This is in answer to your recent letter requesting an interpretation of various sections of Indiana law governing the establishment and operation of municipal utility employees’ pension funds.

You stated that you were writing on behalf of the employees of the Municipal Electric Lighting and Power Plant of the City of Richmond, Indiana. A pension fund was established for such employees in or around 1944. You point out that two different statutes appear to apply to municipal utility employees’ pension funds, Acts 1923, ch. 10, as amended and supplemented, Burns IND. STAT. ANN. §§ 48-6601 to 48-6609 (hereinafter referred to as the “1923 Act”), and Acts 1939, ch. 110, as amended, Burns §§ 48-6631 to 48-6634 (hereinafter referred to as the “1939 Act”). Your questions are:

1. Which of the two statutes above authorized the establishment of the City of Richmond’s municipal utility employees’ pension fund?

2. Does the City have the option of operating the pension fund pursuant to either statute?

3. Under the applicable statute or statutes, is membership in the pension fund, including involuntary deductions from wages, a condition of employment, or may it be made
mandatory by a rule or regulation of the governing body of the City?

4. Under the applicable statute or statutes, is the City required to contribute to the pension fund?

5. May the city count as part of its contribution to the fund the interest accruing annually on the corpus of the fund?

The right of any political subdivision of the State of Indiana to establish an employees' pension fund depends upon a power expressly granted by the General Assembly, see 1967 O.A.G. pp. 365, 366. The two statutes you mention are the only statutes I have found which confer the right to establish a separate municipal employees' pension fund. Therefore, each of the above mentioned statutes must be analyzed in order to determine whether one or both apply to Richmond.

The 1923 Act has applied, since its amendment by Acts 1943, ch. 170, only to cities of the second class which have a population of forty thousand (40,000) or more, as of the last preceding United States census, and which operate an electric light plant and a water-works plant as public utilities:

"That in every city of this state of the second class having a population of forty thousand or more, according to the last preceding United States census, and which cities operate an electric light plant and a waterworks plant as public utilities, there shall be and is hereby created in such city a municipal public utility pension fund, which said fund shall be derived from the sources hereinafter provided." Acts 1923, ch. 10, §1, as last amended by Acts 1943, ch. 170, §1, Burns §48-6601.

The use of such words as "there shall be and is hereby created" and the provisions of the entire section indicate the mandatory nature of this legislation. The General Assembly itself established the fund for all second class cities qualified by population and public utility ownership.
The population requirements of this law have been readjusted by successive amendments, Acts 1939, ch. 62, § 1, and Acts 1943, ch. 170, § 1. However, the population requirement has never been below the existing forty thousand (40,000) limitation. The City of Richmond did, for the first time, in 1960 achieve that population according to a United States census.

Under section 1 of the original 1923 Act and its 1939 amendment, the Act applied to second class cities of the specified population which controlled or operated two or more public utilities. The 1943 amendment changed that qualification to operation of an electric light plant and a waterworks plant as public utilities. You have informed me that the City does not and has not, since the 1943 amendment became effective, operated waterworks. Neither did the City control or operate, between the year 1923 and 1943, and two or more public utilities. The City of Richmond apparently does not and never did meet the criteria of the 1923 Act. The utility pension fund established in 1944, therefore, was not created by the 1923 Act, and cannot be made subject to that Act without action by the General Assembly.

The 1939 Act authorizes the establishment of retirement funds for the utility employees of any city or town which owns or operates a municipal utility:

“That the common council of any city or the Board of Trustees of any town owning or operating a municipal utility of any kind, or the board of directors for utilities of any such city or town, any utility district or other organization charged by law with the duty of government, management, regulation and control of any municipal utility, for such city or town, may provide for a system of retirement pensions, annuities, insurance or any other suitable provision for a retirement fund for the employees of such municipal utilities.”

1939 Act, section 1, as last amended by Acts of 1945, ch. 124, § 1, Burns § 48-6631.
Prior to its 1945 amendment, this statute applied only to cities of the first, second and third classes. Richmond was a city of the third class in 1939. It became a second class city in 1940, and has remained in that class. See Acts 1933, ch. 233, § 1, as amended by Acts 1935, ch. 97, § 1, Burns § 48-1201. The 1939 statute was given general applicability in 1945.

The pension fund for employees of the Richmond Light Plant must have been established pursuant to this 1939 Act rather than the 1923 Act. Since the 1923 Act does not apply to Richmond, the utility governing body may not now elect to operate its utility employees' pension fund thereunder. The fact that the governing body of the Richmond Electric Lighting and Power Plant may not elect to operate the pension fund for its employees pursuant to the 1923 Act does not mean, however, that the 1939 Act is the only choice which the General Assembly has given to the governing body for such a pension fund. Municipal utilities may elect to join the Public Employees' Retirement Fund created by Acts 1945, ch. 340, as amended, Burns §§ 60-1601 to 60-1626, as supplemented by Acts 1955, ch. 329, as amended, §§ 12 to 28, Burns §§ 60-1923 to 60-1940. The manner in which the employees and governing body participating in an existing retirement fund may effect such election is outlined in § 24 of the 1945 Act, as amended by Acts 1947, ch. 6, § 21, Burns § 60-124, see 1968 O.A.G. p. 8, supra. However, since you asked specifically about the 1923 and 1939 Acts, I will confine the answers to the rest of your questions to an interpretation of the provisions of the 1939 Act, which currently governs the retirement fund in question.

Your third question is whether employee membership in and contributions to the retirement fund are made a condition of employment by the statute, or may be made so by rule and regulation of the governing body of the utility. Section 3 of the 1939 Act, as last amended by Acts of 1945, ch. 124, § 3, Burns § 48-6633, reads in part as follows:

"Any such ... municipal subdivision operating a municipal utility desiring to establish such retirement fund, may provide rules and regulations for the crea-
tion and operation of said fund, and shall provide for contributions from employees desiring to become members of said fund: Provided, however, that the amount of contributions required from any such employee shall not exceed five per cent of the wage or salary of any such employee.” (Emphasis added.)

In my opinion, the statute clearly provides that no employee may be required to become a member of the fund, see 1968 O.A.G., p. 8, supra. Only an employee who is a member must make contributions. Rules and regulations of an administrative body are authorized and valid only when they are in compliance with statutory authority:

“An administrative board has the undoubted right to adopt rules and regulations designed to enable it to perform its duties and to effectuate the purposes of the law under which it operates, when such authority is delegated to it by legislative enactment. Blue v. Beach (1900), 155 Ind. 121, 56 N.E. 89; Albert v. Milk Control Board of Indiana (1936), 210 Ind. 283, 200 N.E. 688; McCreery v. Ijams (1945), 115 Ind. App. 631, 59 N.E. 2d 133. But it may not make rules and regulations inconsistent with the statute which it is administering, it may not by its rules and regulations add to or detract from the law as enacted, nor may it by rule extend its powers beyond those conferred upon it by law. McCreery v. Ijams, supra; 73 C. J. S., Public Administrative Bodies and Procedure, §§ 93 and 94.”

Indiana Dept. of State Revenue v. Colpaert Realty Corp. 231 Ind. 463, 479, 480, 109 N.E. 2d 415, 422, 423 (1952).

Since the statute has made employee membership in the retirement fund voluntary, it is my opinion that the governing body may not by rule and regulation require any employee to become a member, or deduct involuntary contributions from the wages of an employee who is not a member of the fund.
In your fourth question, you ask whether the City is required to make a contribution to the pension fund. The applicable section is § 2 of the 1939 Act, as last amended by Acts 1945, ch. 124, § 2, Burns § 48-6632, which reads in part as follows:

“Any such . . . municipal subdivision operating any municipal utility, desiring to set up such retirement fund for the benefit of the employees of such municipal plant, may provide that the contributions of employees be matched by like contributions of such utility out of its earnings, reserves or earned surplus, to create a fund for such purpose and to allocate to such fund contributions sufficient to establish the plan on a sound actuarial basis, including contributions for past services of employees, and where such contributions for past services are made they need not be matched by like contributions from employees.” (Emphasis added.)

In my 1968 O.A.G., p. 8, supra, I stated that an employer contribution from utility earnings or reserved or earned surplus is authorized by this section. In my opinion, it is clear that the governing body of the utility is not required to make any contribution to the pension fund. (In the cited opinion, the question was whether the governing body could contribute for current services more than an amount to “match” employees’ contributions. My conclusion was that the governing body could not contribute for current services more than employees’ contributions, and that the contributions of each for current services could not exceed five per cent (5%) of the salaries and wages of member-employees. The governing body may, however, contribute additional amounts for past services of employees to establish the plan on a sound actuarial basis, when the pension plan is properly set up in the first instance.)

From the wording of your last question, I assume that the governing body of the utility has undertaken to contribute to the pension fund for current services the same (or “like”) amounts which employee-members are contribut-
ing from their wages and salaries. Apparently, the governing body desires to consider the interest earned annually on the entire pension fund as a part of its contribution, thereby reducing the amount of cash it must pay into the fund annually. Section 2 of the statute, as amended and quoted *supra*, authorizes the governing body to make contributions of like amounts for current services "out of its earnings, reserves or earned surplus." The earnings, reserves and surplus referred to are those of the utility, not those of the fund. Further, in the recent case of *Board of Trustees of Public Employees' Retirement Fund v. King*, — Ind. —, 236 N.E. 2d 600 (1968), the Supreme Court held that the appellant therein could reduce the debt owed that retirement fund by the State and political subdivisions by a percentage of the interest earned on the fund, because the statute creating the fund clearly authorized and required the governing body of the fund to take that action. The statute in question does not so provide. It provides that only "any surplus" of the fund shall be invested in securities approved by the Indiana Public Service Commission, or may be invested in the purchase of retirement income or annuity contracts of Indiana licensed insurance companies, section 4 of the 1939 Act, as amended by Acts 1943, ch. 313, § 4, Burns § 48-6634.

It is my opinion that the governing body of the utility may not, if it chooses to make contributions to the fund to match those of employee-members, count the interest earned on the pension fund as a part of its contribution.