> the sole power of appointing and removing any member of the department as chief of the department: Provided, That such appointment shall be made by the mayor from the personnel of said department having had at least five [5] years' service in said department: Provided further, That the removal of any member of the police department as chief of said department shall be deemed as removal from rank only, and not from the department: Provided, further, That the office of [chief of police and the office of] superintendent of police shall be considered as one and the same office."

This section only requires that the person appointed chief of a police department have had at least five years' service in said department and since your question indicates that the person in question has more than twenty years' service as a member of the department, he would meet this qualification.

In summary hereof, it is my opinion that:

1. A man who has completed twenty years of service as a member of the police department may be retired because of physical disability;

2. Such man, if it is agreeable with both himself and the board of trustees, may be returned to active duty without a physical examination;

3. The only qualification for a chief of police in either Evansville or Michigan City is five years' service in said department, and this requirement is met according to your question.

OFFICIAL OPINION NO. 22

April 16, 1964

Hon. Earl F. Landgrebe
State Senator
State Road 130
Valparaiso, Indiana

Dear Senator Landgrebe:

This is in answer to your recent letter wherein you requested my Official Opinion concerning applications for re-

newal retailer permits under the 1935 Liquor Control Act on establishments located in unincorporated areas, your specific question reading as follows:

> "Does this requirement of 'resident petitions' include applications for 'club' permits located in unincorporated areas, or does it extend only to 'restaurant' establishments?"

A club is defined by the Acts of 1935, Ch. 226, Sec. 3, as amended, as found in Burns' (1956 Repl.), Section 12-303(c), as:

> "'The word 'club,' whenever used in this act, shall be construed to mean a corporation or association organized or formed in good faith by authority of law, which has been in active continuous existence for at least three [3] years prior to the date on which an application for permit is filed by such corporation or association with the proper officer under this law, as hereinafter provided, and which has in good faith maintained a membership roll during said three [3] years, and has at the time the application is filed more than fifty [50] members with dues paid to date, and which is the owner, lessee, or occupant of an establishment operated solely for objects of a national, social, patriotic, political or athletic nature, or the like, but not for pecuniary gain, and the property as well as the advantages of which belong to all the members thereof, and which maintains an establishment provided with special space and accommodations where, in consideration of payment, food, with or without lodging, is habitually served; it shall also mean the establishment so operated. The foregoing shall constitute the definition of a 'club' so as to render the same eligible to apply for and be granted, in the discretion of the commission, the appropriate permit or permits subject to the provisions of this act, if the premises with respect to which said application is filed are situated within the corporate limits of a town or city. Clubs may apply for and be granted, in the discretion of the commission, appropriate permits with respect to premises situated outside the corporate limits of an incorporated town or city, if said clubs as defined

above are duly organized or formed for social and athletic and/or outdoor exercise purposes and require and receive an annual membership fee of at least six dollars [$6.00] and have also an investment of not less than five thousand dollars [$5,000] in any grounds or fields especially prepared for athletic or physical exercises (in addition to any investment in buildings proper) and the said grounds or fields have been especially prepared for said purposes for a period of at least six [6] months previous to the application for said permit and have been patronized and used regularly during seasonable weather for physical exercise upon said grounds: Provided, That no permit shall be issued in any case outside the limits of any city or incorporated town where the club is likely or disposed to avail itself of such permit for maintaining or operating a night club or roadhouse, as the same is commonly understood, and the maintenance or operation of either a night club or roadhouse by such permittee shall constitute a ground for revocation of its permit. Likewise any corporation or association which has been in continuous existence for at least three [3] years and which has been formed for any of said purposes, and which has been well known as such organization during said period of time and which either through the financial records which it has preserved or through the financial institution or institutions with which it has dealt, can show that it has been in such continuous active operation for said period of three [3] years, and which has acquired by lease or ownership or other kind of substantial control an establishment outside the corporate limits of any city or town of such respectability and probable permanence as to warrant, in the judgment of the commission, the issue of the appropriate permit thereto, may be eligible, although it does not have the qualifications, other than those contained in this sentence, to receive and be granted any retailer's permit at said establishment: Provided, That last said club shall in no case be granted any permit where said club is likely or disposed to avail itself of such permit for maintaining or operating a night club or roadhouse, as

the same is commonly understood or as the same is defined in this section, and the maintenance or operation of either a night club or a roadhouse by such permittee shall constitute a ground for revocation of its permit. 'Night club,' within the meaning of this paragraph (c) shall include an establishment situated outside the corporate limits of any incorporated city or town which is not patronized or but irregularly patronized during the daylight hours, and is not patronized regularly for outdoor exercise during seasonable weather, and which attracts patronage by reason of entertainment at night, and a considerable or larger portion of the income of which is derived from night attendance. 'Roadhouse' within the meaning of this paragraph (c) shall include an establishment situated outside the corporate limits of a city or town which, either on account of the practices therein carried on, or on account of facilities provided which will likely be employed for evil practices, and which is of such character that the same is likely to be considered either a restaurant, hotel or club, and which is frequented or likely to be frequented by persons of both sexes under circumstances likely to promote immorality, or which has rooms and quarters so disposed as to be readily available or secretly available for improper conduct or immoral practices.

"Notwithstanding any previous provision made in this subdivision (c) clubs, the establishment of which is located within the corporate limits of any city or town, the membership of which is comprised of or forms a lodge or local chapter or corresponding unit of any fraternal order or of any other association of a kindred nature, or of any body, the membership of which is comprised of persons who have served in the military and/or naval service of the United States of America, which has been in existence on a national scale for more than five [5] years continuously prior to the date of the application shall also be deemed a club within the meaning of this act, irrespective of other qualifications, and shall be known as a 'Fraternal Club,' and shall be eligible to the appropriate permit

or permits in respect to said establishment located within the corporate limits of any city or town.

"In respect to any club herein defined which is eligible to the issue of a permit in respect to premises situated within a city or town, or outside of the corporate limits of a city or town, one permit may be issued to such applicant in respect to an establishment located outside of the corporate limits of a city or town, and another appropriate permit may be issued to the said same applicant in respect to an establishment located within the corporate limits of a city or town, but a separate license fee shall be charged therefor."

The basic provisions of the Liquor Control Act of 1935 relating to the requirements for the issuance of a new or renewal "retailer" type permit may be found in the Acts of 1935, Ch. 226, Sec. 10, as amended, as found in Burns' (1956 Repl.), Section 12-509, which reads as follows:

"Beer retailers' permits for the sale of alcoholic malt beverages may be issued as hereinafter provided. Any person desiring to sell alcoholic malt beverages to patrons or customers for consumption on licensed premises, shall make application to the commission for a retailer's permit, which application shall be writing, and verified, on forms herein authorized to be prescribed and furnished, and the commission may, in its discretion, after the proceeding shall have been concluded, as herein prescribed, in relation thereto subject to the restrictions of this act, issue such retailer's permit.

* * *

"At the time of filing an application for a beer retailer's permit, the applicant therefore shall pay in cash to said excise administrator a license fee of two hundred dollars [$200] if the premises, at which sales under said beer retailer's permit are to be made, be located in any city of the first or second class; one hundred fifty dollars [$150] if located in any town or city having a population, according to the last preceding decennial census of the United States, of less than

thirty-five thousand [35,000] if located outside the corporate limits of any incorporated town or city, one hundred dollars [$100], which said respective license fees in all of said cities, however, shall be increased if such applicant has accomodations [accommodations] for the service of any number of guests in excess of fifty [50] as follows: Such applicant shall pay in addition to said license fee mentioned above, the sum of fifty dollars [$50.00] where such applicant has accommodations for one hundred [100] guests, and where such applicant has accommodations up to one hundred fifty [150] guests, said full additional sum shall be seventy-five dollars [$75.00], and for each fifty [50] accommodations in excess of one hundred and fifty [150], said additional sum shall be increased twenty-five dollars [$25.00]. Where such applicant has accommodations in number in excess of any multiple of fifty [50], such excess shall be computed as though such excess accommodations were exactly fifty [50] in number. Whenever the word 'accommodations' is used in this act, such words shall mean the seating capacity for the serving of food in the room or rooms in which alcoholic beverages are sold, but in the case of a hotel it does not signify any accommodation or seating capacity in any sleeping quarters.

* * *

"* * * The holder of a retailer's permit, while the same continues in force, subject to revocation by the commission for violation of any provision of this act, or for violation of any rule or regulation of the commission, shall be entitled to purchase alcoholic malt beverages only from permittees under this law entitled to sell to him and to possess and sell at retail (but not at wholesale) to patrons and customers only on the premises described in his application and permit, and not elsewhere, and such alcoholic malt beverages may be consumed upon said premises only by patrons or customers who are seated, both while being served and while consuming such alcoholic malt beverages, at a table or counter ordinarily used in the serving of food and/or meals: Provided, That no counter or similar

arrangement shall be kept or maintained in said premises at which patrons or customers are permitted to stand and be served and/or consume such drinks; provided also, that such holder of said retailer's permit for alcoholic malt beverages may also sell to any patron or customer and deliver to such customer on the licensed premises, (and not on the street, and not at the curb outside thereof), or to such customer's home, alcoholic malt beverages in bottles or in such containers as are permissible under the rules and regulations of the commission, in a quantity not to exceed forty-eight [48] pints of alcoholic malt beverages at any one time. Except as otherwise authorized herein, no beer retailer's permit for alcoholic malt beverages shall be issued to:

* * *

"(11) *A person who is not the proprietor of a* restaurant located and being operated, on the premises described in the application for said permit or of a hotel as defined herein or a *club as defined herein,* owning, or leasing said premises as a part thereof (provided, that nothing contained in this specification (11) shall apply to the qualifications for, or affect the privileges to be accorded under a dealer's beer permit, or a dining-car beer permit). The foregoing eleven [11] specifications may be referred to elsewhere in this act as 'special disqualifications.'

* * *

"A beer retailer's permit may be issued in respect to premises situated outside of any incorporated city or town, but within or in immediate proximity to an unincorporated town. An unincorporated town, within the meaning of this section, is one which has been a settlement or a group of residences for more than ten [10] years, and to which the inhabitants of the surrounding countryside resort for purchases or public meetings or as a community or neighborhood center, and which has borne a name and has been known by said name for more than ten [10] years.

"No beer retailer's permit, however, shall be issued in such unincorporated town, or in immediate proximity

thereto, unless and until the application asking for the issue of such permit bears the written indorsement of thirty [30] taxpayers owning real estate within the township in which said unincorporated town is situated, recommending the character of applicant as law-abiding and responsible, and approving the application. It must also appear by affidavit filed with said application that each of said thirty [30] signers have resided within said township for more than five [5] years last past, and the applicant himself must be shown by affidavit to have lived and resided in said township for at least one [1] year. Also, no application shall be granted in relation to premises situated within said unincorporated town, or in immediate proximity thereto, unless the bond required above to be furnished in case of application for a beer retailer's permit be signed by a surety company to be approved by the commission, and in no case shall said permit be issued unless at least two [2] members of the advisory board of the township wherein said premises are located shall have indorsed their approval in writing on the application, or in lieu thereof one [1] member of the advisory board of the township and the township trustee. In all other respects, the procedure with reference to the granting of said application shall conform to that for granting other applications for a beer retailer's permit.

"The applicant for a beer retailer's permit in respect to premises located within or in immediate proximity to an unincorporated town, who is disqualified by any of the special disqualifications above set out, excepting special disqualification (2), shall not receive a permit: Provided, also, That such applicant must be either the proprietor of a drug store, grocery store, confectionery, or the proprietor of a store in good repute which, in the judgment of the commission, deals in such other merchandise that the sale of alcoholic malt beverages is not incompatible therewith or likely to contravene, in the judgment of the commission, the policies and purposes of this act. In other respects the procedure for the issue of said permit in respect to premises situated outside of any unincorporated city or town, but within

or in immediate proximity to an unincorporated town, shall conform to that required for the issue of a beer retailer's permit under this section." (Our emphasis)

In addition to the foregoing, there is relevant language contained in the liquor retailers' permit section of the Liquor Control Act, which is found in the Acts of 1935, Ch. 226, Sec. 18, as found in Burns' (1956 Repl.), Section 12-517, and reads, in pertinent part, as follows:

"* * * No city or town or board of trustees or common council or other officer thereof shall have any power or jurisdiction to regulate or govern the sale of, traffic in, or transportation of alcoholic beverages, or to levy or impose any tax, fee, license fee or issue or to require any license to be issued by any such town or city or by the officer or agent thereof in respect thereto, excepting only that in towns and cities having a population of less than five thousand [5,000], according to the last decennial census of the United States of America, the board of trustees of such towns or common council of such cities shall have power and jurisdiction to enact an ordinance consenting that liquor retailer's permits may be issued to applicants otherwise duly qualified under this act in respect to premises located within said town or city.

"Said ordinance must be a general ordinance, containing no conditions, exceptions or limitations and after the same has been duly enacted, said ordinance may not be altered, amended or repealed for a period of two [2] years and sixty [60] days after the date of the enactment thereof * * *

* * *

"In case, however, the applicant be a club, as defined herein, then the amount of the license fee, required above in this section, shall be augmented at the rate of fifteen cents [15c] for each member of said club in excess of the first five hundred [500] members.

"No liquor retailer's permit shall be granted to any person unless such person is at the time the holder of both a beer retailer's permit and wine retailer's permit * * *

> "* * * No club shall, however, receive a permit after the date of expiration fixed in this act for permits issued prior to its enactment, unless said club applies for and is granted a beer retailer's permit, a wine retailer's permit and liquor retailer's permit, which may all be granted for said single respective license fee as above provided * * *"

At first blush from a consideration of Burns' 12-303(c), 12-509 and 12-517, *supra,* it might well appear that the 1935 General Assembly intended that all applicants, including clubs, for any retailer's permit, must meet the same application procedural requisites.

This legislative intent in relation to your particular question becomes doubtful upon a consideration of the Acts of 1935, Ch. 226, Sec. 7, clause 4, as amended, as found in Burns' (1956 Repl.), Section 12-505, which reads as follows:

> "No permit entitling the holder thereof to sell or deal in alcoholic beverages shall be granted in respect to premises situated outside of the corporate limits of an incorporated city or town, excepting in three [3] cases only, to wit: (a) A club of the class specifically qualified to obtain a permit in respect to premises situated outside of said corporate limits under paragraph (c) in section three of this act; and, (b) a hotel of the class specifically qualified to obtain a permit in respect to premises situated outside of such corporate limits under paragraph (n) in section three of this act; (c) an applicant for a permit in respect to premises located in or in the immediate proximity to an unincorporated town, pursuant to the provisions of section ten of this act.
>
> "Under no circumstances shall any permit hereunder be issued to a 'night club' or 'roadhouse' situated outside of the corporate limits of a city or town."

From the use of this language the Legislature undoubtedly intended to, and did, differentiate between an application for a club situated outside of corporate limits under "(a)" of Burns' 12-509, *supra,* and an application for a permit in respect to

premises located in, or in immediate proximity to, an unincorporated town under "(c)" of Burns' 12-505, *supra.*

It is true that the definition of a club, as contained in Burns' 12-303(c), *supra,* makes reference to the obtaining by the applicant of a retailer's permit, but that same definition also states, in part, as follows:

> "* * * *Likewise any corporation or association* which has been in continuous existence for at least three [3] years and which has been formed for any of said purposes, and which has been well known as such organization during said period of time and which either through the financial records which it has preserved or through the financial institution or institutions with which it has dealt, can show that it has been in such continuous active operation for said period of three [3] years, and which has acquired by lease or ownership or other kind of substantial control an establishment outside the corporate limits of any city or town of such respectability and probable permanence as to warrant, in the judgment of the commission, the issue of the appropriate permit thereto, *may be eligible, although it does not have qualifications, other than those contained in this sentence, to receive and be granted any retailer's permit at said establishment* * * *" (Our emphasis)

Thus, while it is clear that the 1935 General Assembly intended the nature of the alcoholic beverage permit held by a "club" to be a "retailer's" permit, of which a beer retailer's permit is basic to the receipt of a wine and liquor "retailer's" permit, the General Assembly, by the enactment of Burns' 12-505, *supra,* clearly specified that a club application did not have to have the same procedural requisites by way of application as did a restaurant under Burns' 12-509, *supra.* This differentiation, considered together with the immediately foregoing quote from Burns' 12-303(c), *supra,* makes it clear that an application for the issuance of a "club" retailer's permit on permit premises located outside of the corporate limits of a city or town does not have to be accompanied by the approval of the township officials or the endorsement of thirty (30) taxpayers owning real estate within such township.

It is, therefore, my opinion that the requirement of resident petition was not intended by the General Assembly to be included with applications for "club" permits located in unincorporated areas, that such requirement was intended to be applicable only to "restaurant" establishments.

OFFICIAL OPINION NO. 23

April 23, 1964

Mr. Harry E. McClain
Insurance Commissioner
Department of Insurance
509 State Office Building
Indianapolis, Indiana

Dear Mr. McClain:

Your letter of March 16, 1964, requesting my Official Opinion presented the following questions and reads, in part, as follows:

> "The Department now has before it an annual financial statement, as of December 31, 1963 of a domestic capital stock company, incorporated November, 1952, authorized to make the kinds of insurance described in sub-sections (a) and (b) of Class I of section 59 in which the surplus is reported to be slightly under $22,000.
>
> "We, therefore, ask your official opinion on the following:
>
> "1. Is it required that the above mentioned company maintain a surplus of not less than $50,000?
>
> "2. Does the anti-retroactive provisions of this law apply only to the 1955 amendments or does it likewise apply to the 1959 amendments or any part thereof?"

The Acts of 1935, Ch. 162, Sec. 74, as found in Burns' (1952 Repl.), Section 39-3614, reads, in applicable parts, as follows: