Honorable Mildred Churilla  
State Representative  
4724 Todd Avenue  
East Chicago, Indiana  

Dear Representative Churilla:

This is in reply to your request for an Official Opinion, which reads in part as follows:

"* * * can a Mayor of a municipality within the limits of departmental budgets adjust salaries upward of employees within said department over the preceding year where said salaries pertain to employees whose salaries are not set by statute, such as street workers, payable on a per hour basis?"

Acts of 1933, Ch. 233, Sec. 10, as amended, as found in Burns’ (1950 Repl.), Section 48-1222, places upon the Mayor, with certain exceptions, the responsibility of employing and discharging city employees and gives the Mayor the power to fix the salaries of city employees subject to the approval of the common council which may reduce but may not raise the salary so fixed by the Mayor. Said statute reads as follows:

"The provisions of any law now in effect in so far only as said provisions fix or purport to fix the salaries of any elective or appointive officer and/or employee of any civil city of this state and the provisions of any laws now in effect in so far only as they fix or purport to fix the salary of any member of any board, commission, department of [or] institution maintained or operated by any civil city, are hereby repealed upon the taking effect of this act, except all laws affecting cities of the second class owning and operating two [2] municipal utilities, which shall remain in full force and effect. * * * The salaries of each and all of such appointive officers, employees, deputies, assistants and departmental and institutional heads, other than those fixed by the common council under provisions of this act, shall be fixed by the mayor subject to the approval
of the common council, which may reduce but in no event shall raise the salary so fixed. * * * All salaries fixed by the mayor with the approval of the common council in accordance with the provisions of this act, shall be fixed on or before the time provided by law for the adoption of the annual budget for the next calendar year.” (Our emphasis)

It should be pointed out that as originally passed the last sentence of the above act read as follows:

"* * * All salaries fixed by the mayor with the approval of the common council in accordance with the provisions of this act shall be fixed on or before the first Monday in September of each year immediately ensuing and when so fixed shall not be increased during such ensuing calendar year except as provided in this act.” (Our emphasis)

This language was construed by our Supreme Court as preventing the increase of any of the salaries fixed under the provisions of the act during the year for which the budget was adopted.

Johnson, City Controller et al. v. Lenz (1936), 209 Ind. 627, 200 N. E. 249.

However, Acts of 1945, Ch. 32, Sec. 1, which re-enacted the section in question omitted entirely from the last sentence the words “and when so fixed shall not be increased during such ensuing calendar year except as provided in this act.”

It is an established rule of statutory construction that a change of phraseology from that of the original act will raise the presumption that a change of meaning was also intended.

Chism v. State (1931), 203 Ind. 241, 179 N. E. 718;
State ex rel. Neal v. Beal (1916), 185 Ind. 192, 113 N. E. 225;
Hasely v. Ensley (1907), 40 Ind. App. 598, 82 N. E. 809.

In the case of Dailey v. Pugh (1921), 83 Ind. App. 431, 131 N. E. 836, the Appellate Court was faced with the construction
of a statute dealing with descent and distribution. An act passed in 1843 had been re-enacted in 1852. However, the last line of one of the subsections was omitted in the re-enactment. The court said at page 436:

"* * * We note, however, that in the Act of 1852, the provision contained in the last line of said subdivision two is wholly omitted. This we consider to be a significant fact, in determining the meaning the legislature intended should be given the particular provision we are now considering. It is well settled that where a statute is amended or re-enacted in different language, it will not be presumed that the difference between the two statutes was due to oversight or inadvertence on the part of the legislature; on the contrary, it will be presumed that the language was intentionally changed for the purpose of effecting a change in the law itself, unless it clearly appears to have been made for the purpose of expressing the original intention of the legislature more clearly. [Citations omitted] An application of this rule in the instant case leads us to conclude that the omission of the last line in subdivision two of said § 112 of the Act of 1843 from § 5 of the Act of 1852, clearly evidences an intention on the part of the legislature to prevent descendants of uncles and aunts from inheriting as a class where all such uncles and aunts are dead, as they had theretofore done, and to cast the inheritance on 'the next of kin, in equal degree of consanguinity,' instead."

It would then appear that the Legislature, by omitting the restriction on increasing salaries during the ensuing calendar year, has intended to remove said restriction, and therefore it is my opinion that the salaries of city employees as provided in Burns' 48-1222, supra, may be adjusted upward by the Mayor with the approval of the common council, provided, of course, the increase does not exceed the appropriation for salaries of the particular executive department.

In further support of this conclusion, it should be noted that since the passage of the Acts of 1945, Ch. 32, supra, the State Board of Accounts has considered the statute in question as permitting the increase of salaries to city employees during
the calendar year by authorization of the Mayor with the approval of the common council as long as the appropriation is not exceeded. In regard to such contemporaneous construction, our Supreme Court in Indiana Department of State Revenue, Gross Income Tax Div. v. Colpaert Realty Corp. (1952), 231 Ind. 463, 109 N. E. (2d) 415, said at page 478:

"While not controlling, the contemporaneous construction of a statute by those charged with the administration of it is entitled to great weight, and should not be interfered with unless there are very cogent and persuasive reasons for departing from it. [Citations omitted] Particularly is this true where, as here, the legislature by inaction continuing through several sessions, has indicated satisfaction with that construction."

In regard to a question that might arise concerning the increase of wages of employees of the city paid by the hour but not by salary, please note the following previous opinion of this office:

1941 O. A. G., page 422:

"2. Can county units of government or cities and towns increase the wages of employees paid by the hour during the operating year? In this case the amounts are carried in the budget that have been approved in a lump sum for personal services by the hour."

"I must respond to this question in the affirmative. The inclusion of a lump sum appropriation for personal services to pay for services of a number of employees of a given grade or class in nowise can be construed as fixing the wage, salary or compensation of each member thereof. No wage is fixed in such a case. In addition it should be noted that the restriction contained in the statute heretofore reproduced herein refers only to 'salaries' and not to 'wages.' Therefore, county units of government, cities or towns may during the operating year, increase the wages of employees paid by the hour in instances where the budget contains lump sum appropriations for personal services."
In conclusion, it is my opinion that salaries of city employees which are fixed pursuant to Burns' 48-1222, supra, may be increased by the Mayor with the approval of the common council during the ensuing calendar year, providing the increase would not have the effect of exceeding the amount appropriated for salaries within the particular executive department.

OFFICIAL OPINION NO. 57
December 4, 1958

Mr. Norval L. Martin, Executive Secretary
Indiana State Teachers' Retirement Fund
145 West Washington Street
Indianapolis 4, Indiana

Dear Mr. Martin:

This is in reply to your recent request for an Official Opinion which reads in part as follows:

"We would appreciate your official opinion as to whether or not an Indiana State Teacher Retirement account is bound by the provisions of Section 17 (d), Chapter 329 of the Acts of 1955 when the teacher's original membership in the fund had been established under the old retirement system which was in effect until our Fund integrated with the Federal Social Security Act on January 1, 1956.

"The teacher's membership was originally established in September, 1922. He had transferred his membership to the provisions of the 39, 45, 47, 51 and 53 amendments to the retirement fund law governing administration of the old system."

Additional information included with your letter discloses that the teacher in question was in active service at the time of his death in 1957, and also on January 1, 1956, when the members of the Teachers' Retirement Fund automatically became subject to the provisions of Acts of 1955, Ch. 329 (as since amended), as found in Burns' (1951 Repl. and 1957 Supp.), Section 60-1911 et seq. This act is known as the