powers and jurisdiction conferred in this chapter is first obtained."

The Juvenile Court Code was codified by the Legislature and Section 1 of Amended Senate Bill No. 268 provides as follows:

"That Section 1639-1 to 1639-60 inclusive of the General Code be enacted to read as follows:"

These sections would, therefore, come within Chapter 8 of the Code entitled "Juvenile Court" and the reference to the "judge of the court exercising the powers and jurisdiction conferred in this chapter" is clearly and obviously to the judge of the court exercising the jurisdiction of the Juvenile Court.

Respectfully,
HERBERT S. DUFFY,
Attorney General.

2411.

PUBLIC EMPLOYES RETIREMENT SYSTEM—EMPLOYE—MEMBERSHIP COMPULSORY—EXEMPTIONS—TYPE OF APPLICATION TO BE FILED—SEE OPINION 2423, MAY 9, 1938.

SYLLABUS:

It is compulsory for an employe of a charter city that has not established a retirement system for its employes to become a member of the Public Employes Retirement System, unless such employe becomes exempted from membership, by filing written application for such exemption with the Retirement Board within three months after the Act goes into effect, or, such employe is a new member over the age of fifty years, and becomes exempted by filing written application for exemption within three months after being regularly appointed an employe, or, such employe comes within that class or group that the board has authority to exempt from compulsory membership, as provided in Section 486-33, *General Code, or, such employe comes within the provisions of any other*

retirement system established under the laws of this state or, such employe comes within the provisions of a police relief fund or a firemen's pension fund established under provisions of law.

COLUMBUS, OHIO, May 7, 1938.

State Employes Retirement Board, Columbus, Ohio.

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

> "During the present special session of the General Assembly, amended House Bill No. 776 was enacted and signed by the Governor on January 14th. The provisions of this bill extended the scope of the present State Employes Retirement Law to include county and municipal employes, employes of health districts, conservancy districts, and public librarians within the State of Ohio. All such employes who do not now belong to a pension system established under the laws of the state or by city charter are to be covered.
>
> The question arises as to whether the provisions will be compulsory for the employes of chartered cities in case the charters of such cities do not contain provisions relative to retirement systems for their employes. Inasmuch as there are no provisions for optional membership, that question is quite important as to whether any conflict will exist between this law and the law granting privileges to chartered cities.
>
> The above bill did not contain an emergency clause and will therefore not be in effect until on or about April 15, 1938. Despite that fact it is quite important that this board should know your opinion on the question at your earliest convenience. Since this question is already being raised rather emphatically, your kind attention is respectfully requested."

Section 486-33, General Code, reads in part, as follows:

> "A state employes retirement system is hereby created for the employes of the state of Ohio. * *"

Section 486-33a, General Code, reads as follows:

> "The state employes retirement system created by Section 486-33, General Code, shall hereafter be known as the

public employes retirement system, and the state employes retirement board shall hereafter be known as the public employes retirement board. Provided, however, that all legal, valid and authorized contracts and agreements entered into by the state employes retirement board shall be binding on the public employes retirement board. Beginning July 1, 1938, in addition to the present membership of said retirement system, there shall be included therein all county, municipal, conservancy, health and public library employes as defined herein, and such county, municipal, park district, conservancy, health and public library employes, except as otherwise provided herein, shall have all the rights and privileges and be charged with all the duties and liabilities provided for in the laws relating to said retirement system as are applicable to state employes. Provided, however, that any original member may be exempted from membership by filing written application for such exemption with the retirement board within three months after this act goes into effect; and any new member over the age of fifty years may be exempted from membership by filing written application for exemption with the retirement board within three months after being regularly appointed as a county, municipal, park district, conservancy, health or public library employe."

