OFFICE OF THE ATTORNEY GENERAL

July 12, 2006

Mr. David J. Adams
Executive Director
Public Employees' Retirement Fund
143 West Market Street
Indianapolis, Indiana 46204

Official Opinion No. 2006-3

Re: Legal Status of the Consolidated City of Indianapolis

Dear Director Adams:

As the State Social Security Administrator, you recently requested an analysis of several questions posed to you by the Social Security Administration ("SSA"). The following analysis is provided in answer to those fact specific questions as presented by SSA. Please be advised that the legal opinion offered herein may not be relevant when evaluating the legal status of the Consolidated City of Indianapolis and Marion County under the Uni-Gov Act in other situations not pertaining to matters involving the Social Security Act.

Background and Questions Presented

When the Social Security Act was initially enacted in 1935, state and local government employees were excluded from coverage. Congress questioned the constitutionality of a general levy of employer tax on states and their localities. Soc. Sec. Admin., State and Local Coverage Handbook ("SLCH") ch. SL20001.201;[1] *Bowen v. Public Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 45 n.4 (1986). Later, Section 218 of the Social Security Act was added in 1950 in order to make Social Security coverage available to state and local government workers. *Id*.; 42 U.S.C.§418. Originally, under Section 218, states were allowed to enter into voluntary agreements ("Section 218 Agreements") with the federal government only if their employees were not covered by a public retirement system offered by the governmental entity. SLCH at SL20001.201. In 1954, the Social Security Act was expanded to allow coverage for state and local government employees who were members of a public retirement system if social security coverage was authorized by the state and approved through a voluntary referendum of the retirement system members. 42 U.S.C §418(d)(3); 20 C.F.R. §404.1206. All 50 states have entered into irrevocable Section 218 Agreements with SSA. SLCH at SL20001.201.

In September of 1951, the Indiana State Employees' Retirement Fund (PERF), under legislative direction as the State's Social Security Administrator, entered into a Section 218 Agreement with SSA.[2] In December of 1951, SSA approved a modification to that agreement which provided for social security coverage of all employees of Marion County for all positions not covered by an existing retirement system. Ind. State Soc. Sec. Agreement, Mod. No. 2. Because no retirement system covered Marion County employees, the entire group of employees was provided with social security coverage, including sheriff department employees. In 1963, when Marion County Sheriff deputies began being covered by an additional retirement system (the Marion County Law Enforcement Personnel Retirement Plan), the coverage had no impact on the continuation of the deputies' coverage under the Social Security Act. 1963 Op. Ind. Atty. Gen. 37, 43; *Palatine v. Califano*, 1979 WL 6846 (N. D. Ill.). A few years later, in 1955, SSA approved another modification to the Section 218 Agreement allowing for social security coverage of employees of the "Indianapolis Civil City," even though some city employees were already participants of the Indiana Public Employees Retirement Fund (PERF).[3] Ind. State Soc. Sec. Agreement Mod. No. 55. The modification did not include Social Security coverage for Indianapolis city police officers who were members of the police pension fund established in 1953[4] and who were not members of PERF. Additionally, city police officers who later became members of the 1977[5] Police Officers' and Firefighters' Pension and Disability Fund were not covered by Social Security.

When political entities change status, SSA requests that the State Social Security Administrator make SSA aware of any change. SLCH at SL 40001.475. SSA differentiates between a simple name change and a more comprehensive change reflecting the creation of a new legal entity. SSA advises State Social Security Administrators:

> If only a name change is involved and the entity's composition remains the same or the entity merely annexes or gives up territory and its legal status is not changed, a written notice of the name change with legal documentation for the name change is sufficient.

> However, if the name change reflects the dissolution of the old entity and the creation of a new entity, a new modification may be required to cover employees of the new entity.... The State Administrator may be asked to contact the State Attorney General's office for an opinion on the legal status of the entity under state law.

Id.

In 1969, under what came to be known as the "Uni-Gov Act," the Indiana legislature reorganized local municipal and county government in counties containing a city of the first class. The reorganization allowed for the consolidation of governmental functions in heavily populated communities. *See* Ind. Acts of 1969, ch. 173, p. 357 (codified as amended at Ind. Code §36-3-1-1 to 36-3-7-5); *Dortch v. Lugar*, 277 N.E.2d 25, 30 (Ind. 1971). After the initial implementation of the Uni-Gov Act in 1969, the state did not readdress modifications to the State Social Security Agreement with SSA.

In 2005, Public Law 227-2005,§18, codified at 36-3-1-5.1, allowed the consolidated city-county legislative body to adopt an ordinance to further consolidate the police department of the consolidated city and the county sheriff's department. On December 19, 2005, General Ordinance 110, 2005 was passed by the city-county council to amend the Revised Code to establish a metropolitan law enforcement agency through the consolidation of the Indianapolis Police Department and the county police force of the Marion County Sheriff's Department. As such, SSA has requested an analysis of the following questions:

1. What is the legal status of the City of Indianapolis and Marion County after the enactment of the Uni-Gov Act at Indiana Code article 36-3.
2. Did the Uni-Gov Act create a separate political subdivision from the City of Indianapolis and Marion County?
3. To what extent were the city and county governments consolidated after Uni-Gov?
4. Does the City of Indianapolis continue to exist as a political subdivision in light of section 36-3-1-4's establishment of a consolidated city and the abolishment of the first class city as a separate entity?
5. Was there an annexation as a result of Uni-Gov?
6. How does Uni-Gov affect the existing Section 218 agreement with the City of Indianapolis and Marion County?

Analysis

Local governmental units, such as cities and counties, are part of the state government as a whole and are creatures of the legislature. *Woerner v. Indianapolis*, 177 N.E.2d 34, 40 (Ind. 1961). The legislature may "abolish, consolidate, combine, eliminate, or create new governmental corporations, or authorize such alterations to govern those who live in a given area." *Id*.

"Consolidation" generally entails the merger of "two or more political units, involving the surrender of all power of one unit to the other, or to a new consolidated government." Eugene McQuillin, The Law of Municipal Corporations §8.21 (3rd ed. 1996). The stated purpose for the Uni-Gov Act was for the "'reorganization of government in counties containing a city of the first class.'" *Dortch,* 266 N.E. at 550-51 (citing Acts of 1969, ch.173, p. 357). In 2005, for the first time, the Indiana Court of Appeals reviewed the extent to which the city and county governments were consolidated under Uni-Gov in *Scott v. Consolidated City of Indianapolis*, 833 N.E. 2d 1094, 1099 (Ind. Ct. App. 2005) trans. denied.

In *Scott*, on appeal was the denial of Scott's motion for a change of venue from Marion County. *Id.* at 1096. The trial court had denied the motion by ruling that Marion County was not a nominal party to the action involving the Indianapolis Water Company, owned by the City of Indianapolis. *Id.* The Court of Appeals upheld the ruling and noted that while many of the Uni-Gov statutory provisions would appear to indicate that the city and county became one entity under the Uni-Gov Act, the bulk of the Uni-Gov Act would indicate that the City of Indianapolis and Marion County retained separate identities. *Id*. at 1100.

In *Scott*, the Court highlighted the following in as indicators that portions of the county government remained separate from the city government: 1) geographically, the consolidated city encompasses less than the entire area of Marion County; 2) many Uni-Gov statutory provisions do not affect citizens of the entire county, but only citizens of the consolidated city; 3) even though the legislative and executive bodies of the city and county are one and the same, the legislature intended that the county government continue to exist outside of the city government by expressly naming the executive and legislative body for both the city and the county rather than abolishing either entirely; 4) the legislature maintained the standard constitutional offices for a county; 5) budget estimates are separately prepared by city and county officials[6]; 6) section 36-3-6-7 of the Indiana Code allows for taxes to be levied upon the whole county and placed in the consolidated county fund for departments having jurisdiction over the whole county while taxes levied for departments having jurisdiction inside the "corporate

boundaries of the consolidated city" are levied only on property within that jurisdiction; 7) finally, the court noted that Indiana Code section 36-3-7-1 requires the consolidated city and county independently conform to either the city or county administration statutes at Indiana Code chapters 36-4-8 or 36-2-6. *Id.* at 1099-01. *See also Metro. Emer. Commc'ns Agency v. Cleek*, 835 N.E.2d 565 (Ind. Ct. App. 2005) trans. denied (confirming the separate identities of the city and county by concluding that the MECA was solely an agency of the county even though it was subject to the approval of the city-county legislative body and was considered a special taxing district of the consolidated city). *Compare Holsclaw v. Stephens* 507 S.W.2d 462, 470 (Ky. 1973) (noting legislature intended to combine the powers of a city and county to create a new and separate classification of local government that is neither a city nor a county).

Scott establishes that both the city and county exist as separate entities under the Uni-Gov Act and should not to be considered as a single governmental entity. Therefore, Section 218 Agreements with both the City of Indianapolis and Marion County continue to be appropriate. There is no indication in the Uni-Gov Act, or through its judicial interpretation, that the law created a separate and distinct third governmental entity for purposes of requiring an additional Section 218 Agreement modification with SSA.

Also at issue is whether the Section 218 Agreement modifications entered into by Marion County in 1951 and the City of Indianapolis in 1955 continue to be effective. SSA requires modification of an original agreement if a governmental entity has been dissolved or reorganized in such a way that a new entity is created. SLCH at SL 40001.475. The SSA equates "dissolution" with the legal "nonexistence" of a political subdivision. 20 C.F.R. §404.1219. The dissolution of a municipal corporation involves legislative direction for its discontinuance, the winding up of its affairs, and the liquidation of the corporation. McQuillin, *supra*, §8.12; 8.14. The Indiana legislature provided such express statutory direction only for the "included towns" under Uni-Gov with populations of less than five thousand (5,000) that became part of the consolidated city. Ind. Code §36-5-1.1-1(2) (statutes regarding dissolution of town applies to "included towns").

The Uni-Gov Act does not provide for the discontinuance, winding up or liquidation of the City of Indianapolis' affairs. While Indiana Code section 36-3-1-4 expressly provides that the City of Indianapolis, as it existed prior to the Act, was "abolished as a separate entity," the Court in *Dortch* noted the stated purpose of the Uni-Gov Act was to reorganize local government in order to consolidate governmental functions of a county and a first class city. *Dortch*, 266 N.E.2d at 31. The court determined that the term "reorganize" meant "'to organize again or anew; change the organization of.'" *Id*. (citations omitted). The Uni-Gov Act provided for the reorganization of the city with some extension of population and territory. Ind. Code §36-3-1-4. The rights and liabilities of the originally established city were not extinguished, but were transferred during the reorganization. Ind. Code 36-3-1-8. As such, for purposes of analyzing the State's Section 218 Agreement, the Uni-Gov Act's reference to the City of Indianapolis being "abolished as a separate entity" should not be considered as a reference to the extinguishment of the pre-existing city altogether. The reference should be viewed more narrowly as a reference to its continued existence in a reorganized fashion as a municipal entity that is no longer a "separate entity," but an independent part of a hybrid governmental organization with overlapping city and county jurisdictions. *MECA*, 835 N.E.2d at 568.[7] Accordingly, as noted in *Scott*, both the city and county separately survived the consolidation and separately continue to employ governmental employees. As such, the existing modifications to the state's Section 218 Agreement appropriately address Social Security coverage for those employees.

Additionally, public policy considerations support the position that the existing modifications to the state's Section 218 Agreement properly cover both the Consolidated City of Indianapolis and Marion County employees. The two current modifications to the Section 218 Agreement have governed coverage of both county and city employees without revision for over fifty-five (55) and fifty-one (51) years, respectively. Since the implementation of the Uni-Gov Act thirty-seven (37) years ago, both the city and county have operated under the assumption that the existing modifications legally extended social security coverage to their governmental employees. The SSA has not previously questioned the State Administrator's decision to operate under its existing modifications for the city and county. By example, SSA did not dispute the city's continued use of the same Employer Identification Number (EIN) both before and after Uni-Gov for tax identification and social security withholding purposes. To require a new modification at this time would cause unnecessary confusion. Outside of the recent merger of the law enforcement agencies, the basic structure of the city and county government has not significantly changed since the implementation of Uni-Gov.

Furthermore, in 1983, Congress amended the Social Security Act to make Section 218 Agreements irrevocable and to prevent states and localities from withdrawing from the system. *Bowen*, 477 U.S. at 44; 42 U.S.C.§418(g). Congress sought to protect the integrity of the "pay as you go" financing system which uses current contributions to pay out current benefits. *Id.* To determine, at this date, that the Uni-Gov Act created a new governmental employer in 1969, thus voiding the existing Section 218 modifications governing city and county

employees, would be in opposition to Congressional intent to create a stabile, mandatory system of coverage. The aforementioned policy considerations support the position that the Uni-Gov Act should not be deemed to have created a new governmental employer or substantially changed the existing governmental employers for the purposes of the Section 218 Agreement modifications.

