

mit" be regarded as a variance, its effect is only as above stated.

4. No opinion is expressed upon the effect of a rule of the State Highway Commission if one were adopted under Section 20-807 Burns', above quoted, as none has been found, but see:

Hollywood Theatre Corporation v. City of Indianapolis *et al.* (1940), 218 Ind. 556.

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OFFICIAL OPINION NO. 26

May 15, 1947.

Mr. Ross Teckemeyer,  
Executive Secretary,  
Public Employes' Retirement Fund,  
307 Board of Trade Building,  
Indianapolis 4, Indiana.

Dear Mr. Teckemeyer:

I am in receipt of your request for an official opinion as follows:

"In your official opinion can an agricultural agent, employed pursuant to an act of the Legislature, be eligible for membership in the Public Employes' Retirement Fund and also voluntarily participate in the Federal Civil Service Pension Plan?

"If your answer to the foregoing question is in the negative, can a county agricultural agent participate in the Public Employes' Retirement Fund if he does not choose to participate in the Federal Civil Service Pension Plan, or since the Federal Civil Service Pension Plan is available to the agricultural agent, is he prohibited from participation in the Public Employes' Retirement Fund?"

The office of the county agricultural agent is established by the Acts of 1913, Chapter 24, Section 12, page 37, as amended, by the Acts of 1937, Chapter 224, Section 1, page

1101 (Section 28-4911 Burns' 1945 (Pamphlet Supp.). This act is as follows:

"The office of county agricultural agent is hereby created in each and every county of this state and all appointments to such office shall be made in the manner and subject to the provisions of this act. The county council shall appropriate, annually, not less than one thousand dollars (\$1,000), which shall be used in paying office help, expenses of the county agent, mileage, rent or other incidental expenses. The county council may make additional appropriations for the salary and other additional expenditures of the county agent. A state board is hereby created which shall be known as the County Agricultural Agent Board. The county agricultural agent board shall consist of the director of agricultural extension of Purdue University, the state superintendent of public instruction and the executive officer of the division of agriculture. It shall be the duty of the county agricultural agent board to prescribe the qualifications of county agricultural agents. It shall be the duty of the director of agricultural extension service of Purdue University to appoint, subject to the approval of the county agricultural agent board in each county in Indiana, a county agent from those qualified, as herein provided. When such appointment has been made there shall be paid from the state fund provided for in this act, to Purdue University, to be paid to the county agricultural agent, a sum no less than two thousand dollars (\$2,000) per annum as a part or the whole of the salary of the county agricultural agent. It shall be the further duty of the above named board to make a distribution of state funds to the several counties, on a graduated scale, according to qualifications of the county agricultural agent employed therein and the needs of the county. It shall be the duty of such county agricultural agent, under the supervision of Purdue University, to cooperate with farmers' institutes, farmers' clubs and other rural and civic organizations, conduct practical farm demonstrations, boys' and

girls' clubs and contest work and other movements for the advancement of agriculture and country life and to give advice to farmers on practical farm problems and aid the county superintendent of schools and the teachers of such county in giving practical education in agriculture and domestic science. The county agricultural agent is hereby authorized to file monthly bills covering the salaries and expenses to be paid from county funds, the same to be approved by Purdue University, with the county auditor, who shall draw his warrant or warrants on the county treasurer for the payment thereof."

With this statute in mind, reference is made to the definition of "Employee" in Section 4 of the Public Employees' Retirement Act, as amended, by Chapter 6 of the Acts of 1947 (Section 60-1604 Burns' (Pocket Supp.)). The pertinent portions of this definition are as follows:

" 'Employe' shall mean any person in the employ of the state whose compensation is paid out of funds of the state, including employes in the classified service and employes of any department, institution, board, commission, office, court, agency, institution of higher education, or any division of the state government receiving state appropriations and having power to certify payrolls authorizing payments of salary or wages against such appropriations or against trust funds held by the treasurer of state or by any department as herein defined, or any person in the employ of a municipality or of any institution, board, commission, office, bureau or any other agency maintained by a municipality, or any person in the employ of the board of trustees herein created, but shall not include the following: \* \* \* (e) employes who are members of other pension or retirement funds or plans maintained in whole or in part by appropriations by the State or municipality, or who are presently eligible for membership, or who by reason of their employment will become eligible for membership in such other pension or retirement funds or plans."

Section 5 of the Public Employes' Retirement Fund Act, as amended by Chapter 6 of the acts of 1947, provides in paragraph (a) for optional membership in the fund of those who were employed upon the effective date of the act. Paragraph (b) is as follows:

“(b) Any person under fifty-nine years of age who becomes an employe on or after the effective date of this act may elect upon the completion of one month and not more than twelve months of continuous service, uninterrupted by a break of more than two months, to become a member of the fund. In the event such person shall not elect to become a member after one month of continuous service, such person shall after twelve months of continuous service, uninterrupted by a break of more than two months, become a member of the fund as a condition of 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 any existing retirement plan.”

Membership in the Federal civil service retirement fund would not be a disqualification under section 4(e) as that plan is not maintained in whole or in part by state or municipal appropriations. The question arises as to whether the last sentence in Section 5(b) enlarges the ineligibility contained in Section 4(e). Provisions in the same act should be interpreted in such manner as to be consistent and to give effect to all provisions, if possible.

Lemon v. New Albany (1926), 198 Ind. 127.

The provision in section 5(b) does not by its language purport to affirmatively establish a disqualification. Its whole declared purpose is a negation of any intent to limit disqualification by the mandatory language of section 5(b).

In this manner these two provisions may be construed harmoniously. If, on the contrary, this sentence of section 5(b) be construed as affirmatively establishing an ineligibility then clause (e) of the definition of “employee” is wholly surplusage.

The context of these provisions further illustrates the validity of this construction of the last sentence of Section 5(b) as a mere negation of conflict between section 5 and section 4. The definition of "employee" in section 4 is directly concerned with eligibility and ineligibility to membership. Section 5 is concerned with the time and manner at which and by which those who are eligible become members of the fund. If construed as affirmatively establishing an ineligibility, the last sentence of Section 5(b) is obviously out of place. In Section 4, the attention of the legislature was specifically directed to the question of eligibility, while in section 5 its attention was directed to another subject and the broad general language of the last sentence was inserted. The reasoning of the cases which hold that specific provisions control general provisions is here applicable.

Straus Bros. Co. v. Fisher (1928), 200 Ind. 307, 316;

Garvin v. Chadwick Realty Corp. (1937), 212 Ind. 499;

Lemon v. New Albany, *supra*.

The retirement plans referred to generally in the last sentence of Section 5(b) must, therefore, be construed to include only those retirement plans specifically described elsewhere in the act where they are particularized. Only membership or eligibility for membership in such particular retirement plans will render one ineligible for membership in the Public Employes' Retirement Fund.

I am, therefore, of the opinion that membership of a county agricultural agent in the federal civil service retirement fund does not debar him from membership in the Indiana Public Employes' Retirement Fund.