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OFFICIAL OPINION NO. 44

June 10, 1953.

Mr. Don Clark,
Director of the Budget,
302 State House,
Indianapolis, Indiana.

Dear Sir:

Your letter of May 14, 1953 has been received and reads as follows:

“Section 9 (a) of Chapter 157, Acts of 1953, specifies that the Secretary of the Public Employees Retirement Fund shall be, ex-officio, the secretary of the Judges Retirement System, and shall receive such salary as the board may fix.

“I should like to have your official opinion as to whether the Secretary of the Public Employees Retirement Fund, a full-time paid employee of the State, is entitled to additional compensation as Secretary of the Judges Retirement System.”

Section 9 (a) of Chapter 157 of the Acts of 1953 provides as follows:

“The board shall elect from its number a chairman and a chairman pro-tem. The secretary of the board of trustees created by the Public Employees Retirement Act of 1945 shall be, ex officio, the secretary of the board hereby created. He shall be the executive officer in charge of the administration of the detailed affairs of the fund; he shall receipt for all payments made to the fund and deposit the same with the treasurer of state for its account; he shall sign vouchers for the payment of money out of the fund as authorized by the board and shall perform such other duties as may be assigned by the board and shall receive such salary as the board may fix from time to time.”

Section 18 of said act provides in part as follows:

“The board of trustees shall have in addition to all other powers and duties, arising out of this act, not

otherwise specifically reserved or delegated to the others, the following specific powers and duties:

* * *

“(m) Have authority at any time they may deem it necessary to establish a general office at the Capitol for the meetings of the board, and for the administrative personnel.

“(n) Install a complete and adequate system of books, accounts, and records which will give effect to all requirements of this act, and credit all assets of the fund according to the purposes for which they are held. All books, accounts, and records shall be kept in the general office of the board.”

Section 19 of said act in part provides as follows:

“The Treasurer of the State of Indiana shall be ex-officio the treasurer of the fund, and shall have the following specified powers and duties, and is hereby authorized and directed to:

* * *

“(c) Make payments for purposes specified in this act upon warrants of the auditor of state, issued in accordance with vouchers or order signed by the secretary pursuant to resolutions of the board.”

Section 20 of said act provides in part as follows:

“* * * The Auditor of the State of Indiana is authorized and directed to draw warrants upon the state treasurer, payable from the funds created by this act, for purposes provided for in this act, upon the presentation of vouchers or order signed by the secretary of the board, in accordance with resolutions of the board.”

Section 15, Chapter 6 of the Acts of 1947, same being Section 60-1615, Burns' Indiana Statutes Annotated (1951 Repl.) provides in part as follows:

“The secretary shall be the executive officer in charge of the administration of the detailed affairs of the fund; shall receipt for all payments made to the fund and deposit same with the treasurer of state for its

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account; shall sign vouchers for the payment of moneys by the fund in accordance with authorization of the board; and shall perform such other duties as may be assigned by the board. The secretary shall be required to execute a corporate surety bond in such an amount as the board shall specify, the premium to be paid by the board."

From the foregoing it is clear that the secretary of the Public Employees' Retirement Fund is ex-officio, secretary of the Judges' Retirement Fund. The statute specifically authorizes the board of trustees of the Judges' Retirement Fund to fix such secretary's salary. Unless some constitutional provision prohibits such secretary serving in both capacities and receiving a salary in each capacity, I am of the opinion he can serve in both capacities and receive both salaries.

The principle of an officer or an employee by virtue of such position being assigned additional duties ex-officio, is not new. In 1947 Ind. O. A. G., p. 100, Official Opinion No. 24, which concerned the right of a city clerk to occupy the office of Clerk of the Board of Public Works and to receive salary in both positions, on page 104 of the opinion it is stated, there is no constitutional or statutory prohibition against such person holding both positions. There it was held that each of such positions were separate.

Again in 1945 Ind. O. A. G., p. 289, Official Opinion No. 69, which concerned the right of the county treasurer to receive a salary for services rendered as ex-officio city treasurer, it was there held the same was permitted and that the county treasurer performed additional duties and received additional salary, authorized by statute, and that in performing the same he acted as county treasurer. This construction was made due to the fact that the office of city treasurer had been abolished.

It would seem that unless there was some constitutional prohibition against the right of the secretary of the Public Employees' Retirement Fund to also act as secretary of the Judges' Retirement Fund and receive salary from both positions that the same would be permissible. It is to be observed that a statutory provision could not be controlling under the instant statute as this is the last expression of the legislature on the matter.

It is clear that Article III, Section 1 of the Constitution could not be applicable as that only prohibits officials in one branch of government from exercising functions of another branch of government, the branches being the Legislative, the Executive, including the Administrative, and the Judicial. The only other possible constitutional provision is Article II, Section 9 of the Constitution of Indiana which provides as follows:

“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: * * *.”

In the case of *State ex rel. Wickens, Prosecutor v. Clark* (1935), 208 Ind. 402, 404 to 409, 196 N. E. 234, it was held that the superintendent of the county asylum was not an officer. That the county board of commissioners retain general supervision and control over the institution and that said superintendent was merely a county employee.

In the instant case the secretary of the Judges' Retirement Board merely carries out the orders and directions of the board of trustees of the Judges' Retirement Fund who retain general supervision and control over such Fund. In this capacity, in my opinion, he is merely a state employee and regardless of what his position would be as secretary of the Public Employees' Retirement Fund, it would not be violative of the above constitutional provision. In addition to the foregoing, it is my opinion, in view of the authorities cited in the foregoing official opinions, that he is occupying this second position by virtue of the first position; that the additional duties have been cast upon him by virtue of his first position, and specific authority is given by the statute for additional compensation for such additional duties even if such duties were of a sovereign nature.

I am therefore of the opinion that the secretary of the Public Employees' Retirement Fund is entitled to additional compensation as fixed by the board of trustees of the Judges' Retirement Fund, for his service as secretary of the Judges' Retirement Fund.