period would not have the same value as where it had actually been paid for through a contractual relation in the year before.

An examination of the teachers retirement act shows that what the act is primarily interested in, in establishing what may be justly due to a teacher, is the service "as a teacher," and no reference is made anywhere in the act to service in any other profession, and activity in other lines should not be considered in arriving at the actual "average annual compensation as a teacher." So, in construing the expression (3) "average annual compensation as a teacher," it is necessary to have in mind that the work performed by the person as a teacher during the given period is what is to be considered, and not work performed in any other activity. Taking all of these things into consideration, possibly the best explanation that could be given in defining "earnable compensation," as contemplated under the operation of the teachers retirement system, would be the compensation which a teacher would receive under contract, or by the compensation fixed under by-laws, minutes or schedule of pay adopted by a board of education, if the teacher worked the full number of days which he would be expected to work in the regular course of

employment. For example, if the teacher was entitled to \$100.00 for a month's service and was absent two days without pay, that would be \$5.00 per day compensation, there being twenty school days in a school month.

For the purpose of administration and in order to lessen the bookkeeping of small amounts and minor changes, the teachers retirement law provides that four per cent of the monthly compensation, as appearing upon the records of the board of education, shall be paid into the teachers retirement fund. It is understood that this has been the practice of the teachers retirement board, that a teacher employed under contract for \$100.00 per month, should pay \$4.00 into the teachers retirement fund, the same being remitted by the clerk of the board of education. Thus the deduction is based upon the rate of salary paid the employe rather than the amount actually earned, for in the case indicated here the teacher receiving \$100.00 per month and absent two days without pay, would actually have earned and received but \$90.00, four per cent of which would have been \$3.60, as the amount to be forwarded to the teachers retirement fund. It will thus be seen there is a distinction between "earned compensation" and the expression "earnable compensation," the latter rather contemplating the compensation that the teacher would have received had he been present on duty for the full time for which his services were contracted by the board of education. The expression "earnable compensation" appears in several instances throughout the teachers retirement act, notably section 7896-43 and section 7896-44, while in section 7896-45, General Code, the expression is changed to "earnable salary." That an employer is necessary, or the contractual relation of being employed must exist in order to receive "earnable compensation," as the same appears in the teachers retirement act, is again illustrated in section 7896-44, which says:

"Each employer of a teacher who is a member of the retirement system, shall pay to the employer's accumulation fund a certain percentum of the earnable compensation of each such teacher, being known as the 'deficiency contribution'."

The teachers retirement system has before it in its records the previous service of the teacher "as a teacher," for section 7896-26 General Code says:

"Each teacher, upon becoming a member, shall file a detailed statement of all his previous service as a teacher \* \* \*."

After the receipt of this statement of service, the teachers retirement board is governed by the following pertinent sections of the law:

"Section 7896-29: \* \* \* The retirement board \* \* \* shall issue to each present-teacher a certificate certifying to the aggregate length of all his prior service *as a teacher*, as defined in this act."

"Section 7896-31: \* \* \* A prior service certificate shall be final and conclusive for retirement purposes as to such service. \* \* \*"

"Section 7896-33: At retirement the total service credited a teacher shall consist of all his service as a teacher since he last became a member, and if he has a prior-service certificate, which is in full force and effect, all service certified on such prior-service certificate."

Answering your first question specifically, you are advised that the retirement board, in arriving at the final average salary of a teacher cannot consider the "ten years immediately preceding the date of retirement" to be ten years of *service*, but

the computation must be made upon the actual number of years of service "as a teacher" obtaining *during* the ten years immediately preceding the date of retirement. That is to say, in a case of a teacher retiring in 1921, the ten years would be the ten calendar years running back to the end of 1911. If it had to be the ten years of service which a teacher had prior to retirement, it is apparent that the ten years of service might run back of 1911, for such ten years of service might have occurred during a possible twenty calendar years prior to retirement. The total of the compensation earned as a teacher during the ten years immediately preceding retirement should not be divided by ten to find the average annual compensation, unless the teacher had taught in each and all of such calendar years, but the total earned compensation as a teacher during the ten years preceding retirement should be divided by the number of years in which such compensation was earned.

In your second question you desire to know whether, if a teacher were on leave of absence or out of active service on account of illness for two years during the last ten years prior to retirement, it would be legal to divide the total salary earned in the remaining eight years by eight instead of by ten.

The reply to this question is as indicated above, that if the teacher actually performs service as a teacher for eight years in the period of ten years immediately preceding the date of retirement, then the earned compensation of the teacher in question in the eight years should be divided by eight and not by ten, in order to establish the average annual compensation.

To give a practical illustration of this, and to show the justice of such a division, there is herewith given a table which might be the history of the ordinary teacher during the ten calendar years immediately preceding retirement, possibly in 1921 :

1912 1st year	\$600	—	"as a teacher"
1913 2nd "		—	in business for self
1914 3rd "	800	—	"as a teacher"
1915 4th "		—	ill health
1916 5th "	1,000	—	"as a teacher"
1917 6th "	1,200	—	"as a teacher"
1918 7th "		—	in war work
1919 8th "	1,550	—	"as a teacher"
1920 9th "	1,600	—	"as a teacher"
1921 10th "	2,000	—	"as a teacher"

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7) \$8,750 total "as a teacher"

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\$1,250 average annual compensation  
"as a teacher."

In the above example the person in question received during the last year \$2,000, which, under the provisions of the state teachers retirement act, is the maximum amount upon which any contribution is required. The table covers the ten years immediately preceding 1921, but shows an absence in certain years from the actual work of teaching, so that seven years was the time in which the person in question was engaged as a teacher. By adding the total of the compensation received "as a teacher," there appears \$8,750.00 received "as a teacher" in this ten years immediately preceding 1921. Dividing this by 7, it is found that the annual average compensation "as a teacher" is \$1,250.00. If this compensation received "as a teacher" was divided by 10 instead of 7, a clear injustice to the person concerned would at once be manifest, for the result would be not \$1,250.00, but \$875.00, as the average annual compensation "as a teacher."

In your third question you desire to know whether in a case where a teacher desiring to retire at the close of 1920-21, who had been out of active service for two years during the last ten years, for example 1917-1918 and 1918-1919, and her salary for 1916-1917 was \$1,000 and her salary for 1919-1920 was \$1,200.00, it would be legal, in finding the final average salary, to regard her compensation "earnable as a teacher" as \$1,000 during the two years she was out of service, because you indicate that her salary for 1916-1917 would be regarded as the amount she would have earned in each of the next two years (1917-1918 and 1918-1919) or during the time she was out of active service.

Section 7896-28 G. C. reads in part 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 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 \* \* \*."*

The above section clearly provides that the retirement board shall credit no time during which a member was absent without pay. Of course this strictly runs against one who has a status of a member and rather means the period following the inauguration of the system on September 1, 1920, but it must naturally follow that if during the time the teacher is a member there shall be no credit given for years when the teacher was absent without pay, it would hardly be proper to give credit for years prior to 1920, when the teacher "was absent without pay." If the teacher in question were given a credit of any kind for the two years' interim in which she was not teaching, it would be a false assumption to say that the teacher's earnable compensation during the two years she was absent was \$1,000 simply because she drew that pay in the year preceding. As indicated heretofore, the mere fact that she received \$1,000 for the preceding year is not conclusive that she would have received \$1,000 for either of the two following years, because, as has been explained before, there must be a contractual relation which clearly establishes earnable compensation, and when a party who is employing pays the compensation, and the teacher renders the service, then and not until then is earnable compensation, as contemplated in this act, clearly established. If the teacher whom you describe was absent during these two years and received no compensation as a teacher, then the board should take no notice of these two years as being time when the person served "as a teacher," but the case would fall within the rule given above, that these two years should be omitted in the creation of the divisor. If a divisor of ten years was contemplated and these were the only two years the teacher had been out of the service, then the remaining years during which she earned compensation as a teacher during the ten years preceding retirement, at the close of the year 1920-1921, would be the true divisor, and the whole amount actually earned as a teacher during the ten years prior to 1921, would be the sum to be divided by the true divisor, in order to establish the average annual compensation, and the salary of the teacher in question could not be held to be \$1,000 during the two years you mention unless she was actually employed under contract by a board of education or other employer, as contemplated by the teachers retirement act, during those two years.

In your fourth question you desire to know whether the state teachers retirement board may consider any excess above \$2,000 received annually in computing

the final average salary. That is, referring directly to the clause itself, does the phrase "not exceeding \$2,000" modify "compensation," or does it modify "average annual compensation"? You give a specific instance as where a teacher's salary for ten years immediately preceding retirement is \$1,500.00 for five years and \$2,500.00 for five years, and indicate that her average salary would be \$2,000 if the phrase "not exceeding \$2,000" refers to "average annual compensation," and it would be \$1,750.00 if it refers to and modifies the word "compensation" only.

From a practical standpoint your question directly is, whether a teacher, who during any or all of the ten years prior to retirement had received an excess of \$2,000, should have his annual salary actually received placed in the column to be added for ten years or whether, regardless of what salary the teacher received above \$2,000, anything above \$2,000 would be omitted from such column of ten years in arriving at the total to be divided by the divisor, which would be the number of years during which compensation as a teacher would be earned. You will note in the table previously given that the year's salary received in the last year was \$2,000, and of course the average would be lower than \$2,000, because of computing the nine previous calendar years. If a teacher received in all of these years the sum of \$2,000 each year, then the total amount received by that teacher as compensation would be \$20,000. However, the facts of the matter are that a great many teachers in the same ten years would have earned "as a teacher" an excess over the \$20,000 and the "average annual compensation" of that teacher would be in excess of \$2,000 for each of the ten years which were computed.

As a practical example of this, your attention is invited to a table herewith given, which is not an unusual one when it is considered that the principals, supervisors, superintendents, high school instructors and professors in colleges might be, and in the public schools are, members of the teachers retirement system:

1911	10th year	\$2,500	as city superintendent
1912	9th	4,000	as " " "
1913	8th	4,000	as " " "
1914	7th		in teachers agency work
1915	6th		in private educational work
1916	5th	3,000	as county superintendent
1917	4th	2,000	as " " "
1918	3rd	3,000	as instructor state normal school
1919	2nd	2,000	as " " "
1920-21	1st	300	as high school teacher 1 month

8) \$22,800 total earned "as a teacher"

\$2,850 "final average salary" as a teacher

less 2,000 limitation

\$850 excess received but not counted.

In the above case the member of the teachers retirement system had at no time received less than \$2,000 in the ten years prior to retirement, as earnable compensation as a teacher. This table shows an absence from actual teaching service of two years plus a possible nine months in the last year, having taught but one month in the last year. The grand total of compensation earned as a teacher equaling \$22,800, when divided by 8, the number of years in which compensation was earned as a teacher, gives a final average salary of \$2,850.00. It is at once apparent that this was the average salary earned by that teacher in the 8 years in which he spent

time in the school room out of the ten calendar years used in the table. It will thus be seen that this teacher, with an average salary of \$2,850.00, which is the true average of the amount earned as a teacher, would be compelled to accept less than \$2,000 as an actual final average salary, if the phrase "not exceeding \$2,000" modified "annual compensation" alone, rather than "average annual compensation." This certainly is not the intent of the law, because this method would give a result that would be unjust and unfair to those whose compensation in each year employed as a teacher was in excess of \$2,000. Investigation shows that in a number of retirement systems or retirement policies that are carried out, only the final wage received in the last year is made the base upon which the pension is allowed. Thus a corporation which has a retirement system will retire its employes on a certain percentage of the last year's pay. The retirements in the United States army are based on the last annual amount received; and in the judiciary, when the judges retire, under the law they are retired at full pay, that is, the amount shall be the same amount that was received the year prior to retirement. However, in the state teachers retirement system it appears that the desire was not to take the figures covering the last annual salary received to be the final annual average salary, but rather that it should cover a series of years, which was placed in section 7896-1 to be "the ten years immediately preceding his date of retirement." This safeguards the funds of the system, tending to keep it solvent, but militates in a sense against the teacher, because it brings in, in the first few years at least of the ten calendar years computed, a wage much lower in many cases than that obtaining at the present time or at the time of the enactment of the state teachers retirement law.

It must therefore be held that the phrase "average annual compensation" is an entirety and should be treated as such, and that the \$2,000 is the limitation to be used upon the average of the annual compensation and not that only \$2,000 annual compensation can be used in ascertaining the average itself.

In your fifth question you indicate that a teacher asks for retirement at the middle of the school year, her retirement being effective as of the end of the year. If the teacher should apply for retirement in January, 1921, retirement being effective August 31, 1921, and pension starting in September, 1921, you desire to know whether, in computing final average salary, her contract salary for 1921 would be considered for the entire year, or would her final average salary be based on her salary for the ten years preceding the date of her request, or would the part of her salary earned during 1920-1921 be counted as her annual salary for that year.

Section 7896-1 (c) General Code, heretofore discussed, says that the final average salary shall be computed for the time covered in the ten years immediately preceding his "*date of retirement.*" This then means that the ten years must be computed from August 31, 1921.

Section 7896-28 says:

"The retirement board \* \* \* shall credit no time during which a member was absent without pay."

In the case you mention the teacher might be absent without pay for the latter half of the school year and under this section no credit could be given for the time when absent, and under the rule previously given, that the compensation to be computed should be that which was actually received, then the teacher earned in the school room "as a teacher" only the compensation which was received up to the middle of the year. A situation such as this could be obviated if the law said "previous to the date of request for retirement," but on the other hand it says "preceding his date of retirement," which of course is in every instance August 31, unless it should be a case of disability retirement, which cases are effective upon action by the

retirement board and not at the end of the current school year. In disability retirement cases it would appear that the ten calendar years could run back from the date of the retirement, also in order to ascertain the final average salary earned as a teacher. There does not appear to be any authority in the law for saying that the teacher's contract salary for the last year of service previous to retirement should be considered for the entire year, but what would actually obtain would be that the salary actually earned during the last year "in service as a teacher" would have to be the figure used for the last year in making up the aggregate of the ten preceding calendar years, to be divided by the number of years engaged as a teacher, in order to find the final average salary of that particular teacher. In the last table given you will note that the last entry shows the case of a teacher who, during the year 1920, taught but one month and received \$300 for that month and thereafter, during the nine remaining months of the school year, did not work at all "as a teacher." For a ten months school at \$300 per month this would have been an annual salary of \$3,000 per year; \$300 was actually earned as a teacher and \$2,700 of such contract salary was apparently not earned at all. It would hardly be fair to add the \$2,700.00 not earned as a teacher during the last year in the computation which is presumed to cover in its items the salary actually received by the teacher as earned compensation.

You are therefore advised, in answer to your specific questions, based upon the above sections of the General Code, that:

1. In computing the "final average salary" (7896-1 G. C.) as defined in the teachers retirement act, the total earned compensation as an employed teacher during the ten calendar years preceding retirement should be divided by the number of years in which such compensation as a teacher was earned and received.

2. Where a teacher was on leave of absence or out of active service as a teacher for two years during the period of the last ten calendar years, prior to the date of retirement, the total of the compensation received as a teacher during such ten calendar years should be divided by eight, the number of years in which such compensation as a teacher was actually earned and received.

3. Where a teacher desiring to retire at the close of the year 1920-1921 was out of active service as a teacher for two years during the last ten calendar years prior to retirement, and her salary for the school year 1916-1917 was \$1,000, and her salary for the school year 1919-1920 was \$1,200, to compute her compensation "earnable as a teacher" as \$1,000 during the two years she was out of service as a teacher, would be incorrect, for her compensation earnable as a teacher during such two years would be the amount paid by the employing board of education during such two years. Unless the person was employed as a teacher and received compensation therefor during such period of two years, such person would have no compensation earnable as a teacher during that two years.

4. In computing final average salary under the teachers retirement act, the retirement board should credit the teacher with all the compensation received as a teacher during the preceding ten calendar years and the total of such compensation, when divided by the number of years in which compensation is earned as a teacher, would be the final average salary, but where such final average salary exceeds \$2,000, such excess above \$2,000 cannot be considered.

5. Where a teacher asks retirement at the middle of the school year, such retirement is effective as of August 31 following, unless in case of disability retirement, and in computing final average salary the salary earned and received during the year 1920-1921 should be counted as her earnable compensation received as a teacher during that year.

Respectfully,  
JOHN G. PRICE,  
*Attorney-General.*