(1950 Repl.), Section 18-201 et seq. I do not deem it necessary to discuss all the institutions covered by this act, except to say that it does not include any financial institutions chartered by the Federal Government.

While there is a possibility that the constitutionality of charging a fee to federally chartered institutions and not to state chartered institutions might be raised, I do not deem it advisable to discuss this question in this opinion.

I find that there is no ambiguity in the statute. The answer to your question is: The section of the statute which you underline does refer exclusively to institutions chartered by the Indiana Department of Financial Institutions and does not apply to all financial institutions. I find that the language of the statute admits of no construction and clearly states that only financial institutions which are licensed or chartered by the Department of Financial Institutions are excluded from paying the fifty cents (50¢) fee. Therefore, other financial institutions, not licensed or chartered by the Department of Financial Institutions, must pay the fee. This means National Banks and National Loan Associations must pay the fee.

OFFICIAL OPINION NO. 39

July 9, 1958

Mr. T. M. Hindman
State Examiner
State Board of Accounts
304 State House
Indianapolis 4, Indiana

Dear Mr. Hindman:

This is in response to your letter of June 17, 1958, in which you request an Official Opinion concerning the Board of Trustees of the Department of Water Works in Hammond, Indiana.

There are two sets of facts which give rise to your question, and in order to fully understand the problem, these facts should be enumerated. The first situation is as follows:

The four-year appointive term of one member of the Board of Trustees expired, whereupon the mayor reappointed the
same trustee to succeed himself, and submitted the reappointment to the city council for its approval. The council has not approved the reappointment. Conversely, the mayor has not made any other appointment and as a result the trustee involved now serves without council approval.

The other situation arises from these facts:

A trustee of the Hammond Department of Water Works died, whereupon the mayor appointed a successor to fill the vacancy until the expiration of the term of the deceased trustee. The council has not approved the appointment, and since the mayor has appointed no other person, the appointee now serves without council approval.

These two situations give rise to the question stated in your letter as follows:

"The refusal of the City Council to confirm these two appointments to the Board of Trustees raises the question of whether the two appointees are legal members of the Board and entitled to pay and allowances, even though their appointments have not been approved by the City Council."

The city of Hammond is a municipal corporation of the second class. In 1933 and 1936 the city created a Department of Water Works and provided for the election of five trustees by the city council, pursuant to the provisions of Acts of 1933, Ch. 235, as it then existed. In 1937, Sec. 3 of the aforesaid act, as found in Burns' (1957 Supp.), Section 48-5303, was amended to read in part as follows:

"In any city, having availed itself of the provisions of this act, other than a city of the fifth class, the board of trustees shall consist of five [5] members and the members of such board shall be appointed by the mayor and approved by the council of such city. Upon the taking effect of this act, the term of the trustees now serving in all cities, other than cities of the fifth class, shall terminate and the mayor of such city shall appoint five [5] trustees in the following manner: One [1] trustee to serve for one [1] year; one trustee to serve for two [2] years; one [1] trustee to serve for three

No section of the act makes specific provisions for the replacement of a deceased trustee. However, it is to be noted that the board "shall consist of five [5] members and the members of such board shall be appointed by the mayor and approved by the council of such city." (Acts of 1933, Ch. 235, Sec. 3, as amended, supra.)

In the case of Rogers et al. v. The Calumet National Bank of Hammond et al. (1938), 213 Ind. 576, 12 N. E. (2d) 261, the court was concerned with the question as to whether the first appointees to the board needed to be approved by the council, and it declared as follows [p. 582]:

"The terms of this statute are clear and unambiguous. It was within the province of the legislature to provide how trustees of water works departments should be selected. It might have directed, as was formerly the law, that such trustees should be elected by the council. It might have lodged the appointive power exclusively in the mayor or it might have said, as it did in this instance, that the first trustees should be appointed by the mayor, but that thereafter such appointments should be made with the council's approval.

* * *"

It therefore appears that the purported successor to the deceased trustee is not a member of the Board of Trustees.

The provisions of the Acts of 1905, Ch. 129, Sec. 80, as amended, and as found in Burns' (1957 Supp.), Section 48-1502, that the mayor has the general duty to fill by appointment vacancies for unexpired terms in the offices of such city, are neither inconsistent with the provisions of Burns' 48-5303, supra, nor controlling as to such appointment.

The other situation would seem to be controlled by Burns' 48-5303, supra, which reads in part as follows:

"Upon the expiration of the term of office of each of said trustees, the mayor of such city shall appoint a successor to be approved by the council of said city to
serve for a term of four [4] years from the date of such appointment: * * *"

The section is voluminous and in a preceding paragraph states:

"* * * Each of such trustees, upon qualifying as hereinafter set out, shall serve as such and perform his duties as herein and by law provided, during such term to which he was so elected, or appointed, and until his successor has been elected or appointed and qualified."

(Our emphasis)

Thus we find that the newly appointed trustee has not been approved by the city council, but nevertheless occupies the position of trustee because of the fact that no successor to his former appointment has qualified.

As indicated above, this is not the first time that the act in question has been litigated in connection with the Department of Water Works in the city of Hammond. In the Rogers case, cited above, the court was concerned with the holding over of the former trustees subsequent to the amendment of the act herein involved. The court said in part (pages 582, 583):

"The terms of this statute are clear and unambiguous. It was within the province of the legislature to provide how trustees of water works departments should be selected. * * *"

"Equally sound reasons may be observed for the provision directing that subsequent appointments should only be made with the approval of the city council. Upon expiration of the terms of the original trustees they would continue in office, under the terms of the act, and by virtue of Article 15, Sec. 3 of the State Constitution, until their successors were chosen and qualified. No possibility of these municipal properties being without responsible officers in charge would arise. Under such circumstances the legislature may wisely have concluded that the appointment of subsequent trustees should be subject to the approval of the city council."

In the case of Swank v. Tyndall (1947), 226 Ind. 204, 78 N. E. (2d) 535, the Court said with respect to an elected officer (page 212):
"* * * When the elective term ends and no qualified person has been elected and qualified to take over the duties of the office, the person holding the office at the end of the elective term has a right and duty, commanded by Art. 15, § 3, supra, to hold the office and discharge its duties ‘until his successor shall have been elected and qualified.' This service is not a part of his elective term, but is a constitutional term granted to avoid a vacancy—and to assure an ever-continuing government in any and every emergency." (Our emphasis)

The foregoing cases cite and take as their authority the Constitution of the State of Indiana, Art. 15, Sec. 3, which reads as follows:

"Whenever it is provided in this Constitution, or in any law which may be hereafter passed, that any officer, other than a member of the General Assembly, shall hold his office for any given term, the same shall be construed to mean, that such officer shall hold his office for such term, and until his successor shall have been elected and qualified."

There is no doubt that a situation such as the one you present could have serious implications because the statute in effect gives the city council power to retain a trustee in office indefinitely by withholding its approval of a new appointee. I do not presume to express any opinion as to such a situation but merely point it out in passing.

Therefore, it is my opinion that:

(1) The person appointed to succeed the deceased trustee cannot become a member of the Board of Trustees unless his appointment is approved by the city council.

(2) The trustee whose appointment to succeed himself has not been approved by the city council nevertheless holds office as a trustee of the Department of Water Works in view of the fact that no successor has been appointed or qualified.