Acts of 1955, Ch. 329, *supra,* to which provisions the teacher had not consented, the disabled teacher with vested contractual rights under the Acts of 1915 is entitled to receive the disability payments in the amounts and under all the terms and conditions prescribed by the 1915 Act. However, a valid election to receive disability benefits under the provisions of a specified act is binding and cannot later be changed by the retiree in order to take under the other act.

The question of whether or not a valid election of benefits has been made by the member which would amount to a waiver of other rights would be a matter for factual determination by the board of trustees of the Teachers' Retirement Fund in each particular case.

OFFICIAL OPINION NO. 56

August 3, 1962

Hon. John C. Ruckelshaus
State Senator
129 E. Market Street, Room 1000
Indianapolis, Indiana

Dear Senator Ruckelshaus:

This is in response to your written request, dated July 18, 1962, for my Official Opinion on the following question:

> "Can an individual who was elected to the office of Prosecuting Attorney of Marion County, Indiana, in the General Election held in 1958 resign from said office and become Mayor of the City of Indianapolis prior to the expiration of his term of office to which he had been elected?"

Your request for my opinion also sets forth Art. 7, Sec. 16 of the Indiana Constitution, which is applicable to your question, and reads as follows:

> "Sec. 16. No person elected to any judicial office, shall, during the term for which he shall have been elected, be eligible to any office of trust or profit, under the State, other than a judicial office."

The ultimate determination of the over-all question presented partly depends upon whether the offices of Prosecuting Attorney and Mayor of the City of Indianapolis are both judicial offices.

The Supreme Court of Indiana, in the case of State *ex rel.* Freed v. Martin Circuit Court *et al.* (1938), 214 Ind. 152, 14 N. E. (2d) 910, held:

> "The prosecuting attorney is a judicial officer, charged with the administration of justice."

To the same effect, are the cases of:

> The State v. Henning (1870), 33 Ind. 189;
>
> State of Indiana *ex rel.* Williams v. Ellis (1916), 184 Ind. 307, 112 N. E. 98;
>
> Tinder, Prosecuting Attorney, *et al.* v. Music Operating Inc. (1957), 237 Ind. 33, 142 N. E. (2d) 610.

Accordingly, the law of this state appears to be well-settled that the office of prosecuting attorney is a "judicial office."

In considering the legal status of the Mayor of Indianapolis, it should be observed that, by statute, city courts (of which the mayor serves as the judge in all cities of the first class) in any county containing a municipal court, have been abolished.

> Acts of 1925, Ch. 194, Sec. 27, as found in Burns' (1946 Repl.), Section 4-2527.

Therefore, the Mayor of Indianapolis, being the chief executive of a first-class city wherein municipal courts have been established, does not, and cannot, assume judicial powers of a city judge under existing statutes. Nor does such mayor have any other authorized judicial powers, duties or authority legally sufficient to constitute him a judicial officer.

The next question to be decided is whether or not the Mayor of Indianapolis holds an "office of trust or profit, under the state, other than a judicial office," as contemplated by the constitutional provision herein considered.

In Chambers v. The State *ex rel.* Barnard, Prosecuting Attorney (1890), 127 Ind. 365, 367, 26 N. E. 893, the court held:

> "It must, therefore, be regarded as the settled law of this State that if an office is purely municipal, the officer not being charged with any duties under the laws of the State, he is not an officer within the meaning of the Constitution, *but if the officer be charged with any duties under the laws of the State, and for which he is entitled to compensation, the office is a lucrative office within the meaning of the Constitution.* * * *" (Our emphasis)

In order to apply the above-emphasized portion of the court's decision to your question, consideration should be given as to whether: (1) the Mayor of Indianapolis is charged with any duties *under the laws of the State of Indiana;* and (2) whether, as such mayor, he is entitled to *compensation.*

In considering the first of the above two tests, reference is made to the well-considered and often-cited case of Attorney General *ex rel.* Moreland v. Common Council of City of Detroit (1897), 112 Mich. 145, 70 N. E. 450, 37 L. R. A. 211, which involved the legality of one person holding two lucrative offices. The offices of Mayor of the City of Detroit and Governor of the State of Michigan were involved. The Supreme Court of Michigan, in this case, stated:

> "* * * First, that an officer of a city, whose duties are simply and purely municipal, and who has no function pertaining to state affairs, does not come within the constitutional description of officers holding office *under the state;* and, second, where officers in cities are appointed or elected by the community in obedience to laws of the state which impose duties upon them in relation to state affairs, as contradistinguished from affairs of interest to the city merely, such as relate to gas works, sewers, waterworks, public lighting, etc., they are upon a different footing, and may properly be said to hold office *under the state.* * * *" (Our emphasis)

The court proceeded to distinguish between "offices *of* the state," which phrase pertains to state officers, such as the

Governor, Lieutenant Governor, Secretary of State and other elected and appointed state officials, and "offices *under* the state."

