diate possession a valid operator's license from his home state or country, there is no limitation as to the length of time that such nonresident may operate in the State of Indiana.

3. The same rules apply to chauffeurs and public passenger's chauffeur's licenses, pursuant to the provisions of subparagraphs 4 and 5 of Burns' 47-2702, *supra*.

4. The answers to the foregoing questions would not be affected by the fact that the nonresident in question was operating a motor vehicle bearing Indiana registration and plates. This is true because there is no relationship between the issuance of drivers' licenses and motor vehicle registration in any particular case.

OFFICIAL OPINION NO. 57

October 27, 1961

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

Dear Mr. Utterback:

This is in reply to your request for an Official Opinion which reads as follows:

> "Mr. Robert S. Hinshaw died on June 3, 1961 with Indiana State Teacher Retirement Fund membership on active status. As of June 8, 1961 he would have been married to Janet D. Hinshaw for three years.
>
> "Mr. Hinshaw had filed a designation to accept his retirement benefit from the fund under a co-survivor provision and named Janet D. Hinshaw as the co-survivor. He did not designate a specific beneficiary for his account.
>
> "We will appreciate your official opinion as to whether or not Mr. Hinshaw's account is bound by the provisions of Chapter 329, Section 17 (d) of the Acts of 1955, as amended in 1959 since his membership in

the Fund had been established by election under the provisions of the 1953 amendment to the old system retirement law.

"Did Mr. Hinshaw have a vested right in the provisions of the old system retirement law such as the guarantee of a spouse benefit on his account or did the new law impair this right?

"We would also appreciate your opinion as to whether or not a named co-survivor has the status of a beneficiary until such time as the teacher signifies retirement.

"Your official opinion No. 57 issued December 4, 1958 is in regard to the contractual rights of a teacher whose membership had been established under the old retirement system."

The retirement benefits which a member of the Teachers' Retirement Fund may now receive consist of the sum of a pension provided by the contributions of the employer and an annuity provided by the employee's contributions, all as provided by the Indiana Public Employees Social Security Integration and Supplemental Retirement Benefits Act, the same being the Acts of 1955, Ch. 329, as amended and added to, as found in Burns' (1960 Supp., 1961 Temp. Supp.), Section 60-1911 *et seq.* (See: Burns' 60-1928(a), *supra.*) The boards of pre-existing retirement funds administer the provisions of such Act.

Your office has supplied me with a copy of the Election of Benefits form which Mr. Hinshaw signed on September 5, 1958 wherein he chose "Co-Survivor Option #3" and designated his wife as his "Co-Survivor." Reference to the form entitled "Explanation of Retirement Options" which was available to Mr. Hinshaw at the time he made this Election of Benefits indicates that, by choosing "Co-Survivor Option #3," he elected to receive the benefit provided by the Acts of 1955, Ch. 329, Sec. 17 (c) (i), with 100% continuation of his decreased benefits to a designated person surviving him. In such case, the Election of Benefits form indicated that one should not designate a "beneficiary" but a "co-survivor" whereas a "beneficiary" was directed to be designated only if

one did not choose any of the options provided by Section 17 (c) (i), *supra.*

Section 17 (c) (i) of such Act, as found in Burns' 60-1928, *supra,* read substantially then as now, thus:

> "(c) Each employee subject to this act shall have the right, subject to the provisions of this subsection, to elect to have his retirement benefits payable under any of the nonconflicting options set forth in this subsection in lieu of the retirement benefits otherwise payable to him upon retirement under the provisions of this section. The amount of any such optional retirement benefits shall be determined by the rules and regulations of the board administering the fund; provided that such *optional retirement benefits shall be the actuarial equivalent of the retirement benefits otherwise payable* under this section. Such election shall be made by written request to the board administering the affairs of the system of which he is a member.
>
> "(i) Request for this option shall be made at least twelve [12] months prior to retirement unless evidence of the employee's good health, which is satisfactory to such board, is provided. *The employee may elect to receive a decreased retirement benefit during his lifetime and have such retirement benefit* (or one-half [½] or two-thirds [⅔] thereof if so designated) *continued after his death to another designated person* during the lifetime of such person. *If the employee dies before going on retirement the designated beneficiary shall receive only the amount provided* in section 13(d) and 13(f) of this act except as provided in section 14(c) and section 17(d) of this act. If the *designated beneficiary* dies before the employee goes on retirement, such election shall be automatically cancelled. If the *designated beneficiary* dies while the employee is receiving benefits the amount of benefits received by such employee by reason of such election shall not be affected." (Our emphasis)

