by law, to fill the vacancy should be printed on the regular ballot. The war ballot act then makes the war ballot conform by putting the name of the successor candidate on the war ballot by operation of law.

ACCOUNTS, BOARD OF: Armory Board—Military funds—Method of handling and disbursing certain funds—Canteen etc. funds—History and status of Armory Boards, State and local.

September 25, 1944.

Opinion No. 85

Hon. Otto K. Jensen,
State Examiner,
Department of Supervision of Public Offices,
State House,
Indianapolis, Indiana.

Dear Sir:

This will acknowledge receipt of your letter of August 11th, in which you request my opinion upon the following questions:

"1. Do local armory boards have any legal existence other than as agents of the state armory board?

"2. Is the state armory board and/or local armory boards required to pay into the state treasury amounts received as rentals, income, earnings and all other receipts of whatsoever character, accruing to the state treasury by virtue of the operation of the state armories?

"3. Does the provision of the statute that all expense incurred in the operation of state armories shall be paid out of the rentals, income, earnings and any and all other receipts of whatsoever character, operate as an appropriation of such receipts for the payment of the expenses incurred in the operation of the state armories?

"4. Is the state armory board and/or local armory boards authorized to pay the expenses incurred in the operation of state armories in any manner other than
by state warrant issued by the auditor of state upon
duly itemized and approved vouchers?

“5. Can funds received from the operation of state
armories be donated to company funds or expended for
flowers, for funerals, or for courtesy advertisements?

“6. Can the cost of equipment, additions to and alter-
ations of armories be paid from funds for the opera-
tion of armories?

“7. Can money received from the operation of state
armories be expended without each item of expense be-
ing first authorized by the state armory board?

“8. If your answer to question No. 2 is in the nega-
tive, does the public depository law apply to funds re-
ceived on account of the operation of state armories,
collected by the state armory board or by local armory
boards?”

With your letter you enclose a copy of what is called “Gen-
eral Orders No. 15,” dated December 8, 1941, which consists
of “Regulations for Management and Care of Armories.”
These were adopted by the Armory Board of the State of In-
diana and are also signed by the Adjutant General “by direc-
tion of the Governor.” You also enclose what is called “Gen-
eral Orders No. 1,” dated January 6, 1941. This is also signed
by the Adjutant General “by direction of the Governor,” and
is substantially the same as “General Orders No. 15,” above
referred to.

Your questions deal with the military forces of the State of
Indiana, their property and funds, and it is therefore neces-
sary to review the facts in connection with armories and mili-
tary laws and rules. I find no decisions of the courts of this
state which are helpful. However, I do find that a large num-
ber of opinions have been given in the past by prior Attorney
Generals.

Military law consists of rules and articles of war and other
statutory provisions to which may be added the unwritten or
common law of usage and custom of military service. It is a
part of our body of law fully recognized by the civil courts
and is in force in time of peace as well as in time of war. It
is that law which relates to the organization, government,
management, and discipline of the military forces. It is a
body of rules superadded to the civil law regulating the citizen in his character of soldier and is binding in the field to which it applies.

The executive authority has power to establish rules and regulations for the government of the military forces. These derive their force from the power of the executive as commander-in-chief and are binding within the sphere of his legal and constitutional authority.

6 C. J. S. Army and Navy, Sec. 1, page 346;
Ives on Military, p. 16;
Customs of the Service by Powell, p. 9;
Winthrop, Military Law & Precedents, p. 4.

The Governor is the commander-in-chief of the military forces of the State. He appoints the Adjutant General who is his chief of staff.

Article 5, Sec. 12, Constitution of Indiana;
Article 12, Sec. 2, Constitution of Indiana;
Section 45-601 Burns' R. S. 1933, 1940 Repl.

The Governor also appoints the State Armory Board.
Section 45-301, Burns' R. S. 1933, 1940 Repl., is as follows:

“There shall be appointed within the state of Indiana an armory board, to consist of the Governor, the adjutant-general, and five (5) persons to be appointed by the Governor, of whom three (3) shall be officers of the national guard, whose duty it shall be to provide, manage and care for armories, for the use of the national guard of Indiana.”

The quotation above is as this section appears in Chapter 185 of the Acts of 1907 at page 307. This section was amended by Section 1 of Chapter 283, Acts 1943, page 796, which amendment substituted the words “military forces of the state of Indiana” in both places for the words “national guard” and “national guard of Indiana.” The question has been raised as to the validity of this amendment, but this question need not be determined for the purposes of this opinion.
Section 45-305, Burns’ R. S., 1940 Repl., provides as follows:

"The armory board hereby appointed shall also constitute a board for the general management and care of said armories when established, and shall have the power to adopt and prescribe rules and regulations for their management and government, and formulate such rules for the guidance of the organization occupying them as may be necessary and desirable."

Although the statute for the appointment of a State Armory Board was enacted in 1907, we do not find any record or minutes definitely showing the existence of such a board until in 1921. The 1920 Year Book at page 233, contains this statement:

"The only discouraging feature for the National Guard now is the lack of proper armory facilities to house the organizations and to care for the valuable and delicate equipment and material which will be issued to the State. A recommendation is being made to the Governor for the appointment of an Armory Board, and it is hoped that this board will soon be organized and take up actively the question of providing suitable armories for all organizations of the National Guard. In order that Indiana may have an efficient Guard, it is absolutely necessary to have adequate armories, and the Government will insist on armories that will properly care for all stores and supplies turned over to the State. Indiana is a patriotic State, has always furnished more than her quota of men and money in time of war, and it is believed that she will provide suitable armories for her sons to secure the excellent training making toward better manhood, as well as preparing them for the second line of defense in the protection of the State and country."

In the Year Book for 1921, at page 1064, appears the following:

"At the commencement of the organization of the Indiana National Guard the question of armories presented a very serious problem. In order to have an efficient unit it is very essential that proper housing fa-
cilities be arranged. Through an armory board appointed, at the suggestion of this office, by the Governor of the State of Indiana, the question of armories is readily taken care of. At the present time arrangements have been perfected whereby each organization in the Indiana National Guard is or will be provided with a suitable armory for drill instruction and storage of government property. The actions of the civilian in the localities where a National Guard unit has been organized have been very commendable in the question of armory arrangements. It is anticipated that within a very few years suitable armories will be provided for every unit in the National Guard."

There are expressions in the reports of the Adjutant General to the Governor prior to this time which indicate that attempts have been made to obtain an appropriation from the Legislature for the purpose of buying or erecting armories but that those attempts have not met with success. During this period of time, various units of the Guard were housed in whatever quarters could be rented in the locality of the particular troop or unit. There being no adequate legislative appropriations for equipment, supplies, etc., it was customary for the various companies to use various methods of raising money for equipment, encampments, and matters of that kind. Some of these methods were through the use of canteens, donations, and various enterprizes. These proceeds were used to purchase equipment, defray expenses at encampments, and similar purposes.

On September 28, 1916, the Attorney General ruled that the Armory Board had authority to lease an armory and bind the State by such lease. Opinions Attorney General, 1916, p. 497.

On August 13, 1923, the Attorney General ruled that it was proper to pay rent for armories used by the National Guard throughout the State. Opinions Attorney General, 1923, p. 36.

Along about this time and because of the failure of the Legislature to make appropriations for the purpose of the building of armories, various schemes were advanced to acquire armories.

In January of 1925, the Adjutant General requested an opinion of the Attorney General upon the power of the Armory Board to execute a mortgage to finance the building of an
armory. On January 28, 1925, the then Attorney General gave it as his opinion that the Armory Board had authority to buy the ground and erect armories but could not execute a mortgage. Opinions Attorney General, 1925, p. 337.

Following this opinion various attempts were made to interest public-spirited people in making donations to make possible the acquisition of armories, and various persons and cities were found who wanted to make donations of grounds upon which an armory could be erected and a method was worked out and followed all over the state in a substantially similar manner as follows: the owner of the ground would execute a deed to a group of approximately five people by which the real estate was conveyed to them as trustees in trust for the state and the Armory Board of the State of Indiana, under the terms of which they were to hold the same and devote it to the purpose of causing to be erected thereon a building adapted to the use of the National Guard and for such other public use as might be deemed desirable. Said Board of Trustees would then enter into a contract with a contractor for the erection of such a building thereon and would execute a mortgage deed of trust to the Peoples State Bank, Trustee, to secure a mortgage bond issue in an amount sufficient to pay the cost of the erection of such building. The Board of Trustees would also execute a lease to the Armory Board for an annual rental, which annual rental was figured at such an amount as would meet interest and maturity of the mortgage bond issue and pay the upkeep and maintenance charges. It was also a provision of the trust deed that, when the mortgage bond issue was liquidated, the property should then belong to the State of Indiana. These instruments were submitted to the Attorney General and in an opinion given by him, dated September 8, 1925, he approved such a plan as valid and legal, but called attention to the fact that it would be subject to the State Legislature's making sufficient appropriations from time to time to pay said rentals. Opinions Attorney General, 1925, p. 340.

Again, in 1935, a similar set of instruments was submitted to the Attorney General, who gave a similar opinion. Opinions Attorney General, 1935, p. 92. We make the following quotations from the 1925 opinion:

"All these instruments construed together show for their object not only the acquisition of a leasehold in-
terest by the state in the said property but also the acquisition of the title itself. The rental provided for is apparently sufficient to accomplish both objects at the end of a twenty-five year period.

"** * * The lease in question is, therefore, only binding on the armory board and on the state so far as the present legislative authority and appropriations warrant the execution of a lease for this purpose.

"** * *

"Assuming that the lease feature of the proposed contract calls for no greater expenditure of money than a pure lease would require then it is my opinion that the additional features by which the state would ultimately acquire the title would not vitiate the contract on a theory that such method of purchase standing by itself would be unauthorized.

"With the views I have herein expressed in mind it is my opinion that the contract in question may legally be entered into and when so entered into the contract will have the limited binding force which I have herein indicated." Opinions Attorney General, 1925, p. 340.

It is my information that over forty armories were built in the State of Indiana following this plan. Following the building of said armories and following military custom, a canteen would be operated in the armory with the permission and acquiescence of the state and local armory boards, the Adjutant General, and the commanding officer. The proceeds realized therefrom would be turned over to the local armory board and deposited in its armory fund in bank. When donations were made by civic bodies or persons, they were handled in the same way. In addition, the armory would, on occasions, be used for civic or entertainment purposes, where such use did not interfere with the use of the building by the Guard. This use was by agreement with or permission of the local armory board, state armory board, and the Adjutant General. Such use frequently resulted in income, which fund was also turned over to the local armory board and by it deposited in said armory fund. It has been held that, by permission of the board in charge, an armory may be used for other purposes where the same will not interfere with the proper use of the building by the military forces, and such use
is proper and legal, particularly where that use is conducive to the efficiency and esprit de corps of the military organization.

40 C. J., Military, Sec. 60, p. 687, and authorities cited.

From the days of the organization of military forces in this country, through military custom and usage, there has existed something which was the equivalent to the canteen or post exchange which was operated on the military reservation, post or military property, the object of which was to encourage contentment, good behavior and morale and to provide comforts and necessities for the men in the service under military regulations. The profit from such canteens was used by the company or unit for the benefit of the members of that military unit such as for the betterment of their mess, a library and reading room, gymnasium and gymnasium equipment, and for such purposes as the military officials in charge deemed desirable for the betterment or the health and amusement of the soldiers of the post or unit. Historically this fund was kept by some officer designated for that purpose and accounts were rendered to the commanding officer which eventually went to the Adjutant General of the Army through the department commander. These funds were handled under the general orders and the Army Regulations, some of the earlier of which are General Order 10 of 1889, General Order 11 of 1892 and General Order 46 of July 25, 1895, and at present are regulated by Army Regulation 210-50. According to military custom and practice such funds are designated as "nonappropriated funds" as distinguished from those funds which are appropriated by legislative action and raised by taxation. Paragraph 1 of AR 210-50 is as follows:

"1. General.—Certain revenue-producing and welfare activities are necessary adjuncts to the Army and are hereby authorized despite the fact that appropriated funds to support such activities may not be available. The nature of these activities imposes on the War Department the responsibility of supervising their administration and providing adequate controls."

Paragraph 3 provides in part as follows:

"3. Definitions.—a. Nonappropriated funds.—Nonappropriated funds consist of cash, investments, or
other assets accumulated to finance the conduct of revenue-producing, welfare, and certain other activities. For purposes of these regulations, funds of Army Emergency Relief and of American Red Cross are excluded."

Paragraph 6 c provides as follows:

"c. Administration.—The major revenue-producing funds will be administered in accordance with basic policies determined by the War Department and in conformity with pertinent Army Regulations. Funds of Army exchanges and the Army exchange fund will be administered in accordance with AR 210-65, and funds of War Department theatres and the United States Army Motion Picture Service Fund will be administered in accordance with AR 210-390 (C10, 1 June 1944), all under the staff supervision of the Director, Special Services Division, Headquarters Army Service Forces. The administration of revenue-producing activities at the post level shall be the responsibility of the post commander operating through a properly designated officer in accordance with policies established by appropriate staff agencies."

It is thus seen that such nonappropriated funds though raised by post canteens, post exchanges, post restaurants, or from amusements or enterprises upon Army property, have been under military custom and usage held, managed and expended for the purposes above mentioned pursuant to military general orders and regulations. In the same way the State Armory Board, under the direction of the Governor as Commander-in-Chief, has issued general orders covering the custody, management and expenditure of the so-called armory fund, which fund was not created by legislative appropriation, but was created at least in part through the operation of canteens, exchanges and other money raising activities sponsored by the military unit at the post or armory in question.

Winthrop’s Military Law and Precedents, 2nd Vol., p. 871;
Farrow’s Military Encyclopedia, p. 385 Vol. 1, p. 568 Vol. 2;
Customs of the Service by Powell, p. 177.
In the very recent work on military law by Appleton at p. 90 it was pointed out that the theft of post exchange funds, company funds, and money not appropriated to the military service, should not be charged under the Article of War relating to a larceny of property of the United States.

Recently in the case of Standard Oil Co. v. Johnson (1942), 316 U. S. 481, the United States Supreme Court had occasion to pass upon the nature of a post exchange and after pointing out that the establishment and control of post exchanges has been in accordance with Army regulations, the court at p. 484 said:

"The commanding officer of an Army Post, subject to the regulations and the commands of his own superior officers, has complete authority to establish and maintain an exchange. He details a post exchange officer to manage its affairs. This officer and the commanding officers of the various company units make up a council which supervises exchange activities. None of these officers receives any compensation other than his regular salary. The object of the exchanges is to provide convenient and reliable sources where soldiers can obtain their ordinary needs at the lowest possible prices. Soldiers, their families, and civilians employed on military posts here and abroad can buy at exchanges. The Government assumes none of the financial obligations of the exchange. But government officers, under government regulations, handle and are responsible for all funds of the exchange which are obtained from the companies or detachments composing its membership. Profits, if any, do not go to individuals. They are used to improve the soldiers' mess, to provide various types of recreation, and in general to add to the pleasure and comfort of the troops."

Military Funds:

As early as 1905, it was ruled by the Attorney General that the Governor had authority to disburse the military fund at his own discretion and could pay the commanding officer of the National Guard, although there was no statute authorizing the same. Opinions Attorney General, 1905, p. 138. This opinion is referred to in an opinion of the Attorney General, dated February 25, 1915, where it is said:
In that case there was no provision for the payment of the officer commanding the National Guard in any statute, there was no explicit authority fixing the rate of pay, and it is doubtful if the legislature until 1911 ever contemplated a commanding officer of the National Guard on constant duty. For many years the commanding general of the National Guard maintained an office in the State House and was paid a regular salary by order of the Governor, but never until 1911 was an appropriation made by the legislature for such purpose.

"The authority of the Governor as Commander-in-chief in the exercise of his discretion is so absolute, that where the matter is solely one of discretion, and the exercise of a function belonging to the Commander-in-chief as such, neither the judiciary nor the Legislature may question the acts of such commander-in-chief.


"The necessity for non-interference, with a full authority to the Commander-in-chief, is discussed by Mr. Justice Story conclusively in favor of the fullest exercise of his powers.

Story on the Constitution, Par. 1491-1492.

"The Commander-in-chief may direct the forces under his command as he deems most effectual for the purposes for which they exist.

Fleming v. Page, 9 Howard 603.

"The orders of the Commander-in-chief, issued through subordinates, are binding upon all persons under his authority.

U. S. v. Eliason, 16 Peters 302;
The Confiscation Cases, 20 Wall. 109;
Kurtz v. Moffit, 115 U. S. 503;
Johnson v. Sayre, 158 U. S. 114."


On August 24, 1915, the then Attorney General said, concerning the expenditure of the military fund for a moving picture film advertising and giving publicity to the Guard:
"It is my opinion that where the matter to be determined is discretionary with the governor, and his judgment is that certain action proposed is for the proper organization of the militia, or the promotion of its discipline, instruction or military efficiency, then that, no matter what the subject matter of such determination, the judgment of the governor is sufficient to preclude interference or objection by other persons. The responsibility and the authority are his. If his judgment says that any measure will effect proper organization, discipline, instruction or efficiency, then the expenditure of money from the military fund made necessary by the expense entailed in effecting such proper organization, discipline or military efficiency, is properly charged against the military fund. However, before the expenditure can be made, the Governor must first determine that the purchase and use of a moving picture film for the purpose of advertising and giving publicity to the Indiana National Guard, will either aid in the proper organization of the militia or promote its discipline, instruction or military efficiency. When he determines these matters one way or the other, my judgment is that his judgment cannot be questioned."

Opinions Attorney General, 1915, p. 466.

In the case of Cox v. McNutt, 12 Fed. Supp. 355, the Federal District Court with three judges sitting, upheld the discretionary authority of the Governor as Commander-in-Chief over the military, and that the court had no power or control thereover in the absence of his act being arbitrary and capricious and a clear abuse of his power.

In an opinion, dated January 4, 1916, the then Attorney General gave an opinion that the Governor could expend funds for additional assistance in the Adjutant General's office, although there was a specific appropriation for clerical and stenographic help, which had already been used and none for such additional help, saying:

"The functions given to the Adjutant General's office by law are varied. The Adjutant General's office has supervision of the militia as a whole as well as of the Indiana National Guard. It also has care and custody
of the records of Indiana troops in the various wars of the United States and has functions to perform in relation to those who are now, and have been at times in the past, soldiers of the State and of the United States. It is appreciated that the personnel for which appropriations are specifically made may be sufficient under some circumstances in the office of the Adjutant General but wholly inadequate to accomplish the purposes for which the militia of this State is intended, and to properly administer the affairs of the Indiana National Guard, in my opinion, the Governor's authority is complete and his will and discretion supreme."


On March 10, 1916, the Attorney General gave it as his opinion that the Governor might, by general order, provide:

"through what officer or officers of the militia the fund should be expended, what sort of vouchers or receipts should be taken, and in a general way the purposes for which the fund is to be expended, when such expenditure is not expressly authorized by statute."


The above opinions were dealing with the expenditure of the military fund appropriated by the Legislature. Many more opinions of the Attorney General might be cited upon the question of the discretionary power and authority of the Governor as Commander-in-chief of the military forces and the military funds.

In addition to Section 45-305, Burns' R. S. 1933, above quoted, it is provided by Section 45-402 as follows:

"The governor may, from time to time, make and publish rules, regulations and orders for the government of the national guard, not inconsistent with the law, and cause the same, together with any laws relating thereto, to be printed and distributed in book form or otherwise, in such numbers as he may deem necessary, and he shall have authority to provide for all books, blank books and blanks that may be necessary for the proper discharge of the duty of all officers."
As above pointed out, the Governor, as Commander-in-chief, can delegate his authority and power to the Adjutant General, members of his staff, or proper officials of the military forces. In addition, Section 45-604, Burns' R. S. 1933, provides for the duties of the Adjutant General. This is quite a lengthy section, but it is sufficient for this opinion to point out that, under Clause 5 thereof, he has charge of the safekeeping of the military equipment and property; and under the direction of the Governor he has authority to dispose of property. Under Clause 6 the duty of keeping a just and true account of all expenses is on the Adjutant General, and "such expenses shall be audited and paid in the same manner as other military and naval accounts are audited and paid." Under Clause 7, purchases of property not exceeding $500.00 in value are made in such manner as the Adjutant General shall direct. Purchases in other amounts have other requirements as to receiving bids or advertisements, but they are all made by the Adjutant General. By Clause 9, the Adjutant General is required to report annually to the Governor. By Clause 11 of said section it is provided:

"The adjutant-general of the state shall be the auditor of all military accounts payable by the state except such as are for expenditures made by him or through his office, which shall be audited by the auditor of state. Copies of all orders and contracts relating to expenditures subject to his audit shall be filed in his office."

Section 45-605, Burns' R. S. 1933, 1940 Repl. provides as follows:

"The adjutant-general shall, within one (1) month after the close of the fiscal year, report to the governor the amount of the military fund drawn, the amount expended and the items of expenditure, and, in such report, shall publish copies of all general orders, together with such other matters as may be deemed necessary or important to the military service. All officers of the militia shall make such reports, and, at such times, as may be fixed by general orders."

General Orders No. 15, which you enclosed in your letter, by Section 1 provides for the formation and organization of
what are commonly called local armory boards, and provides for such a board for each armory, the method of appointment of said board, its officers, and duties. Said general order covers in some detail the general management, operation, and care of the armory. Section 5 of said General Orders No. 15 covers the duties of the officers and provides a method for the handling of the armory fund.

At about the same time as General Orders No. 15 was adopted, a standard system of bookkeeping for use by all local armory boards and forms for reports covering the armory fund were adopted by the State Armory Board, which form and system was approved by the State Board of Accounts, according to the minutes of the Armory Board meeting, held September 17, 1931. I am informed that substantially this same form has been continued in use since that time, which form shows the receipts to the said armory fund and the disbursements therefrom, the disbursement record showing the date, the voucher number, the check number, explanation, and the nature of the payee and the amount thereof.

In 1933, the Adjutant General submitted a series of five questions to the then Attorney General, which questions cover a considerable portion of the field covered by the questions submitted by you. Included in said questions were those relating to whether the local armory boards had any legal entity or status, what the duties and responsibility and authority was, and what, if any, authority existed in said local armory boards as to the collection and disbursement of the so-called "armory fund" which fund was derived from rental on certain occasions of the armory facilities and what responsibility and authority existed in the board for the handling, custody, and expenditure of such funds. As this opinion covers considerable of the subject matter of your inquiry, we refer you thereto. It was the opinion of the then Attorney General that the State Armory Board had full and adequate authority to adopt such rules and regulations as were necessary and advisable for the proper care and management of the various armories in the State of Indiana. General Orders No. 15 is expressly referred to in said opinion and found to be a valid rule and regulation, and to furnish ample legal authority for the existence of the local armory boards. In said opinion it was also held that Clause 5 of said General Orders
No. 15, which we have referred to above in this opinion, covered the question of the custody, handling, and disbursement of the armory fund by the local board.

Some of the other opinions of the Attorney General, bearing on the subject matter of your questions, are as follows: Opinions Attorney General, 1933, p. 32; this opinion is to the effect that the Armory Board can contract for the Adjutant General's Office. Opinions Attorney General, 1933, p. 404; this opinion is to the effect that the armory board was liable for insurance under the armory lease. Opinions Attorney General, 1936, p. 48, is to the effect that the armory board has authority to carry insurance over and above that required by the lease. Opinions Attorney General, 1943, p. 213, is to the effect that the Soldiers' and Sailors' Monument Board could authorize one member to approve vouchers. Opinions Attorney General, 1913, p. 159; this opinion was to the effect it was proper to pay the expenses of a trip to Washington D. C., to make a card index of soldiers as approved by the Governor. Opinions Attorney General, 1923, p. 74; this was to the effect that fines collected from enlisted men should go to the organization or corps of which he was a member and fines of officers to go to the Adjutant General, who should apply them to the use of the Guard. Opinions Attorney General, 1933, p. 449, (same effect as last opinion referred to).

The only statute which I have been able to find, which in any way mentions or refers to local armory boards, is Section 45-311, Burns' R. S. 1933, 1940 Repl., which is as follows:

"All rentals, income, earnings, and any and all other receipts of whatsoever character, accruing to the state treasury by virtue of the operation of the state armories shall be paid to the local armory board of the several armories of the state from which the receipts are derived, and said sums shall be under the care, custody and jurisdiction of the adjutant-general. All expenses incurred in the operation of state armories shall be paid out of the rentals, income, earnings and any and all other receipts of whatsoever character or out of any other appropriation provided by law for the purpose of paying the expenses incurred in the operation of the several armories."
Section 45-304 provides in part:

"* * * When such armory or armories are erected or provided, the said armory board shall have charge thereof, and arrange for its occupancy and use under the direction and responsibility of the senior officer in command of such company, battery, troop, battalion or regimental organization."

Under date of December 21, 1937, the Attorney General's office gave an opinion to Elmer E. Straub, Adjutant General, upon the question of leasing certain space in the Naval Armory at Indianapolis to the United State Government. The opinion quotes Sections 45-304 and 45-311, above quoted in this opinion. In this opinion it is stated that the Adjutant General acted as the agent of the Governor and was responsible to the Governor for his acts in connection with the administration of the National Guard. It was further stated that the Indianapolis Naval Force Armory Board (a local armory board) was a proper board to negotiate the lease and the payments on the lease could be made to said board or a member of said board, properly delegated and named as eligible to receive the same. It was further pointed out in said opinion that, under General Orders No. 15, the Treasurer of the armory board was the custodian of the armory fund, and that the Treasurer of the Indianapolis Naval Forces Armory Board was the proper person to receive rental payments.

Such funds as canteen and post exchange funds are derived from expenditures by the men in service and those whom the military authorities or military usage give access to the use of that facility or enterprise. As pointed out, military usage has permitted military property such as the reservation or post and buildings to be used for fund raising purposes which do not conflict with its military use. Such funds have always been regarded as really belonging to the men in the company or unit located there to be held and used for their betterment and welfare and the betterment and increased military efficiency of that unit. Their custody and disbursement has been provided for and regulated by general orders and military regulations. These funds were not raised by taxation or legislative appropriation, nor were they raised by virtue of any requirement of the Legislature. To borrow
an expression, they were raised by extra-curricular activities of those in service.

Such funds are not collected by the State of Indiana and are not a part of the state's general fund and are not governed by Chapter 43 of the revised statutes of 1852 (Section 61-201, Burns' R. S. 1943 Replacement) or Chapter 28 of the Acts of 1925 (Section 61-202, Burns' R. S. 1943 Replacement). Nor do I think Chapter 115 of the Acts of 1897 (Section 61-205 Burns' R. S. 1943 Replacement) applies, as the type of fund here discussed is held by the military authorities under their orders and regulations for the uses herein outlined.

I am informed that there is at present included in the "armory fund" receipts which have been derived from the rental of space in the armory for such purposes as to the United States Government for use by a Selective Service Board. It is true that such receipts are of a somewhat different character than those derived through the operation of a canteen post exchange and similar usage. There is no statutory authorization for such rental or sub-rental. I find no precedent other than the opinion of the Attorney General dated December 31, 1937, above referred to. This rental, however, is for a military purpose. It is in effect an action of the military authorities of the state permitting the federal government to use state military property for a military use by the federal government for a consideration. It therefore seems to me that this is within the authority of the proper military officials of the state and that the income received from the federal government by the state military authorities would be impressed with a trust that it be properly handled under the general orders and regulations of the state military authorities.

Based upon what has been said, we believe that your specific questions should be answered as follows:

(1) Local armory boards do have a legal existence under the General Orders of the State Armory Board, which were issued by the authority of the Governor. The local boards are more than mere agents of the State Armory Board as they are ultimately responsible to the Governor as Commander-in-Chief, also as to some of the funds coming into their hands they act in a trust or quasitrust capacity as previously pointed out.
(2) In your question numbered (2) you refer to "rentals, income, earnings, and all other receipts of whatsoever character," of the state or local armory boards. It is impossible to give a categorical answer to your question as applied to the "armory funds" as they include such receipts as donations where the donor had specifically provided the use to which the donation was to be put. It includes all funds going into their hands by virtue of the General Orders herein referred to. Receipts of the type which we have discussed in this opinion and which are a part of the armory fund, covered by General Orders No. 15 (now General Orders No. 1) are not required to be paid into the State Treasurer but are to be handled as provided in said General Orders. Even if the "armory fund" includes "rentals, income, earnings, and any other receipts of whatever character" which would not come in the classification or character of post exchange funds, but concerning which it might be said they accrue to the state treasury then by force of Section 45-311, above quoted, they would go to the local armory board and be under the jurisdiction of the Adjutant General.

(3) As pointed out in opinions of prior attorneys general, specific appropriations are not necessary for the expenditure of military funds, but expenditures may be made by the Governor for military purposes, although there is no express appropriation. Generally, the judgment and discretion of the Governor, as Commander-in-Chief, as to whether a particular expenditure is for a military purpose or conducive to promote the military is conclusive unless arbitrary or capricious. This authority may be exercised for the Governor by the Adjutant General or properly authorized persons. General Orders No. 15, now General Orders No. 1, is valid and covers the custody, management, and disbursement of the armory funds which are within its scope.

(4) The answer to your 4th question is: Yes. Local armory boards may pay expenses incurred in the operation of state armories under the General Orders issued by the State Armory Board by authority of the Governor. This applies to those funds which are within the scope and purview of said General Orders. There may be in the hands of said local armory boards funds which might not necessarily fall within the scope of the General Orders. An example of this would be a sum of money donated to said board for a particular pur-
pose. In such instances the local board would be acting as trustees in the disbursement thereof. This also applies to the State Armory Board but would not apply to a legislative appropriation to the State Armory Board. In this latter case, expenses should be paid by state warrant, issued by the Auditor of State upon a duly itemized and approved voucher.

(5) As I understand the facts, at least a part of the "armory fund" in the custody of the local armory board, is the result of profits derived from the operation of canteens, post exchanges and like enterprises. Therefore, they are at least to that extent company funds, which, under the general orders issued by direction of the Governor, are in the custody of the local armory board and at least to that extent may be used as company funds are used under military usage and practice pursuant to such general orders. I have already pointed out that it has previously been ruled by a prior Attorney General that even appropriated military funds may be expended for a motion picture to be used for the advertisement of and promotion of the military service.

It is my opinion that such nonappropriated funds as the "armory fund" may be used for advertisements as authorized by the Governor or by those to whom that authority has been designated so long as the action is not arbitrary or capricious. As to an expenditure for flowers for a funeral, I think that would depend upon whether it was a military funeral or of a member of the military service and upon military custom and practice. While it is common knowledge that the purchase and use of a flag at a military funeral is customary and proper military practice, I am not advised as to the use of flowers.

(6) The cost of equipment, additions to and alterations of armories could not be paid from appropriated funds unless within the provision of the appropriation, but I see no objection to the use of the armory fund not resulting from legislative appropriation for that purpose.

(7) It is my opinion that any expenditure made by a local armory board under and pursuant to the General Orders above referred to is an expenditure authorized by the state armory board and it would not be necessary for the state armory board to authorize each item of expense prior to the expenditure thereof.
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