

OFFICIAL OPINION NO. 33

August 2, 1963

Mr. Eugene Garrison
Executive Secretary
Public Employes' Retirement Fund
501 State Office Building
Indianapolis, Indiana

Dear Mr. Garrison:

This is in reply to your letter requesting an Official Opinion as follows:

“We request an official opinion on the following questions:

“Chapter 285 of the Acts of 1961 provide for extending to Deputies of County Sheriff's offices in certain Counties a merit status and calling them County Policemen. The same Act qualified them for retirement benefits under a new retirement formula and under a local retirement fund.

“In a case where Deputy Sheriffs are already members of Public Employes' Retirement Fund, are such employees entitled to withdraw from the Public Employes' Retirement Fund in order to establish a new pension fund as provided by the Acts of 1961?

“If the answer to the foregoing question is yes, is there any time limit on the notice that must be given to this department before such withdrawal is effective?”

Continuation of social security coverage for persons formerly called “deputy sheriffs,” but denominated “county policemen” following creation of a county police force pursuant to the Acts of 1961, Ch. 285, as found in Burns' (1963 Supp.), Section 49-2821 *et seq.*, was the subject of 1963 O. A. G., No. 8.

In such 1963 Opinion, *supra*, it was said:

“The powers and duties of a county policeman, as set forth in the Acts of 1961, Ch. 285, Sec. 4, being

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Burns' 49-2824, *supra*, are identical with those of a sheriff, as set out in 2 R. S. 1852, Ch. 6, Sec. 2, as found in Burns' (1951 Repl.), Section 49-2802 * * *

* * *

"The primary distinction between an organization of deputy sheriffs with police powers and of a county police force is that members of the latter may be member-beneficiaries of a pension trust, and so members of a 'retirement system' * * *"

The definition of "employee" set forth in Section 4 of the Public Employes' Retirement Fund Act, being Acts of 1945, Ch. 340, as found in Burns' (1961 Repl.), Section 60-1601 *et seq.*, and particularly Section 60-1604, excludes

"Employees who are members of other pension or retirement funds or plans, excepting the federal social security program, maintained in whole or in part by appropriations by the state or municipality, or who are presently eligible for membership, or who by reason of their employment will become eligible for membership in such other pension or retirement funds or plans."

Pension trusts authorized by the Acts of 1961, Ch. 285, *supra*, are pension plans maintained in part by appropriations by county sheriff's departments [See: Burns' 49-2829, *supra*] and a county is a "municipality" within the meaning of the Public Employes' Retirement Fund Act, as defined in Burns' 60-1604, *supra*.

1954 O. A. G., page 74, No. 21, concerned one who was a member of the Public Employes' Retirement Fund and later qualified for membership in the Teachers' Retirement Fund, though continuing in the same job. The above definition of "employee" was referred to before it was said at pages 77 and 78 of such 1954 Opinion:

"From the foregoing, and in answer to your question number 1, I am of the opinion that a teacher-clerk, upon becoming licensed under said Rule 32, *supra*,

ceases to be in a classification subject to membership in the Public Employes' Retirement Fund, and is required to be a member of the Teachers' Retirement Fund; that while it is true the provision made for a right to withdraw accumulated funds from the Public Employes' Retirement Fund is set out in Section 12 of said Act, same being Burns' Indiana Statutes (1951 Repl.), Section 60-1612, the basis of the withdrawal of such funds being 'withdrawal from service,' I am of the opinion that when such a teacher-clerk so changes her classification as to ineligibility for further participation as an active member of the Public Employes Retirement Fund, that she would be entitled to consider herself 'withdrawn from service' as used in the Public Employes' Retirement statute for the purpose of making a withdrawal of accumulated funds from the Public Employes' Retirement Fund."

A distinction may be drawn between the situation here involved and that in the 1954 O. A. G., No. 21, *supra*, in that a teacher-clerk's qualification for another retirement fund was due to her own action in applying for a license while county policemen receive their new classification as a group and upon adoption of an ordinance or resolution by the county council. However, the volitional factor does not, by statute, have any bearing upon individual Public Employes' Retirement Fund membership except at the time of effecting participation. [See: Burns' 60-1605, *supra*.]

While authority is granted to the sheriff's department of a county adopting Acts of 1961, Ch. 285, *supra*, to establish an actuarially sound pension trust, such establishment is not required. Nevertheless, following establishment of a pension trust by a sheriff's department, every county policeman in such a department is eligible for membership in the pension trust, and so excepted from employees eligible to be members of the Public Employes' Retirement Fund.

It is, therefore, my opinion that persons who are members of the Public Employes' Retirement Fund as deputy sheriffs are entitled to consider themselves withdrawn from service covered by such fund upon establishment of a pension trust

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by the sheriff's department of any county which adopts the Acts of 1961, Ch. 285, *supra*.

Deputy sheriffs may have become members of the Public Employees' Retirement Fund as employees of a "municipality," (particularly, a "county" which elected, by ordinance or resolution, to participate in the fund and designated as members thereof employees of the sheriff's department [See: Burns' 60-1622, *supra*]) or, in those cases where the county as a whole is not a member of the fund, as employees of a "participating unit," being a department associated with a county, which department has been elected to membership by the governing body. [See: Burns' 60-1604, *supra*.]

A "county" and a "participating unit" are both included in the statutory definition of "municipality" found in Burns' 60-1604, *supra*; therefore, in either case, the Acts of 1945, Ch. 340, Sec. 23, as found in Burns' (1961 Repl.), Section 60-1623, would control withdrawal of the county or of the participating sheriff's department from the Public Employees' Retirement Fund. Notice of withdrawal from the fund is required in Burns' 60-1623, *supra*, as follows:

"* * * Any municipality shall be permitted to withdraw from the fund upon giving six [6] years written notice to the board of trustees of the fund, said six [6] year period shall commence with the first day of the next fiscal year immediately following the filing of such notice. Upon expiration of the six [6] year period said municipality or participating unit of a municipality shall cease to be a member of the fund * * *"

Because there is no provision for a municipality (whether a county or a participating unit) to withdraw part of its employees and retain others in membership in the fund, a sheriff's department could not withdraw from the fund under the provisions of Burns' 60-1623, *supra*, unless such department held membership as a participating unit in the absence of county membership as a whole. If a sheriff's department should be a participating unit and elect to withdraw, it would still be a member of the fund until expiration of the six year

notice, with all rights and duties pertaining to membership continuing effective.

There is no provision by which any statutorily defined employee may withdraw from the Public Employees' Retirement Fund while his employer continues to be a member thereof; but such employees who withdraw from service are impliedly no longer members of the fund, as Burns' 60-1612, *supra*, reads, in part, as follows:

“* * * In the event any member who withdraws from service elects not to withdraw his contributions from the fund and shall later return to the service of the state, or the participating municipality or unit under which he accumulated creditable service and *becomes again a member*, such member shall receive credit for the service previously rendered for which contributions have been made and remain in the fund. Any such member who has withdrawn his contribution and returns to the service of such previous employer and *becomes a member* of the fund after one [1] year of service, may, by repaying the amount previously received by him as a refund, together with regular interest at the rate of two and one-half per cent [2 1/2%] from the date of refund to the date of repayment, again receive credit for the period of creditable service which was forfeited upon withdrawal * * *”
 (Our emphasis)

The 1954 Opinion, *supra*, characterized the teacher-clerk as entitled to consider herself withdrawn from service upon becoming ineligible for further participation as an active member of the Public Employees' Retirement Fund, and such has been here determined to be the status of county policemen eligible to membership in a pension trust supported in part by funds from the county. There is, in Burns' 60-1612, *supra*, no requirement of notice when one who withdraws from service elects to withdraw his contributions, but it is provided that the board of trustees of the Public Employees' Retirement Fund may, at its discretion, “withhold payment of a refund for a period of not to exceed one [1] year after a member has ceased to be an employee” eligible to membership in the fund,

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which provision, so far as administration of the fund is concerned, serves the same function as notice required when a municipality elects to withdraw.

Your first question asked whether employees may withdraw from the Public Employes' Retirement Fund, and the answer is that only municipalities, (such as counties and departmental participating units), are authorized to withdraw from the fund. Employees who withdraw from service cease to be contributing members of the fund although they retain some rights therein until they withdraw their contributions. The inference is that an employee's withdrawal from service amounts to either a withdrawal from, or suspension of membership in, the fund.

In light of the foregoing explanation determining withdrawal from service to approximate withdrawal from the Public Employes' Retirement Fund, it is my opinion that deputy sheriffs, as employee-members of the Public Employes' Retirement Fund, are entitled to consider themselves withdrawn from service when they become county policemen eligible to membership in a pension trust established pursuant to the Acts of 1961, Ch. 285, *supra*; however, such withdrawal is not "in order to establish a new pension fund," it being automatically accomplished upon such establishment and resultant ineligibility to be employee-members of the Public Employes' Retirement Fund.

In answer to your second question, it is my opinion that notice is not required of employees withdrawing from service.

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August 7, 1963

Hon. Paul Hatfield
State Senator
706 Old National Bank Building
Evansville, Indiana

Dear Senator Hatfield:

This will acknowledge your recent letter in which you request my Official Opinion upon the following question: