> the decisions on the former act furnish the rule of construction for the latter.
>
> " 'This view is greatly strengthened by the fact that it is customary for the legislature itself to limit the operation of such acts, *where they are not intended to affect rights of action already accrued.*' " (Our emphasis)

The holding of the court was that, under long-established precedent, the 1937 amendment must be treated as being applicable to the estate of the decedent who had died prior to its enactment. In view of the decision in In re Batt's Estate, *supra,* it is obvious that, in the absence of any legislative directive to the contrary, the 1957 amendment to the same section of the statute must, likewise, be treated as being applicable to estates of decedents who died prior to its enactment.

Therefore, it is my opinion that the Acts of 1957, Ch. 204, as found in Burns' 7-2430, *supra,* is applicable to the estate of a decedent dying before June 25, 1957, the effective date of said act, as well as to estates of decedents dying after that date.

OFFICIAL OPINION NO. 52

July 25, 1962

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

Dear Mr. Garrison:

This is in reply to your request for an Official Opinion regarding the effect of the Public Employes' Retirement Fund law on certain employees of the City of Indianapolis. Your letter states that the City of Indianapolis filed a notice of withdrawal from the Public Employes' Retirement Fund in accordance with Section 23 of Chapter 340 of the Acts of 1945. Subsequently, the board of sanitary commissioners of the City of Indianapolis elected to continue participation of their employees under the Public Employes' Retirement Fund. Your letter further states that the fund is encountering many cases

where current employees of the board of sanitary commissioners had also been employed previously by the City of Indianapolis in various other departments which have now withdrawn from participation in the fund. Your letter sets out four specific questions involving the amount of credit to be given to such employees. Due to the nature of the questions raised, I have taken the liberty of answering them by way of a general discussion rather than setting them out individually in this Opinion.

The Public Employes' Retirement Fund of Indiana was established by the Acts of 1945, Ch. 340 to provide retirement, death and withdrawal benefits for officers and employees of the state and of those political subdivisions of the state which voluntarily chose to participate. The City of Indianapolis, by ordinance of the common council, elected membership in the fund, effective January 1, 1947, for all city employees who had been so employed for ten years or more. By later common council ordinance, membership in the fund was extended to *all* employees receiving salary or wages from the City of Indianapolis, such membership to be effective January 1, 1953. On December 19, 1955, the common council of the City of Indianapolis passed Resolution No. 1, 1955, which elected social security coverage for virtually all employees of the civil city, and also served to advise the board of trustees of the Public Employes' Retirement Fund that the City of Indianapolis desired to withdraw from said fund pursuant to the terms of Ch. 340 of the Acts of the General Assembly of the State of Indiana, 1945, as amended.

The last paragraph of Sec. 23 of Ch. 340 of the Acts of 1945, as amended and found in Burns' (1961 Repl.), Section 60-1623, provides for the withdrawal by a municipality from participation in the fund. That paragraph reads 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 and all amounts

> exclusive of the amounts set aside for payments of retirement benefits granted during the period such municipality was a participant, shall, after deduction of a proper pro rata charge for administration expense, be refunded to said municipality. Thereafter no such municipality nor any employee thereof shall have any claim of any kind against the fund, but nothing contained herein shall deprive the employee of his right to proceed against the municipality for a refund of his contributions, less any retirement benefits received by him. After satisfying all claims of employee members by the municipality, should any funds remain, they will be held in trust by the municipality subject to the equitable distribution among the employees who were members of the fund at the time of withdrawal."

The effect of the withdrawal from the fund by a municipality was considered by me in 1954 O. A. G., page 252, No. 69, with particular reference to the account of a retired member who had outlived her life expectancy as computed at the time of her retirement and the establishment of her individual retirement reserve account. That Opinion states that upon expiration of the six year period following written notice of withdrawal the municipality ceases to be a participant in the Public Employes' Retirement Fund.

Any rights which any individuals have in the retirement fund must be found within the terms of the statutes creating and governing the fund. The Acts of 1945, Ch. 340, Sec. 24, as amended and found in Burns' (1961 Repl.), Section 60-1624, provides in part as follows:

> "Where a member has left or leaves the employ of an employer which is included in the fund and enters the employ of another employer included in the fund, his service credits shall remain unimpaired, but in such a case the unliquidated liability for prior service shall be prorated by the board between the employers concerned in a basis determined by the board."

The terms used in the Retirement Fund Act are defined in the Acts of 1945, Ch. 340, Sec. 4a, as added by the Acts of 1957, Ch. 232, Sec. 1, as amended and found in Burns' (1961

Repl.), Section 60-1604. That section includes the following definition, among others:

> " '*Employer*' *shall mean* the state of Indiana, including any state agency which is a body politic and corporate, or any department as herein defined, any judicial circuit or *any municipality included in the fund.*" (Our emphasis)

Burns' 60-1604, *supra,* also defines the following terms which are pertinent here:

> " 'Department' shall mean any department, institution, board, commission, office, court, agency, institution of higher education, or any division of the state government receiving state appropriations and having power to certify payrolls authorizing payments of salary or wages against appropriations made by the general assembly from any state fund, or against trust funds held by the treasurer of the state including any departments receiving salaries or wages from state appropriations, or any board including the office of the state adjutant general in the operation of all branches of the national guard authorized by law to operate a state property independently of appropriations or funds held and disbursed by the state treasurer.
>
> " 'Municipality' shall mean a county, city, town, township, any political body corporate, any body politic and corporate and any political entity, any school corporation, a public library or public utility of any county, city, town or township, said public utility to be included whether operated by the city or town or under the terms of trusteeship for the benefit of such city or town, or a participating unit as herein defined: Provided, That a state agency of any kind or a judicial circuit shall not be construed to be a municipality.
>
> " 'Participating unit' shall mean the department or division of a department, associated with a municipality, which has been elected to membership by the governing body in those cases where the municipality as a whole is not a member of the fund."

The City of Indianapolis, by giving written notice of its intention to withdraw from the Public Employes' Retirement Fund, evidenced the fact that the city would cease to be a participant in that fund at the end of the six year withdrawal period. However, during the six years of the notice period, the city continued to be a participant, and all of its employees continued to be members accruing creditable service in the fund. In their desire to continue retirement fund coverage of their particular employees, the board of sanitary commissioners of the city, acting as the "governing body" of a "participating unit," as those terms are defined in Burns' 60-1604, *supra,* acted by resolution to become a participant in the fund, under the authority granted by the Acts of 1945, Ch. 340, Secs. 19 and 22, as amended and found in Burns' (1961 Repl.), Sections 60-1619 and 60-1622. Since a "participating unit" under the act could only request participation in the fund by ordinance of its own governing body in the event that the municipality as a whole was not a member of the fund, the board of sanitary commissioners could only request that their participation as a single unit begin in the fund when the participation of the City of Indianapolis and all of its employees ceased by virtue of the expiration of the six year period of notice. Thus a simultaneous action took place—the City of Indianapolis completed its withdrawal from the fund and at the same time the board of sanitary commissioners effected coverage in the fund for its employees, who had previously been covered as city employees. It is therefore my opinion that the employees of the board of sanitary commissioners were in effect leaving the employ of one "employer" included in the fund and entering the employ of another "employer," as that term is used in the Retirement Fund Act. The rights in the fund of a member leaving the service of one employer and entering the service of another employer were considered in 1954 O. A. G., page 118, No. 33, and the following conclusion reached, as stated on page 121:

> "1. That the transfer of employment from one municipality to another does not destroy such employee's earned creditable service so long as *both* employers are *participants* in the fund *and* such employee does *not* withdraw his contributions to the fund upon termina-

tion of his first employment, the length of time between such employments being immaterial."

In this instance, both of the "employers," the city and the board of sanitary commissioners, would be considered to be included in the fund at the precise moment the city effected withdrawal and the board extended coverage to its employees as a "participating unit," and thus the service credits of the employees would remain unimpaired under the terms of Burns' 60-1624, *supra,* and the unliquidated liability for prior service would be prorated between the employers concerned in a basis determined by the board of trustees of the Public Employes' Retirement Fund.

Since the city extended Public Employes' Retirement Fund coverage to all of its employees in 1953, all of the city employees so covered were required by statute to contribute to the fund from that time until the date of withdrawal of the city from the fund. There are no statutory provisions excusing participation because a unit anticipates withdrawing, and the city was thus without authority to deny such participation to any employees. The fact that some city employees were not required to make payments to the fund during this six year period because they could not acquire ten years of service by the termination of the city's period of participation in the fund would not affect such employees' rights to creditable service for such period.

OFFICIAL OPINION NO. 53

July 31, 1962

Hon. Joseph L. Hensley
State Representative
251 Hargon Drive
Madison, Indiana

Dear Representative Hensley:

This is in response to your letter of July 7, 1962, wherein you asked my Official Opinion concerning the legality of a "* * * new policy aimed at giving Hoosier dealers an extra advantage over out-of-staters in bidding for State coal con-