> "In any such case, provision shall be made for the transfer of the moneys and securities in the retirement or pension fund or funds, in whole or in part, to the fund established by this act. * * *"

By way of summary I would state that it is my opinion that the Health and Hospital Corporation created pursuant to the terms of Acts of 1951, Ch. 287, *supra,* may adopt its own retirement program in establishing a personnel system for certain compensated employees, or such corporation may elect to participate in the Public Employes' Retirement Fund. If the retirement program established by the corporation is supported in whole or in part by appropriations of the corporation, then the employees of such corporation cannot also participate in the Public Employes' Retirement Fund.

OFFICIAL OPINION NO. 45

December 5, 1960

Mr. Harold F. Brigham, Director
Indiana State Library
140 N. Senate Avenue
Indianapolis, Indiana

Dear Mr. Brigham:

This is in response to your letter of November 2, 1960, wherein you request an Official Opinion as to whether an individual may simultaneously hold the office of Judge of the Knox City Court and serve as a member of the Knox-Center Public Library Board.

In any question pertaining to the legal right of one individual to hold more than one governmental position such as you have enumerated, the following tests should be applied, 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 for the distribution and separation of powers provided in the Indiana Constitution, Art. 3, Sec. 1?

(3) Is such holding in violation of the provision against any person elected to any judicial office being ineligible during such term to any office of trust or profit under the State, other than a judicial office, as provided in the Indiana Constitution, Art. 7, Sec. 16?

(4) Are the offices incompatible with each other?

(5) Would such holding be against public policy?

First: Let us consider your question on the first basis concerning "lucrative office" status. The Indiana Constitution, Art. 2, Sec. 9, provides 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)

You will note that emphasis of this provision is directed toward such positions as are a *"lucrative office"* and also are *"under this State."* These essential elements are necessary in any consideration of dual office holding under this provision.

To come within the constitutional prohibition against the holding of two lucrative offices, one must hold the title to an office wherein he is authorized to exercise some of the state's sovereignty and so is an officer rather than a mere employee. In addition, it is a necessary element of a "lucrative office" that there be compensation attached for services rendered.

A public office within the meaning of the Indiana Constitution, Art. 2, Sec. 9, *supra,* was defined in the case of Shelmadine v. City of Elkhart (1920), 75 Ind. App. 493, 495, 129 N. E. 878, as follows:

> "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."

Let us now look to the two positions which serve as the basis for your inquiry. Prior to 1959, the mayor of a fifth class city could also serve as a city judge. This authority was contained in the Acts of 1905, Ch. 129, Sec. 215, as amended and found in Burns' (1946 Repl.), Section 4-2401. The powers and jurisdiction of such city judge are found in the Acts of 1905, Ch. 129, Sec. 216, as amended and found in Burns' (1959 Supp.), Section 4-2402. The Acts of 1959, Ch. 107, Sec. 5, as found in Burns' (1959 Supp.), Section 4-2615a, gives cities of the fifth class the power, through the means of a proper ordinance passed and adopted by the common council, to create the elective office of city judge, to which office the mayor is ineligible during the tenure of his office as mayor. The powers and jurisdiction thus granted a city judge by virtue of Burns' 4-2402, *supra,* are clearly indicative of the fact that a city judge in a city of the fifth class does exercise a portion of the sovereignty of the State of Indiana.

Therefore, inasmuch as a city judge in a city of the fifth class does exercise a portion of the sovereignty of the state and does receive compensation for the performance of his duties, he is, in my opinion, the holder of a "lucrative office," "under this State," within the meaning of the Constitution.

Let us now turn to the position of membership on the Knox-Center Library Board. The Acts of 1947, Ch. 321, known as the "Library Law of 1947" as found in Burns' (1952 Repl.), Section 41-902 *et seq.* contains the various provisions of law dealing with such libraries. There are two sections of said act which deal with the subject of compensation or expenses for members of such library boards. These provisions are set forth in the Acts of 1947, Ch. 321, Sec. 8, as amended, and as found in Burns' (1959 Supp.), Section 41-908. The closing words of said section are as follows:

> "* * * *All members of the board shall serve without compensation.* No board member shall serve as a paid employee of the library." (Our emphasis)

In the Acts of 1947, Ch. 321, Sec. 15, Subsection (n), as amended, and as found in Burns' (1959 Supp.), Section

41-915(n), the following provision is found among the authorized powers of such library boards:

> "(n) When the interests of the library require it, to authorize any member of the library board or any person in the employ of the library to be absent therefrom, and to pay out of its funds the necessary hotel and board bills and transportation expenses of such member or person while so absent in the interests of such library."

The constitutional prohibition is against dual *lucrative* office holding. It is essential that any such library board member should receive compensation or per diem in order to classify board membership as a "lucrative" position. The statutory provisions for the payment of actual expenses incurred by library board members and the explicit inhibition against additional compensation is practically identical with the law governing membership on the State Office Building Commission. The Acts of 1953, Ch. 221, Sec. 3, as amended and found in Burns' (1959 Supp.), Section 60-2103, contains the following provision pertaining to said State Office Building Commission:

> "* * * The officials constituting the commission shall be allowed and paid their actual expenses incurred in connection with the affairs of the commission but shall receive no further or additional compensation."

The Supreme Court of Indiana in the case of Book v. State Office Building Commission (1958), 238 Ind. 120, 151, 149 N. E. (2d) 273, 289, considered the provisions of the Indiana Constitution, Art. 2, Sec. 9, *supra,* and those of Burns' 60-2103, *supra,* and said, in part, as follows:

> " 'Lucrative office' as the term is used in Art. 2, § 9, of the Constitution of Indiana has been considered and defined by this court since the year 1846 as an office to which there is attached a compensation for services rendered. The definition which is still followed in Indiana (Op. Atty. Gen., 1953, p. 353) is stated in The State *ex rel.* Platt v. Kirk, 1873, 44 Ind. 401, at pages 405, 406, 15 Am. Rep. 239, * * *

> "While members of the State Office Building Commission are charged with certain duties under the Act creating the Commission, they receive no compensation for their services, and under the above definition adopted by this court membership on the Commission does not constitute a lucrative office. *The State ex rel. Platt* v. *Kirk, supra; Chambers* v. *The State ex rel. Barnard, Prosecuting Attorney* (1891), 127 Ind. 365, 367, 26 N. E. 893, 11 L. R. A. 613; *Wells* v. *State ex rel.* (1911), 175 Ind. 380, 94 N. E. 321; *Crawford* v. *Dunbar* (1877), 52 Cal. 36, 39; *State ex rel.* v. *Slagle* (1905), 115 Tenn. 336, 340, 89 S. W. 326, 327."

Thus the Court, by its decision, held in effect, that mere reimbursement for actual expenses was not sufficient to constitute compensation for services rendered.

Therefore, as far as the "lucrative office" question is concerned, there would be no violation of the Constitution by one individual holding both offices for the reason that the essential element of compensation or per diem for services rendered is lacking for members of the library board, and thus, membership on that board does not constitute the holding of a "lucrative office."

Second: Let us next consider whether such holding would be in violation of the constitutional provision for the distribution and separation of powers.

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."

In the case of Baltimore & Ohio R. Co. v. Town of Whiting (1903), 161 Ind. 228, 233, 68 N. E. 266, the Supreme Court in considering Art. 3, Sec. 1 of the Indiana Constitution stated:

> "This provision of the Constitution relates solely to the state government and officers charged with duties under one of the separate departments *of the State, and not to municipal governments and officers.*" (Our emphasis)

In the case of Mogilner v. Metropolitan Plan Commission *et al.* (1956), 236 Ind. 298, 322, 140 N. E. (2d) 220, the Supreme Court in considering the same Article and Section stated:

> "* * * However, such constitutional provisions pertaining to division of powers apply only to state governments, its officers and departments, and not to municipal governments and its officers. *B. & O. R. Co.* v. *Town of Whiting* (1903), 161 Ind. 228, 233, 68 N. E. 266; *Sarlls, City Clerk* v. *State, ex rel.* (1929), 201 Ind. 88, 166 N. E. 270; *State ex rel. Buttz* v. *Marion Cir. Ct.* (1947), 225 Ind. 7, 72 N. E. 2d 225. The metropolitan plan commission falls within the category of municipal governments, therefore, the constitutional provisions relied upon by appellant are inapplicable."

See also: Livengood v. City of Covington (1924), 194 Ind. 633, 643, 144 N. E. 416.

The Library Law of 1947 in Section 3, as amended and found in Burns' (1959 Supp.), Section 41-903, states:

> " 'Library district' shall mean any municipal corporation, or combination thereof, organized under this act, * * *"

Section 5 of said Library Law of 1947, as found in Burns' (1952 Repl.), Section 41-905, states, in part:

> "All library districts in Indiana, organized or otherwise coming under the provisions of this act are hereby declared to be and are made public corporations for library purposes, separate and distinct from the civil or municipal corporations comprising such library districts, * * *"

In my opinion, a local library district is, at most, a political subdivision of the state, as municipalities are political subdi-

visions of the state and as the term is applied to cities and towns as distinguished from separate departments of state government. This conforms with my position recently stated in 1960 O. A. G. No. 34, issued August 18, 1960. Therefore, I do not believe library board members come within the purview of the Indiana Constitution, Art. 3, Sec. 1, *supra.*

Third: The Indiana Constitution, Art. 7, Sec. 16 provides as follows:

> "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."

Membership on the Knox-Center Public Library Board is a position of trust. Nevertheless, while it is a position of trust, it is not one of profit and it is not an office *"under the State."*

See: 1943 O. A. G., pages 693, 695;
1960 O. A. G., No. 34, dated August 18, 1960.

Inasmuch as the membership on the library board cannot be classed as being *"under the State,"* in my opinion this provision of the Constitution does not apply in the instant case.

Fourth: Let us now examine the possible dual holding on the basis of whether such offices are incompatible with each other.

In 1954 O. A. G., No. 70, page 258 and in 1960 O. A. G., No. 9, dated February 5, 1960, you will find the following aids in testing for incompatibility:

> "It is also a general rule that a public officer is prohibited from holding two incompatible offices at the same time, the rule being founded on principles of public policy. * * * In this regard offices are generally held to be incompatible where a conflict of interests exists, as where one is subordinate to the other and subject in some degree to the supervisory powers of its incumbent. * * *
>
> " ' "The test of incompatibility is the character and relation of the offices; as where one is subordinate to the other and subject in some degree to its revisory

> power, or where the functions of the two offices are inherently inconsistent and repugnant. In such cases it has uniformly been held that the same person cannot hold both offices." * * *' "

From an examination of the powers and duties of a city judge, in a city of the fifth class, and those of a member of the library board, it is my opinion that there is no apparent incompatibility shown by a comparison of the powers and duties of the two positions.

Fifth: We now turn to the question of whether such holding would be against public policy. The Supreme Court of Indiana, in the case of Hogston v. Bell (1916), 185 Ind. 536, 545, 112 N. E. 883, said:

> "What the public policy of a state is must be determined from a consideration of its constitution, its statutes, the practice of its officers in the course of administration and the decisions of its court of last resort. * * *"

Due to varying factual situations attendant upon a consideration of various positions, in any given instance, it is my opinion that the responsibility for a determination as to whether any particular dual holding would be against public policy rests with the appointing authority.

In summary, it is my opinion that the simultaneous holding of the offices of city judge, in a city of the fifth class, and membership on the library board would not be in violation of the provisions of the Indiana Constitution cited above, relative to holding more than one lucrative office, distribution and separation of powers, or judicial office holding. In addition, I see no apparent incompatibility in the two offices and finally, as stated above, it is my opinion that the appraisement as to whether such holding is against public policy rests with the appointing authority.