

A member of a State Correctional Institution Parole Board who wishes to run for the State Legislature, need not resign as a Parole Board member before he runs for election to the Legislature; however, he cannot serve in both positions at the same time and should resign from the Parole Board prior to the time that he enters upon his duties as a member of the State Legislature.

OFFICIAL OPINION NO. 17

April 10, 1956

Honorable William H. Herring
State Representative
P. O. Box 86
Linton, Indiana

Dear Representative Herring:

We have received your letter requesting my Official Opinion which reads as follows:

"I request an official opinion on the following question:

"(1) Can the Common Council of a fifth class city fix the retirement age of a police officer who is not participating in the police pension fund?"

The Acts of 1905, Ch. 129, Sec. 170, as amended, as found in Burns' Indiana Statutes (1950 Repl.), Section 48-6120, reads, in part, as follows:

"* * * And, in such cities of the fifth class, the common council may provide, by ordinance, for the exercise by committees of such council of all functions in this act provided to be exercised by boards of public safety, so far as applicable; and may also provide, by ordinance, for the exercise by the mayor of the functions provided by law to be exercised by the boards of public safety relating to the appointment, suspension, and discharge of all members of the police force; and may also provide for the compensation of all the members of such forces."

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The Acts of 1905, Ch. 129, Sec. 160, as amended, as found in Burns' Indiana Statutes (1950 Repl.), Section 48-6105, reads, in part, as follows:

"Every member of the fire and police forces, including police radio operators and police signal and fire alarm operators, appointed by the mayor, the commissioners of public safety or the board of metropolitan police commissioners, shall hold office until they are removed by said board. They may be removed for any cause other than politics, after written notice is served upon such member in person or by copy left at his last and usual place of residence notifying him or her of the time and place of hearing, and after an opportunity for a hearing is given, if demanded, and the written reasons for such removal shall be entered upon the records of such board. * * *"

It will be noted that Burns' 48-6120, *supra*, makes a reference to "functions in this act provided to be exercised by boards of public safety." We are unable to find any legislative authority for anyone to act with regard to fixing the retirement of policemen in cities of the fifth class, where the policeman is not participating in the police pension fund. Insofar as the Legislature has expressed itself on the retirement age of policemen of any class of city, such expression has always been made coupled with an expression concerning the payment of benefits under the police pension fund.

See Acts of 1933, Ch. 8, Sec. 1, as amended, as found in Burns' Indiana Statutes (1950 Repl.), Section 48-6201;

Acts of 1935, Ch. 89, Sec. 7, as amended, as found in Burns' Indiana Statutes (1950 Repl.), Section 48-6211;

Acts of 1925, Ch. 51, Sec. 1, as amended, as found in Burns' Indiana Statutes (1950 Repl.), Section 48-6401 *et seq.*

I believe it therefore becomes necessary to examine the relevant statutes for a determination of legislative intent with regard to the tenure of policemen. As pointed out above,

Burns' 48-6120, *supra*, states that the common council of fifth class cities may exercise all functions of the board of public safety in other classes of cities, so far as applicable. Among the various functions of the board of public safety are those quoted in part from Burns' 48-6105, *supra*, concerning removal from the force by the board and we believe this statute controls your question.

The Court in *State ex rel. Shanks et al. v. The Common Council of the City of Washington* (1936), 212 Ind. 38, 7 N. E. (2d) 968, held that Burns' 48-6120, *supra*, provided tenure for firemen in fifth class cities the same as those cities of a higher class, regardless of whether they were appointed by the common council or the board of public safety, citing Burns' 48-6105, *supra*.

It has been held under Burns' 48-6105, *supra*, that original appointment, promotion and rank secured by members of the police force shall be retained by such members unless dismissal or demotion is justified by some cause personal to the particular member.

Coleman v. City of Gary (1942), 220 Ind. 446, 44 N. E. (2d) 101.

In the case of *City of Lafayette v. Keen et al.* (1943), 113 Ind. App. 552, 48 N. E. (2d) 63, the Court was required to construe the rights of a fireman under the above statutes, and on page 562 of the opinion, said:

"It is well settled that the so-called 'Fireman's Civil Service Law,' Acts 1905, ch. 129, § 160, and Acts 1933, ch. 86, § 1, constitute firemen tenure employees of a city and that their employment is continuous until terminated as provided by such statutes. * * *"

Again, in the opinion of the same case, the Court further said at page 564:

"Having found no compelling authority, either in this State or elsewhere, it is difficult for us to subscribe to appellant's contention that a tenure contract, valid in its inception and which the Legislature has said can be terminated by the city only for cause after proper hearing, can subsequently be rendered invalid by the

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failure of the common council to appropriate sufficient money for its performance. The appellees held tenure contracts with the appellant to render services to said city for the compensation provided by the ordinance of 1929, as long as the same remained in force and until such contracts were legally terminated. * * *

Our Supreme Court in 1901 considered a predecessor statute to Burns' 48-6105, *supra*, and which contained language essentially similar, saying:

"* * * By this section, the legislature expressly declares what shall be the term or holding of the members of the respective forces. Such term is not fixed so as to be measured in point of time by any particular number of years, neither is it declared to be at the pleasure of the board of public safety; but the holding or term is declared to be, in the plain and unmistakable language of the statute, until removed by the board for any cause other than politics. If, as declared, they can not be removed except for cause other than politics, it is reasonable to assume from the language or terms employed in the statute that the legislature intended that they should hold their positions during good behavior, unless physically incapacitated from discharging the legitimate duties thereof. * * *"

Roth v. The State *ex rel.* Kurtz *et al.* (1902), 158 Ind. 242, 252, 63 N. E. 460.

Again in 1932, the Court rendered a further explanation as to the meaning of the first sentence of Burns' 48-6105, *supra*, by quoting as follows:

"* * * 'The statute declares in general terms that the removal must be for cause and, this, as the authorities affirm, necessarily and reasonably implies that the cause intended is to be some dereliction or general neglect of duty, or some delinquency affecting the general character of the officer, or his fitness for holding the office, or his incapacity to discharge the duties thereof. Mechem, Public Officers, § 457; (Citations omitted). Their term of office is thus a fixed tenure within the meaning of the law * * * and as a general proposition

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they are not subject to be dismissed from the service except for cause, and then after a hearing on proper notice.' *Shira v. State ex rel.*, 187 Ind. 441, 445, 119 N. E. 833, 834."

State ex rel. Felthoff v. Richards et al. (1932), 203 Ind. 637, 180 N. E. 596.

Inasmuch as there are no provisions for the retirement or pension benefits for the police officer in question, his retirement must be deemed the same as a dismissal. The Acts of 1905, Ch. 129, Sec. 160, *supra*, provides that dismissal must be justified and may only be effected for cause.

In view of the foregoing, it is my opinion that the common council of a fifth class city may not fix an arbitrary age at which all policemen who are not members of a police pension fund will be retired from the police force. However, if a policeman is, because of age, incapable of fully performing his duties, then he could be removed under and pursuant to the provisions of Burns' 48-6105, *supra*.

OFFICIAL OPINION NO. 18

April 17, 1956

Mr. R. R. Wickersham
State Examiner
State Board of Accounts
304 State House
Indianapolis 4, Indiana

Dear Mr. Wickersham:

This is in reply to your letter of March 14, 1956, in which you inquire as follows:

"Chapter 99, Acts of 1945, as amended, is a general statute providing for the methods to be followed in making purchases of materials, equipment, goods and supplies with public funds of the state, county, township, cities and towns.

"Section 65-319 Burns is Section 9, Chapter 105, Acts of 1899, which statute is commonly referred to as the