to be paid in cash payments and the balance of the salary used by the school corporation in the purchase of an annuity for such teacher.

2. Whether or not amounts paid direct by a school corporation for an annuity for the teacher, under the form of contract submitted, would be taxable for federal income tax and social security purposes are questions for federal determination, and accordingly have not been answered in this Opinion.

3. The gross salary paid to the teacher under the submitted form of contract, including the cost of the purchase of the annuity, must be reported to the Indiana Gross Income Division, and gross income tax deductions withheld from the gross amount of the salary contracted for.

This Opinion is based on the form of contract as submitted, and in the event a different arrangement is used in purchasing an annuity, a different result might conceivably be reached.

OFFICIAL OPINION NO. 25
March 29, 1962

Mr. Earl M. Utterback
Executive Secretary
Indiana State Teachers' Retirement Fund
506 State Office Building
Indianapolis 4, Indiana

Dear Mr. Utterback:

This is in response to your recent request for an Official Opinion, which reads, in part, as follows:

"'May a teacher who is receiving a monthly retirement benefit from the Teachers' Retirement Fund waive his rights to the post increase benefits granted retired teachers by the 1961 General Assembly?"

* * *

"Assuming the teacher is permitted to waive his rights and not receive an increase,
The particular post increase benefit for retired teachers to which your letter refers was authorized by the Acts of 1961, Ch. 281, Sec. 1, as an amendment to the Acts of 1957, Ch. 219, Sec. 1, which had also been amended by the Acts of 1959, Ch. 244, Sec. 1. The provisions for this additional retirement benefit are found in Burns' (1961 Supp.), Section 28-4511c, which reads as follows:

“Every person who shall be receiving or eligible to receive a retirement benefit from the Indiana state teachers’ retirement fund shall be eligible to receive and shall receive from such fund an additional retirement benefit of an amount sufficient when added to his present pension benefit derived from state sources and his social security benefit earned as a teacher to equal one hundred seven dollars and fifty cents [$107.50] per month from said sources for a person with thirty [30] years of creditable service, and a greater or less amount per month for more or fewer years of service, adjusted on an actuarial basis by the actuary of the fund. Said benefit shall be payable beginning July 1, 1961, and shall be paid from an appropriation from the general fund of the state of Indiana from moneys not otherwise appropriated; and there is hereby appropriated for the Indiana state teachers’ retirement fund from moneys not otherwise appropriated in the general fund an amount sufficient to satisfy the requirements of this act.”

Section 1A of the Acts of 1961, Ch. 281, as found in Burns’ (1961 Supp.), Section 28-4511d, provides:

“Any teacher subject to the provisions of c. 182 of the acts of 1915 or acts amendatory or supplemental thereto who heretofore shall have been retired for permanent or temporary disability and who now is receiving disability payments shall receive an amount of not less than $60 per month for such disability.”
OPINION 25

It is a well-established rule that a statute like the one in question should be construed in the way which is most beneficial to the recipients of the benefit. It has been said that such statutes must be construed in the most beneficial way the language will permit to prevent absurdity, hardship, or injustice; to favor public convenience and to oppose all prejudice to public interests.


Your letter specifically asks if a retired teacher receiving a monthly retirement benefit from your fund may waive his rights to the 1961 post increase benefits.

A waiver is commonly defined as the intentional relinquishment of a known right; and it is comprehensively defined as a voluntary and intentional relinquishment or abandonment of a known existing legal right, advantage, benefit, claim, or privilege, which except for such waiver the party would have enjoyed.

31 C. J. S. Estoppel, § 61, p. 242;
56 Am. Jur., Waiver, § 2, p. 102;
Lavengood v. Lavengood (1947), 225 Ind. 206, 73 N. E. (2d) 685.

The general rule concerning waivers is stated thus in 31 C. J. S. Estoppel, § 67, at page 258:

"Provided the waiver will not infringe on the rights of others, nor be against public policy, and the right or privilege waived is exclusively private and is intended for the benefit of the person waiving it, a person may waive any right or privilege to which he is legally entitled, whether such right or privilege is conferred, secured, or guaranteed by a rule of law, a statute, a constitutional provision * * * or a contract * * *"

In Brown v. State (1941), 219 Ind. 251, 261, 37 N. E. (2d) 73, 137 A. L. R. 679, the court stated:

116
1962 O. A. G.

"* * * Ordinarily, an individual may waive any right provided for his benefit by contract, by statute, or by the Constitution * * *

A former teacher who is receiving or is currently entitled to receive a retirement benefit from the Indiana State Teachers' Retirement Fund does have a known existing legal right which he is entitled to enjoy. This is a right which is intended for the benefit of the teacher. As a general rule, a teacher may waive any right which he has, including statutory and even constitutional rights, unless such waiver is expressly prohibited by statute or would violate public policy. However, the right of a teacher to waive payment of a retirement benefit is apparently a question of first impression in this state. The Indiana case closest in point appears to be Freyermuth et al. v. State ex rel. Pinter et al. (1939), 215 Ind. 693, 21 N. E. (2d) 707, in which policemen had agreed to accept reduced pension payments in order to preserve the assets of the pension fund during the depression, and then later attempted to recover the total amount of the reduction withheld. In holding that such amounts could not be recovered, the court declared that there was an effective agreement between the parties for a reduction in the pensions. The court stated at page 697 of 215 Ind.:

"* * * The appellees [retired policemen] had an interest in the preservation of the fund, which was a sufficient consideration for a voluntary agreement that their pensions should be reduced. The pensioners had a vested right to be paid in full so long as there was a fund, or assets out of which funds could be made, out of which to pay. But they had an undoubted right to make voluntary concessions, if they deemed it in their interest to do so, in order that the securities in which the fund was invested might be preserved and the value of the fund safeguarded * * *" (Our emphasis)

In the case of Rosen v. New York City Teachers' Retirement Board et al. (1953), 282 App. Div. 216, 122 N. Y. S. (2d) 485; aff'd 306 N. Y. 625, 116 N. E. (2d) 239, a teacher sought to have the cost of living bonus, which was paid to her in addition to her base salary, included in her average salary for
purposes of computing her retirement allowance under the pension plan. The court in that case determined that it was not against public policy for a teacher to waive the benefits of the retirement statute, and held that the teacher had accepted salary payments on the condition they not be considered with respect to pension rights and had, by her conduct through the years, waived the right to have the bonus included as salary for the purpose of computing the pension. The court pointed out that in an earlier case involving a fireman [Carroll v. Grumet et al. (1952), 281 App. Div. 35, 117 N. Y. S. (2d) 553, motion for leave to appeal denied, 281 App. Div. 863, 119 N. Y. S. (2d) 922, motion to dismiss appeal granted, 305 N. Y. 692, 112 N. E. (2d) 775] it had determined that a waiver of a retirement benefit did not violate but was in accordance with the public policy of the state and was valid and binding on the fireman.

I am not aware of any express statutory prohibition in this state against a teacher waiving a retirement benefit to which he is entitled. In view of the foregoing authorities, it is my opinion that such a waiver would not be against public policy and that a retired teacher who is receiving a monthly retirement benefit from the Indiana State Teachers' Retirement Fund may therefore legally waive his right to the post increase benefit granted to retired teachers by the Acts of 1961, Ch. 281.

In the event a retired teacher desires to waive his right to the post increase benefit granted by the Acts of 1961, Ch. 281, he should execute a written form of waiver with the fund clearly evidencing his intention to waive the benefit. The period of time of the waiver and the amount of the benefit waived would depend on the precise terms and conditions of the waiver itself. Generally, once a party has waived a known right or advantage, he cannot reclaim it without the consent of his adversary. The rule is stated as follows in 56 Am. Jur., Waiver, § 24, p. 126:

"One who intentionally relinquishes a known right cannot, without consent of his adversary, reclaim it, for it is well settled that a waiver once made is irrevocable, even in the absence of consideration, or of any change in position of the party in whose favor the waiver operates. A waiver is conclusive on the party
waiving and his privies. Where parties for whose benefit conditions are imposed waive them, strangers there-to cannot complain."

It would thus appear that a retired teacher who voluntarily and intentionally relinquishes a known existing legal right to a retirement benefit from the Indiana State Teachers' Retirement Fund has effectively waived that right and cannot later reclaim or recapture it without the consent of the retirement fund. Thus a properly executed written form of waiver would effectively waive the retired teacher's right to the benefit permanently, unless and until the State Teachers' Retirement Fund consented to a release or retraction of such waiver.

OFFICIAL OPINION NO. 26

March 30, 1962

Hon. William E. Wilson
State Superintendent of Public Instruction
227 State House
Indianapolis, Indiana

Dear Mr. Wilson:

Your letter of March 21, 1962 has been received requesting an Official Opinion on the following question:

"'As stated in the above communications, the Comprehensive Plan that includes the two school corporations in question was submitted to the State Commission for Reorganization of School Corporations on October 23, 1961. Sometime after that date, the City of Mishawaka annexed certain areas included in the plan to be voted on in May 1962. Since the aforesaid plan did not require the voters of Mishawaka to vote on the approved plan, what is the voting status next May on the school reorganization plan of the voters out of Mishawaka on October 23, 1961, but annexed to Mishawaka at a later date?""

Acts of 1959, Ch. 202, Subsec. (2a) of Sec. 7, as added by Acts of 1961, Ch. 302, Sec. 1, as found in Burns' (1961 Supp.), Section 28-6116a, provides as follows: