

subsection may be made. Perhaps it may be contended that it confers judicial power upon a non-judicial officer, the clerk of the court, but as already pointed out, that is not the effect of the provision.

It is true that the clerk is required to enter the amount certified by the board in the judgment docket as a judgment against the employer, but, after all, he is not required to exercise judicial power; all that he does is to record the amount certified; he has nothing to do with determining the legality of the certification by the board; what he does is purely ministerial and while referred to in the Act as entering the amount as a judgment, in compliance with well recognized rules of construction, which requires statutes to be construed so as to make them constitutional instead of unconstitutional, where that can be reasonably done, the word "judgment" will not be construed in its strict literal sense but in a more general sense, as the entering of the amount in the judgment docket as judgments are entered, the purpose of entering being to furnish a record which will supply notice of the lien which the statute seeks to give.

In my opinion, the proceedings as provided in said subsection (b) for the collection of the board's assessments are valid, notwithstanding the omission from the enrolled Act of the language appearing in brackets, *supra*.

ACCOUNTS, STATE BOARD OF: Teachers' Retirement Fund, right to pay interest on withdrawals; right to trade and exchange securities.

July 28, 1937.

Hon. W. P. Cosgrove,
State Examiner,
State Board of Accounts,
Indianapolis, Indiana.

Dear Sir:

This will acknowledge receipt of your letter of July 26 in which you submit the following questions:

"1. Is the board of trustees of the Indiana state teachers' retirement fund authorized to pay interest on the amount withdrawn by a teacher in addition to

the per cent of the contributions provided by section 9 of chapter 182 of the Acts of 1915 as amended?

“2. Is the board of trustees of the Indiana state teachers’ retirement fund authorized to sell securities purchased as an investment, or is such board authorized to trade or exchange any such securities, so purchased as an investment, for other securities?”

In reply to your first question your attention is directed to the provisions of the statute, the same being section 28-4506, which provides in part that:

“In the event that any teacher, a member of the fund, leaves the service of the public schools for any reason, that 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%

“If such teacher returns to the employ of a State school to which this Act applies, such teacher shall be required to pay into said fund, within one (1) year, the amount withdrawn therefrom and shall thereupon have credit for all the service comprehended in the amount so withdrawn and repaid.”

The only other provision with reference to withdrawals is in sub-paragraph 2 of the proviso of section 28-4511, which provides that:

“In case of withdrawal, the amount paid in under this Act before amendment shall be refunded, under the terms of the Act before amendment, but the amount paid in under the Act as amended shall be returned under terms of the Act as amended.”

The only provision of the statute with reference to the payment of interest is found in section 28-4511, wherein a provision is made that in the event of the death of any teacher before such teacher has retired on an annuity, the estate of the deceased 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 four per cent, if application therefor be made within three years after the death of such teacher.

I find no provision in the statute authorizing the payment of interest on amounts withdrawn. I am advised, however, that under date of April 1, 1932, the teachers' retirement fund board adopted the following resolution:

“Interest on withdrawals shall be paid at four per cent compounded annually to the date of the application for withdrawal provided that no interest shall be paid for a period longer than three years after the teacher ceases teaching.”

This rule was evidently adopted under the general authority conferred by section 28-4506, which provides that:

“The board of trustees of the Indiana state teachers' retirement fund shall have power to adopt and enforce all necessary by-laws and regulations for the government and administration of the department and the control and investment of the funds committed to its care, not inconsistent with the provisions of this Act.”

Whether or not the rule therefore adopted, by which interest is paid on withdrawals within the general power conferred, is the question presented. The general rule is that the State is not liable for interest unless it contracts to pay it.

Carr, Auditor, v. State—127 Ind. 205.

This principle of law has been followed by the Appellate Court in the more recent case of State v. Wright, 97 Ind. 660, in which it is stated:

“It is not the policy of the State to pay interest in the absence of a law, or a contract stipulating for its payment.”

While the board of trustees of the Indiana state teachers' retirement fund is, in some respects, dealing with trust funds yet they are also dealing with funds raised by general taxation and are chargeable generally with rules applicable to departments of state.

The Act creating the teachers' pension program was quite carefully and specifically drawn and in view of the fact that withdrawals were not permitted in full by teachers leaving the profession until after ten years of contribution, is persuasive that the percentage which is stipulated as amounts to be withdrawn was intended as full and final settlement with the parties seeking withdrawal. Nowhere in the Act is interest on accounts mentioned except in case of the death of a teacher before retiring on an annuity. Had the legislature intended to permit four per cent compound interest annually to be paid on all withdrawals they could have easily so stated. Having fixed the amount payable on withdrawals, it is my opinion that the board of trustees are without authority to increase that amount or permit withdrawals in greater sum.

Your attention is directed to the fact that the statute provides that having withdrawn such amounts, if the teachers so desire they may again be reinstated by paying in the amount so withdrawn. Here again no mention is made of interest and clearly it was not the intention of the legislature to permit a withdrawal with interest at any rate which the board might desire to fix and then obtain reinstatement by paying back into the fund the principal sum only of the amount withdrawn and thus be the recipient of four per cent compound interest on the amounts paid in.

It is my opinion, therefore, that your first question should be answered in the negative.

Your second question deals with the right of the board of trustees of the Indiana state teachers' retirement fund to sell securities purchased as an investment or trade or exchange such securities. Your attention is directed to section 28-4508 of the Act which provides that:

“The board of trustees of the Indiana state teachers' retirement fund shall determine what part of said fund may be safely invested and how much shall be retained for the immediate needs, demands and exigencies of said fund. Such investments shall be made in in-

terest-bearing securities of the United States; or of any state or territorial possession of the United States; or in any security lawfully issued by any state or county, township, city or other municipal corporation within the United States of America. The board of trustees shall have authority at all times to make any investigations in purchasing securities deemed necessary for the protection of the fund. All securities purchased shall be deposited with and remain in the custody of the board of trustees of the Indiana state teachers' retirement fund, who shall collect all interest due thereon and all the income therefrom, as the same shall become due and payable and deposit the same to the credit of the Indiana state teachers' retirement fund, as directed in this Act, and account for all interest and income as provided by law."

The same section above quoted continues to recite the manner of safe keeping of "such securities" so purchased. This is described in minute detail and provides that duplicate lists of such securities shall be obtained upon examination at stated intervals, "the original of which shall be deposited with the state teachers' retirement fund and the duplicate of which shall be kept in the state board of accounts."

It is interesting to note that nowhere in the Act does the word "sell" or "sale" appear with regard to the securities which constitute the investment of the teachers' retirement fund. The entire duty imposed upon the board seems to deal with the purchasing of such securities, together with the collection of all interest due thereon and all the income therefrom as the same shall become due and payable. The fact that an examination of these securities is required at least once a year and a list of the securities on hand deposited after each examination with the state board of accounts indicates that the investment of the fund was intended to have such a degree of permanency as would make an identification of such investments possible at all times. I can find nowhere in the statute any authority for the selling or trading of securities once purchased and identified as a part of the investment fund.

It is my opinion, therefore, that the board is charged only with the investment of the funds in interest-bearing securities of the type named in the Act and having made such pur-

chases they are charged with the duty to deposit and keep in their custody the securities so purchased, collecting only the interest and income therefrom as the same shall become due and payable.

When bonds mature they should be surrendered for payment, otherwise they become identified with the fund when purchased and should so remain.

Your second question, therefore, is answered in the negative.

ACCOUNTS, STATE BOARD OF: City sinking fund; interest on coupons.

July 28, 1937.

Hon. W. P. Cosgrove,
State Examiner,
State Board of Accounts,
Indianapolis, Indiana.

Dear Mr. Cosgrove:

This is in answer to your inquiry dated July 17th submitting the following question:

“Can interest coupons on bonds issued by a civil city be paid from the sinking fund of such city?”

Chapter 129 of the Acts of 1905 made provision for a sinking fund for the gradual payment of the indebtedness of a city. The common council is empowered to levy a tax which is to be applied to extinguishing the “bonded indebtedness of the city.” Section 24 of the Act provides that no money whatever shall be withdrawn from the sinking fund for any purpose other than the redemption of the “bonded indebtedness” of the city. The sinking fund is to be kept in certain designated depositories, and is under the control of commissioners.

Section 71 of the Act provides for meetings of the commissioners and how they shall proceed with their duties, and reads in part as follows.

“All questions relating to the designation of a depository, the payment of bonds *or interest*, or involving the payment or appropriation of money shall be decided by a viva voce vote,” * * *. (Our italics.)

Acts of 1905, p. 263.