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
Indiana Public Employees' Social Security Integration and Supplemental Retirement Benefits Act and provides for the extension of coverage for public employees under the provisions of the Federal Social Security Act, and also provides for certain benefits in lieu of all benefits to which members would or might have become entitled under the Teachers' Retirement Fund Acts.

Your letter specifically asks whether a retirement account established under the old teachers' retirement system and later made subject to the Supplemental Benefits Act is bound by the provisions of Acts of 1955, Ch. 329, as amended, as found in Burns' (1957 Supp.), Section 60-1928 (d), which reads as follows:

"(d) If an employee with twenty [20] or more years of creditable service shall designate his spouse as his beneficiary under this act, or if no designated beneficiary survives the employee, he may elect, or his spouse may elect upon his death in service, to provide annuity survivor benefits as follows: Upon the death in service of such employee, if such spouse shall have been married to the member for at least three [3] years and shall survive him, a survivor annuity shall become payable immediately in an amount equal to that which would have been payable under the supplemental retirement benefit system had the employee retired at the time of his death under an effective election of the option provided in subsection (c) (i) of this section 17; provided that any additional annuity contributions under section 13 (f) shall be disregarded in the determination of survivor benefits under this subsection (d); provided further that each periodic benefit payment shall be reduced by the amount of any benefit payable to survivors of such employee with respect to the same period under the Federal Social Security Act. Such federal social security benefits shall be presumed payable for the purposes hereof even though such survivor may fail to apply for such benefits or may lose all or part of them through delay in applying for them or by engaging in covered employment or otherwise. If a survivor annuity becomes payable under the provisions of this subsection with respect to a deceased employee, such annu-
ity shall be in lieu of all benefits otherwise payable under this act with respect to such deceased employee, except for any death benefit that may become payable under section 13 (f)."

It has been specifically held by this office that a member of the Teachers' Retirement Fund has a vested right to have benefits paid to persons eligible and in amounts set by the statute under which the teacher made contributions to the Fund, and these rights are retained by the teacher under the Supplemental Benefits Act. 1955 O. A. G., page 146, No. 38, states at page 150:

"** * * Without discussing these provisions in detail, I believe that teachers who have made contributions to the Teachers' Retirement Fund under statutes granting them the right to have death or retirement benefits payable to certain persons, or classes of persons, named by the statute or teacher, upon their election or otherwise, would have acquired a vested contractual right to have such death or retirement benefits paid in accordance with the statute under which the contributions were made to the Fund and the contractual rights therein created. These rights are retained."

The teacher in question had acquired a vested contractual right under the old teachers' retirement system to have annuity survivor benefits paid to his widow in accordance with the terms of the Acts of 1915, Ch. 182, as amended from time to time and as found in Burns' (1948 Repl. and 1957 Supp.), Section 28-4501 et seq. The Indiana Constitution provides in Article 1, Section 24 that no law shall ever be passed impairing the obligation of contracts. However, this vested contractual right could be changed by the mutual consent of the parties to that effect. Burns' (1957 Supp.), Section 28-4511 (n), supra, under the old system, provides:

"(n) In case any teacher shall fail to apply in writing for the benefits and obligations conferred by this act he shall continue in prior contractual relationship to the fund. * * *

The Supplemental Benefits Act provides as follows in Burns' 60-1938, supra:
“The obligations created by this act of the state and each participating political subdivision, with respect to payment of benefits provided herein, shall be contractual with respect to each member of a retirement system becoming subject to its provisions to the same extent as such respective obligations to the members of each system were made contractual by the provisions of The Indiana State Teachers' Retirement Act * * * in force at the time the members of each such system first became subject to the supplemental retirement benefit system.”

The vested contractual right to benefits established under the old retirement system could also be changed by legislative amendment which was not detrimental or damaging to the member. This principle was stated as follows in 1945 O. A. G., page 340, No. 85, at page 343:

“It is therefore clear the State of Indiana has no such vested interest in the contract between the teachers and the State Teachers' Retirement Fund Board that such contract cannot be changed by the Legislature as long as no detriment or damage results as far as the teachers who are members of such Fund are concerned.” (Our emphasis)

In order to avoid an unconstitutional impairment of contract, it is my opinion that each member's account must be examined individually to determine whether or not the deduction provisions of Burns' 60-1928 (d), supra, result in any detriment or damage to the contractual rights which have become vested under the old retirement system. If there is no detriment, or if the member has agreed to the change in benefits, the section will apply. However, if the member has not so agreed and in fact the member or recipient will be damaged by an enforcement of the section, the section will not apply and benefits will be paid under the provisions of the law under which the rights vested. Therefore, each individual account must be studied in light of its own particular facts to determine whether or not the provisions of Burns' 60-1928 (d), supra, apply to it.