Home, is of questionable constitutionality and validity, and that any funds, pension or otherwise, including bonds, savings certificates and other securities, paid to or due a deceased member of the State Soldiers’ Home, the legal title to which funds is in such member at the time of his death, are a part of his estate. If such member dies intestate as to such funds, and without heirs, the funds are subject to the laws of escheat of Indiana and cannot be legally appropriated by said institution for any purpose.

OFFICIAL OPINION NO. 48
November 4, 1957

Mr. Cecil Bolinger
Executive Secretary, Public Employes’ Retirement Fund
145 West Washington Street
Indianapolis, Indiana

Dear Mr. Bolinger:

Your original request was followed by the preparation of this opinion. After the opinion was prepared, the release thereof was postponed from time to time at your request and that of the Board of Trustees of the Public Employes’ Retirement Fund, in order that pending negotiations could be carried on between the Board and the City of Indianapolis, in the utmost good faith, to settle a matter then in dispute between said parties. I am advised that an agreement has been reached and that the release of this opinion can serve a useful purpose in the administration of the Public Employes’ Retirement Fund. Therefore, in accordance with your request of October 30, 1957, this opinion is hereby released.

Your original letter, with attached exhibits, requested an opinion on the following questions:

“Has the Public Employes’ Retirement Fund, acting as the State Agency for the administration of social security coverage for public employees, taken all the necessary steps required by the State Enabling Acts providing for the extension of Social Security to a political subdivision whose employees are in positions covered by the Public Employes’ Retirement Fund?”
"If the answer to the foregoing question is in the affirmative, then is the Modification entered into between the State and the Secretary of Health, Education and Welfare valid, insofar as extending social security to employees of the Civil City of Indianapolis who were in positions covered by the Public Employes' Retirement Fund, particularly as the same pertains to the effective date which was made retroactive to January 1, 1955 by the above described Modification?"

The Acts of 1955, Ch. 329, as amended, as found in Burns' (1957 Supp.), Section 60-1911 et seq., is the statute providing for a referendum of employees of state and political subdivisions who are members of an existing retirement system. The short title of this Act is "The Indiana Public Employees' Social Security Integration and Supplemental Retirement Benefits Act."

Prior to the 1954 amendment of the Federal Social Security Act, employees covered by retirement systems were not eligible for social security coverage even though other employees had been brought in pursuant to an agreement with the State. The 1954 Federal amendment provided that if a referendum were held among the members of such a retirement system and a majority voted in favor of social security coverage, the members could be included in a State-Federal agreement.

The purpose of the Acts of 1955, Ch. 329, supra, was to establish the authority and procedure for such a referendum among the members of existing retirement systems in Indiana in which State funds participated and to provide for supplemental benefits for such employees.

Section 4 of said Act, as found in Burns' (1957 Supp.), Section 60-1914, reads as follows:

"The governor is hereby authorized to conduct or cause to be conducted separate referenda with respect to the employees currently covered (or with respect to the employees of any political subdivision hereafter making application for coverage pursuant to section 9 of this act if a referendum is necessary in order for such employees to obtain social security coverage) by the Indiana state teachers retirement fund, the public
OPINION 48

employees’ retirement fund and the state board of accounts retirement fund, in which there shall be submitted the question of whether services in positions covered by each such system shall be excluded from or included under an agreement under section 218 [F. C. A., tit. 42, Section 418] of the Federal Social Security Act. Each such referendum shall be conducted in full compliance with all the requirements of section 218(d) of the Federal Social Security Act, as amended in 1954. The governor may designate the board administering the affairs of each such system as the agency to conduct and supervise the referendum in such system. For the purpose of the referendum herein authorized the employees of the state covered by the public employees’ retirement fund, and the employees of each participating political subdivision covered thereby, shall be deemed to be separate retirement systems with respect to the state and each political subdivision concerned. Members of the public employees’ [employees’] retirement fund who have been classified as federal employees by the secretary of agriculture of the United States and as such participate in the federal civil service retirement system shall not be eligible to vote in any referendum. The governing body of any such participating political subdivision shall be authorized by ordinance or resolution, duly adopted and certified to the governor within 60 days of the issuance of the notice provided for in said section 218(d) [F. C. A., tit. 42, Section 418 (d)] of the Federal Social Security Act, as amended, to determine that such referendum shall not be held with respect to the employees thereof. In the event such ordinance or resolution shall be so certified by such governing body, no referendum shall be held with respect to the employees of such participating political subdivision unless such referendum shall thereafter be requested by said governing body. In the event that a majority of the employees of the state covered by the public employees’ retirement system eligible to vote in such referendum, vote in favor of including services in such positions under an agreement under section 218 of the Federal Social Security Act [F. C. A., tit. 42, Section 418], and the governing
body of any such participating political subdivision shall determine not to hold such referendum, or, if held, a majority of the employees of any participating political subdivision fail to vote in favor of including services in such positions thereunder, the board administering the public employees' retirement system shall continue to administer the retirement system of such political subdivision or subdivisions under the provisions of the Public Employees' Retirement Act as though this act had not been passed. Provided, however, That unless and until a majority of the members of the state covered by the public employees' retirement system eligible to vote in such referendum shall have voted in favor of including services in such positions under an agreement under section 218 of the Federal Social Security Act [F. C. A., tit. 42, Section 418], the employees of participating political subdivisions shall not be included under such an agreement. Each board shall pay the expenses of any referendum conducted with respect to the system it administers as a part of its expense of administration, except that the expense of the referendum of any political subdivision shall be paid by such subdivision."

The provisions of Section 218 (d) of the Social Security Act, as amended in 1954, referred to above, are found in U. S. C. A., tit. 42, Section 418 (d) (3), and are:

"(A) A referendum by secret written ballot was held on the question of whether service in positions covered by such retirement system should be excluded from or included under an agreement under this section;

"(B) An opportunity to vote in such referendum was given (and was limited) to eligible employees;

"(C) Not less than ninety days' notice of such referendum was given to all such employees;

"(D) Such referendum was conducted under the supervision of the governor or an agency or individual designated by him; and
“(E) A majority of the eligible employees voted in favor of including service in such positions under an agreement under this section.”

According to your letter and the attachments, the following proceedings were had.

Pursuant to a request of the Public Employes' Retirement Fund the Governor issued an order, on June 1, 1955, directing that a separate referendum in each political subdivision be conducted among the members of the Public Employes' Retirement Fund in the subdivision and designating the trustees of the Public Employes' Retirement Fund as the agency to conduct such referendum.

The order further directed the governing body of each political subdivision to adopt a resolution within sixty (60) days from the date of the order either approving or disapproving the inclusion of its employees in social security and if approving such inclusion, fixing an effective date and exercising the right of optional exclusions permitted by law.

The City of Indianapolis did not adopt such a resolution within the sixty (60) days following the orders and apparently elected to follow the above-quoted statute.

On August 12, 1955, a “Notice of Referendum,” together with a summary of the provisions of the Acts of 1955, Ch. 329, supra, was mailed to all employees of the Indianapolis Civil City found by the Board of Trustees to be eligible to vote in the referendum.

Pursuant to the notice, a referendum was held on November 14, 1955, among the eligible voters of the Indianapolis Civil City. The tabulation was:

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Eligible voters</td>
<td>572</td>
</tr>
<tr>
<td>Yes votes</td>
<td>536</td>
</tr>
<tr>
<td>No votes</td>
<td>10</td>
</tr>
<tr>
<td>Not voting</td>
<td>26</td>
</tr>
</tbody>
</table>

On November 28, 1955, the result of the referendum was certified to the Governor.

On December 27, 1955, the Governor certified to the Secretary of Health, Education and Welfare that the conditions of
the Social Security Act, as amended, relative to holding the referendum, had been met. This Certification was pursuant to Burns’ (1957 Supp.), Section 60-1916, supra, which reads, in part, as follows:

“If a majority of the employees in a retirement system eligible to vote in a referendum conducted pursuant to section 4 hereof, vote in the affirmative, the governor is authorized to certify to the secretary of health, education and welfare of the United States that the conditions prescribed by section 218 (d) (3) [F. C. A., tit. 42, section 418 (d) (3)] of the Social Security Act as amended in 1954, have been met, and to notify the state agency as designated in Acts of 1951, ch. 313 of the general assembly of Indiana, of such certification. Said state agency shall thereupon request a modification of the agreement entered into between the secretary of health, education and welfare and the state of Indiana pursuant to such Acts of 1951, ch. 313, to include service in positions covered by such retirement system.

* * *

Your agency submitted a modification of the Federal-State agreement to the Federal authorities asking that employees of the City of Indianapolis be covered by Social Security effective January 1, 1955. This modification was approved by the Regional Representative on December 31, 1955, ratified on April 4, 1956, by the Assistant Director, Bureau of Old Age and Survivors’ Insurance. The approval of the modification of the agreement on December 31, 1955 by the Regional Representative of the Bureau of Old Age and Survivors’ Insurance was in compliance with the authority and procedures of the Department of Health, Education and Welfare so as to make it an agreement entered into in 1955. The Secretary of Health, Education and Welfare has instituted the practice of delegating to certain regional officials the authority to execute modifications received in the regional offices in the last two weeks of the calendar year. The ratification of the acts of the regional officials is considered by the Department, as under the general law of agency, to be a confirmation of the execution as of the date upon which it occurred, rather than on the date of ratification.
The effective date was fixed pursuant to a resolution of the Indianapolis City Council submitted to you on December 21, 1955, which will be given more detailed consideration.

In view of the foregoing, it is my opinion that the Trustees of the Public Employes' Retirement Fund have done all that is required of them by Acts of 1955, Ch. 329, supra, to hold a referendum and extend Social Security coverage to those employees of the Civil City of Indianapolis who were members of the Public Employes' Retirement Fund.

Your second question goes into the effect of the modification of the State-Federal agreement.

The entire wording of the Acts of 1955, Ch. 329, supra, shows that the effect of the Act was intended to be supplemental to the existing statutes relating to governmental employees' retirement systems. It created a procedure for members of the various systems to qualify for social security membership that had not previously existed and provided supplemental benefits and payments for those who came under the new law. It provides that those retirement groups who did not vote to come under the new supplemental system, or wherein the governing body of the employing political subdivision objected to the supplemental system, should remain under the existing system. As was said in McCleary v. Babcock, Treasurer et al. (1907), 169 Ind. 228, 82 N. E. 453:

"A supplemental act has quite a different meaning. 'It signifies something additional, something added to supply what is wanting.' Webster's Int. Dict. It is that which supplies a deficiency, adds to, or completes, or extends that which is already in existence, without changing or modifying the original."

The two employees' retirement systems affected herein are the Public Employes' Retirement Fund, created by the Acts of 1945, Ch. 340, as amended, and old age and survivors' insurance provisions of the Acts of 1951, Ch. 313, as amended, covering political subdivision employees other than those otherwise covered by State-supported retirement systems.

As I understand, the City of Indianapolis participated in the former, but not in the latter system at the time of the referendum.

The Act authorizes coverage of certain employees of the State and political subdivisions under old age and survivors’ insurance provisions. Prior to 1955, only political subdivisions were affected by the Act, not State employees.

The Resolution No. 1 of the Common Council of Indianapolis, passed December 19, 1955, and submitted to your agency on December 21, 1955, indicates an intent of this Council to bring all employees of the City, except those positions of (1) an emergency nature, (2) part-time, and (3) on a fee basis, under Social Security.

There may be a question as to whether the resolution and proceedings met all the technical steps outlined by Burns’, Sections 60-1905 and 60-1907, supra, i.e., submission of a plan of coverage containing statements as specified by statute, ordinance or resolution electing coverage, and an agreement signed by the State agency. However, the only positions which would gain Social Security coverage under these sections would be positions held by Indianapolis City elected officials. All other Indianapolis City employees had had Public Employees’ Retirement coverage extended to them by city ordinances of 1946 and 1952, and could gain Social Security coverage only through Acts of 1955, Ch. 329, as amended.

Since your question is limited to the effect upon the retirement system coverage group, this answer will also be limited likewise, insofar as possible.

A study of both the original Act of 1951, Ch. 313 and the 1955 amendment leads me to the conclusion that it is not applicable to bringing members of the Public Employees’ Retirement Fund who are employees of political subdivisions into Social Security coverage. The definition of “employment” as contained in Burns’ (1957 Supp.), Section 60-1902, is:

“(b) The term ‘employment’ means any service performed by an employee in the employ of the state and of any political subdivision or local unit of the state for such employer, except (1) service which in the absence of an agreement entered into under this
act would constitute 'employment' as defined in the Social Security Act [F. C. A., tit. 42, Sections 301-1305]; or (2) service which under the Social Security Act [F. C. A., tit. 42, Sections 301-1305] may not be included in an agreement between the state and the federal security administrator entered into under this act; service which under the Social Security Act [F. C. A., tit. 42, Sections 301-1305] may be included in an agreement only upon certification by the governor in accordance with section 218 (d) (3) [F. C. A., tit. 42, Section 418 (d) (3)] of that act shall be included in the term 'employment' if and when the governor issues, with respect to such service, a certificate to the secretary of health, education and welfare pursuant to section 10 (d) of this act.” (Our emphasis)

Service which may be included in an agreement under Section 218 (d) of the Social Security Act only on certification by the Governor is service already covered by a retirement system. Were it not for the reference in the above-quoted definition from Burns', Section 60-1902, to “section 10 (d) of this act,” it might be construed to include the Public Employes' Retirement Fund. However, section 10 of the Act, as found in Burns' (1957 Supp.), Section 60-1910 states “* * * The eligibility created by this section does not extend to any member of the public employees' retirement fund * * *.”

Since Acts of 1951, Ch. 313, as amended, excludes members of the Public Employes' Retirement Fund in its procedure for Social Security coverage we can conclude only that the proceeding set up by Acts of 1955, Ch. 329, supra, is the only procedure applicable to this coverage group.

As above stated, this Act of 1955 supplements the pre-existing laws regarding retirement plans of teachers, public employees, State Board of Accounts as well as the State old age and survivors' insurance laws by providing a method of integration of existing State retirement plans with Federal Social Security.

It has already been established that the procedure followed in holding the referendum was in conformance with the statute.
The Common Council of the City of Indianapolis did not avail itself of the authority given by Burns', Section 60-1914, supra, to pass a resolution that the referendum not be held and thereby consented to the referendum and the legal effect thereof.

The resolution of the Council of December 19, 1955 recognized the referendum and showed an intent to expand its effect by bringing all employees except those in emergency, part-time, and fee basis positions under Social Security coverage, effective January 1, 1955.

Whether all the steps detailed by Acts of 1951, Ch. 313, as amended, and as found in Burns', Sections 60-1905 and 60-1907, were completed so as to effect complete coverage is not necessarily determined in answering your second question since only the positions covered by the Public Employees' Retirement Fund are involved herein. Apparently, the only other positions which could be affected would be those held by elected officials, and whether all steps detailed by the Acts of 1951, Ch. 313, as amended, supra, were completed so as to include such elected officials, is not decided herein due to the limitation of your question.

In the 1955 resolution, the Indianapolis City Council exercised the option given by Burns', Section 60-1916, supra, of excluding certain services, and established the effective date of coverage as January 1, 1955.

This leaves to be determined the question of whether establishing the effective date as January 1, 1955, is valid.

I find no such specific authority in Acts of 1955, Ch. 329. It may be inferred in the authority to modify the State-Federal agreement entered pursuant to Acts of 1951, Ch. 313, as found in Burns' (1957 Supp.), Section 60-1903, the section authorizing the agreement to be modified, which reads in subsection (3), as follows:

“(3) Such agreement shall be effective with respect to services in employment covered by the agreement performed after a date specified therein but in no event may it be effective with respect to any such services performed prior to the first day of the calendar year in
which such agreement is entered into or in which the modification of agreement making it applicable to such services, is entered into * * *.”

The Federal statute, U. S. C. A., tit. 42, Section 418 (f) (2), 1955 Supp., provides that any agreement or modification of the agreement after 1954, but prior to 1958, may be made effective not earlier than December 31, 1954.

Burns’ (1957 Supp.), Sections 60-1917 and 60-1919 each refer to payment for “back coverage to which the employee may be entitled under such modification.” Apparently, it was within the legislative contemplation that some of the modifications would be retroactive in effect and authorization to pay for such coverage was granted to the political subdivisions.

Since Acts of 1955, Ch. 329, supra, may be considered to be supplemental to Acts of 1951, Ch. 313, as amended, the two Acts may be construed together. The resolution of the Common Council of Indianapolis setting January 1, 1955 as the effective date for commencement of coverage is not inconsistent with the provisions of these acts. The Acts of 1957, Ch. 311, an amendment to the Acts of 1955, Ch. 329, makes definite provision that the governing body of a political subdivision shall by resolution determine the effective date for coverage. This was a legislative enactment of the procedure followed by the administrative board. Sutherland’s Statutory Construction, 3rd Ed., Vol. 2, Sec. 5110, p. 526, states:

“Where a former statute is amended, or a doubtful meaning of a former statute rendered certain by subsequent legislation, a number of courts have held that such amendment or recent legislation is strong evidence of what the Legislature intended by the first statute. * * *”

The Public Employes’ Retirement Fund was acting in compliance with Burns’, Section 60-1916, supra, in asking for a modification of the State-Federal agreement and was bound to be guided by and rely upon the official action of the Common Council of Indianapolis in fixing the effective date in compliance with its resolution.

I am therefore of the opinion that both of the questions stated in your letter should be answered in the affirmative.