PUBLIC INSTRUCTION: Whether an attendance officer working in a city school system and paid out of civil county funds is eligible to draw his earned annuity payments from the State Teachers Retirement Fund at the same time that he is serving as such attendance officer.

STATE TEACHERS RETIREMENT FUND: Whether an attendance officer working in a city school system and paid out of civil county funds is eligible to draw his earned annuity payments from the State Teachers Retirement Fund at the same time that he is serving as such attendance officer.

November 16, 1942.

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

Dear Mr. Malan:

I have before me your request for an official opinion in answer to the following question:

"Is an attendance officer working in a city school system and paid out of civil county funds eligible to draw his earned annuity payments from the State Teachers Retirement Fund at the same time that he is serving as such attendance officer?"

In considering the above question I desire to call your attention to three provisions of the Teachers' Retirement Fund Act as embodied in Section 28-4511 of the June, 1942, Cumulative Pocket Supplement of Burns' Indiana Statutes Annotated (1933). The first of these provisions deals with the subject as to who are members and beneficiaries of the fund, the same providing as follows:

"The members and beneficiaries of this fund" (referring to the Teachers' Retirement Fund) "shall include * * * any persons employed by a public school corporation who were qualified under this Act previous to their election or appointment;" * * * (Our italics.)
I desire also to call your attention to subdivisions (i) and (j) of the same section which provide the conditions which will entitle a beneficiary of the fund to an annuity. The first of these subdivisions, subdivision (i) is as follows:

"Any person coming under the provisions of this act who shall have rendered thirty-five (35) years or more teaching service in the public schools of the state and who ceases to be in the employ of the public schools of the state, for any cause, shall be entitled to an annuity of nine hundred and sixty dollars ($960), payable in four (4) instalments on the tenth day of January, April, July and October and terminating with the last payment made prior to the death of the annuitant." (Our italics.)

Subdivision (j) of the same section is as follows:

"Any person who shall have taught twenty (20) years or more in the public schools and who ceases to be in the employ of the public schools of the state for any cause, may in lieu of any other benefit be entitled to an annuity payable as above (referring, of course, to subdivision (i) supra) "of such an amount as the then present value of the annuity which would otherwise have ultimately been available, computed on the actuarial basis provided for, will purchase at such teacher's age of retirement, based upon actuarial tables made a part of this law or as so later adopted by the board of trustees." (Our italics.)

So far as I am advised the above subsections of Section 28-4511 supra, are the only ones which bear directly upon the question as to when the payment of an annuity may begin. It will be noted that in both cases the beginning of the payment of the annuity is conditioned by the language—"who ceases to be in the employ of the public schools of the state for any cause."

The above condition apparently is intended to tie in with the earlier language to the effect that "the members and beneficiaries of this fund shall include * * * any persons employed by a public school corporation who were qualified under this act previous to their election or appointment" to
give effect to the intent that no annuity should be paid so long as the person is a member of the fund by virtue of the above provision. It will be noted that subdivision (i) and subdivision (j) both use the identical language and apparently cover only the case of an employment. The same is true with respect to the first provision heretofore quoted in this opinion except for the use of the language—"previous to their election or appointment"—such latter terms referring ordinarily to official positions rather than employment. I think, therefore, that the language in subdivisions (i) and (j)—"who cease to be in the employ of the public schools of the state" probably ought not to be given the restricted meaning involved in the use of the word "employ" but rather should be held to extend to official positions as well as strict employment.

With this in mind I desire now to pass to the question as to whether an attendance officer working in a city school system and paid out of civil county funds—as to whether such attendance officer is in the employ of the public schools of the state within the meaning of subdivisions (i) and (j) supra. On that subject I desire to call attention to previous provisions in the Compulsory Education Law. It will be noted first that with respect to a city school having 2,000 or more children of school age, the superintendent of schools shall nominate and the board of school trustees of such city shall appoint one attendance officer for every 10,000 school children of school age enumerated in such city. (Sec. 28-501, Burns' Indiana Statutes Annotated (1933)).

Section 28-502 of Burns' Indiana Statutes Annotated (1933), provides that appointive attendance officers shall take office on the first of August and shall serve for one year and until their successors have been elected and qualified unless said officers are removed from office by the state board of attendance. The same section provides, among other things, as follows:

"* * * Appointive attendance officers, unless otherwise provided in this act, shall have their salaries fixed by the appointing board and shall receive from the county treasurer not less than three dollars ($3.00) nor more than five dollars ($5.00) per day for each day of actual service and shall further receive actual
expenses necessary to the proper performance of their
duties, said salaries and expenses to be paid by the
county treasurer upon a warrant signed by the county
auditor, and the county council shall appropriate, and
the board of county commissioners shall allow the
funds necessary to make such payments. * * *"

It thus appears that such attendance officer is nominated
by the superintendent of schools and appointed by the board
of school trustees who fix the salaries of such officers within
the terms as set out in the act. The salary of such officers,
however, is paid by the county so far as necessary for this
consideration. The question is as to whether the fact that
the compensation is provided by the county makes of such
attendance officer an employee or officer of the county. I do
not think it does.

Further reference to the statute and especially Section
28-502 supra, reveals the fact that such officer is to serve
"subject to the rules, direction and control of the superin-
tendent of schools of the attendance district of said attend-
ance officer." Ordinarily the right to control is the deciding
factor in determining whose employee any particular indi-
vidual is. Clearly the attendance officer is under the control
of the schools and undoubtedly his service is a service to the
schools of his particular district. I am of the opinion, there-
fore, that an attendance officer working in a city school sys-
tem, even though paid out of civil county funds, is not—while
such relationship exists—eligible to draw his earned annuity
payments from the State Teachers' Retirement Fund.