

In answer to your fourth question, I am of the opinion that Burns' 47-2310, *supra*, is applicable to later amendments of other sections of this original act, thus extending the power of a peace officer to arrest without a warrant for the leaving of a scene of a property damage accident as now provided in Burns' 47-1910, *supra*, for the reason that the 1957 amendment thereto was an amendment to Chapter 48 of the Acts of 1939. Therefore, this original act, as amended, should be construed as if it had been originally enacted in its present form.

Sutherland, Statutory Construction, 3rd Ed., Vol. I,
Sec. 1935.

OFFICIAL OPINION NO. 18

May 2, 1961

Honorable Anna Maloney
State Representative
131 E. 5th Avenue
Gary, Indiana

Dear Representative Maloney:

This is in answer to your letter of April 19, 1961, wherein you request an Official Opinion relative to the appointment of a member to the Board of Trustees of the Indiana State Teachers' Retirement Fund. Your specific question is stated as follows:

“Could a State Senator or Representative be appointed as a member of this Board and still retain the office of Senator or Representative?”

In any question pertaining to the legal right of an individual to hold more than one position under state government the following tests should be taken into consideration, namely:

(1) Is each position a “lucrative office” within the meaning of the Indiana Constitution, Art. 2, Sec. 9?

(2) Is such holding in violation of the provision of the distribution and separation of powers provided in the Indiana Constitution, Art. 3, Sec. 1?

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- (3) Are the offices incompatible with each other?
- (4) Would such holding be against public policy?

The Indiana Constitution, Art. 2, Sec. 9, provides, in part, as follows:

*“No person holding a lucrative office or appointment under the United States or under this State, shall be eligible to a seat in the General Assembly; nor shall any person hold more than one lucrative office at the same time, except as in this Constitution expressly permitted: * * *.”* (Our emphasis)

Your question will be considered first on the basis of possible dual “lucrative office” holding. Two essential elements are involved in testing any position to determine whether such position comes within the constitutional prohibition against “lucrative office” holding. These necessary elements are: (a) an exercise of some portion of the sovereign power and (b) the provision for some form of compensation for the services rendered.

The fact that a member of the Indiana General Assembly is the holder of a “lucrative office,” under the Indiana Constitution, Art. 2, Sec. 9, *supra*, is well established.

See: 1953 O. A. G., page 445, No. 96;
1954 O. A. G., page 258, No. 70;
1960 O. A. G., page 42, No. 9.

In a determination of the “lucrative office” status of a member of the Board of Trustees of the Indiana State Teachers’ Retirement Fund, we look first to the scope of authority and duties prescribed by law for such Board of Trustees. The Acts of 1915, Ch. 182, Sec. 9, as amended and found in Burns’ (1959 Supp.), Section 28-4506, reads, in part, as follows:

“(a) The board of trustees of the Indiana state teachers’ retirement fund shall have power to adopt and enforce all necessary bylaws and regulations for the government and administration of the department and the control and investment of funds committed to its care not inconsistent with the provisions of this act.

Said board may sue and be sued under the name and style of the board of trustees of the Indiana state teachers' retirement fund; shall have authority to summon and examine witnesses in the adjustment of claims; shall have authority, in adjusting disability claims, to require physical examinations by doctors approved or appointed by the said board as provided by this act, but shall not require more than two [2] such examinations in any one [1] year; shall have power to meet any emergency which may arise in the administration of its trust; and shall have discretionary power in determining all matters pertaining to its trust not specifically provided for in this act. Members of said board shall serve without pay except that all traveling and all other necessary expenses plus a reasonable per diem shall be paid, upon proper order of the board. The governor shall appoint from among the members of the fund an executive secretary who shall keep a true and accurate record of the proceedings of the board and who shall have the care and custody of books and records belonging to the department and shall give bond as fixed by the board. The board shall, subject only to the approval of the governor, fix the salary of the executive secretary, and shall employ other assistants and fix their compensation." (Our emphasis)

In *Shelmadine v. City of Elkhart* (1921), 75 Ind. App. 493, 495, 129 N. E. 878, the Court said:

"A public officer may be defined as a position to which a portion of the sovereignty of the state attaches for the time being, and which is exercised for the benefit of the public. The most important characteristic which may be said to distinguish an office from an employment is, that the duties of the incumbent of an office must involve an exercise of some portion of the sovereign power. * * *"

The exercise of sovereignty was considered in 1947 O. A. G., page 201, No. 40, in connection with a "lucrative office" question under the Indiana Constitution, Art 2, Sec. 9, *supra*. One of the positions therein considered was membership on the

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Board of Trustees of the Public Employes' Retirement Fund. The scope of duties of said Board was very similar to that of the Board under consideration in your question. On page 204, of the above Opinion, it is stated:

"It is also evident that the Board of Trustees of the Public Employes' Retirement Fund exercises sovereign powers granted to them by the General Assembly and that compensation is given them for their services."

An examination of the provisions contained in Burns' 28-4506, *supra*, in my opinion, definitely shows that the members of the Board of Trustees of the Indiana State Teachers' Retirement Fund are empowered to exercise a portion of the sovereign power of the State and therefore each member occupies the position of a public officer rather than merely an employee.

Let us now look to compensation for services as a member of the Board of Trustees of the Indiana State Teachers' Retirement Fund. An examination of Burns' 28-4506(a), *supra*, shows that:

"* * * *Members of said board shall serve without pay except that all traveling and all other necessary expenses plus a reasonable per diem shall be paid, upon proper order of the board. * * **" (Our emphasis)

It will be noted in the emphasized portion of the statute, above quoted, that while such Board members shall serve "without pay," provision is made for the payment of necessary expenses "*plus a reasonable per diem.*" My information is that Board members of the Indiana State Teachers' Retirement Fund are paid a per diem of \$10.00 for attendance at regular or special meetings of the Board plus a mileage allowance for travel.

In my 1954 O. A. G., page 258, No. 70, *supra*, I considered the provisions of the Indiana Constitution, Art. 2, Sec. 9, *supra*, on the question of whether a member of the Indiana General Assembly could also serve as a member of the Marion County Plan Commission. The Acts of 1947, Ch. 174, Sec. 21, as found in Burns' (1951 Repl.), Section 53-721, in force at the time of the above Opinion, contains no salary provision for a member of a County Plan Commission. However, provi-

sion is made that the County Commissioners may approve a per diem allowance of not more than \$5.00 to any citizen member of a County Plan Commission for attendance at regular or special meetings of the Commission. My conclusion, in that Opinion, was as follows:

“In view of the foregoing, *I think the per diem allowance to a member of a County Plan Commission is to be considered as compensation for a service given the county.* Therefore, if the Board of Commissioners, pursuant to their statutory authority, approved a per diem allowance, then a member of the County Plan Commission would be the holder of a lucrative office under Art. 2, Sec. 9 of the Indiana Constitution.” (Our emphasis)

See also: 1957 O. A. G., page 54, No. 12;

1958 O. A. G., page 92, No. 21.

In 1947 O. A. G., pages 142, 149, it is said:

“* * * It is generally held that the acceptance, by a person holding a lucrative office, of a second lucrative office within the meaning of the constitutional provision, automatically operates as a vacation of the first office held.”

See also: 1957 O. A. G., page 54, No. 12, *supra*;

1960 O. A. G., page 42, No. 9, *supra*.

Therefore, in my opinion, inasmuch as membership in the Indiana General Assembly and membership on the Board of Trustees of the Indiana State Teachers' Retirement Fund are both “lucrative offices” within the meaning of the Indiana Constitution, Art. 2, Sec. 9, *supra*, these offices could not be held simultaneously by the same individual. The acceptance of the Board membership would automatically vacate the first office, namely, membership in the Indiana General Assembly.

Your question has been fully answered above. However, in view of the direct relationship of your question to the constitutional provision for the distribution and separation of powers, plus public concern for good government, further

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consideration is deemed appropriate. The Indiana Constitution, Art. 3, Sec. 1, *supra*, provides as follows:

“The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial; and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.”

A leading case in Indiana on the distribution and separation of powers for governmental departments is *State ex rel. Black v. Burch* (1948), 226 Ind. 445, 457, 80 N. E. (2d) 291, wherein the Court said:

“In order to properly determine the meaning of the said § 1 of Art. 3, we should consider the purpose which induced its adoption. 11 Am. Jur., Constitutional Law, § 62; 50 Am. Jur., Statutes, §§ 303, 305. It has to do solely with the separation of powers. Separation of powers has been one of the paramount purposes to be accomplished by our various State Constitutions and our Federal Constitution. * * *”

The Supreme Court on page 459 of said Opinion quoted from the case of *O'Donoghue v. United States* (1933), 289 U. S. 516, 77 L. Ed. 1356, 53 S. Ct. 740, as follows:

“If it be important thus to separate the several departments of government and restrict them to the exercise of their appointed powers, it follows, as a logical corollary, equally important, that each department should be kept completely independent of the others— independent not in the sense that they shall not cooperate to the common end of carrying into effect the purposes of the Constitution, *but in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments.* * * *”

See also: *Book v. State Office Building Comm. et al.* (1958), 238 Ind. 120, 149 N. E. (2d) 273.

Therefore, in my opinion, since the positions herein considered belong to two different departments, namely, membership in the Indiana General Assembly to the Legislative department and membership on the Board of Trustees of the Indiana State Teachers' Retirement Fund to the Executive department, such dual holding would be in violation of the Indiana Constitution, Art. 3, Sec. 1, *supra*.

In view of my conclusions stated above, a discussion of the tests of incompatibility and of public policy against dual office holding is unnecessary herein. Nevertheless, I wish to emphasize again their importance to any question pertaining to the legal right of an individual to hold simultaneously more than one position under state government. The responsibility for a determination as to whether such employment or appointment would fail in either of these tests rests with the appointing authority.

In summary, it is my opinion that:

(1) A member of the Indiana General Assembly and a member of the Board of Trustees of the Indiana State Teachers' Retirement Fund are both holders of "lucrative offices" under the state and the simultaneous holding of such offices by one individual would be in violation of the Indiana Constitution, Art. 2, Sec. 9, *supra*. Therefore, a member of the Legislature could not be appointed as a member of said Board of Trustees and still retain membership as a Senator or Representative because the acceptance of the second office would automatically vacate the first.

(2) The offices in question are under separate departments of state government and the simultaneous holding thereof by one individual would be in violation of the Indiana Constitution, Art. 3, Sec. 1, *supra*.