For these reasons and under these authorities, I am of the opinion that the clerk of the circuit court is not a county officer, but is an officer of the circuit court and a circuit officer. The clerk of the circuit court, being a circuit officer, and an officer commissioned by the Governor, (Section 49-201 Burns), any vacancy in that office should be filled by appointment by the Governor under the provisions of Section 49-404 of Burns, 1933, rather than by the board of county commissioners under the provisions of Section 49-405 of Burns, 1933.

OFFICIAL OPINION NO. 105

December 3, 1951.

Honorable Ross Teckemeyer,
Executive Secretary,
Public Employees’
Retirement Fund,
707 Board of Trade Building,
Indianapolis 4, Indiana.

Dear Sir:

Your letter of August 21, 1951, has been received requesting an official opinion on the following question:

The County Council of Madison County has informed the Public Employees’ Retirement Fund that the Council refuses to allow the retirement fund’s claim for Madison County’s contribution in return for that county’s participation in the fund. “In your official opinion, what steps should be taken by the Executive Secretary and/or the Board of Trustees of the Public Employees’ Retirement Fund to cause the Auditor and, if necessary, the Board of County Commissioners to comply with the act and make the necessary remittance?”

In substance, your problem is simply to determine the procedure available to the Public Employees’ Retirement Fund to secure payment of Madison County’s fair contribution to the fund.
The solution to your query is found in that part of Burns’ 60-1623, 1951 Replacement (same being Acts 1945, ch. 340, sec. 23, p. 1589; 1947 ch. 6, sec. 20, p. 7), which says:

“In case of failure of any municipality to make any payments to the fund or any other payments required by this act (§§ 60-1601—60-1626), or in case any municipality is in any way indebted to the fund for any amounts incurred or accrued, such amounts owing to said fund by said municipality may be recovered in a suit in the circuit or any superior court of the county wherein such municipality is located in an appropriate action by the state of Indiana on the relation of the board, such suit to be prosecuted by the attorney-general of Indiana.”

The wording of the quoted portion of sec. 60-1623, when considered in the light of the factual situation at hand, raises two questions that must be answered before it can be definitely stated that the quoted portion is applicable. The two questions are:

1. Is Madison County a municipality within the terms of the preceding quotation?

2. If Madison County is such a municipality, has it relieved itself from liability for payment of the funds claimed by the Retirement Fund by reason of the fact that on May 15, 1951, the Madison County Council moved that that body was not in sympathy with the county’s participation in the fund, and the County Commissioners refused to allow the funds claimed for the contribution?

In connection with this second question, it must be noted that on November 20, 1950, the Madison County Council elected to become a participant in the retirement fund.

Burns’ 60-1604, 1951 Replacement (same being Acts 1945, ch. 340, sec. 5, p. 1589; 1947, ch. 6, sec. 4, p. 7; 1951, ch. 64, sec. 1, p. 150), answers the first question. That section defines “municipality” for purposes of wage in the quoted portion of Burns’ 60-1623, as including counties. Hence, inasmuch as Madison County is a municipality, it follows that the pertinent provision of 60-1623 is applicable to Madison County and, if that county defaults in its payments to the
fund, then it is subject to an action initiated in the manner provided by 60-1623. Providing, of course, that Madison County has not exempted itself from liability to the fund in view of the Madison County Commissioners' refusal to allow sufficient funds to pay the claim and in view of the Madison County Council's unfavorable view of further participation in the retirement fund.

This brings us to the consideration of the second question that I posed above.

In answer to that second question, it must first be assumed, and there is nothing to indicate the contrary, that the Madison County Council properly complied with all statutory requirements set forth in Burns' 60-1601—60-1626 when it announced its participation in the Public Employees' Retirement Fund.

Madison County being a municipality within the terms of the Public Employees' Retirement Act, it follows that the county is subject to the requirements enunciated in the last paragraph of Burns' 60-1623, which last paragraph says:

"Any municipality shall be permitted to withdraw from the fund upon giving six (6) years written notice to the board of trustees of the fund, said six (6) year period shall commence with the first day of the next fiscal year immediately following the filing of such notice. Upon expiration of the six (6) year period said municipality or participating unit of a municipality shall cease to be a member of the fund and all amounts exclusive of the amounts set aside for payments of retirement benefits granted during the period such municipality was a participant, shall, after deduction of a proper pro rata charge for administration expense, be refunded to said municipality. Thereafter no such municipality nor any employee thereof shall have any claim of any kind against the fund, but nothing contained herein shall deprive the employee of his right to proceed against the municipality for a refund of his contributions, less any retirement benefits received by him. After satisfying all claims of employee members by the municipality, should any funds remain, they will be held in trust by the municipality subject to equitable distribution
among the employees who were members of the fund at the time of withdrawal.”

The last quoted paragraph is, as far as I can determine, the only law required to be complied with by a municipality when that governmental unit elects to withdraw from participation of the retirement fund.

Inasmuch as said last paragraph sets forth mandatory procedure to be complied with when a municipality withdraws from the fund, it necessarily follows that Madison County will not be permitted to withdraw until six (6) years have elapsed from the first day of the fiscal year immediately following service of written notice stating a desire to withdraw. For the reason that the Madison County welfare unit only became a participating member in 1950, it follows that the county has not withdrawn and is still a member. Therefore, as such member, Madison County is liable for payment of just claims properly assessed by the Fund.

Because it appears that said county has incurred a proper indebtedness and is liable for its payment, it follows that, if the county fails or refuses to make payment, it becomes subject to action by the Attorney General’s office as outlined earlier in this opinion.

OFFICIAL OPINION NO. 106

December 4, 1951.

Dr. Roy W. Elrod,
State Veterinarian,
1330 West Michigan Street,
Indianapolis, Indiana.

Dear Sir:

Your request for an official opinion presents the following question:

“Where a county makes an appropriation in any one year to carry out a contract made by the county commissioners with the Live Stock Sanitary Board, and the contract is not performed until the subsequent year, may the appropriation be carried over and remain available in such subsequent year?