Brief Answers

Based on the foregoing analysis, short answers to the questions presented for purposes of reviewing the state's Section 218 Agreement with SSA are as follows:

1. The legal status of the City of Indianapolis and Marion County, after the enactment of the Uni-Gov Act at Indiana Code article 36-3, is that of a separate city and county with overlapping jurisdictions. The city and county should not be considered as a single governmental entity.
2. The Uni-Gov Act did not create a separate political subdivision from the City of Indianapolis and Marion County.
3. The consolidation of the city and county government after Uni-Gov resulted in certain county departments and agencies being merged with existing city departments with similar duties. The county maintains certain elected officials, including the auditor, recorder, prosecutor, sheriff, and coroner. The Uni-Gov Act does not provide for the existence of county departments or agencies other than those that are overseen by elected county officials. While the city and county maintain a single executive and legislative arm, each is administered independently, with budgets estimated and taxes levied separately.
4. The City of Indianapolis continues to exist as a political subdivision and was not dissolved by the Uni-Gov Act. For purposes of analyzing the State's Section 218 Agreement, the Uni-Gov Act's reference to the City of Indianapolis as being "abolished as a separate entity" should not be considered as a reference to the extinguishment of the pre-existing city altogether. The statutory language should be viewed as a reference to the city's continued existence in a reorganized fashion as a municipal entity that is no longer a "separate entity," but an independent part of a consolidated government.
5. The territory of the City of Indianapolis was expanded under the Uni-Gov Act to include all other territory in the county except for that of any excluded city. Ind. Code §36-3-1-4(a). Traditional annexation proceedings as allowed under Indiana Code chapter 36-4-3 were not used in the development of the consolidated city and county under Uni-Gov.
6. The existing Section 218 agreement and its subsequent modifications involving the City of Indianapolis and Marion County were not affected by the consolidation under the Uni-Gov Act. The city and the county separately survived the consolidation and separately continue to employ governmental employees. The existing modifications to the state's Section 218 Agreement continue to legally address Social Security coverage for those employees.

The above analysis is offered solely for purpose of determining the status of the current modifications to the state's Section 218 Agreement with the Social Security Administration. It should not be construed as offering an opinion about the status of the City of Indianapolis and Marion County for any other purpose.

Sincerely,

Stephen Carter
Attorney General

Rebecca Walker
Deputy Attorney General

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[1]The SLCH is a part of the Social Security Administration's Program Operations Manual System (POMS) available online at *https://s044a90.ssa.gov/apps10/poms.nsf/chapterlist!openview & restricttocategory=19*. The SLCH may not be used or cited as authority for technical matters. SLCH at SL10001.101. POMS contains the Social Security Administration's policy interpretations and does not have force of law, but is entitled to persuasive authority and is used in this opinion for informational purposes only. *Ramey v Rizzuto*, 72 F.Supp. 2d 1202, 1212 (D. Colo., 1999) (citations omitted).

[2]Ind. Code §5-10.1-2-2 ("[PERF] with the approval of the governor may enter into a federal-state agreement with the federal administrator to extend the benefits of the Social Security Act to the employees of the state and its political subdivisions.")

[3]In accordance with federal requirements, a majority vote in favor of Social Security coverage was obtained from the eligible members of PERF. SLCH at SL 30001.323.

[4]Ind Cod ch. 36-8-7.5.

[5]Ind. Code ch. 36-8-8.

[6]Public law 227-2005, §22-25 (codified at Ind. Code ch. 36-3-5) revised the duties of the controller, the fiscal officer of the consolidated city and county. The new laws changed the controller's authority in presenting final budget estimates to the executive; however, city and county budgets are still separately estimated and maintained.

[7]*See also Shapleigh v. San Angelo,* 167 U.S. 646, 53 (1897) ("When, therefore, a new form is given to an old municipal corporation, or such a corporation is reorganized under a new charter, taking, in its new organization, the place of the old one, embracing substantially the same corporators and the same territory, it will be presumed that the legislature intended a continued existence of the same corporation, although different powers are possessed under the new charter, and different officers administer its affairs; and, in the absence of express provision for their payment otherwise, it will also be presumed in such case that the legislature intended that the liabilities as well as the right of property of the corporation in its old form should accompany the corporation in its reorganization").

Posted: 08/09/2006 by Legislative Services Agency
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