1937 law would be the 1909 law. However, as previously pointed out, these statutes are not inconsistent. Repeals by implication are not favored and result only when the intention of the legislature is clear and where the later act is so repugnant to and inconsistent with another act that it must necessarily be assumed that the legislature did not intend both acts to stand. E. g. Lake County Department of Public Welfare v. Nichol's Estate (1948), 223 Ind. 467, 62 N. E. (2d) 156.

Thus in my opinion, a third class city may organize a park board pursuant to Chapter 58, Acts of 1909.

OFFICIAL OPINION NO. 26

April 23, 1953.

Hon. Robert D. Harris,
State Representative,
R. R. No. 6
Kokomo, Indiana.

Dear Sir:

Your letter requesting an official opinion has been received and reads as follows:

> "I have been questioned as to the legality of a member of the Kokomo High School faculty serving in the House of Representatives.
>
> "As a member of the House, he votes on appropriations to raise his own salary and likewise on all other school matters. He also receives salaries from two state supported agencies, schools and legislature, which comes from the Auditor of State.
>
> "For example, if one school teacher can serve in the legislature and appropriate their own budget, suppose that every member were a school teacher, they could appropriate any amount of money and raise their own salaries to any amount they might desire.
>
> "I would also like to have an opinion as to the legality of a school principal serving on the City Council. The City Council appropriates all school money. Can this man legally serve in this capacity?"

1. The answer to your first question involves three separate constitutional questions: (A) the question of whether or not the Legislature is the sole judge of its membership; and, (B) does this case conflict with the provisions of Article III, Section 1 of the Constitution of Indiana, on the separation of the powers of state government, within the purview of the Indiana Supreme Court's decision in the case of State *ex rel.* Black v. Burch (1948), 226 Ind. 445, 80 N. E. (2d) 294; and (C) does such constitute a violation of Article II, Section 9 of the Constitution of Indiana relative to holding two lucrative offices. These questions will be discussed in that order.

(A) Article IV, Section 10 of the Constitution of Indiana provides:

> "Each house, when assembled, shall choose its own officers, the President of the Senate excepted; *judge the elections, qualifications, and returns of its own members; determine its rules of proceedings,* and sit upon its own adjournment. But neither House shall, without the consent of the other, adjourn for more than three days, nor to any place other than that in which it may be sitting." (Our emphasis)

Article IV, Section 30 of the Constitution of Indiana provides:

> "No Senator or Representative shall, during the term for which he may have been elected, be eligible to any office, the election to which is vested in the General Assembly; nor shall he be appointed to any civil office of profit, which shall have been created, or the emoluments of which shall have been increased, during such term; but this latter provision shall not be construed to apply to any office elective by the People."

In an official opinion of this office under date of March 3, 1953, same being 1953 Ind. O. A. G. 61, Official Opinion No. 14, after considering the above constitutional provision, it was held:

> "Upon examination of these two provisions it can be seen that the Constitution provides that the Legislature is the sole judge of such matters."

It is therefore apparent that regardless of the qualifications of a member of the Legislature, the right to participate in the session is to be judged solely by the Legislature.

(B) Article III, Section 1 of the Constitution of Indiana provides as follows:

> "The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial; and no person, charged with official duties under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided."

Under the decision in the case of State *ex rel.* Black v. Burch, *supra,* it is clear that in construing said constitutional provision the court considered it applicable only to those on a state level. In considering the meaning of the word "functions" the court, after lengthy consideration, construed it to mean state functions, duties and employment rather than on a purely local or municipal basis.

It is therefore necessary to determine whether a teacher in the common schools of the state is an officer or an employee; and to determine if such provision is applicable to him even though he is an employee in a local school system.

Under Article VIII of the Constitution of Indiana, the common school system of the state was created and it is the duty of the General Assembly to provide by law for a general and uniform system of Common Schools. As such it is a state function of government.

> Freel v. School City of Crawfordsville (1895), 142 Ind. 27, 41 N. E. 312.

It has been held that teachers in common schools of the state are not officers but are merely employees.

> Konstanzer v. State (1933), 205 Ind. 536, 187 N. E. 337, 341.

In the case of State *ex rel.* Osborn v. Eddington (1935), 208 Ind. 160, 195 N. E. 92, being an action to determine the right

to the office of county superintendent of schools, the court, after considering that the matter of education is a function of the state as distinguished from local government and that the school corporations and officers act as officers of the state independent of civil municipal corporations or civil administrative units, on page 166 of the opinion held that the county superintendent of schools was a state officer as he performed no functions of government for the county of a political or civil character. However, in making this decision, the court among other things pointed out:

> "The county superintendent performs no functions of government for the county of a political or civil character. His powers and duties relate entirely to the functions of school government. * * * Consequently the powers and duties of a county superintendent of schools can not devolve upon him as an officer of a county; but must devolve upon him as an officer of the public school system, which is a state institution. All of the powers and duties of a county superintendent pertain to the administration of school government. He has general superintendence over schools of his county and 'shall at all times carry out the orders and instructions of the state board (of) education and the state superintendent of public instruction, and shall constitute the medium between such state superintendent and subordinate school officers and the schools.' * * * Appeals may be taken to the county superintendent from decisions of township trustees relating to school matters, and from the decisions of county superintendents to the state superintendent."

So far as I know, this principle of law has not been carried beyond that of the county superintendent of schools, and so far as I can determine, teachers in the city, town and township school corporations have not been determined to be either state officers or employees. It is to be noted from the above quoted language that the court was careful to point out the fact that the county superintendent of schools was not connected with a distinct local school corporation operating a school in that district and that it referred to his exercise of state function of government in determining rights of appeals

in case of disputes in the school system on a local level. Therefore, in the absence of any decision carrying such a proposition to such an ultimate conclusion, I am of the opinion, teachers in the local school systems are not state officers or employees. If this is true they do not come within the provision of the case of State *ex rel.* Black v. Burch, *supra.*

(C) Article II, Section 9 of the Constitution provides:

> "No person holding a lucrative office or appointment under the United States or under this State, shall be eligible to a seat in the General Assembly; nor shall any person hold more than one lucrative office at the same time, except as in this Constitution expressly permitted: Provided, that offices in the militia to which there is attached no annual salary, and the office of Deputy Postmaster where the compensation does not exceed ninety dollars per annum, shall not be deemed lucrative: And provided, also, that counties containing less than one thousand polls, may confer the office of Clerk, Recorder, and Auditor, or any two of said offices, upon the same person."

The consistent construction of this constitutional provision is that it applies only to lucrative officers exercising sovereign state functions of government and does not include employees.

> Kirmse v. City of Gary (1943), 114 Ind. App. 558, 73 N. E. (2d) 485.

Since a school teacher is an employee under the authority of the case of Konstanzer v. State, *supra,* Article II, Section 9 of the Constitution of Indiana is not applicable to this question.

In addition to the foregoing it is pointed out that in the case of School City of East Chicago v. Sigler (1941), 219 Ind. 9, 36 N. E. (2d) 760, the court was required to determine the validity of a local school corporation's rules requiring a candidate for public office to take a leave of absence from his duties as a teacher in said school corporation, during the period of time he would serve in such capacity. In upholding such rule against the plaintiff in that case, who was a school teacher in the East Chicago, Indiana, schools, and who was

a candidate for the office of State Representative, the court on page 13 of the opinion, in part, said:

> "It will be conceded that he has the same privilege as any other citizen to become a candidate for public office. Such candidacy should not be and is not ground for cancellation of his contract as a permanent teacher. But anyone who has been a candidate recognizes that political activity is apt to interfere with one's usual avocation and this fact, independent of any possible involvement of the school system in political controversies, affords a sound reason for a temporary severance of the candidate's connection with the schools."

Since by the above quoted language the Supreme Court specifically recognized the right of a public school teacher to be a candidate for the office of State Representative, and said that the same could not interfere with his rights as a tenure teacher except during the period of such political activity, it has recognized the right of a school teacher to be such a candidate and to serve in such office. Certainly the Supreme Court was conscious of the constitutional questions herein involved in using such broad language.

Your first question also is premised upon the assumption that school teachers are interested in the enactment of legislation beneficial to them as a class.

As above pointed out our Supreme Court in the case of School City of East Chicago v. Sigler, *supra*, upheld the right of a school teacher to be a candidate for State Representative. The right to be a candidate would of course carry the right to serve, if elected. There is no constitutional provision prohibiting a person of any particular business or profession from being a member of the General Assembly. Rather it is the theory of our form of government, that the General Assembly be composed of members of all professions and businesses. Legislation is apt to be considered affecting any particular business or profession and it would thus be impossible to fill the membership. Farmers could not be elected to the General Assembly for the reason that some legislation effecting their business might arise; the same would apply to all businesses and professions. Such principle of disqualification does not apply to teachers or other businesses or professions.

Your second question is as to the legality of a school principal serving on a City Council and your question assumes that the City Council appropriates all the school money. I am aware of no instance in which the City Council appropriates money for the operation of the school system as that is a function of the school board which is a separate and distinct corporation from the civil city government.

It has been held that city councilmen are not lucrative officers within the meaning of Article II, Section 9 of the Constitution of Indiana.

> 1949 Ind. O. A. G., p. 29, Official Opinion No. 6; 1944 Ind. O. A. G., p. 469, Official Opinion No. 110, and authorities therein cited.

It is also pointed out that the authorities heretofore cited in answer to your first question are in substance applicable to your second question.

I am therefore of the opinion a principal in a local city school would not be prohibited from serving as a member of the City Council of such city.

OFFICIAL OPINION NO. 27

April 24, 1953.

Mr. C. F. Cornish, Director,
Aeronautics Commission of Indiana,
311 W. Washington Street,
Indianapolis 4, Indiana.

Dear Sir:

I have your request for an official opinion in which you ask the following questions:

"1. What is the 'governing body' of:

a.) the County of St. Joseph
b.) any Indiana city or town which owns and operates a municipal airport?

"2. What municipality official is the 'executive officer' of a