The court held that functions performed "under the state" are not limited to state, county and township officers, but also extend to municipal officers. In this connection, the court, at p. 453, stated:

> "* * * The next distinction made relates to municipal offices, and it is said that officers elected in cities are not to be classified with county and township officers, and cannot be said to hold office *under the state;* that such offices are held *under the city.* * * * These are all part and parcel of the one great scheme of state government. But at this point it is said that we must draw the line; that when we pass the confines of the smallest village or the largest city the section does not apply. *Such localities are parts of the state, state laws are enforced within such territory, and the various officers have to perform many functions pertaining to state as contradistinguished from city affairs.* * * *" (Our emphasis)

The court then proceeded to enumerate specific duties pertaining to state affairs performed by the Mayor of Detroit under Michigan laws, which included preservation of the public health, morals and welfare. The court concluded, that since the offices of mayor and governor were both offices *"under the state,"* the same were incompatible.

Certain Indiana statutes either authorize or require the Mayor of Indianapolis to perform the following functions:

Acts of 1905, Ch. 129, Sec. 80, as amended, and found in Burns' (1962 Supp.), Section 48-1502, requires the mayor to execute and enforce the laws of the state in these words:

> "It shall be the duty of the mayor:
>
> "First. To cause the ordinances of the city and *the laws of the state to be executed and enforced.* * * *" (Our emphasis)

1 R. S. 1852, Ch. 23, Sec. 18, as amended, and found in Burns' (1961 Repl.), Section 56-123, authorizes the mayor to take acknowledgments.

Acts of 1861, Ch. 76, Sec. 1, as amended, and found in Burns' (1962 Supp.), Section 49-601, authorizes the mayor to administer oaths and take acknowledgments.

Acts of 1881 (Spec. Sess.), Ch. 38, Sec. 287, as found in Burns' (1946 Repl.), Section 2-1501, authorizes the mayor to take depositions.

Acts of 1951, Ch. 287, Sec. 7, as found in Burns' (1962 Supp.), Section 35-908, authorizes the mayor to appoint trustees of health and hospital corporations.

Acts of 1905, Ch. 129, Sec. 80, as amended, and found in Burns' (1962 Supp.), Section 48-1502 (Eighth), authorizes the mayor of a city to sign all bonds, deeds and written contracts of the corporation.

Acts of 1897, Ch. 86, Sec. 1, as found in Burns' (1952 Repl.), Section 44-301, authorizes the mayor to solemnize marriages.

Acts of 1905, Ch. 129, Sec. 239, as amended, and found in Burns' (1962 Supp.), Section 48-1303, authorizes the mayor to revoke or suspend licenses issued by the city.

Acts of 1905, Ch. 129, Sec. 80, as amended, and found in Burns' (1962 Supp.), Section 48-1502 (Eighth), authorizes the mayor to issue subpoenas and compel attendance of witnesses to testify at hearings on complaint of a licensee.

Acts of 1945, Ch. 190, Sec. 2, as amended, and found in Burns' (1950 Repl.), Section 14-413, authorizes the mayor to appoint members of the board of aviation commissioners.

Such cited functions of the mayor are broad in scope and include powers and duties not limited to affairs of government strictly municipal in character.

In Howard and Another v. Shoemaker, Auditor of State, and Another (1871), 35 Ind. 111, 115, the court held:

> "* * * it is the opinion of a majority of the court that as *the mayor of a city,* under the act of 1867, has duties to perform, under the laws of the State, aside from those which are judicial and those of a purely municipal character, such as the taking and certifying of affidavits and depositions, the proof and acknowledgment of deeds and other instruments in writing

> * * * the office is a 'lucrative' one, within the meaning of sec. 9, art. 2, of the constitution of the State * * *" (Our emphasis)

Under the 1867 Act, referred to above (superseded by Acts 1905, as amended, *infra*), it was the duty of the mayor to "see that the laws of the state and the by-laws and ordinances of the common council be faithfully executed within such city * * *." The first duty of the mayor, prescribed by Acts of 1905, Ch. 129, Sec. 80, as amended by Acts of 1957, Ch. 141, Sec. 1, as found in Burns' (1962 Supp.), Section 48-1502, now in effect, requires that he cause the ordinances of the city and laws of the state to be executed and enforced.

Reference is made to the cases of The State *ex rel.* Platt v. Kirk (1873), 44 Ind. 401 and Mohan v. Jackson (1876), 52 Ind. 599, both of which cite the case of Howard and Another v. Shoemaker, Auditor of State, and Another, *supra*. The first case above referred to held the office of city councilman to be purely municipal and not an office under the state. The second case above cited held that the office of city clerk is not an office under the state within the meaning of the Indiana Constitution, Art. 7, Sec. 16. Thus it appears that our Supreme Court has clearly distinguished the above cases involving a city councilman and city clerk from the Howard and Another v. Shoemaker, Auditor of State, and Another case, *supra*, concerning a mayor, thereby recognizing that a mayor of a city has duties to perform under the laws of the state other than those which are purely municipal or judicial in character.

The mayor, or his counterpart, was held to be an "officer under the state" in the following cases:

> Attorney General *ex rel.* Moreland v. Common Council of City of Detroit (1897), 112 Mich. 145, 70 N. W. 450;
>
> State *ex rel.* Young, Attorney General v. Robinson (1907), 101 Minn. 277, 112 N. W. 269;
>
> Padran v. People of Puerto Rico *ex rel.* Castro (1944), 142 F. (2d) 508;
>
> State *ex rel.* Attorney General v. Armstrong (1907), 91 Miss. 513, 44 So. 809.

With respect to the second of the aforementioned tests, there can be no question but that the Mayor of Indianapolis receives compensation for his services as such public official, and, therefore, holds an "office of * * * profit, under the state."

Acts of 1933, Ch. 233, Sec. 20(a), as added by Acts of 1959, Ch. 107, Sec. 6, as found in Burns' (1962 Supp.), Section 48-1233, provides, in part:

> "The common council of each city shall, by ordinance duly enacted on or before the first day of April of the year in which elections of city officers are held, fix the annual salaries of all elected city officials * * *"

The legal opinions expressed herein appear to be in harmony with the intention of the framers of the 1851 Constitution of the State of Indiana.

In Smith v. Moore (1883), 90 Ind. 294, 305, the court, in its interpretation of Art. 7, Sec. 16 of the Indiana Constitution, referred to the "Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana," which convention was held Monday, October 7, 1850, in the Hall of the House of Representatives, pursuant to an act of the General Assembly to provide for the call of a convention of the people of the State of Indiana, to revise, amend, or alter the Constitution of said state. The court said, in part:

> "* * * It is contended, on the one side, that the purpose of the convention in the adoption of this provision was to insure a stable judiciary; that by thus rendering the judges ineligible, the result is to keep them in their places during the term for which they may have been elected. On the other side, it is insisted that the purpose was to keep the judges of the court free from political alliances, and prevent them using their positions as a means of acquiring other offices. Judging from the debates, we might conclude that the convention had both objects in view. * * *"

In Vol. 2 of the Debates in Indiana Convention 1850, at p. 1735, the discussion on the subject matter of Sec. 7 of Art. 29,

which was revised and subsequently became Art. 7, Sec. 16 of the 1851 Indiana Constitution, John Pettit stated, in part:

> "I wanted time to have prepared an additional instruction, so as to strike out that part which renders a judge ineligible for re-election during the term for which he was elected, and which will render it necessary that he should resign his office on the bench before he can be re-elected to any other. * * *"

To which statement, Walter March replied:

> "For one, I hope the principle contained in that part of the section which it is proposed should be stricken out, may be retained. I am in no way particular about the phraseology, but if there be any one place which ought, more than another, to be kept pure from the polluting presence of the habitual and professed office-seeker, it is that of the judiciary, and I trust that this provision will be preserved in the Constitution. For one, I should be willing to make every officer holding an important office ineligible to re-election to any other office during the term for which he is elected—and I would do so on the principle that when a man has sought an office and obtained it, or when it is conferred upon him without being sought, and he accepts it, he should make it a public duty to fill it well, and not make one office a ladder by which to climb into notoriety or to get into another. Sir, I cannot subscribe to the doctrine advanced in this Convention, and that, too, by high authority, that offices are the mere rewards of talent and public service. They are public trusts, instituted for the public good, and their duties ought to be discharged with faithfulness, to the end, by those who hold them. [Applause]"

The Journal of the Convention of the People of Indiana (1850) to Amend the Constitution discloses, on p. 720 thereof, that Sec. 16 of Art. 7 of the Indiana Constitution, as it now reads, was offered by Mr. March and duly adopted.

In summary, I am of the opinion that an individual elected to the office of Prosecuting Attorney of Marion County, In-

diana, cannot legally resign from said office and become Mayor of the City of Indianapolis, prior to the expiration of his term of office as prosecuting attorney to which he has been elected. This position is consistent with prior Official Opinions of this office.

See: 1951 O. A. G., page 68, No. 26;

1954 O. A. G., pages 83, 85, No. 23.

OFFICIAL OPINION NO. 57

August 9, 1962

Mr. Joe McCord, Director
Department of Financial Institutions
1024 State Office Building
Indianapolis, Indiana

Dear Mr. McCord:

This is in response to your request for my Official Opinion concerning the authority of state-chartered building and loan associations to conduct all or part of their business at a fixed location, other than that of their principal office. Your letter indicates that examiners of your department have discovered several factual situations giving rise to the three questions presented by your request, the first two of which will be considered together and read as follows:

> "1. Is the provision contained within the Acts of 1933, Ch. 40, Sec. 90 (7), as amended, as found in Burns' (1950 Repl.), Section 18-502 (7), alone sufficient to authorize a state-chartered building and loan association to conduct regularly all or part of its business at a fixed location other than that of its principal office, when no authority for a branch office at that location has been granted?
>
> "2. The Acts of 1955, Ch. 40, as found in Burns' (1959 Supp.), Section 18-2159 to 18-2165 provides for the procedure whereby the establishment and operation of branch offices of state-chartered building and loan associations may be authorized. If such an association regularly conducts all or part of its business at a fixed