institutions. School is adjourned by the local school officials for the purpose of attending the meeting or meetings particularly designated by them and the statute authorized payment for the salary of such teachers during such period of adjournment only "for the time spent." When considered in connection with the context of the body of said statute, as well as the title of said Act it can only refer to time spent by the teacher "while attending" such meetings, as this statute is specifically limited by its title to such matters. Whether a teacher has incidental expenses as a result of such attendance does not qualify the provisions of the statute or change its requirements.

I therefore affirm the foregoing official opinion and state that while authorities do not have the right to require teachers to become members of or pay fees to any certain teachers' organizations, it is up to local school officials to designate for what meetings as authorized by Burns' Indiana Statutes Annotated, Section 28-4405, *supra,* school is adjourned, and that such school officials can pay such teachers during such adjournment only for their time spent while attending such meetings so designated.

OFFICIAL OPINION NO. 96

October 23, 1953.

Hon. George N. Craig,
Governor, State of Indiana,
206 State House,
Indianapolis, Indiana.

Dear Governor:

This is in reply to your inquiry of October 19, 1953 as to the following:

> "May a member of the state legislature serve on the State Fair Board without resigning from the legisture?"

This involves three sections of the Indiana Constitution which are as follows:

Article 2, Section 9:

> "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."

Article 3, Section 1:

> "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."

Article 15, Section 1:

> "All officers, whose appointment is not otherwise provided for in this Constitution, shall be chosen in such manner as now is, or hereafter may be, prescribed by law."

It has been held that a member of the legislature is a holder of a lucrative office in 1934 O. A. G., page 334, 1947 O. A. G., page 142, No. 30 and 1951 O. A. G., page 168, No. 60.

Section 1 of Chapter 214 of the Acts of 1947 as found in Burns' Indiana Statutes Annotated (1950 Repl.), Section 15-216 provides as follows:

> "Purpose of act—Indiana state fair grounds as trust property.—Whereas through various legislative changes the exact status of the Indiana state fair board, successor to the Indiana board of agriculture, its powers,

duties and relationship to the state of Indiana have become confused.

"And, Whereas, the existence of duplicate boards for the same purpose is possible under the present Indiana statutes,

"And, Whereas it is deemed advisable to clarify the manner in which the Indiana state fair grounds are held and the duties, powers, and responsibilities of the state of Indiana and the Indiana state fair board with relationship thereto,

"Now, therefore, it is the purpose of this act to permanently fix the status of the Indiana state fair grounds as trust property held by the state of Indiana as trustee for and on behalf of the people of the state of Indiana and the Indiana state fair board as the sole agency of the state of Indiana to administer said trust property for and on behalf of the state of Indiana." (Our emphasis.)

Section 6 of Chapter 214 of the Acts of the General Assembly of 1947, as found in Burns' Indiana Statutes Annotated (1950 Repl.), Section 15-221 defines the powers and duties of the Indiana State Fair Board as follows:

"The Indiana state fair board shall have power to hold state fairs at such times and places as it may deem proper and expedient and have the entire control of the same, fixing the amounts of various premiums offered embracing the various products of farm, field, garden, animal husbandry, or other industries relating to agriculture, including any article of science and art as it may deem expedient and proper. Said board is authorized to receive contributions and donations which may be made for the furtherance of its purposes. Said board shall also have complete control of said state fair grounds, the buildings and other equipment thereon and all property and property rights held for the furtherance of its purposes, and it is authorized to purchase such other property, equipment, and material and erect such other buildings or make improvements thereof, as may by it be deemed necessary to the proper control of

> the exhibitions held under its direction and to rent buildings or space therein, or space on said grounds for exhibitions during fairs and for such other purposes at other times as the board may determine; to fix and collect rentals for the same, to fix and collect entrance fees, admission fees, and privilege fees, as may be deemed just and proper; Provided, however, that the board shall not permit any use of the grounds or buildings in a manner prohibited by the laws of the state of Indiana; nor shall any obscene shows, fakirs, fortune tellers, or games of chance be allowed on the grounds. The board shall have power to enlarge the scope and field of its activities from time to time as it may deem to the advantage of agriculture, including district fairs, and its kindred pursuits."

Section 7 of said Act, Burns' Indiana Statutes Annotated (1950 Repl.), Section 15-222 provides that the real and personal estate administered by the State Fair Board is to be exempt from taxation so long as it is held for the purpose of giving fairs or exhibitions, that bonds and other evidence of indebtedness issued pursuant to the Act shall be exempt from tax and license charges under the laws of Indiana, and, under Section 13 of said Act (Burns' Section 15-228) a tax is levied on all the taxable property in the State in order to aid the State Fair Board in meeting the obligations incident to its activities.

Section 3 of Chapter 214 of the Acts of the General Assembly of 1947, as amended in 1953, as found in Burns' Indiana Statutes Annotated (1950 Repl., 1953 Supp.), Section 15-218 provides in part:

> "The members of the board shall receive twenty dollars ($20.00) per day and actual travel expense for each day actually employed on official business. Said *per diem* and expenses to be paid out of the funds of said board as hereinafter provided."

In 1945 O. A. G., page 188, No. 40 it was said:

> "A *per diem* is not a fee, salary or wages. It is a compensation for a service given a governmental unit for a day or part of a day, * * *."

In the case of Seiler v. State *ex rel.* Board of Commissioners (1902), 160 Ind. 605, 66 N. E. 946, the court said at page 621:

> "The statute, under its terms, does not pretend or profess to award to the members of the board of review the *per diem* therein provided for any particular act or items of service performed, but it is to compensate them for all acts and duties performed or discharged each day as an entirety, while acting as a member of said board."

A public office within the meaning of Article 2, Section 9 of the Indiana Constitution was defined by the case of Shelmadine v. City of Elkhart (1920), 75 Ind. App. 493, 129 N. E. 878 as follows:

> "A public officer may be defined as a position to which a portion of the sovereignty of the state attaches for the time being, and which is exercised for the benefit of the public. The most important characteristic which may be said to distinguish an office from an employment is, that the duties of the incumbent of an office must involve an exercise of some portion of the sovereign power."

In the case of State *ex rel.* Black v. Burch (1948), 226 Ind. 445, 456, 80 N. E. (2d) 294 the court said:

> "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."

It is clear that the State of Indiana holds the Indiana state fair grounds, in trust for and on behalf of the people of the State of Indiana, and I believe the State does so by virtue of its sovereign prerogative.

Likewise, I believe that the State Fair Board in administering said trust property for the State of Indiana and in performing the duties enjoined upon it by the legislature, must necessarily exercise a part of the sovereign power of the State. For these reasons, I think the members of the State Fair Board are public officers since:

> "* * * a public officer is one who exercises some part, however small, of the sovereign power of government."
>
> State *ex rel.* Black v. Burch (1948), 226 Ind. 445, 487, 81 N. E. (2d) 850.

It is apparent from the foregoing that the Indiana State Fair Board members fall within the definition of lucrative offices as used in Article 2, Section 9 of the Indiana Constitution, *supra.* For that reason a legislator purporting to act as a member of the Indiana State Fair Board would be holding two lucrative offices.

The section of the Constitution dealing with the distribution of powers as found in Article 3, Section 1 of the Indiana Constitution has been construed numerous times. The most recent case which has not been overruled or superseded is the case of State *ex rel.* Black v. Burch, *supra.* The Honorable Judge Starr of the Indiana Supreme Court said on page 463:

> "In view of the fact that it is obvious that the purpose of all these separation of powers provisions of Federal and State Constitutions is to rid each of the separate departments of government from any control or influence by either of the other departments, and that this object can be obtained only if § 1 of Art. 3 of the Indiana Constitution is read exactly as it is written, we are constrained to follow the New York and Louisiana cases above cited. If persons charged with official duties in one department may be employed to perform duties, official or otherwise, in another department the door is opened to influence and control by the employing department. We also think that these two cases are logical in holding that an employee of an officer, even though he be performing a duty not involving the exercise of sovereignty, may be and is, executing one of the

> functions of that public office, and this applies to the cases before us."

It therefore becomes necessary to determine whether the State Fair Board is in the executive, judicial or legislative branch of government. Article 3, Section 1 of the Indiana State Constitution, *supra,* provides that the executive department of government includes the administrative department.

The police power is a sovereign power and while the authority to enact laws is in the legislature, power to execute and enforce the laws is in the executive and it is the function of the administrative division of government to administer the law.

> Tucker v. State (1941), 218 Ind. 614, 35 N. E. (2d) 270.

It is evident that Section 6 of Chapter 214 of the Acts of 1947, *supra,* gave the State Fair Board the power of administration thereby constituting it as an administrative agency.

In the case of Tucker v. State, *supra,* it was held that the appointive power of administrative officers is in the Governor. Therefore in order to avoid the consequences of Tucker v. State it is necessary to take into consideration the "now is" clause of the Constitution as found in Article 15, Section 1 of the Indiana State Constitution, *supra.*

The Board of Agriculture was created in 1835 and was in existence at the time of the adoption of the Constitution in 1851. Members were elected by the presidents and delegates of county agricultural associations (Chapter 3, Page 6, Acts of 1851). This method was preserved in the Revised Statutes of 1852, Chapter 2, page 98, which made it a body corporate with perpetual succession. It is my belief in view of the status of the Board of Agriculture in 1851 that the present State Fair Board is an administrative board contained in the executive department of government and is exempt from the application of the Tucker case by virtue of Article 15, Section 1 of the Indiana Constitution.

I am therefore of the further opinion that a legislator, if appointed to the State Fair Board, would be purporting to exercise functions of two different departments of state gov-

ernment in violation of Article 3, Section 1, of the Indiana Constitution as construed in State *ex rel.* Black v. Burch, *supra.*

In this connection I would call your attention to 1951 O. A. G., pages 168, 173, No. 60 where it was said:

> "It is apparent that the Indiana State Fair Board and its members fall within the foregoing definitions of lucrative offices. For that reason a legislator purporting to act as a member of the State Fair Board would be holding two lucrative offices. Furthermore, there is a strong public policy to the effect that the legislature which regulates and provides the funds to administrative departments of government should not have a personal interest in any department, nor should a legislator put himself in the position in which an improper influence could be placed upon him in the exercise of his duties, due to employment with any state department or agency. See State *ex rel.* Black v. Burch, *supra.* This policy is illustrated by Section 30 of Article 4 of the Indiana Constitution which reads as follows:
>
> > " '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 a summary of the related court decisions it is quite apparent that the reasoning of the law would be in violation for the same person to hold two distinct offices such as these enumerated. It certainly must be a logical conclusion that the spirit of the law was intended by the framers of the Constitution in creating these prohibitions for the benefit of the citizens of the State. There is no question but that such holding could never be considered as a good public policy. Therefore, it is my opinion that it is contrary to the Constitution of the State of Indiana, as interpreted by the Supreme

> Court, for a member of the legislature to serve as a member of the Indiana State Fair Board."

Therefore, it is my opinion that a member of the legislature may not serve on the State Fair Board without resigning from the legislature.

OFFICIAL OPINION NO. 97

October 27, 1953.

Mr. F. W. Quackenbush,
Indiana State Chemist and Seed Commissioner,
Agricultural Experiment Station,
Purdue University,
Lafayette, Indiana.

Dear Sir:

Your letter of August 28, 1953 has been received and in part reads as follows:

> "I request your official opinion concerning the legality of 'custom mixing' of fertilizer under the Indiana Fertilizer Law of 1953 (House Enrolled Act Number 65).
>
> "Specifically I request your answer to the following question: 'If a farmer places with a fertilizer distributor an order for fertilizer materials (for example, 2,000 lbs. of super-phosphate and 1,000 lbs. of muriate of potash) and asks that the materials be mixed or bulked together into a truck (owned either by the farmer, the distributor or a commercial trucker) for delivery, must the distributor have registered as a mixed fertilizer the product he delivers and must he furnish a label or statement of the guaranteed analysis of the mixture, or can he legally furnish the farmer only a statement of the number of pounds and guaranteed analysis of each of the registered fertilizer materials which were put into the mixture delivered?'
>
> "The following information would seem to be pertinent and may be useful to you: