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OFFICIAL OPINION NO. 29

November 24, 1971

Hon. Robert D. Garton
State Senator
P. O. Box 1111
Columbus, Indiana

Dear Senator Garton:

This is in response to your request for my Official Opinion concerning the following question: "May a board of education authorize the designation of a single agency to handle all tax-sheltered annuities for employees of the board of education?"

ANALYSIS

The Acts of 1965, Ch. 307, as found in Burns' (1970 Repl.), Section 28-1710 (7), IC 1971 20-5-2-2-(7), provides that governing bodies of school corporations shall have the specific power to fix and pay salaries and compensation of teachers subject to the laws relating to the employment, contracting and discharge of teachers. The definition section as found in Burns' Section 28-1703 (h), IC 1971 20-5-1-3, specifically includes Burns' Section 28-4525, IC 1971 20-6-18-1, (therein identified as Acts 1945, Ch. 84) in this category.

Burns' Section 28-4525, *supra*, relating to insurance protection for teachers provides in part that:

"It shall hereafter be required, upon written request of any teacher * * * for the trustee or board of trustees of any school corporation in this state to withhold a requested amount of money from the salary of such teacher * * * the same to be held by such trustee or board of trustees and paid in accordance with the direction of such teacher * * * to any insurance company or other agency or organization in the state of Indiana which provides, extends, supervises, or pays for any insurance protection of any kind or for the establishment or payment on any annuity account for such teacher * * *" (My emphasis)

Two provisos follow. The second reads: "provided further that it shall be discretionary with the trustees or board of trustees to withhold any such amounts * * * where fewer than twenty percent (20%) of the teachers of such corporation shall make requests for paying such amounts of money to a single recipient."

If the employees in question are teachers, Burns' 28-4525, *supra*, will govern. The emphasized language which is relevant to the question is ambiguous. It lends itself to the following interpretations:

1. The money withheld must be paid to a company or agency designated by the teacher who directs payment.
2. The money withheld must be paid when the teacher so directs, but the school board may select the company or agency to be paid.

There is no Supreme Court case or prior Attorney General's opinion construing this language. However, a reading in light of the proviso indicates that the teacher is empowered to designate the recipient, since it provides that the board need not withhold unless 20% or more of the employees request funds to be withheld for the purpose of payment to a single recipient. Thus, the first interpretation appears proper, and if the employees are teachers, and are not fewer than 20% of the teachers of the school corporation, the money must be paid to the insurance company that they designate.

Burns' 28-4525 applies only to *teachers* and beneficiaries of the Indiana state teachers' retirement fund. If the employees in question are not teachers, Burns' 28-1710 (7), *supra*, gives the school corporation power to fix and pay salaries without the limitation of Burns' 28-4525. It would therefore seem that the school corporation's power to designate the recipient of funds withheld from the salaries of non-teaching employees is governed only by 26 U.S.C.A. §403 (b) which is the basis of the tax-sheltered annuity program. That section offers no guidelines for answering the present question.

But it is apparent that the school corporation has no interest in designating the recipient of the withheld funds other

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than administrative convenience. The second proviso of Burns' 28-4525, indicates that the standard of convenience is that a number of less than 20% of the teachers may not designate a recipient. The situation is no different when the employees involved are non-teachers.

Thus, it would seem that if a school corporation decides to withhold funds from the salaries of its non-teaching employees for the purchase of tax-sheltered annuities, it would be reasonable for the school corporation to adopt the statutory guidelines for teachers and pay the funds to any agency the employees designate, provided that at least 20% of the employees designate that agency.

CONCLUSION

It is my official opinion that public school teachers are entitled to designate the recipients of funds withheld for insurance or annuity purposes from their salaries if 20% or more of the teachers of a school corporation designate the same recipient. It would be reasonable to follow the analogy of the provisions concerning teachers and hold that non-teaching employees of school corporations have the same right as teachers to designate the recipient of funds withheld from their salaries.