

1430.

CITY SCHOOL DISTRICT—SCHOOL BUILDINGS—TERM "CUSTODIAN"
USED IN PENSION FUND ACT CONSTRUED—WHEN HEATING
PLANT ENGINEER A CUSTODIAN.

SYLLABUS:

1. *The term "custodian", as used in the act providing for a pension fund for the custodians of the public schools in city school districts, applies not only to head janitors or caretakers of the school buildings, but to all those persons regularly employed on a salary who are charged with the duty of either overseeing or performing the janitorial work in a building or buildings belonging to his school district.*

2. *An engineer in charge of the heating plant of a school building is not a "custodian", as the term is used in the act providing for a pension fund for the custodians of school buildings in city school districts, unless he in fact is in charge of some part of the janitorial work for the building.*

COLUMBUS, OHIO, January 20, 1930.

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

GENTLEMEN:—This will acknowledge receipt of your request for my opinion which reads as follows:

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

Section 7875 of the General Code, as amended in 113 O. L. at page 627, contains the following:

"'Custodian' shall mean any person regularly employed to have charge of the janitorial work 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 hereafter be promoted to executive positions.'

Question 1. Does the word 'Custodian' as thus defined, apply only to the person employed to have charge of the janitorial work in a building or buildings or would it also apply to any employes working under such custodian in janitorial capacities? In many instances, one person is employed to have charge of a building and several additional persons are employed to assist in the work, hence, this question as to the status of such employes in connection with the custodian's pension fund.

Question 2. Would a person employed as an engineer in charge of the heating plant and fixtures in connection therewith come within the definition of a custodian?"

In 1927 the Legislature of Ohio passed an act entitled "An Act to authorize boards of education to provide a pension fund for custodians of the public schools." 112 O. L. 99. The act, by its terms, applied to boards of education in city school districts only. In Section 1 of the act, codified as Section 7875, General Code, the term "custodian" was 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."

Said Section 7875, General Code, was amended by the 88th General Assembly. 113 O. L. 627. As so amended, the term "custodian" is defined as stated in your letter.

The significant change made by the amendment in the language defining the term "custodian", is that the expression "employed as caretaker" used in the original statute, is changed in the amended statute to "employed to take charge of the janitorial work."

There of course must have been some purpose in making this change, else it would not have been done. It is rather difficult to say just what the purpose of the change was as the terms "caretaker" and "custodian" are practically synonymous, and both terms apply to the persons "in charge" of a person or thing. The terms "caretaker" and "custodian" standing alone, are somewhat broader, however, than to merely import being in charge of "janitorial work". "Caretaker" is defined by Webster as:

"One who takes care or charge of any place, person or thing, as of a child, of the premises of an insolvent or of an estate or house during the absence of the owner or tenant."

"Custodian" is defined as:

"One who has care or custody as of some public building; a keeper."

Custody means care, inspection or guardianship. In *Turner vs. Coffin*, 9 Idaho p. 338, 74 Pac. 962-968, it is stated:

"'Custody' means a keeping, guarding, care, watch, inspection, preservation or security of a thing, and carries with it the idea of the thing being within the immediate personal care and control of the person to whose custody it is subjected."

In the case of *Martin vs. U. S.*, 168 Fed. 198-204, "custody" is defined as follows:

"'Custody' means keeping, and implies responsibility for the protection and preservation of the thing in custody."

Strictly speaking, the director of schools in city school districts is the person directly in charge of the school buildings of the district. It is provided by Section 7695 of the General Code, with reference to the director of schools, that:

"He shall have the care and custody of all property of the school district, real and personal, except moneys, oversee the construction of buildings in the process of erection and the requirements thereof."

A board of education in a city school district is also authorized by the terms of Section 7690, General Code, to elect a superintendent of buildings or it may, by authority of the same section, authorize the director of schools to appoint janitors or superintendents of buildings. Where a superintendent of buildings is elected for a school district he would no doubt be directly in charge of the building, including the janitorial work, although probably this would not necessarily be so as the statute does not set out just what duties a superintendent of building shall have, leaving the fixing of the duties of such a person to the board of education.

At any rate, it would seem that the Legislature did not intend that the term "custodian", as used in the statute, was to apply to a director of schools or a superin-

tendent of buildings, as it speaks of custodians being promoted to executive positions. Furthermore, where the board employs a superintendent of buildings and a director of schools, there would be but one in each district, whereas, the context of the act in question seems to imply the providing of a pension fund for the persons in charge of the janitorial work of the several buildings, other than the director of schools or the commissioners of buildings, if such a person is elected in the district.

Strictly speaking, a person in charge of the janitorial work of a building or buildings of a school district would be a person employed to direct the work, and would be ultimately responsible for the work—in everyday language, the “boss”, sometimes called a head janitor. If that interpretation is to be given to the statute, “custodians” to which the act applies, include the head janitors of the several buildings only, or the persons charged with the duty of overseeing the janitorial work of one or more buildings. Adopting that view of the statute, however, renders the interpretation no different than would have been the interpretation before the amendment. In other words, if the term “custodian” is to be confined to those persons who oversee the work and have the responsibility of directing the workmen who actually perform the janitorial work only, then it is confined to the caretaker, and does not credit the amendment with having made any change in the statute.

This interpretation would be contrary to a not unfamiliar principle of statutory construction, and one which appeals to our common sense, that any considerable change in the phraseology of a statute, upon amendment, indicates a legislative intent to change the effect of the statute to the extent of the change in language. Thus, in *Bloom vs. Richards*, 2 O. S. 388, 402, Judge Thurman said: “It is a general presumption that every word in a statute was inserted for some purpose, * * * When a considerable change is made in the phraseology of a former law, the inference is reasonable that a change of meaning was also intended.” See also, *The Wheeling & Lake Erie Railroad Company vs. The Toledo Railway & Terminal Company*, 14 O. C. C. N. S. 324.

The words of the statute, “in charge of the janitorial work”, need not necessarily be limited to the overseers of the work, or the persons charged with the ultimate responsibility for getting the work done, but may be, and often are, used as applying to persons who actually do the work or are directly in charge of the work.

To hold that the term “custodian” as used in the statute, applies to the head janitor, or the person in charge of the employees engaged in doing the janitorial work about a school building, only, would not be giving any effect to the fact that the statute was amended in 1929. Head janitor, or overseer of the work is, in my opinion, synonymous with “caretaker”, as used in the original statute. I am therefore of the opinion that the statute as amended, contemplates the inclusion within the term “custodian” of all the persons doing janitorial work, or charged with the duty, by the terms of their employment, of doing the janitorial work in and about the school building.

There are, however, other limitations on the classes of employees to be regarded as custodians, as indicated by other provisions of the law. It apparently is contemplated that employees only, who receive a salary, are to be regarded as beneficiaries of the custodians’ pension law. Section 7883, General Code, being a part of the act relative to the pension fund for custodians of public schools, provides in part, as follows:

“As soon as the board of trustees shall meet and organize they shall order and assess each member of such custodians’ pension fund a sum equal to four (4) per cent of the annual salary of each custodian in so far as such annual salary does not exceed \$2,000.00 which contribution shall be returnable to him under the same conditions as are provided for the return of contributions to

teachers under the state teachers retirement system, as provided in Section 7890-40 of the General Code. * * * ”

The language above quoted clearly indicates that the membership of a custodians' pension fund is confined to those employees who receive a salary.

In the case of *Fagan vs. City of New York*, 84 N. Y. 348, 352, the term "janitor" is defined as follows:

"Janitor is understood to be a person employed to take charge of rooms or buildings, to see that they are kept clean and in order; to lock and unlock them, and generally to care for them."

The above is the definition given by Bouvier for the term "janitor". Confining the term strictly to the definition given, it would probably not include the heating of the building, as in many instances, the heating of large buildings is done separately from the janitorial work, the heating being in charge of what is often called a heating engineer.

In referring to the term "janitorial work" of small buildings we usually think of the heating of the building, as a part of the work, but this is not true with reference to larger buildings, either public or private. The heating of the building is entirely separate from the cleaning of the building or the keeping of same in repair. It is, of course, true that in many buildings even of the larger type, the head janitor or custodian, is directly in charge of the heating plant, and is required to be licensed to operate steam boilers for the heating plant of the building before he can be employed as janitor or custodian of the building, but this is not usually the case. Ordinarily, the heating and janitorial service are entirely separate, but oftentimes are under the same superintendent. I am of the opinion, however, that the language of the statute is not sufficiently broad to include the heating engineer unless he be at the same time the caretaker of the building or in charge of the janitorial work of the building, as well as the heating of the building.

In specific answer to your question, therefore, I am of the opinion:

1. The term "custodian", as used in the act, providing for a pension fund for the custodians of the public schools in city school districts, applies not only to head janitors or caretakers of the school buildings, but to all those persons regularly employed on a salary who are charged with the duty of either overseeing or performing the janitorial work in a building or buildings belonging to his school district.

2. An engineer in charge of the heating plant of a school building is not a "custodian", as the term is used in the act providing for a pension fund for the custodians of school buildings in city school districts, unless he in fact is in charge of some part of the janitorial work for the building.

Respectfully,

GILBERT BETTMAN,

Attorney General.

1431.

FEES—RESULTING FROM CIVIL CASES—VILLAGE MAYOR AND MARSHAL MAY RETAIN.

SYLLABUS:

The mayor and marshal of a village may retain fees in civil cases tried by the mayor of such village, for their own use.