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Assn. v. Moritz, 244 Ind. 156, 191 N.E.2d 21 (1963), *supra*, the present rule is that the Legislature may not give the county council discretion to control or curtail the functioning of any constitutional judicial officer, including a prosecuting attorney, by limiting the amount of money he may obtain for office space. In my opinion, a county council may be mandated to appropriate for office space the amount a prosecuting attorney finds is necessary within reasonable standards for him to fulfill his constitutional duties.

OFFICIAL OPINION NO. 37

September 1, 1965

Mr. Earl M. Utterback
Executive Secretary
Indiana State Teachers' Retirement Fund
506 State Office Building
Indianapolis, Indiana 46204

Dear Mr. Utterback:

This is in reply to your recent letter in which you request an Official Opinion on the following question:

"If a teacher, who has 15 or more years of service and has not attained age 50 or has 10 or more years of service and has not attained age 65, makes application for withdrawal and receives his total accumulation and subsequently returns to service after a period of inactivity and renders less than 60 days of service and is now age 50 or 65 respectively, is this teacher entitled to any retirement benefits?"

The Indiana State Teachers' Retirement Act provides, in part, at Ind. Acts of 1915, ch. 182, § 9, as amended, Burns IND. STAT. ANN., § 28-4506:

"(e) In the event that any teacher, a member of the fund, leaves the service . . . for any reason, such teacher shall be entitled to withdraw all arrearages paid in and the following portions of his regular contributions:

* * *

"After ten years

100%

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“(f) If such teacher returns to the employ of a state school to which this act applies, such teacher shall be required to pay into said fund within one [1] year the amount withdrawn therefrom and shall thereupon have credit for all the service comprehended in the amount so withdrawn and repaid. No interest shall be charged for time not credited to the teacher. . . .”

Subsection (f) of § 9 was amended, effective April 1, 1965, by Ind. Acts of 1965, ch. 410, § 1(f), to read as follows:

“(f) If such teacher returns to the employ of a school to which this act applies, such teacher may pay into said fund within one year the amount withdrawn therefrom and shall thereupon have credit for the amount so withdrawn and repaid. No interest shall be charged for time not credited to the teacher. . . .”

There is no substantial change in the language as newly amended except to remove the *requirement* that such accumulations be repaid within one (1) year after re-employment. This amendment puts the re-employed teacher who has previously withdrawn his contributions in an elective position consistent with the language of § 14(n) of the Act, Burns IND. STAT. ANN., § 28-4511(n) which provides for voluntary election to come under the act subsequent to each amendment thereof, and § 14(h) Burns IND. STAT. ANN., § 28-4511(h) permitting a teacher to waive his rights to any previous years of service at time of transfer to the fund.

All teachers who participated in the Indiana State Teachers' Retirement Fund on and after January 1, 1955, by making contributions thereto, are subject to the provisions of the Indiana Public Employees Social Security and Supplemental Retirement Benefits Act, Ind. Acts of 1955, ch. 329, Burns IND. STAT. ANN., §§ 60-1911—60-1940, except to the extent that their exposure to the operation of the latter law may be limited by their original contracts of employment in view of the incontinuity of their service, by their privilege to elect to withdraw as a participating member of the Indiana State Teachers' Retirement Fund, and by the operation of other laws applicable hereto. The records in your office verify that on December 16, 1955, a referendum of the teachers

covered by the State Teachers' Retirement Fund was held pursuant to the provisions of Ind. Acts of 1955, ch. 329, § 4, Burns IND. STAT. ANN., § 60-1911. Minutes of the meeting of the Trustees of the Teachers' Retirement Fund dated December 19, 20 and 21, 1955, show that a majority of the teachers eligible to vote in that referendum voted in favor of coming under the Federal Social Security Act, 42 U.S.C.A. § 418(d) (3). Said minutes also show that the Governor was notified of the results of such referendum. The Federal State Agreement, dated September 12, 1951, providing coverage of state employees under the Federal Social Security Act, 42 U.S.C.A. §§ 301—1305, was subsequently effectively modified on December 31, 1955, to cover certain members of the Teachers' Retirement Fund effective January 1, 1955.

Section 20 of Ind. Acts of 1955, ch. 329, Burns IND. STAT. ANN., § 60-1931, reads, in part, as follows:

“(a) An employee subject to the supplemental benefits of this act [§§ 60-1911—60-1940], who ceases to be in service may at any time thereafter and prior to death, retirement, or resumption of service, elect to suspend his membership in the system of which he is a member, except that such election may not be exercised at any time after the member is eligible for retirement Upon return to active service, such employee may again claim service credit for such previous period of employment. . . .”

From a reading of the above-quoted sections together, it is clear that at some point after return to service, the teacher may again become entitled to claim credit for her previous years in service. Section 60-1913(a), *supra*, states that, “*Upon return to such active service*, such employee may again claim service credit for such previous period of employment.” However, a further requirement is added by § 28-4506(f), *supra*, wherein he is given credit for such prior service upon payment within one [1] year of the amount previously withdrawn by the teacher.

A member or beneficiary of the Teachers' Retirement Fund is defined in § 14(a) thereof, Burns IND. STAT. ANN., § 28-4511(a) to include “any legally qualified and regularly em-

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ployed teacher. . . .” It was concluded in 1962 O.A.G., pages 160, 162, No. 33, that a “substitute teacher” is not a “regularly employed” teacher and cannot therefore be an active participating member of the Fund.

Section 14(m) of the Act, Ind. Acts of 1915, ch. 182, as amended, Burns IND. STAT. ANN., § 28-4511(m) further provides, in part, as follows:

“ . . . Credit shall be given under this act for all years of service rendered under its provisions, before, as well as after, the taking effect of this act. Not less than one hundred twenty [120] days of service, whether under contract or not, shall be required for one year of service credit. No teacher shall be granted more than a year of credit for service rendered during any one calendar year or fiscal year.”

In my opinion this subsection does not require that a re-employed teacher serve in such re-employment at least sixty (60) days before he is entitled to claim prior service credit. It merely establishes the minimum number of days’ service required before one [1] year’s service credit may be given.

It is my opinion, based on the above-quoted statutes, that a teacher may become an active, participating member of the fund upon a *bona fide* re-employment under contract, and may claim credit for all prior service upon repayment of all accumulations previously withdrawn. No minimum number of days of re-employment is necessary before credit may be claimed for such prior service. It would, however, be a question of fact to be determined by the Board of Trustees, whether or not an individual was a full-time *bona fide* employee under a valid employment contract in any given case. 1959 O.A.G., pages 249, 252, No. 53.

In conclusion, it is my opinion that a teacher, who has fifteen or more years of service and has not attained age fifty (50) years, and a teacher who has ten (10) or more years of service and has not attained age sixty-five years and who has left the service and withdrawn her total accumulation, but subsequently returns to active service as a full-time, *bona fide* employee under a valid contract, and repays all accumulations previously withdrawn, and serves less than sixty

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(60) days in such re-employment, is entitled to retirement benefits on subsequent retirement at age fifty (50) years or age sixty-five (65) years, respectively, under Ind. Acts of 1955, ch. 329, § 16, Burns IND. STAT. ANN., § 60-1927.

OFFICIAL OPINION NO. 38

September 17, 1965

Mr. Lewis B. Grafft
Assistant to Secretary-Treasurer
Indiana Port Commission
706 State Office Building
Indianapolis, Indiana

Dear Mr. Grafft:

Your letter of August 4, 1965, has been received requesting an Opinion specifically in regard to purchasing and contracting functions, as follows:

“There has been some question as to whether the purchasing and contracting functions of the Port Commission are to be carried on by the Department of Administration or by the Commission itself.

“In asking this question, the Commission is not attempting to divest itself of control by the Department of Administration, if such control does, in fact, exist by law. To the contrary, if the facilities and services of the Department of Administration are available to the Commission, by law or by election, the Commission desires to avail itself of these services at least until such time as its entire operation is located at the Port site and is involved only with the operation and maintenance of the Port and its facilities and the expenditure of other than State-appropriated funds.”

Pursuant to the provisions of the Indiana Port Commission Act, Acts of 1961, ch. 11, p. 14, as amended by Acts of 1963, ch. 395, p. 1096, and Acts of 1965, ch. 224, p. 521, as supplemented by Acts of 1965, ch. 237, p. 608, as found in Burns IND. STAT. ANN., (1961 Repl. and 1965 Supp.),