

18 and 19, both of which were issued under the authority of the State Election Board, contain identical statements to those found in the 1959 Edition, *supra*, quoted above.

In answer to your specific question, it is my opinion that in a city of the third class, such as the City of Mishawaka, each political party has the authority to nominate seven (7) candidates for city councilman-at-large. It is my further opinion that to achieve the total of seven (7) candidates for councilman-at-large each political party in the City of Mishawaka, or any city of the third class, may nominate one (1) candidate for each of the five (5) councilmanic districts and two (2) candidates for city councilman-at-large and the voters of the entire city may vote for the candidates for each of the districts and also the two (2) running at-large.

OFFICIAL OPINION NO. 8

April 10, 1963

Mr. Eugene Garrison
Executive Secretary
Public Employes' Retirement Fund
501 State Office Building
Indianapolis 4, Indiana

Dear Mr. Garrison:

This is in reply to the following request for an Official Opinion:

"Chapter 285 of the Acts of 1961 provided for extending to the deputies of county sheriffs offices, in certain counties, a merit status and calling them county policemen. The same Act also qualified them for retirement benefits under a new retirement formula. As deputy sheriffs these employees were covered under the Social Security program and participation in this Social Security program preceded, by a considerable period of time, participation in the new retirement fund benefits.

"Under these circumstances, are such deputies or county policemen entitled under State and Federal

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law to continue participation in the Social Security program?"

The county sheriff is a constitutional officer who has long had authority to appoint deputies.

See: Indiana Constitution, Art. 6, Sec. 2, and 2 R. S. 1852, Ch. 6, Sec. 4, as found in Burns' (1951 Repl.), Section 49-2804.

In 1959, the Legislature enacted the Acts of 1959, Ch. 143, as found in Burns' (1962 Supp.), Section 49-2805a, providing for appointment by certain sheriffs of a legal deputy "who shall have no police power" and also the Acts of 1959, Ch. 336, as found in Burns' (1962 Supp.), Section 49-2814 *et seq.*, providing in certain counties for a county sheriff's merit board and setting forth the powers and duties of such county sheriffs and their deputy sheriffs "with police power."

See: Burns' 49-2816 to 49-2820, *supra*.

Thereafter, the Acts of 1961, Ch. 285, above referred to and found in Burns' (1962 Supp.), Section 49-2821 *et seq.*, was enacted and authorized creation of a county sheriff's merit board and a county police force in many counties, some of which may otherwise have been subject to the provisions of Burns' 49-2814, *supra*.

The bulk of the Acts of 1961, Ch. 285, *supra*, concerns establishment of a pension trust in which any member of the county police force, otherwise called a county policeman, may be an employee beneficiary. Section 7, Ch. 285 of the Acts of 1961 (Burns' 49-2827, *supra*), reads as follows:

"All deputies sheriff who, upon the taking effect of this act in their respective counties shall have served for more than one [1] year, shall be deemed qualified to serve as county policeman, except that all those holding superior rank, grade or position as deputies sheriff, upon the taking effect of this act in their respective counties must be approved by the sheriff and the board before assuming such superior rank, grade or position as county police.

“Deputies having served one [1] or more years upon the taking effect of this act in their respective counties shall be deemed to have passed their probationary period for county police.”

The section just quoted provides evidence that the Legislature expressly considered and approved continuation of service by a deputy sheriff as a county policeman. However, following establishment of a county police force under provisions of the 1961 Act, the members thereof occupy a previously non-existent position, and are no longer deputies sheriff.

For more than a decade it has been possible for deputies of county sheriffs to have received social security coverage as “employees” of a political subdivision electing same, either under the Acts of 1951, Ch. 313, Sec. 5, as amended, as found in Burns’ (1961 Repl.), Section 60-1905, relating to employees of political subdivisions who are not covered by any existing retirement system, or under the Acts of 1955, Ch. 329, Sec. 4, as found in Burns’ (1961 Repl.), Section 60-1914, as employees of political subdivisions which participate in the Public Employees’ Retirement Fund.

Burns’ 60-1905, *supra*, reads in part as follows:

“(a) Each political subdivision or local unit of the state is hereby authorized to submit for approval by the state agency a plan for extending the benefits of title II of the Social Security Act [F. C. A., tit. 42, §§ 401-410], in conformity with applicable provisions of such act, to employees of such political subdivision or local unit.”

Under the 1951 and the 1955 Acts referred to above, the Public Employees’ Retirement Fund is the named state agency authorized to administer provisions relating to social security coverage of employees of political subdivisions of the state. Pursuant to each of such acts, social security coverage of employees of political subdivisions could be effected only by modification of the federal-state agreement entered into by the Social Security Administration and the Public Employees’

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Retirement Fund under authority of Section 218 of the Federal Social Security Act.

See: Burns' 60-1905 and 60-1914, *supra*.

The Federal Social Security Act is to be found in 42 U. S. C. A., where Section 218, *supra*, is Section 418 therein. 42 U. S. C. A. § 418, subsection (a) authorizes extension of the insurance system commonly called social security to "services performed by individuals as employees" of a state or of a political subdivision.

Section 418, *supra*, subsection (d), paragraph (3), applies specifically to social security coverage of services performed by employees of political subdivisions in positions covered by a retirement system, which term is defined in Section 418, *supra*, subsection (b), paragraph (4) to include a pension system established by a political subdivision of a state, such as that provided for county policemen by the Acts of 1961, Ch. 285, *supra*. However, subsection (d), paragraph (5), subparagraph (A), of the same Section 418, reads as follows:

"Nothing in paragraph (3) of this subsection shall authorize the extension of the insurance system established by this title to service in any policeman's or fireman's position."

An exception thereto, applicable to certain named states, not including Indiana, is found in 42 U. S. C. A. § 418, *supra*, subsection (p).

In the Handbook for State OASI Administrators, [6-7-57 TL No. 10], Coverage Under Agreements, § 253, it is said:

"A policeman's or fireman's position for purposes of Federal-State agreements is any position which would be so classified under the statutes and court decisions of the State. Generally, these positions exist in the regularly organized police and fire departments of incorporated municipalities, towns, cities, etc. In most States a policeman is a member of the 'police' which is an organized civil force for maintaining order, preventing and detecting crimes, and enforcing

laws. *The terms 'policeman' and 'fireman' do not include services in positions which, although connected with police and firefighting functions, are not policeman or fireman positions.*

"In many jurisdictions, services as a game warden, forester, forestry patrolman, crime investigator, supervisor, stenographers in a police department, sheriffs, and highway patrolmen have been held not to be in 'policeman's' positions." (Our emphasis)

The powers and duties of a county policeman, as set forth in the Acts of 1961, Ch. 285, Sec. 4, being 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. Such duties are, within the county, substantially the same as the powers of a city police officer provided by the Acts of 1905, Ch. 129, Sec. 161, as found in Burns' (1950 Repl.), Section 48-6107; however, Section 164 of the 1905 Act, as found in Burns' (1950 Repl.), Section 48-6110, specifically empowers members of the city police force in relation to matters as to which a sheriff has no comparable express authority.

Furthermore, police powers have also been delegated by statute to many other officers and persons, thus:

Acts of 1905, Ch. 169, Sec. 142, as found in Burns' (1956 Repl.), Section 9-1024, to judicial officers, coroners, constables, marshals, watchmen and train conductors;

Acts of 1905, Ch. 169, Sec. 453, as found in Burns' (1956 Repl.), Section 10-508, to church sextons and officers of fairs;

Acts of 1913, Ch. 192, Sec. 2, as amended, as found in Burns' (1950 Repl.), Section 20-802, to the fire marshal;

Acts of 1927, Ch. 18, Sec. 1, as found in Burns' (1951 Repl.), Section 55-3401, to railroad policemen;

Acts of 1939, Ch. 142, Sec. 23, as found in Burns' (1950 Repl.), Section 21-1023, to cemetery sextons;

Acts of 1945, Ch. 344, Sec. 10, as found in Burns' (1952 Repl.), Section 47-855, to the state police; and

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Acts of 1961, Ch. 333, Sec. 503, subsection (i), as found in Burns' (1962 Supp.), Section 25-869, to the securities commissioner.

The foregoing officers and employees all may, upon occasion, exercise police power; however, none of them have all the duties of a city policeman, nor may any of them be classified as "organized police departments of incorporated municipalities."

See: Handbook for State OASI Administrators, § 253, *supra*.

While a county police force is undoubtedly an organized police department, a county is not an incorporated municipality, such as a town or city.

Hence, the position of a county policeman created pursuant to the Acts of 1961, Ch. 285, as found in Burns' 49-2821, *supra*, is apparently not a policeman's position excluded from social security coverage by 42 U. S. C. A. § 418(d) (5) (A), *supra*, as such term is interpreted by the Handbook, *supra*.

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," as that term is defined in 42 U. S. C. A. § 418, *supra*, subsection (b), paragraph (4). However, careful perusal of the provisions of the Federal Social Security Act and of the state enabling acts relating to eligibility for social security of employees in positions covered by a retirement system reveals that all of such provisions relate to coverage by a retirement system prior to coverage by social security. The statutes are wholly silent as to any effect of subsequent coverage of any services by a retirement system. In fact, while it is provided in federal and state statutes that certain services rendered to a political subdivision may be excluded from social security coverage at the time when the state agreement is modified to include such political subdivision and that services previously excluded may be included by later modifications, there is no provision for subsequent termination of coverage of any