Government, it would be subject to the provisions of the Act if
the boiler or vessel be privately owned and operated or owned
by the Federal Government and under lease to a private user,
as the private concern is responsible either as owner or user,
unless coming within an exception above referred to.

5. If the boiler or vessel be located on land ceded to the
Federal Government, it would not be subject to the provisions
of the Act, even though it might be under lease to a private
concern.

OFFICIAL OPINION NO. 69

December 16, 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 requesting my Official Opinion.
Your letter, in part, is as follows:

"Mrs. X is librarian of the Anytown Public Library
which is a municipality participating under the Public
Employes' Retirement Fund. On January 1, 1954
Mrs. X retires and receives from the Public Employes' 
Retirement Fund an annual retirement benefit of
$1,049.00. Her payments to the Public Employes' Re
tirement Fund with earnings amount to $390.53. The
present value of her prospective benefits on July 1,
1954, as computed by the Actuary is $12,285.46. On
January 1, 1954 the Public Employes' Retirement Fund
transfers the $390.53 in Mrs. X's account to a retire
ment reserve account. The Fund also transfers $11,-
894.93 from an account containing payments made by
the Anytown Public Library for its employes to the
Retirement Reserve Account so that the balance in the
Retirement Reserve Account on January 1, 1954 will
be $12,285.46.

"On July 1, 1954 Mrs. X dies and the Retirement

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Fund pays her estate a death benefit of $377.53 as required by law. On July 1, 1954 the Annuity Reserve Account will appear as follows:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Balance January 1, 1954</td>
<td>$12,285.46</td>
</tr>
<tr>
<td>Plus interest on average balance to July 1, 1954</td>
<td>117.61</td>
</tr>
<tr>
<td>Less payments to Mrs. X, 6 months @ $87.41</td>
<td>$524.46</td>
</tr>
<tr>
<td>Death Benefit paid to estate</td>
<td>377.53</td>
</tr>
<tr>
<td>Balance July 1, 1954</td>
<td>$11,501.08</td>
</tr>
</tbody>
</table>

"1. Should the Public Employes' Retirement Fund return the $11,501.08 to the account from which it was taken on January 1, 1954 and use this to reduce future payments from the Anytown Library?

"If, instead of dying on July 1, 1954, let us suppose that Mrs. X is still alive and receiving her pension on January 1, 1968. On this date she will have used up the $12,285.46 set aside for her and all earnings and there will be a deficit on the account of around $800.00.

"2. Should the Public Employes' Retirement Fund bill the Anytown Public Library for the $800.00 and charge the Library for Mrs. X's pension each year as long as she shall live?

"3. Now let us suppose that on January 1, 1948 the Anytown Public Library filed notice of intention to withdraw from the Public Employes' Retirement Fund as provided in the last paragraph of Section 23 of the Public Employes' Retirement Fund Act. On January 1, 1954 the six years notice is up and the Anytown Public Library withdraws from the Public Employes' Retirement Fund and is paid all the money in its account except for the $12,285.46 which is set aside for Mrs. X. As far as it is humanly possible to tell this is the required amount. Now let us suppose that on January 1, 1968 Mrs. X is still living. Is the Anytown Public
Library liable for the $800.00 deficit and her future benefits? If the answer is NO, who is?

"In the above cases let us suppose that Mrs. X is the only employe of the Anytown Public Library who is retired, up to 1-1-68. We have many small municipalities of this type and these questions are beginning to arise."

The Acts of 1945, Ch. 340, as amended in 1947, 1951 and 1953, the same being Burns' Indiana Statutes (1951 Repl.), Section 60-1601 et seq., is known as the Public Employees' Retirement Act and this Act must be the source for the answers to your questions.

Section 14 of the Act, supra, the same being Burns' Indiana Statutes, Section 60-1614, provides that the board of trustees shall have the power and duty to "maintain a separate account for each member's contributions," "credit contributions by members to their individual accounts" and "establish appropriate reserve accounts necessary to give effect to the provisions of the Act in accordance with sound accounting procedure." Section 23 of this Act, supra, the same being Burns, Section 60-1623, provides, in part, as follows:

"The board shall keep a separate account for each municipality and individual accounts for the employees thereof, in the same manner as for other members of the fund, to which payments made by a municipality and contributions by the employees thereof for retirement benefit purposes shall be credited, and to which all appropriate retirement and other benefits shall be charged."

According to your letter in regard to question number 1, the estate of Mrs. X was paid the entire amount of this member's contributions due under Section 11 of the Act, supra, the same being Burns, Section 60-1611; this section reads, in part, as follows:

* * * *

"Upon death of a member who is receiving a retirement benefit, unless a reversionary annuity is payable
under the provisions of section 10 [§ 60-1610] hereof, a death benefit shall be paid in a single cash sum to his estate, or to such person as he shall have nominated by written direction duly acknowledged and filed with the board, consisting of the excess, if any, of the accumulated contributions of the member at time of retirement over the total amount of all member’s annuity payments received by the retired member prior to his death.”

Accordingly, it appears that the estate of Mrs. X has no further claim on the fund. Consequently, I conclude that the balance in this reserve account should be returned to the Anytown Public Library account, from whence all of said balance was originally taken. Your first question is answered in the affirmative since the individual account of Mrs. X is entitled only to her contributions and the particular municipal account is entitled to all its unexpended payments not set aside and held for any individual’s retirement benefits.

Under the facts given in relation to your question number 2, Mrs. X’s longevity, plus the circumstance that the Act does not permit pooling the account of any participating municipality with any other account, has completely depleted the reserve set aside for her benefits. Section 23 of the Act as above quoted requires the separation of accounts and further requires that the retirement benefits of a particular municipal employee shall be charged to his account and to that of the municipality which employed him; that is, of course, not consistent with standard private insurance practice. Therefore, there are only two possible taxpaying sources to replace the depletion in this case—the state or the municipality; and the state has not undertaken to bear the financial responsibility for supplying municipal employees’ pensions; municipalities are not required to join the fund as are state agencies; on the contrary, municipalities elect by ordinance or resolution to participate in the fund and such election is subject to acceptance and approval of the board of trustees; Sections 19 and 22 of the Act, supra, Burns, Sections 60-1619 and 60-1622. Under the definition of “retirement benefit” contained in Section 4 of the Act, supra, Burns, Section 60-1604, three factors make up such retirement benefit; these are:
1. employer's membership pension
2. employer's prior service pension
3. employee's membership annuity.

Section 8 of the Act, supra, Burns, Section 60-1608, indicates the method of computing each factor. Only number 3 of these factors is required to be paid by the individual employee's contributions. The other two factors are exclusively paid by the state or municipal employer. Section 21 of the Act, supra, Burns, Section 60-1621, indicates the procedure for the state to pay for factors number 1 and number 2; Section 23 of the Act, supra, Burns, Section 60-1623, indicates the procedure whereby the board is to charge the municipality for the amounts of such factors number 1 and number 2. In my opinion this deficiency should be paid by the municipality which is the employer.

With regards to your question number 3, the pertinent section of the Act is the last paragraph of Section 23 of the Act, supra, Burns, Section 60-1623, which provides as follows:

"Any municipality shall be permitted to withdraw from the fund upon giving six (6) years written notice to the board of trustees of the fund, said six (6) year period shall commence with the first day of the next fiscal year immediately following the filing of such notice. Upon expiration of the six (6) year period said municipality or participating unit of a municipality shall cease to be a member of the fund and all amounts exclusive of the amounts set aside for payments of retirement benefits granted during the period such municipality was a participant, shall, after deduction of a proper pro rata charge for administration expense, be refunded to said municipality. Thereafter no such municipality nor any employee thereof shall have any claim of any kind against the fund, but nothing contained herein shall deprive the employee of his right to proceed against the municipality for a refund of his contributions, less any retirement benefits received by him. After satisfying all claims of employee members by the municipality, should any funds remain, they will be held in trust by the municipality subject to equitable
distribution among the employees who are members of the fund at the time of withdrawal."

Under this quoted provision, upon expiration of the six year period following written notice of withdrawal, the municipality ceases to be a participant in the fund; all amounts exclusive of the amounts set aside for payments of retirement benefits theretofore granted are refunded to the municipality, subject to an administration expense. You have made such refund, according to your letter. The Act then states clearly that thereafter no municipal employee "shall have any claim of any kind against the fund." Your question number 3 is best divided into two parts and restated thus:

3a. Is the Anytown Public Library liable for the $800.00 deficit and her future benefits?

3b. If the answer to 3a is "no," who is so liable?

"Fund" means the Public Employes' Retirement Fund of Indiana; Section 4 of the Act, supra, Burns, Section 60-1604. When the municipal unit involved in this question effectively withdrew from the fund and the retirement reserve account of Mrs. X was exhausted, all claims for retirement benefits by Mrs. X were completely barred. The municipality by withdrawing from the fund is no longer assessable for any part of the pension granted Mrs. X; no provision in the Act permits assessment against a nonparticipating municipality; the state is not liable since Mrs. X was not a state employee; and the Act must be interpreted as limiting Mrs. X's claim to the reserve set aside for her. The reference to a municipal "employee" as having no "claim of any kind against the fund" must necessarily mean any past as well as present employee since the same sentence in the Act reserves to the "employee—his right to proceed against the municipality for a refund of his contributions, less any retirement benefits received by him." Only a former employee can have received retirement benefits; withdrawal from service—or employment—must precede payment of retirement benefits; Sections 8 and 9 of the Act, supra, Burns, Sections 60-1608 and 60-1609. Consequently, I conclude that the answer to question number 3a must be negative; and the answer to question number 3b is that no one is liable for such deficit. These conclusions are
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