

OPINION 16

tional in its general application but unconstitutional in its application to a particular set of facts. On this question numerous authorities and texts are cited:

11 Am. Jur., Constitutional Law, §§ 100, 102, 163 and 164, found on pages 733, 738, and 857 to 859.

In answer to your second question, I am of the opinion that if the County School Corporation of Brown County, Indiana, is reorganized pursuant to the provisions of Acts of 1959, Ch. 202, the Indiana Common School Fund Building Commission could accept applications from said school corporation under the provisions of Acts of 1959, Ch. 379.

OFFICIAL OPINION NO. 16

April 20, 1960

Mr. Cecil Bolinger
Executive Secretary
Public Employes' Retirement Fund
145 West Washington Street
Indianapolis 4, Indiana

Dear Mr. Bolinger:

This is in reply to your letter, submitted pursuant to a directive of the Board of Trustees of the Public Employes' Retirement Fund, in which you request my Official Opinion on three questions. The first of these reads as follows:

- “1. Mr. X served as an employee of the Public Service Commission of the State of Indiana from April 1, 1945 through July 1, 1948. The Public Employes' Retirement Fund was effective January 1, 1946. In December 1945 Mr. X signed a waiver electing not to participate in the Public Employes' Retirement Fund. Subsequently Mr. X served as a teacher and was a member of the Indiana State Teachers' Retirement System from September 1955 through June 1959 and retired as of July 1, 1959 with 17 years service credit as a teacher.

Mr. X has now submitted a claim for his service as an employee of the Public Service Commission and is claiming such service under Section 21, Chapter 329, Acts of 1955, as amended. Is Mr. X entitled to such credit?"

The facts set forth in your first question show that Mr. X was an employee of the state at the time the Public Employees' Retirement Fund became operative on January 1, 1946. As an employee on the effective date, Mr. X had the option of becoming a member or waiving all his present and prospective rights and benefits in the Fund. Acts of 1945, Ch. 340, Sec. 5, page 1593, originally provided, in part, as follows:

"(a) Any person twenty-five years of age or over who is an employe on the effective date shall become a member of the Fund as of that date, unless during the period of sixty days prior to that date, such employe shall have filed with the board on a prescribed form, a notice of election not to be included in the membership of the Fund, and a duly executed waiver of all present and prospective rights and benefits which he would otherwise have as a member. * * * Any employe who so elects not to become a member may nevertheless thereafter apply for and be admitted to membership at any future time, but without credit for service rendered prior to the time he becomes a member. * * *"

[This Section 5 was later repealed by Acts of 1957, Ch. 232, Sec. 7.]

Your letter states that in December, 1945, Mr. X signed a waiver electing not to participate in the Public Employees' Retirement Fund. There is no evidence that Mr. X ever attempted to revoke his waiver or obtain its release, nor did he apply thereafter for membership in the Fund. The form of waiver used reads, in part, as follows:

"If you file this form with the Board, you will forfeit all right to benefits under the Retirement System for past services.

OPINION 16

NOTICE OF WAIVER OF RIGHTS

under

PUBLIC EMPLOYES' RETIREMENT FUND
OF INDIANA

"I,, an employe of the State of Indiana hereby notify the Board of Trustees of the Public Employes' Retirement Fund of Indiana that I elect not to be included in the membership of said retirement fund; and I hereby waive all present and prospective annuities or benefits which I would otherwise have as a member of said retirement fund."

Mr. X is now claiming credit for the period of service from April 1, 1945, through July 1, 1948, under the provisions of Acts of 1955, Ch. 329, Sec. 21, as amended, as found in Burns' (1959 Supp.), Section 60-1932. The first paragraph of that section reads as follows:

"An employee with creditable service in any retirement system which becomes subject to this act, at the time he becomes a member of any other retirement system so subject shall be entitled to retain such service credit and the automatic suspension provision of section 20(a) of this act shall apply only if the combined creditable service of said employee in said retirement systems is less than seven [7] years at the expiration of a continuous period of five [5] years during which he performs no service. With respect to any such employee the last retirement system in which he renders service shall be responsible for payment of the benefits provided by section 17 of this act, based on his total creditable service and the amount of his prior contributions and interest credits thereon in the possession of any other retirement system subject to this act, together with its proportionate actuarial cost of his retirement benefits shall be paid by such system to the system hereby made responsible for the payment of such benefits."