It should be noted at the outset that Section 17 (c) (i), *supra,* nowhere uses the word "co-survivor" but rather speaks

of the right to designate a person to receive an annuity benefit, after death of the employee, thereafter referring to that person consistently as a "designated *beneficiary*." Furthermore, it should be noted that Section 17 (c) (i), *supra,* in no way limits the class of persons who may be designated to receive benefits after death of the member exercising the option provided thereunder. Therefore, it would appear that designation of a "co-survivor" to receive "Co-Survivor Option #3" identified as "100% Continuation to Co-Survivor-Section 17 (c) (i)," all as provided by forms utilized by the Indiana State Teachers' Retirement Fund, could only amount to designation of a "beneficiary" under the statute.

Section 17 (c) (i), *supra,* makes reference to other sections of the statute to determine the *amount* which the designated beneficiary of a "co-survivor option" would receive in the event that the employee should die before going on retirement. In most situations, this would be the sum of the amount provided by Sections 13 (d) and 13 (f) as found in Burns' 60-1924 (d) and (f), *supra.*

Section 13 (d) [Burns' 60-1924 (d)] is itself "subject to the provisions of section 17 hereof in the event of the death of an employee prior to retirement." Under Section 13 (d) the beneficiary would get only the *amount* of the employee's contributions plus interest credits thereon less any disability benefits paid to the employee prior to his death. By Section 13 (f) [Burns' 60-1924 (f), *supra*] the *amount* of a member's allowed additional annuity contributions plus interest credits thereon would be paid, in the event of a member's death before retirement, to his "designated beneficiary," if any, or to his estate.

According to Section 14 (c) [Burns' 60-1925 (c), *supra*], every *member* who becomes subject to social security is entitled to *at least an amount,* which, when added to the primary social security benefit to which he may become entitled, would equal the normal retirement benefit to which he would have been entitled under the provisions of the system in effect at the effective date of the Supplemental Benefits Act if he had continued contributions for the period during which contributions should have been made under the new act, at the

amount then required by such old provisions or at the total amount required under the new act if in excess of said amount.

The Indiana State Teachers' Retirement Fund was a pre-existing retirement system provided by the Acts of 1915, Ch. 182, as amended, as found in Burns' (1948 Repl., 1961 Supp.), Section 28-4501 *et seq.* Burns' 28-4511, *supra,* subparagraphs (e) and (i), provide the so-called "spouse benefits" to which your letter refers, whereby the husband or wife of a teacher dying in service without having designated a beneficiary may either receive the death benefit provided by that Act or the annuity protection which the teacher might have elected "for not more than one [1] dependent as shall be recognized by the board."

It is significant to note here that the language of Burns' 28-4511 (e) and (i), *supra,* does not indicate any contemplation by the Legislature that a spouse (whether husband or wife) should be excluded from qualifying for the annuity provided for one *dependent* of a teacher-member by any standard of recognition adopted by the Board of Trustees of the State Teachers' Retirement Fund. Under this pre-existing retirement system, the spouse of a member dying in service without having designated a beneficiary could take either a lump-sum benefit under Burns' 28-4511 (e) or an annuity under Burns' 28-4511 (i), *supra.*

Pre-existing rights, privileges or benefits were expressly preserved for members of pre-existing retirement systems by Burns' 60-1925 (c), *supra.* 1958 O. A. G., page 240, No. 57, at page 242, quotes from 1955 O. A. G., page 146, No. 38, to restate the conclusion that a member of the Teachers' Retirement Fund prior to the effective date of the Supplemental Benefits Act "has a vested right to have benefits paid to persons eligible and in amounts set by the statute under which the teacher made contributions to the Fund," however, this vested contractual right could be changed by the mutual consent of the parties or by legislative amendment which was not detrimental or damaging to the member. That Opinion, in answering a question virtually identical to the first one raised in your letter, specifically stated:

> "In order to avoid an unconstitutional impairment of contract, it is my opinion that each member's ac-

> count must be examined individually to determine whether or not the deduction provisions of Burns' 60-1928 (d), *supra,* result in any detriment or damage to the contractual rights which have become vested under the old retirement system. If there is no detriment, or if the member has agreed to the change in benefits, the section will apply. However, if the member has not so agreed and in fact the member or recipient will be damaged by an enforcement of the section, the section will not apply and benefits will be paid under the provisions of the law under which the rights vested. Therefore, each individual account must be studied in light of its own particular facts to determine whether or not the provisions of Burns' 60-1928 (d), *supra,* apply to it."

Your letter indicates familiarity with the 1958 Opinion and that Opinion is herewith expressly reaffirmed. Therefore, the spouse option benefits provided by Burns' 28-4511 (e) and (i), *supra,* are still effective, subject to the conditions set out in the 1958 Opinion, and the further possibility of reduction by the amount of social security benefits, as provided in Burns' 60-1925 (c), *supra.*

Your statement of facts and primary question indicate that your chief concern is the proper interpretation of Section 17 (d) [Burns' 60-1928 (d)], *supra,* when an employee who dies in service has designated his spouse as the person to receive benefits provided by Section 17 (c) (i), *supra,* but that spouse has not, at the time of the employee's death, been married to him three full years.

Section 17 (d), *supra,* provides the second statutory exception to taking the amount provided by Sections 13 (d) and 13 (f), *supra,* which a person designated to receive benefits under Section 17 (c) (i), *supra,* may receive in the event the employee dies before going on retirement and Section 17 (d), *supra,* reads as follows:

> "(d) If an employee with fifteen [15] or more years of creditable service shall designate a beneficiary under this act, or if no designated beneficiary survives the employee, he may elect, or his spouse may elect

upon his death in service, to provide annuity survivor benefits as follows: Upon the death in service of such employee, if the spouse shall have been married to the member for at least three [3] years and shall survive him, or if a designated dependent beneficiary shall have been so designated for a period of six [6] months a survivor annuity shall become payable immediately in an amount equal to that which would have been payable under the supplemental retirement benefit system had the employee retired at age fifty or at the time of his death whichever would be later under an effective election of the option provided in subsection (c) (i) of this section 17; provided that any additional annuity contributions under section 13(f) shall be disregarded in the determination of survivor benefits under this subsection (d). If a survivor annuity becomes payable under the provisions of this subsection with respect to a deceased employee, such annuity shall be in lieu of all benefits otherwise payable under this Act with respect to such deceased employee, except for any death benefit that may become payable under section 13(f)."

Ability to elect annuity benefits payable after the employee's death in service is, under Section 17 (d), *supra,* granted only to an employee with fifteen or more years of creditable service or, after death of such an employee in service, to his spouse in the event that the employee either failed to designate a beneficiary under the Acts of 1955, Ch. 329, or such designated beneficiary failed to survive him. No right to an annuity is granted by Section 17 (c) (i), *supra,* if the employee dies in service, the named "co-survivor" being entitled only to lump-sum benefits under Sections 13 (d) and (f), *supra,* except as provided in Section 14 (c), *supra.* Whereas the right given by Section 17 (d), *supra,* to an employee to designate a beneficiary to receive annuity survivor benefits after his death is comparable to that given him by Section 17 (c) (i), *supra,* it is only by Section 17 (d), *supra,* that any person may receive annuity benefits if the employee dies in service. Furthermore, it is only by Section 17 (d), *supra,* that a spouse may *elect* annuity survivor benefits and it does not there appear that the spouse may ever designate

another as the employee's beneficiary. Therefore, if a spouse should elect an annuity, such annuity could be payable only to the spouse.

Prior to amendment by the Acts of 1959, Ch. 325, Section 17 (d), *supra,* permitted annuity payments (after death in service of an employee with twenty or more years of creditable service) to no person other than a surviving spouse married to such employee for at least three years. The 1959 amendment broadened the privilege of receiving annuity survivor payments in several respects: (a) extending the privilege of receiving such payments to dependent persons designated as beneficiaries for at least six months, (b) reducing from twenty to fifteen years the period of creditable service of an employee to qualify any of his survivors to receive annuity payments, and (c) omitting the previously required reduction of the periodic benefit payment by the amount of federal social security benefits to which the survivor is eligible. It does not seem consonant with such obvious intent to broaden the provisions of this Section 17 (d), *supra,* that the Legislature should have placed other designated beneficiaries in a more beneficial position than a spouse who, as has been previously noted, not only was previously entitled to benefits under this section *as a designated beneficiary* but who was entitled to spouse option annuity benefits even before there was a Supplemental Benefits Act.

The restriction on payment of an annuity to a fifteen year employee's spouse married for less than three years would therefore seem applicable only if there were no other surviving designated dependent beneficiary and the spouse had to elect the annuity payment, but if such employee had designated his spouse as beneficiary under the Act and had done so more than six months before his death, the annuity provided by Section 17 (d), *supra,* would be payable to such spouse as a "designated dependent beneficiary" even though married less than three years before the employee's death.

The effect of Section 17 (d), *supra,* upon Section 17 (c) (i), *supra,* like Sections 13 (d), 13 (f) and 14 (c), *supra,* expressly concerns only the *amount* to be received by the designated beneficiary if the employee dies before going on retirement but after having designated such beneficiary to receive

a "co-survivor" annuity as provided by Section 17 (c) (i), *supra.* Once it is established that the dependent beneficiary was designated more than six months before the employee's death, the *amount* which Section 17 (d), *supra,* specifies is one "equal to that which would have been payable under the supplemental retirement benefit system had the employee retired at age fifty or at the time of his death whichever would be later under an effective election of the option provided in subsection (c) (i) of this section 17; provided that any additional annuity contributions under section 13 (f) shall be disregarded in the determination of survivor benefits under this subsection (d)." Death benefits on account of additional annuity contributions allowed under Section 13 (f), *supra,* are, under Section 17 (d), *supra,* as under Section 17 (c) (i), *supra,* not included in the computation of annuity benefit payments, but are additionally payable as provided by Section 13 (f), *supra.*

In answer to your questions, it is my opinion that 1958 O. A. G., page 240, No. 57, continues to provide the answer to the question presented therein and to your first question, although Section 17 (d), *supra,* was amended after the issuance of that Opinion. It is also my opinion that the designation of a person as "co-survivor" to take the specific benefits provided by Section 17 (c) (i), *supra,* of the Supplemental Benefits Act, which Section itself uses the term "designated beneficiary" rather than "co-survivor," constitutes such person a designated beneficiary both before and after the employee retires, but such designation of beneficiary is limited by the provisions of Section 17 (c) (i), *supra,* so that there can be no other designation of beneficiary or benefits *after* retirement of the employee. It is my further opinion that the provisions of Section 17 (d), *supra,* affect the account of Mr. Hinshaw (as well as of other employees who, like him, elect one of the so-called "co-survivor" benefits provided by Section 17 (c) (i), *supra,* of the Supplemental Benefits Act and who die before going on retirement with such election effective) but that if Mr. Hinshaw had fifteen or more years of creditable service, such Section 17 (d), *supra,* would not prohibit his spouse (as designated dependent beneficiary of a "co-survivor" annuity benefit under the Supplemental Benefits Act more than six months before the employee's death)

from being paid a survivor annuity even though she had not been married to him at least three years before his death.

OFFICIAL OPINION NO. 58

November 7, 1961

A. C. Offutt, M. D.
State Health Commissioner
Indiana State Board of Health
1330 West Michigan Street
Indianapolis, Indiana

Dear Dr. Offutt:

This is in response to your recent request for an Official Opinion concerning the professional membership on the various types of local boards of health. Your questions are directed, in part, toward Acts of 1949, Ch. 157, Sec. 609, as amended by Acts of 1961, Ch. 14, Sec. 2, as found in Burns' (1961 Supp.), Section 35-810.

Your specific questions are as follows:

"1. In the event no member of the specified professions residing within the official health jurisdiction is willing to serve as an official member of the Board of Health, should the County Commissioners appoint a seven member Board of Health omitting representation from the particular professions in which no member is willing to serve, or should the County Commissioners leave unfilled those memberships to the official Board of Health for which a properly qualified individual cannot be obtained?

"2. Would a Board of Health established by either of the above alternatives constitute a legal body?"

In a consideration of your questions the following statutory provisions are set forth as indicated:

35–810 "Each county full-time health department provided for in this act shall be managed by a board of health of seven [7] members appointed by the