> cases involving the unauthorized practice of the law under such rules and regulations as it may prescribe."

A justice of the peace court is a court of record. *Brackney v. State,* 182 Ind. 343, 106 N.E. 532 (1914). Thus the Supreme Court has exclusive jurisdiction to admit attorneys to practice law in such courts.

It is, therefore, my opinion that it is not lawful for a person not admitted to the practice of law to appear for and represent a person other than himself in proceedings before a Justice of the Peace, and of course a corporation can appear in court only through a duly admitted attorney at law.

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## OFFICIAL OPINION NO. 53

December 27, 1967

**CITIES AND TOWNS—OFFICERS—Town Marshal—Authority of Town Board to Provide Pension.**

Opinion Requested by Mr. Richard L. Worley, Chief Examiner, State Board of Accounts.

This is in reply to your letter of October 9, 1967, in which you request my Official Opinion concerning the following question:

> "Does Chapter 129, Acts of 1905, Section 30, Burns 48-208, authorize the town board to provide a pension for the town marshal?"

You have indicated in the information enclosed with your request for an opinion that the question has arisen in many

instances, but that the most recent instance is the action of a town board of trustees granting to a previously retired town marshal a "pension" of a fixed amount per month, minus the dollar amount received monthly by the retired marshal as social security benefits.

The statute concerned grants to a board of town trustees the power to fix the "compensation" of town officers and employees, including the town marshal.

Municipal corporations, including towns, have only the powers expressly granted them by the General Assembly, those powers necessarily implied in or incident to the express powers, and those essential to the declared purposes of the corporation. *Scott v. City of LaPorte,* 162 Ind. 34, 68 N.E. 278, 69 N.E. 675 (1903). Therefore, unless town boards are authorized by statute to provide a pension plan for town officers and employees, or unless such power is necessarily implied in or incident to an express power, town boards may not provide such a plan. The only express general authority I have been able to find for a town board of trustees to establish a pension plan for town officers and employees is that contained in the Act creating the Public Employees' Retirement Fund, as amended and supplemented, Acts 1945, ch. 340, as amended, Burns §§ 60-1601—60-1626. (The Firemen's Pension Act, Acts 1937, ch. 31, § 1, was amended by Acts 1967, ch. 208, § 1, Burns § 48-6518, to authorize the creation of a firemen's pension fund in towns which maintain a regularly organized and paid fire department. However, the act creating a pension plan for city policemen has not been amended to apply to towns, see Acts 1925, ch. 51, as amended, Burns §§ 48-6401—48-6406.)

It is apparent from your question that some town boards of trustees do desire to establish a pension plan or plans separate and apart from the Public Employees' Retirement Fund, and are attempting to use section 30 of ch. 129 of the 1905 Act, Burns § 48-208, regarding compensation, as authority for the establishment of such plans.

An answer to your question requires a determination of the meaning of the word "compensation" as used in that Act:

> "The trustees, clerk, treasurer and marshal, respectively, shall receive for their services such *compensation* as the board of trustees, by ordinance, may direct; and such board shall cause to be paid to all other town officers and employees a just and reasonable compensation for their services." (Emphasis added.)

The usual methods by which public officers and employees are "compensated" have been explained by our Supreme Court:

> "There are now, and were, at the adoption of our constitution, at least three modes in use of compensating persons engaged in the public service, viz., fees, salaries and wages. These modes are all different, each from the other; and the difference between them has been immemorially well understood.
>
> "Fees are compensation for particular acts of services; as the fees of clerks, sheriffs, lawyers, physicians etc.
>
> "Wages are the compensation paid, or to be paid, for services by the day, week, etc., as of laborers, commissioners, etc.
>
> "Salaries are the per annum compensation to men in official and some other situations. The word "*salary* is derived from *salarium,* which is from the word sal, salt, being an article in which the *Roman* soldiers were paid. See [the dictionaries of] *Richardson, Webster, Bouvier,* and *Wharton.*
>
> "Where the constitution does not provide otherwise, the state may adopt either of these modes of compensating those who may be in her service. . . . These judges, therefore, might be paid by fees, as are justices of the peace; or by *per diem* allowance, wages, as were the Probate judges under the old constitution; or by salary, as are the present judges of the Circuit and Supreme Courts." *Cowdin v. Huff,* 10 Ind. 83, at 85-86 (1858).

The Appellate Court later held that the Legislature used the word "compensation" in the County Salary Act "as applied to payment for official services." *Starr v. Board of Comm'rs.*, 40 Ind. App. 7, 11, 79 N.E. 390 (1906). The Court held that "compensation" or "payment for official services" included payment for expenses as well as salary, fees, wages and per diem. The word "recompense" was also used as a synonym of "compensation." 40 Ind. App. at 12.

A pension paid by a public body, on the other hand, is a "gratuity," *Klamm v. State ex rel. Carlson*, 235 Ind. 289, 291, 126 N.E. 2d 487, 489 (1955). In the *Klamm* case, the court described a pension system as "in the nature of compensation for services previously rendered":

> "The constitutionality of statutes establishing a pension system has been sustained by our courts on the grounds that the primary object is public, not private, interest; that the annuities are *in the nature of compensation for services previously rendered.* It virtually is pay withheld to induce long continued service. Its purpose is to hold out to those who adopt such service as a career some assurance of income upon retirement because of age or disability. This is an expectation that more competent persons will be attracted to such positions." 235 Ind. at 291, (Emphasis added.)

Since a pension plan is only "in the nature of compensation" for services previously rendered rather than "compensation," "payment" or "recompense" for services, by way of salary, per diem, wages, fees or expenses, it is my opinion that the Acts 1905, ch. 129, § 30, Burns § 48-208, does not authorize a town board to establish a pension plan for the town's officers or employees, including the town marshal.

In addition to the fact that the statute under consideration does not provide authority for a town board to establish a pension plan, I must point out that the General Assembly, in creating the Public Employees' Retirement Fund, expressed a strong public policy in favor of uniform retirement benefits for public employees and officers in the State of Indiana,

to be administered by a board composed of public officers for the benefit of Indiana tax-payers and their officers and employees.

Section 1 of the Act creating that Fund, Acts 1945, ch. 340, § 1, as amended by Acts 1947, ch. 6, § 1, Burns § 60-1601, reads as follows:

> "There shall be and is hereby created a fund to be known and designated as the Public Employes' Retirement Fund of Indiana for officers and employes of the state of Indiana, including departments and agencies thereof, and for officers and employes of municipalities of the state, including counties, cities, *towns,* townships and school corporations, and related agencies thereof, to be used and applied in the payment of retirement, death and withdrawal benefits, to said officers and employes, after stated periods of service and upon fulfillment of conditions as are hereinafter set forth." (Emphasis added.)

Section 2 of the same Act, as amended by Acts 1947, ch. 6, § 2, Burns § 60-1602, reads as follows:

> "The purpose of such fund is to provide an orderly means whereby officers and employes of the State of Indiana, and of municipalities thereof, may be retired from active service without prejudice and without inflicting a hardship upon the employes retired, thus promoting economy and efficiency in the administration of the state government and of local governments of the State of Indiana."

The trend since 1945 has been to include ever more pension or retirement funds of governmental units within uniformly administered systems. See the Supplemental Benefits Act, Acts 1955, ch. 329, Burns § 60-1911—60-1940, increasing and equalizing contributions and benefits for two retirement funds, including the Public Employees' Retirement Fund; Acts 1967, ch. 225, Burns §§ 60-248a—60-248c, adding sections 10—12 to Acts 1947, ch. 107, and requiring that future benefits and contributions of members of the Field Examiners Retirement Fund (of the State Board of

Accounts) be computed according to the Supplemental Benefits Act. Therefore, I cannot conclude that a municipal corporation has implied or incidental power to establish a retirement system for its employees separate and apart from the Public Employees' Retirement Fund.

As to the situation which gave rise to your question, the general rule concerning the pension plans of municipalities, even when authorized by statute, is that

> "Pension acts are valid only in so far as they confer pensions upon persons who at the time of the grant of the right to receive them are officers or employees of the municipality. And a statute which authorizes a municipal corporation to pay a pension to persons who were formerly in its service but have retired or withdrawn therefrom before the statute was enacted is unconstitutional. Such a payment is a mere gratuity." 40 Am. Jur. 972-973, *Pensions*, § 16 (1942). See also Annotation, 142 A.L.R. 938 (1943).

Although this is the general rule (rather than an Indiana rule), our own Appellate Court has expressed the same opinion, in construing an amendment to a statute which increased benefits to covered state employees. The question was whether the amendment also applied to and gave higher annuities to those employees already retired at the time the amendment became effective. The Court said:

> "After many years of faithful service to the public, the appellee and those he represents have retired to private life and an increase in their benefits would savor of a gratuity extended by an appreciative sovereign under the guise of an annuity contract. It would serve purely a private and not a public purpose. On the other hand the restriction of the amendment to those who are now in the service and to those who may be attracted to it in the future, seems to us to be in full accord with the fundamental theory and purpose of the legislation." *Jensen v. Pritchard,* 120 Ind. App. 439, 452, 91 N.E. 2d 845 (1950).

Therefore, even should the town board in question be authorized to establish a separate pension or retirement plan for its employees or officers, it is not authorized to pay a pension to one retired from town employment before the pension plan was adopted. In the absence of specific action by the General Assembly clearly showing that a public purpose is involved, such a payment would serve purely a private, rather than a public, purpose.

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OFFICIAL OPINION NO. 54

December 27, 1967

**CRIMINAL LAW—Constitutional Right to Speedy Trial—Discharge of Defendant for Undue Delay—Authority and Applicability of Supreme Court Rules to City Courts.**

Opinion Requested by Hon. Robert E. Robinson, Prosecuting Attorney, 46th Judicial Circuit.

This is in response to your request for my Official Opinion on the effect of Indiana Supreme Court Rule 1-4D on City Court cases. More specifically you requested:

> "Would you give me an opinion as to the effect of Supreme Court Rule 1-4D as regards discharge for delay in trial in reference to City Court cases? And particularly when the delay is occasioned by the filing of a petition for a change of judge on the behalf of defendants."

Rule 1-4D reads as follows:

> "Rule 1-4D. Discharge for Delay in Criminal Trials. 1. Defendant in Jail—No defendant shall be de-