The provisions of this act, of course, should not be employed except in cases of emergency, and the assistant employed should be paid out of moneys appropriated by the common council of the city and from funds of the city and not funds of the utility.

From all the foregoing, I am led to the conclusion that in a city of the fifth class, such as Lebanon, a utility service board has no power to employ and fix the salary of a special legal counsel to represent and advise the utility service board, as is provided for in Section VI of the ordinance which is attached to your letter. I am, however, of the opinion that if, due to an emergency, the duties of the city attorney become so numerous that it is impossible for him to adequately perform them, an assistant may be employed in the manner herein provided and that the employment of the assistant city attorney in no way would affect the duties of the city attorney or the compensation of the city attorney in regard to any other duties he is required to perform by law.

GENERAL ASSEMBLY: Whether General Assembly may legally provide an additional maintenance per diem.

January 13, 1943.

Honorable Hobart Creighton,
Speaker House of Representatives,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter requesting an official opinion as to the constitutionality of a proposed bill, the provisions of which would allow members of the General Assembly a certain amount per diem for maintenance while on duty as members of the General Assembly. Apparently, however, the question is as to whether an additional allowance may be made so as to be effective in the case of the present members.

It is sometimes difficult to pass upon the constitutionality of a bill pending before the Legislature in the absence of the exact terms and provisions of such bill. I shall, however, endeavor to state the general principles which apply and so far as possible in the absence of the exact terms of such bill apply those principles to your question.
Section 29 of Article 4 of the Constitution of Indiana provides as follows:

"The members of the General Assembly shall receive for their services, a compensation to be fixed by law; but no increase of compensation shall take effect during the session at which such increase may be made. * * *"

The section of the statutes which at this time fixes the compensation of members of the General Assembly is Section 34-201 of Burns' Indiana Statutes Annotated (1933), which provides as follows:

"From and after the first day of January, 1929, the pay of the members of the general assembly shall be ten dollars ($10.00) per day while in actual attendance, or absent by leave, or on business of the general assembly, or unable to attend from sickness, and five dollars ($5.00) for every twenty-five (25) miles they may travel from their usual places of residence to the seat of government and back * * *."

It will be noted that the term "compensation" is not used in the above quoted section of the statute; nor does the language "for their services" appear in said section. It is clear, however, I think, that the first item of $10.00 per day referred to in Section 34-201, supra, is "compensation" and that the same is for the "services" of the members of the General Assembly. It would seem, therefore, that such $10.00 per day paid for the services of the members of the General Assembly by the express terms of the constitutional provision cannot be increased so as to take effect during the session at which such increase is made. However, as to the additional $5.00 provided for every twenty-five miles the members may travel from their usual places of residence to the seat of government and back, the question as to whether the same may be increased so as to make the increase effective as to the present members of the General Assembly is not quite so clear. It will be observed that with respect to this additional $5.00 it is not described as expense reimbursement. I think it is evident, however, that it is, in fact, an item of expense reimbursement. If there were need of any more evidence, I think the fact that it varies in proportion to the number of miles traveled shows clearly that
it is in the nature of an expense reimbursement, as distinguished from compensation for service, since otherwise we would have the situation of different members of the General Assembly receiving different compensation for their services. I think, therefore, that this item must be considered as an expense reimbursement based solely upon the question of mileage, and in my opinion it is not in the nature of compensation for services which cannot be increased so as to affect the salaries of the present members as provided in the constitution.

I find that this question has been considered by the courts of the United States upon several occasions, although I have been unable to find an Indiana case upon the subject. As a basis for my opinion as above expressed, I desire first to call your attention to the case of Taxpayers' League of Carbon County, Wyo., v. McPherson et al., reported in 54 P. (2d) at page 897. In that case two questions were considered. The first of these questions was:

"Is compensation for the use of automobiles or other conveyances by county officers as provided by the legislative acts of 1931 and 1933, above referred to, an emolument which cannot be increased or diminished after the election or appointment of such officer as provided by Section 32, article 3 of the Constitution?"

The second question was:

"Is the constitutional prohibition against a change in salary or emolument after election or appointment as provided by section 32, article 3, to be construed as a limitation upon legislative authority to provide for mileage expenses of public officers after the election or appointment of such officer?"

Section 32 of article 3 of the Wyoming Constitution provided that:

"No law shall extend the term of any public officer or increase or diminish his salary or emolument after his election or appointment."

The court in the above case answered both questions in the negative. In arriving at that conclusion numerous authorities were reviewed by the court which, however, I do not deem
necessary that I review in this opinion other than to state the conclusion reached which is found on page 905 of the report, and which reads as follows:

"We think it plain, from the authorities cited above, that generally speaking, statutory compensation for expenses necessarily incurred in performing the duties of an office is neither salary nor an emolument of the office within the meaning of section 32 of article 3 of our State Constitution. Such compensation is merely to assure the officer that for the performance of his official duties alone, and not for the performance of such duties and the payment of expenses incident there-to, he will receive the salary provided by law therefor. Consequently the amount allowed by law for such expenses may be changed during the officer's term, without doing violence to the aforesaid constitutional provision."

This case was annotated in 106 A.L.R. beginning on page 779, wherein numerous authorities are considered, and I think such consideration reveals the fact that the weight of authority supports the decision in the case already referred to above.

See the case of State v. Yelle, Supreme Court of Washington, 110 P. (2d) 162-171.

See, also, Bowman v. County Commissioners of Harford County, Court of Appeals of Maryland, 171 Atl. at page 48.

See, also, Clark v. Board of County Commissioners of Clark County, Supreme Court of South Dakota, 267 N. W. 138. Note the language of the court quoting from page 140:

"We are of the opinion that this mileage allowance is just what it was stated to be in the statute where it originated, to-wit, an allowance 'in lieu of all actual and necessary expenses.' It was not intended for the personal benefit of the officer or as remuneration for services or time, but was adopted by the Legislature as a method of computing the amount that should be paid to him to cover his actual and necessary expenditures upon official business instead of requiring the keeping of a precise record of all expenditures in detail, including the difficult problem of some sort of proper reim-
bursement for depreciation and wear upon the automobile used. We do not believe that this is 'compensation' within the meaning of the constitutional provision. We regard that point as settled in the law of this state by the decision in State ex rel. Payne v. Reeves (1921) 44 S. D. 568, 184 N. W. 993."

Upon the authority of the above cases, if supported by the facts, I think a reasonable reimbursement item for necessary maintenance of the members of the General Assembly while on duty could be made effectual and available for the present membership.

INDIANA SOLDIERS' AND SAILORS' CHILDREN'S HOME: Residence requirements for admission to Home.

January 13, 1943.

Indiana Soldiers' and Sailors' Children's Home, Knightstown, Indiana.

Attention: Mrs. Monterey Kinerk, Social Service Department.

Dear Mrs. Kinerk:

I have your letter of January 8, 1943, asking for an official opinion relative to the residence requirements for admission to the Indiana Soldiers' and Sailors' Children's Home. Which letter follows:

"Recently we have had an inquiry requesting admission of Josephine Riley, age eight years, to this Institution. This child is the daughter of Homer Riley, a disabled war veteran, who has residence at Decatur, Illinois, and is a patient at the United States Veterans Hospital at Outwood, Kentucky, where he has been for approximately five years. The mother died in Illinois two years ago.

"The child and her younger sister have been cared for in the home of a paternal uncle, who resides in Marion County, Indiana. The children have been with this uncle and his family for nearly two years. They receive an allotment from the father's veterans compensation."