

ance Exchange of the Chicago Motor Club is subject to the payment of the fire marshal tax.

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OFFICIAL OPINION NO. 73

July 27, 1945.

Colonel Austin R. Killian,  
Superintendent, Indiana State Police,  
State House,  
Indianapolis, Indiana.

Dear Colonel:

I wish to acknowledge your request for an official opinion upon the following agreed facts:

An employee of the Indiana State Police Department resigned in 1944 prior to reaching the normal retirement age of fifty-five years. In May of 1944 the Pension Advisory Board forwarded this office an application for a lump sum pension payment which did not in fact afford such officer the right of election of lump sum settlement or an annuity provided by paragraph 9, Section 8 of the Indiana State Police Department Pension Trust Agreement. As a matter of fact at that time and for some period of time thereafter the State Police Pension Board was not aware of the optional retirement benefits afforded by said Trust Agreement, and the application for such lump sum payment was given said retired officer under the admitted departmental misunderstanding that such officer was only entitled to lump sum settlement, such facts being communicated to such police officer. Under these facts the applicant mailed back the application for lump sum settlement and on May 27, 1944, was mailed a check in lump sum settlement in the sum of \$773.06.

Subsequently, early in 1945 the Pension Board and the officers of the Indiana State Police Department became aware of the provisions of said Trust Agreement authorizing such optional pension adjustment and granted an annuity to one of the retiring officers. Upon this fact becoming known to the previously retired officer he presented to the Pension Board, by his attorney, a request that they receive the return of the

lump sum settlement and permit him to retire on an annuity. At that time a check of such retired officer for such amount was given the Pension Board subject to their determination if they had a right to receive the same. This was done on March 26, 1945.

Your question is can the Indiana State Police Pension Board accept the return of such tendered lump sum payment and thereafter consider such retired officer's application for an annuity adjustment.

Under Section 47-836 Burns' 1940 Replacement, same being Section 2, Chapter 54, Acts 1937, the Indiana State Police Department is authorized to establish and operate an actuarially sound pension trust fund.

Under Section 47-840 Burns' 1943 Replacement, same being Section 6, Chapter 54, Acts 1937, said department is authorized to prepare and execute an actuarially sound supplemental trust agreement between the department and the pension fund trustees for the exclusive benefit of the employee beneficiaries and their dependents.

Paragraph 9, Section 8 of the Indiana State Police Department Pension Trust Agreement, made pursuant to said statute for the benefit of the employees of said department, provides as follows:

"With the consent of the Department and the approval of the Engineers an Employee Beneficiary may retire prior to the normal retirement age of 55 on an adjusted pension in lieu of the regular pension amount to which he would have been entitled at age of 55 as set forth herein. In the event of such prior retirement the amount of his adjusted pension shall be determined by the Engineer in accordance with actuarial tables approved by the Insurance Department."

It is clear the aforesaid provision of said Trust Agreement contemplates a right of the employee on retiring before reaching fifty-five (55) years of age to make an election, to be freely made that he desires a lump sum pension settlement or that he desires an annuity pension settlement, all of which is of course subject to the consent and approval of the State Police Department and the approval of the engineers in accord-

ance with the actuarial tables approved by the insurance department.

It has been held that the statutory pension benefits granted to public officers and employees may not be waived by them in the absence of some consideration such as some special benefit received by the employee or an agreement made to protect the solvency of a pension fund.

Annotation 125, A. L. R. 728.

The law concerning election of remedies requires the election be made without mistake of law or facts.

“An election between two remedies necessarily implies knowledge that there are two remedies, and in the absence of circumstances constituting an estoppel, an election made by a party under a mistake of facts, or a misconception as to his rights, is not binding in equity, and this is true whether the mistake is one of law or one of fact. \* \* \*”

20 C. J. 37.

The Supreme Court of this State has consistently permitted a widow to rescind her election to take under the will or under the law when it was not made with complete understanding.

Garn v. Garn (1893), 135 Ind. 687;  
Whitesell v. Strickler (1907), 167 Ind. 602, 78 N. E. 845.

In an official opinion of this office (1944 Ind. O. A. G., p. 75, No. 20, under date of February 29, 1944) to Hon. Don F. Stiver, Superintendent Indiana State Police, it was held the members of the State Police Pension Fund had a vested interest in said fund. However, I am advised that the trust agreement establishing such fund is based upon actuarial tables allowing such option payment plans on retirement, and therefore the solvency of the fund would not be impaired.

Under the above authorities and principles, if the solvency of the fund would not be impaired, I am of the opinion that the election may be rescinded upon a return of the consideration already paid.