

(8) I do not believe that the public depository law applies to the fund which we have herein designated as the "armory fund" and which did not come into being as the result of legislative appropriation.

This opinion is limited to the "armory fund" and does not apply to specific appropriations of the Legislature, as the latter is not involved in your questions. It is the duty of the Governor and the military authorities to see that this fund is used for proper military purposes but the determination of whether a particular purpose is a military purpose lies with them and is not subject to review except where they act arbitrarily or capriciously or commit a clear abuse of power. It is also their responsibility and duty to supervise their administration and to provide adequate controls.

INDIANA EMPLOYMENT SECURITY DIVISION—One who has qualified as regular employee and who is also serving in a provisional appointment may be granted a salary increase under certain circumstances. Certain provisions of Personnel Act suspended and held in abeyance during war emergency.

October 2, 1944.

Opinion No. 86

Hon. Everett L. Gardner, Director,
Indiana Employment Security Division,
141 South Meridian Street,
Indianapolis, Ind.

Dear Sir:

This will acknowledge receipt of your letter of August 7th in which you ask the following questions:

"1. May a salary increase be granted, within the purview of said Section 5 of Regulation I, to an individual who has become a 'regular' or 'permanent' employee in a certain classification, when and while such individual is serving a working test period under a provisional appointment for a different classification?

"2. Within the intent and meaning of the language in Section 23, Chapter 139, Acts of 1941, to the effect

that no person shall receive more than one four-month provisional appointment within a twelve-month period, is an individual who is already in 'regular' or 'permanent' status in one classification precluded from serving a four-month provisional appointment in another and higher classification, and thereafter, within the same twelve-month period, serving another four-month provisional appointment in still another and higher classification, or under a renewed or extended appointment in the same position until such time as an examination for the position can be held?"

In your letter you refer to Section 6, Chapter 139 of the Acts of 1941 and also Section 23 of said chapter. You also quote Section 5 of Regulation I of the personnel rules and regulations. Said Section 6 of Chapter 139 of the Acts of 1941 (Section 60-1306 Burns' R. S. 1943 Replacement) reads in part as follows:

"The board is hereby authorized and required:

"(a) To adopt, with or without modification, such classification plan as may be recommended by the director and as is in conformity with the provisions of this act, and to promulgate and enforce the same.

"(b) To adopt, with or without modification, such pay plan as may be recommended by the director and as is in conformity with the provisions of this act, and, upon approval of the state budget committee, to promulgate and enforce the same: Provided, That any pay plan so adopted shall provide salary ranges, within which the appointing authorities may fix the salaries to be paid.

"(c) To make, promulgate, alter, amend or repeal rules and regulations by a majority vote of the members thereof, for any or all of the following enumerated purposes:"

Section 23 of said act (Section 60-1323 Burns' R. S. 1943 Replacement) is as follows:

"When an appointing authority desires to fill a vacancy in the classified service, and the director can not certify the required number of eligibles for such

vacancy because there is no appropriate list or because there is not a sufficient number of persons on appropriate lists who are willing to accept appointment, the director may authorize the appointing authority to fill the vacancy by provisional appointment. A provisional appointee shall hold this position only until an appropriate list has been established and the required certification can be made. No provisional appointee shall hold his position for more than four (4) months. No provisional appointment shall be renewed, and no person shall receive more than one (1) provisional appointment in any twelve-month period."

Section 5 of Regulation I is quoted in your letter as follows:

"Section 5. Salary advancements.

"(b) Salary advancements shall be limited to permanent employees who have completed the probationary period and, during the period of the war emergency, to employees who have completed at least three months of satisfactory service as probationary employees."

I do not have the rest of said rules before me. I call your attention to my official opinion of March 6, 1944 addressed to "Hon. Dudley A. Smith, Director of State Personnel" and enclose a copy of the same herewith for your information. The last paragraph of said opinion is as follows:

"Therefore, it is my opinion that during the war time emergency and the existence of the manpower shortage with reference to obtaining employees for the operation of state government, the limitations contained in Section 60-1323, Burns' 1933 Supplement, and Section 60-1324 Burns' 1933 Supplement, which limit the time that a provisional appointee may be employed or the time that an emergency employee may be employed are suspended and held in abeyance during the time of such emergency."

The State Personnel Act does not define the term "permanent employee" but it does define a regular employee in Section 2 (n) of said Chapter 139 of the Acts of 1941 (Section 60-1302 Burns' R. S. 1943 Replacement) as follows:

“(n) ‘Regular employee’ means an employee who has been appointed to a position in the classified service after completing his working test period.”

I take it that the term “permanent employee” as used in the above rule is used as an equivalent to the term “regular employee” in the statute.

Section 1 of said Chapter 139 of the Acts of 1941 (Section 60-1301 Burns’ R. S. 1943 Replacement) is as follows:

“This act shall be known and may be cited as the ‘State Personnel Act;’ and this act shall be liberally construed to effectuate its policies and purposes to increase governmental efficiency, to insure the appointment of qualified persons to the state services hereinafter defined solely on the basis of proved merit, to offer all citizens a fair and equal opportunity to enter such state service, and to afford the employees in such state service an opportunity for public service and individual advancement according to fair standards of accomplishment based upon merit principles, and to which ends there is by this act established a personnel system based on merit principles and scientific methods relating to the appointment, compensation, promotion, transfer, lay-off, removal and discipline of employees and to other incidents of state employment.”

As I understand the situation presented by your first question, an individual has become a “regular” or “permanent” employee in one classification and while such a “regular” or “permanent” employee he also starts serving a working test period under a provisional appointment in a different and probably a higher classification. Your question is whether under these circumstances he can be granted a salary increase. In your question you do not state whether such employee has held his provisional appointment three months. Such an employee has completed the requirements necessary to become a “regular employee” and I do not believe that he would lose that standing merely because he then accepts a provisional appointment in another or higher classification in the same department.

Therefore, in answer to your first question it is my opinion that a salary increase may be granted under these circum-

stances so long as such increase does not violate some other valid rule and regulation.

His salary as increased could not exceed the maximum of a regular employee in the lower classification or that of a provisional employee in the higher classification. He could not be given an increase of salary on the basis that he is a regular employee of the higher classification.

I believe your second question is answered by my opinion of March 6, 1944 above referred to wherein I give it as my opinion that Section 60-1324 Burns' R. S. 1943 Replacement was suspended and held in abeyance during the time of the present emergency.

**SUPERINTENDENT OF PUBLIC INSTRUCTION: Schools—
pupils of age or married: Public school corporations may
not by general rule exclude pupils married or of age, and
may not charge them tuition.**

October 3, 1944.

Opinion No. 87

Hon. Clement T. Malan,
State Superintendent of
Public Instruction,
State House,
Indianapolis, Indiana.

Dear Dr. Malan:

Your letter of September 21, 1944, received requesting an official opinion on the following questions:

“1. May a person that is married or a person twenty-one years of age or older attend the public schools of a school corporation if he or she is a legal resident of that school corporation?”

“2. May a school corporation collect tuition for school attendance from an individual who is twenty-one years of age or older who is a legal resident of the school corporation?”

“3. May a school corporation collect tuition for school attendance from an individual not yet twenty-one years of age who is a legal resident of that school corporation, but married?”