1941 General Assembly shall be expended for such purposes by the person or persons heretofore or hereafter designated by the Governor.

AUDITOR OF STATE: Biennial Appropriation of 1941—Duties of auditor as to newly created boards and commissions.

July 16, 1941.

Honorable Richard T. James, Auditor of State, State House, Indianapolis, Indiana.

Dear Sir:

This will acknowledge your letter of July 5, 1941, asking for an official opinion with respect to the liability of the Auditor of State on his bond should he make payments from appropriations set up by the General Assembly, for the operation and expense of departments created by the Acts of 1941 General Assembly, during the period when certain boards or commissions were functioning under previous laws and before such boards and commissions had been duly appointed and qualified as provided by the several Acts which are outlined in your letter. It is further stated that you have found several conflicts existing between the boards and commissions and the express terms of the Appropriation Act, which, in some cases, might lead to the conclusion that, according to the records, some boards and commissions do not, in a strict sense of the word, exist.

For purposes of clarity, I will discuss the several boards and commissions outlined in your letter in several classifications. The following boards and commissions fall into my first classification:

Chapter 11, Acts 1941, page 16, creates the "Indiana Tax Board" which board shall consist of three (3) members, who are required to file a bond in the penal sum of $10,000.

Chapter 12, page 21, Section 2, creates a "State Highway Commission of Indiana" to take over the duties of the "State Highway Commission," the chairman of said board must give bond in the sum of $25,000.00.
Chapter 35, Acts 1941, page 107, creates, by amendment to the old “Department of Financial Institutions Act,” a new commission to be known as “The Commission for Financial Institutions,” consisting of six (6) members in place of five (5) members, as heretofore required.

Chapter 39, Acts of 1941, page 121, amends the Acts of 1933 for the appointment of a “State Purchasing Agent” and provides for the filing of a bond by the purchasing agent appointed by this Act.

Chapter 56, page 152, provides for the appointment of a new “Conservation Commission” consisting of four (4) members.

Chapter 101 of the Acts of 1941, page 255, creates a “Public Service Commission of Indiana” and abolishes the “Public Service Commission” provided in Chapter 93, Acts 1933, and provides for the filing of bond in the penal sum of $10,000.

Chapter 125, Acts 1941, page 361, creates a “State Board of Certified Accountants” by an amendment to Section 1 of the Acts of 1921.

Chapter 134, Acts 1941, page 377, creates a “State Police Department” and provides for a “State Police Board” and repeals the section which provides for the “Indiana State Police.”

Chapter 198, Acts 1941, page 598, creates a “Milk Control Board” and amends several sections of the previous “Milk Control Board.”

With respect to the boards or commissions set out above, it is only necessary for me to say that the Governor has already appointed the members of the several boards or commissions and that commissions for such appointments have been issued and that in cases where the statute demands it, certain of said appointees have properly qualified and given bond. Accordingly, your question is now moot with respect to these boards and commissions and the appointees thereunder.

Chapter 179, Acts 1941, page 536, provides for the appointment of a “State Board of Public Welfare” by amendment to Section 3 of the Public Welfare Law of 1936. (Chapter 3, Acts
The 1941 amendment attempted to change the setup of the State Board of Public Welfare and particularly the method by which members thereof should be appointed; however, by official opinion addressed to Mr. T. A. Gottschalk, of the State Department of Public Welfare, dated June 27, 1941, I held that the whole amendatory section must fall by virtue of the decision of the Supreme Court in Tucker et al. v. State et al., Cause No. 27547 (rehearing denied July 11, 1941). It follows from this official opinion that the State Board of Public Welfare, as established in 1936, remained as an agency of the State Government without change and that the members thereof continued to serve under their original appointments without the necessity of reappointment or re-commissioning.

Chapter 38, Acts 1941, page 115, provides for the appointment of Boards of Trustees of State Benevolent, Reformatory, Correctional, and Penal Institutions. Section 2 of Chapter 38 provides that the tenure of all present trustees of said institutions shall terminate upon the appointment of trustees as provided in the Act, which appointments "shall at all events be made not later than June 30, 1941." I have already advised the Governor unofficially that the above quoted phrase is directory only and that while it is the duty of the Governor to appoint, he cannot be mandated to proceed at any particular time. Parenthetically, I may observe, however, that the Governor has indicated that he will make such institutional appointments in the near future. Until such appointments are made, the present trustees of the several state institutions will, at least, be de facto officers and will act until their successors are appointed and qualified. Since there are no other persons assuming to act as trustees of said institutions except those presently acting, and since they enjoy de facto authority, I do not believe that the Auditor of State would be liable on his bond in making current payments out of appropriations to said boards of trustees.

Chapter 182, Acts 1941, page 552, provides for the appointment of a State Board of Education. This chapter amends the 1913 law on the same subject and changes the number of members on the board, as well as the method of appointment. Under the decision of the Supreme Court of Indiana in Tucker et al. v. State et al., supra, the appointive power will now repose in the Governor alone. Again, I am advised that Governor Schricker is now proceeding to make appointments to this Board under the provisions of the 1941 Act. I know of no payments that
would have to be made to this Board in the near future but should that circumstance arise, it is my opinion that payments may be made to the old Board on the theory that they remain de facto members of the State Board of Education.

I should say that in the case of both the State Board of Education and the Boards of Trustees of the several state institutions, it is highly probable that appointments by the Executive will be forthcoming in the immediate future so that your questions with reference to these appointments, like those referred to earlier in my letter, will become moot.

DEPARTMENT OF PUBLIC INSTRUCTION: Tenure Teachers—Method of cancellation of tenure contracts.

July 16, 1941.

Mr. Ellis H. Bell,
Ass’t Superintendent of Public Instruction,
Department of Education,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter of the 1st inst., in which you submit two cases involving the tenure status of two school teachers and the alleged loss thereof through certain stated developments. For purposes of certainty I have treated each of the cases submitted by you separately.

CASE 1

The pertinent facts in the first case detailed by your letter are as follows:

The teacher was on tenure, that is a permanent teacher at the start of the 1939-1940 school year;

After three weeks she was taken ill and a substitute appointed in her place;

Being unable to return to work she requested and was granted a leave of absence for the balance of that school year;