Section 486-33c, General Code, reads in part, as follows:

"For the purposes of this act, 'county or municipal employes' shall mean any person holding a county or municipal office, not elective, in the state of Ohio, and/or paid in full or in part by any county or municipality in any capacity whatsoever. * * But said term shall not include those persons who come within the provisions of any other retirement system established under the provisions of the laws of this state or of any charter, nor shall the provisions of this act in any manner apply to a police relief fund or a firemen's pension fund established under provisions of law. The board shall have authority to exempt from compulsory membership in the retirement system classes or groups of employes engaged in work of a temporary, casual or exceptional nature, but individuals in any such class or group may become members by making application therefor, subject to the approval of the retirement board; provided, however, that any county, municipal, conservancy, health or public library employe who

is, or who becomes, a member must continue such membership as long as he is such employe, even though he may be in or transferred to an exempted class or group. In all cases of doubt the retirement board shall determine whether any person is a county, municipal park district, conservancy, health or public library employe as defined herein, and its decision shall be final. * *"

It is to be observed from the provisions of Sections 486-33, 486-33a, and 486-33c, General Code:—that it is compulsory for any person holding a municipal office not elective within the State of Ohio, and paid in full or in part by any "municipality in any capacity whatsoever," to be a member of the Public Employes Retirement System, *unless* such municipal employe becomes "exempted from membership, by filing written application for such exemption with the Retirement Board within three months after the act goes into effect," or, such employe is a new member over the age of fifty years, and becomes exempted by filing written application for exemption within three months after being regularly appointed an employe, or, such employe comes within that class or group that the board has authority to exempt from compulsory membership, as provided in Section 486-33, supra, or, such employe comes within the provisions of any other retirement system established under the laws of this state or of a charter, or, such employe comes within the provisions of a police relief fund or a firemen's pension fund established under provisions of law.

There is no provision in the charter of the City of Cleveland for the establishment of a pension system for its municipal employes. It must be said that the establishment and payment of a retirement pension to municipal employes for services rendered for a certain number of years, or, until a certain age is reached, or, upon disability, can be classed as a matter of "local concern." In order to be entitled to certain benefits in such a retirement system the public employe renders service and contributes a certain percentage of his earnable salary or compensation. The rendering of service and contributing from salary by a public employe is the reason for such a pension not being considered as a gratuity. As stated in the case of *O'Dea* vs. *Cook*, 176 Calif., 659, "A pension is a gratuity only when granted for services previously rendered which gave rise to no legal obligation at the time they were rendered," but "where services are rendered under a pension statute, the pension provisions become a part of the contemplated compensation and a part of the contract itself."

It is important to first observe that the very language of Section 486-33c, General Code, implies that a charter city may make provisions for establishing a pension system by excluding from membership any municipal employe who comes within the provisions of, or, who is eligible to membership in a retirement system established under the provisions of a charter.

I am unable to find any case decided in Ohio, wherein there was discussed the validity of a provision in a charter establishing a retirement system for municipal employes. However, an opinion appearing in Opinions of the Attorney General for 1931, Volume II, page 947, is worthy of note. Although the question discussed therein was limited to whether or not the charter city of Cincinnati that had "inaugurated a pension system for all employes except members of the police and fire department," had authority to pay from the automobile license and gasoline tax funds pensions for such of those employes whose regular compensation was legally payable from those funds, the opinion justified payment of a pension to a public employe by the following language:

> "The doctrine upon which rests the justification for the payment of a pension to a public employe is stated by Judge Allen, in the case of *State, ex rel.* vs. *Kurtz*, 110 O. S., 332 at page 343, as follows:
>
> 'Contributing to a state teachers' retirement fund is a proper expenditure of money for a school purpose. Such a retirement system increases the morale and tends to raise the standard of the teaching force.'
>
> This doctrine is equally applicable where contributions of public money are made to a pension fund for the purpose of paying pensions to municipal employes."

The conclusion that a charter city may establish a retirement system for its employes must be reached when we consider the provisions of Sections 3 and 7, of Article XVIII of the Constitution of Ohio, which read as follows:

> "Sec. 3. Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.
>
> Sec. 7. Any municipality may frame and adopt or amend a charter for its government and may, subject to the

provisions of Section 3 of this article, exercise thereunder all powers of local self-government."