That part of Burns' 60-1932, *supra*, quoted above, is not applicable to the problem under discussion because that section

refers to "an employee with creditable service in any retirement system" subject to Acts of 1955, Ch. 329, who later becomes a member of any other retirement system also subject to Acts of 1955, Ch. 329. Mr. X has had membership in only one retirement system so subject to Acts of 1955, Ch. 329—namely, the Indiana State Teachers' Retirement System. Acts of 1955, Ch. 329, Sec. 15, as found in Burns' (1959 Supp.), Section 60-1926 says of creditable service:

"Each employee shall have included in his *creditable service* for the purpose of determining his eligibility for retirement benefits and the amount thereof, *all service for which he was entitled to credit in the retirement system of which he was a member at the time the members of said system were included by a modification of the federal-state agreement pursuant to section 5 of this act, in addition to all service rendered after said date.* Each board administering such a retirement system shall determine the creditable service of each member thereof in the same manner as creditable service was determined under the provisions with respect to such system at the effective date of this act." (Our emphasis)

Under the terms of the section quoted above, one must necessarily be a *member* of a retirement system in order to receive creditable service under that system. Likewise the Public Employees' Retirement Act provided in Acts of 1945, Ch. 340, Sec. 6 (a) that one "who shall have become a member of the Fund" shall receive credit for prior service rendered his immediate employer prior to January 1, 1946. Mr. X specifically elected *not* to become a member of the Public Employees' Retirement Fund and therefore is not "an employee with creditable service in any retirement system" other than the Teachers' Retirement System.

The second and third paragraphs of Burns' 60-1932, *supra*, provide the conditions under which a state employee who is a member of a state retirement fund can claim past service as a state employee which he has been unable to claim otherwise. Burns' 60-1932, *supra*, provides, in part, as follows:

"Any employee of the state of Indiana who is now or hereafter becomes a member of the Indiana state

OPINION 16

teachers' retirement fund, the public employees' retirement fund or the field examiners' retirement fund and who has past service as an employee of the state of Indiana which such employee has not been able to claim because such past service was not covered by the retirement fund of which he or she is now or hereafter shall become a member, may claim credit for such past service under the following conditions:

“Such employee shall file with the secretary of the *retirement fund, under which said service would have been recognized had the employee remained in his past position*, an application, in form to be prescribed by the secretary of each fund, describing the dates and nature of service rendered and submitting proof of such service satisfactory to the secretary of the fund in question and such other information as the secretary may require.” (Our emphasis)

The question then for determination is whether this past service rendered by Mr. X as a Public Service Commission employee would have been recognized by the Public Employees' Retirement Fund had Mr. X remained in that position. It is my opinion that such service would not be recognized by the Public Employees' Retirement Fund since Mr. X specifically elected not to become a member of that Fund and in fact waived all his present and prospective rights and benefits in the Fund. Had he later chosen to apply for and be admitted to membership, he could have done so under Burns' 60-1605 (a), *supra*, but he would not have received credit for service rendered prior to the time he actually became a member of the Fund. From time to time the Legislature has expressly provided that, for a limited period or under certain circumstances, one might revoke his waiver of membership. [See: Acts of 1945, Ch. 340, Sec. 14, as amended, as found in Burns' (1951 Repl.), Section 60-1614 (e); Acts of 1951, Ch. 64, Sec. 2, page 157; Acts of 1957, Ch. 232, Sec. 2, as found in Burns' (1959 Supp.), Section 60-1605 (e).] However, as pointed out above, there is no indication Mr. X ever attempted to revoke his waiver and become an active member of the Public Employees' Retirement Fund.

The continuing effect of a waiver not to participate in the Public Employees' Retirement Fund was considered in 1952

O. A. G., page 222, No. 54. That Opinion determined that one in state employ on the effective date of the Fund, who filed a waiver and subsequently resigned and was re-employed, was not required to become a member of the Fund. That Opinion reads, in part, as follows, on page 225:

“Construing the above quoted portions of the Public Employees’ Retirement Act [60-1605] to effectuate each portion thereof, I come to the conclusion that an employee once given the right to waive benefits under the terms of the Act does not become subject to its terms without taking the affirmative steps required by the Act to revoke the election not to participate. * * *

“* * * However, no place in the Public Employees’ Retirement Act is there any provision requiring a person who originally elected not to participate to participate later without an affirmative revocation of the previous election.”

From the foregoing and in answer to your first question, it is my opinion that the Public Employees’ Retirement Fund cannot recognize the service claimed by Mr. X for the period from April 1, 1945, through July 1, 1948.

Each case requiring determination of benefits to be paid to a claimant must be considered and decided on the particular facts involved in each case inasmuch as the statutes have been amended and parts rewritten at various times. Therefore there is no intention in this Opinion to construe and apply the statutes as to any circumstances other than those specifically presented in your factual situations.

The second question on which you requested my opinion reads as follows:

“2. Mr. Y served in the Indiana General Assembly as a State Representative from January 1, 1941 through January 1, 1949. Mr. Y subsequently served as a teacher in the Indiana Public School Systems and under the Indiana State Teachers’ Retirement System from September 1955 through June 1959. He retired as of July 1, 1959 under the Indiana State Teachers’ Retirement System. Mr. Y has submitted a claim to the Board of Trustees

OPINION 16

of the Public Employees' Retirement Fund claiming credit for his service as a member of the General Assembly, pursuant to Acts of 1945, Ch. 340, Sec. 4a, as added by Acts of 1957, Ch. 232, Sec. 1, as amended. Can Mr. Y receive credit for such service, and if so does he get a full year of credit for each year that he served as a member of the General Assembly?"

Your letter states that the section under which Mr. Y is seeking to claim credit for service as a legislator is Acts of 1945, Ch. 340, Sec. 4a, as added by Acts of 1957, Ch. 232, Sec. 1, as amended, which is found in Burns' (1959 Supp.), Section 60-1604. That section is part of the Public Employees' Retirement Act. The part of that section pertinent to the problem you present in question No. 2 reads as follows:

"The following words and phrases as used in this Act, unless a different meaning is plainly required by the context, shall have the following meanings:

* * *

" 'Employee' shall mean any person in the service or employ of the state * * * whose compensation is paid out of funds of the state, * * * but shall not include the following:

* * *

"(d) Employees who are members of other pension or retirement funds or plans, excepting the federal social security program, maintained in whole or in part by appropriations by the state or municipality, or who are presently eligible for membership, or who by reason of their employment will become eligible for membership, in such other pension or retirement funds or plans;

* * *

"In the event any member of the general assembly, * * * who has or shall, following his tenure of office, *become an employee of the state of Indiana*, the board, in determining the amount of creditable service of such *employee*, shall give such *employee* credit for the service performed by the *employee* as a member of the

general assembly, * * * Provided, That such *employee* serves the state of Indiana for a period of at least one [1] year, subsequent to April 1, 1955." (Our emphasis)

Mr. Y is attempting to claim credit under the final paragraph above quoted. In order to receive creditable service under Burns' 60-1604, *supra*, for the period one served as a legislator, it is necessary that one "become an employee of the state of Indiana" and serve the state for one year subsequent to April 1, 1955. However, that same section has defined at length the term "employee" and it specifically does *not* include any person in the service or employ of the state whose compensation is paid out of funds of the state who is a member of another retirement plan maintained in whole or in part by appropriations by the state. Your letter states that Mr. Y was a member of the Indiana State Teachers' Retirement System and accumulated sufficient creditable service under that system to qualify for retirement benefits in 1959. Since the Teachers' Retirement System is a retirement plan for which appropriations are made by the state, under the terms of Burns' 60-1604 (d), *supra*, one who is a member of such system is not an "employee" within the terms of the Public Employees' Retirement Act and is therefore ineligible to receive credit from the Public Employees' Retirement Fund for the service he performed as a member of the Indiana General Assembly. Since there is no indication in the facts presented in your letter that Mr. Y ever became an "employee of the state of Indiana" as that term is defined and used in Burns' 60-1604, *supra*, he is not now entitled to credit from the Public Employees' Retirement Fund for the period of time he served in the Legislature from January, 1941, through January, 1949. Should Mr. Y return to state employment in the future and become an "employee" as that term is defined in Burns' 60-1604, *supra*, he would then be entitled to credit for the service he performed as a member of the General Assembly.

The third and final question presented by your letter reads as follows:

3. Mr. Z served as an employee of the State Highway Department of the State of Indiana for the years

OPINION 16

1940, 1941, and 1942. Mr. Z is now employed in the Vocational Rehabilitation Division of the Superintendent of Public Instruction of the State of Indiana where he has been employed for the past several years. However, he is the holder of a Teachers License and is therefore participating in the Teachers' Retirement System. Mr. Z has submitted an application claiming credit for service rendered to the State Highway Commission for the years 1940, 1941, and 1942. Is Mr. Z entitled to benefits based upon this service credit for these years of service?"

The answer to your final question is determined by the provisions of Burns' 60-1932, *supra*, which were discussed in the first part of this Opinion. Mr. Z is now employed by the state and is a member of the Indiana State Teachers' Retirement Fund. He has past service as a state employee in the Highway Department. He has not been able to claim this past service because it is not covered by the retirement fund of which he is now a member, but the position is covered instead by the Public Employees' Retirement Fund. Mr. Z may claim credit for this past service by filing the prescribed application with the secretary of the Public Employees' Retirement Fund, which is the Fund under which this Highway Department service would have been recognized had Mr. Z remained in his past position. Had Mr. Z been in active service in the Highway Department on January 1, 1946, he would have become a member of the Public Employees' Retirement Fund automatically, and under the provisions of Acts of 1945, Ch. 340, Sec. 6a, as added by the Acts of 1957, Ch. 232, Sec. 3, as amended and found in Burns' (1959 Supp.), Section 60-1606 (a), he would have received credit for all service rendered his immediate employer prior to that date in any position and in any department in the service of such immediate employer for which he received compensation. Burns' 60-1932, *supra*, requires the application for creditable service to be filed with the secretary of the retirement fund "under which said service would have been recognized had the employee remained in his past position." It is my opinion that Mr. Z's prior service would have been recognized by the Public Employees' Retirement Fund had he remained in his past posi-

1960 O. A. G.

tion, and therefore Mr. Z is now entitled to credit for such past service upon filing his application and proof of service as prescribed by Burns' 60-1932, *supra*.

By way of conclusion and in answer to your first question, I would state that it is my opinion for the reasons stated earlier that the Public Employes' Retirement Fund cannot recognize service performed for the Public Service Commission by Mr. X under the circumstances you described. Nor can the Public Employes' Retirement Fund give credit to Mr. Y, described in your second question, for the period of time he served in the Indiana General Assembly. However, Mr. Z, discussed in your final question, is entitled to credit from the Public Employes' Retirement Fund for the past years of service as described in your letter. The conclusions reached in this Opinion are to be restricted to the fact situations involved and not extended to other situations where the circumstances are different in any way.

OFFICIAL OPINION NO. 17

April 21, 1960

Hon. William G. Greif
State Representative
511 National Bank Building
Evansville, Indiana

Dear Representative Greif:

This will acknowledge receipt of your letter of March 18, 1960, wherein you request an Official Opinion relative to the reassessment of land and improvements provided for in the Acts of 1959. In your letter you state:

“A number of people and organizations in this area favor the assessors engaging a professional appraisal firm to appraise the entire county for this required assessment. The question has been raised as to whether Chapter 316, Acts of 1959 permits such action on the part of the assessors.”

In your letter, you have listed your questions as follows: