Therefore, even should the town board in question be authorized to establish a separate pension or retirement plan for its employees or officers, it is not authorized to pay a pension to one retired from town employment before the pension plan was adopted. In the absence of specific action by the General Assembly clearly showing that a public purpose is involved, such a payment would serve purely a private, rather than a public, purpose.

OFFICIAL OPINION NO. 54

December 27, 1967

CRIMINAL LAW—Constitutional Right to Speedy Trial—Discharge of Defendant for Undue Delay—Authority and Applicability of Supreme Court Rules to City Courts.

Opinion Requested by Hon. Robert E. Robinson, Prosecuting Attorney, 46th Judicial Circuit.

This is in response to your request for my Official Opinion on the effect of Indiana Supreme Court Rule 1-4D on City Court cases. More specifically you requested:

> "Would you give me an opinion as to the effect of Supreme Court Rule 1-4D as regards discharge for delay in trial in reference to City Court cases? And particularly when the delay is occasioned by the filing of a petition for a change of judge on the behalf of defendants."

Rule 1-4D reads as follows:

> "Rule 1-4D. Discharge for Delay in Criminal Trials. 1. Defendant in Jail—No defendant shall be de-

tained in jail on a charge, without a trial, for a continuous period embracing more than six [6] months from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge (which ever is later); *except where a continuance was had on his motion, or the delay was caused by his act,* or where there was not sufficient time to try him during such period because of congestion of the court calendar; provided, however, that in the last mentioned circumstances, the prosecuting attorney shall make such statement in a motion for continuance not later than ten [10] days prior to the date set for trial, or if such motion is filed less than ten [10] days prior to the trial, the prosecuting attorney shall show additionally that the delay in filing the motion was not the fault of the prosecutor.

"2. Defendant in Jail.—Motion for Early Trial.—If any defendant held in jail on an indictment or an affidavit shall move for an early trial, he shall be discharged if not brought to trial within fifty [50] judicial days from the date of such motion, except where a continuance within said period is had on his motion, or the delay is otherwise caused by his act, or where there was not sufficient time to try him during such fifty [50] judicial days because of the congestion of the court calendar: Provided, however, that in the last mentioned circumstance, the prosecuting attorney shall file a timely motion for continuance as under paragraph one (1) of this rule.

"3. Defendant on Recognizance.—No person shall be held by recognizance to answer an indictment or affidavit, without trial, for a period embracing more than one [1] year continuously from the date on which a recognizance was first taken therein; but he shall be discharged *except as provided by paragraph one (1) of this rule.*

"4. Discharge for Delay in Trial.—When May be Refused—Extensions of Time.—If when application is

made for discharge of a defendant under this rule, the court be satisfied that there is evidence for the state, which cannot then be had, that reasonable effort has been made to procure the same and there is just ground to believe that such evidence can be had within ninety [90] days, the cause may be continued, and the prisoner remanded or admitted to bail; and if he be not brought to trial by the state within such additional ninety [90] days, he shall then be discharged.

"5. When any time period established by the rule shall expire on a holiday or during vacation, the time so established shall be extended until the close of the next day when court is in session. This rule supersedes in part Burns' Ind. Stat. Anno. Sec. 9-1402 (1956 Repl.); Sec. 9-1403 (1956 Repl.); and Sec. 9-1404 (1956 Repl.).

"6. *This rule shall apply to all trial courts having criminal jurisdiction in the State of Indiana. Effective July 1, 1965.*" (Emphasis added.)

Subsection 6 of Rule 1-4D, *supra,* states that the rule shall apply to *all courts having criminal jurisdiction.* Acts 1905, ch. 129, § 216, as last amended by Acts 1963, ch. 186, § 1, the same being Burns § 4-2402, concerns the judge of a city court and specifically provides, *inter alia,* that "He shall also have original concurrent jurisdiction with the circuit court or criminal court in all cases of petit larceny and assault and battery and all other violations of the laws of the State where the penalty provided therefor may be less than a fine of five hundred dollars [$500] and imprisonment for a period of six [6] months." (See also Burns § 4-2403, which contains somewhat similar provisions.) Thus a city court has criminal jurisdiction, and therefore Rule 1-4D of the Rules of the Supreme Court applies to city courts.

Rule 1-4D supersedes in part Acts 1905, ch. 169, §§ 219, 220, as amended by Acts 1927, ch. 132, § 12, as found in Burns §§ 9-1402, 9-1403. Burns § 9-1402 provides for discharging a defendant held in jail for a certain length of

time ". . . except where a continuance was had on his motion or the delay was caused by his act." Burns § 9-1403 provides for discharging a person held by recognizance for more than three terms of court ". . . unless a continuance be had upon his own motion, or the delay be caused by his act." As you can see, the above wording from §§ 9-1402 and 9-1403 is employed in the exceptions to subsections 1 and 3 of Rule 1-4D.

In the case of *Wedmore v. State,* 237 Ind. 212, 216, 143 N.E. 2d 649 (1957), the court stated:

> "Appellant, by his request for a change of judge, set in motion the chain of events which caused the delay in his trial. This delay was caused by his acts, hence he is not entitled to a discharge under § 9-1403, *supra. Sullivan v. State*; *Flick v. State,* (1939), 215 Ind. 343, 345, 346, 19 N.E. 2d 739; *Colglazier v. State,* (1953), 231 Ind. 571, 575, 110 N.E. 2d 2; *Shewmaker v. State,* (1956), 236 Ind. 49, 138 N.E. 2d 290."

Thus, delays resulting from the filing of a petition for change of judge by the defendant are delays caused by his own act. However, once the delay so caused is ended the case must be timely prosecuted. *Colglazier v. State,* 231 Ind. 571, 110 N. E. 2d 2 (1953).

The actual effect of the petition for change of judge on the ripening of the defendant's right to discharge is more difficult to determine since all reported cases are concerned with the statutes that have been superseded by Supreme Court Rule 1-4D. However, consideration of those cases should be helpful.

Acts 1905, ch. 169, § 220, as amended (Burns § 9-1403), provides in part:

> "No person shall be held by recognizance to answer an indictment or affidavit, without trial, for a period embracing more than three terms of court, not including the term at which a recognizance was first taken thereon. . . ."

In *Colglazier, supra,* the recognizance was first taken during the March, 1951, term of court. During that term (on March 21st) defendant filed an affidavit for change of judge and, on the same day, the change was granted and the special judge selected. Defendant, for reasons not attributable to him, stood without trial for a period embracing the May, 1951, September, 1951, and November, 1951, terms of court. The Supreme Court held that he was entitled to discharge.

The opinion in *Wedmore, supra,* is silent as to the nature and extent of the delay resulting from defendant's petition for a change of judge. An examination of the briefs filed in that cause (see Briefs of Divided Cases, 237 Ind., v. 3, on file in the library of the Indiana Supreme Court) shows that recognizance was first taken in the February, 1953, term of court; that a verified motion for change of judge was both filed and granted during that term; and that the special judge was selected during that same term. The briefs further show that during the February, 1955, term (a delay of two years) the presiding judge found that the special judge had not qualified pursuant to his appointment, and so in that term another special judge was appointed and qualified. During the May, 1955, term, the term immediately following that term during which the special judge qualified, defendant filed a motion to dismiss for want of prosecution which, as set out above, the Supreme Court held was properly overruled.

In *State v. Mabrey,* 199 Ind. 276, 157 N.E. 97 (1927), recognizance was first taken in the September, 1922, term of court. During the November, 1922, term of court the defendant filed a motion for change of venue from the county, which motion was granted and the venue to Monroe Circuit Court perfected in that same term. The cause was continued in the February, 1923, and the April, 1923, terms by order of the Monroe Circuit Court. During the September term the defendant filed a motion for discharge, which was granted. The Supreme Court reversed, holding that the Monroe Circuit Court gained jurisdiction in the November, 1922, term and that the three-term rule started to run the first term

thereafter and would include the February, 1923, April, 1923, and September, 1923, terms.

From the above cases I deduce that the statutes superseded by Supreme Court Rule 1-4D provided that the filing by the defendant of a motion for change of venue from either the county or the judge cancels all time until the change is perfected, and that upon perfection of the change the time in which trial may be had begins to run in the same manner and for the same period as if recognizance had just then been taken or the defendant had just then been arrested (or the charges filed, if appropriate). I believe that Supreme Court Rule 1-4D should be interpreted in the same manner.

Therefore, it is my opinion that Supreme Court Rule 1-4D applies to city court cases, and that a defendant who petitions for a change of judge must be tried within six months of the date the special judge qualifies if the defendant is in jail, or within one year of the date that the special judge qualifies if the defendant is being held by recognizance. This conclusion seems most logical when one considers that the less serious criminal matters are tried in city court and therefore public policy would dictate they be handled expeditiously.

OFFICIAL OPINION NO. 55

December 28, 1967

FINANCIAL INSTITUTIONS—Mutual Savings Banks—As Having Authority to Make Installment Loans.

Opinion Requested by Hon. Frederick T. Bauer, State Representative

I am in receipt of your request for an Official Opinion, which request reads: