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.

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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;
In April, 1940, she notified the board she would be ready for work in September for the 1940-1941 school year and was granted a contract;

In August of the same year she verbally notified your office (this office as stated in your letter) that she would be unable to teach for a few weeks and a temporary substitute was appointed;

Thereafter for the year 1940-1941 there was no change, she was unable to teach, did not request and was not granted a leave of absence.

In addition to the foregoing, the school authorities, due to a decrease in the number of pupils in the elementary grades, decided to close a two-teacher school and reduce the number of teachers. Thereafter one married teacher resigned and the subject teacher was not re-employed. She has since notified us of her desire to teach in the fall.

Your question is, "Is she a tenure teacher?"

More accurately your question seems to me to be did she lose her teacher tenure status by reason of all or any of the facts above set forth?

Chapter 27 of the Acts of 1927, as amended by Chapter 116 of the Acts of 1933, which is Section 28-4307, Burns' Revised Statutes 1933, defines the tenure status of teachers in the common schools. It provides:

"Any person who has served or who shall serve under contract as a teacher in any school city corporation or in any school town corporation in the State of Indiana for five or more successive years, and who shall at any time hereafter enter into a teacher's contract for further service with such corporation, shall thereupon become a permanent teacher of such school corporation."

That the teacher in question had acquired the teacher tenure status above defined and had met the requirements of said act is conceded.

The effect of having acquired a teacher tenure status is also covered by said act (supra) in the following language:

"Upon the expiration of any contract between such school corporation and a permanent teacher such contract shall be deemed to continue in effect for an indefi-
nite period and shall be known as an indefinite contract. Such indefinite contract shall remain in force until such permanent teacher shall have reached the age of sixty-six years unless succeeded by a new contract signed by both parties or unless it shall be cancelled as provided in Section 2 of this act."

Section 2 of said act provides:

"An indefinite contract with a permanent teacher as defined in Section 1 of this act may be cancelled only in the following manner:

"Then follow the steps to be taken for cancellation which are mandatory including notice of the intention of the board to cancel to the teacher and the grounds thereof among which are ‘justifiable decrease in the number of teaching positions.’"

In the instant case no notice to cancel was given and there is, presumably, no record of any proceeding of the school officials whereby this teacher's contract was cancelled. So that under the law this teacher's contract, not having been cancelled as by law provided, must be regarded as an indefinite contract as defined in said act and still in force and effect.

The statements in your letter suggest that this teacher, by her failure to apply for and receive a leave of absence in the year 1940-1941 because of illness and inability to teach, thereby waived her rights as a tenure teacher. I do not believe that this follows. It is possible, of course, for a teacher with a tenure contract to be guilty of laches with respect to the rights thereby vested in him and thereby impliedly to relinquish his tenure status. But this would be a matter of defense in an action in equity by the teacher to enforce a tenure contract and I seriously question the authority of any school board or official to make such a finding.

But even if it could be made there is a real doubt as to its application to the instant case. Here the teacher was granted a contract for the 1940-1941 school year. She was ill and unable to teach. She verbally notified the board of this fact. A substitute was appointed for her. The substitute continued in her place throughout the year because of her inability to teach. True she did not ask for leave of absence but this would seem to be futile where the board knew and was acquainted with the
existing condition and had made provision for it by the appointment of a substitute teacher. It is generally conceded that where the fact or facts materially affecting the performance of a contract are equally within the knowledge of all parties to it, notice thereof from one to the other is unnecessary.

The situation presented here fails to disclose any circumstances warranting any positive action by the teacher to protect her tenure status. No notice was given her of any intention of the board to cancel her contract—no action was taken by the board to cancel it. She was not tendered a new contract and there was nothing to put her on notice that her tenure status as a teacher was in jeopardy. How, then, could it be maintained that she remained passive and failed to take action to protect her rights or assert them when the failure so to do might conceivably work injury to another? This would be laches but in my opinion no such circumstances existed in the case submitted by you.

So far as failure of the teacher to request a leave of absence is concerned that is optional under the statute. And optional, too, with the board if the teacher fails to make application for it. (See section 28-4311 Burns’ Revised Statutes 1933, which is Section 4, Chapter 116, Acts 1933.)

The above section of the statute imposes no obligation upon the teacher, to apply for, or the board of its own motion, to grant a leave of absence to the teacher.

It is my opinion, however, that the statute itself is decisive of the whole question. The indefinite or continuing contract of a teacher may only be lost through the positive action of the board.

As was said in Taylor v. School Town of Petersburg, 98 Ind. App. 409, and quoted with approval in Board of School Commissioners v. State ex rel. Wolfolk, 209 Ind. 498:

“If the statute prescribes a mode in which the power shall be exercised and the method prescribed is disregarded or not substantially followed and a contract entered into, such contract is void.”

While this case had to do with a contract which was not drawn and executed in conformity with an express statute, the principle therein enunciated is applicable to the instant case. And again in the Wolfolk case, supra, our Supreme Court said at page 594 of the opinion:
“It is held generally that where a statute prescribes a mode of exercising a power, that mode must be adopted for there is no inherent right of discretion in corporate bodies.”

A school city or town or Board of School Commissioners is a municipal corporation, a corporate body and it seems very pertinent to inquire into the right, power or authority of any of the same to assume or take the position that a tenure teacher has lost tenure status when the statute prescribing the action to be taken to cancel such contracts has not been complied with.

My answer to your first question “Is she a tenure teacher?” is accordingly in the affirmative.

Case 2

Your second question reads as follows:

“This teacher taught from 1914 to 1926 in the Garrett schools and was out because of illness until 1934. She did substitute work during 1934-1936 and in 1936 was employed as a regular teacher and given a contract. She has taught continuously since that time in Garrett and was given a contract for the year 1941-1942. Was she a tenure teacher prior to the 1941-42 contract?”

The situation presented by the facts above cited is not greatly dissimilar in principle to that presented by your first question. This teacher taught continuously from 1914 to 1926. While the facts detailed do not disclose that she taught “under contract” it is presumed that this was the fact. The Act of 1899 requiring the appointment and employment of teachers by school corporations to be evidenced by written contracts covering certain essentials, was and still is in force and effect. In the absence of a statement to the contrary it is presumed for the purposes of this opinion that such contract had in fact been executed as required by statute.

Also the Act of 1933, Chapter 116, cited above, provides:

“That any person who has served or who shall serve under contract as a teacher in any school city corporation or in any school town corporation in the State of Indiana for five or more successive years and who shall at any time hereafter enter into a teacher’s con-
tract for further service for such corporation, shall thereupon become a permanent teacher of such school corporation."

It is to be noted that the Act covers teaching service before as well as after its effective date. As to the former it is construed simply as declaratory of a past fact found to exist by the General Assembly. As to the latter it-prescribes a rule for future operation.

To such effect is the Board of School Commissioners v. State ex rel. Wolfolk, 209 Indiana 498.

Consequently the continuous service of this teacher under contract for the years 1914 to 1926 plus her employment as a regular teacher under contract in 1936 apparently meets all the requirements of the statute for the acquisition of the status of a permanent teacher.

The question arises, however, as to the necessity of immediate re-employment of the teacher under contract following the five successive years of employment as a teacher under contract. This question was decided in Miller v. Barton School Township of Gibson County, 215 Indiana 510. In this connection the court made the following distinction at page 513 of the opinion, to-wit:

"In the construction of statutes of this character where the meaning is in doubt, so that either of two constructions may, with propriety, be adopted by the court, it is the duty of the court to adopt that construction best calculated to protect the public right as against the individual right, even though in individual instances such construction may work slight hardship." This rule of construction is stated in Board of Commissioners of Vigo County v. Davis et al., 136 Ind. 503, as follows:

"Rules of construction applicable to legislation, in which the public at large are interested, require liberality, while, with reference to legislation granting powers or privileges to individuals, for their own advantage, require strict construction as against such individuals."

The court held in view of the foregoing construction that that construction must be given to the statute which is most
favorable to the general public and that accordingly it did not seem reasonable to permit a teacher to wait for a period of four years or any other number of years to enter into a further contract with a school corporation after having completed the first "five or more successive years."

It is to be noted that the court says that it does not seem reasonable to permit a teacher to wait.

However, where circumstances beyond the teacher's control may have intervened, the teacher's rights to acquire tenure by a contract for further service should not thus be put in jeopardy.

It is also to be noted that this decision was controlled by the Act of 1927, the first teacher tenure act.

The language of that act was:

"That any person who has served or who shall serve under contract as a teacher in any school corporation in the State of Indiana for five or more successive years, and who shall hereafter enter into a teacher's contract for further service with such corporation, shall thereupon become a permanent teacher of such school corporation. * * *"

The Act of 1933 amended this section of the Act of 1927 reading the same except that the language "and who shall hereafter enter into a teacher's contract for further service," was changed to read "and who shall at any time hereafter enter into a teacher's contract for further service with such corporation * * *"

As the Act of 1933, amended the Act of 1927, is the Act under which the question presented you must be decided it can hardly be said that Miller v. Barton School Township, above cited, is controlling in this instance.

Indeed there is a significance to the change of language used in the 1933 Act by the addition of the words "at any time." This would seem to make the time within which a contract for future service after the five-year successive period of teaching is granted not limited to any particular time, except, however, that such contract should be executed and granted within a reasonable time thereafter, all circumstances considered.

On the whole, it seems to me in view of the amendment made by the Act of 1933 and the fact that the teacher was ill
and unable to teach for a number of years and was thereafter given a contract for further service brings her within the meaning and purview of the statute so as to acquire a tenure status.

STATE BOARD OF ACCOUNTS: Filled-in land in Lake Michigan—whether sale price should be covered into General Fund.

LAKE MICHIGAN: Whether sale of filled-in land should be covered into General Fund.

July 18, 1941.

Mr. Otto K. Jensen,
State Examiner,
State Board of Accounts,
Indianapolis, Indiana.

Dear Mr. Jensen:

I have before me your letter in which you state, in part, as follows:

"Field Examiners from our department making an examination of the office of the Auditor of State have brought to our attention the receipt of $10,442.75 on October 16, 1939, from the Carnegie-Illinois Steel Corporation for the privilege of filling in 417.71 acres of ground then under the waters of Lake Michigan, in accordance with Chapter 91, Acts of 1907.

"This money was receipted into the State General Fund in accordance with a ruling given by your office to Virgil Simmons, Administrative Officer of the Department of Conservation, on October 4, 1939. The ruling held that the money should not be receipted into the Conservation Rotary Fund, but should be credited to the General Fund."

You further state that prior to the ruling above referred to it had been the practice to credit similar items such as receipts for sale of saline and swamp lands, etc., to a special fund known as "Reclamation of State Lands" and periodically to transfer any money in the fund to the principal of the Common School Fund. This was done under the authority of Section 2 of Article 8 of the Constitution, and especially the following paragraph thereof: