August 3, 1954

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

Dear Mr. Wickersham:

I have your letter requesting an Official Opinion as follows:

"We have before us, in connection with a current audit, the question of the legality of payments made by a county tuberculosis hospital, for premiums paid on a group life insurance policy covering its employees. It is our understanding that the full premium is paid by the hospital and the hospital is not the beneficiary of the policy. Our investigation does not show that this arrangement was understood to be a part of the agreement or contract at the time of employment.

"We request your official opinion on the following question:

"Are municipal, county or state agencies or institutions authorized to procure group insurance covering their employees and to pay the premium on such insurance in whole or in part out of public funds?"

I also have your request upon the same type of question, but applied to the Housing Authorities of the City of Hammond and the City of Gary. In the latter request it appears that the employees are under Social Security under the insurance provisions of 42 U. S. C. A., Section 418, and the Housing Authorities propose an insurance contract with a private company to provide an annuity plan to supplement Social Security coverage.

In this opinion I shall try to answer both requests.

In the beginning we are confronted with the rule that a state agency, municipality, or political subdivision of the state has only such power and authority as is expressly given it or
arises from necessary implication to carry out a power expressly given.

In the case of Lund v. Board of Commrs. of the County of Newton (1910), 47 Ind. App. 175, 179, 93 N. E. 179, it is said:

"The board of commissioners, like other statutory officers, is without power to make any contracts for the expenditure of money, except such as are conferred upon it by statute."

See also:

Department of Insurance v. Church Members Relief Assn. (1940), 217 Ind. 58, 60, 26 N. E. (2d) 51;

Silver, Burdette & Co. v. Indiana State Board of Education (1904), 35 Ind. App. 438, 453, 454, 72 N. E. 829;


With the exception of a few special acts such as Acts of 1939, Ch. 110, Sec. 1, as amended, as found in Burns' Indiana Statutes (1950 Repl.), Section 48-6631, applicable to municipally-owned utilities, I find no statute expressly authorizing any state agency, municipality, or political subdivision to enter into such an insurance contract. The question is, therefore, reduced to whether implied authority can be found. I have not found any decision of the Indiana Supreme or Appellate Courts upon this question, and it appears to be a question of first impression in this state. I appreciate the help given by briefs submitted by the attorneys for the Housing Authorities and by a life insurance company, and have given them full consideration.

There are authorities from other states to the effect that the power to fix, increase, or decrease the wages of an employee of a municipality implies the power to put this increase of wages in the form of insurance.

The general rule is laid down in 37 Am. Jur., Municipal Corporations, § 124, as follows:

"A municipal corporation, having power to increase the wages of its employees, may take out group insur-
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...ance for their benefit, the expenditure being viewed by the courts as for a public purpose * * *.*

The subject is also considered in the annotations contained in 16 A. L. R. 1089 and 27 A. L. R. 1267. The two leading cases on the subject are State of Tennessee *ex rel.* Frank M. Thompson, Attorney General et al. v. City of Memphis et al. (1923), 147 Tenn. 658, 251 S. W. 46, 27 A. L. R. 1257 and Fred Nohl v. Board of Education of the City of Albuquerque (1921), 27 N. M. 232, 199 P. 373, 16 A. L. R. 1085. In the former case it was stated as follows by the Tennessee Supreme Court:

* * * *

"The right to fix the wages of employees inheres in the city, and when, in its judgment, conditions justify an increase in wages, it has the power to authorize such increase. The act under which the water department functions authorizes the city to fix the compensation of its employees.

"In 28 Cyc. 601, it is said: 'Unless such change is prohibited by the Constitution, statutes, or charter provisions, the power vested in a municipal board or officer to fix the compensation of a municipal agent or employee generally includes the power to increase or reduce the salary or wages of such agents or employees.'

"It could hardly be contended but that the governing powers would have the right to increase the annual wages of each employee of the water department $18 per annum, if justified by existing conditions. This, in effect, is what it did when it took out said policy of group insurance, but from an economic basis it concluded that better results would be obtained as to both parties by investing it in insurance instead of paying the money to the employee.

"Ordinarily, what can be done indirectly can be done directly. If a city can increase the wages of its employees, why not invest the increase in insurance for them, instead of paying it to them direct, if, by so doing, they are better satisfied and the city obtains better service?"
"The large enterprises of this country have reached a wonderful condition of economic efficiency, and according to the stipulation, they are adopting the group insurance system for the benefit of their employees. If it is beneficial to them, why would it not be beneficial to our municipalities? * * *"

I am impressed by the above authorities, but the danger lies in the extent to which it can be carried. If insurance can be purchased as a wage increase, why could not houses be purchased and furnished as wage increases, or groceries or other such items purchased as wage increases. The Legislature has provided retirement systems for state and local employees: The State Police Pension Fund; police and pension funds for cities; the State Teachers' Retirement Fund; and the Public Employees' Retirement Fund. The employees of municipalities may come under the latter fund at the option of the municipality. Also, provision is made for employees coming under the provisions of the insurance system established for employees coming under the provisions of the insurance system established for employees under Federal law (Social Security), where such employees are not otherwise covered by a retirement system. It thus appears that the Legislature has given consideration to retirement benefits for employees of the state and its municipalities on numerous occasions, but has never expressly authorized insurance contracts with private companies.

I have above set forth reasons and authorities which would justify an opinion either way on the question of the authority to enter into such an insurance contract. However, as the weight of authority outside of Indiana is to the effect that there is authority in municipalities to enter into such an insurance contract where authority is given to fix, increase and decrease wages, I feel that I should follow these authorities in the absence of any decision of an Indiana court of appeal. In doing so, I wish to add that the only really safe protection for such a contract of insurance is to obtain legislative sanction and authority therefor. In arriving at this conclusion I am aware of 1944 O. A. G., page 394, No. 89. That opinion concluded that such expenditure was for a public purpose and stated that the only justification for the payment of premiums
upon group insurance would be as an increase in salary. The opinion then pointed out that "Sec. 48-1222, Burns 1933" prohibited the raising of salary during the year and that in view of this section and other sections prohibiting salary increase concluded that such premiums could not be paid as a wage increase. Said Section "48-1222, Burns 1933" was amended in 1945 and said prohibition against wage increase was deleted. [Acts of 1945, Ch. 32, Sec. 1, as found in Burns' Indiana Statutes (1950 Repl.), Section 48-1222.] Since then group insurance has become a common part of wage scales. The laws generally are now more favorable to the authorization of wage and salary increase than a decade ago.

It will be necessary to check the statutes relating to each political subdivision, board or agency to determine whether wage and salary increase is or is not authorized and where not authorized there could be no payment of such premium as a wage or salary increase.

However, this does not constitute a complete answer to your question. It is the law of Indiana that public funds cannot be expended without an appropriation. Generally, the expenditure of funds cannot be contracted without an appropriation. On the state level, this is covered by the Indiana Constitution, Art. 10, Sec. 3 and various acts of the Legislature, particularly Acts of 1947, Ch. 279, as found in Burns' Indiana Statutes (1951 Repl.), Section 60-1801 et seq. As to county boards, officers, agents and employees, it is covered by Acts of 1899, Ch. 154, Sec. 25, as found in Burns' Indiana Statutes (1948 Repl.), Section 26-525. As to cities, it is covered by the Acts of 1905, Ch. 129, Sec. 56 and Sec. 86, as found in Burns' Indiana Statutes (1950 Repl.), Sections 48-1411 and 48-1508. Similar statutory prohibitions exist as to townships and towns. Under these provisions it has been uniformly held in Indiana that a contract made for the expenditure of money without an existing appropriation therefor is void. Consequently, any insurance contract involving a liability to pay premiums by a municipality would have to be against an existing appropriation therefor. As appropriations are made annually, any premiums to be paid after the first year would be subject to due appropriation being made therefor each year.

1925 O. A. G., page 340;
The above would not apply to a municipal unit which had available funds which could be spent without appropriation and which it had authority to spend for such purpose, and an investigation would have to be made in each instance of this question.

Another principle of law recognized in Indiana is that no public board or officer can bind its or his successor by a contract of employment or a contract such as proposed, without express statutory authority.

Board of Comrs. v. Taylor (1890), 123 Ind. 148 to 152, 23 N. E. 752;
Jessup v. Hinchman (1922), 77 Ind. App. 460, 133 N. E. 853;
Hord v. State, supra;
Shelden v. Butler County (1892), 48 Kan. 356, 29 P. 759;
First National Bank v. Peck (1890), 43 Kan. 643, 23 P. 1077;
Millikin v. Edgar County (1892), 142 Ill. 528, 32 N. E. 493;
20 C. J. S. Counties § 176;
Moore v. Luzerne County (1918), 262 Pa. 216, 105 A. 94.

There is another phase of this matter which should have careful consideration. This is particularly applicable to those instances where employee pension insurance is desired to supplement Social Security. Subdivision (d) of Section 418 of Title 42, U. S. C. A. provides as follows:

“(d) No agreement with any State may be made applicable (either in the original agreement or by any modification thereof) to any service performed by employees as members of any coverage group in posi-
tions covered by a retirement system on the date such agreement is made applicable to such coverage group."

The above provision is somewhat clarified by the legislative history as found in U. S. Code, Congressional Service of the 81st Congress, 2nd Session, Volume 2, page 3292, which is as follows:

"(e) Employees of State and local governments: Covered only if not under a retirement system and if state enters into an agreement with the Federal Government. All public employees under a retirement system would be excluded on a mandatory basis."

It would thus appear that there is a serious question as to whether any employees of a state governmental unit could have Social Security coverage and also a separate insurance retirement plan. 1953 O. A. G., page 268, No. 55.

In connection with the Housing Authority of the City of Gary, which is specifically requesting one of the opinions, I call attention to 1953 O. A. G., page 502, No. 109. From this opinion it would appear that this Housing Authority previously had pension coverage with the Continental Assurance Company, which apparently was terminated in order to make the Authority eligible for Social Security under a state agreement, and this opinion authorized Social Security only in the event their previous retirement insurance plan was terminated. It would now appear that they obtained the Social Security and are trying to reinstate the insurance plan which the previous plan required be terminated in order to get Social Security. The said opinion, 1953 O. A. G., page 502, No. 109, expressly refrained from passing upon the question of whether a plan involving a private contract of insurance, commonly referred to as a "retirement income plan," comes within the meaning of the words "retirement system" contained in 42 U. S. C. A., Section 418 (d).

The letter from the Housing Authority states that the Public Housing Administration of the Federal Government has agreed to and approved the contemplated program. It will still be necessary to obtain approval of the Federal Security Administrator.
I wish to point out that the purchase of any annuity, pension or retirement plan by a state institution for its employees cannot be made if thereby the application of the Public Employees' Retirement Act of Indiana is effected. The Public Employees' Retirement Act was enacted by the Acts of 1945, Ch. 340, as amended, as found in Burns' Indiana Statutes (1951 Repl.), Section 60-1601 et seq. Generally speaking, this Act creates a mandatory retirement system for many state employees. Municipalities may, at their own option, elect to participate in such retirement system. In Section 4 of said Act, it is stated that the word "employe" shall not include the following:

"(e) Employes who are members of other pension or retirement funds or plans maintained in whole or in part by appropriations by the State or municipality, or who are presently eligible for membership, or who by reason of their employment will become eligible for membership in such other pension or retirement fund or plans."

Since the power and authority of a state agency to procure any annuity, pension or retirement plan from a private insurance company must be founded only upon implication or inference from the authority to increase or reduce wages, then no such implication or inference is warranted whereby any state agency would be enabled to make its employees ineligible for membership in the Public Employes' Retirement Fund of Indiana, where such membership is otherwise mandatory; any other conclusion would make the terms of such insurance contract conflict with the provisions of the Public Employes' Retirement Act, supra.

In summary and conclusion, it is my opinion:

1. Any agency, municipality or political subdivision of government having the power to fix, increase and decrease wages may, as a part of that power, provide group and annuity insurance for such employees. Where, however, the compensation of any employee is fixed by law absolutely at a specific figure, then such insurance could not be provided for such an employee; the power to fix, increase and decrease wages would be absent in such case. I recognize in giving this opinion that
the opposite result may be reached by a court to which it is submitted as it is a question of first impression in this state and a close question.

2. As to any agency of government, municipality, or political subdivision which cannot legally contract to spend without appropriation, the validity of such contract depends upon their being an existing appropriation for the payment of premiums coming due in the appropriating period of the contract’s execution. Any premiums thereafter provided for would be subject to due appropriation being made therefor.

3. Any such insurance contract would not be binding upon a succeeding board or official.

4. The only really safe method is to obtain legislative sanction and authority for such contracts of insurance.

OFFICIAL OPINION NO. 50

September 23, 1954

The Adjutant General
212 State House
Indianapolis, Indiana

Dear Sir:

I am in receipt of your request for an Official Opinion regarding the following queries, to-wit:

"1. * * * As to whether or not the State Armory Board is the proper agency of the State to purchase real estate for the erection and construction of armories.

"2. If the State Armory Board is the proper agency in this case, is this Board excepted from the provisions of the 1947 Indiana Financial Reorganization Act regarding such purchases?"

In reply to your first question, the Acts of 1953, Ch. 187, Sec. 211, as found in Burns’ Indiana Statutes (1952 Repl., 1953 Supp.), Section 45-1911, provide: