

OFFICIAL OPINION NO. 40

July 15, 1947.

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

Dear Sir:

I have your letter of June 26, 1947 making a request for an opinion as to whether John D. Cramer, who now serves and has served the State of Indiana for many years as its First Deputy Insurance Commissioner, can legally continue to hold said position and at the same time serve as a member of the Board of Trustees of the Public Employes' Retirement Fund.

Section 13 of the Public Employes' Retirement Fund Act, as amended and found in Chapter Six (6) of the Acts of 1947 reads in part as follows:

“* * * The general administration and responsibility for the proper operation of the Fund for making effective this Act are vested in a Board of Trustees * * *. This Board shall consist of five members who shall be appointed by the Governor * * * one of whom shall be a member of the Fund with not less than ten years of *creditable service* * * *.”

Said Section further reads as follows:

“* * * The Trustees shall each receive compensation in the sum of \$300.00 annually, payable quarterly on October 1, January 1, April 1 and June 30, * * *.”

Section 4 of said Act as amended by the General Assembly of 1947 defines the word “service” as follows:

“‘Prior Service’ shall mean all service as an employe rendered prior to the effective date of this Act.”

“‘Membership Service’ shall mean service rendered subsequent to the effective date and after becoming a member of the Fund.”

“‘Creditable Service’ shall consist of membership service and prior service.”

It is clear that it was the intent of the General Assembly that one of the members of the Board of Trustees should be a person who was a public employe prior to the passage of the Act and became a member of the Fund after the Act became effective. It is also clear that Mr. Cramer possessed all of these qualifications and served legally as a trustee of the Fund until the Act was amended by the General Assembly of 1947 at which time provision was made to compensate the Trustees of the Fund by paying them \$300.00 annually for services rendered.

Article 2, Section 9, of the Constitution of The State of Indiana 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: 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.”

The question is presented as to whether the positions of First Deputy Insurance Commissioner and Trustee of the Public Employes' Retirement Fund are within the definition of the constitutional term "lucrative office". This term has been defined by the courts of this State on numerous occasions. The most common and generally accepted test in the State of Indiana is whether the person in question is vested with some of the functions pertinent to sovereignty or has

some of the power and duties which inhere within the legislative, judicial or executive department of the government.

In *Wells v. State* (1911), 175 Ind. 380, at page 384 the court said:

“* * * 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 * * *.”

In *Shelmadine v. City of Elkhart* (1921), 75 Ind. App. 493, the Court also said:

“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. * * *.”

It must be determined as to whether the position of First Deputy Insurance Commissioner is a lucrative office within the meaning of the above quoted constitutional provision or whether the person holding the capacity is merely an employee of the State.

Section 39-3302 Burns' Indiana Statutes annotated 1933, provides in part as follows:

“The powers, duties, management and control of the Department of Insurance are hereby conferred on and invested in the ‘Insurance Commissioner.’ * * * and shall be the chief executive and administrative officer of the department.” His powers, as enumerated in subsequent sections of the Indiana Insurance Code, including those to visit and examine, to subpoena and swear witnesses, to hold hearings, to grant and revoke licenses, to issue orders and to promulgate regulations leave no question but what the Indiana Commissioner holds a lucrative office under the State.

The Act creating the Department of Insurance also provides for the appointment of deputies, examiners and assistants. The First Deputy Insurance Commissioner in performing the duties enjoined upon him by the Insurance Commissioner is deemed to exercise a portion of the sovereign power of the State and therefore holds a lucrative office within the meaning of Article 2, Section 9, of the Constitution of the State of Indiana. *Wells v. State*, 175 Ind. 380, 384.

It is also evident that the Board of Trustees of the Public Employes' Retirement Fund exercises sovereign powers granted to them by the General Assembly and that compensation is given them for their services.

See:

Howard v. Shoemaker (1871), 35 Ind. 111;
Chambers v. State ex rel. (1890), 127 Ind. 365.

I am therefore of the opinion that Mr. Cramer cannot accept appointment as Trustee of the Public Employes Retirement Fund since it is a lucrative office under the State.

OFFICIAL OPINION NO. 41

July 28, 1947.

Hon. C. E. Ruston, State Examiner,
 State Board of Accounts,
 304 State House,
 Indianapolis, Indiana.

Hon. Ben H. Watt, Superintendent
 of Public Instruction,
 State House,
 Indianapolis, Indiana.

Gentlemen:

Your joint written request for an official opinion has been received as follows:

"1. Do teachers who have gained tenure status in a unit becoming a part of a consolidated unit retain such tenure status in the new school corporation?"