"Local self-government" referred to in Section 3, of Article XVIII of the Constitution of Ohio, was defined in the case of *City of Mansfield* vs. *Endly*, 38 Ohio Appellate, 533, by the following language:

> "By the expression, 'to exercise all powers of local self-government,' we hold it to be understood that a municipal corporation may enact all such measures as pertain exclusively to it, in which the people of the state at large have no interest or concern, and which they have not expressly withheld by constitutional provision. Applying this understanding to the ordinance in question, we are of one mind that the people of the state of Ohio outside the corporate limits of the city of Mansfield, are not interested in the amount of the salary paid by it to its councilmen, and that therefore the subject matter of the ordinance is purely one of local concern; and we know of no granted power, inalienable right, or constitutional limitation that in any way abridges the city's power to enact such legislation unless it be, as suggested by it, in contravention of the powers granted to the legislature in Section 13 of Article XVIII and Section 6 of Article VIII, in that the legislature may limit the power of municipalities to incur debts for local purposes and restrict the power of contracting debts."

In an opinion appearing in Opinions of the Attorney General for year 1931, Volume II, page 889, the first branch of the syllabus reads as follows:

> "A municipal corporation, which, by force of its charter adopted by authority of Section 7 of Article XVIII of the Constitution of Ohio, possesses all powers of local self-government granted to it by the Constitution of Ohio, may provide group life or indemnity insurance for its officers or employes and pay the premium for such insurance, either in whole or in part, from the public funds of the municipality, unless it is prohibited from so doing by the provisions of its charter."

The same conclusion was reached in Opinions of the Attorney General for year 1927, Vol. I, page 37 and for year 1928, Volume II,

page 1099. In an opinion numbered 882, rendered by me on July 19, 1937, I concurred in the conclusions reached in the above mentioned opinions and held in the first and third branches of the syllabus, as follows:

> "1. The city council of a non-charter city may legally authorize group life insurance on behalf of any or all of the employes of such municipality by virtue of Section 3 of Article XVIII of the Constitution of Ohio.
>
> 3. Group life insurance may be authorized without regard to the compensation of employes of the municipality and premiums for such insurance may be paid in a lump sum for all employes participating."

In my judgment no distinction exists between a municipality exercising authority to purchase insurance on behalf of any or all of the employes of such municipality and paying for the same, and a municipality establishing a retirement system for the benefit of its employes whereby the employes contribute a certain percentage of their compensation and the municipality contributes a certain amount for the benefit of each employe.

Therefore, in view of the foregoing, it must be said that a charter city in the exercise of its powers of local self-government may provide for the establishment of a retirement system for its employes, unless it is prohibited from so doing by the provisions of its charter.

It therefore becomes important to determine that if a charter city has authority to establish a retirement system for its employes, and it does not do so, may the state enact legislation that makes it compulsory for the employe of a city to become a member of a State Public Employes Retirement System?

It is important to note that a municipality acts in a twofold character. One, that can be termed "public," since it concerns the state at large, in so far as it acts as the state's agent in government; the other can be termed "private" in so far as it acts to provide the local necessities and conveniences for its own local inhabitants. Although by the provisions of Section 3 of Article XVIII of the Constitution of Ohio, municipalities were given authority to exercise all powers of local self-government, the state was not deprived of its sovereignty over such municipalities, and such municipalities still remain the "agencies" through which the state performs certain obligations which relate to the peace, morals, health and safety of people of the state. This principle of law was well stated in the case of *State, ex rel. Rainey, et al.* vs. *Davis, et al., Co. Comrs.*, 119 O. S., 5496, wherein at page 599, the Court said:

> "By the adoption of Section 3, of Article VIII, the state did not cede the territory of the municipalities to other sovereigns but only surrendered to the inhabitants of such territory the sovereign right to locally govern themselves, and as to all sovereign powers not thus surrendered the sovereignty of the state over such territory remained supreme, and the municipalities remained as they theretofore had been political subdivisions of the state agencies through which the state administered its government. This theory of the relationship of the municipalities to the state, and the respective sovereign powers of each, has been considered and neces sarily decided by this court in a number of cases."

By the provisions of Section 34, of Article II, of the Constitution of Ohio, the state has authority to pass laws "fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employes; and no other provision of the constitution shall impair or limit this power."

It is clear that the language "all employes" as used in Section 34, Article II of the Constitution of Ohio, is broad enough to include municipal employes. Therefore, it can be said that by the express provisions of Section 34, Article II, of the Constitution of Ohio, the State has authority to provide for a retirement system that provides for the "comfort" and "general welfare" of municipal employes.

In the case of *State ex rel. Retirement Board of the State Teachers' Retirement System* vs. *Kurtz, et al., Board of Education of Stark County,* 110 O. S., 332, the Supreme Court justified a teachers' retirement system on the ground that "such a retirement system" increases the morale and tends to raise the standard of the teaching force."

It is common knowledge that the tenure of employment of municipal employes, excepting those in positions under civil service, is uncertain, and remuneration for services rendered is not as high as that paid by private industry. It therefore cannot be denied that the establishment of a retirement system which provides for payment of a pension to municipal employes under certain conditions would have an effect of attracting more efficient, competent and interested persons into municipal employment.

Upon the state is imposed the obligation to do all within its power to protect the health, life, safety and property of all its citizens. This obligation is not local, but general throughout the state. This principle was enunciated by our Supreme Court, in the case of *Froelich* vs. *City of Cleveland,* 99 O. S., 376, in which it was held:

"3. The state and municipalities may make all reasonable, necessary and appropriate provisions to promote the health, morals, peace and welfare of the community. But neither the state nor a municipality may make any regulations which are unreasonable. The means adopted must be suitable to the end in view, must be impartial in operation and not unduly oppressive upon individuals, must have a real and substantial relation to their purpose, and must not interfere with private rights beyond the necessities of the situation."

At page 386, the court said:

"The state is concerned with the peace, health and safety of the people, and the protection of their property and rights, wholly separate from and without reference to any of its political subdivisions; such laws for instance as regulate the morals of the people, the purity of their food, the protection of streams, the protection of life and property, the safety of buildings, and similar matters. These matters are not local—they are general."

To the same effect is the holding in the case of *State, ex rel. Village of Cuyahoga Heights* vs. *Zangerle, Auditor,* 103 O. S., 566, wherein the first two branches of the syllabus read as follows:

"1. The general assembly in the exercise of the legislative power conferred by the constitution has authority to enact general laws prescribing health, sanitary and similar regulations effective throughout the state; and to provide such reasonable classifications therein as may be deemed necessary to accomplish the object sought.

2. The peace, morals, health and safety of the people are a matter of concern to the state, and when the state has enacted general laws providing sanitary and similar regulations effective throughout the state the different subdivisions of the government may be required to contribute to the carrying out of the legislation."

It is only logical to conclude that the more efficient, competent and conscientious the employes of a municipality are, the more efficient and thorough will be their performance of those duties imposed by law on a municipality. It cannot be denied that there is a cor-

relation between the efficient and proper management of a municipality and the peace, morals, health and safety of the inhabitants.

It is stated in Ruling Case Law, Vol. 19, page 726, as follows:

> "The establishment of a pension system for municipal officers and employes, whereby, after serving a certain number of years or upon disablement for injuries received in the course of their duties, they are relieved from active service and paid a certain proportion of their salaries for the remainder of their lives, is not an unconstitutional disposition of public moneys for private use when applied to officers and employes who have entered or continued in the service after the system went into effect.
>
> A pension in such case is not a gratuity but a part of the stipulated compensation. *A judiciously administered pension fund is doubtless a potent agency in securing and retaining the services of the most faithful and efficient class of men connected with those arms of the municipal service in which every property owner and resident of the city is most vitally interested.* Reasons in support of this proposition need not be stated in detail. They are such as readily suggest themselves to every reflecting mind." (Italics, the writer's.)

It therefore can be said that by virtue of Section 34, of Article II, of the Constitution of Ohio, the state has authority to enact legislation that makes it compulsory for employes of a municipality to become members of a retirement system in order to provide for the comfort and general welfare of the employes of the municipalities.

It is probably appropriate at this time to observe:—that, Section 486-33e, General Code, makes it mandatory for a municipal employe who is a member of the Public Employment Retirement System, to contribute to the employes' savings fund the same rate per centum of his earnable salary or compensation, not exceeding two thousand dollars per annum, as is required for each state employe member by Section 486-68, General Code, and provides for payment by the member in accordance with the provisions of Section 486-69, General Code, of an amount not to exceed one dollar per year, to be applied for defraying the expenses of the administration of the retirement system. Section 486-33f, General Code, makes it mandatory for the municipality to pay to the employers accumulation fund for each member employed by it, the "normal contribution and deficiency contribution." Section 486-33g, General Code, makes it mandatory for a municipality to include in its budget the amount certified to it by the retirement board necessary to pay the obligation of the

municipality for the next succeeding year, and requires the county commissioners to allow such amount, and also requires that the legislative body of each municipality appropriate sufficient funds to provide for such obligations of the municipality. Section 486-33d, General Code, provides that the municipality and its heads of departments perform the same duties as are required of the state and heads of departments thereof under the State Employes' Retirement System Act, which includes deducting from the employe's compensation his contribution each and every payroll and his "expense fund" contribution once a year, the transmitting by the head of each department at the end of each and every payroll, a copy of the original payroll showing thereon all deductions made together with warrants or checks covering such total deductions.

Briefly commenting upon the authority of the state to enact such mandatory provisions, it must be said in reference to the deductions from the compensation of municipal employes, that if the state has authority to make membership of a municipal employe compulsory in a State Public Employes Retirement System, by the same token it has the authority to provide for enforcing the deductions of such contributions. A municipal employe has no vested right in his employment. He serves at the pleasure of the appointing authority unless he is a civil service employe, and then he serves "during good behavior and efficient service."

If the state has authority to provide for a retirement system applicable to municipal employes, such municipal employes render their services under existing statutory provisions. Therefore, it must be said that the statutory provisions of the retirement system in a sense become a part of the contract of employment.

In reference to the state mandatorily requiring payment by the municipality of the "normal contribution" and "deficiency contribution" for each municipal employe, the including of such amounts in its budget and appropriation ordinance, deducting from the employe's compensation as additional amount for expenses once a year, the transmitting of copies of payroll, and check for total deductions, etc., it must be said that since the state is performing a governmental duty in establishing such a retirement system, it may impose upon the municipality certain duties and the payment of funds in order that the employes of the municipality may share in the benefits of such retirement system. This proposition of law is well expressed in McQuillin on Municipal Corporations (2nd Ed.), wherein at Section 255, it states:

> "The doctrine everywhere prevails, sustained by early and late cases, that public moneys in the custody of municipalities are subject to state control and disposition for governmental purposes within the limitations of the constitution. Neither the

> charter nor any legislative act concerning the subject can operate as a restriction in this respect. The authority of the legislature of a state to direct a municipality to make any payment of its funds rests upon the fact that such funds are public moneys acquired under the authority of the State for public purposes. The legislature has the same power of disposition over the public moneys in the custody of the municipality that it has over those in the state treasury."

To the same effect is the second branch of the syllabus in the case of *State, ex rel.* vs. *Zangerle, supra.*

By reason of all of the foregoing, I have no hesitancy in reaching the conclusion that either the state or a charter city, provided it is not prohibited from so doing by the provisions of its charter, may provide for the establishment of a retirement system that would include within its provision compulsory membership of municipal employes.

In specific answer to your question it is my opinion that, it is compulsory for an employe of a charter city that has not established a retirement system for its employes to become a member of the Public Employes Retirement System, unless such employe becomes "exempted from membership, by filing written application for such exemption with the Retirement Board within three months after the Act goes into effect," or, such employe is a new member over the age of fifty years, and becomes exempted by filing written application for exemption within three months after being regularly appointed an employe, or, such employe comes within that class or group that the board has authority to exempt from compulsory membership, as provided in Section 486-33, supra, or, such employe comes within the provisions of any other retirement system established under the laws of this state or, such employe comes within the provisions of a police relief fund or a firemen's pension fund established under provisions of law.

Respectfully,

HERBERT S. DUFFY,

Attorney General.