OPINION 43

OFFICIAL OPINION NO. 43

December 23, 1966

JUDICIAL OFFICERS—Judges' Retirement Act—Qualifications and Entitlement of Widows Under Provisions of Act.

Opinion Requested by Mr. Eugene Garrison, Executive Secretary, Indiana Judges' Retirement Fund.

This in in response to your request for an opinion on the following questions regarding the application of the 1965 amendment to the Judges' Retirement Act:

> "1. A Judge age 65 or more years of age and with 12 or more years of creditable service is deceased after the effective date of the Act. May the surviving widow complete the payments for 16 years and receive the 50% widows benefit?
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> "2. A Judge with 12 or more years of creditable service is deceased after the effective date of the Act at an age less than 65 years. May the surviving widow pay into the Fund the balance of 16 years of contributions and receive the 50% widows pension as the widow of a disabled Judge? If the answer is in the negative, may such widow wait until the deceased Judge's 65th birthday and then make payment and qualify?"

You asked five other questions, each of which concerns the widow of a judge who died prior to the effective date of the 1965 amendatory Act.

The Indiana Judges' Retirement Fund was created by Acts 1953, ch. 157, Burns IND. STAT. ANN., §§ 4-3244—3266. Section 10 of the Act, Burns § 4-3253 was amended by Acts 1965, ch. 269, § 1, increasing the amount of benefits receivable

on retirement and adding a paragraph concerning annuities for widows.

No provision was made in the original act for payments to the widows of judges except that provision in § 13, Burns § 4-3256, permitting a widow or other surviving dependent to withdraw from the fund, on the death of a participant, the amount or balance of amount the participant had actually paid into the fund.

Section 10 of the Act now provides that a participant in the fund whose employment as judge is terminated, regardless of cause, shall be entitled to a "retirement annuity" beginning on the date specified in a written application therefor, provided:

> ". . . (a) the date upon which the annuity begins is not prior to the date of final termination of employment of such participant, or the date thirty days prior to the receipt of such application by the board; (b) the participant has attained at least the age of sixty-five or has become permanently disabled; (c) the participant has at least twelve years of service credit, except as otherwise provided in this act; (d) the participant is not receiving, nor is entitled at the time to receive, any salary from the employer, as defined in this act, for services currently performed.
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> "One who is judge at the time of taking effect of this act, and who becomes a participant, and who is separated from service after at least twelve years of service but before he has made at least sixteen years contribution to the fund, shall, before he files a written application for benefits, pay into said fund a sufficient amount, with the amount he has paid before retirement, equal to sixteen years contribution to said fund, based upon the salary he was receiving during the period for which he makes such payment."

The third paragraph of that section establishes the annual retirement benefits at fifty per cent (50%), with an upper limit of four thousand eight hundred dollars ($4,800.00) per

year. The last paragraph of said section 10, as added by amendment, reads as follows:

> "The widow of any participant who has heretofore qualified or who hereafter qualifies to receive the retirement annuity, under the provisions of this act, *either by length of service or by being permanently disabled,* shall, *upon the death of such participant,* be entitled to an annuity in the amount of fifty (50%) per cent of the amount of retirement annuity the participant was drawing at the time of his death, *or to which he would have been entitled had he retired and begun receiving retirement annuity benefits prior to his death.*" (Emphasis added.)

As to your first question, it is my opinion that this statute clearly and unambiguously provides that when a judge aged sixty-five (65) years or more dies after the effective date of the amendatory Act, having completed twelve (12) or more years of creditable service, his widow is entitled to an annuity. However, it is also my opinion that since the amount of the annuity the widow is entitled to receive is measured by a percentage of the amount to which the judge would have been entitled had he retired and begun receiving retirement annuity benefits prior to his death, and since he was entitled to no annuity unless he made a payment into the fund of an amount sufficient to equal a total contribution from him of sixteen (16) years, the widow must also fulfill this qualification in order to become entitled to receive a dollar amount of annuity. The obvious intention of the Act is that she must also file the application which the judge must file in order to receive an annuity.

As to your second question, it is obvious that a deceased judge who was qualified by length of service, but had not reached the age of sixty-five (65) before his death, was not entitled to retire and receive any retirement annuity at or prior to the time of his death unless he were permanently disabled, as all other annuities under this Act require as a condition precedent the participant's having reached at least the age of sixty-five (65).

Section 11 of the Act, Burns § 4-3254, reads as follows:

> "A participant shall be considered permanently disabled if the board has received a written certificate by at least 2 licensed and practicing physicians, appointed by the board, indicating that said participant is totally incapacitated, by reason of physical or mental infirmities, from earning a livelihood and that such condition is likely to be permanent; Provided, however, that such participant shall be re-examined by at least 2 physicians appointed by the board, periodically at such times as the board shall designate but at intervals of not to exceed 1 year, and if in the opinion of said physicians, said participant has recovered from his disability then benefits shall cease to be payable to him as of the date of such examination unless, on said date, he shall have reached the age of 65 years."

The description in this section of those participants who shall be considered "permanently disabled" may not include, in the strictest sense, a deceased participant. However, it is obvious that a participant who dies is "totally incapacitated . . . from earning a livelihood" and that such condition is certain to be permanent. The Legislature surely did not intend to exclude a widow from an annuity simply because her husband was killed or died instantly, and did not have time to apply for his annuity before death occurred. The same rationale would apply to a participant who did submit an application but whose proof was not received by the board until after his death. It is apparent that the reason for the description of "permanently disabled" in § 11, and for the physical examinations which are to follow at least once a year, is a legislative intention to discontinue an annuity to any participant who recovers from a disability erroneously diagnosed as permanent. In the case of a deceased participant, of course, there would be no question of such an erroneous diagnosis.

It is to be noted in this connection that the words "retirement annuity" in the Act and particularly in Section 10 thereof, are used to describe annuities conditioned upon two different facts—those receivable upon a permanent disability and

those receivable at age sixty-five (65) for length of service. Since the words "retirement annuity" do refer to both types of annuities, the Legislature must have intended the word "retired" in the last paragraph of Section 10 to apply to both types of termination of employment.

Thus, the last phrase of this section may be fairly interpreted as including in its meaning "the retirement annuity . . . to which he [the participant] would have been entitled had he become permanently disabled and begun receiving retirement annuity benefits for permanent disablement prior to his death," as well as including a judge past age sixty-five (65) who was qualified at the time of his death to retire and to apply for benefits but who had not done so. The fact that the qualifications of participants which are specified in the added paragraph of Section 10 pertaining to windows include "either by length of service or by being permanently disabled," but do not include reaching age sixty-five (65), strengthens the conclusion that the Legislature did intend to place the widows of those judges who die before reaching age sixty-five (65) without a preceding permanent disablement on a par with widows of those judges who die before reaching age sixty-five (65) but after a preceding permanent disablement.

Therefore, in my opinion, the widow described in question number two may pay into the fund the balance, if any, of sixteen (16) years' contributions, and may then apply for and receive a fifty per cent (50%) widow's annuity as the widow of a permanently disabled judge.

As previously indicated, your other five questions all concern judges who died before the effective date of the 1965 amendments to the Act.

Whether or not the Act, as amended, was intended to apply to widows of judges who died prior to the effective date of the amendment cannot be determined from a literal interpretation of the Act.

As stated by the Legislature in the title of the Indiana Judges' Retirement Act, it was enacted

> ". . . for the purpose of inducing competent and qualified attorneys to become judges and to remain in the service of the people of the state as judges, and for the further purpose of establishing a fund to be known as the Judges' Retirement Fund for efficient means of providing retirement annuities and other benefits for judges in the State of Indiana; thereby, enabling such judges to accumulate reserves for themselves and their dependents in case of old age, disability. . . ."

Under the recent amendment of Section 10, it is apparent that the Legislature now intends that an annuity benefit should be paid to the widow of a judge covered by the Act in the event of his death. But there is no specific provision that such benefits are to be paid to widows of judges who died prior to the effective date of the Act. If we were to interpret the Act to have such a meaning, where would we place the limitation? On the widow whose husband died one day prior to the Act's effective date? Could we include the widow whose husband died in 1955 and who, ten years ago, had received, under Section 13, the amount her husband had actually paid into the fund?

The intent of the Legislature was not to grant benefits to judges who had died prior to the effective date of the Act, but was to induce "competent and qualified attorneys to become judges and to remain in the service of the people of the state as judges." This same intent must be applied to the 1965 amendment granting annuities to widows of judges, even though it incidentally benefits prospective widows of judges presently receiving retirement or disability benefits. Nowhere in the Act does it appear that the Legislature intended to grant gratuities or benefits to widows of judges who had, prior to the effective date of the Act, performed services to the people and died. If this had been the intent of the Legislature, the provision would have so stated in clear and unmistakable language.

To award benefits under the Act to a widow whose husband died prior to the effective date of the Act would require that a retroactive effect be given to the 1965 amendment. An

amendatory act is to be construed as having a prospective and not retroactive effect in the absence of express language declaring it to be retroactive.

> *Cummins v. Pence,* 174 Ind. 115, 124, 91 N.E. 529, 532 (1910) ; *State ex rel. Taylor v. Mount,* 151 Ind. 679, 693, 51 N.E. 417, 421 (1898).

We are also bound by the general rule that statutes are to be construed as having a prospective operation unless otherwise apparently intended by the language used.

> *Chadwick v. City of Crawfordsville,* 216 Ind. 399, 413, 24 N.E. 2d 937, 944, 129 A.L.R. 469 (1940) ;
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> *Jackson v. Pittsburgh Ft. W. & C. Ry.,* 193 Ind. 157, 139 N.E. 320 (1923) ;
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> *Tecumseh Coal & Mining Co. v. Buck,* 192 Ind. 122, 135 N.E. 481 (1922) ;
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> *Lang v. Clapp,* 103 Ind. 17, 23, 2 N.E. 197, 200 (1885).

Therefore, in answer to your last five questions, it is my opinion that no widow of a judge who died prior to the effective date of the 1965 amendment to the Indiana Judges' Retirement Act is entitled to an annuity under Section 10 of the Act, as amended in 1965.