> any property acquired or used by the commission under the provisions of this act, or upon the income therefrom. . . ."

In view of all the foregoing, it is my opinion that the Port Authority of Michigan City is not liable for the payment of Indiana Gross Income Tax on income realized from the operation of a marina.

OFFICIAL OPINION NO. 59

December 29, 1967

LOCAL HEALTH DEPARTMENTS—Local Health Officers as Being Permitted to Retain Fees for Issuance of Certificates —Department Considering Such Remuneration When Determining Salaries.

Opinion Requested by Mr. Richard L. Worley, Chief Examiner, State Board of Accounts.

I am in receipt of your inquiry concerning the right of local health officers to retain, as their personal property, fees collected for furnishing certificates of birth, death or stillbirth. Your letter asks two specific questions:

> "1. May local health officers continue to retain as their personal property fees collected for furnishing certificates of birth, death, or stillbirth registration, under Acts 1949, ch. 157, s. 1236 (Burns 35-2102), as held in Official Opinion No. 117 (1945) of the Attorney General, or is this act superseded by Acts 1949, ch. 157, s. 423, as added by Acts 1965, ch. 358, s. 11 (Burns' Supp. 35-524), to the extent that such

fees must be accounted for and receipted to the health fund?

"2. If your answer is to the effect that a local health officer may retain such fees as his personal property, does a local board of health have authority to require that such fees be paid into the health fund in fixing the compensation of the health officer pursuant to Acts 1949, ch. 157, s. 418, as added by Acts 1965, ch. 358, s. 6 (Burns' 35-519)?"

The authority for a local health officer to charge and retain fees is permissive rather than mandatory, and is found in Acts 1949, ch. 157, § 1236, the same being Burns § 35-2102, which provides in part:

> "The local health officer may make a charge not in excess of one dollar ($1.00) for each certificate of birth, death, or stillbirth registration; provided that no charge shall be made by any local health officer of this state for furnishing a certificate . . . to a person or to a member of the family of a person who needs the certificate.
>
> "1. To establish his age or . . . the dependency of any member of his family in connection with his service in the Armed Forces of the United States.
>
> "2. To establish his age or . . . the dependence of any member of his family in connection with a death pension or disability pension of any person who is serving or has served in the Armed Forces of the United States.
>
> "3. To establish or to verify the age of a child in school who desires to secure a work permit."

It appears that the General Assembly made a determination that the issuance of the certificates to the listed persons for any of the listed reasons served a public purpose, and should be performed without charge to the individual who requested the certificate. However, any other certificate requests were determined by the Legislature to serve a pri-

vate, rather than a public, purpose for which a charge might be made.

An earlier statute concerning the furnishing of certificates, Acts 1945, ch. 154, § 9, was mandatory concerning certificate charges, and provided that "[s]aid health officer *shall charge* for such certified copies of certificates, however, said charge shall not exceed the sum of one dollar ($1.00)." (Emphasis added.) 1945 O.A.G., p. 516, considered that statute and reached the conclusion that "the money received by local health officers for such certified copies of certificates provided for by chapter 154, in the Acts of 1945, is the personal property of such health officers." At that time, local health officers were compensated under an earlier act which provided salaries based upon the population of the area included in the local health department, with a maximum compensation of eighteen hundred dollars ($1,800.00) per year for such salary, see 1945 O.A.G., p. 516, at 517.

The provision contained in the 1949 Act was considered in 1957 O.A.G., p. 25. That opinion was basically concerned with the question of whether the statute had been superseded by later legislation concerning charges of county officers rather than with the disposition of the fees collected under the 1949 statute, but the opinion did state (on p. 27):

> ". . . Acts of 1949, Ch. 157, as found in Burns' (1949 Repl.), Sections 35-101 to 35-3809, known as the 'Public Health Code of Indiana,' repealed many former statutes on this subject, including the ones construed in Official Opinion No. 117, *supra* [1945 O.A.G., p. 516]. However, a review of said repealed statutes and their counterparts as now found in the 'Public Health Code of Indiana,' *supra,* would lead to the same conclusion as to the disposition of said fees."

Thus, the Public Health Code of Indiana, as originally written, was interpreted as authorizing local public health officers to retain fees charged for issuing certificates of birth, death and stillbirth.

The Public Health Code of Indiana was amended by Acts 1965, ch. 358, which, by its 11th section, added an entirely

new section to the Health Code. The new section (§ 423, Burns § 35-524) provides:

> "The board of each local health department may, with the approval of the board or boards of county commissioners and/or the common council of any city or cities involved, establish and collect fees for specific services and records as established by local ordinances and state law: Provided, That such fees shall not be in excess of the cost of services rendered. Such fees shall be accounted for and transferred to the health fund of the taxing jurisdiction."

Your question, then, is whether this addition to the Health Code supersedes and nullifies the earlier provision permitting the health officers to retain the fees collected for the issuance of certificates.

It is my opinion that the above provision added in 1965 does supersede and nullify the previous authorization to local health officers to establish and retain the fees collected for the issuance of birth, death and stillbirth certificates, when the condition precedent in the 1965 addition has been met, *i.e.*, when the board of the local health department with approval of the proper authority or authorities has established fees for said services.

This 1965 statute adding section 423 to the Public Health Code by amendment, Burns § 35-524, does not specifically repeal or amend section 1236 of the Code, Burns § 35-201, which provides that local health officers may charge one dollar ($1.00) for the services in question. Repeals or amendment by implication are not favored, *In re Marshall,* 117 Ind. App. 203, 210, 70 N.E. 2d 772 (1947). However, a later amendment to one section of an act will repeal another section by implication to the extent that the amendment and the earlier section are in irreconcilable conflict. *State ex rel. Blieden v. Gleason,* 224 Ind. 142, 65 N.E. 2d 245 (1946). As the Supreme Court said in *Kramer v. Beebe,* 186 Ind. 349, 355, 115 N.E. 83 (1946):

> ". . . 'even where two acts are not in express terms repugnant, yet if the latter act covers the whole sub-

> ject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.' " 186 Ind. at 355.

The section added in 1965 does embrace new provisions in that it authorizes the local health department to establish fees for many services other than those for which a local health officer was authorized to charge fees by the original provisions of the 1949 Code. In my opinion, it was plainly intended as substitute for the first act, to the extent that any fees for the services in question established by the department must replace and supersede fees previously established by the local health officer.

If your first question were answered in the affirmative, the result would be, in areas in which the local department has established fees for the issuance of said certificates, that two fees would be charged for such services—one by the health officer, and another by the department. The first would benefit the health officer, and the second would benefit the health fund of the taxing jurisdiction.

I do not find that any provision of the Public Health Code, prior to its 1965 amendment, authorized local health departments to collect fees for services rendered. It is my opinion that the fees authorized by section 423 were intended by the General Assembly, to be, when established, the exclusive fees charged for such services. The granting of discretionary establishment of fees to the local health department is inconsistent with the retention of discretion in the local health officer to establish and collect additional fees for the same services. The General Assembly limited the amount of the fees established by the department to "not in execss of the cost of services rendered." The maximum measure of the fees thus includes, as part of the "cost of services rendered" the salary paid to the local health officer pursuant to 418 of the Public Health Code, as added by the 1965 Act, ch. 358, § 6, Burns § 35-519.

The conclusion that health officers may collect and retain such fees would also run counter to the public policy against fees expressed in other acts as to other officers.

The original system for compensating public officers under our present Indiana Constitution, adopted in 1851, relied heavily on the fee system. See *Cowdin v. Huff*, 10 Ind. 83 (1858). However, that system for compensating officials "became so intolerable, through the custom of charging constructive fees, that the public generally throughout the state demanded relief and protection along this line." *Harter v. Board of Comm'rs,* 186 Ind. 301, 303, 116 N.E. 304 (1917). The Legislature responded in 1891 with the first strictly salary law applicable to county officers, and, as a means of paying those salaries, established fees to be paid to the counties, *ibid.* Since that time, the trend in all areas of government has been to substitute salaries or per diem for fees retained by the officer as his compensation for performing public services. For example, Acts 1957, ch. 319, the County Officer's Salary Act, in its third and sixteenth sections (Burns §§ 49-1055, 49-1068) specifically provides that the county officers covered by that Act are to receive only the salaries fixed by the Act, and that they are not to receive any fees. Similarly, Acts 1933, ch. 233, § 20b, as added by Acts 1959, ch. 107, § 6 (Burns § 48-1233a) provides that elected city officials are not to receive fees. I believe these statutes express the intention on the part of the Legislature to abolish fees to officers as a matter of public policy.

Therefore, I am forced to conclude that a local health officer may not retain as his personal property fees collected for furnishing certificates of birth, death or stillbirth registration when his local health department has established fees for such services and records pursuant to Acts 1965, ch. 358, § 11, adding section 423, Burns § 35-524, to the Public Health Code of Indiana. However, if the local health department has not established fees for those services and records pursuant to that statute, the local health officer may retain the fees prescribed in section 1236 of the Public Health Code, Burns § 35-2102, for such services and records.

Since your first question was answered partly in the negative and partly in the affirmative, it is necessary to answer your second question with regard to those public health offi-

cers employed by local health departments which have not legally established fees for the services in question.

Acts 1949, ch. 157, § 418, as added by Acts 1965, ch. 358, § 6, the same being Burns § 35-519, provides:

> "The board of each local health department shall prescribe the duties of all officers and employees. It shall fix compensation of all officers and employees."

Thus, there can be no doubt that the board has the authority to fix the salary of the local health officer. However, the health officer's right to retain fees for issuing certificates is established by statute. I know of no instance wherein a local administrative agency has the authority to require an employee to turn over fees granted him by statute as a condition precedent to receiving a salary from that agency. Conversely, I know of no law which would prohibit an administrative agency, when determining the remuneration it will pay an employee, from taking into consideration other remuneration attached to his position.

OFFICIAL OPINION NO. 60

December 29, 1967

MOTOR VEHICLES—Applicability of Nonresident Motorist Statute in Justice of the Peace Court.

Opinion Requested by Hon. John H. Hesseldenz, Justice of the Peace, Center Township, Marion County.

I am in receipt of your inquiry concerning the applicability of the nonresident motorist statute to actions before Justices of the Peace. The same question has been asked by