OFFICIAL OPINION NO. 44

July 14, 1954

Mr. Cecil Bolinger
Executive Secretary
Public Employes' Retirement Fund
707 Board of Trade Building
Indianapolis 4, Indiana

Dear Mr. Bolinger:

Your letter of March 1, 1954, has been received requesting an Official Opinion on the following question:

"Are the employes of the Indiana Toll Road Commission to be considered employes of the State of Indiana? If so, are they compulsorily covered by the Public Employes' Retirement Fund?"

The Acts of 1951, Ch. 64, Sec. 1, as found in Burns' Indiana Statutes (1951 Repl.), Section 60-1604, being an amendment to Section 4 of the original Public Employes' Retirement Act, defines the word "employee" in part, as follows:

"'Employee' shall mean any person in the employ of the state whose compensation is paid out of funds of the state * * * ."

The Toll Road Commission statute, the Acts of 1951, Ch. 281, as found in Burns' Indiana Statutes (1949 Repl., 1953 Supp.), Section 36-3201 et seq. was very fully considered by the Supreme Court of Indiana in the case of Ennis v. State Highway Commission (1952), 231 Ind. 311, 108 N. E. (2d) 687. On pages 324 and 325 of said decision the Court said:

"Appellant argues that a portion of Section 3, Chapter 281, of the Acts of 1951, contravenes the last-cited section of the Constitution of Indiana. Section 3 provides in part:
"* * * The commission hereby created is a body both corporate and politic in the State of Indiana * * *.'

"However, Section 3 further provides:

"and the exercise by the commission of the powers conferred by this act in the construction, operation and maintenance of toll road projects shall be deemed and held to be essential governmental functions of the state * * *.'

"The last-cited provision makes it clear that the commission is created for a public purpose. From a reading of the act in its entirety, it is apparent that it provides for the construction, operation, and maintenance of toll roads anywhere in the State of Indiana. The law applies to the entire state. It is neither local nor special. It is a general law under Sections 22 and 23, Article 4, of our Constitution. Bennett v. Spencer County Bridge Comm. (1938), 213 Ind. 520, 13 N. E. (2d) 547, supra.

"The toll road commission here created is a commission of the state created for a public purpose. Application of Oklahoma Turnpike Authority (1950), 203 Okla. 335, 221 P. (2d) 795. It could not embark on an enterprise of a private character. State ex rel. v. Ferguson (1951), 155 Ohio St. 26, 97 N. E. (2d) 660. Despite the fact that the commission is given the characteristics of a corporation it is still a commission of the State of Indiana. Section 36-3205, Burns' 1949 Replacement (1951 Supp.)." (Our emphasis)

"The commission is not a corporation within the meaning of Section 13; Article 11, of the Constitution of Indiana."

In determining the question as to whether said Toll Road Commission statute violated the provisions of the Constitution of Indiana, Art. 11, Sec. 12, as a pledge of the state's credit in allowing advancements of funds and services by the State Highway Commission to the Toll Road Commission, the Supreme Court on p. 334 of said opinion said:

"It seems clear that this last-cited section of our Con-
stitution has reference to the advancing of credit to private corporations or associations, and does not apply to an agency of this state." (Our emphasis)

On pages 335 to 337 of the opinion, the Supreme Court further said:

"Appellant also contends that the act is a subterfuge to avoid Section 1, Article 13, of the Constitution of Indiana, which provides:

"'No political or municipal corporation in this State shall ever become indebted in any manner or for any purpose to an amount in the aggregate exceeding two per centum of the value of the taxable property within such corporation * * *.'"

"Section 1, Article 13, applies solely to municipal corporations or to political corporations which are local and limited territorially. This section does not apply to the State of Indiana.

"Section 5, Article 10, of the Constitution of Indiana, is binding upon the state. If the revenue bonds to be issued, as provided by the act here in question, are an indebtedness of the state, then Section 5 of Article 10 is violated.

"Section 1 of Chapter 281 of the Acts of 1951 [§ 36-3201, Burns’ 1949 Replacement (1951 Supp.)] provides in part:

"'* * * and to issue toll road revenue bonds of the state payable solely from revenues * * *.'"

"Section 2 of the act [§ 36-3202, Burns’ 1949 Replacement (1951 Supp.)] provides:

"'Toll road revenue bonds issued under the provisions of this act shall not be deemed to constitute a debt of the state or of any political subdivision thereof or a pledge of the faith and credit of the state or of any such political subdivision, but such bonds shall be payable solely from the funds pledged for their payment as authorized herein * * *. All such revenue bonds shall contain on the face thereof a statement to the
effect that the bonds, as to both principal and interest, are not an obligation of the State of Indiana, or of any political subdivision thereof, but are payable solely from revenues pledged for their payment.' (Our emphasis)

"From the above sections, it is clear that this act does not create a debt of the state; Application of Oklahoma Turnpike Authority (1950), 203 Okla. 335, 221 P. (2d) 795, supra; State, ex rel. v. Ferguson (1951), 155 Ohio St. 26, 97 N. E. (2d) 660, supra; State v. Fla. State Improvement Commission (1947), 159 Fla. 338, 31 So. (2d) 548; nor can tax monies of the state be used to pay the revenue bonds. Bonds which are to be paid solely from the revenue collected from a project have been discussed by this court many times, and have been held not to create a debt of the municipal corporation involved, under Section 1, Article 13, of the Constitution of Indiana. Property Owners, Inc. v. City of Anderson (1952), 231 Ind. 78, 107 N. E. (2d) 3; Edwards v. Housing Authority of City of Muncie (1939), 215 Ind. 330, 19 N. E. (2d) 741; Letz Mfg. Co. v. Public Service Commission of Ind. (1936), 210 Ind. 467, 4 N. E. (2d) 194; Underwood v. Fairbanks, Morse & Co. (1933), 205 Ind. 316, 185 N. E. 118; Bennett v. Spencer County Bridge Comm. (1938), 213 Ind. 520, 13 N. E. (2d) 547, supra; Voss v. Waterloo Water Co. (1904), 163 Ind. 69, 71 N. E. 208; Jefferson School Twp. v. Jefferson Twp. S. Bldg. Co. (1937), 212 Ind. 542, 10 N. E. (2d) 608; Fox v. City of Bicknell (1923), 193 Ind. 537, 141 N. E. 222.

"We feel that the reasoning in the last-cited cases is equally applicable to the State of Indiana, and that therefore Chapter 281 of the Acts of 1951 does not violate Section 5, Article 10, of the Constitution of Indiana." (Our emphasis)

From the last-referred to quotation, the Supreme Court has specifically found that the bonds to be issued by the Toll Road Commission are "bonds of the state," in fact, the statute specifically designates the same as such, but the Supreme Court holds they are not a debt of the state within the meaning of
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said constitutional provision where they are payable entirely from revenue received from the operation of the toll road.

The Supreme Court has further found in the other quoted parts of the opinion that the Toll Road Commission is a "Commission" of the State of Indiana, and is an "Agency" of the State of Indiana.

It has been held that a "Commission" of the state is synonymous with a "Department" of the state.

Kolano v. Dept. of Labor and Industries (1933), 172 Wash. 27, 19 P. (2d) 113, 114;

O. K. Construction Co. v. Burwell (1939), 185 Okla. 443, 93 P. (2d) 1092, 1093;


It is, therefore, clear that the Indiana Toll Road Commission is an agency, commission and department of the State of Indiana and as such its employees are employees of the State of Indiana.

The answer to your first question is therefore in the affirmative.

From the answer to your question Number One, it is clear that these employees of the Indiana Toll Road Commission would be covered by the Public Employes' Retirement Fund, if their "compensation is paid out of funds of the state," within the aforesaid definition of the word "employee" as used in such Public Employes' Retirement Fund Act. [Burns' Indiana Statutes (1951 Repl.), Section 60-1604, supra.]

From an examination of the entire statute creating said Indiana Toll Road Commission, supra, as well as a consideration in its entirety of the Supreme Court's decision in the case of Ennis v. State Highway Commission, supra, it is clear the State Highway Commission advances money and services to the Indiana Toll Road Commission in the initial stage of the carrying out of the purposes of said statute prior to the issuance by the Indiana Toll Road Commission of its revenue bonds; that when the revenue bonds are sold, the State Highway Commission is to be repaid from the funds received from
the sale of such bonds; that the Toll Road is to be maintained and said revenue bonds retired from operating revenue received from the operation of the particular toll road. So, at all stages of such proceedings, state funds are being used to pay employees.

The monies used by the State Highway Commission are clearly state funds; the monies received from the sale of the revenue bonds "issued by the state," as aforesaid, including monies received as revenue from the operation of the Toll Road, are clearly state funds and are declared by said Toll Road Commission statute to constitute "trust funds." Acts of 1951, Ch. 281, Sec. 15, as found in Burns' Indiana Statutes (1949 Repl., 1953 Supp.), Section 36-3215, the last-referred to statute provides as follows:

"All moneys received pursuant to the authority of this act, whether as proceeds from the sale of bonds or as revenues, shall be deemed to be trust funds, to be held and applied solely as provided in this act. Such funds shall be kept in depositories as selected by the commission in the manner provided by law. The resolution authorizing the issuance of bonds of any issue or the trust agreement securing such bonds shall provide that any officer to whom, or any bank or trust company to which, such moneys shall be paid shall act as trustee of such moneys and shall hold and apply the same for the purposes hereof, subject to such regulations as this act [§§ 36-3201—36-3222] and such resolution or trust agreement may provide."

In the case of Storen, State Treas. v. Sexton, Marion Co. Treas. (1936), 209 Ind. 589, 200 N. E. 251, the Court was required to determine in a declaratory judgment action the constitutionality and effect of the State Sinking Fund for Public Deposits Act [Acts 1932, Ch. 33, p. 141], and in so doing reviewed the legislation of this state beginning with the first legislation regarding the depositing of public funds as originally enacted in 1907, and on pages 602 and 603 of the opinion the Court, in part, said:

"Appellees who are owners of Barrett Law, municipal sinking fund, municipal water works, and other
bonds and obligations issued under statutes which provide for payment out of revenue derived from levies in special assessment districts, or the operation of publicly-owned utilities, assert that the law is unconstitutional because it violates the Fourteenth Amendment of the Constitution of the United States by taking their property without due process of law, and section 21 of article 1 of the Constitution of Indiana, which protects against taking property of the individual without compensation and section 10 of article 1 of the Constitution of the United States, and section 24 of article 1 of the Constitution of Indiana, which protect against the impairment of the obligations of contracts. The statutes under which the several securities were issued provide that certain revenue shall constitute a special fund which shall be set aside for their payment. Some of the statutes provide that the public officers having the funds in charge shall invest the money in the fund in certain specified securities for the benefit of the holders of the obligations pending their maturity. In some statutes it is expressly provided that current funds shall be deposited as other public funds, and in some statutes there are express provisions for depositing current funds in banks which will pay the highest rate of interest. It is clear, however, that, while the funds thus received by the public officer must be devoted to the express purpose provided by statute, the funds still belong to the public until they are paid to the bondholders. * * *

While the statute refers to all moneys received as trust funds, this does not mean that the only interest of the state therein is as a mere trustee. It means that the moneys received are to be held and applied as provided in the act and are separate from the general fund of the state. However, while the funds thus received must be applied as so provided, they still belong to the state, subject to being applied as required by the Act.

In answer to your second question, I am, therefore, of the opinion such employees of the Indiana Toll Road Commission are covered by the Public Employes' Retirement Fund and
they are required to be members thereof under the compulsory requirements of its provisions except those specifically exempt under the provisions of said Act [Acts of 1951, Ch. 64, Sec. 1, "employee," subsections (a) to (e), as found in Burns' Indiana Statutes (1951 Repl.), Section 60-1604, supra], or as may be otherwise specifically exempted by law.

OFFICIAL OPINION NO. 45

July 15, 1954

Mr. Harry E. Wells
Insurance Commissioner
Department of Insurance
240 State House
Indianapolis, Indiana

Dear Mr. Wells:

This is in reply to your letter of June 14, 1954, in which you inquire as to the following:

"Can Indiana legally collect a Fire Marshal Tax on the fire portion of Inland Marine premiums paid to Insurance Companies that are doing business in Indiana?"

The Acts of 1913, Ch. 192, Sec. 18, as amended, as found in Burns' Indiana Statutes (1950 Repl.), Section 20-818, provide:

"All fire insurance companies duly licensed to transact business in the state of Indiana shall pay into the state treasury on or before March 1 and September 1 of each year, an amount equal to three-fourths of one per cent (¾%) of the gross premiums of each company, received on fire risks written in the state, after deducting therefrom return premiums and considerations received from reinsurance, as reported by them to the auditor of the state of Indiana for the payment of premium taxes as now provided by law; said semi-annual payment by such companies shall be in addition to all taxes and license fees now required by existing law or laws to be paid by fire insurance companies do-