The Acts of 1955, Ch. 329, Sec. 12, as amended, as found in Burns' (1959 Supp.), Section 60-1923, specifically provides that:

> "* * * No employee shall be required to pay any contributions for service prior to the time he is covered by this act as a condition precedent to receipt of the supplemental benefits provided by the employer under this act. * * *"

On this authority, it appears that the fact that the Teachers' Retirement Fund does not now hold any contributions paid to it by the teacher would not relieve it of the liability for paying its proportionate actuarial cost of the retirement benefit, nor would the presence or absence of such contributions affect the amount such fund is liable to pay.

It is therefore my opinion that under the terms of Burns' 60-1932, *supra,* the Teachers' Retirement Fund is required to assume the retirement reserve for years of service properly credited to a teacher although no contributions were ever made and although the former teacher is retiring from a municipal unit covered by the Public Employes' Retirement Fund, rather than from a state unit of government.

OFFICIAL OPINION NO. 50

September 28, 1961

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 an Official Opinion concerning the question of whether the Chesterton State Bank of Chesterton, Indiana may open a branch bank in the town of Portage pursuant to authority granted by the Department of Financial Institutions on October 28, 1959. Because the facts giving rise to this problem are somewhat unusual, a resumé of the factual situation is important.

On March 30, 1959, prior to the incorporation of the town of Portage, the Chesterton State Bank of Chesterton, Indiana filed an application for the establishment of a branch bank in the Chrisman-McCool area in Porter County, Indiana as to which area there was anticipation of the incorporation thereof in connection with the deep water seaport and Burns Ditch project in that locality. At the time of the holding of a public hearing upon this application on September 17, 1959, this area had, in fact, become incorporated as the town of Portage and also included the town of Garyton at which a branch bank of the applicant bank was already established and in operation. At that time there was no other bank or trust company in such town. As a result of this hearing the Department found that the requisites of the statute concerning the establishment of branch banks were in compliance therewith so that it approved the application for the establishment of the second branch of the applicant bank in the town of Portage, which approval was given on October 28, 1959. Because of the undeveloped condition of the town at that time, such approval was granted with the knowledge that a particular bank building for such branch operation was not then available and that the applicant bank would need more than the normal period of time within which to open and establish an operating branch. On that account, the approval by the Department of Financial Institutions of this application was to remain in force for a period of six [6] months from the date of approval and on the condition that in the event that the applicant bank was unable to establish the branch within that period of time that a request should be submitted to the Department for an extension of time within which to effectuate the plan and commence operations.

It is my understanding that more time than was originally anticipated was needed by the bank for purposes such as making a survey to determine the exact location of the bank, after which it was necessary to receive approval from zoning authorities, the preparation of plans and specifications for the bank building and the time for its construction. The Department recognized the need for more time, as a consequence of which three separate six-months extensions were granted, the last of which will expire on October 28, 1961. It is my further understanding that this bank has acquired a land site,

entered into a contract for the construction of a bank building which at this time is sufficiently completed so that banking operations may be expected to commence prior to the expiration date of the last extension granted.

However, during the time that these extensions were in effect an application for the establishment of a national banking institution in the town of Portage was filed with and granted by the Comptroller of the Currency, as a result of which there is now in operation in that town a national banking institution. The Chesterton State Bank is a member of the Federal Reserve System within Federal Reserve District #7, which district is served by the Federal Reserve Bank of Chicago. Because of the provision in the Indiana law that branches may be opened in cities or towns located in the same county as the applicant bank if there is no bank or trust company located in such city or town, the authorities of the Federal Reserve System are questioning whether the branch now under construction can be considered a legal branch bank so that the insurance coverage of this system may be continued with respect to the Chesterton State Bank and its branches.

The Indiana law applicable to this situation is the Acts of 1933, Ch. 40, Sec. 224, as last amended by the Acts of 1959, Ch. 39, Sec. 2, as found in Burns' (1961 Supp.), Section 18-1707, the first sentence of which is that which gives rise to the question presented and which reads as follows:

> "In all counties having a population of less than five hundred thousand [500,000] inhabitants, according to the last preceding decennial United States census, or in counties having three [3] or more cities of the second class, except as hereinafter otherwise provided, any bank or trust company may open or establish a branch bank in any city or town within the limits of the county in which the principal office of such bank or trust company is located, if there is no bank or trust company located in such city or town. * * *"

The second paragraph of the same section provides the procedure to be followed by a bank desiring to open and establish a branch and to be followed by the Department when such an application is filed and provides as follows:

"No branch bank shall be opened or established without first having obtained the written approval of the department. The location of any branch bank may be changed at any time when such change of location is authorized by the board of directors of the bank or trust company and approved by the department. Any bank or trust company desiring to establish one [1] or more branches shall file a written application therefor, in such form, and containing such information as may be prescribed by the department. The department is hereby authorized, in its discretion, to approve or disapprove such application. *Before the department shall approve* or disapprove *any application for the establishment of a branch bank,* as herein authorized, *it shall ascertain and determine to its satisfaction* that the public convenience and advantage will be subserved and promoted by the opening or establishment of a branch bank in the community in which it is proposed to establish such branch bank; in the case of counties having a population of less than five hundred thousand [500,000] according to the last preceding decennial United States census, or in counties having three [3] or more cities of the second class, *that there is no bank or trust company located in the city or town in which it is proposed to establish such branch bank, if the application is for a permit to open or establish a branch bank in a city or town other than that within which the applicant bank or trust company is located;* that the applicant bank or trust company has satisfied the capital and surplus requirements, as hereinabove provided, if application is made by a bank or trust company located in a city the population of which exceeds fifty thousand [50,000] inhabitants, according to the last preceding United States census, for a permit to open or establish a branch bank in such city; and that the welfare of any other bank already established in such city will not be jeopardized. No branch bank may be opened if the real estate (as defined in section 174 of this act [18-1105]) of the bank or trust company establishing such branch bank will thereby exceed the capital and surplus of such bank or trust company actually paid in and unimpaired." (Our emphasis)

From the foregoing, it appears that one finding which the Department is required to make as a condition precedent to the approval of such an application is that "there is no bank or trust company located in the city or town in which it is proposed to establish such branch bank, if the application is for a permit to open or establish a branch bank in a city or town other than that within which the applicant bank or trust company is located; * * *."

Insofar as the facts are known to me, as of September 17, 1959, the date on which the public hearing was held in the town of Portage and as of October 28, 1959, the date of the Department's approval of the application of the Chesterton State Bank for the establishment of a branch in the town of Portage, there was then no bank or trust company located in such town. There does not appear to be any question as to the right of the Department of Financial Institutions to have approved this application on said date and it is only because of the subsequent establishment of a national banking institution in said town that the question arises.

The Indiana statute, Burns' 18-1707, *supra,* does not provide a restriction limiting the time within which an applicant bank must open and establish its branch after the approval of the application therefor by the Department. Under normal circumstances, it is presumed that by the use of an existing building at a predetermined location or by the execution of plans which were specific at the time of the public hearing before the Department, an applicant bank could have the branch for which application was made and approved open and operating in a relatively much shorter period of time than is the case with respect to the Chesterton State Bank. Also, it would appear that the national banking institution has acted with greater expediency in opening its institution than has the state bank. However, not only does the Indiana law fail to state a time within which such a branch must be opened and operating, but it vests in the Department of Financial Institutions considerable discretion as to the information which may be required to be submitted in the application and complete discretion further on whether to approve or disapprove any application for the establishment of a branch bank, so long as the granting of such application at the time does not violate any of the statutory requirements. There is

nothing in the act which would prohibit the Department from administratively prescribing a time limitation within which the applicant bank must have the branch open and operating, or from granting extensions of time to such an applicant bank in cases in which the application was approved and circumstances justify the granting of such extensions.

Under the circumstances of this case there does not appear to be any fact which existed at the time of the approval of the application for the branch bank which would operate to void the approval of such application by the Department at that time. The public hearing held by the Department was in the town of Portage and from the action of the Department, it is clear that it did not misunderstand the situation, but recognized that the town was undeveloped and that more than the usual amount of time would be required to consummate its plans for the opening and establishing of a branch bank. Obviously, the state bank had no control over the establishment of a national bank in the same town. The circumstance of the national bank being later located in the same town certainly could not have absolutely been anticipated at the time of the hearing on the application of the Chesterton State Bank. Moreover, even though it be admitted that the state bank has taken a long period of time, it appears to have acted in good faith to ultimately establish a branch in the town of Portage as represented by it, in the original application to the Department. It has relied upon the approval granted on October 28, 1959 and upon the three six-months extensions by having acquired a site and taken the necessary steps for the construction of a bank building, now partially constructed, so as to show its good faith in carrying out its original intention. Property rights have thus become vested and substantial amounts of money have been expended upon the representation by the Department of Financial Institutions of the State of Indiana that its approval of the application for a branch bank in the town of Portage is still in force and effect until October 28, 1961.

While the doctrine of equitable estoppel has been said to not be applicable against the government in its governmental or public capacity, there are certain circumstances in which that doctrine has been applied. On the one hand, those dealing with public officers of limited authority are bound to deter-

mine the scope of such officers' authority and cannot claim an estoppel with respect to acts done in excess of the officers' authority.

> Indiana Law Encyclopedia, Vol. 12, Estoppel, Sec. 27, pp. 359, 360.

However, in the case of State of Indiana v. Milk (1882), 11 Fed. 389 at page 397 it was said:

> "Resolute good faith should characterize the conduct of states in their dealings with individuals, and there is no reason, in morals or law, that will exempt them from the doctrine of estoppel. *Com.* v. *Andre,* 3 Pick. 224; *Com.* v. *Pejepscut Proprietors,* 10 Mass. 155; *People* v. *Soc. for Prop. of Gosp.,* 2 Paine 545; *State* v. *Bailey,* 19 Ind. 452; *People* v. *Maynard,* 15 Mich. 463; *Cahn* v. *Barnes,* 5 Fed. Rep. 326."

The doctrine of estoppel has, in the absence of fraud and misrepresentation, been applied to the grantor of a license or franchise, as for instance when a municipal corporation issues a franchise, again depending upon the circumstances involved. For instance, in 38 Am. Jur., Municipal Corporations, Estoppel as to Franchises, § 556, pp. 241, 242, it is said:

> "* * * Every person dealing with a municipal corporation is bound to know the extent of its authority, and the principle of estoppel will not be applied to permit the doing indirectly of what cannot be done directly. On the other hand, it is well settled that a municipal corporation may be estopped, as to matters within its power, to deny that consent or authorization was given for a franchise claimed by a public service company or other asserted grantee."

See also, Hagerstown v. Hagerstown Railway Co. (1914), 123 Md. 183, 91 Atl. 170, 7 A. L. R. 1239. Also in Dillon, Municipal Corporations, 5th Ed., § 1242 it is said:

> "And if the municipality has the power to grant such right or franchise, and a corporation, believing and assuming that it has the consent or grant of the municipality, has, with the knowledge of the proper municipal

> authorities, proceeded to exercise the right or franchise, and has constructed, maintained, and operated its works and appliances in the city streets, the municipality will, in a proper case, be estopped by the acts and conduct of its officers and representatives in knowingly permitting and acquiescing in the use and occupation of the streets, from asserting the invalidity of the grant of the franchise, so far, at least, as concerns its own failure to pass an ordinance or take steps necessary to effectuate the grant."

Therefore, with respect to the general rule forbidding the doctrine of estoppel as applied to the government, it may be said that one of the exceptions concerns the granting of franchises or licenses which are within the power of the governmental agency to grant. Such is the situation in the instant case.

In view of these facts it seems to me that, as the state agency which has the statutory power to and has granted such approval and such extensions, the Department and the state would be estopped to deny the validity of the authority upon which the Chesterton State Bank has been relying. Since this was a plan which would not violate the branch bank law of the State of Indiana at the time it was approved, and because of the extensions granted by the Department of Financial Institutions, the last of which has not yet expired, and further because of the reliance of the applicant bank upon such actions of the Department, it is my opinion that if this building is opened and operating as a branch bank by the Chesterton State Bank before the expiration of the last extension granted or within such time as the Department may grant by further extension, that it must be recognized as a legally established and operating branch bank of the Chesterton State Bank of Chesterton, Indiana.