

to the ownership of the property which was purchased from these funds during the past five years.

“3. Your formal opinion is respectfully requested.”

I call your attention to Opinion No. 85, page 362, of the Opinions of the Attorney General for 1944, which goes into considerable detail as to the character and nature of non-appropriated military funds including such funds as described in your letter. In the case of *Standard Oil Company v. Johnson* (1942), 316 U. S. 481, the Supreme Court discussed the nature of post exchange funds and pointed out that the profits and proceeds from canteens, etc., do not go to individuals, but are handled under military regulations.

I call your attention to page 378 of said opinion of the Attorney General where it is pointed out that the custody and disbursement of such funds are regulated by general orders and military regulations. In this connection I call your attention to Army Regulation 210-50 of the War Department covering non-appropriated funds, which include such funds as are described in your letter, for the method similar funds are handled by United States military forces.

It is my opinion that the disposition of the funds and property mentioned in your letter should be covered by general order or regulation which would preserve them in so far as possible for the units which will succeed the units being deactivated.

OFFICIAL OPINION NO. 23

May 8, 1947.

Hon. Forrest V. Carmichael,
Executive Secretary,
Indiana State Teachers' Retirement Fund,
336 State House,
Indianapolis 4, Indiana.

Dear Sir:

Your letter of April 25, 1947 has been received requesting an official opinion on the following questions:

“Is the employment of a ‘Permanent teacher’ who has attained the full age of sixty six years, optional with the employing official of a school corporation or is the permanent contract binding until July 1, 1949?”

Section 28-4307, Burns’ 1933, same being Section 1, Chapter 97, Acts 1927, amended by Section 1, Chapter 116, Acts 1933 provides in part 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 of this act; * * *”

It is to be noted that under the 1933 amendment of the above statute, tenure rights of teachers in any school city corporations or school town corporations are valid and enforceable only until such teacher attains the age of 66 years, unless removed for cause in compliance with the provisions of said tenure statute.

It is to be further noted that under the original tenure act, same being Section 1, Chapter 97, Acts 1927, said statute applied not only to school city corporations and school town corporations but also applied to school township corpo-

rations. It is deemed pertinent to point out that the 1927 tenure act did not contain the provision regarding lapsing of such tenure contract on a teacher attaining 66 years of age. This was the subject of an opinion by the Indiana Appellate Court in the case of *Engel v. Mathley* (1943), 113 Ind. App. 458, where on page 470 of the opinion the court said:

“But we are of the opinion that no question of the appellee’s age is involved in this case. The Act of 1927 under which appellee’s rights accrued, makes no mention of any age limit in connection with an indefinite contract. The Act of 1933 concerns teachers in school city and school town corporations only and does contain the age limitation, but in no way purports to attach it to township teachers whose previously acquired rights as such have been held to continue despite the enactment of the 1933 Act. State *ex rel. Anderson v. Brand, supra.*”

While the facts involved in the foregoing decision of the Appellate Court only involved the age of a township teacher who had attained tenure rights under the 1927 law, the same reasoning is applicable to the status of a teacher who attained tenure rights under the 1927 law in a school city corporation, school town corporation or school township corporation. To these the tenure contract does not lapse at 66 years of age unless they have been waived by the teacher by reason of membership in the Indiana State Teachers’ Retirement Fund, as hereinafter pointed out.

The teachers’ pension statute was originally enacted in 1915, same being Chapter 182 of the Acts of 1915. Section 9 of Chapter 182 of the Acts of 1915 was successively amended by Section 4, Chapter 256, Acts 1921; Section 2, Chapter 189, Acts 1937; Section 2, Chapter 328, Acts 1945; and Section 1, Chapter 353, Acts 1947, all except the last amendment being found under Section 28-4506, Burns’ 1933 and 1945 supplement.

Section 28-4506, Burns’ 1933, *supra*, clause (d), as amended by Section 2 (d) of Chapter 189 of the Acts of 1937, *supra*, provides in part as follows:

“* * * Every teacher who is employed to teach in the public schools of this state and who avails

himself or herself of and accepts the provisions and privileges of this act, shall, by virtue of such acceptance, agree that (1) when such teacher shall have attained the full age of sixty-six years, he or she shall not be employed to teach and shall not be eligible to continue to teach in any of the public schools of any school corporation of this state, and (2) that such teacher will be ineligible to enter into any contract with any school corporation to teach in any of the public schools thereof. If any person who is employed to teach in the public schools of any school corporation shall attain the full age of sixty-six years prior to the expiration of any school year for which he has been employed to teach, such person shall be eligible to complete such school year notwithstanding the fact that he has attained the full age of sixty-six years prior to the expiration of such school year."

The foregoing provision of the 1937 *tenure act* was the first provision in the *tenure act* requiring an agreement on behalf of the teacher to retire on attaining 66 years of age. Clause (d) of Section 2 of the 1937 Act as amended by Section 2, Chapter 328, Acts 1945, *supra*, was identical with the 1937 amendment except it provided that such teacher "shall, by virtue of such acceptance, agree that (1) after *July 1, 1947*, when such teacher shall have attained the full age of sixty-six (66) years," he shall not be employed or eligible to continue to teach in any school corporation of the State.

The last referred to provision of the 1945 law was amended by Section 1, Chapter 353, Acts 1947, Clause (d) which provides in part as follows:

"* * * Every teacher who is employed to teach in the public schools of this state and who avails himself of and accepts the provisions and privileges of this act *or any act of which this act is amendatory*, shall, by virtue of such acceptance, agree that (1) after July 1, Nineteen Hundred Forty-Nine, when such teacher shall have attained the full age of sixty-six (66) years, he shall not be employed to teach and

shall not be eligible to continue to teach in any of the public schools of any school corporation of this state, and (2) that such teacher will be ineligible to enter into any contract with any school corporation to teach in any of the public schools thereof. * * *” (Our emphasis).

In addition to the foregoing amendments of the Teachers' Retirement Act, it is necessary to note two intermediate statutes, which did not purport to be amendatory statutes, except by reference. These are Chapter 193 of the Acts of 1943 which was amended by Chapter 71 of the Acts of 1945. Section 1 of Chapter 193 of the Acts of 1943 provides:

“* * * *That for the duration of the present war and for six months thereafter, but not later than the first day of May, 1945, the following provisions of paragraph (d) of section 2 of Chapter 189 of the Acts of the 1937 General Assembly of Indiana, to-wit: Every teacher who is employed to teach in the public schools in this state and who avails himself or herself of and accepts the provisions and privileges of this act, shall, by virtue of such acceptance, agree that (1) when such teacher shall have attained the full age of sixty-six (66) years, he or she shall not be employed to teach and shall not be eligible to continue to teach in any of the public schools of any school corporation of this state, and (2) that such teacher will be ineligible to enter into any contract with any school corporation to teach in any of the public schools thereof, be and the same are hereby suspended.*” (Our emphasis).

Section 1 of Chapter 71 of the Acts of 1945 which amended Chapter 193 of the Acts of 1943, *supra*, provided as follows:

“* * * That section 1 of the above entitled act be amended to read as follows: Section 1. That for the duration of the present war and for six months thereafter, *but not later than the first day of May, 1947*, the following provisions of paragraph (d) of section 2 of Chapter 189 of the Acts of the 1937 General Assembly of Indiana, to-wit: Every teacher

who is employed to teach in the public schools in this state and who avails himself or herself of and accepts the provisions and privileges of this act, shall, by virtue of such acceptance, agree that (1) when such teacher shall have attained the full age of sixty-six years, he or she shall not be employed to teach and shall not be eligible to continue to teach in any of the public schools of any school corporation of this state, and (2) that such teacher will be ineligible to enter into any contract with any school corporation to teach in any of the public schools thereof, be and the same are hereby suspended. *Provided*, that during the period of time of the suspension of Section 1 of this act, as herein provided, any school corporation of this State *may, but shall not be required to*, thereafter continue in its employ, after the expiration of any current school year, any teacher who shall have attained the full age of sixty-six years." (Our emphasis).

From the foregoing provisions of the amendments of the Teachers' Retirement Act, as affected by the provisions of Chapter 193 of the Acts of 1943, and as amended by Chapter 71 of the Acts of 1945, *supra*, it is clear that any teacher who as a result of becoming a member of such retirement fund had agreed to retire at 66 years of age, such agreement was by such statutes extended as above set out. The 1947 act extended such time until July 1, 1949.

In the 1947 amendment to the Teachers' Retirement Act, it is provided that "every teacher who is employed to teach in the public schools of this State *and who avails himself of and accepts the provisions and privileges of this act or any act of which this act is amendatory*, shall, by virtue of such acceptance, agree that (1) after July 1, Nineteen Hundred Forty-Nine, when such teacher shall have attained the full age of sixty-six (66) years, he shall not be employed to teach and shall not be eligible to continue to teach in any of the public schools of any school corporation of this state,
* * *"

From the foregoing 1947 amendment to the Teachers' Retirement Act, the Legislature has expressly provided that any teacher who is a member of *any fund* set up pursuant to *any statute which is amended by the 1947 act*, is eligible to

be employed in the public schools until July 1, 1949; and that the agreement of a tenure teacher under the 1927 act to retire at 66 years of age, which agreement resulted solely from accepting membership in the Teachers' Retirement Fund, is by the 1947 act extended to July 1, 1949, so that such teacher, except for cause, may not be compelled to retire until July 1, 1949.

In the case of *Engel v. Mathley*, *supra*, at pp. 465 to 470 of the opinion the court at great length discusses the successive steps taken by such teacher in that case in accepting independent employment upon the renewal of her tenure contract being refused by the trustee, and discusses her subsequent yearly employment in the township in which she had a tenure contract to determine whether she, in fact, had abandoned her tenure contract, or whether she had been guilty of such laches under the circumstances as would be sufficient to act as an implied waiver of her tenure contract and an acquiescence in its cancellation. Said case is therefore an authority for the proposition that a teacher can abandon or waive her tenure contract by positive action. Such positive action would be sufficiently exemplified by her taking membership in the Teachers' Retirement Fund and agreeing to its provisions as to date of retirement. On this question your attention is directed to an official opinion of this office under date of August 30, 1945, to the State Superintendent of Public Instruction, same being 1945 Ind. OAG Official Opinion No. 93, where the subject herein involved is discussed at length.

From the foregoing I am of the opinion:

(1) A teacher who has tenure rights under the 1927 act, prior to its amendment in 1933, and who did not take membership in any of the Indiana State Teachers' Retirement Funds, is not bound by any age limitation as to her tenure rights of contract, except for possible removal for cause under the provisions of said act. Of course, if such teacher has accepted membership in any Teachers' Retirement Fund set up pursuant to the provisions of any statute beginning with the 1937 amendment, such teacher is by such acceptance bound by the retirement age prescribed in such act setting up the fund in which she elected membership, except that the time in which such teacher is required to retire has been extended by the 1947 act to July 1, 1949;

(2) That any teacher who attained tenure status under the tenure act after its amendment in 1933, does not thereby have the *right to demand* continuance of employment after arriving at the age of 66 years; such teachers, while they may not be able to require employment after attaining the age of 66 years by virtue of their tenure contract, may *continue to be employed by the school corporation* until July 1, 1949, under the provisions of the 1947 amendment to the Teachers' Retirement Act.

OFFICIAL OPINION NO. 24

May 12, 1947.

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

Dear Mr. Ruston:

I have your letter in which you ask for an official opinion on the following questions pertaining to second class cities having a population of from 35,000 to 50,000 and operating one utility, namely a light plant:

"1. Can the clerk of the Board of Public Works and the City Clerk be one and the same person?

"2. If so, can the City Clerk receive not only his salary as set by statute, but also the salary as set for the appointive position of clerk of the Board of Public Works?

"3. If your answer to above questions are in the affirmative, would your answer be the same if the city owned and operated one or more public utilities?"

Section 48-1215 of Burns' 1933 (1945 Pocket Part) provides that in cities of the second class, except those having a population of more than 85,000 and less than 100,000, according to the last United States census, the elective officers shall consist of a mayor, a city clerk, a city judge and members of the common council. It is further provided