

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.

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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?"

"2. Can tenure status be acquired in the new consolidated school corporation after its establishment?"

"Will you please answer the foregoing questions when applied to consolidated school corporations consolidated under the terms of each of the following laws:

"Chapter 40, Acts of 1947; Chapter 68, Acts of 1947; Chapter 123, Acts of 1947; Chapter 205, Acts of 1929 and Chapter 134, Acts of 1925 as amended by Chapter 177, Acts of 1937 and Chapter 304, Acts of 1947.

"May we also have your official opinion on the following questions relating to teachers' tenure status:

"3. When all townships of a county combine and form a county unit system of schools under the terms of Chapter 281, Acts of 1947, do teachers who have gained tenure status in the townships before formation of the county unit system retain such tenure status in the county school system?"

"4. Can tenure status be acquired in the county unit system of schools after its establishment?"

Since your questions numbered 1 and 2 are made applicable to a separate consideration of a number of statutes on consolidation of schools, it is deemed advisable to state the general law applicable to each of those questions and thereafter specifically apply such interpretation of the law to each statute in question.

1. In answer to your first question, it is submitted the tenure status of teachers becoming a part of a consolidated school unit is clearly and correctly stated in an official opinion of this office to Hon. Clement T. Malan, State Superintendent of Public Instruction, and found in 1941 Ind. O. A. G. page 154 which is as follows:

"I have before me your letter requesting an official opinion in answer to the following question:

"When two corporations consolidate for school purposes and erect a joint school building to care for

the educational needs of both corporations, do teachers who have gained tenure rights in each corporation before consolidation retain such tenure rights?"

"I think the answer to your question is influenced by the method of consolidation which is involved. Under some of the Acts providing for consolidation of school corporations, such consolidation is contractual and the identity of the two contracting corporations is not destroyed. In such a case, I think, the tenure rights of teachers as respects each separate corporation involved would continue, subject to being lost under the provision whereby the cancellation may take place on account of the 'justifiable decrease in teaching positions.' In other words, in such case, I think it is obvious that the management of the joint school would not be obliged to employ all of the tenure teachers if they could justify their dismissal on the ground of 'justifiable decrease in the number of teaching positions.' (See on this subject the case of *Harris v. State ex rel. Allen*, 212 Ind. 386, quoting extensively from the case of *Ehle, Trustee v. State ex rel. Wissler*, 191 Ind. 502.)

"There is at least one law in which the identities of the consolidating corporations are entirely lost and a new entity is created. Under such circumstances, reasoning by analogy, it seems to me that there would be no tenure rights with respect to the new entity. (See *Burns' Indiana Statutes Annotated 1933*, Sec. 28-4307, which shows clearly that the several contracts must be with the same school corporation)."

2. The general law applicable to your second question as to whether tenure status may be acquired in the new consolidated school corporation after its establishment is also the subject of an opinion of this office to Hon. Clement T. Malan, Superintendent of Public Instruction, appearing in 1943 Ind. O. A. G. page 540. Since this opinion so clearly states the law involved and its application, it is quoted at length and is as follows.

"Will you kindly give me your official opinion relating to the following question:

“Can a teacher become a tenure teacher in a joint school, owned and operated jointly by a school town and a township?”

“It is my opinion that a full and complete answer to your question is found in the decision of the Supreme Court of Indiana in the case of *Harris et al. v. State ex rel. Allen* (1937), 212 Ind. 386. The facts in this case were as follows:

“One Ray Allen had been employed as a teacher under contract by the trustees of the school board of the consolidated schools of school town of Odon, Indiana, and Madison school township of Daviess county, Indiana during the school years from 1929 to 1935, inclusive. The board of school trustees of such consolidated school refused to renew Allen’s teaching contract for the school years of 1935 and 1936 and refused to recognize his status as a tenure teacher. Allen filed suit for a writ of mandate to compel said school authorities to renew his contract and recognize his status as a tenure teacher.

“The question presented to and decided by the Supreme Court was whether or not the teacher’s tenure law, which is Burns’ 1933, Section 28-4307, applies to teachers of consolidated schools owned and operated by a school board of a school town and school township. In deciding the case, the Supreme Court considered the provisions of the teacher’s tenure law in connection with the provisions of the statutes for the creation, maintenance and operation of consolidated schools and used the following language, to wit:

“The provision, in effect and for all practical purposes, where there is a consolidation of a town school and township school or a township school and a city school of the fifth class, makes such consolidated school a town school corporation or a city school corporation. This was evidently the intention of the legislature. \* \* \*

“\* \* \* Moreover, consolidated schools partake of the form and character of town and city

schools. A township school is governed entirely by the trustee and county superintendent while a town or city school is governed by the trustees and city superintendent of schools. A consolidated school is clearly not a township school as recognized by law.

“\* \* \* Under the law and facts as presented, the appellee Ray Allen is entitled to be recognized as permanent teacher of said consolidated schools.’

“The above case has never been modified, distinguished, or overruled by the Supreme Court of Indiana and stands as the last expression of the law applicable to your question. Therefore, it is my opinion that your questions should be answered in the affirmative.”

Attention is further directed to the propositions stated and authorities cited herein in answer to your question number 3. For obvious reasons they are equally applicable to the question here presented.

Since each of the statutes referred to under your questions numbered 1 and 2 are different in their provisions regarding the manner of management and status of the new consolidated school corporation, it is considered necessary to consider each statute separately and apply the above interpretation thereto, as follows:

#### Chapter 40, Acts 1947.

Under Section 1 of this statute provision is made for consolidation of school cities of the third class with the school township in which such city is located; Section 6 provides that the school shall be managed by a board of five trustees; Sections 7 and 8 provide in substance that when such township school corporation and city school corporation have consolidated, the city school corporation and township school corporation are deemed abandoned and all property of such corporations are transferred to the new consolidated school corporation; Section 9 provides that the board of trustees of such consolidated school shall be vested with the power vested in school boards of third class cities and taxes shall be assessed for the operation of such consolidated school

against the property in such township and city as a single unit; Section 10 provides the board of trustees shall be subject to all laws applicable to third class city school corporations.

From the foregoing it is clear that the identity of the township school corporation and the identity of the city school corporation is lost on such consolidation and a new school corporation is founded. Under the foregoing authorities in such event teachers who had tenure status in either the city school corporation or the township school corporation would lose their tenure rights on such consolidation.

It is equally clear that such consolidated school when founded would be classed as a city school corporation and that teachers thereafter teaching in such consolidated school corporation for the required length of time prescribed by the tenure statute could become tenure teachers in such new consolidated school corporation.

#### Chapter 68, Acts 1947.

Under Section 1 it is provided for the consolidation of a school town or school city of the fifth class with a school township, providing such city or town lies wholly within such township; Section 6 provides for a board of trustees of three members; Section 7 and 8 provide that on such consolidation the school township and school city or school town effecting such consolidation shall be deemed abandoned and all property transferred to the new consolidated school corporation; Section 9 provides that such board of trustees of such consolidated school shall be vested with all the powers and duties pertaining to school cities of the fifth class and that the assessment and levy of taxes for the maintenance and operation of such consolidated unit shall be made as a single unit in such township and city or town.

Under the foregoing authorities it is clear that on the consolidation of a town or city of the fifth class with a township for school purposes under Chapter 68 of the Acts of 1947, a new school corporation is formed and the old separate school corporations of the city, town and township are abandoned and cease to exist. Therefore, teachers who had tenure status in such city, town or township unit prior to consolidation would lose such tenure rights on such consolidation.

It is further submitted that tenure status could be acquired in the new school consolidation corporation after its establishment in the event teachers receive five successive written contracts to teach in such consolidated schools and are thereafter at some time given a sixth written contract to teach therein.

#### Chapter 123, Acts 1947.

Section 1 of this statute provides for consolidation of two or more school corporations, whether towns, cities or townships; Section 6 provides for a board of trustees to be composed of from three to seven members as determined by the provisions of the resolution adopted when such consolidated plan was voted upon; Section 7 provides on such consolidation that the old school corporation is deemed abandoned and all property of such old school corporations are merged in the new consolidated school corporation and all indebtedness of said old school corporations are assumed by said new school corporation; Section 8 provides that the board of trustees of such consolidated school is vested with all the powers and duties pertaining to school cities of their class and that the assessment of taxes for operating the schools shall be made as a single taxing unit throughout the boundaries of such new consolidated school corporation.

From the foregoing it is clear that on consolidation under Chapter 123 of the Acts of 1947 the identities of the old consolidating school units are abandoned and are merged in the new consolidated school. Therefore, teachers who had acquired tenure rights in such consolidating units would not thereafter maintain such status in such new consolidated school corporation.

Since such new consolidated school corporation has the status of a city school, teachers could acquire tenure status against such consolidated school corporation by thereafter meeting the requirements of the teacher tenure statutes.

#### Chapter 205, Acts 1929.

Chapter 205 of the Acts of 1929 was repealed by Section 13, Chapter 68, Acts 1947, *supra*. Section 14 of said statute provided that said repeal should not be construed as annulling

or abrogating any subsisting legal right created under or any cause of action which arose and has fully accrued pursuant to the provisions of said act repealed, if such right became effective before the effective date of Chapter 68 of the Acts of 1947.

We are, therefore, concerned only with any rights accruing or status resulting from the consolidation under Chapter 205, Acts of 1929 prior to the effective date of Chapter 68 of the Acts of 1947, which was March 1, 1947, that being the date said act became effective due to an emergency clause.

Section 1 of Chapter 205 of the Acts of 1929 (Section 28-1242 Burns' 1933, as amended) provided for the consolidation of fifth class school cities with school townships in which said city is wholly located; Section 6 provides for a board of trustees of three members; Sections 7 and 8 provide that on consolidation the individual school units comprising such consolidated school would be deemed to have been abandoned and all their property rights would vest in such consolidated school corporation; Section 9 provides that school board shall have all the powers and be vested with all the duties applicable to cities of the fifth class.

Applying the foregoing authorities to the provisions of Chapter 205 of the Acts of 1929, it is clear that on such consolidation the individual school corporations comprising said consolidated school would be deemed abandoned. This would effectively cut off any tenure teachers' rights held by teachers in those units effecting such consolidation.

I am also of the opinion since such new consolidated school would be classed as a city school that teachers after such consolidation could acquire tenure status therein by complying with the provisions of the teacher tenure law.

#### Chapter 304, Acts 1947.

This statute amends Chapter 134 of the Acts of 1925, as amended by Chapter 177, Acts of 1937, same being Section 28-1231 Burns' 1933.

Section 1 provides for a consolidation of cities of the fifth class with the township in which such city is located and provides for a board of trustees of three members. It also provides that additional townships may come into such consolidated school corporations; Section 2 provides that on

such consolidation the school corporation owning buildings suitable for such consolidated school shall have such buildings appraised and the other corporation included in such consolidation shall annually pay that percentage of 8% of the appraised value of such buildings as the enumeration of school children of such school corporation having no interest in such buildings bears to all children of school age enumerated in such consolidated school corporation. It further provides that such consolidated school corporation may acquire, pursuant to an election held for the legal voters of such respective school corporations, the buildings and property used by such consolidated school corporation, in which event said property shall belong to said consolidated school corporation and the legal existence of the various school corporations forming such consolidated school shall thereupon be deemed abandoned. Section 3 provides that such board shall have powers and duties of school boards in cities of the fifth class and that levies of taxes for the support of such school shall be made by single levy within the boundaries of said consolidated school corporation.

It is pertinent to note that Section 8 of the 1925 law, prior to its amendment by Section 3, Chapter 177, Acts 1937, provided for separate assessment of taxes in the local school corporations for the support of such consolidated school; by the amendment of Section 3 of Chapter 177 of the Acts of 1937 (Section 28-1238 Burns' 1945 Supp.) said section was amended to make such assessment of taxes equal and as a unit throughout the consolidated school corporation. This provision is carried forward under the 1947 law.

A careful examination of Chapter 134 of the Acts of 1925, prior to its amendment, reveals that a school organized under such statute was more in the nature of a "joint" school than a "consolidated" school, for the reason the identities of the different school corporations effected were not lost, and the revenue to support the school was raised proportionately by each of the separate school corporations.

A different situation resulted from the amendment of said Act by Chapter 177 of the Acts of 1937, for by such amendment it is specifically referred to as a "consolidated school corporation"; funds for the upkeep and maintenance of said school were to be raised by the new school corporation as a single unit throughout said school district; and provision

was made that in the event said consolidated school board followed the procedure set forth in such Act, it could acquire the title to the buildings owned by one of the consolidating school corporations, upon payment therefor, at which time such consolidating school corporation which owned such building would be deemed abandoned and cease to exist for all school purposes. The provisions of the 1937 Act were carried forth in the 1947 amendment.

Therefore, in answer to your first question, I am of the opinion that for those schools organized as a joint school under the provisions of Chapter 134 of the Acts of 1925, prior to its amendment in 1937, a teacher holding tenure rights prior to such joinder would continue to hold such tenure rights in such new joint school. This result would also continue after 1937 for the aforesaid schools and teachers for, in my opinion, after 1937, those schools existing prior to 1937 would be schools maintaining the same identity of membership and I do not think the fact that a corporate structure is imposed upon them by statute without any affirmative action of the "joint" schools should deprive those teachers of tenure who had acquired it in the "joint" school structure. On the other hand, as to those separate school corporations consolidating under this act after 1937 by affirmative action of the separate corporations, one consolidated operating corporation is formed.

Therefore, in my opinion, prior tenure rights of teachers in the school corporations effecting a consolidation under Chapter 177 of the Acts of 1937, and after the effective date of such act, would be lost on a consolidation of such schools, irrespective of whether or not one of the school corporations effecting such consolidation owned school buildings being used by such consolidated school which had not been purchased by the consolidating school. I believe this to be true because in such event pending purchase by the consolidated school corporation the local school corporation owning such building would be merely holding them in the nature of a holding corporation, but its identity for general school purposes would be considered absorbed in the new consolidated school corporation.

The construction of the rights of teachers as to tenure in a consolidated school effected since the enactment of Chapter 304 of the Acts of 1947, would be identical with those here-

tofore outlined regarding tenure teachers in schools whose consolidations were effected under and after the effective date of Chapter 177 of the Acts of 1937.

Each of the foregoing statutes: Chapter 134 of the Acts of 1925; Chapter 177 of the Acts of 1937; and Chapter 304 of the Acts of 1947, make such a school corporation a city school for all practical purposes. Therefore, teachers after such consolidation could acquire tenure status against said joint or consolidated school by thereafter meeting the requirements of the Teachers' Tenure Act.

3. Your third question raises a very serious question which has not, as far as I can determine, been specifically determined by either the Appellate or Supreme Court of the State of Indiana, or by the Supreme Court of the United States or of any other State.

Section 28-4307, Burns' 1933, same being Section 1, Chapter 97, Acts 1927, as amended by Section 1, Chapter 116, Acts 1933, in part provides as follows:

"Any person who has served or who shall serve under contract as a teacher in any school city corporation or in any school town corporation in the state of Indiana for five (5) or more successive years, and who shall at any time hereafter enter into a teacher's contract for further service with such corporation, shall thereupon become a permanent teacher of such school corporation. The term 'teacher' as used in this section shall mean and include licensed public school teachers, supervisors and principals of all such public school corporations, and licensed assistant superintendents and superintendents of such school corporations. Upon the expiration of any contract between such school corporation and a permanent teacher, such contract shall be deemed to continue in effect for an indefinite period and shall be known as an indefinite contract. Such an indefinite contract shall remain in force until such permanent teacher shall have reached the age of sixty-six (66) years unless succeeded by a new contract signed by both parties or unless it shall be canceled as provided in section two (Sec. 28-4308) of this act; \* \* \*."

In reaching a conclusion on this question, it is deemed necessary to call attention to the following provisions of Chapter 281 of the Acts of 1947: Section 4 of said Act provides:

“The provisions of Chapter 97 of the Acts of 1927 which prescribe the manner by which a teacher may become a permanent teacher with an indefinite contract shall not be effective with reference to the employment of teachers in any county school corporation created in this act.”

Section 1 of said Act in part provides:

“\* \* \* The township trustees of each and every township of each county shall perform all the civil functions heretofore performed by such township trustees and together with other township trustees of the county shall constitute a county board of education for the purpose of managing the affairs of the county school corporation hereby created in each such county. School cities and school towns shall retain independent organization and administration unless abandoned as provided by law, and the county school corporation, also hereinafter referred to as the county, shall include all areas not now organized under the laws of this state into jurisdictions controlled and governed as school cities or school towns. Said county board of education may be referred to interchangeably as the county board of school trustees and herein as the board. \* \* \*.”

“The board as above referred to shall make decisions as to the general conduct of the schools, which shall be enforced as entered upon the minutes recorded by the secretary of the board, and shall exercise all powers heretofore exercised under the law, by or through township trustees or meetings or petitions of the township trustees of the county.”

“\* \* \* .

“The government of the common schools of the county shall be vested in the board, and the board

shall function with all the authority, powers, privileges, duties, and obligations heretofore granted to or required of school cities and school towns and their governing boards generally under the laws pertaining thereto with reference to the purchase of supplies, purchase and sale of building, grounds and equipment, the erection of buildings, the employment and dismissal of school personnel, except as provided in Section 4 hereof, the right and power to sue and be sued in the name of the county, the insuring of property and employees, the levying and collecting of taxes, the making and executing of a budget, the borrowing of money, the paying of the salaries and expenses of the county superintendent and employees as approved by the board and to any act necessary to the proper administration of the common schools of the county."

"Such school corporations shall be vested with all right, title and interest of their respective predecessor township school corporations hereby terminated to and in all the real, personal, and other property of any nature and from whatever source derived, and shall assume, pay and be liable for all the indebtedness and liabilities of the same."

"\* \* \*

"\* \* \*

"Every such board shall have, as respects the levy of taxes by it, power annually to levy such amount of taxes as in the judgment of such board, made matter of record in its minutes, should be levied to produce income sufficient to conduct and carry on the common schools committed to such board, and it is hereby made the duty of such board annually to levy a sum sufficient to meet all payments of principal and interest as they will mature in the year for which such levy is made on the bonds, notes, or other obligations of such board. The power of such board in so making tax levies shall be exercised within existing statutory limits and said levies shall be subject to the same review as school city and school town levies."

Section 3 of said Act reads as follows:

“Whenever any county school corporation shall have been created as provided herein, the board of such corporation shall be empowered to dissolve such corporation after 3 years from the date of the creation of such corporation by a majority vote of said board. In the case of the dissolution of any such county school corporation, said corporation and county board of education created by this act shall retain its corporate entity for a sufficient time and with sufficient powers to levy and collect sufficient tax revenue to retire any outstanding bonds or other indebtedness that may have been incurred during the period of time during which such county school corporation shall have been in existence and for no other purpose.”

Section 5 of said Act in substance provides that if any portion of said Act shall be held unconstitutional by a court of competent jurisdiction, it does not affect in any way the validity of any other portion of said Act. Section 6 repeals all laws in conflict, and Section 7 of the Act declares an emergency.

I am of the opinion any teacher who holds tenure status in a township located in a county which adopts the county unit system of schools under the foregoing Act, would not thereby become a tenure teacher in such county school corporation. The conclusion reached is clear in the opinion of the writer for the following reasons:

Under Section 28-4307, Burns' 1933, a person could qualify as a tenure teacher by meeting the requirements of said statute, but such tenure status would only be valid and enforceable as against the particular school corporation in which said teacher qualified for such status by successive contracts.

It is clear that under the provisions of Chapter 281 of the Acts of 1947, above quoted, when such county unit of schools is adopted by the respective township trustees pursuant to the provisions of said act, each of such respective township school corporations in such county cease to exist. Thereafter only one municipal corporation for school purposes exists throughout the extent of said county which is

the County Board of Education, which county board thereafter has all the powers and duties and carries out the functions previously enjoined upon the respective township trustees in such county, except as otherwise provided in said Chapter 281 of the Acts of 1947.

It is pertinent to note that in prescribing the duties and powers of said County Board of Education, in connection with the employment of personnel in such schools, Section 1 of said act provides that said board shall have all the authority, powers, privileges, duties and obligations previously granted to school cities and school towns except as provided in Section 4 hereof. Section 4 above quoted provides that Chapter 97 of the Acts of 1927, being the tenure teacher statute, "shall not be effective with reference to the employment of teachers in any county school corporation created in this act."

In the first place, the constitutionality of the above provisions of said statute would be considered valid until declared otherwise by a court of competent jurisdiction.

In the second place, it is to be noted that Legislature clearly intended a new corporation to be created for the purpose of operating such county unit of schools. This is apparent for the reason such County Board of Education, among other things, takes over and manages as a unit such county schools; makes provision for the maintenance thereof by a county-wide assessment and levy of taxes; gives authority to sue and be sued; provides for transportation of children as a unit; has authority to issue bonds of said county Board of Education for the carrying out of such purposes. In connection with such bond issue, it is to be noted that under Section 1 of said act the right to issue such bonds are to be controlled as to the right of review by the laws applicable to school cities and school town levies; and while Section 3 of said act authorizes a dissolution of such county corporation after three years from the date of its creation, by a vote of the township trustees constituting such board, it is provided that in case of such dissolution "said corporation and county Board of Education created by this act shall retain its corporate entity for a sufficient time and with sufficient powers to levy and collect sufficient tax revenue to retire any outstanding bonds or other indebtedness that may have been

