

STATE BOARD OF ACCOUNTS: Teachers' Retirement Fund, relative amounts to be furnished by teachers and by State.

Teachers' Retirement Fund: Whether State guarantees 4% earnings on funds supplied by teachers.

Teachers' Retirement Fund: Funds to be segregated.

Teachers' Retirement Fund: Method of handling annuities.

November 12, 1940.

Hon. E. P. Brennan,
State Examiner,
State House,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter requesting an official opinion concerning certain provisions of the Teachers' Retirement Fund Act.

You refer first to Section 9 of Chapter 182 of the Acts of 1915 as subsequently amended by Section 4 of Chapter 256 of the Acts of 1921, and as thereafter amended in 1937 by Section 2 of Chapter 189 of the Acts of 1937. This Section is Section 28-4506 of the June, 1940 Cumulative Pocket Supplement of Burns' Indiana Statute Annotated, 1933. The particular language referred to and concerning which your first two questions are asked, is found in subdivision (b) of the section, which reads as follows:

"The board shall provide for an actuarial investigation during the year 1937 and every four (4) years thereafter and make such adjustments in the assessments or payments to be made by teachers as may be necessary to provide not less than three-sevenths (3/7) of an annuity of nine hundred and sixty dollars (\$960) per year to teachers who have served thirty-five (35) years, and based on the teacher's age at nearest birthday at the time of beginning service, and withdrawals, and death benefits prior to the maturity of the annuity as fixed by this Act have been allowed for, in making the rates." (Our italics.)

Directing attention to the above provisions you submit the following questions:

“Question: (A) Should the State of Indiana contribute the remaining four-sevenths ($4/7$) ?

“Question: (B) In view of the fact that the Retirement Fund Act provides for the segregation of the funds into two divisions, the Annuity Savings Account for Teachers’ Contributions and the Pension Reserve for the State’s Contribution, should the annuities paid on retirement be divided as between the two accounts three-sevenths ($3/7$) and four-sevenths ($4/7$) ?”

In the same section, Section 28-4506, *supra*, in subdivision (c) thereof is set out the assessments to be paid by teachers as their contributions to the Retirement Fund, and later on in the same section under subdivision (g) thereof it is provided as follows:

“In the year 1937 there shall be levied as other state taxes are levied, an Indiana State Teachers’ Retirement Fund levy, sufficient to provide the necessary funds to cover the actuarial liability incurred by the State for the operation of this Act as determined by the actuarial investigation above provided for.”

It is further provided in the said subsection as follows:

“On the basis of the actuarial investigation herein provided for, the trustees of the Indiana Teachers’ Retirement Fund shall submit its budget and estimated necessary tax levies to the Governor or to such other officer or committee as shall be by law authorized to recommend to the general assembly the necessary tax levies and the general assembly shall make or cause to be made the necessary tax levies for the succeeding biennium which shall be sufficient to provide the necessary fund to cover the estimated liability of the State under this Act for the current year and the succeeding year.”

It will be noted from the last quoted language that recognition is given to the theory of a liability of the State to provide some portion of the fund, but the amount thereof is not definitely stated; and, I have not found any provision in the Act

as to what that liability is with respect to the entire annuity payable to any particular teacher other than as may be derived from a mathematical computation based upon the language first above quoted that "during the year 1937, and every four (4) years thereafter" the board shall provide an actuarial investigation and thereafter "make such adjustments in the assessments or payments to be made by teachers as may be necessary to provide not less than three-sevenths ($3/7$) of an annuity of nine hundred and sixty dollars (\$960)."

The fact that the language used is "not less than three-sevenths of an annuity of nine hundred and sixty dollars (\$960) per year" gives rise very definitely to your first question. Obviously, if the language used is to be taken in its exact literal sense a very wide discretion is given to the Board, since anything above three-sevenths ($3/7$)—even as high as seven-sevenths ($7/7$) would be "not less than three-sevenths ($3/7$)."

But, clearly, the Legislature had no intention of giving to the board such a wide discretion; and, while the language used is somewhat unfortunate, I am of the opinion that the table of assessments appearing in subdivision (c) of the above section which must be contributed is the primary will of the Legislature, to be altered in case only they are not sufficient to provide three-sevenths ($3/7$) of an annuity of nine hundred and sixty dollars (\$960). I do not think, however, that it was the intention of the Legislature to delegate to the board any additional power in that regard. In other words, the board was not left free to determine the relative division of the liability of the teacher and of the State in providing the fund. I think such a decision would probably be invalid as an illegal delegation of legislative power, but whether it is or not, it seems to me that the true intent of the Legislature was to make the teacher liable for the assessments which were fixed by the Legislature, and if those proved to be too small they could be adjusted up to three-sevenths ($3/7$) of the amount necessary to provide the nine hundred and sixty dollars (\$960). If this is correct, then the State's liability would be relatively four-sevenths ($4/7$) of the amount. The answer to your first question in this group is in the affirmative.

As to the second question, the statute, Section 28-4510 of Burns' Indiana Statutes Annotated, 1933, definitely provides for an Annuity Savings Account into which the teachers'

contributions are to be paid and a Pension Reserve Account into which the State's contributions are to be paid. It is also provided that, with certain exceptions not important here, "the sum of the Annuity Savings Account added to the Pension Reserve Account, to be supplied by the State, shall contain an amount equal to, or greater than, the aggregate of the actuarial liabilities incurred by the years of service of all contributors or beneficiaries of the Fund."

It seems to me that in view of the foregoing the relative proportions of three-sevenths and four-sevenths could not be maintained except through the division of the annuity paid on retirement between the two accounts upon that basis. If two accounts are to be kept, one for teachers' contributions and the other for the State's contributions, as the statute plainly provides, then it seems to me that three-sevenths ($3/7$) of every annuity should be paid out of the Annuity Savings Account and four-sevenths ($4/7$) paid out of the Pension Reserve Account. Your second and last question in the first group of questions is answered accordingly.

Your next group of questions, two in number, grow out of the provisions of subsection (h) of Section 28-4511 of the June, 1940 Cumulative Pocket Supplement of Burns' Indiana Statutes Annotated, 1933, which provides as follows:

"Teachers coming under the provisions of this act except those teachers provided for in paragraph (3) of subdivision (a) of this section shall be required to pay as arrearages an amount equal to the amount which would have accumulated from their contributions with four (4) per cent compound interest had they been members under this act for the number of years which they claim for prior service, provided that a teacher may waive his or her right to former service and pay only current rates from the time when the membership begins and receive no credit for prior service. These arrearages may be paid in cash the first year or in a series of instalments according to the rules and regulations of the board of trustees of the Indiana state teachers' retirement fund or may be left as a lien against the annuity; Provided, however, That deferred payment or adjusted accounts must bear interest at four (4) per cent per annum which shall be com-

pounded if not paid. *In case of retirement before all arrearages are paid, the annuity otherwise available will be reduced in the proportion which the amount unpaid bears to the then present value of such annuity.*" (Our italics.)

The questions submitted are as follows:

"Question: (A) Should the State bear its full liability regardless of the unpaid arrearages left by the teacher, or should the State's liability be reduced in the same proportion as the teachers' required contributions have been reduced by the failure to pay the arrearages?

"Question: (B) If the state in such case bears the full liability, does not this conflict with Section 2, as hereinbefore set out?"

The italicized portions of subdivision (h) *supra*, it seems to me hold the answer to the questions submitted, and I will, therefore, address myself at once to what I consider a fair construction of that language. Note the language—"in case of retirement before all arrearages are paid the annuity otherwise available will be reduced in the proportion which the amount unpaid bears to the then present value of *such* annuity." (Our italics.)

What is "the annuity otherwise available?" Clearly, it is the annuity which would be available if all arrearages were paid. Therefore, the annuity to be proportionately reduced is the entire annuity just as if everything had been regular throughout and all arrearages had been paid.

Note next the language "the then present value of such annuity." What annuity is meant here? The word "such" clearly refers back to the annuity which would otherwise be available if all arrearages had been paid. In obtaining a present value, therefore, for *such* annuity not only the full contributions of the teacher but also the full liability of the State must be taken into consideration because it is the present value of the full annuity with which we are dealing.

It will be noted that the statute provides that the annual amounts payable are to be reduced "in the proportion which the amount unpaid bears to the then present value of such

annuity;" that is, the entire annuity. In that sense the State bears its full liability, that is, in the sense that the proportion stated takes into consideration the present worth of the entire annuity otherwise payable. Your first question is answered accordingly.

It should be noted that subsection (h) of Section 28-4511, *supra*, expressly excepts from its provisions the class of teachers described in subdivision (3) of subsection (a). Teachers in that class are required to pay all arrearages for prior service claimed before being entitled to retire on an annuity.

As to your second question, in this group, I do not see that this interpretation conflicts with Section 2, *supra*, earlier referred to in your letter, and discussed in this letter.

Your third group of questions is as follows:

"Question: (A) Does the law make any guarantee of earnings of 4% to the teachers?"

"Question: (B) If it does guarantee an earning of 4%, does this guarantee cover the amounts to the credit of the individual teacher or does it cover the entire balance of the Annuity Savings Account which includes forfeited contributions and earnings of teachers who have withdrawn as well as teachers who are now members of the Fund?"

Prior to the statement of the questions you refer to certain provisions of the Retirement Fund Act which, it is perhaps thought, have some relation to the questions submitted. For example, you refer to Section 7 of the 1921 Act (Acts of 1921, p. 751), providing as to what shall enter into and make up the Annuity Savings Account, including among other things, the earning on contributions from teachers and interest on investments of the permanent account, pointing out, however, that no reference is made to any particular rate of interest. You also refer to the provision of subdivision (e), Section 22-4511 of the June, 1940, Cumulative Pocket Supplement of Burns' Indiana Statutes Annotated, 1933, which provides that in the event of the death of a teacher who was a member of the fund before the teacher had retired on an annuity, the estate of such teacher shall be entitled to a sum chargeable to the Annuity Savings Account equal to the contributions of

the teacher with interest thereon compounded annually at 4% if the application therefor is made within three years after the death of such teacher. You point out also the provision in subsection (h) of Section 28-4511, *supra*, providing that teachers who claim prior service should pay arrearages, but providing that the arrearages to be paid shall be "an amount equal to the amount which would have accumulated from their contributions with four per cent (4%) compound interest" if such teacher had been a member of the fund for the years for which prior service was claimed. The above subsection has already been referred to in this opinion.

It seems to me, however, that these provisions cannot be considered as fixing a liability upon the State to make up the deficit where the State has not been able to invest the fund so as to make a net yield of 4%. The language certainly does not say as much, in addition to which I think it is significant that in the Section of the Act having to do with investments, there is no requirement that the funds be invested so as to make a net yield of 4%. (See Section 28-4508, Burns' Indiana Statutes Annotated, 1933.) Indeed the above section, in listing the types of securities in which the fund may be invested, nowhere makes any reference to the interest which must be realized. All that is necessary to comply with the section in the investment of funds is that such investments be of a type listed therein and that they be interest-bearing. In my opinion, your first question in this group should be answered in the negative.

The first question in this group being answered in the negative, the second question requires no answer.

I realize that the fixing of a rate based upon an earning of 4% would result in a deficit if the actual earning was less than 4%, but the Act provides for an actuarial investigation every four years and, it seems to me, that any deficit arising in the fund must be taken care of by increasing the rate of assessments in the case of the teacher and of taxation in the case of the State to the extent necessary to produce not less than three-sevenths ($3/7$) in the case of the teacher and four-sevenths ($4/7$) in the case of the States of the entire liability.

You finally submit the following question:

"Question: (A) A teacher coming under this provision enters the fund and pays his assessments for prior

service including interest at 4% but later applies to withdraw his contribution. On what shall his withdrawal rights be based, the amount he would have been assessed during those prior years had he been a member, or the amount he paid which included compound interest on the deferred payments?"

Upon the basis of other parts of your letter the word "assessments" in the second line of the question evidently refers to "arrearage." This question is to be determined upon the basis of a proper construction of Section 28-4506 of the June, 1940, Cumulative Pocket Supplement of Burns' Indiana Statutes Annotated, 1933, and especially subdivision (e) thereof which reads as follows:

"Withdrawals. In the event that any teacher, a member of the fund, leaves the service of the public schools for any reason, such teacher shall be entitled to withdraw the following portions of her *contributions*:

After one year	25%
After two years	35%
After three years	45%
After four years	55%
After five years	65%
After six years	75%
After seven years	85%
After eight years	90%
After nine years	95%
After ten years	100%."

(Our italics.)

This Department has already held in an opinion to the State Board of Accounts dated July 28, 1937, that the percentages referred to above are without interest, and the percentages referred to above as applied to the actual contributions must constitute the total amount of the withdrawal which would be allowed. Your question, however, raises the question as to what the "contribution" is where the same was paid as an arrearage, which was arrived at by adding interest as set out earlier in this opinion. It seems to me that the contribution upon which the percentages above referred to

are to be calculated, is the amount of the actual payment by the teacher, even though included therein is an item of interest. It is true that the fund does not get the benefit of the interest item included in the payment as it does where the payments have been made in the regular way beginning with the time when the teacher actually began teaching. Neither does the fund incur the liability unless membership in the fund is elected and the amount of the arrearages for prior service claimed have been ascertained. Of course, this total contribution cannot be withdrawn with interest accruing added, but the interest which enters into the process of determining the amount of arrearage in the first place, it seems to me, is a part of the contribution and should form the basis for the application of the percentage of withdrawals, as above authorized. It is my opinion, therefore, that in the case assumed in your last question the withdrawal rights should be based on the actual contribution.

MILITIA: Defense force to replace National Guard. Power of Governor to organize.

November 13, 1940.

Hon. M. Clifford Townsend,
Governor, State of Indiana,
State House,
Indianapolis, Indiana.

Dear Governor:

This will acknowledge receipt of your letter of recent date in which you request an official opinion on the following question:

“May the Governor legally create a defense force for the State of Indiana to replace the National Guard when it is called into federal service? May the Governor take such action by executive order?”

I direct your attention to Sections 1 and 5 of Article 12 of the Constitution of Indiana which sections recite as follows:

“Section 1. Organization. The militia shall consist of all able-bodied male persons, between the ages of eighteen and forty-five years, except such as may be