Hon. H. Joel Deckard
Indiana State Representative
Mt. Vernon, Indiana

Dear Representative Deckard:

This is in response to your request for my Official Opinion concerning whether or not the Board of Trustees of a city police pension fund has the authority to retain a private attorney whose fee is to be paid from funds in custody of the treasurer.

ANALYSIS

The statutory power creating and regulating the Police Pension Fund and its Board of Trustees is found in Acts of 1925, Ch. 51, as amended and found in Burns’ (1963 Repl.), Section 48-6401, et seq. Nowhere in this statute is such Board of Trustees given the power to hire an attorney.

As stated in the case of Kern v. State ex rel, Bess (1937), 10 N. E. (2d) 917, the Board of Trustees of the Police Pension Fund, in effect, “exercise only a ministerial duty in respect to a public fund and cannot bind the fund for payments which are not permitted by the legislation which created and controls the disposition of the fund.”

Also in point is this: “A ministerial duty is one in respect to which nothing is left to discretion. It is a simple, definite duty arising in the conditions admitted or proved to exist, and imposed by law—a duty absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts.” 1 Am. Jur. (2d), Administrative Law, Section 83.

As recently as 1966, the Indiana Supreme Court found that this type of board was not empowered to do anything other than,

“* * * to arrange for the collection, preservation and disbursement of pension monies and to take care of other matters connected with the proper execution of

As stated in 73 C. J. S., “Public Administrative Bodies,” Section 17, pp. 312, 313:

“As a general rule, the power to employ counsel is not deemed incident to the mere existence of an administrative agency, board, or commission and does not exist unless it is expressly conferred or results by necessary implication from the powers granted, especially where other statutes place on the attorney general the duty of furnishing legal advice and services to such bodies * * *”

Analogous on the state level, Burns’ 49-1929 is in point and reads as follows:

“No agency, except as provided in this act shall have any right to name, appoint, employ or hire any attorney, or special or general counsel, to represent it or perform any legal service in behalf of such agency and the state without the written consent of the attorney general (Acts of 1943, Ch. 70, Sec. 3, p. 173)” (My emphasis)

It is the intent of the Indiana General Assembly to avoid the proliferation of public services in a wasteful manner and it is its intent, therefore, to avoid the waste of tax money and the violations of the principles of good government and good administrative procedure by not duplicating civil legal agencies at any level of government when the law already provides for legal counsel—the Attorney General at the state level, county attorneys at the county level, and city attorneys at the city level.

Accordingly, all legal advice and counsel for the Board of Trustees of a City Police Pension Fund should come from the respective city attorney, whose principal duties are as follows:

“* * * He (city attorney) shall have the management, charge and control of the law business of such city and for each branch of its government * * * shall be the legal adviser of all its departments and officers
* * * He shall conduct all legal proceedings authorized by this act, and all appeals of every nature whatsoever in which such city or the public shall have an interest * * * Acts of 1905, Ch. 129, § 90, p. 219; 1909, Ch. 122, § 1, p. 312, and found in Burns' Ind. Stat. 48-1801."

(My emphasis)

CONCLUSION

It is, therefore, my opinion that the Board of Trustees of a city police pension fund does not have the legal authority to hire a private attorney with pension funds. Instead, all legal matters that Board may encounter and all legal advice it may desire should come from its city attorney.