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Since the Soldiers' and Sailors' Civil Relief Act of 1940 provides that before a default judgment is taken against a serviceman an attorney must be appointed to represent the serviceman and protect his interests, the defendant does not remain undefended and the Prosecuting Attorney need not appear and resist the petition.

Therefore, in answer to your first question, it is my opinion that, in view of the provisions of the Universal Military Training and Service Act, the Soldiers' and Sailors' Civil Relief Act of 1940 is still in full force and effect in Indiana.

In answer to your second question, I am of the opinion that the wife of a nonresident serviceman may obtain service by publication on her husband by conforming to the provisions of the Indiana statute which provides that the defendant must be a nonresident of Indiana or his residence, upon diligent inquiry, is unknown. As previously stated, persons inducted into the Armed Services from Indiana do not lose their Indiana residence merely by virtue of being in the Armed Services. Residence is a question of fact which must be determined in each case. I am also of the opinion that an appearance by the Prosecuting Attorney in a divorce action where the serviceman defendant does not appear does not satisfy the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, which require that an attorney representing the defaulting serviceman must be appointed by the Court.

OFFICIAL OPINION NO. 40

October 3, 1955

Honorable W. O. Hughes
State Representative
403 Standard Building
Fort Wayne, Indiana

Dear Representative Hughes:

This is in reply to your letter in which you request an Official Opinion, and which letter reads as follows:

"A question has arisen as to the rights and obligations of members of the Fort Wayne Board of Health. I

respectfully ask an official opinion on the following questions:

“1. Are employees of the Fort Wayne Board of Health, who are covered under the Pension Act of 1945, Chapter 36, eligible to participate in the benefits conferred by Chapter 340 of the Acts of 1955?

“2. Does an election under Chapter 340, Section 5 of the Acts of 1955, bind members participating in Pension Plan established by Chapter 36 of the Acts of 1945?

“3. May Sanitary Officers and Inspectors of the Fort Wayne Board of Health now under the Pension Plan of Chapter 36, Acts of 1945, be required to participate in the benefits conferred under Chapter 340 of the Acts of 1955?”

Your questions, put in succinct form, ask what are the rights and duties relative to Federal Social Security of municipal employees who are members of the Sanitary Officers' Pension Fund.

The Sanitary Officers' Pension Fund was created by the Acts of 1945, Ch. 36, as amended, as found in Burns' Indiana Statutes (1950 Repl.), Section 48-6651 *et seq.* Said Act establishes a pension fund for the sanitary officers and inspectors of the city board of health in cities of the second class having a population of more than one hundred and fifteen thousand (115,000).

A brief historical resumé is of great value to a solution of your questions.

1. The original Federal Social Security Act of 1935 excluded all state and municipal employees. See 49 Stat. 625, Ch. 531, Sec. 210 (b) (6).

2. Thereafter, in 1950, Congress enacted a provision whereby a state could enter into an agreement with the Federal Government to extend Old Age and Survivors' Insurance of Social Security to state and municipal employees; however, such coverage could not be extended to any state or municipal employee who was under a retirement system. See 64 Stat.

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514, as found in 42 U. S. C. A., Section 418 (a) and (d). See also 1950 U. S. Code, Cong. Service, p. 3292, A1 (e). You will thus note that public employees under a retirement system were mandatorily excluded.

3. Upon passage of this 1950 Federal Act, the Indiana General Assembly immediately took advantage thereof by passing state enabling legislation. See Acts of 1951, Ch. 313, as found in Burns' Indiana Statutes (1951 Repl.), Section 60-1901 *et seq.* However, this last cited Indiana Act recognized in Section 10 thereof that it was inapplicable to employees of the state or a municipality who were under a state or local tax-supported retirement plan.

4. Thereafter, in 1954, Congress enacted a further amendment to the Social Security Act whereby a Federal-State Agreement could be entered into or modified so that Social Security coverage could be extended to service by state or municipal employees in positions covered by a retirement system. See 68 Stat. 1055, as found in 42 U. S. C. A. (1954 Supp.), Section 418 (d) (3).

5. Thereupon, the Indiana General Assembly enacted two more enabling laws. Acts of 1955, Ch. 329, as found in Burns' Indiana Statutes (1951 Repl., 1955 Supp.), Section 60-1911 *et seq.*, generally speaking, established procedure for inclusion under Social Security of members of The Indiana State Teachers' Retirement Fund, The Public Employes' Retirement Fund, The State Board of Accounts Retirement Fund, and retirement systems established by state institutions of higher learning. The Acts of 1955, Ch. 340, as found in Burns' Indiana Statutes (1951 Repl., 1955 Supp.), Section 60-1902 *et seq.* established the procedure for the inclusion of certain other retirement systems under Social Security.

From the above and foregoing resumé, you will note that the Sanitary Officers' Pension Fund members are not made eligible for Social Security by the Acts of 1955, Ch. 329, *supra*, since these members are not members of any retirement system covered by said Chapter 329. Also, a referendum conducted among Fort Wayne municipal employees who are members of the Public Employes' Retirement Fund would be conducted under said Chapter 329, and therefore, the members of

the Sanitary Officers' Pension Fund could not vote in such referendum.

The Acts of 1955, Ch. 340, Sec. 7 (a), as found in Burns' Indiana Statutes (1951 Repl., 1955 Supp.), Section 60-1910, reads as follows:

* * *

(a) *Any employee of a political subdivision or of a local unit, who is now or may hereafter become a participant in a retirement plan of a political subdivision or local unit which said plan does not receive support from any state funds, shall be eligible to participate in the Old Age and Survivors Insurance program provided by the Federal Social Security Act.* The modification of the federal-state agreement to effectuate such participation, as hereinafter provided, may be effective with respect to services performed on and after January 1, 1955, or on January 1 of any year thereafter, as specified in such modification. The eligibility created by this section does not extend to any member of the Public Employes' Retirement Fund or any other state retirement system, nor shall the same extend to those persons covered by the Indiana State Teachers' Retirement Fund, the Judges' Retirement System, or a police or fire department's pension fund plan." (Our emphasis)

The members of the Sanitary Officers' Pension Fund are employees of a political subdivision and are members of the retirement plan of a political subdivision which said plan receives no support from state funds. Therefore, the members of the Sanitary Officers' Pension Fund are eligible to participate in the benefits of the Acts of 1955, Ch. 340, subject to the conditions hereinafter stated.

The Acts of 1955, Ch. 340, was an Act amending the Acts of 1951, Ch. 313, *supra*. If you will re-examine Item No. 3 in the historical resumé above, you will note that Section 10 of said 1951 Act recognized that said Act was inapplicable to members of retirement systems. The Acts of 1955, Ch. 340, Sec. 7 amended Acts of 1951, Ch. 313, Sec. 10, in this regard. It is the Acts of 1955, Ch. 340, Sec. 7, to which one must look to find authorization for inclusion under Social Security of mem-

bers of the Sanitary Officers' Pension Fund. Said inclusion is not authorized by any other provision of the Acts of 1955, Ch. 340, or by the Acts of 1955, Ch. 329. The Acts of 1955, Ch. 340, Sec. 5, does not mention employees under a retirement system; said section is a mere continuation of the Acts of 1951, Ch. 313, Sec. 7, whereby a political subdivision could elect, by mere ordinance, coverage of its non-retirement system employees under Social Security. See again Item 3, *ante*, under historical resumé. The Acts of 1955, Ch. 340, Sec. 7, is the only section of said Act which mentions employees who are under a retirement system and said Section 7 is complete and paramount as to the members of a purely municipal retirement system. Therefore, no mere ordinance or resolution of the political subdivision's governing body, as provided in the Acts of 1955, Ch. 340, Sec. 5, will suffice to extend Social Security coverage to retirement system members. *The federal law requires a referendum to be conducted.* See the Federal Act cited in Item 4 of historical resumé. The Acts of 1955, Ch. 340, Sec. 7, executes and implements such Federal Act. Thus, the answer to your second question is in the negative; the Acts of 1955, Ch. 340, Sec. 7, must be complied with to extend Social Security coverage to the members of the Sanitary Officers' Pension Fund.

The Acts of 1955, Ch. 340, Sec. 7, among other things, provides that the governor may conduct, or cause to be conducted, a referendum among the employees in a retirement system covered by said Section 7, at which referendum, there shall be submitted the question of whether or not service in positions covered by the retirement system shall be excluded from or included under the Federal-State Agreement for Social Security coverage. Also, before Social Security can be extended, a majority of the eligible voters must vote for inclusion; this means not merely a majority of those members of the retirement system who actually vote, but it means a majority of the members of the retirement system who could have voted. See the Federal Act cited in Item 4 of the historical resumé and Acts of 1955, Ch. 340, Sec. 7 (d). Also, said Sec. 7 (b) of the Indiana Act provides in part as follows:

“* * * The governor shall *not* conduct or cause to be conducted any referendum with regard to the employees covered by any such retirement system *until and unless*

a request therefor is made to him by the board or governing body administering the affairs of the particular retirement system above described.” (Our emphasis)

As a result of this quoted provision, before any referendum could be held with respect to employees covered by the Sanitary Officers' Pension Fund, it would be necessary that the Board of Trustees which manages and governs this pension fund make a voluntary request to the governor for the holding of such a referendum. Acts of 1945, Ch. 36, Sec. 1, as found in Burns' Indiana Statutes (1950 Repl.), Section 48-6651, indicates that the Board which administers the affairs of this retirement system is a board of trustees composed of five (5) members; these five members consist of the mayor, the city health officer, and three (3) active or retired sanitary officers or inspectors of the city board of health who are elected by the sanitary officers and inspectors of the board of health. The answer to your third question is that the members of this retirement system cannot be compelled to take any action with regard to Social Security coverage except under the conditions and procedure established in the Acts of 1955, Ch. 340, Sec. 7. These conditions include: (1) A request for the holding of a referendum made by the board of trustees to the governor; (2) an Executive Order by the governor for the holding of a referendum in this particular retirement system; an Executive Order relating to some other retirement system, such as the Public Employees' Retirement System, would be inadequate; (3) a referendum limited exclusively to the members of this particular retirement system at which referendum a majority of those eligible to vote therein, vote for inclusion under Social Security.

My conclusions are:

1. The members of the Sanitary Officers' Pension Fund created by the Acts of 1945, Ch. 36, as amended, are eligible to participate in the benefits conferred by the Acts of 1955, Ch. 340, by complying with the conditions and procedure stated in Section 7 of said Act as well as the provisions of the Federal Social Security Act, *supra*.

2. An ordinance or resolution of the political subdivision as provided in Acts of 1955, Ch. 340, Sec. 5, cannot be effective

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to extend Social Security coverage to the members of the Sanitary Officers' Pension Fund; Section 7 of said Ch. 340, and the Federal Social Security Act, must be complied with to accomplish this result.

3. Until and unless the conditions and procedure stated in Acts of 1955, Ch. 340, Sec. 7 are met and complied with, the members of the Sanitary Officers' Pension Fund cannot be required to vote and cannot vote in any Social Security referendum and cannot be required to participate and cannot participate in Social Security coverage.

OFFICIAL OPINION NO. 41

October 4, 1955

Mr. Wilbur Young
State Superintendent of Public Instruction
227 State House
Indianapolis 4, Indiana

Dear Sir:

Your letter of August 19, 1955 has been received and reads as follows:

"The question regarding the following local school policy in connection with Special Education classes has come to our attention in several cases and a clarification of the law is needed. May we have an Official Opinion regarding the following question:

"When school corporations that organize Special Education classes and make application for and receive excess cost payments, shall they accept transfer students from surrounding corporations who do not maintain Special Education programs * * *.

"If in previous years a child has been accepted by transfer, can the school corporation refuse to continue the child in the program on the premise that the program is overcrowded?"