to the above leave expressly provided by statute, which must be consistent with the salary schedule adopted by the School Board and in force and effect.

OFFICIAL OPINION NO. 62

December 6, 1954

Mr. Hugh P. O'Brien, Chairman
State Board of Correction
210 State House
Indianapolis, Indiana

Dear Sir:

Your request has been received and reads as follows:

"We would appreciate an official opinion regarding the eligibility of a State employee, in the classified service, to remain on the payroll while a candidate for a public elective office. It is our understanding that any employee in the classified service who becomes a candidate for public office shall be deemed to have resigned from the service (Section 41, Chapter 139, Acts of 1941). It is also our understanding that no person elected to public office shall, for the term for which he is elected, be appointed to any position in the classified service.

"Specifically, we have an employee who has been nominated and is seeking election for the office of Justice of the Peace. Are we correct in assuming that he shall be deemed to have resigned from the service once he has filed for such public office?"

Acts of 1941, Ch. 139, as amended, as found in Burns' Indiana Statutes (1951 Repl.), Section 60-1301 et seq. is an Act for the establishment of a State personnel merit system, applicable not to the employment of all public employees but only to those specified in Section 2(a) of the Act. Being an Act for the establishment of an employment system based upon merit, it is similar to statutes providing for the employment of persons on a civil service basis as contrasted with Acts for the
establishment of employment on a bipartisan basis. It provides for employment of persons by reason of their ability as determined by examinations and certain other requirements.

Acts of 1941, Ch. 139, Sec. 41, as found in Burns' Indiana Statutes (1951 Repl.), Section 60-1341, removes all political considerations as requisites to employment in any of the state agencies covered by the Act and provides as follows:

"In applying the provisions of this act or in doing any of the things hereby provided for, no officer or employee shall give any weight whatsoever to political, social, religious or racial considerations. No person holding a position in the state service nor any member of the board shall directly or indirectly solicit or receive or be in any manner concerned with soliciting or receiving any assistance or subscriptions or contributions for any political party or political purpose, be forced to make such contributions, nor be required to participate in any form of political activity whatsoever other than to express freely his views as a citizen and to cast his vote in any election. The board shall provide by rule for the strict observance of the provisions of this section.

"No person elected to public office shall, during the term for which he was elected, be appointed to any position in the classified service.

"Any employee in the classified service who becomes a candidate for public office shall be deemed to have resigned from the service." (Our emphasis)

Your question relates to the meaning and application of the last sentence contained in the above section, particularly with reference to the meaning of the words "shall be deemed to have resigned from the service."

First of all, it is noteworthy that the statute uses the word "shall" and it has been stated that generally it is the presumption that the word "shall," as used in a given law, is to be construed in an imperative sense, unless a different legislative intent clearly appears from the context or manifest purposes of the Act as a whole.
State ex rel. Simpson v. Meeker (1914), 182 Ind. 240, 105 N. E. 906;


The words "shall be deemed" have been held to create a conclusive presumption equivalent to the word "adjudged." See: Words & Phrases, Permanent Edition, Vol. 39 "Shall be Deemed," p. 171 and cases there cited. In other words, whenever an employee in the classified service becomes a candidate for public office, such fact raises an automatic conclusive presumption of resignation and such Act is the equivalent of tendering resignation. Such resignation is just as automatic as revocation of a will in the case of 2 Rev. Stat. (1852), Ch. 11, Sec. 3, as found in Burns' Indiana Statutes (1933), Orig. Ed., Sec. 7-303, which stated: "If, after the making of a will, the testator shall have born to him legitimate issue, who shall survive him, or shall have posthumous issue, then such will shall be deemed revoked, unless provision shall have been made in such will for such issue."

The Indiana Supreme Court in interpreting 2 Rev. Stat. (1852), Ch. 11, Sec. 3, supra, in the case of Hughes v. Hughes (1871), 37 Ind. 183, held that the birth of legitimate issue after the execution of a will works an automatic revocation of the entire will unless provision shall have been made in such will for such issue. While this section of the former Probate Code is no longer in effect, the interpretation of the same by our Supreme Court, in the above case, is conclusive that the words "shall be deemed" create an automatic operation of the statute upon the happening of such event. Just as in the case of Hughes v. Hughes, supra, the birth of legitimate issue after the execution of the will worked an automatic revocation of the will unless provision was made in the will for such issue, so, in the instant question, the act of becoming a candidate for public office works an automatic resignation of such person from classified service under the State Personnel Act.

The statute in question uses the word "resigned" so that the next question is as to the effect of the resignation. This is governed by the Acts of 1941, Ch. 139, Sec. 26, as amended, as found in Burns' Indiana Statutes (1951 Repl.), Section 60-1326, which provides as follows:
"Resignations from the classified service shall be subject to such rules as the board may prescribe. Any person who has resigned while in good standing from the classified service and whose resignation has been accepted may, at the discretion of the director, not later than two years after the date of his resignation, have his name placed on the appropriate re-employment list."

It appears to be the law of Indiana that a resignation does not of itself terminate the office or employment until accepted, unless accompanied by an abandonment.

In State ex rel. McGuyer v. Huff, 172 Ind. 1, at page 7, 87 N. E. 141, the Court said:

"A resignation may be withdrawn if not accepted, and it has been held not effective, although a successor has been appointed, if it was transmitted without the officer's consent. Biddle v. Willard, supra; State ex rel. v. Boecker (1874), 56 Mo. 17; Rogers v. Slonaker (1884), 32 Kan. 191, 4 Pac. 188."

If a resignation can be withdrawn before acceptance, it necessarily follows that it does not of itself terminate the relationship.

The above quotation from Section 26 of the Act indicates the Legislature contemplated that resignations had to be accepted and did not work automatic termination. Had the Legislature intended the mere fact of being a candidate did work automatic termination, it would have been simple to have said so, instead of putting it on the basis of a resignation.

In other words, becoming a candidate for public office is not the equivalent of an automatic termination of employment, but is equivalent to any other voluntary tender of resignation, subject to acceptance without further cause, or to such rules as the Board prescribes. It would seem, therefore, that there is a certain latitude of discretion in the employer-agency as to whether being a candidate for public office conflicts with the employee's duties to such an extent as to justify accepting such resignation. It would appear, however, that when such an employee files as a candidate for public office, the tender of
his resignation is automatic at such time and that such resig-
nation may be accepted and employment terminated thereafter
at any time without further cause or notice, so long as such
condition remains.

OFFICIAL OPINION NO. 63

December 9, 1954

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

Dear Mr. Bolinger:

This is in reply to your letter in which you request my
Official Opinion. Your letter commences with the following
paragraph:

"I respectfully request an official opinion, in regard
to certain questions that have arisen in administering
the provision for persons who have fifteen or more
years of creditable service but who have not attained a
retirement age at the time they leave the service of an
employer participating in the Public Employes' Retire-
ment Fund. These persons may receive an annuity on
reaching retirement age, based on the formula appear-
ing in Chapter 64, Section 4, Sub-section (d), page 161
of the Acts of 1951. We submit the following questions
based on theoretical cases similar to those we are en-
countering in actual practice as follows:

Your first question is as follows:

"1. Employe 'A' leaves the service of the City of
'X' on December 31, 1950, after acquiring 15 years of
creditable service with the City of 'X' but leaves his
contributions with the Fund. The City of 'X' has been
a participant in the Public Employes' Retirement Fund
since January 1, 1947. On April 1, 1951, 'A' files a
retirement application with the Public Employes' Re-
tirement Fund to take effect on his 60th birthday which