That the provisions of this act shall be applicable to all persons who shall have completed twenty (20) years or more of teaching service as defined herein whether or not they have heretofore qualified for same, but no annuity payment shall be made pursuant to this act for time in retired status prior to July 10, 1953, or final filing of service record, whichever is later." (Our emphasis)

The last proviso (emphasized) is the controlling part applicable to this question and is new language inserted by the 1953 Legislature.

By the above provision any teacher who has completed twenty years or more of teaching service, as defined in said Act, is entitled to the benefits of the 1953 amendatory provisions of the statute, and I am, therefore, of the opinion that although this teacher was not a member of the 1953 Retirement Fund, the wife of the teacher mentioned in your request would be entitled to the beneficial provisions of the 1953 amendatory statute. This would give her the right of election to take either the lump sum death benefits under the statute, or the option of having the same converted in accordance with the Acts of 1953, Ch. 149, Sec. 2, subsection (i), the latter being the right of election as an annuity survivor, providing such teacher had completed twenty years or more of teaching service, as defined in said Act.

OFFICIAL OPINION NO. 16

March 5, 1954

Honorable Wilbur Young
State Superintendent of Public Instruction
227 State House
Indianapolis, Indiana

Dear Sir:

Your letter has been received requesting an Official Opinion and reads as follows:

"The Board of School Trustees of the School City of
East Chicago, Indiana, in meeting on December 9, directed that through your office an Official Opinion be obtained from the attorney general regarding the situation as set forth following:

"The Acts of 1951 of the General Assembly of Indiana, Chapter 38, make provision for the election of the Board of School Trustees in East Chicago. Section 4 thereof (§ 28-1710 Burns' 1933 Indiana Statutes) refers to the qualifications of the members of the Board of School Trustees and provides that 'The members of said board of school trustees shall be ineligible to any other elective or appointive office under the jurisdiction of any governmental unit during the time of service as a member of said board of school trustees. * * * Each member of said board of trustees shall, before assuming the duties of his office, take an oath before someone qualified to administer such oath, that he possesses all the qualifications required by this act.'

"On January 1, 1954 one of the elected members of the Board of School Trustees is prepared to assume his duties and to take his oath of office. At the present time this individual is serving as Chief Investigator for the Prosecuting Attorney of Lake County and is paid for his services from County funds. He proposes to continue with said employment after qualifying on January 1, 1954 as a member of the Board of School Trustees.

"1. Will this individual be qualified to assume his duties as a member of the Board of School Trustees on January 1, 1954?

"2. Will this individual be eligible to serve as a member of the Board of School Trustees and at the same time continue his employment as Chief Investigator for the Prosecuting Attorney of Lake County, Indiana?"

The pertinent part of Burns' Indiana Statutes (1948 Repl., 1953 Supp.), Section 28-1710, supra, is as follows:

"The members of such board of school trustees shall be resident voters of not less than twenty-five (25)
years of age. Each trustee shall have been a resident freeholder of the school city for a period of not less than five (5) years next preceding his election. The members of said board of school trustees shall be ineligible to any other elective or appointive office under the jurisdiction of any governmental unit during the time of service as a member of said board of school trustees.

* * *

It is, therefore, necessary to determine if the chief investigator for the Prosecuting Attorney of Lake County, Indiana, is an "elective or appointive office" within the meaning of the foregoing statute.

The Acts of 1951, Ch. 323, Sec. 1, as found in Burns' Indiana Statutes (1951 Repl., 1953 Supp.), Section 49-2514 provides as follows:

"The prosecuting attorney of any county of this state having a population of eighty-five thousand (85,000) or more according to the last preceding United States census, is hereby authorized to appoint one (1) or more investigators with the approval of the county council, who shall work under the direction of the prosecuting attorney and whose duties shall be to conduct such investigations and assist in the collecting and assembling of such evidence as, in the judgment of the prosecuting attorney, may be necessary for the successful prosecution of any of the criminal offenders of the county; any such investigator so appointed shall give bond in the sum of five thousand dollars ($5,000) and shall have and possess the same police powers within the county authorized by law to all police officers. The salary or other compensation to be paid such investigators shall not exceed in each county having a population of more than ninety-five thousand (95,000) according to the last preceding United States census, the sum of five thousand dollars ($5,000) in any one (1) year, and in each county having a population of less than ninety-five thousand (95,000) but more than eighty-five thousand (85,000) according to the last preceding United States census, it shall not exceed the sum of three thousand dollars ($3,000) in any one (1)
year: Provided, That in counties having a population of not less than three hundred thousand (300,000) nor more than four hundred thousand (400,000) according to the last preceding United States census and in which counties are located three (3) or more cities of the second (2nd) class, and which county comprises in itself a judicial circuit, the prosecuting attorney thereof is hereby authorized to appoint without the approval of the county council, not to exceed four (4) such investigators, and said prosecuting attorney shall fix the amount of salary to be paid such investigators which salary shall not exceed the sum of five thousand dollars ($5,000.00) per year for each investigator: and Provided further, That within thirty (30) days after the passage of this act and upon application therefor made by the prosecuting attorney of said last described judicial circuit, the county council of said county shall meet and appropriate as an emergency additional appropriation for the year 1951, the amount requested by said prosecuting attorney for such investigators."

That part of the above section of the statute contained in the first Proviso clearly refers to the investigators for the Prosecutor’s office of Lake County, Indiana. From the provisions of the above statute, such investigators work under the supervision and direction of the prosecutor and the only thing indicia of an office is the fact they are required to give bond, their salary is fixed, the manner of their appointment is provided for, and they are given “the same police powers within the county authorized by law to all police officers.”

It is interesting to know that as shown by the foot notes in Burns’ to the above section of the statute, prior to the 1951 amendment, they were given the same powers: “as the county sheriff.” This was changed by the last amendment to the statute.

In the case of Kirmse v. City of Gary (1944), 114 Ind. App. 558, 561, 51 N. E. (2d) 883, the court held that a member of the police department is an employee of the city with a contractual relationship of employer and employee, and for authority cites the case of City of Evansville v. Maddox (1940), 217 Ind. 39, 45, 46, 25 N. E. (2d) 321, and City of Huntington
The distinction between an employment and a public office is exhaustively considered by the Supreme Court of Indiana in the case of State ex rel. Black v. Burch, Auditor of State of Indiana (1948), 226 Ind. 445, 80 N. E. (2d) 294, whereafter in detail considering the specific duties of the Secretary of the Flood Control Commission, Director of the Motor Vehicle Department of Public Service Commission, Superintendent of Maintenance of State Highway Commission, and Barber Inspector of the Board of Barber Examiners, the court specifically held such were not "public offices" but mere "employees," and in that regard on pages 456 and 457 of the opinion said:

"After examining the foregoing stipulations and statutes, we agree with the appellants that their jobs, all as above described and provided for, are not public offices, nor do they in their respective positions, perform any official functions in carrying out their duties in these respective jobs; they were acting merely as employees of the respective commission or boards by whom they were hired.

"In performing their respective jobs none of these relators were vested with any of the functions pertaining to sovereignty. "* * * 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, and emolument is a usual, but not a necessary element thereof." Wells v. State (1911), 175 Ind. 380, 94 N. E. 321.

"See also Shelmadine v. City of Elkhart (1921), 75 Ind. App. 493, 129 N. E. 878; Tucker v. State (1941), 218 Ind. 614, 35 N. E. (2d) 270; Freyermuth v. State ex rel. Burns (1936), 210 Ind. 235, 2 N. E. (2d) 399; State ex rel. Wickens, Prosecutor v. Clark (1935), 208
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Ind. 402, 196 N. E. 234; State ex rel. Coffing v. Abolt (1934), 206 Ind. 218, 189 N. E. 131. See also Note, 53 A. L. R. 595 as to distinction between office and employment.”

For the foregoing reason, I am of the opinion that the chief investigator for the prosecuting attorney of Lake County, Indiana, does not hold an “elective or appointive office” within the meaning of the provisions of Burns’ Indiana Statutes (1948 Repl., 1953 Supp.), Section 28-1710, supra, and, therefore, each of your questions are answered in the affirmative.

OFFICIAL OPINION NO. 17

March 8, 1954

Colonel John W. McConnell
Assistant Adjutant General
212 State House
Indianapolis, Indiana

Dear Colonel McConnell:

This is in reply to your inquiry in which you request the following information:

May the employees of the Adjutant General’s office who are paid from federal funds, withdraw from the Public Employees’ Retirement Fund in order that they may participate under the Social Security plan of the Federal Government?

The Acts of 1945, Ch. 340, Sec. 5, as amended, as found in Burns’ Indiana Statutes (1951 Repl.), Section 60-1605, provides in part as follows:

“(b) Any person under fifty-nine (59) years of age who becomes an employe on or after the effective date of this act may elect upon the completion of one (1) month and not more than twelve (12) months of continuous service, uninterrupted by a break of more than two (2) months, to become a member of the fund. In the event such person shall not elect to become a member after one (1) month of continuous service, such