

1829.

CUSTODIANS' PENSION FUND—WHEN ONCE ESTABLISHED CANNOT BE DISSOLVED BY ACTION OF BOARD OF EDUCATION—DISCUSSION OF BOARD'S AUTHORITY.

SYLLABUS:

1. *A custodians' pension fund when once established in a city school district according to law, can not be dissolved by action of the board of education of the school district in which the fund is maintained or by the action of the custodians who are members of the fund, except as the same might be done by the united action of all the beneficiaries of the fund and those interested therein.*

2. *The language of Section 7882, General Code, providing that, in city school districts where a custodians' pension fund has been established, the board of education shall appropriate for the uses of said pension fund "a sum equal to not less than one-tenth nor more than one-fifth of one per cent of the amount levied and collected by said school board for all purposes," does not include levies made after a vote of the people authorizing such levies for bond retirement purposes.*

COLUMBUS, OHIO, March 9, 1928.

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

GENTLEMEN:—This will acknowledge receipt of your communication which reads as follows:

"You are respectfully requested to furnish this department your written opinion upon the following:

Amended Senate Bill No. 41, enacted by the 87th General Assembly, 112 O. L. 99, authorizes boards of education to provide a pension fund for custodians of the public schools. Under this act a certain city board of education set up a custodians' pension fund, into which the custodians have paid 2% assessments since October 15th, 1927, the board of education having thus far made no contributions to the fund.

Question 1: After being established, could such fund be dissolved at the request or insistence of the board of education or the custodians in case the assessment on either party became burdensome?

Question 2: Does the contribution to be made by the board of education under Section 7882 G. C., for the custodian's pension fund of a fund equal to not less than one-tenth nor more than one-fifth of one percent of the amount levied and collected by said school board for all purposes include the amount raised for bond retirement purposes?"

Amended Senate Bill No. 41, enacted by the 87th General Assembly on March 7, 1927 (112 O. L. 99), is entitled:

"An Act—To authorize boards of education to provide a pension fund for custodians of the public schools."

The act is codified as Sections 7875 to 7888, inclusive, of the General Code of Ohio. By its terms, the establishment of a pension fund for custodians of public schools

is confined to city school districts. In Section 7875, General Code, setting forth the definitions of words and phrases used in the act, the phrase "board of education" is defined as follows:

"'Board of education' shall mean the board of education of any city school district in which a pension fund is established as provided for by this act."

In the same section, the word "custodian" is defined as follows:

"'Custodian' shall mean any person regularly employed as caretaker of a building or of buildings under the custody and care of the board of education, and for the purposes of this act shall include all such custodians as have been promoted or may be hereafter promoted to executive positions."

The act provides in substance that boards of education in city school districts may create a custodians' pension fund by a majority vote of the members of the board. When so created, said fund is to be under the management and control of a board of trustees. Provision is made for the personnel of said board of trustees, the manner of the election of such trustees, their term of office, the manner of organization of said board and its duties with reference to the acceptance of gifts, investment of moneys received by it, the making of rules and regulations for the collection and distribution of the fund and the filing of reports.

Provision is also made for appropriations from public funds by the board of education for the benefit of the said pension fund and for the assessment of members of said fund. The more pertinent provisions are contained in Sections 7876, 7877, 7878, 7880, 7882, 7883, 7884 and 7887, General Code, which read in part as follows:

Sec. 7876. "When the board of education of any city school district by resolution adopted by a majority vote of the members thereof, declares that it is advisable to create a school custodians' pension fund for said district, such fund shall be under the management and control of trustees to be known as 'the board of trustees of the school custodians' pension fund' for such district."

Sec. 7877. "Such board of trustees shall be composed of not less than three nor more than five members, as the board of education may determine, one of said trustees to be elected by said board of education and the remaining trustees to be elected by such custodians as shall have requested such election and have signified in writing their intention of accepting the provisions of this act."

