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OFFICIAL OPINION NO. 54

August 8, 1952.

Honorable Frank T. Millis,  
Auditor, State of Indiana,  
Room 238, State House,  
Indianapolis, Indiana.

Dear Sir:

I have your letter requesting an official opinion on the following:

"Is it mandatory that a present state employee become a member of the Public Employees' Retirement Fund who was in state employment prior to January 1, 1946, has executed a waiver of all rights as to membership, resigned employment approximately May, 1947, and then later was reemployed by the state?"

"The specific facts as to the person concerned are as follows:

- "(1) In state employment prior to January 1, 1946.
- "(2) Executed waiver as to rights of membership.
- "(3) Resigned state employment approximately May, 1947.
- "(4) Reemployed in state employment August, 1947.
- "(5) Resigned state employment July, 1949.
- "(6) Reemployed in state employment December 1, 1950, and still employed."

The Public Employees' Retirement Act was enacted by the legislature in 1945. It was enacted primarily to give additional incentive and more security to the present and prospective employees of the state. Private industry and business had to establish similar retirement plans and the state was finding it difficult to compete in the obtaining of competent employees. Although the provisions of the Public Employees' Retirement Act were to most persons highly advantageous, a number of the employees of the state at the time

of the adoption of the act had specific reasons for not wishing to have its benefits extended to them. Some were employed by the state merely to supplement the family income, and others had made independent retirement plans. The state, not wishing to inconvenience the present employees and at the same time recognizing the necessity of a broad base and an extensive coverage in order to administer the act effectively was required to make a compromise in the coverage of employees under the act. It did so by the provisions of Section 5 of the Public Employees' Retirement Act, same being Burns' 60-1605:

“Membership—(a) Any person who is an employe of the State of Indiana or a participating municipality or a participating unit of a municipality on the effective date shall become a member of the fund as of that date, unless during the period of sixty (60) days prior to that date, such employe shall have filed with the board on a prescribed form, a notice of election not to be included in the membership of the fund, and a duly executed waiver of all present and prospective rights and benefits which he would otherwise have as a member. Except that any person who was an employe prior to January 1, 1946, and was not a member due to being under twenty-five (25) years of age shall become a member on July 1, 1947, unless such person shall file with the board, between May 1, 1947, and July 1, 1947, on a form furnished by the board, a duly executed waiver of all present and prospective rights and benefits which he would otherwise have as a member. *Any employe who elects not to become a member may nevertheless thereafter apply for and be admitted to membership at any future time but without credit for service rendered prior to the time he became a member.* Any such person in the service of an employer who was absent from service on the effective date, or is absent on the date of eligibility for membership as provided for in this section, on an approved or authorized leave of absence not extending for more than one (1) year continuously from said effective date, or from such date or eligibility, shall become a member upon return to service but shall have

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sixty days in which to file a waiver if he elects not to become a member. Any person employed prior to July 1, 1946, who is made eligible for membership service subsequent to January 1, 1946, under the provisions of this act (§§ 60-1601—60-1626), may elect not to claim credit for such membership service and become a member of the fund on July 1, 1947.

“(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 person shall after twelve (12) months of continuous service, uninterrupted by a break of more than two (2) months, become a member of the fund as a condition of the employment. Nothing in this section shall be construed to make any person eligible for membership in this fund who is now a member of any existing retirement plan, or who will at a later date become eligible for membership in an existing retirement plan, supported in whole or in part by an appropriation or tax levy made by a governing body, which appropriation or tax levy is authorized by an act or acts of the Indiana General Assembly. \* \* \*

“(e) Any present employe who was an employe on the effective date, who elected as provided under subsection (a) to waive all rights or benefits of the fund, may receive credit for service prior to the effective date and membership service from the effective date to April 1, 1951, providing that said employe files with the Board of Trustees a petition to be elected to participate in the fund providing said petition is accompanied by the payment of the amount that would have been deducted from his or her salary from the effective date until April 1, 1951, plus interest. No petition under the provisions of this section shall be accepted or acted upon by the Board of Trustees after June 30, 1951.” (Our emphasis.)

Construing the above quoted portions of the Public Employees' Retirement Act to effectuate each portion thereof, I come to the conclusion that an employee once given the right to waive benefits under the terms of the Act does not become subject to its terms without taking the affirmative steps required by the Act to revoke the election not to participate. The critical wording in this regard appears to me to be as follows:

First, in sub-section (a) of Section 5, it provides that any employee electing not to become a member may become a member on subsequent application; sub-section (b)—the application of the section is limited to persons who become an employee after the effective date of the Act and membership in the Fund is made a condition to employment of such person, and, sub-section (e) makes specific provision for retroactive election to membership by persons who had previously elected to waive membership.

By the nature of the employment in a large class of state boards, agencies and offices, the tenure of individual employees is interrupted rather than continued and in a number of these types of employment, a long uninterrupted employment is almost unknown. When the Public Employees' Retirement Act is applied to the foregoing fact situation, which was as obviously true then as it is now, it is apparent that had the legislature wished to limit the election not to participate solely to that single employment or portion of employment in which the particular employee was engaged on the adoption of the Act, that appropriate wording could easily have been used. However, no place in the Public Employees' Retirement Act is there any provision requiring a person who originally elected not to participate to participate later without an affirmative revocation of the previous election. The wording of the section on compulsory membership or subsequent employees is limited to persons whose original employment began subsequent to the effective date of the Act. Keeping in mind that words and phrases are to be given their plain and ordinary meaning, unless a different purpose is clearly manifested

Shirmeyer v. Indiana Revenue Board (1951), 229  
Ind. 586, 49 N. E (2d) 849;

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State *ex rel.* Clemens v. Kern (1939), 215 Ind. 515,  
20 N. E. (2d) 514, 21 N. E. (2d) 141;

and similarly keeping in mind that the primary purpose of interpreting all statutes is to effectuate the apparent legislative intent, it is clear that an employee under the fact situations outlined in your letter is not required to become a member of the Public Employees' Retirement Fund and may continue the employment which began December 1, 1950 permanently without being required to become a member of the Public Employees' Retirement Fund.

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### OFFICIAL OPINION NO. 55

August 11, 1952.

Mr. Edwin Steers, Sr., Member,  
State Election Board,  
108 East Washington Bldg.,  
Indianapolis, Indiana.

Dear Sir:

I have your request for an Official Opinion in which you ask whether or not the office of Sheriff should be placed on the ballot for the General Election of this year if the present incumbent should resign this month.

As you know, Article 6, Section 11, of the Indiana Constitution was amended in 1948 to read as follows:

“Notwithstanding any other provision hereof, the sheriff of each county shall be elected in the general election held in the year 1950 and each four years thereafter. The term of office of each such sheriff shall be four years beginning upon the first day of January next following his election and no person shall be eligible to such office more than eight years in any period of twelve years: Provided, however, that any elected sheriff who shall hold said office on December 31, 1950, and who shall have been elected to said office for a period of less than two consecutive years imme-