reached because of the provisions in the Act permitting a municipality to withdraw from the fund; no such permission is granted to a state agency. The result reached herein is therefore necessarily due to the dissimilar provisions of the Act respecting the state and municipalities.

OFFICIAL OPINION NO. 70

December 17, 1954

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

Dear Mr. Wickersham:

This is in reply to your letter of November 19, 1954, in which you inquire as to the following:

> "A question has been presented to this office by the Board of Commissioners of Marion County with reference to the legality of a member of the Marion County Plan Commission continuing to serve and be paid as such member after having been elected as a member of the Indiana General Assembly.
>
> "1. May a member of the Marion County Plan Commission continue to serve and be compensated as such after being elected as a member of the Indiana House of Representatives at the last general election or after taking office as such Representative?
>
> "2. If your answers to questions 1 and 2 should be in the negative, would your opinion be different if no compensation were paid by the County Plan Commission?"

Two different principles of law are involved in your question, namely, (a) whether Art. 2, Sec. 9 of the Indiana Constitution, which prohibits any person from holding more than one lucrative office at the same time, prevents a person from being a member of the Marion County Plan Commission and

at the same time a member of the Indiana General Assembly; and (b) whether the offices of a member of the Marion County Plan Commission and a member of the Indiana General Assembly are incompatible at common law.

I will consider the foregoing in the order set out above.

(a) The fact that a member of the Indiana General Assembly is the holder of a lucrative office under Art. 2, Sec. 9 of the Indiana Constitution is too well established to require citation of authority herein.

Is the office of a member of the Marion County Plan Commission a lucrative office within the meaning of Art. 2, Sec. 9 of the Indiana Constitution?

> "An office is a public charge or employment in which the duties are continuing, and prescribed by law and not by contract, invested with some of the functions pertinent to sovereignty, or having some of the powers and duties which inhere within the legislative, judicial, or executive departments of the government. An emolument is a usual, but not a necessary element thereof. Wells v. State (1911), 175 Ind. 380, 94 N. E. 321."

The creation of County Plan Commissions is authorized under Ch. 174 of the Acts of 1947, as amended, as found in Burns' Indiana Statutes (1951 Repl.), Section 53-701 *et seq.* Reference to this statute clearly shows that the duties of a member of a County Plan Commission are continuing and are prescribed by law and not by contract. Further, and without enumerating the specific powers conferred upon the Plan Commission, I think a County Plan Commission is invested with some of the functions pertinent to sovereignty, since it is granted extensive powers with regard to planning and zoning, all of which are an exercise of the police power of the State. A member of a County Plan Commission is, therefore, the holder of an "office" within the meaning of Art. 2, Sec. 9 of the Indiana Constitution.

The Acts of 1947, Ch. 174 contains no salary provision for a member of a County Plan Commission; however, Sec. 21 of said Ch. 174, *supra,* as found in Burns' Indiana Statutes (1951 Repl.), Section 53-721 provides that the County Commis-

sioners may approve a per diem allowance of not more than five dollars ($5) to any citizen member of a County Plan Commission for attendance at a regular or special meeting of the Commission. A per diem is not a fee, salary or wages. It is a compensation for a service given the government for a day or a part of a day. 1945 O. A. G., pp. 188, 190, No. 40.

In Dailey v. State (1848), 8 Blackf. 329, in speaking of the offices of Recorder and County Commissioner, the Court said:

> "We think, also, they are lucrative offices. Pay, supposed to be an adequate compensation, is affixed to the performance of their duties. We know of no other test for determining 'lucrative office' within the meaning of the Constitution. The lucrativeness of an office—its net profits—does not depend upon the amount of compensation affixed to it. The expenses incident to an office with a high salary may render it less lucrative, in this latter sense, than other offices having a much lower rate of compensation."

In view of the foregoing, I think the per diem allowance to a member of a County Plan Commission is to be considered as compensation for a service given the county. Therefore, if the Board of Commissioners, pursuant to their statutory authority, approved a per diem allowance, then a member of the County Plan Commission would be the holder of a lucrative office under Art. 2, Sec. 9 of the Indiana Constitution.

(b) It is also a general rule that a public officer is prohibited from holding two incompatible offices at the same time, the rule being founded on principles of public policy. (67 C. J. S. Officers, Section 23, p. 133.) In this regard offices are generally held to be incompatible where a conflict of interests exists, as where one is subordinate to the other and subject in some degree to the supervisory powers of its incumbent. In a case similar to the situation now under consideration, Weza v. Auditor General *et al.* (1941), 297 Mich. 686, 298 N. W. 368, the Supreme Court of Michigan considered the question as to whether the office of a member of the State Legislature was incompatible with the office of County School Commissioner. The Court held that:

> "The office of county school commissioner is not a

constitutional office, but instead is one created by the legislature. Eligibility to that office and the powers and duties of county school commissioners are fixed by legislative action. These may be increased or diminished by the legislature. The compensation of one holding that office might be fixed by the legislature, and in fact the minimum salary of county school commissioners is fixed by statute. The manner of electing one to the office and of filling a vacancy therein are likewise determined by legislative action. * * * Clearly the office of county school commissioner is subordinate to that of a member of the legislature. The former owes its creation and continuation to legislative enactment and is completely subject to legislative control. Further, as a matter of sound public policy these two offices should be held incompatible. If a controlling faction in the legislature was composed of county school commissioners, it is conceivable that the legislature might materially increase salaries of county school commissioners, enlarge their powers, or diminish their duties.

" 'It is the universal rule that when such incompatibility exists the acceptance of the latter office vacates the first.' State v. Goff, 15 R. I. 505, 9 A. 226, 2 Am. St. Rep. 921, and authorities there cited. The authorities are in substantial agreement as to the rule of incompatibility, and Mechem states it as follows: 'This incompatibility which shall operate to vacate the first office exists where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both.' Mechem, Pub. Off. § 429. In State v. Goff the test is thus stated:

" 'The test of incompatibility is the character and relation of the offices; as where one is subordinate to the other, and subject in some degree to its revisory power, or where the functions of the two offices are inherently inconsistent and repugnant. In such cases it has uniformly been held that the same person cannot hold both offices.' Attorney General v. Detroit Common Council, 112 Mich. 145, 168, 70 N. W. 450, 458, 37 L. R. A. 211.

"Numerous authorities are cited in support of the text of 22 R. C. L. (pp. 413-414), §§ 55 and 56, which in part reads:

" 'It is extremely difficult to lay down any clear and comprehensive rule as to what constitutes incompatibility of offices. * * * Sometimes it is said that incompatibility exists where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one incumbent to retain both. * * * It is not an essential element of incompatibility at common law that a clash of duty should exist in all, or in the greater part, of the official functions. * * *'

"One of the most important tests as to whether offices are incompatible is found in the principle that the incompatibility is recognized whenever one is subordinate to the other in some of its important and principal duties, or is subject to supervision by the other, or where a contrariety and antagonism would result in the attempt by one person to discharge the duties of both.

"Without further citation of a mass of sustaining authorities, we hold that the two offices here involved are incompatible."

I think the foregoing principles are applicable to the question now under consideration in view of the fact that the office of a member of a County Plan Commission is clearly subordinate to the office of a member of the General Assembly in its importance and principal duties and is subject to supervision by the latter, and I am, therefore, of the opinion that the two offices are incompatible at common law.

Therefore, my answers to your questions are as follows:

1. A member of the Marion County Plan Commission may not continue to serve and be compensated as such after being elected as a member of the Indiana House of Representatives.

2. In view of the incompatibility of the offices, my opinion would be no different if no compensation were paid by the County Plan Commission.