Sec. 7878. "The first election of said board of trustees shall be held within thirty days after a majority of the custodians shall have filed with the board of education of the district, a request that such election be held. At the time of filing such request for election of a board of trustees not less than a majority of said custodians shall signify in writing their intention to become a member of such pension fund, giving their full name and address, and further signifying their willingness to contribute to said pension fund, annually, from their salary a sum not to exceed two per cent of said salary, said payments to be made in such manner and at such time as the board of trustees may determine."

Sec. 7880. "The members so elected shall serve for one year or until their successors are elected and qualified. * * * Such board of trustees shall administer and distribute the school custodians' pension fund."

Sec. 7882. "In every city school district where the board of education has authorized the establishment of a custodians' pension fund, the board of education shall cause to be paid into said pension fund a sum equal to not less than one-tenth nor more than one-fifth of one per cent of the amount levied and collected by said school board for all purposes, by the appropriation of said sum from its general or contingent fund."

Sec. 7883. "As soon as the board of trustees shall meet and organize they may order and assess each member of such custodians' pension fund a sum not to exceed two (2) per cent of the annual salary of each custodian. Said payments shall be made in the manner ordered by the board of trustees. Each custodian who shall thereafter become a member of the custodians' fund shall be assessed in like manner as those joining the pension fund and each custodian appointed after the establishment of said fund, shall become a member and pay like assessments, and his acceptance of such appointment shall be deemed an acceptance of this act and of the rules of the board of trustees."

Sec. 7884. "The board of trustees of the pension fund may take any gift, grant, devise or bequest, moneys or real or personal property, upon such terms as to investment or expenditures thereof, for the benefit of such fund, as may be fixed by the grantor."

Sec. 7887. "Such board of trustees shall make all rules and regulations for the collection and distribution of said funds, and the amount thereof, including the qualifications of those to whom any portion of which shall be paid and the amount thereof, but no rules or regulations shall be deemed to be in force or effect until approved by the two-thirds ($2/3$) vote of the board of trustees of the school custodians' pension fund."

It will be noted that the entire administration of a custodians' pension fund when once established, is under the control of a board of trustees, who are charged with the administration and distribution of the fund and with the duty of making such rules and regulations as may be necessary to carry out the object to be attained by the establishment of the fund.

The board of education of the district wherein the fund is created is vested with no authority whatever in the premises other than to authorize the establishment of the fund in the first instance and to provide for the election of one member of the board of trustees. When this is done, it becomes the mandatory duty of the board to make appropriations as provided by Section 7882, *supra*, for the benefit of said pension fund. Moreover, it appears that the board's power to establish the fund is not absolute, but is dependent on the concurrence of a majority of the school custodians in the district, as a board of trustees can only be elected when, after the board of education determines by resolution the advisability of the creation of a school custodians' fund, a majority of the custodians of the district request such election and agree to become members of the fund and to contribute to said fund annually a sum not to exceed two per cent of their salaries.

When the fund is created and a board of trustees elected, the money and property, which come under the control of the board of trustees for the use of the pension fund, whether from appropriations made by the board of education, from assessments upon the members of the custodians' pension fund or from gifts, grants, devises or bequests, become trust property for the uses and purposes of the pension fund; and such fund must be administered by the board of trustees as such.

So soon as a custodian becomes a contributing member of such fund he becomes a beneficiary of the trust represented by the fund and can not be deprived of his beneficial interest in such fund without his consent or otherwise than in accordance with such equitable rules as he may have consented to at the time of his becoming a member.

The board of education for the district in which a custodians' pension fund has been created has no control whatever over the disbursements of the fund or the making of rules and regulations for its disbursement. The board of education could not therefore take any action, after once creating the fund, to dissolve it or discontinue its existence. Nor can the contributing members themselves discontinue the fund; although by united action of all members and the board of trustees, in conjunction with the board of education, this result might be accomplished. That is, all the beneficiaries of the trust including the contributing members, pensioners and the board of education might by agreement discontinue the existence of the fund and dissolve the same. The fund could no doubt also be discontinued and dissolved by appeal to a court of equity, where upon a showing that the cost of the maintenance and administration of the fund was so disproportionate to its benefits as to make its continuance burdensome, the court would no doubt order its discontinuance and distribution in accordance with the equities of the situation.

The answer to your second question is entirely dependent on the construction to be placed on Section 7882, *supra*, wherein it is stated that the board of education, in city school districts where a custodians' pension fund has been established shall

“cause to be paid into said pension fund a sum equal to not less than one-tenth nor more than one-fifth of one per cent of the amount *levied and collected by said school board for all purposes.*”

The primary object to be attained in the construction of the statutes is to so interpret the language contained therein as to give effect to the intention of the Legislature in enacting them. Though the question is not free from doubt, I am inclined to the view that the language of Section 7882 above quoted was not intended to include levies made and collected by school boards with the consent of the electorate for bond retirement purposes. It seems to me that the language “levied and collected by said school board for all purposes” refers only to the levies authorized by law to be made under ordinary circumstances *by the school board* for school purposes, and not to those levies which can only be made by a vote of the people. In practically all cases where bonds are issued by a board of education for the purpose of acquiring a site, or constructing a school house, or for other like purpose, because of the net indebtedness limitations fixed by statute the consent of the people is required, and levies for the purpose of retiring bonds issued for such purposes can only be made by the board after a favorable vote has been obtained. It will be observed that the custodians' pension fund is established by action of the board of education alone, and it is believed that only those levies which the board is authorized to make, by virtue of the power vested in it, were intended by the language of the section under consideration.

Specifically answering your questions, it is my opinion that:

(1) A custodians' pension fund when once established in a city school district according to law, can not be dissolved by action of the board of education of the school district in which the fund is maintained or by the action of the custodians who are members of the fund, except as the same might be done by the united action of all the beneficiaries of the fund and those interested therein.

(2) The language of Section 7882, General Code, providing that, in city school districts where a custodians' pension fund has been established, the board of education shall appropriate for the uses of said pension fund "a sum equal to not less than one-tenth nor more than one-fifth of one per cent of the amount levied and collected by said school board for all purposes," does not include levies made after a vote of the people authorizing such levies for bond retirement purposes.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1830.

COURTS—POWER TO CORRECT MISTAKES IN JUDGMENT ENTRIES
—NUNC PRO TUNC ENTRY DISCUSSED.

SYLLABUS:

1. *It is the duty of a court and it has power at any time to make an order correcting a mistake in the record of a judgment. A court has power to amend its records so as to make them conform to the truth even after the term has expired.*

2. *The purpose of a nunc pro tunc entry is to correct the record of the court in a cause so as to make it set forth an act of the court, which although actually done at a former term thereof, was not entered upon the journal.*

COLUMBUS, OHIO, March 9, 1928.

HON. P. E. THOMAS, *Warden, Ohio Penitentiary, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter of recent date which reads:

"We have confined in the Ohio Penitentiary one, Charles Sanders, our Serial Number 56946, admitted to this institution from Hamilton County on March 31, 1927, for the crime of 'Pointing Firearms'.

The indictment in this case shows that Sanders was indicted for 'pointing firearms' and the Journal Entry provides that 'Charles Sanders be imprisoned and confined in the Ohio State Penitentiary, Columbus, Ohio, and kept at hard labor, but without any solitary confinement for one (1) year', etc. The Certificate of Sentence states that Sanders plead guilty to 'pointing firearms'.

We have requested the authorities of Hamilton County to state what section of the General Code this man was sentenced under, but as you will note from the letters and replies shown in Sanders' file, herewith attached, we have not received proper authority to enable us to enter this man properly on our records.

Therefore, we ask your kindly guidance in this case."

From information furnished me it appears that there were two cases in the Court of Common Pleas of Hamilton County, styled the *State of Ohio vs. Charles Sanders*, and that the following action was taken with reference thereto: