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

Dear Mr. Hindman:

This will acknowledge your letter of January 28, 1958, which reads as follows:

"A question has arisen concerning the amount of payment to be made to retired members of the Fire Force of a certain city now on pension.

"Burns' Ind., Section 48-6507, provides, among other things:

"* * * Upon retirement with such disability during service a member shall receive in monthly instalments not less than thirty-five (35) per cent and not more than fifty-five (55) per cent of the monthly wage received by a fully paid first class fireman in such city at the time of the payment of such pension; * * *"

"May I have your official opinion on the following question:

"Do retired firemen now on pension receive longevity pay advantages of present members of the force, as now provided by city salary and appropriation ordinances?"

From the question as presented, it would appear that firemen as they retire, either as a result of age or injury, are granted longevity benefits in the calculation of pensions. Assuming this fact to be true, you ask whether or not firemen who have already retired and who are now receiving pension payments may be granted longevity benefits enacted and allowed since their retirement, and paid to present members of the force as they retire.
It is my opinion that such additional benefits may be allowed by any city coming within the purview of the act, provided that such city shall see fit to do so. I reach this conclusion after extensive research, and base it upon the fact that the retirement fund here involved is a pension fund and not an annuity.

There have been numerous cases in Indiana involving the retirement of public employees. In 1950, the Appellate Court decided the case of Jensen et al. v. Pritchard, 120 Ind. App. 439, 92 N. E. (2d) 856. (It is to be noted that a rehearing of that case and a transfer to the Supreme Court were denied.) The Jensen case concluded that "a 'pension' is in the nature of a bounty springing from the appreciation and graciousness of the sovereign and may be given, withheld, distributed or recalled at its pleasure."

The case differentiated between a pension and an annuity, with respect to vested rights, and said that two tests are applicable in determining whether or not payments made to a retired employee are truly a pension. First, said the court, contribution to any retirement fund must be obligatory upon the employee; and secondly, payment to the retired employee must be made from public funds. Applying these tests to the situation now before us, I conclude that payments being made to retired firemen are in the nature of a pension and are not payments upon an annuity.

In the case of Klamm et al. v. State ex rel. Carson (1955), 235 Ind. 289, 126 N. E. (2d) 487, the court determined that payments made to retired policemen are pensions within these definitions. However, the court discussed at some length the effect of the vesting of rights, and held that:

"Where the statutory conditions for retirement existing when the application is made have been met, and the award of the pension has been made, or as of right should have been made, the pensioner's interest becomes vested and takes on the attributes of a contract, which, in the absence of statutory reservations, may not legally be diminished or otherwise adversely affected by subsequent legislation."

The Klamm case concerned the Policemen's Pension Act and did not discuss retirement payments made to firemen. The
Policemen's Pension Act at that time provided that the retired member should receive the sum of 50% per month of such wage as at the time of application was paid to a first-class patrolman. However, the amount to be received by retired firemen is based on the monthly wage received by a fully paid first-class fireman in such city at the time of the payment of such pension.

The court determined in the Klamm case that the particular pension in question had vested and that there were no statutory provisions that would allow the amount to fluctuate when the wages of currently employed policemen fluctuated. However, as has been pointed out, the provisions of the Policemen's Pension Act then in effect were materially different from the provisions of the Firemen's Pension Act now before us. For that reason, the Klamm case has no bearing upon the matter.

Based upon the foregoing authority and reasoning, it is my opinion that any city coming within the purview of Acts of 1905, Ch. 129, Sec. 188, as amended, as found in Burns' (1950 Repl.), Section 48-6507, may grant to a fireman now on pension any longevity advantages of present members of the force as now provided by city salary and appropriation ordinances that may exist at time of payments of such pensions.

OFFICIAL OPINION NO. 20

March 11, 1958

Mr. Edwin Steers, Sr.
Member, State Election Board
108 E. Washington Street
Indianapolis, Indiana

Dear Mr. Steers:

Your letter of February 12, 1958, asks the following question on behalf of the Clerk of the Brown Circuit Court:

"1. Am I allowed to collect the salary as Clerk of the election board and Clerk of the County Canvassing Board as this is not a fee to be collected and turned over to the County, or am I to serve without additional pay set up by the last legislation?"

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