OPINIONS

OF THE

Attorney General

OF

NEW JERSEY

FOR THE

Period from January 1, 1954
to December 31, 1955

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STATE OF NEW JERSEY

Department of Law and Public Safety
Division of Law

JANUARY 1, 1954—DECEMBER 31, 1955

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March 9, 1954.

Hon. Archibald S. Alexander
State Treasurer
State House
Trenton, New Jersey

FORMAL OPINION—1954 No. 1

Dear Treasurer Alexander:

You have requested our opinion as to whether the Director of the Division of Purchase and Property, hereinafter called the Director, has the power to secure a performance bond on a contract for building construction at Rutgers University, to select the surety company and to pay the premium for the bond.

Rutgers University advertised for bids for the construction of a new library building. The bidders were furnished with a set of specifications, and the contract subsequently executed the successful bidder was made subject to the specifications. Through inadvertence the specifications provided, *inter alia*, that the successful bidder should, within ten days after acceptance of his bid, "qualify for" a performance bond to be paid for by the "Owner." The "Owner" is defined in the contract as the Trustees of Rutgers University for themselves and on behalf of the State. The successful bid was exclusive of the cost of a performance bond according to the affidavit of the contractor.

It is our understanding that the provision with respect to the performance bond in the specifications is a departure from the policy adopted by the Division of Purchase and Property pursuant to Formal Opinion No. 27 of September 4, 1951. We have reviewed Formal Opinion No. 27 and conclude that, to the extent that it states that the Director lacks the power to select the surety company for a performance bond and to pay the premium therefor, the opinion is hereby withdrawn.

By statute, the Director is in charge of erection and alteration of State office buildings in the City of Trenton (N. J. S. A. 52:27B—64) and of State institutional buildings except for State Board of Education buildings (N. J. S. A. 52:18A—19.2), with the power to award contracts.

The Director has a statutory duty to maintain insurance wherever necessary to safeguard the interest of the State. N. J. S. A. 5227B—62 provides:

> "The director is hereby authorized, and it shall be his duty, after consultation with the heads of State departments and agencies, to purchase and secure all necessary casualty insurance, marine insurance, fire insurance, fidelity bonds, and any other insurance necessary for the safeguarding of the interest of the State. He is hereby authorized, subject to the commissioner's supervision and approval, to establish, in the Division of Purchase and Property, a bureau to administer a centralized system of insurance for all departments and agencies of the State Government."

It should be noted that fidelity bonds are listed with types of insurance in the statute *supra*.

Subtitle 3 of Title 17 of the Revised Statutes covers the general subject of insurance. Chapter 31 of this subtitle, R. S. 17:31—1 *et seq.*, deals with surety bonds required or permitted by law. R. S. 17:31—1 provides:

"Any bond, undertaking, recognizance, guaranty or other obligation required or permitted to guarantee the performance of any act, duty or obligation, or the refraining from any act, required or permitted, by law, or the charter, ordinances, rules or regulations of any municipality, board, body, organization, court or public officer, to be made, given, tendered or filed with surety or sureties, may be executed by any company authorized under the laws of this state to carry on the business specified in paragraph "g" of section 17:17—1 of this title."

There is no authority elsewhere in the Revised Statutes for the execution of a surety bond either required or permitted by law except by a company which meets the specifications of R. S. 17:31—1. Only a company authorized under the laws of the State to carry on a business specified in paragraph "g" of R. S. 17:17—1 can validly execute such bond. The use of the permissive "may" in R. S. 17:31—1 is of no significance. The use of "shall" would be nugatory as applied to the execution of a surety bond permitted, but not required, by any law.

R. S. 17:17—1 (g) (N. J. S. A.) provides as follows:

"17:17—1. Kinds of insurance

"Ten or more persons may form a corporation for the purpose of making of any kinds of insurance, as follows: . . .

"g. Against loss from the defaults of persons in positions of trust, public or private, or against loss or damage on account of neglect or breaches of duty or obligations guaranteed by the insurer; and against loss by banks, bankers, brokers, financial or moneyed corporations or associations, of any bills of exchange, notes, checks, drafts, acceptances of drafts, bonds, securities, evidences of debt, deeds, mortgages, documents, gold or silver, bullion, currency, money, platinum and other precious metals, refined or unrefined and articles made therefrom, jewelry, watches, necklaces, bracelets, gems, precious and semiprecious stones, and also against loss resulting from damage, except by fire, to the insured's premises, furnishings, fixtures, equipment, safes and vaults therein caused by burglary, robbery, hold-up, theft or larceny, or attempt thereat: No such indemnity indemnifying against loss of any property as specified herein shall indemnify against the loss of any such property occurring while in the mail or in the custody or possession of a carrier for hire for the purpose of transportation, except for the purpose of transportation by an armored motor vehicle accompanied by one or more armed guards."

Thus, the statute providing for the formation of insurance companies and classifying kinds of insurance is the statutory authority for the formation of companies acting as sureties on bonds conditioned against loss or damage on account of the breach of an obligation owed to the State.

In *State v. Community Health Service, Inc.*, 129 N. J. L. 427 (E. & A., 1943), the former Court of Errors and Appeals approved the opinion of Mr. Justice Oliphant, sitting as Supreme Court Commissioner, in which Justice Oliphant adopted a definition of insurance which is broad enough to encompass performance bonds. In his opinion he referred to the statement in Moresh v. O'Regan, 120 N. J. Eq. 534, 549 (Ch., 1936), rev'd. 122 N. J. Eq. 388 (E. & A., 1937), that "a contract which for a consideration, undertakes to do anything other than to pay a sum of money upon the destruction or injury to something in which the other party has an interest, is not a contract of insurance." With respect to this definition, Justice Oliphant said, 129 N. J. L. at 429:

"This pronouncement was apparently based on the definition of insurance as contained in 32 C. J. 975 & 1; 'broadly defined, insurance is a contract by which one party, for a compensation called the premium, assumes particular risks of the other party and promises to pay to him or his nominee a certain ascertainable sum of money on a specified contingency.'

"Tested by this rule the business of the defendant is not that of insurance, but I believe the definition therein contained is too narrow. I prefer that found in the Mass. Gen. Laws 175, S2. It is 'an agreement by which one party for a consideration promises to pay money or its equivalent or to do an act valuable to the insured upon the destruction, loss or injury of something in which the other party has an interest.' Of this definition, the Massachusetts Supreme Judicial Court has recently said, in Attorney-General, ex. rel. Monk v. Osgood Co., 249 Mass. 473. 'This statutory definition does not differ in any essential from the common-law definition.'"

Aetna Casualty & Surety Co. v. International Re-Insurance Corp., 117 N. J. Eq. 190 (Ch. 1934), also reinforces the construction that the Legislature intended to classify surety bonds as insurance.

The Court of Chancery held that an obligee on a surety bond was a policyholder within section 10 of the Insurance Act of 1902 providing that the deposit of securities with the Commissioner of Banking and Insurance by authorized insurance companies should be in trust for policyholders.

The opinion by Vice-Chancellor Buchanan states:

"An insurance policy is the formal written instrument in which the contract of insurance is embodied; and a contract of insurance by a surety or guaranty company, though in the form of a bond, is in fact a policy of insurance and should be so construed."

Referring to what is now R. S. 17:31—1 quoted *supra*, the Vice-Chancellor's opinion concludes:

"Moreover, section 46 of this act of 1902, provides that surety bonds made by insurance companies incorporated thereunder and authorized to carry on the business of insurance (indemnifying) against loss by reason of breach of duty or obligation (specified in subdivision 7 of section 1 of the act), shall be deemed and taken to be in full compliance with all qualifications prescribed by statutes under which the giving of such a surety bond is required or authorized. This is an obvious recognition of the fact that such surety bonds (whether or not they be in cases where such bonds are required or authorized by statute) are contracts of insurance against loss by reason of breach of duty or obligation, and of the kind contemplated by insurance companies organized under the act for the purpose of doing the business specified in subdivision 7 of section 1, and are 'policies' within the meaning of that word in section 2. Section 47 requires that any such insurance company, in order to be entitled to the benefits of the provision of section 46, 'must comply with all the requirements of the act applicable to such company'—and assuredly sections 8 and 10 deal with one of such requirements. All this further confirms the conclusion that the holder of such a surety bond is a policy holder within the meaning of section 10."

The statute (N. J. S. A. 52:27B—62) empowering the Director to purchase and secure any insurance necessary for the safeguarding of the interest of the State is *in pari materia* with the statutes in subtitle 3 of Title 17 dealing with insurance. N. J. S. A. 52:27B—62 was enacted in 1944, while the applicable provisions of Title 17 were enacted in 1902.

Because of the specific statutory authority, it is not necessary to consider the Director's incidental powers in a matter related to State construction involving a large prospective saving for the State.

There is no basis in legal theory for a distinction between suretyship and insurance in deregation of the plain language of the above statutes. Both the surety (see N. J. S. 2A:44—143 to 147) and the insurer have primary obligations. That the surety's obligation is both joint and several is not a material distinction.

Inasmuch as Rutgers University in respect to contracts for construction financed by the Trustees secures and pays for the performance bonds, there can be no greater right in the contractor on Rutgers University construction financed by the State to choose his own bondsman than on any other State construction. The contractor does not contract with the surety company of his choice for a performance bond to the Trustees of Rutgers as sole owner.

In view of the foregoing authorities, it is our opinion that the Director is authorized to secure the performance bond, select the surety company and pay the premium for the bond out of the legislative appropriation for the construction of the library at Rutgers University.

It is also our conclusion that the Director may legally continue the policy adopted subsequent to the issuance of Formal Opinion No. 27 of September 4, 1951 which has been to permit the successful bidder to secure the performance bond from any authorized surety company of his own selection and to pay the premium therefor. In such cases, the contracts executed by the contracting agency and approved by the Director so provide and the cost of the performance bond is presumably included in the bid. Under this procedure the State's interest is fully safeguarded without interference with the normal and desirable relationship between the contractor and the surety company and there is therefore no need for the Director to exercise his authority to secure a performance bond.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: DAVID D. FURMAN
Deputy Attorney General

JANUARY 20, 1954.

The Honorable The Members of the
State Investment Council
State House
Trenton, New Jersey

FORMAL OPINION—1954. No. 2.

You have requested my opinion as to the investment responsibility of the Director of the Division of Investment and the State Investment Council over certain assets in the account of the Trustees for the Support of Public Schools, State of New Jersey.

I am informed by the Director of the Division of Investment that the assets in question consist of the following:

Stocks—880 shares capital stock ($25.00 par value) Trenton Banking Company
1,355 shares capital stock ($100.00 par value) United New Jersey Railway and Canal Company, and
Mortgage—on real estate transferred to Mrs. Marion T. Newbold, $5,000.00

Chapter 1, P. L. 1903 (R. S. 18:10—1 to 18:10—17), as amended, established a board known as "The Trustees for the Support of Public Schools", and vested in the trustees investment responsibility over the funds entrusted to this board, for the support of public schools "arising from appropriations made by law, or which may arise from gift, grant, bequest, or devise." (R. S. 18:10—1).

In connection with this fund, Paragraph 2 of Section IV of Article VIII of our new State Constitution, provides as follows:

> "The fund for the support of free public schools, and all money, stock and other property, which may hereafter be appropriated for that purpose, or received into the treasury under the provision of any law heretofore passed to augment the said fund, shall be securely invested, and remain a perpetual fund; and the income thereof, except so much as it may be judged expedient to apply to an increase of the capital, shall be annually appropriated to the support of free public schools, for the equal benefit of all the people of the State; and it shall not be competent for the Legislature to borrow, appropriate or use the said fund or any part thereof for any other purpose, under any pretense whatever."

The general functions of the trustees of this fund were the subject matter of an opinion by our Court of Errors and Appeals in the case of *The American Dock and Improvement Company, et al. v. The Trustees for the Support of the Public Schools, et al.*, 35 N. J. Eq. 181. In this case Mr. Justice Depue, speaking for the Court said:

> "The property in the fund set apart for the support of the public schools is by law vested exclusively in the trustees to hold on the trusts declared by the statute. They are made custodians of the fund, free, by constitutional provision, from even the control of the Legislature, except in the designation of the mode of application to the support of public schools."

See also *The Trustees for the Support of Public Schools v. The Ott and Brewer Company, et al.*, 135 N. J. Eq. 174.

Section 170 of Chapter 1, P. L. 1903 (2nd Sp. Sess.), as amended, (R. S. 18:10-8) provides that moneys belonging to the school fund shall be invested by the trustees in bonds of the United States, of the State of New Jersey, or of any county or municipality of this State; and further provides that interest on such bonds shall become a part of the income of the school fund.

The State Investment Council and the office of the Director of the Division of Investment were established by Chapter 270, P. L. 1950 (R. S. 52:18A—70 to 52:18A—94 inc.). Section 9 of this act (R. S. 52:18A—87) vested in the Director of the Division of Investment "the functions, powers and duties vested by law in . . . the trustees for the support of public schools, of, or relating to, investment or reinvestment of moneys of, and purchase, sale or exchange of any investment or securities of or for, any funds or accounts under the control and management of such agencies . . .".

In view of the provisions of the statute last cited, it is my opinion that the provisions of Section 9 of Chapter 270, P. L. 1950 vest in the Director of the Division of Investment, investment responsibilty over the specific assets referred to in this letter.

In connection with the $5,000 mortgage that is part of the assets, I note the provisions of Chapter 18, P. L. 1953 (R. S. 18:10—2) that requires the Trustees to foreclose whenever the interest on bonds secured by mortgages shall remain unpaid for six months. It is my opinion that your responsibility is solely that touching upon the investment, and reinvestment, of moneys, and the purchase, sale or exchange of other assets of the Fund, and neither you, nor the Investment Council, have any responsibility for directly supervising the status of this mortgage, or enforcing any default.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: DANIEL DE BRIER
Deputy Attorney General

ddb;b

FEBRUARY 2, 1954.

HON. CHARLES R. ERDMAN, JR.
Commissioner, Department of Conservation and Economic Development
520 East State Street
Trenton, New Jersey

FORMAL OPINION 1954—No. 3.

DEAR COMMISSIONER:

You have requested a formal opinion as to the legal authority of your Department, with respect to lands below low water mark in the Delaware River within the so-called twelve-mile Delaware Circle, (1) to make riparian grants and (2) to issue licenses and fix a charge for the dredging of bottom material pursuant to R. S. 12:3-22.

As you have noted, the decree of the United States Supreme Court entered June 3, 1935 in the Delaware boundary case (*N. J. v. Delaware*, 295 U. S. 694) fixed the boundary within the Delaware Circle at the mean low water line on the New Jersey side of the Delaware River; and this decree was made without prejudice to the rights of either state under the Compact of 1905, which was enacted in New Jersey as R. S. 52:28—34, et seq. The Compact provides generally for the service of civil and criminal process by either State upon any portion of the Delaware River, for the common enjoyment of fishing rights throughout the waters of said river between the low water marks on each side thereof, and for riparian jurisdiction. This last item is covered by Article VII, which reads as follows:

> "Each state may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases and conveyances of riparian lands and rights under the laws of the respective states."
> (L. 1905, c. 42, Art. VII, p. 71.)
> Article VIII of the Compact reads:
> "Nothing herein contained shall affect the territorial limits, rights or jurisdiction of either state of, in or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth." (L. 1905, c. 42, Art. VIII, p. 71.)

In my opinion, the State of New Jersey has by virtue of Article VII the complete and exclusive right to make grants and leases of riparian lands below low water mark on its side of the river.

In the first place, as was observed in the opinion of the United States Supreme Court in *New Jersey v. Delaware*, 291 U. S. 361, the State of Delaware has apparently never claimed to own the shore between high and low water mark on the New Jersey side; that part of the shore has always belonged to the State of New Jersey. *State v. Jersey City*, 25 N. J. L. 525, 527. Since New Jersey owned to low water mark in any event, the Article (VII) granting to each State the right to continue to exercise riparian jurisdiction of every kind and nature and to make grants and leases of riparian lands under its own laws would have had no meaning or purpose unless it applied to lands below the low water mark. An act of the Legislature should be so construed that, if it can be prevented, no part thereof shall be superfluous, void or insignificant. *Steel v. Freeholders of Passaic*, 89 N. J. L. 609, 612; *Ford Motor Company v. New Jersey Dept. of Labor and Industry*, 5 N. J. 494, 509.

In the next place, I am informed that two grants of land below low water mark were made by the predecessor of your Navigation Bureau before the Compact of 1905 was entered into. It was also noted in the opinion of the Supreme Court in the Delaware boundary case (291 U. S. 361, 375) that the riparian proprietors on the New Jersey shore had for many years exercised dominion over the land below low water mark by building wharves and piers out into the river, in accordance with licenses or privileges granted by the State of New Jersey. When the Compact provided in Article VII that New Jersey on its own side of the river might "*continue* to exercise riparian jurisdiction of every kind and nature and to make grants, etc.," it obviously contemplated the continuance of the exercise of riparian jurisdiction as theretofore, including the making of grants for lands below low water mark.

I am further informed that since the year 1905 thirty grants of such land have been made by the State of New Jersey, and that no claim has been made by the State of Delaware of any right to make riparian grants on the New Jersey side of the river. The practical construction thus placed by the parties upon the Compact in question, and adhered to by them for approximately fifty years, is entitled to great weight. *State v. Rogers*, 56 N. J. L. 480, 646; *Passarella v. Board of Commissioners*, 1 N. J. Super. 313, 320.

A contrary view would require a riparian owner who desired to acquire riparian lands below low water mark to undergo the cumbersome procedure of applying first to the State of New Jersey for a grant of the foreshore and then to the State of Delaware for a grant of the land below low water mark. "We cannot attribute to the Legislature a purpose so at variance with the common sense of the situation when the language used is susceptible of a construction in harmony with it." *Township Committee of Freehold Township v. Gelber,* 26 N. J. Super. 388, 391.

For these reasons we are convinced that by virtue of the Compact above referred to, the State of Delaware has given to the State of New Jersey the power to grant riparian lands adjacent to the New Jersey shore even though the title to said lands is in the State of Delaware.

As to your authority to issue licenses and fix a charge for the dredging of bottom material below low water mark, I am compelled to a different conclusion.

As we have seen, Article VIII of the Compact provides that nothing contained therein shall affect the rights of either State or the ownership of the subaqueous soil in the Delaware River except as set forth in the Compact; and the only exceptions made by the Compact to the jurisdiction of the State of Delaware over its territory in the Delaware River are the service of civil and criminal process, the common enjoyment of fishing rights, and the provisions of Article VII for the exercise of "riparian jurisdiction of every kind and nature" and the granting of "riparian lands and rights." Dredging and removing material from subaqueous soil (other than soil owned by a riparian proprietor) is not a riparian right, nor is the licensing of such activity an exercise of riparian jurisdiction. The word "riparian" is derived from the Latin word "ripa", which means "bank", and it is defined in Webster's Dictionary as "pertaining to * * * the bank of a river". Accordingly, the word "riparian" ordinarily refers to the bank and not the bed of the stream, and riparian rights are generally defined as those which grow out of the ownership of the banks, rather than the beds, of streams. *Gough v. Bell,* 22 N. J. L. 441, 464; *Rome Ry. & Light Co. v. Loeb,* 80 S. E. 785, 787, 141 Ga. 202; *United Paper Board Co. v. Iroquois Pulp & Paper Co.,* 123 N. E. 200, 202, 226 N. Y. 38; *cf. City of Paterson v. East Jersey Water Co.,* 74 N. J. Eq. 49, 63, aff'd. 77 N. J. Eq. 588.

Unlike the situation in respect to grants, New Jersey has never undertaken to issue licenses for dredging within the twelve-mile Circle. Moreover, R. S. 18:3—22 provides only for licenses to dredge or remove any deposits of sand or other material "from lands of the state" under tide waters. The lands below low water mark within the twelve-mile Circle are not lands of this State, but lands of the State of Delaware.

In view of the foregoing, I find no authority for your Department to exercise the power in question with respect to the lands under discussion.

Very truly yours,
GROVER C. RICHMAN, JR.
Attorney General

By: THOMAS P. COOK
Deputy Attorney General

tpc;b

APRIL 15, 1954.

MR. GORDON S. KERR, DIRECTOR
Division of Investment
State House
Trenton, New Jersey

FORMAL OPINION 1954—No. 4

DEAR MR. KERR:

You request the opinion of this office as to the jurisdiction of the Division of Investment, Department of the Treasury, over the Unsatisfied Claim and Judgment Fund, established by Chapter 174, P. L. 1952 (N. J. S. A. 39:6—61 to 39:6—91, incl.).

In 1952 our Legislature enacted a series of laws, one of which was the statute above cited, for the general purpose of affording financial protection for persons suffering bodily injury or death, or property damage, as the result of motor vehicle accidents caused by the negligence of others. Among these statutes are the Motor Vehicle Security-Responsibility Law (Chapter 173, P. L. 1952—N. J. S. A. 39:6—23 to 39:6—57, incl.); Chapter 176, P. L. 1952 (N. J. S. A. 39:6—58 to 39:6—60) which provides for the apportionment of the cost of the administration of the Motor Vehicle Security-Responsibility Law among certain insurance companies; the Unsatisfied Claim and Judgment Fund Law, referred to above; and the Motor Vehicle Liability Security Fund Act (Chapter 175, P. L. 1952—N. J. S. A. 39:6—92 to 39:6—104, incl.).

The Unsatisfied Claim and Judgment Fund Law provides for the establishment and maintenance of a fund, the principal sources of which are fees from persons registering an uninsured motor vehicle in this State, fees from every other person registering a motor vehicle in this State, and a percentage of the premiums written by insurers issuing motor vehicle liability insurance.

The fund is held in trust by the State Treasurer, to be disbursed under the provisions of the Act, for the payment of certain unsatisfied claims and judgments arising out of the ownership, maintenance, or use of motor vehicles in this State.

The responsibility of the State Treasurer in connection with the custody of this fund, and the investment thereof, are set forth in N. J. S. A. 39:6—88 which reads as follows:

> "All sums paid to the director as Unsatisfied Claim and Judgment Fund Fees and as additional charges against owners of uninsured motor vehicles shall be remitted to the treasurer within thirty days after the receipt of the same. All sums received by the Treasurer pursuant to any of the provisions of this act shall become a part of the fund, and shall be held by the Treasurer in trust for the carrying out of the purpose of this act and for the payment of the cost of administering this act. Said fund may be invested and reinvested in the same manner as other State funds and shall be disbursed according to the order of the treasurer, as custodian of the fund."

It will be observed from the statute above, that the State Treasurer is required to hold, as custodian, the moneys constituting the Unsatisfied Claim and Judgment Fund, for a particular use.

With reference to moneys so held, Chapter 148, P. L. 1944 (N. J. S. A. 52:18—25.1) provides:

> "In any case in which the State Treasurer holds moneys of the State under a requirement that said moneys be held for a particular time or be held for a particular use, he may invest such moneys in bonds or notes of the United States until such particular time has arrived or until such time as said moneys are required to be applied to the particular use."

The 1944 restriction placed upon the State Treasurer by Chapter 148, P. L. 1944 supra, as to the type of investments which he may make with moneys held for a "particular time", or for a 'particular use", was removed by the provisions of N. J. S. A. 52:18A—86 (Chap. 270, P. L. 1950, as amended by Chap. 272, P. L. 1952). This statute transferred the functions, powers and duties relating to the investment of such moneys from the State Treasurer to the Director of the Division of Investment, Department of the Treasury; and another section of the same statute (N. J. S. A. 52:18A—89, as amended) authorized the Director of the Division of Investment to invest such moneys in obligations of the United States, and, subject to the authorization or approval of the State Investment Council, in savings-bank legals, in certain industrial obligations, and in certain Canadian governmental and provincial obligations.

Inasmuch as moneys constituting the Unsatisfied Claim and Judgment Fund are held by the State Treasurer for the particular uses set forth in the statute establishing that Fund, it follows that investment functions and duties relating to such fund are transferred to the Director of the Division of Investment by the specific reference to Chapter 148, P. L. 1944, contained in Chapter 270, P. L. 1950, as amended and supplemented, and that the Director of the Division of Investment and the Investment Council are to exercise, in connection with this fund, the responsibilities and duties vested in them by Chapter 270, P. L. 1950, as amended and supplemented.

In other words, as we view the matter, that portion of N. J. S. A. 39:6-88 requiring that the Unsatisfied Claim and Judgment Fund "be invested and reinvested in the same manner as other state funds" means that such Fund is to be invested and reinvested in the same manner as any other funds held by the State Treasurer, for a "particular time" or for a "particular use."

Your second question inquires as to whom is to accept, reject or modify the investment recommendations of the Director of the Division of Investment, assuming the investment jurisdiction of the Director of the Division of Investment over the Unsatisfied Claim and Judgment Fund.

Chapter 270, P. L. 1950, as amended and supplemented, vests in the State Treasurer the power to accept or reject any investment, reinvestment, purchase, sale, or exchange proposed to be made by the Director of the Division of Investment in connection with moneys being held by the State Treasurer under Chapter 148, P. L. 1944, namely, for a "particular time" or for a "particular use."

Yours very truly,
GROVER C. RICHMAN, JR.
Attorney General.

By: DANIEL DEBRIER,
Deputy Attorney General.

May 5, 1954.

FORMAL OPINION—1954. No. 5

HON. FREDERICK M. RAUBINGER,
Commissioner of Education,
175 West State Street, Trenton, New Jersey.

DEAR COMMISSIONER:

You have requested our opinion on two questions which arise when a town school district with a population over 10,000, which has an appointed Board of Education of five members, adopts a proposal to change the Board to an elected one, pursuant to Chapter 100 of the Laws of 1951 (N.J.S.A. 18:7-52.1 et seq.). The questions are (1) whether the number of members on the Board will automatically increase to nine, and (2) if so, when and how will the additional members be appointed or elected.

In my opinion, the aforesaid change from the appointive to the elective method of inducting Board members does not affect the number which shall constitute the Board. The answer to your first question, therefore, must be in the negative, whereupon your second question becomes academic.

The statute above cited sets forth the procedure whereby an incorporated town school district governed by Chapter 7 of Title 18 may determine whether the members of the Board of Education shall be appointed or elected. Section 3 of the statute (N.J.S.A. 18:7-52.3) provides that if the voters adopt the proposition (whether it be for election or appointment), the members of the Board "shall thereafter be elected by the legal voters of the district at the regular school election to be held in said district, or appointed by the Mayor, as the case may be." Section 4 (N.J.S.A. 18:7-52.4) provides as follows:

> "The members of the board of education in office in the district at the time such proposition is approved shall continue in office until the expiration of their respective terms of office but their respective successors shall be elected by the legal voters of the district, or appointed by the mayor, as the case may be."

This law makes no mention of a change in the number of board members, nor is any procedure provided therein for effecting such a change in the event of adoption of a new method of inducting members.

R.S. 18:7-4 states that in each district there shall be a board consisting of nine members, except as otherwise provided in Article 2 of Chapter 7 of Title 18. However, the number of board members in town school districts with a population over 10,000 has been fixed at five by R.S. 18:7-48 and 18:7-49 with exceptions not here material. These last two sections were derived from Chapter 280 of the Laws of 1929, while R.S. 18:7-4 was derived from Chapter 1 of the Laws of 1903. Insofar as the later acts are repugnant to the earlier, the later repealed the earlier to the extent of the repugnancy. Bruck vs. Credit Corporation, 3 N. J. 401, 408 (1950). Moreover, where there is a conflict between a provision of a general statute and a provision of a later statute relating to the same subject matter in a more minute and definite way, the later statute will prevail over the general statute and will be considered an exception to the latter. Hackensack Water Co. vs. Division of Tax Appeals. 2 N.J. 157, 165 (1949); Monte vs. Milat, 17 N.J. Super., 260, 267 (1952).

The number of board members can apparently be increased from five to seven by the procedure set forth in the last two paragraphs of R.S. 18:7-9, as amended. which also authorizes an increase from three to five or from three to seven. I can find no authority in the law for an increase beyond seven. The presence of Section 18:7-9 indicates that if the legislature had intended to provide for an increase in number to nine, whether or not in connection with an election under 18:7-52.1, such an intent would have been manifested in express language. The absence of any such provision requires, in my opinion, the answer above given.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By : THOMAS P. COOK,
Deputy Attorney General.

TPC:JC

May 26, 1954.

CONSOLIDATED POLICE AND FIREMEN'S
PENSION FUND COMMISSION,
State House,
Trenton, New Jersey.

Attention: HON. ARCHIBALD S. ALEXANDER.

FORMAL OPINION—1954. No. 7

GENTLEMEN :

You have requested our opinion concerning the scope of the statutory function conferred upon the commission by the phrase "and the commission concurs therein" as contained in the last sentence of R.S. 43:16-2, as amended, with respect to an application for reinstatement.

It is our understanding that there is pending before the commission the application of a retired member of a municipal fire department who was retired for disability on August 28, 1950 at the age of 51 years after having served as fireman for 31 years. The disability for which the employee was retired was "general poor health." Recently, on March 19, 1954, the employee filed an application seeking reinstatement to his job in the Fire Department. His present age is 55. The municipal Fire Department has indicated that there is available the job of assistant mechanic in the Fire Department in which the individual would be employed should he be reinstated. Two physicians have certified that the individual is physically capable of performing limited physical activities and that they have been given to understand that the job of assistant mechanic is such a job.

It is our opinion that the statutory language in question confers upon the commission the quasi-judicial function of making an independent determination that the applicant is, or is not, "fit for his usual duty or any other available duty in the department which his employer is willing to assign to him" and that such a finding must be based upon record evidence submitted to the commission which must include, at least, the report of not less than a majority of the physicians or surgeons referred to in earlier paragraphs of R.S. 43:16-12, as amended. The record should also contain evidence to the effect that the employee's usual duty is vacant or available or that there is other available duty to which the employer is willing to assign the former employee should he be reinstated.

R.S. 43:16-2, as amended, sets forth a comprehensive scheme for retirement of police and firemen, members of police or fire departments in municipalities which have adopted the provisions of the act, for permanent disability received either while on duty or not.

Entitlement to retirement pursuant to this section is made to depend upon the determination of the commission, on the basis of medical evidence, that an applicant is unfit for the performance of his usual duty or such other duty in his department which his employer is willing to assign him. The statute provides that the commission may require subsequent periodic physical examinations, of those who are under fifty-one years of age and who retired for physical disability, in order to ascertain whether or not the disability for which the employee was retired still exists. Failure of the employee to submit to such physical examination or to return to work upon the determination of the commission, on the basis of medical evidence that he is physically able to perform either his former usual duties, if such be available, or such other available duties in the department which his employer shall assign to him, results in a discontinuance of pension payments.

The statute also provides, in the last sentence, that "any pensioner" may apply for reinstatement when he is "of the opinion that he has recovered from the disability which existed at the time of his retirement." This provision must be construed to include those who are over fifty-one years of age as well as those who are under that age. This sentence then provides:

> ". . . and if it be found by the physicians or surgeons or a majority of them that he be fit for his usual duty or any other available duty in the department which his employer is willing to assign to him and the commission concurs therein then he shall be reinstated thereto, if such be available, at the salary prevailing for the position at the time of his reinstatement and thereupon his pension payment shall cease."

The apparent policy of the statute, though evidencing an intent to bestow pension benefits upon police and firemen suffering permanent disability, is to curtail such disability pensions when the retired employee becomes physically able to perform either his former job or such other available job in his department which his employer is willing to assign to him and thus relieve the retirement fund of the burden of pension payments.

In applying R.S. 43:16-2, as amended, the commission, as an administrative agency created by the legislature, has as its primary function the duty to carry into effect the will of the legislature. See *Rosenthal* v. *State Employees' Retirement System*, 30 N.J. Super. 136 (A.D. 1954). In making determinations pursuant to the power conferred upon it by statute the commission is exercising a quasi-judicial power and not a ministerial or executive power. *McFeeley* v. *Board of Pension Commissioners*, 1 N.J. 212 (1948). Although an administrative agency exercising quasi-judicial functions is normally entitled to employ administrative discretion, such an exercise of discretion is circumscribed by the statutory policy and the evidence before the agency so that a reviewing court may ascertain whether the determination of the agency has support in the record and whether it is arbitrary or capricious. In re *Plainfield-Union Water Co.*, 11 N.J. 382, 395 (1953).

It is therefore necessary that in making a determination in the instant case as to whether the commission concurs in the factual determination of the physicians that it base such a determination on findings which are supported by the record before it. *Pennsylvania R. Co.* v. *Department of Public Utilities*, 14 N.J. 411 (1954) *McFeeley* v. *Board of Pension Commissioners, supra.*

Prior to the adoption of the Constitution of 1947 the New Jersey courts regularly reviewed determinations of pension fund commissioners concerning employee eligibility for retirement pensions in prerogative writ actions and frequently reviewed the record on which the commissioners had based their decisions. In *Schlishe* v. *Firemen's and Policemen's Pension Fund Commission,* 133 N.J.L. 249 (Sup. Ct. 1945), and *Beronio* v. *Pension Commission,* 130 N.J.L. 620 (E. & A. 1943), the courts granted applications for mandamus to compel the boards to grant pensions where the boards had thought they had discretionary power to refuse the pensions on grounds other than those contained in the statutes. In *Seleg* v. *Firemen's and Policemen's Pension Fund Commission,* 119 N.J.L. 266 (Sup. Ct. 1938), the court reviewed the medical evidence and agreed that the employee was not entitled to a pension.

Under our present Constitution and court rules the procedure for review of similar administrative action by a state administrative agency would be by appeal to the Appellate Division of the Superior Court pursuant to Rule 4:88-8, and the court pursuant to Rule 4:88-13 would also have power to review the facts. The principles of law recited in the pre-1947 cases, that the pension fund board does not have discretionary power to deny a pension where the factual situation disclosed by the record satisfies the statutory requirements, would remain applicable in such a review unless modified by statute or subsequent judicial decisions.

In view of the foregoing, it is our conclusion that the commission must make its determination on the basis of the medical evidence in the record and such other facts in the record as are relevant to the issues before it. The issues before the commission are: (1) whether the employee is physically fit (a) to perform his usual duty or (b) any other available duty in the department which his employer is willing to assign to him, and (2) whether (a) his usual duty is available or (b) there is another available job in the department which the employer is willing to assign to him. Evidence with respect to such issues should be before the commission and the determination of the commission must be supported by such evidence.

Very truly yours,
GROVER C. RICHMAN, JR.,
Attorney General.

By : WILLIAM P. REISS,
Assistant Attorney General.

GCR:WPR:kms

February 18, 1954.

HON. FREDERICK M. RAUBINGER,
Commissioner of Education,
Trenton, New Jersey.

FORMAL OPINION—1954. No. 8

DEAR COMMISSIONER:

You have requested an interpretation of Section 13 of the Municipal Planning Act (N.J.S.A. 40:35-1.13; Ch. 433, P.L. 1953), regarding the jurisdiction of a planning board over a school construction project. The pertinent portions of that section read as follows:

> "Whenever the planning board after public hearing shall have adopted any portion of the master plan, the governing body or other public agency having jurisdiction over the subject matter, before taking action necessitating the expenditure of any public funds, incidental to the location, character or extent of one or more projects thereof, shall refer action involving such specific project or projects to the planning board for review and recommendation, and shall not act thereon without such recommendation or until forty-five days after such reference have elapsed without such recommendation. This requirement shall apply to action by a housing, parking, highway or other authority, redevelopment agency, school board, or other similar public agency, Federal, State, county or municipal.***"

> "Whenever the planning board, pursuant to this act shall have made a recommendation to another body, such recommendation may be overridden only by a majority of the full membership of such other body. Where the body which shall have overridden a recommendation of the planning board is a municipal body or agency, the action of such body shall not become final until the governing body of the municipality shall, by majority vote, approve its action in overriding the recommendation of the planning board."

Your specific question is whether the action of a board of education in overriding a recommendation of the planning board is final, or whether such action shall not become final without the approval of the governing body of the municipality.

In my opinion, the action of a board of education in overriding a recommendation of the planning board, pursuant to the above quoted statute, is final. The veto power of the governing body obtains only where the body which has overridden a recommendation of the planning board is "a municipal body or agency." A school board is not a municipal body or agency, within the meaning of the statute in question.

Section 2 of the statute (N.J.S.A. 40:55-1.2) defines "municipality," as used in this act, as meaning "any city, borough, town, township or village." Since the word "municipal" as used in Section 13 obviously refers to municipalities as defined in the act, it does not refer to school districts. The design of section 13 is that a body or agency which is subordinate to the governing body of a municipality should not, without the concurrence of the governing body, overrule the recommendation of its planning board. A school board, however, is itself an autonomous governing body, most of whose powers are exercised independently of the municipal authorities.

The distinction between municipalities and schools districts has been judicially recognized in connection with the Municipalities Act of 1917, which was incorporated in Subtitle 3 of Title 40 of the Revised Statues. Section 1 of that Act (R.S.

40:42-1) again defines the term "municipality" as meaning and including "city, town, township, village, borough, and any municipality governed by a board of commissioners, or improvement commission." In *Horton* v. *Board of Education of Oradell*, 6 N.J. Misc. 963, Justice Parker of the old Supreme Court held that "The Municipalities Act plainly does not include school boards; its scope is carefully defined in section 1 of article 1, and the phrase "governing body" is similarly defined in section 2. In neither is there any mention of a school district or board of education." (p. 964). It seems equally clear that a school board is not a municipal body or agency within the meaning of the Municipal Planning Act of 1953, particularly in view of the similar definition of "municipality" in both of the Acts mentioned.

Yours very truly,
GROVER C. RICHMAN, JR.,
Attorney General.

By : THOMAS P. COOK,
Deputy Attorney General.

tpc:d

April 7, 1954.

HON. WILLIAM J. DEARDEN, *Director,*
Division of Motor Vehicles,
State House,
Trenton, New Jersey.

FORMAL OPINION—1954. No. 9

DEAR SIR:

We have a request for an opinion on the question whether a dealer licensed with an established place of business may under the same license operate branch agencies at different addresses.

It will be noted that the only statute with reference to this particular question is contained under Title 39, Motor Vehicles and Traffic Regulations, Chapter 10, which deals with purchase, sale and transfer of motor vehicles. R.S. 39:10-3 specifically provides for the interpretation of this chapter, to wit:

> "This chapter shall be so interpreted and construed as to effectuate its general purpose to regulate and control titles to, and possession of, all motor vehicles in this state, so as to prevent the sale, purchase, disposal, possession, use or operation of stolen motor vehicles, or motor vehicles with fraudulent titles, within this state."

This particular statute has been construed by our courts in the case of *Chaiet* v. *City of East Orange*, 136 N.J.L. 375, (Sup. Ct. 1947), and the Court states in part:

> "Licensing of automobile dealers by the Commissioner of Motor Vehicles was a means of regulating the title, possession, sale and purchase of motor vehicles . . . ."

We have noted the foregoing observations so as to establish a basis for the determination of the Legislature's intention relative to licensing of dealers as applied to the question before us.

R.S. 39:10-19, as amended, provides:

> "No person shall engage in the business of buying, selling, or dealing in motor vehicles in this State unless he is authorized to do so under the provisions of this chapter. The Commissioner may, upon application in such form as he prescribes, license any proper person as such dealer . . . ."

R.S. 39:10-4 provides:

> "The enforcement of this chapter shall be entrusted to the Commissioner, and he may make rules and regulations necessary in his judgment for the administration and enforcement thereof in addition thereto but not inconsistent therewith."

R.S. 39:10-19, as amended, further provides that

> " * * * A license fee of $100.00 shall be paid by the applicant not licensed at the time of the effective date of this amendment which shall be renewed on the dealer's application from year to year thereafter without payment of a renewal fee.******"

It is interesting to observe that nowhere in these statutes does the Legislature make any reference to the licensing of sites from anyone for the conduct of a business. The reference is strictly confined to the term "dealer." It is further observed that the statute is purely a regulatory act concerned primarily with the purchase, sale and transfer of motor vehicles insofar as title thereto is concerned and is not a revenue producing measure as indicated by the fact that the license fee is paid only in the initial instance and is not required on renewal.

We have noted Formal Opinion 1953—No. 23, Theodore D. Parsons, Attorney General, by John J. Kitchen, Deputy Attorney General, dated June 1, 1953, wherein it is concluded: "No provision is made in this law authorizing the Director of the Division of Motor Vehicles to permit or recognize the operation of branch agencies at an address other than the dealer's address as designated by such dealer in his application for a license." We cannot agree with this conclusion. It is our opinion that the Deputy Attorney General in the opinion cited, *supra,* placed undue and unwarranted stress upon the term "branches." This is in direct opposition to the clear language of the statute which stresses instead the word "dealer."

We further note that nowhere does the statute in question indicate that the Legislature had any intention of concerning itself with the minute regulation of dealers or places of business other than where titles to motor vehicles are concerned.

Indeed in R.S. 40:52-1 dealing with licenses and municipalities, the Legislature expressed itself therein as recognizing that regulation of used car lots was a local concern and empowered municipalities to license such businesses and regulate same under their police power.

The Court in *Chaiet* v. *City of East Orange, supra,* stated:

> ". . . . whereas licensing of used car lots by municipalities was directed toward policing problems and recovery of commensurate revenues and hence State licensing did not preclude exercise of the municipal power."

We conclude, therefore, that a dealer may operate branches under the original license granted by the Director of the Division of Motor Vehicles subject to such rules and regulations as the Director may establish without the necessity of securing a new license for any branch of his business. The Director of the Division of Motor Vehicles may, under the power granted by this statute, require that a licensed

dealer notify the Director of acquisition of a branch, or branches, and that the locations may be added to the original license in order to carry out the regulatory features of the act. We further conclude that the statute in question deals with the licensing of dealers and not with particular sites.

Yours very truly,
GROVER C. RICHMAN, JR.,
Attorney General.

By : ANDREW A. SALVEST,
Deputy Attorney General.

GCR:AAS:jaw

May 28, 1954.

HON. DANIEL BERGSMA,
State Commissioner of Health,
State House,
Trenton, New Jersey.

FORMAL OPINION—1954. No. 10

DEAR DR. BERGSMA:

You have requested our opinion as to whether your department has jurisdiction to entertain and act upon an application by a municipality, under R.S. 40:63-3, for permission to erect or lay a trunk sewer main through two other municipalities to a disposal plant presently maintained in a fourth municipality by the applicant.

In my opinion, the answer is in the affirmative.

A comprehensive scheme for the disposition of sewage by a municipality was established by Chapter 152, Article XXI, of the Home Rule Act of 1917, now incorporated in Chapter 63 of Title 40 of the Revised Statutes. Section 1 of the chapter (R.S. 40:63-1) contains a sweeping grant of power to a municipality to construct sewers and disposal works "within or without the municipality." The section reads:

> "The governing body of every municipality may, by ordinance, provide for and cause to be constructed within or without the municipality, any main sewer or sewers, lateral sewer or sewers, intercepting sewer or sewers, storm sewer or sewers, underground drain or drains, system of sewers, system of drains, system of sewers and drains, sewer outlets, drain outlets, filtration beds, sewage disposal works, sewage receptacles, pumping stations, or any or all such improvements, and such other erections, works, establishments and fixtures as may be required to provide proper sewerage and drainage for the municipality; and may use and occupy any streets, highways, alleys and other public places, within or without the municipality, for such purpose or purposes, or any tidewater creek, or watercourse or portion thereof, and may acquire by purchase, gift or condemnation, and take and appropriate in the name of and for the municipality, any land or interest in land that may be needed therefor, within or without the municipality."

Section 2, however, requires the consent of such other municipality to any such operations within its borders, as follows: (R.S. 40:63-2):

> "No work shall be undertaken, or land acquired, or any public street, highway, alley or other public place occupied, or any sewer or drain outlet, or system thereof, filtration plant, sewerage disposal works or receptacles acquired, occupied or used under this article in any other municipality, without the consent, expressed by resolution of the governing body and of the board of health of such other municipality, upon application made therefor in writing to each of them * * * ."

Then follows Section 40:63-3, which contains a grant of jurisdiction to your department in this language:

> "In case of the refusal of the governing body and board of health of any municipality to which application is made by any other municipality for the location and erection of sewage works therein, or of the refusal of either of them to grant permission therefor, or in case the governing body or the board of health of the municipality to which application is made, shall fail to take final action therein within sixty days after the filing of the application by the applying municipality, such municipality may at any time, within thirty days after such refusal, or within thirty days after the expiration of said period of sixty days, apply to the state department of health, which shall have power, after hearing the municipalities interested, to grant the application for the erection of the sewage disposal works notwithstanding the refusal of the application by the governing body or board of health of the municipality to which application was made, or failure to act as aforesaid, upon being satisfied that the topographical and other physical conditions existing in the applying municipality are such as to make the erection of a sewage disposal works within its boundaries impracticable as an improvement for the benefit of the whole applying municipality."

The question has been raised whether the words "sewage works" and "sewage disposal works," as used in the last quoted section, include a trunk sewer main, as well as a treatment plant, disposal bed, or similar works. In my view, those terms should be construed here as including every part of the sewer system for which the consent of other municipalities is required under the preceding section (40:63-2), i.e., any land to be acquired, any street or public place to be occupied, any sewer or drain outlet, or system thereof, filtration plant, sewerage disposal works or receptacles. A trunk sewer main clearly forms a part of a system of sewers or drain outlets within the meaning of Section 40:63-2. That and the succeeding section should also be read in connection with the general grant of power in Section 40:63-1, which specifically mentions "any main sewer or sewers."

The word "works" has frequently been used as a comprehensive term denoting an entire plant, including all of the real estate, buildings, machinery and other equipment used in the particular business. *Tyrone Gas and Water Co.* vs. *Borough of Tyrone,* 299 Pa. 533, 149 Atl. 713, 716 (1930); *Kern* vs. *Welz and Zerweck,* 136 N.Y.S. 412, 416, 151 App. Div. 432 (1912); *Barker* vs. *Portland Traction Co.,* 180 Ore. 586, 173 P. 2d 288, 296 (1946). The word is considered as the equivalent of the word "plant," and the term "sewerage plant" has been held to include constructed sewer pipes, although not yet connected with any machinery or other apparatus. *Brennan* vs. *Sewerage and Water Board,* 108 La. 569, 32 So. 563, 569 (1902); see also *Poor* vs. *Town of Duncombe,* 231 Iowa 907, 2 N.W. 2d 294, 300 (1942).

In the light of these authorities and in view of the two sections which precede R.S. 40:63-3, that section plainly reveals a legislative intent to allow the state department of health, in case of a refusal by another municipality, to grant an application for the erection of any essential part of a sewer system therein if the state department is satisfied that the topographical and other physical conditions existing in the applying municipality are such as to make the erection of a sewage disposal works within its boundaries impracticable as an improvement for the benefit of the whole applying municipality.

This brings us to another question, which you have also raised—whether the impracticability resulting from such topographical and physical conditions may be economic rather than purely physical.

My answer is "Yes," but only where the financial burden involved in such a project would, as a result of such physical conditions, be prohibitive. The word "impracticable" has been defined as meaning "not practicable; incapable of being performed or accomplished by the means employed or at command." *Security-First National Bank* vs. *J. G. Ruddle Properties,* 218 Cal. 435, 23 Pac. 2d 1016 (1933), citing Webster's International Dictionary. From the economic point of view, it means something more than expensive or inexpedient. As was said in *State* vs. *Public Service Commission,* 339 Mo. 641, 98 S.W. 2d 699, 703 (1936)), it means "impossible or unreasonably difficult of performance," rather than merely inexpedient. Whether the point of unreasonable difficulty or financial impracticability has been reached in any particular case must be determined on the facts there presented.

Very truly yours,
GROVER C. RICHMAN, JR.,
Attorney General.

By : THOMAS P. COOK,
Deputy Attorney General.

GCR:TPC:kms

June 11, 1954.

WILLIAM F. KELLY, JR., *President,*
Civil Service Commission,
State House,
Trenton 7, New Jersey.

FORMAL OPINION—1954. No. 11

DEAR MR. KELLY:

Your inquiry concerning the rights of disabled veterans under the Civil Service Act presents two fact situations:

> "In one of the cases, (A) the applicant had served more than ninety days during the present Emergency and it was definitely ascertained that he had contracted tuberculosis *before* the period of the Emergency was declared and for which he was later qualified by the United States Veterans' Bureau for compensation for a service connected disability. This applicant was considered by this Department as being a veteran because he had served more than ninety days, but he was not admitted as a disabled veteran.
>
> In another case, (B) the applicant was inducted into the armed forces within ninety days of the termination of World War II but continued in such service for over a year thereafter. At some time during this total period, which cannot be definitely ascertained, said applicant suffered a service connected disability and he was later qualified for a service connected disability. This applicant was also admitted as a veteran but not as a disabled veteran."

By the provisions of R.S. 11:27-3, as amended, "Veterans with a record of disability incurred in line of duty, as herein defined in section 11:27-1 of this Title," who receive a passing rating in a competitive examination are placed at the top of the employment list.

The term "veteran with a record of disability incurred in line of duty" is defined in R.S. 11:27-1, as amended, as

> " * * * any veteran as hereinafter defined who is eligible under the United States veterans' bureau qualifications for service-connected disability from World War or emergency service * * *."

The term veteran is also defined in R.S. 11:27-1, as amended, as

> " * * * any soldier, sailor, marine, airman, nurse or army field clerk, who has served in the active military or naval service of the United States * * * in any of the following wars, * * *
>
> (10) World War II, * * *, who shall have served at least ninety days in such active service, * * *; provided, that any person receiving an actual service incurred injury or disability shall be classed as a veteran whether or not he has completed the ninety-day service as herein provided.
>
> (11) Emergency, at any time after June twenty-third, one thousand nine hundred and fifty, and prior to the date of termination, suspension or revocation of the proclamation of the existence of a national emergency issued by the President of the United States on December sixteenth, one thousand nine hundred and fifty, or date of termination of the existence of such national emergency by appropriate action of the President or the Congress of the United States, who shall have served at least ninety days in such active service, * * * * * provided, that any person receiving an actual service incurred injury or disability shall be classed as a veteran whether or not he has completed the ninety-day service as herein provided."

The statute under consideration was interpreted with respect to another problem in the case of *Belfer* v. *Borrella,* 6 N.J. Super. 557, 70 A. 2d 99 (Law Div. 1949), aff'd. 9 N.J. Super, 287, 76 A. 2d 25 (App. Div. 1950) At 6 N.J. Super 561, the Court said,

> " * * *. Being mindful that the quoted section is found in the definition portion of Title 11, Chapter 27, dealing with veteran preference in Civil Service, it cannot be said that the Legislature intended these definitions to be read and construed in the light of other statutes—they were set apart and defined thusly to forestall any such interpretation. As said by Justice Perskie, for the Court of Errors and Appeals in *Zietko* v. *New Jersey Manufacturers Casualty Insurance Co.,* 132 N.J.L. 206, at page 211.
>
> 'Under such circumstances, the elementary rule is that there is no reason or occasion for judicial construction. For the words are presumed to evince or express the legislative intent.'
>
> "It is urged by the defendant that this is social legislature (sic) and should be so construed as to give effect to the undoubted intention of the Legislature in providing preferences for certain veterans. No one would question the mandatory requirements upon the part of a court to follow and to follow gladly such a rule if a proper application was here presented. However, such is not the present situation. A recent case decided by the Court of Errors and Appeals, *Adams* v. *Atlantic City,* 137 N. J. L. 648, at page 652, on September 3, 1948, held in the opinion by Freund, J.,
>
> 'Generally, statutes of the character under consideration (R. S. 38:12—4) would be liberally construed in favor of the citizen who volunteers his services in time of war, but it is not the judicial function to add beneficiaries to those specified in the statutes. The specifications of who shall benefit and under what conditions is a legislative function. Our function is to construe the statute as written and to interpret the legislative intent, but we cannot under the guise of interpretation extend a statute to include persons not in-

tended. We must regard the statutes as meaning what they say and avoid giving them any construction which would distort their meaning. We have no legislative authority and should not construe statutes any more broadly nor give them any greater effect than their language requires.'"

Construing the statute with the approach set forth above we have reached the following conclusions:

1. To be considered a "veteran with a record of disability incurred in line of duty" within the meaning of the Civil Service Act an individual must have incurred the disability claimed during the period veteran status was being attained as provided in the act.

2. A person who has served in the armed forces for a period of less than ninety days in World War II or the Emergency but who received an actual service incurred injury or disability during such a period is entitled to be classed as a veteran and as a "veteran with a record of disability incurred in line of duty" within the meaning of the Civil Service Act.

3. A person who has served in the armed forces for a period of less than ninety days in World War II or the Emergency and who received an injury or disability at a time other than during such period is entitled to be classed as neither a "veteran" nor as a "veteran with a record of disability incurred in line of duty" within the meaning of the Civil Service Act.

The statutory definition of "veteran with a record of disability incurred in line of duty" refers specifically to the definition of "veteran". And to be a veteran an individual must have served within the periods of time set forth. The proviso contained in paragraphs (10) and (11) of R. S. 11:27—1, as amended, sets forth an exception with respect to a person "receiving an actual service incurred injury or disability" who has not *completed* the ninety-day service as provided therein. Use of the term "completed" implies a necessity for service having been rendered during the period specified although it need not be a full ninety days. The term "actual service incurred injury or disability" does not seem to differ in meaning from the term "disability incurred in line of duty" or from the term "service connected disability". The consistent use of specified time periods, the definition of "War Service" as service during the periods specified, and the fact that "disability incurred in line of duty" is limited to "service connected disability from World War or emergency service or * * * service connected disability arising out of such other military or naval service hereinafter defined" leads us to the conclusion that "actual service incurred injury or disability" means actual service incurred injury or disability received during the stated periods. The intention to benefit those who served during the specified periods seems clear. We perceive no intention to benefit individuals who have incurred injury or disability during times other than those stated. It would seem that the natural meaning of the statutory language as written is that a person who has received an actual service incurred injury or disability during the period specified but who has not served a full ninety-day period between the specified dates is entitled to be considered a "veteran" under the statute and also a "veteran with a record of disability incurred in line of duty". One who incurred an injury or disability at a time other than during the periods prescribed might be a "veteran" if he served the required ninety-days but he would not be a "veteran with a record of disability incurred in line of duty".

The conclusion reached by the Department in fact situation (A) set forth above is in accord with this interpretation. We are of the opinion however that the conclusion reached with respect to fact situation (B) is erroneous. Your letter states that the time of incurring the injury or disability cannot be definitely ascertained.

Thus it appears that the applicant has not presented "full and convincing evidence of such record of disability" within the meaning of the statute and so cannot qualify as a "veteran with a record of disability incurred in line of duty". Neither can he qualify as a "veteran" unless he has served a full ninety-day period during the specified times.

Very truly yours,
GROVER C. RICHMAN, JR.,
Attorney General.

By : JOHN F. CRANE
Deputy Attorney General.

JFC:b

JUNE 16, 1954.

DR. WILLIAM C. COPE, *Director*
Division of Planning and Development
Department of Conservation and
Economic Development
Trenton, New Jersey

FORMAL OPINION 1954—No. 12

DEAR SIR:

You have requested our opinion concerning the following questions:

1. Can the officials and employees of the Department of Conservation and Economic Development vested with the powers of a magistrate by R. S. 12:7—6, as amended, levy and collect fines for violations of N. J. S. A. 12:7—44 to 52, inclusive?

2. Can such officials and employees, when sitting as magistrates, conduct proceedings in any of the counties of the State where violations of N. J. S. A. 12:7—44 et seq. have occurred?

3. Can such officials and employees when exercising the powers of a magistrate under R. S. 12:7—6, as amended, and conducting proceedings for violations of N. J. S. A. 12:7—44 et seq. cancel or revoke registrations and master's or operators' licenses?

With respect to your first inquiry R. S. 12:7—6, as amended, provides:

"The Commissioner of Conservation and Economic Development, the Chief of the Bureau of Navigation, the Chief of the Bureau of Planning and Commerce and such of their assistants as shall be designated for the purpose by the commissioner, shall each be vested with all the powers of a magistrate conferred in this chapter."

Since the designated officials and employees of the Department are "vested with all the powers of a magistrate conferred in this chapter" it is our opinion that, N. J. S. A. 12:7—44 to 52, inclusive, being a part of chapter 7 of Title 12, such officials and employees may exercise the powers of a magistrate with respect to violations of the provisions of N. J. S. A. 12:7—44, et seq. N. J. S. A. 12:7—51 provides that persons violating the provisions of these sections shall be subject to fines. The procedure to be followed in such proceedings is that outlined in the penalty enforcement law, N. J. S. 2A:58—1, and in the Rules of the New Jersey Supreme Court Governing Practice in the Local Criminal Courts, R. R. 8:1 et seq.

It is our opinion that the officials and employees of the Department exercising the powers of a magistrate pursuant to R. S. 12:7—6, as amended, may conduct proceedings in any of the counties in which the violations have occurred. The statewide jurisdiction of such officials and employees is a practical necessity and the statute giving them the powers of a magistrate necessarily contemplates the exercise of such powers throughout the State. Cf. R. S. 12:7—33.

With respect to your third question we do not believe that magistrates, and such officials and employees of the Department exercising the powers of a magistrate, may cancel or revoke registrations and masters' or operators' licenses. No such power is expressly given in N. J. S. A. 12:7—51 with respect to violations of N. J. S. A. 12:7—44 et seq. nor is it given in R. S. 12:7—24 which is the general penalty provision relating to violations of the provisions of Chapter 7 of Title 12. Power to cancel registrations of a vessel the master of which shall violate any provision of Chapter 7 or of any rule or any regulation of the "board" and to revoke the license of the master is expressly granted to the "board", by the provisions of R. S. 12:7—16. In view of this express provision and the absence of an equivalent provision in the penalty sections, it is our opinion that the courts would construe the penalty statute to deny such power to magistrates. The "board" referred to in R. S. 12:7—16 is the old Board of Commerce and Navigation. R. S. 12:1—1. The functions, powers and duties of the old Board of Commerce and Navigation have been transferred to and vested in the Division of Navigation and are to be exercised by the Navigation Council. N. J. S. A. 13:1A—29. Action taken by the Navigation Council must be approved by the Commissioner of Conservation, now the Commissioner of Conservation and Economic Development N. J. S. A. 13:1B—6.

The power to cancel registrations and revoke licenses may be exercised by the Navigation Council for violations of the provisions of Chapter 7 of Title 12 as an auxiliary remedial sanction in the interest of the prospective safety and protection of navigation whether or not the violator is also subjected to the penalty provisions of Chapter 7. The Director of the Division of Motor Vehicles exercises a similar power with respect to motor vehicle operators' licenses and our courts have sustained his action in situations in which magistrates have found the violator guilty or not guilty of violating prohibitions of the Motor Vehicle Act. *Tichenor v. Magee,* 4 N. J. Super. 467 (A. D. 1949). *Kocses v. Magee,* 131 N. J. L. 499 (Sup. Ct. 1944). *Sylcox v. Dearden,* 30 N. J. Super. 325 (A. D. 1954).

Finally we wish to bring to your attention the fact that it is doubtful whether the penalties provided for in N. J. S. A. 12:7—51 may be imposed for violations of regulations governing the operation, docking, mooring and anchoring of power vessels operating on tidal waters within the confines of the State which the Department is empowered to issue pursuant to N. J. S. A. 12:7—44. N. J. S. A. 12:7—51 provides merely that penalties may be imposed upon "any person who shall violate the provisions of this act". A violation of such regulations issued by the Department, and filed with the Secretary of State pursuant to Article V, Section IV, paragraph 6, of the Constitution of 1947, is technically not a violation of the provisions of the act itself. However, the sanction of cancellation of registrations and revocation of licenses may be imposed by the Navigation Council for violation of such regulations pursuant to R. S. 12:7—16 and enforcement of such regulations may be obtained in that manner. Although R. S. 12:7—16 refers to violations of regulations of the "board", it is our opinion that, in view of the provisions of N. J. S. A. 13:1A—29 and N. J. S. A. 13:1B—7 transferring the powers and functions of the "board" first to the Navigation Council and then to the Department of Conservation and Economic Development to be exercised and performed through the Division of Planning and Development in the Department, R. S. 12:7—16 must now be construed to include rules and regulations issued by the Department carrying out the functions previously performed by the Board of Commerce and Navigation.

Very truly yours,
GROVER C. RICHMAN, JR.,
Attorney General.

By : WILLIAM P. REISS
Assistant Attorney General

JUNE 22, 1954.

HON. ARCHIBALD S. ALEXANDER
State Treasurer of New Jersey
State House
Trenton 7, New Jersey

FORMAL OPINION 1954—No. 13

DEAR MR. ALEXANDER:

Your recent inquiry relating to the State Disability Benefits Fund is acknowledged.

This fund was established by the provisions of N. J. S. A. 43:21—46. It is composed of worker and employer contributions made pursuant to the provisions of our Unemployment Compensation Law, less refunds, plus interest and earnings from investments of the Fund, and assessments, fines and penalties collected under the act. The Fund is held in trust for the payment of disability benefits and for authorized refunds, the State Treasurer being designated as custodian of the Fund.

Your inquiry presents the following questions in connection with this Fund:

1. What is the proper procedure with respect to purchases and sales of investments for the account of the Fund?

The statute (supra) establishing this Fund, also created a Board of Trustees now consisting of the State Treasurer, the Secretary of State, the Commissioner of Labor and Industry, the Director of the Division of Employment Security of the Department of Labor and Industry and the State Comptroller, vested with power to invest and reinvest all monies in the Fund in excess of its cash requirements. This power to invest and re-invest was the sole function to be performed by this Board of Trustees.

In 1950, however, pursuant to the provisions of N. J. S. A. 52:18A—87, all functions, powers and duties vested by law in the Board of Trustees of the State Disability Fund of, or relating to, investment or reinvestment of monies of, and purchase, sale or exchange of, any investments or securities of or for, any funds or accounts relating to the State Disability Benefits Fund were transferred to the Director of the Division of Investment, Department of the Treasury, to be exercised by him, subject to a right vested in the State Treasurer to accept or reject investments or reinvestments proposed to be made from such Fund by the Director of the Division of Investment.

This transfer from the Trustees of the Disability Benefits Fund to the Director of the Division of Investment, of all investment powers and authority, was made even more manifest by a 1951 amendment to the Disability Benefits Fund Law (Chapter 355, P. L. 1951 First Sp. Sess.) which provided that the provisions of the

then existing section of the law relating to the investment of the Fund by the Board of Trustees shall in all respects be subject to the provisions of the law cited in the preceding paragraph above, transferring these investment powers and authority to the Director of the Division of Investment.

You are therefore advised that the investment of State Disability Benefits Fund, in excess of cash requirements, is the function of the Director of the Division of Investment, Department of the Treasury, subject, however, to the statutory procedure and limitation set forth in N. J. S. A. 52:18A—87, namely:

> "that before any such investments, reinvestments, purchase, sale or exchange may be made by said Director for or on behalf of any such agency, he shall submit the details thereof to the State Treasurer, who shall, within forty-eight hours, exclusive of Sundays and public holidays, after such submission to him, file with the director his written acceptance or rejection of such proposed investment, reinvestment, purchase, sale or exchange; and the director shall have authority to make such investment, reinvestment, purchase, sale or exchange, for or on behalf of such agency, unless there shall have been filed with him a written rejection thereof by the State Treasurer as herein provided."

2. *Who has the responsibility of determining the anticipated cash requirements, present and future, of the Fund, and who has the responsibility for advising those responsible for investments of the amounts available for investment, and of making these amounts available?*

It is our opinion that the responsibility for the determination and functions itemized in your second question above, is that of the Director of the Division of Employment Security, Department of Labor and Industry.

The latter is the official responsible for the administration of the act. To him are known, or are available through his immediate subordinates, all data relating to collections, disbursements, probable and expected impacts and demands upon the Fund, and all departmental experience and statistics touching upon the operation of the Fund and its requirements. The determination as to what constitutes cash requirements, present and forseeable, and what constitutes cash in excess thereof, is his to make, as is likewise, the responsibility of advising all others officially concerned, of his determinations.

3. *Is the Board of Trustees of the Fund still in existence, and if so, what are its duties?*

Inasmuch as the statute establishing this Board of Trustees is still on our statute books, the Board is to be regarded officially as still in existence. As has been pointed out heretofore, however, the real purpose of the Board of Trustees, as we view the matter, was to invest and reinvest the Fund. On the transfer of these investment functions to the Director of the Division of Investment, discussed hereinbefore, the Board, in our opinion, was left without further functions, duties or responsibilities. There would appear, therefore, no need on your part to convene the Board or to again organize it.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: DANIEL DE BRIER
Deputy Attorney General.

JUNE 24, 1954.

HON. CARL HOLDERMAN
Commissioner of Labor & Industry
State House
Trenton, New Jersey

FORMAL OPINION 1954—No. 14

DEAR COMMISSIONER:

You have indicated that a question has been raised in your Department concerning the authority of your Division of Employment Security to lease property for the employment office operations of the Division. The Division has not leased property for any other purposes, nor has it ever claimed authority to do so. But at least since 1945, the Division has leased, for an agreed rental, privately-owned properties for use as employment offices. Such actions have been based upon a memorandum of counsel for the Division, dated July 13, 1945, advising that R. S. 43:21—12 was a grant of authority to lease for those purposes.

You have requested that we advise you (1) whether the Division of Employment Security may enter into and execute leases for employment office purposes, and exercise renewal options in present leases for such purposes, which were originally executed by the Director of the Division: (2) as to the authority of Mr. Frank T. Judge, as Acting Director, to execute such leases or exercise renewal options of leases, if the necessary authority resides in the Division; and (3) where such authority lies, if not in the Division of Employment Security.

In our opinion, the Division of Employment Security, Department of Labor and Industry, has no authority to lease property, or exercise renewal options in leases, for any purpose, where the leases provide for payment of rent. Such authority has been confided to the Division of Purchase and Property, Department of the Treasury. Thus the question of the authority of Mr. Judge as Acting Director becomes moot.

In 1931 the Legislature conferred upon the State House Commission the power to lease property necessary for the operations of the State Government. P. L. 1931, c. 184, (R. S. 52:20—7). The statute was general in terms and contained no specific exceptions. The only possible exceptions, therefore, can be clear grants of such power to specific departments, divisions or bureaus.

Nowhere in Chapter 21 of Title 43 (which established the Unemployment Compensation Commission) or in Chapter 1A of Title 34 of the Revised Statutes (which), inter alia, created the Division of Employment Security and transferred to it the powers and functions of the Unemployment Compensation Commission) will be found an express grant to the Division of the power to lease property, in haec verba. Does the language of R. S. 43:21—12 imply such a power?

> Subsection (a) of that statute provides in part:
> "State employment service. The employment bureau * * * is hereby transferred to the commission as a division thereof, which shall establish and maintain free public employment offices in such number and in such places as may be necessary for the proper administration of this chapter and for the purpose of performing such duties as are within the purview of an Act of Congress * * *.The commission may cooperate with or enter into agreements with the Railroad Retirement Board with respect to the establishment, maintenance, and use of free employment service facilities."
> In subsection (b) is found this language:

"* * * For the purpose of establishing and maintaining free public employment offices, commission is authorized to enter into agreements with the Railroad Retirement Board, or any other agency of the United States charged with the administration of an unemployment compensation law, with any political subdivision of this State, or with any private, nonprofit organization, and as a part of any such agreement the commission may accept moneys, services or quarters as a contribution to the employment service account."

The words "establish and maintain" do not by definition, include or necessarily imply "purchase", "lease", "rent' or any similar terms relating to the acquisition of real property which have a fixed legal meaning. *Black's Law Dictionary, 4th Ed., pp. 643, 1105; Bouvier's Law Dictionary, Century Ed., p. 364; Webster's New International Dictionary, Unabridged, 2d Ed., pp. 874, 1484.* Particularly is there no such inclusion or implication where, as here, there is no necessity for it. When R. S. 43:21—12 was enacted (P. L. 1936, C. 270, sec. 12), the State House Commission had the power and the duty to "* * * lease * * * such office space as may be required for the conduct of the state's business * * *" (R. S. 52:20—7). Clearly, the State House Commission could have leased these properties for the Division's predecessor, the Unemployment Compensation Commission. Why, then, impute to the Legislature an intent to expand words beyond the scope of their normal meaning, when the Legislature was under no compulsion to do so?

When the Legislature desired to give the power to acquire property to a State agency, in addition to the general power it had confided to the State House Commission, it found no difficulty in expressing its will explicitly. In the same year in which it enacted the source of R. S. 43:21—12, in the bill which became law immediately prior to that enactment (which, as noted, was P. L. 1936, C. 270), the Legislature gave such power to the Commissioner of Motor Vehicles for the acquisition of inspection stations. In Section 3 of Chapter 269, P. L. 1936 (now R. S. 39:8—2), it provided:

"* * * The Commissioner of Motor Vehicles shall, with the approval of the State House Commission, have the power to purchase or lease any property for the purpose of assisting him in carrying out the provisions of this act."

Moreover, legislatures often, in empowering an agency or political subdivision to "establish", have considered it necessary, in the same statute, to add the power to "acquire" and "lease". *Village of Hempstead v. Seymour, 34 Misc. 92, 69-N. Y. Supp. 462 [Sup. Ct., N. Y., 1901].*

"* * * Words and phrases in statutes are to be given their generally accepted meaning unless inconsistent with the manifest intent of the Legislature or unless a different meaning is expressly indicated." *Scatuorchio v. Jersey City Incinerator Authority, 14 N. J. 72, 87 (1953).*

In R. S. 43:21—12, the Legislature gave the Unemployment Compensation Commission the power to open and set up employment offices, and to staff them ("establish"), and to keep them in operation ("maintain"). It also conferred the power to determine the necessity for, and the number and location of, these offices. These are the generally accepted meanings of the words in the statute. The statute contains no contrary manifest intent, nor is a different meaning expressly indicated.

The remaining quoted portions of R. S. 43:21—12 only serve to buttress our conclusions on these questions. The specific grant of authority to enter into agreements with Federal agencies, counties, municipalities and nonprofit organizations "* * * for the purpose of establishing and maintaining free public employment offices * * *" is, in the first place, almost identical to that given in the *Hempstead* case, supra. The Legislature obviously felt the necessity of spelling out the power to enter into such agreements as a means of implementing the previously-granted power

to "establish and maintain". But more important, the power is restricted as to potential contracting parties. The maxim, "Expressio unius, exclusio alterius," has a logical, rather than a purely legal origin (*Sutherland, Statutory* Construction, 3d ed. 9d., Sec. 4915), and a mere reading of the statute invokes it here, as a matter of logical interpretation. The Legislature might have added "any person or corporation", but it did not. Having failed to do so, the Legislature excluded that category of potential lessors (such they would be for the purposes of this opinion) from its grant of authority to the Commission.

Assuming, arguendo, that "agreement" includes "lease", the sense of the entire final sentence of R. S. 43:21—12 (b) imposes a further restriction on the power granted: that no lease entered into with any of these parties shall provide for the payment of rent by the State, or the obligation of its credit. The statutory grant of power is that the Commission may "* * * enter into agreements * * * and as a part of any such agreement * * * may accept * * * quarters as a *contribution* * * *" (underscoring supplied). In 1936 and even today, municipalities (Federal agencies were added by amendment in 1939, P. L. 1939, C. 94) could have considered the establishment of an employment service office within their borders highly advantageous and well worth a contribution of office space in a municipal building. So might a non-profit organization, as an opportunity for public service. That such was within the contemplation of the Legislature is manifest, not only from the wording of this sentence, and from the nature of permitted contracting parties, but from the context of the entire statute and existence of power to lease in the State House Commission. Leases involving the expenditure of State funds were to remain under the control of the State House Commission; but there was no need for that body to pass upon mere contributions of office space.

The foregoing does not overlook the fact that funds for the payment of rentals for employment offices normally are supplied by the Federal Government. However, the State, and not the Federal Government, is always the lessee, and the obligation is that of the State. If for any reason Federal funds were unavailable for such purposes, payment would have to be made from State funds.

Under the provisions of R. S. 52:27B—64, the leasing power of the State House Commission was transferred to the Division of Purchase and Property, Department of the Treasury. The Division of Purchase and Property now has the exclusive power and authority to lease property for the employment office operations of the Division of Employment Security, where such leases include in their terms the payment of rent by the State.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By : FREDERICK J. GASSERT, JR.,
Deputy Attorney General.

FJG:jk

JUNE 28, 1954.

HON. ARCHIBALD S. ALEXANDER
State Treasurer of New Jersey
State House
Trenton, New Jersey

FORMAL OPINION 1954 — No. 15

DEAR MR. ALEXANDER:

You have requested the opinion of this Office as to whether the Board of Trustees of the Alcoholic Beverage Law Enforcement Officers Pension Fund may legally permit the purchase, by members of the Fund, of past service credits; and should the answer to the preceding question be in the affirmative, what is the latitude extended to the Board of Trustees in the formulation of a proposed rule and regulation governing the calculation of the cost of such purchase.

Most of the pension systems for our public employees permit the purchase of credits for prior service, under such rules and regulations on the subject as the respective Boards of Trustees may adopt, or in some cases, pursuant to a formula or calculation written in the applicable statute. Illustrative of statutes of this type are R. S. 18:13—43, as amended, and R. S. 18:13—47 as amended, both relating to the Teachers Pension and Annuity Fund, and N. J. S. A. 43:14—63 and 43:14—65 relating to employees of certain public agencies participating in the State Employees Retirement System.

In the first place, it must be noted that the statute establishing the Alcoholic Beverage Law Enforcement Officers Pension Fund (N. J. S. A. 43:8A—1 to 43:8A—25 incl.) does not contain any specific language authorizing the purchase of prior service credits. Apparently, however, a suggestion has been made to the Board of Trustees that such right is implied by the provisions of N. J. S. A. 43:8A—7 (2) (b) which, together with the two sentences preceding this specific subsection, read as follows:

> "(2) Upon retirement for service a present entrant member shall receive a service retirement allowance which shall consist of:
>
> (a) An annuity which shall be the actuarial equivalent of his aggregate contributions at the time of retirement; and
>
> (b) A pension in the amount which, when added to the members annuity will provide a total retirement allowance equal to two per centum (2%) of his average final compensation multiplied by the number of years of service during the first twenty-five years of service for which the member has contributed, up to twenty-five, plus one per centum (1%) of his average final compensation multiplied by the number of all other years of service."

N. J. S. A. 43:8A—7 (2) (b) quoted above refers to two types of service, namely "service during the first twenty-five years of service for which the member has contributed, up to twenty-five," and, secondly, "all other years of service."

Inasmuch as both types of service, as above described, are credited to the member with varying weights for pension purposes, we must assume that each type of service, must in turn be limited by the definition of the term "creditable service" which appears in N. J. S. A. 43:8A—1 which is the definition section of the statute before us. In this section the term "creditable service" is defined as meaning:

> "service rendered while a member, or before becoming a member of the pension fund, for which credit is allowed as provided under section four of this act."

This section four, namely N. J. S. A. 43:8A—4, is as follows:

> "Only service as a law enforcement officer which was rendered by a member before the date of the establishment of this pension fund, or since he became a member, or since he last became a member in case of a break in service, shall be considered as creditable for the purposes of this Act."

The word "service" as used in section 43:8A—7 (2) (b) (supra), is therefore, to be construed to mean "creditable service" as defined by N. J. S. A. 43:8A—4 (supra) as, otherwise, this section would have no meaning.

In other words, the various sections above discussed all relating to service, must be read and construed in conjunction each with the others. As thus read, they mean, in our opinion, simply that a law enforcement officer, as defined by the Act, may only be credited for pension purposes, with the kind of service as is defined by N. J. S. A. 43:8A—4 (supra); and that this credit under the terms of N. J. S. A. 43:8A—7 (2) (b) (supra) may be of two types, namely, credit for service during the first twenty-five years of service for which the member has contributed up to twenty-five years, and credit for all other years of service as a law enforcement officer, each type of service being entitled to a different value or weight in the calculation of the pension to be paid.

At no place, however, as we have previously observed, does this statute authorize, as other statutes do, the purchasing of credits for prior service.

The right to purchase prior credits is an additional benefit which the Legislature may grant or withhold.

The rule governing statutory construction in this situation is well settled. As most recently expressed in *Rosenthal vs. State Employees Retirement System,* 30 N. J. Super. 136, 140 (App. Div. 1954), the Court stated:

> "Where wording of a statute is explicit and clear, the court is not free to indulge in a presumption arising from extrinsic evidence that the Legislature intended something other than that which it actually expressed. Except where uncertainty and ambiguity appear, a statute must speak for itself and be construed according to its terms. *Bass v. Allen Home Improvement Co.,* 8 N. J. 219 (1951)."

In other words, the statute before us is to be regarded as meaning what it says, and should be given no broader construction or effect than its language justifies. *Belfer v. Borrella,* 6 N. J. Super. 557, Aff'd, 9 N. J. Super. 287, (1950).

In view of the fact that other pension statutes make a clear distinction as between prior service, and other service, or require matching contributions on the part of the employee, and further in view of the absence of any language in the statute now before us authorizing the purchase of prior service credits, it is our opinion that such credits may not be purchased, but such years of service, may be credited "as all other years of service" in the formula set forth in N. J. S. A. 43:8A—7 (2) (b) (supra) subject to the provisions of N. J. S. A. 43:8A—4. Accordingly, any rule to the contrary that may be adopted on the subject by the Board of Trustees would be invalid.

Very truly yours,
GROVER C. RICHMAN, JR.,
Attorney General.

By: DANIEL DE BRIER
Deputy Attorney General.

DDeB:jk

AUGUST 6, 1954.

HON. ARCHIBALD S. ALEXANDER
State Treasurer of New Jersey
State House
Trenton 7, New Jersey

FORMAL OPINION 1954—No. 16

DEAR MR. ALEXANDER:

In connection with the various funds established by law within the Division of Employment Security, Department of Labor and Industry, State of New Jersey, you have submitted a series of questions, which may be summarized thusly:

a) Who has the responsibility of determining anticipated cash requirements and the amount to be invested?

b) Who has the responsibility for the selection of depositories, the making of deposits, and the execution of custody agreements?

c) In connection with any investments that may be proposed after the determination mentioned in a) above is made, what is the procedure with respect to the making of such investments?

ORGANIZATIONAL BACKGROUND

The present Division of Employment Security finds its origin in the former Unemployment Compensation Commission established by Chapter 270, P. L. 1936 (R. S. 43:21—10). As part of the reorganization of our State Government in 1948, and the establishment of a Department of Labor and Industry as a principal department in the Executive branch of our State government, (N. J. S. A. 34:1A—1 et seq.), the Unemploymant Compensation Commission and the office of its executive director were abolished (R. S. 34:1A—31) and the functions, powers and duties of the Unemployment Compensation Commission and its bureaus and divisions and of the executive director thereof, were assigned to and were to "be exercised and performed through, the Division of Employment Security of the Department of Labor and Industry * * *" (N. J. S. A. 34:1—14; see also N. J. S. A. 34:1A—21). As a part of the same reorganization statute, the Division of Employment Security was placed under the "immediate supervision" of a director charged to "administer the work of such division under the direction and supervision of the commissioner (of Labor and Industry)", the director to also "perform such other functions of the department as the commissioner may prescribe." (N. J. S. A. 34:1A—15)

The 1948 Act also established within the Division of Employment Security, an Employment Security Council, consisting of seven persons to be appointed by the Governor, with the advice and consent of the Senate; the seven members of the Unemployment Compensation Commission in office on the effective date of the 1948 act being constituted the first members of the Employment Security Council for the remainder of their respective terms (N.J.S.A. 34:1A-16). The Employment Security Council was directed, among other things, to consult and advise with the Commissioner of Labor and Industry and the Director of the Division of Employment Security with respect to the administration and operation of the Unemployment Compensation Law (N.J.S.A. 34:1A-17).

The Act provided in R.S. 34:1A-32 that:

> "Whenever the term 'Unemployment Compensation Commission' occurs or any reference is made thereto in any law, contract, or document, the same shall be deemed to mean or refer to the Commissioner of Labor and Industry designated as the head of the Department of Labor and Industry established hereunder."

and that:

> "Whenever the term 'Executive Director of the Unemployment Compensation Commission' occurs or any reference is made thereto in any law, contract, or document, the same shall be deemed to mean or refer to the director of the Division of Employment Security established hereunder."

R.S. 43:21-11, which defined the powers and duties of the former Unemployment Compensation Commission, was amended in 1952 to define the powers and duties of the Division of Employment Security. An examination of this section discloses that the Division is granted, as was the former Unemployment Compensation Commission, considerable autonomous powers and duties, among which are the duty "to determine all matters of policy," power to "determine its own organization and methods of procedure," power to have "an official seal which shall be judicially noticed," duty to submit an annual report directly to the Governor and power to appoint, fix the compensation and prescribe the duties and powers of its personnel, subject to civil service requirements.

Despite the broad language of R.S. 43:21-11, as amended, in 1952, it is our opinion that it does not disclose a legislative intention that the Division of Employment Security is to be an autonomous agency of the State Government. N.J.S.A. 34:1A-14 provided that the functions, powers and duties of the former Unemployment Compensation Commission were to be assigned to, and to be exercised and performed through, the Division of Employment Security and N.J.S.A. 34:1A-15 provided that the work of the Division was to be administered by the Director "under the direction and supervision of the commissioner [of labor and industry]." In view of these provisions, it is clear that the Legislature intended that the powers and duties conferred upon the Division of Employment Security, pursuant to R.S. 43:21-11, as amended, were to be exercised under the general and overall direction and supervision of the Commissioner of Labor and Industry and that the Division of Employment Security was to be a part, in every sense of the word, of the Department of Labor and Industry. The provisions of N.J.S.A. 34:1A:-3 placing the responsibility on the Commissioner of Labor and Industry for the work of the various divisions of his department, implement this conclusion.

The general duties and powers of the State Treasurer with respect to the deposit of public moneys coming into his hands is set out in R.S. 52:18-17 and R.S. 52:18-18 as follows:

R.S. 52:18-17.

> "The state treasurer shall, except as otherwise provided, deposit to his credit as treasurer, all public moneys coming into his hands, within three days after receiving the same, in such of the national banks located in this state, and institutions authorized by this state to carry on a banking business, as he may select, that will allow interest not exceeding two per cent per annum on all balances. All interest so earned shall be credited to the state. Before making any such deposit of public moneys the state treasurer may require from any such institution a deposit of bonds of the United States or bonds of the state of New Jersey designed to secure any deposit made pursuant to the provisions of this section."

R.S. 52:18-18, as amended.

> "The State Treasurer may, when in his judgment it is not compatible with public safety to deposit the public moneys, or portion thereof, upon interest bearing terms, as provided by section 52-:18-17 of this Title, deposit the same without interest or open time accounts with interest subject to

withdrawal upon thirty days' notice, in such of the national banks located in this State and institutions authorized by this State to carry on a banking business as he may select, until such a condition has, in his judgment, ceased to exist. In all cases where a deposit is made, pursuant to this section, the State Treasurer may require from any such institution a deposit of bonds of the United States, or bonds of the State of New Jersey, designed to secure any deposit made pursuant to this section; provided, that such requirement shall be deemed to be met if the Federal Reserve Bank of New York or the Federal Reserve Bank of Philadlphia certifies to the State Treasurer that, pursuant to authority given by the depositary, it holds bonds, owned by the depositary, of the kind and in the amount required by the State Treasurer to secure any such deposit."

Further, it should be noted that N.J.S. 52:18A-18 provides for the deposit of State revenue "to the credit of the State of New Jersey in such depositories as the State Treasurer shall designate."

THE FUNDS INVOLVED

The Division of Employment Security is concerned with the following separate funds established by statute:

a) The Unemployment Compensation Fund (R.S. 43:21-9)

b) The State Disability Benefits Fund (R.S. 43:21-46, as amended)

c) The Unemployment Compensation Administration Fund (R.S. 43:21-13)

d) The Unemployment Compensation Auxiliary Fund (R.S. 43:21-14 (g) as amended)

We now proceed to consider each of the above four funds in light of your several questions:

THE UNEMPLOYMENT COMPENSATION FUND

(a) The "Unemployment Compensation Fund" was established, pursuant to the provisions of R.S. 43:21-9, "as a special fund separate and apart from all public moneys or funds of this State." It consists of all contributions collected for unemployment compensation, interest earned thereon, any property or securities acquired through the use of moneys belonging to the fund, and all earnings of such property or securities.

R.S. 43:21-9(a) provides that this fund "shall be administered by the commission" [Unemployment Compensation Commission—now the Division of Employment Security].

R.S. 43:21-9(b) provides:

"Accounts and deposit. The treasurer of the State of New Jersey shall be ex officio the treasurer and custodian of the fund and shall administer such fund in accordance with the directions of the commission and shall issue his warrants upon it in accordance with such regulations as the commission shall prescribe. He shall maintain within the fund three separate accounts: (1) A clearing account, (2) an unemployment trust fund account, and (3) a benefit account. All moneys payable to the fund, upon receipt thereof by the commission, *shall be forwarded to the treasurer, who shall immediately deposit them in the clearing account.* Refunds payable pursuant to subsection (f) of section 43:21-14 of this Title may be paid from the clearing account upon warrants issued by the treasurer under the direction of the commission. After clearance thereof, all other moneys in the clearing account shall be immediately deposited with the Secretary of the Treasury of the United States of America to the credit of the account of this State in the unemployment trust fund, established and maintained pursuant to section nine hundred four of the social security act, as amended, any provision of law in this State relating to the deposit, administration, release or disbursement of moneys in the possession or custody of this State to the contrary notwithstanding. The benefit account shall consist of all moneys requisitioned from this State's account in the unemployment trust fund. *Moneys in the clearing and benefit accounts may be deposited by the treasurer, under the direction of the commission, in any bank or public depository in which general funds of the State may be deposited, but no public deposit insurance charge or premium shall be paid out of the fund.* The treasurer shall give a separate *bond conditioned upon the faithful performance of his duties as custodian of the fund* in an amount fixed by the commission and in a form prescribed by law or approved by the Attorney-General. Premiums for said bond shall be paid from the admistration fund." (*Underlining* ours.)

And R.S. 43:21-9(c) provides in part as follows:

"Withdrawals. Moneys shall be requisitioned from this State's account in the unemployment trust fund solely for the payment of benefits in accordance with regulations prescribed by the commission. The commission shall from time to time requisition from the unemployment trust fund such amounts, not exceeding the amounts standing to its account therein, as it deems necessary for the payment of benefits for a reasonable future period. Upon receipt thereof the treasurer shall deposit such moneys in the benefit account and shall issue his warrants for the payment of benefits solely from such benefit account. *** All warrants issued by the treasurer for the payment of benefits and refunds shall bear the signature of the treasurer and the counter-signature of the executive director or his duly authorized agent for that purpose.*** "

It is our opinion that the function of administering the Unemployment Compensation Fund has been transferred to the Division of Employment Security pursuant to the provisions of N.J.S.A. 34:1A-14; that the Division of Employment Security has the responsibility for administering this fund to effectuate the purposes of the unemployment compensation act and that the State Treasurer, in carrying out his functions as treasurer and custodian, is subject to directions of the Division of Employment Security to the extent necessary to enable the Division of Employment Security to carry out its responsibilities for such administration.

As part of its duties with respect to the Unemployment Compensation Fund, the Division of Employment Security must necessarily determine from time to time its anticipated needs for cash requirements. Such determination must inevitably be made upon the basis of past experience and a prognosis of future eventualities. Accordingly, it is our opinion that the determination of anticipated cash requirements and the amount, if any, to be invested is one to be made by the Division of Employment Security under the direction and supervision of the Commissioner of Labor and Industry.

(b) The next questions relate to the responsibility for the selection of depositories, the making of deposits and the execution of custody agreements, in connection with the Unemployment Compensation Fund.

As has been noted hereinbefore, the Unemployment Compensation Fund is separated into three seprate accounts, a clearing account, an unemployment trust fund

account, and a benefit account. We are herein only interested in the first and third accounts because the second account, namely, the unemployment trust fund account, is maintained with the Secretary of the Treasury of the United States.

Under R.S. 43:21-9(b), quoted above, the State Treasurer, by virtue of his office, is treasurer and *custodian* of the Unemployment Compensation Fund, including the moneys of the clearing and benefit accounts.

As custodian, it is the treasurer's duty to "watch, guard and account for that which is committed to his custody" (25 C.J.S. 69, 70; Bank of Commerce v. Hartford Accident and Indemnity Co. 164 F. (2d) 149; C.C.A. 5th, 1947). To insure the faithful performance of such duty, the State Treasurer is required, by the last two sentences of R.S. 43:21-9(b), to give a separate bond.

In view of the duties thus imposed on the State Treasurer as custodian of the moneys of the fund so delivered to him, it is, in our opinion, his responsibility and duty to determine in what depositories he shall deposit and keep the moneys which he must "watch, guard and account for."

The language in R.S. 43:21-9(b) providing that the State Treasurer "shall administer such fund in accordance with the directions of the commission" and that "moneys in the clearing and benefit accounts may be deposited by the treasurer, under the direction of the commission, in any bank or public depository in which general funds of the State may be deposited" is not inconsistent with this conclusion. The Division of Employment Security, as the successor to the Unemployment Compensation Commission, performs its statutory function with respect to the administration of the unemployment compensation fund when it determines how much cash it will require for its immediate future operations and disburses these moneys in accordance with the statute. The State Treasurer, as treasurer and custodian of the fund, is subject to the directions of the Division with respect to how much moneys may be deposited by him in banks.

But the duty of selecting the banks in which such moneys should be deposited is one to be performed by the one whom the statute makes the bonded custodian of the moneys, the State Treasurer, who, as we have hereinbefore indicated, is, by R.S. 52:1-17 and R.S. 52:18-18, as amended, given the general power, and, is required, in the absence of express statutory provisions to the contrary, to deposit all public moneys coming into his hands in banks located in this state which he may select subject to the conditions of R.S. 52:18-17 and 18, as amended.

Chapter 22, P.L. 1954 (N.J.S.A. 52:18A-8.1 to 8.3) authorizes the State Treasurer to enter into custody agreements with reference to funds, securities or other assets of the State or of any pension agency, fund or system maintained in whole or in part by the State.

We consider that the making of these custody agreements represent an authorized delegation by the State Treasurer of some of his administrative functions.

Because the State Treasurer is the only state official or agency statutorily empowered to enter into custody agreements, it is our opinion that any such agreements to be made with respect to the unemployment compensation fund are to be made by the State Treasurer, in accordance with the provisions of the custody agreement statute aforementioned.

(c) As to any investments that may be proposed to be made with respect to any moneys of this fund, — N.J.S.A. 52:18A-86 provides that the functions, powers and duties of, or relating to, investment or reinvestment of moneys of and purchase, sale or exchange of any investments or securities pursuant to the provisions of Chapter 148, P.L. 1944 (R.S. 52:18-25.1), are transferred to and shall be exercised and performed by the Director of the Division of Investment, Department of the Treasury, subject to the written acceptance or rejection by the State Treasurer of

any proposed investment or reinvestment, purchase, sale or exchange. Chapter 148, P.L. 1944, above referred to, applies to moneys of the State held by the State Treasurer "under a requirement that said moneys be held for a particular time or be held for a particular use." It is our opinion that moneys of the Unemployment Compensation Fund are held in the custody of the Treasurer "for a particular time" or "for a particular use" and that therefore any portion of the benefit account declared to be available for investment by the Director of the Division of Employment Security, may be invested in accordance with the provisions of N.J.S.A. 52:18A-86 as aforementioned.

THE STATE DISABILITY BENEFITS FUND

(a) The State Disability Benefits Fund was recently the subject of consideration by this Office in our Formal Opinion 1954—No. 13, dated June 22, 1954, to which reference is hereby made.

As we stated in that opinion, this fund was established by the provisions of R. S. 43:21—46, as amended, comprising worker and employer contributions made pursuant to the provisions of our subsections (d) and (e) of R. S. 43:21—7, less refunds, plus interest and earnings from investments of the Fund, and assessments, fines and penalties collected under the act. The fund is held in trust for the payment of disability benefits and for authorized refunds. The statute provides that "The fund shall remain in the custody of the State Treasurer and to the extent of its cash requirements shall be deposited in authorized public depositories in the State of New Jersey."

Likewise, as was pointed out in our June 22, 1954 opinion, the responsibility for determining the anticipated cash requirements of this fund, and the amount to be invested is that of the Division of Employment Security, acting through its Director, subject, of course, as has heretofore been indicated, to the overall general supervision of the Commissioner of Labor and Industry.

(b) R. S. 43:21—46 (a), as amended, provides in part:

> "The fund shall remain in the custody of the State Treasurer, and to the extent of its cash requirements shall be deposited in authorized public depositories in the State of New Jersey * * * All moneys withdrawn from the fund shall be upon warrant signed by the State Treasurer and countersigned by the Director of the Division of Employment Security of the Department of Labor and Industry of the State of New Jersey. The Treasurer shall maintain books, records and accounts for the fund, appoint personnel and fix their compensation within the limits of available appropriations. The expenses of the Treasurer in administering the fund and its accounts shall be charged against the administration account, as hereinafter established."

It is our opinion that the State Treasurer, who is made custodian of the State Disability Benefits Fund, and in whose custody that fund is to remain, has the responsibility of selecting the depositories in which the moneys of the fund are to be deposited.

As to custody agreements—the execution of such agreements are the responsibility of the State Treasurer, this for the same reasons set forth in the discussion of the matter as it relates to the Unemployment Compensation Fund.

(c) Formal Opinion No. 13 of June 22, 1954 sets forth the responsibilities and procedures for the handling of investments of moneys of this fund in excess of cash requirements.

THE UNEMPLOYMENT COMPENSATION ADMINISTRATION FUND

This fund was created by R. S. 43:21—13 which provides in part as follows:

"There is hereby created in the State treasury a special fund to be known

as the unemployment compensation administration fund. All moneys which are deposited or paid into this fund are hereby appropriated and made available to the Division of Employment Security of the Department of Labor and Industry of the State of New Jersey. All moneys in this fund shall be expended solely for the purpose of defraying the cost of the administration of this chapter (R. S. 43:21—1 et seq.), and for no other purpose whatsoever."

The fund consists of monies appropriated by the State, and moneys received from the United States of America and various agencies thereof for purposes of defraying the cost of administering the Unemployment Compensation Law.

R. S. 43:21—13 further provides:

"All moneys in this fund shall be deposited, administered, and disbursed, in the same manner and under the same conditions and requirements as is provided by law for other special funds in the State treasury. Any balances in this fund shall not lapse at any time, but shall be continuously available to the Division of Employment Security of the Department of Labor and Industry of the State of New Jersey for expenditure consistent with this chapter (R. S. 43:21—1 et seq.). The State Treasurer shall give a separate and additional bond conditioned upon the faithful performance of his duties in connection with the unemployment compensation administration fund . . ."

(a) In our opinion, the statutory provisions governing this fund places the responsibility for determinations as to the cash requirement of this fund and whether any moneys are available for investment with the Division of Employment Security.

(b) The statute (R. S. 43:21—13) provides that moneys in the fund, "a special fund in the State Treasury", "shall be deposited, administered and disbursed, in the same manner and under the same conditions and requirements as is provided by law for other special funds in the State Treasury." In our opinion, the provisions of R.S.52:18—17 and R. S. 52:18—18, as amended, control and empower the State Treasurer to exercise the function of selection of depositories for moneys of the fund.

For the same reasons as set forth in our discussion above concerning the unemployment compensation fund, it is our opinion that the execution of custody agreements, if any, relating to moneys in this fund is the sole responsibility and function of the State Treasurer.

Detailed discussion of the investment responsibilities and procedures incident to this fund appear most academic and therefore unnecessary in view of the fact that this fund represents active working capital, and must be "continuously available" to the Division of Employment Security. *Should,* however, a policy determination be made that surplus of moneys of the fund should be invested, perhaps for a short period, then the procedure set forth in N. J. S. A. 52:18A—86 relating to the investment of funds held by the State Treasurer "for a particular time", or for a "particular use" would apply—namely, such moneys would be invested by the Director of the Division of Investment, subject to the acceptance or rejection of any proposed investment by the State Treasurer, under the procedures set forth in N. J. S. A. 52:18A—86. of which you are aware.

THE UNEMPLOYMENT COMPENSATION AUXILIARY FUND

The Unemployment Compensation Auxiliary Fund was established by R. S. 43:21—14 (g), as amended, and consists of all interest and penalties collected pursuant to R. S. 43:21—14, as amended. The statute cited further provides that:

". . . all moneys in this special fund shall be deposited, administered and disbursed, in the same manner and under the same conditions and requirements as is provided by law for other special funds in the State treasury, and shall be expended, under legislative appropriation, solely for the purpose of aiding in defraying the cost of the administration of this chapter and for essential and necessary expenditures in connection herewith not provided in or by grants of the Federal Government. The Treasurer of the State shall be ex-officio the treasurer and custodian of this special fund and, subject to legislative appropriation, shall administer the fund in accordance with the directions of the division. Any balances in this fund shall not lapse at any time, but shall be continuously available, subject to legislative appropriation, to the division for expenditure. The State Treasurer shall give a separate and additional bond conditioned upon the faithful performance of his duties in connection with the unemployment compensation auxiliary fund . . .".

(a) This fund is not available for expenditure by the Division of Employment Security unless the Legislature first makes an appropriation therefrom for that purpose. In effect, therefore, it is the Legislature which must determine anticipated cash requirements and amount of moneys to be expended out of the fund. The unappropriated balance of the fund remains a special fund in the State Treasury available for investment except for a reasonable reserve to cover possible claims for refund of penalties and interest collected. The amount to be reserved for that purpose is to be determined by the Division of Employment Security through its Director.

(b) As to the selection of depositories—in our opinion, this is the function of the State Treasurer under the provisions of R. S. 52:18—17 and R. S. 52:18—18, as amended, hereinabove discussed. For the same reasons as set forth in our discussion concerning the Unemployment Compensation Fund, it is our opinion that the execution of custody agreements, if any, relating to moneys and properties in this fund, is the sole responsibility and function of the State Treasurer.

(c) It is our opinion that the moneys of the Unemployment Compensation Auxiliary Fund are held in the custody of the State Treasurer "under a requirement that said moneys be held for a particular time or be held for a particular use" within the meaning of Ch. 148, P. L. 1944 above discussed, and that, therefore, any investment of those moneys is to be made by the Director of the Division of Investment, subject to the acceptance or rejection of any proposed investment by the State Treasurer under the procedure set forth in N. J. S. A. 52:18A—86.

Very truly yours,
GROVER C. RICHMAN, JR.
Attorney General

By : HAROLD KOLOVSKY
Assistant Attorney General

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SEPTEMBER 2, 1954.

EDWARD B. MCCONNELL, *Esq.*
Administrative Director of the Courts
State House Annex
Trenton, New Jersey

FORMAL OPINION 1954—No. 17.

DEAR MR. MCCONNELL:

You have advised this Office that you are in receipt of a voucher submitted by the Treasurer of Bergen County seeking reimbursement from the State of New Jersey for forty (40%) per cent of the pension paid by Bergen County to former Judge A. Demorest Del Mar for the period April 1, 1954 to June 30, 1954.

Your inquiry states that Judge Del Mar was retired under the provisions of the Veterans' Pension Act (R. S. 43:4—1 to 43:4—5 inclusive). This retirement was authorized by the County of Bergen. Inasmuch as the facts on which this retirement by Bergen County was based are not before us, we assume for purposes of this opinion, without conceding the fact, that the County's action was legally valid and proper.

It is our opinion, and we so advise you, that this claim of Bergen County for reimbursement should be denied.

The present claim for reimbursement apparently is based upon the provisions of N. J. S. A. 2A:3—19, which provides as follows:

> "The salaries of the judges of the several county courts shall be payable from county funds, by the treasurers of the respective counties, in equal semimonthly installments; provided, however, that 40 per cent of the salaries, which may be paid to June thirtieth in any year to the judges of the county courts in any county by reason of the provisions of this article, shall be refunded to said county by the state treasurer on warrant of the director of the division of budget and accounting in the department of the treasury on vouchers certified or approved by the county treasurer and the administrative director of the courts."

The sections of the Veterans' Pension Act to be considered in connection with your inquiry are the following:

R. S. 43:4—3.

> "A person so retired shall be entitled, for and during his natural life, to receive by way of pension, one-half of the compensation then being received by him for his service, which shall be paid in the same way and in the same installments as his compensation has been payable. No pension paid under this article shall be less than fifty dollars per month, unless the person so retired shall at the time of his retirement be receiving compensation of less than fifty dollars per month, in which case he shall be paid on retirement the full amount then being received by him for his service. * * *"

R. S. 43:4—4.

> "Provisions for all pensions arising under this article shall be made in the appropriation or tax levy for the department of the public service from which the person shall be retired. No pension shall cease or become invalid by reason of the abolition of the department or office in which he served, or any change in its title."

We shall first dispose of R. S. 43:4—4 supra, by pointing out that this section of the statute requires that the veteran's pension shall be paid by "the department of the public service from which the person shall be retired." In the case before us, this is, of course, Bergen County.

R. S. 43:4—3 supra, states that the pension shall be paid to the veteran "in the same way and in the same installments as his compensation has been payable." The source of this section is Chapter 84, P. L. 1912, antedating by many years N. J. S. A. 2A:3—19 (Chapter 257, P. L. 1949), namely, the statute quoted above, obligating the State to pay forty per cent of the salary paid to a county judge. We cannot impute to the 1912 statute requiring the pension to be paid "in the same way and in the same installments" as the compensation was paid, any intention to encompass the condition created by the 1947 statute, whereby the State obligated itself to refund to the County a portion of he salary, heretofore paid by the County, to county judges. The duty to *pay* the salary is that of the employing county. The obligation of the State is only to *refund* to the county a portion of that which the county originally paid to the Judge.

Further, we are of the opinion that the reference in R. S. 43:4—3 that the veteran shall be paid "in the same way and in the same installments" as the compensation was paid, refers only to the mode of procedure, manner and time by which and when the compensation was paid, and does not refer to the source from which the compensation was paid, R. S. 43:4—4 supra, providing that the burden of the pension shall be upon the department or office from which the veteran is retired.

The word "way" (i. e. "in the same way") used in R. S. 43:4—3 may be defined as meaning, when employed in this sense, "manner or method", (Webster's New International Dictionary). In *Marvel v. Camden County,* 135 N. J. L. 575 at 577 (Sup. Ct. 1947), the Court had before it for consideration a statute requiring the filling of vacancies by a Board of Freeholders "in the same manner as the original selection or appointment." The Court held that the word "manner" is to be construed as meaning "mode of procedure."

Aside from the foregoing considerations, we point out that R. S. 2A:3—19 creates an obligation on the part of the State to refund forty per cent of the *salary* initially paid in its entirety by the county to the judge, and does not refer to pensions. To endeavor to extend the obligation of the State to pension payments, as distinct from salary payments, is to ignore the clear distinction between these two terms.

Our Courts consistently have held that pension payments are but a "reward" given for honest and efficient service (See *Walter v. Police and Fire Commission of Trenton,* 120 N. J. L. 39, 42 (Sup. Ct. 1938) and *DeLorenzo v. Newark,* 134 N. J. L. 7, 9 (E. & A. 1945), or a "gratuity" (See *Eckert v. New Jersey Highway Department,* 1 N. J. 474, 480 (1949). More recently, the Appellate Division of our Superior Court in *Balkurio v. Castellini,* 29 N. J. Super. 383, 389 (App. Div. 1954) in a case involving a veteran's pension, held that:

> "A pension is a bounty springing from appreciation and graciousness of the sovereign; it is an inducement to conscientious, efficient and honorable service . . ."

Additionally, our courts have stated that a public officer or employee is not entitled to a pension as of right. (See *Restaino v. Board of Commissioners of the City of Newark,* 16 N. J. Misc. 266 (Cir. Ct. 1938). In view of the foregoing decisions, we believe it is evident that a veteran's pension cannot be regarded as salary which is earned, but is, as our courts have stated, merely a reward or gratuity or bounty given to an employee, for which there is no vested right until awarded.

In reaching this conclusion, we are not unmindful of certain provisions of Chapter 6, Title 43, which refers to certain judicial officers, receiving on retirement or incapacity pursuant to the terms and under the specific conditions of the statutes hereinafter cited, what is referred to as an "annual salary or compensation" during the remainder of their natural life. (See R. S. 43:6—2 and R. S. 43:6—6). The wording of these statutes in describing a pension, as salary or compensation, is unusual, and does not conform with normal statutory language on the subject. Witness that the 1948 Judicial Retirement Statute (N. J. S. A. 43:6—6.1 to 43:6—6:10 incl.), in referring to the benefits payable thereunder to certain retired or disabled judicial officers calls such benefits a pension. In any event, Judge Del Mar's retirement was not under the provisions of R. S. 43:6—2 or 43:6—6 referred to above, but was under the Veterans' Pension Act, which specifically describes the benefits being received by him, as a pension, and not as a salary or compensation.

Inasmuch as pension payments made under the Veterans' Pension Act cannot, in our opinion, in the absence of express words to the contrary, be regarded as salary, the County of Bergen would not be entitled to reimbursement from the State, for any portion of these payments.

Yours very truly,

GROVER C. RICHMAN, JR.
Attorney General

By : DANIEL DE BRIER
Deputy Attorney General

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SEPTEMBER 2, 1954.

HON. FREDERICK M. RAUBINGER
Commissioner of Education
175 West State Street
Trenton, New Jersey

FORMAL OPINION 1954—No. 18.

DEAR COMMISSIONER:

You have requested our opinion as to whether the Law Against Discrimination applies to a private school for boys, providing a course of study from kindergarten through preparation for college, which is owned and operated by a board of trustees and not by a religious or sectarian institution, and which receives no income except from tuition fees and contributions from private sources.

In my opinion, the Law Against Discrimination does apply to such a school. Section 11 of the law (P. L. 1945, c. 169 as amended by P. L. 1949, c. 11, N. J. S. A. 18:25—12f.) makes it an unlawful discrimination for the owner or operator of "any place of public accomodation", in extending the privileges and facilities thereof, to discriminate against any person on account of race, creed, color, national origin, or ancestry. The term "place of public accomodation" is defined in the law (N. J. S. A. 18:25—5j) as including "any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey." The definition then goes on to provide as follows:

> "Nothing herein contained shall be construed to include, or to apply to, any institution, bona fide club, or place of accomodation, which is in its nature distinctly private; nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution, and the right of a natural parent or one in locol parentis to direct the education and upbringing of a child under his control is hereby affirmed; nor shall anything herein contained be construed to bar any private secondary or post-secondary school from using in good faith criteria other than race, creed, color, national origin or ancestry, in the admission of students."

Aside from the question whether a school of the type under discussion might otherwise be considered an institution which is in its nature "distinctly private", the last two clauses of the sentence above quoted make it clear by implication that such a school is covered by the law. If educational facilities which are private in the sense of not being part of the public school system were excluded from the law as distinctly private institutions, there would be no need for the specific exclusion of religious or sectarian schools. Yet it is well settled that every word, clause and sentence in a statute is to be given significance where that is reasonably possible, and that the Legislature will be presumed not to have made a superfluous use of words. *Ford Motor Company v. New Jersey Dept. of Labor and Industry*, 5 N. J. 494, 502 (1950); *Steel v. Freeholders of Passaic*, 89 N. J. L. 609, 612 (E. & A. 1915).

Similarly, if every so-called private school were exempt from the Law Against Discrimination by virtue of being an institution "which is in its nature distinctly private", it would have been superfluous to provide in the last clause of the above quoted proviso that private secondary schools might use in good faith criteria other than race, creed, color, national origin or ancestry in the admission of students. Indeed, the express vesting of such authority in private secondary schools plainly indicates that they are prohibited from considering race, creed, color, national origin or ancestry in the admission of students.

For the foregoing reasons, it is our opinion that so-called private educational institutions were not intended by the Legislature to be considered as institutions which are in their nature "distinctly private", within the meaning of that phrase as used in the law, and that such educational facilities are subject to the law execept for those which are operated or maintained by a bona fide religious or sectarian institution.

It may be added that in using criteria other than race, creed, color, national origin or ancestry in the admission of students, the school must follow the statutory injunction of "good faith". This plainly means that the institution may not circumvent the law by using such other criteria for the purpose of accomplishing the prohibited discrimination.

Yours very truly,

GROVER C. RICHMAN, JR.
Attorney General

By : THOMAS P. COOK,
Deputy Attorney General.

tpc;b

SEPTEMBER 15, 1954.

HON. ARCHIBALD S. ALEXANDER
State Treasurer

State House
Trenton, New Jersey

FORMAL OPINION 1954—No. 19.

DEAR MR. ALEXANDER:

You advise that you had been requested by the Regional Director of Region II of the United States Department of Health, Education and Welfare, to furnish that Department with the opinion of this Office as to the validity of Chapter 84, P. L. 1954, and as to the fact that any benefits granted or extended to members of the present State Employees' Retirement System based on accumulated equities under that System are not conditioned on future employment.

Chapter 84, P. L. 1954 is entitled:

> "An Act to provide coverage for certain State, county, municipal, school district and public employees, under the provisions of Title II of the Federal Social Security Act, as amended; repealing chapters 14 and 15 of Title 43 of the Revised Statutes including acts amendatory thereof and supplementary thereto; granting refund of accumulated deductions paid thereunder or membership in the Public Employees' Retirement System created hereunder, specifying contributions to be paid and benefit rights therein."

This statute, as you will note, (1) authorizes and directs the State Treasurer as the State agency, established under Chapter 253, P. L. 1951, as amended, and with the approval of the Governor, to enter into an agreement with the United States Department of Health, Education and Welfare to extend the provisions of the Federal Old-Age and Survivors Insurance system to certain State, county, municipal and school district and other public employees; (2) repeals as of December 30, 1954, chapters 14 and 15 of Title 43 of our Revised Statutes, under which our present State Employees' Retirement System is established and functions and pursuant to which the benefits of this System may be extended to county and municipal employees; and (3) establishes as of January 1, 1955, a new State retirement system known as the Public Employees' Retirement System.

It is our opinion that Chapter 84, P. L. 1954 was duly and properly enacted, effectively abolishes as of December 30, 1954 the present State Employees' Retirement System, validly accomplishes the several other purposes set forth in the title of this act (supra), and is fully in effect subject only to the various effective dates for specific sections, as is set forth in said act.

The various tests of constitutionality to be applied to legislation relating, as Chapter 84, P. L. 1954 does, namely, to pension and retirement rights for various groups, were early set forth by our Courts in *Hulme v. Trenton*, 95 N. J. L. 30, (Sup. Ct. 1920) affirmed 95 N. J. L. 545 (E. & A. 1920). These tests inquire whether the object of the Legislation under consideration is expressed in its title, whether the employees dealt with have a proper relationship to each other, and whether it avoids the pitfall of being special legislation. A reading of the title of Chapter 84 of P. L. 1954, supra, makes evident the fact that the object of this legislation is precisely and fully set forth in its title. As to the remaining tests, the Supreme Court, in the case cited, pointed out that it would not be "incongruous" to include "all public servants in a general pension act," and further, that such legislation cannot be assailed as special legislation. The language of the Supreme Court in the *Hulme* decision is equally applicable to the 1954 statute now before us for consideration.

It is also clear under the decisional law of our State that the Legislature, as a condition of employment, may require a public employee to become a member of a newly created pension system, at the same time depriving him of membership in an existing pension system. This point was adjudicated by our Supreme Court, in *Pension Commission of the Police and Fire Department of Atlantic City v. Atlantic City Fire Department Pension Fund*, 97 N. J. L. 117 (1922) aff'd 98 N. J. L. 794 (E. & A. 1923).

The facts in that case disclose that in 1920 the Legislature enacted Chapter 150, P. L. 1920, which provided for certain retirement and pension rights for policemen and firemen of municipal police and fire departments of this State, and their dependents. The act further directed the then existing municipal police and fire department pension funds to turn over funds in their possession to the municipal pension boards created under the 1920 statute. The respondent in this case, the old municipal pension fund, declined to turn over to the newly created pension fund, certain assets in the possession of the former. The Supreme Court ordered the turnover, stating that it was within the power of the Legislature to provide for a formation of a new pension system and to direct that assets of the old System, be turned over to the new fund.

The Supreme Court further went on to say that such type of legislation is "but the expression of the legislative will and purpose to make changes in the control, administration and sources of retirement and pension funds," and that the contention of respondent that legislation of this nature amounts to a forfeiture and deprivation of vested rights, is "beside the mark", such legislation being "no more than the change of one legislative trustee for another." (p. 795).

It is also appropriate to note at this point, that our Courts have uniformly held that:

> "It appears to be the general rule, and is certainly the rule in this state, that compulsory deductions from the salaries of governmental employees by the authority of the government for the support of a pension fund create no contractual or vested right between such employee and the government, and neither such employes nor those claiming under them have any rights except their claims be based upon and within the statute governing the fund." *Bennett v. Lee*, 104 N. J. L. 453 (Sup. Ct. 1928); *Plunkett v. Pension Commissioners*, 113 Id. 230 (Sup. Ct. 1934), affirmed 114 Id. 273 (E. & A. 1935); *Salley v. Firemen's and Policemen's Pension Fund Commission and Jersey City*, 124 N. J. L. 79 (Sup. Ct. 1940).

The second inquiry presented for determination is whether Chapter 84, P. L. 1954 adequately protects all accumulated equities granted or extended to members of the State Employees' Retirement System, to be terminated as of December 30, 1954.

It is our opinion that Chapter 84, P. L. 1954 does adequately protect all accumulated equities and that such accumulated equities are not conditioned in any manner upon future employment.

As we have observed heretofore, the present State Employees' Retirement System is based on the provisions of chapters 14 and 15 of Title 43 of our Revised Statutes, and the various amendments and supplements thereto. The repeal of these statutes, provided for in paragraph 4 of Article II of the 1954 statute aforementioned,

is specifically conditioned upon a series of provisos, set forth in paragraph 5 of Article II, all of which have for their specific intent and purpose the protection and safeguarding of equities and benefits held as of December 30, 1954 by members of the present State Employees' Retirement System. These specific provisions, in our opinion, adequately and legally accomplish this purpose.

The power of the Legislature to provide in a new pension act for the safeguarding of pre-existing equities and benefits was approved by the Supreme Court in *Seire v. Police and Fire Pension Commission of Orange,* 6 N. J. 586, at 591, in which case the Court speaking of a 1944 pension act, held as follows:

> "By the 1944 act, the Legislature created a statewide pension system for full-time policemen and firemen designed to ensure the uniform protection of all such public officers through the medium of pensions payable from a fund maintained upon a sound actuarial basis. The Legislature recognized the financial burden imposed on municipalities by pension funds operating within the scope of the earlier legislation and sought to reduce it. For the protection of those persons who were members of existing municipal funds and were disqualified by age or ill health to become members in the state fund, the municipal funds were permitted to continue in existence."

Yours very truly,

GROVER C. RICHMAN, JR.
Attorney General

By : DANIEL DE BRIER
Deputy Attorney General

ddb:b

OCTOBER 11, 1954.

HON. ARCHIBALD S. ALEXANDER
State Treasurer
State House
Trenton, New Jersey

FORMAL OPINION 1954—No. 20.

DEAR MR. ALEXANDER:

You have asked our opinion as to the proper method of computing the tax exemption of an honorably discharged veteran who, on October 1st of the pretax year, is the owner of vacant property assessed at less than $500, and who, thereafter, during the tax year, improves the property by the erection of a building. Your request assumes that the veteran has complied with all statutory prerequisites for exemption.

The veteran's exemption is provided for in Article VIII, Section I, Paragraph 3 of the Constitution of 1947, as amended, which reads in part as follows:

> "Any citizen and resident of this State now or hereafter honorably discharged or released under honorable circumstances from active service, in time of war or of other emergency as, from time to time, defined by the Legislature, in any branch of the Armed Forces of the United States shall be exempt from taxation on real and personal property to an aggregate assessed valuation not exceeding five hundred dollars ($500.00), which exemption shall not be altered or repealed." * * *

The legislature has set up the mechanics and procedure for making claim for, and allowance of, the veteran's exemption (N. J. S. A. 54:4—3.12i to N. J. S. A. 54:4—3.12u). N. J. S. A. 54:4—3.12n provides in part, as follows:

> "Every fact essential to support a claim for exemption hereunder shall exist on October first of the pretax year and in the case of an application by a veteran such application shall establish that he was, on October first of the pretax year, (a) a veteran, as herein defined, (b) the owner of the legal title to the property on which exemption is claimed and (c) a citizen and resident of this State" * * *.

The question posed by you arises only where a veteran owning vacant land on October 1 of the pretax year does not "use up" his entire exemption because the vacant land is assessed at a valuation of less than $500. If he should then, within the tax year, complete the construction of a building on the land, his property would be subject to an added assessment under the provisions of the "Added Assessment Law" (N. J. S. A. 54:4—63.1 to N. J. S. A. 54:4—63.11). The section of that law which is applicable where the building is completed during the tax year is N. J. S. A. 54:4—63.3 which provides in part as follows:

> "* * * when any parcel of real property contains any building or other structure which has been erected, added to or improved after October first and completed between January first and October first following, the assessor shall, after examination and inquiry determine the full and fair value of such parcel of real property as of the first of the month following the date * * * of such completion, and * * * if such value so determined exceeds the assessment made as of October first preceding, the assessor shall enter an assessment, as an added assessment against such parcel of real property, in the 'Added Assessment List, 19,' which assessment shall be determined as follows: by multiplying the amount of such assessment or such excess by the number of whole months remaining in the calendar year after date of * * * such completion, and dividing the result by twelve."

The added assessment, under this section, is the quotient resulting from the application of the formula set out in the section. In our opinion, the "unused portion" of the veteran's exemption is to be deducted from the added assessment as so defined; it is not to be deducted from the valuation or assessment before the apportionment provided in N. J. S. A. 54:4—63.3.

You have advised that it has been suggested that the veteran should not be entitled to any exemption against an added assessment since the improvement resulting in the added assessment was not in existence on October 1st of the pretax year. The suggestion made has no validity. The added assessment, although it results from the improvement made, is an assessment against the real property of which the veteran was the owner on October 1st of the pretax year.

Of course, the total exemption received by a veteran may not, in any case, exceed $500 in the aggregate during any year.

Yours very truly,

GROVER C. RICHMAN
Attorney General

By : HAROLD KOLOVSKY
Assistant Attorney General

hk:b

October 15, 1954.

Hon. Abram S. Vermeulen
Acting Director,
Division of Budget & Accounting
Department of the Treasury
State House,
Trenton, New Jersey

FORMAL OPINON 1954—No. 21.

Dear Director:

This will acknowledge your recent request for an opinion concerning repayment of claims for moneys previously received by the State Treasurer for protective custody under the provisions of Article 3 of Chapter 37 of Title 2A N. J. S.

You inform us that a sum of money has been delivered to the State Treasurer in accordance with a judgment for protective custody duly entered by the Superior Court, Chancery Division. In compliance with an order contained in said judgment the State Treasurer has paid out of said sum of money fees allowed to counsel for plaintiff, counsel for defendant and to the Escheator.

Pursuant to Section 2A:37—32 N. J. S. and within the time limit therein prescribed a number of claims for repayment have been presented to the State Treasurer and you wish to be advised on the following questions which we will answer in order:

1. Is the State Treasurer authorized to determine the validity of all such claims for repayment, without limitation as to amount, or is he limited to determining the validity of only those claims for an amount less than $50.00?

It is our opinion and we so advise you that the State Treasurer may determine, without limitation as to amount, the validity of any claim for repayment made pursuant to Section 2A:37—32 N. J. S. The applicable language of Section 2A:37—32 N. J. S.:

> "* * *. If a claim is made to the state treasurer within such period of 2 years, and he shall determine that the claim is valid, he shall pay the moneys so claimed to the person entitled thereto. If the state treasurer shall determine that the claim is not valid, he shall reject the claim. The claimant may thereupon apply to the superior court, chancery division, for a review of his determination, and the claim shall thereupon be heard and determined, de novo."

indicates quite clearly that there was no intention to limit the amount of the claims for repayment, the validity of which shall be determined by the State Treasurer.

Nor does Section 2A:37—43 N. J. S. which provides:

> "Whenever it shall appear to the satisfaction of the state treasurer or his representative that a person is the lawful owner of any moneys that have heretofore been received by the treasurer under the provisions of this article, and that such moneys are less than $50 the state treasurer is hereby authorized and empowered to repay to the lawful owner aforesaid the moneys so received without the necessity of reopening the judgment theretofore entered."

impose any such limitation upon the amount of the claims which the State Treasurer may pay if he determines same to be valid. The judgment referred to in Section 2A:37—43 N. J. S. is a judgment in an action to escheat personal property wherein notice has been given to the owner who is unknown or whose whereabouts is unknown, as distinguished from a judgment rendered in a proceeding for custody of the moneys, which proceeding is maintained against the holder of the moneys who is not the owner thereof. The judgment in the custody proceeding, directing the delivery of the moneys to the State Treasurer for protective custody, necessarily determines that the defendant holder of the moneys is not the owner of the said moneys. Under Section 2A:37—33 N. J. S. the holder of the moneys was released and discharged from any claim of the owner when the money was paid to the State Treasurer pursuant to the judgment for custody. The owner, who was unknown or whose whereabouts was unknown, was not a party in the custodial proceeding, and no purpose could be served in requiring said owner to reopen the custodial judgment before he could assert a claim of more than $50.00. It therefore becomes readily apparent that the provisions of Section 2A:37—43 N. J. S. were not intended as a limitation on Section 2A:37—32 N. J. S.

2. Where the State Treasurer has determined that a claim for repayment is valid, shall he pay the full amount of said valid claim or should he deduct a pro rata share of the fees allowed to counsel and to the Escheator?

It is our opinion and we so advise you that the State Treasurer shall deduct from the amount of such valid claim for repayment a pro rata share of the fees allowed to counsel but shall not deduct any pro rata share of the fees allowed to the Escheator.

The authority for the allowance of counsel fees is to be found exclusively in R. R. 4:55—7 (formerly Rule 3:54—7) and the effect to be given to that portion of Section 2A:37—35 N. J. S. which provides:

> "* * * the court shall * * * fix and direct the payment of the fees and expenses of the attorney-at-law who shall have prosecuted the action."

is that it removes the statutory obstacles so as to permit the Court to make an award of fees to counsel of the State in these proceedings in the event such an award is authorized by R. R. 4:55—7. *State v. Otis Elevator Co.*, 12 N. J. 1 (1953). Inasmuch as R. R. 4:55—7 contains no specific authorization for allowance of counsel fees in proceedings for protective custody, it is reasonable to assume that the Court must have found that there was a "fund in court" within the meaning of paragraph (b) of said rule. An allowance having been made for fees of counsel out of "the fund" said fund is accordingly diminished and the claimant's share is proportionately reduced. As we said in *Katz v. Farber*, 4 N. J. 333 (1950),

> "Chancery considered that the complainant, if he did not create, as least preserved and protected a fund, at his own expense, and brought that fund under the control of the court for the benefit of a class which should, in good conscience, bear their fair share of the burden of the litigation."

See also *Clintas v. American Car & Foundry Company*, 133 N. J. Eq. 301, (Chan., 1943), affirmed, 135 N. J. Eq. 305 (E. & A. 1943).

The court having jurisdiction over the fund and the allowances to counsel having been made therefrom for their efforts to preserve and protect the fund, no constitutional problem of due process relative to a claim by a potential claimant is involved.

The Escheator's fee is, however, in a different category. Historically, the Escheator was an officer of the King whose duties were generally to ascertain what escheats had taken place and to prosecute the claim of the sovereign for the purpose of recovering escheated property. He performed a service for the sovereign not unlike the services performed by a sheriff. In some instances, the sheriff would perform the duties of the Escheator. *Hardman, The Law of Escheat,* 4 L. Q. Rev. 318, 339 (1888). The Escheator's fees for the service he performed were at an early date set by statute. See 10 *Vin. Abr.* 159 (1792).

The amount of fee presently to be allowed to the Escheator for his services is set by statute and is contained in Section 2A:37—35 N. J. S. where it is provided:

> "After the judgment directing that the person or corporation shall forthwith deliver said moneys to the state treasurer shall have been compiled with as provided in section 2A:37—31 of this title, the state treasurer shall so inform the court. Whereupon the court shall direct that there be paid to the escheator, if any, 5% of the moneys so paid to the state treasurer, * * *."

Although this allowance to the Escheator, in effect, reduces the amount of the sum over which the State Treasurer shall exercise protective custody, the amount of the fee to be paid to the Escheator is provided by statute. This distinguishes it from the amount of fee allowed to counsel by the court out of the fund in court independent of any statute, as compensation for the preservation and protection of the fund.

The amount of the Escheator's fee being set by statute, in the absence of an expression by the legislature that a deduction of said fee shall be made from a claim for repayment, no such deduction should be made.

The Superior Court in dealing with the protective custody statute said in *State v. American Hawaiian Steamship Co.,* 29 N. J. Super., 116, 133 (Ch. Div. 1953):

> "With respect to the assertation that the owner will be saddled with a portion of the expenses of the action for custody, it is not necessary to consider the constitutionality of a deduction on that account since our statute does not provide for any deduction by reason of the custodial proceedings."

We are satisfied that the court had in mind only deductions provided for by statute. The deduction of the allowance of counsel fee is not made by authority of a statute. No statutory provision exists for the deduction of the fee set by statute to be paid to the Escheator, nor is there any general principle of law sanctioning its deduction. (Cf. *Katz v. Farber, supra. Cintas v. American Car & Foundry Company, supra*).

Yours very truly,
GROVER C. RICHMAN JR.,
Attorney General.
By : CHARLES J. KEHOE,
Assistant Attorney General.

CJK:MG

NOVEMBER 8, 1954.

HON. ARCHIBALD S. ALEXANDER,
State Treasurer,
State House,
Trenton, New Jersey.

FORMAL OPINON 1954—No. 22.

DEAR MR. ALEXANDER:

In connection with the administrative implementation of Chapter 84, P. L. 1954 (N. J. S. A. 43:15A—1 to 43:15A—86), you have been advised by the United States Department of Health, Education and Welfare that you, in your capacity as the State Agency, established under Chapter 253, P. L. 1951, (N. J. S. A. 43:22—1 to 43:22—10 incl.), will be required to furnish with respect to each political subdivision of our State to which it is proposed to extend old-age and survivors insurance coverage, pursuant to Section 1, Article 1 of Chapter 84, P. L. 1954 (N. J. S. A. 43:18A—1) "an authoritative certification that under neither any statute of the State of New Jersey nor any action of any appropriate governmental unit, has a retirement system been established for positions in that political subdivision to which old-age and survivors insurance coverage is to be extended."

The basic problem herein presented for determination, arises as a result of certain provisions of Section 218 (d) of the Federal Social Security Act (42 U. S. C. A. s 418) which provide, inter alia, that if on the date of any agreement entered into between a State Agency and the Secretary of Health, Education and Welfare of the United States, or on September 1, 1954, services were performed in any political subdivision by employees in positions covered by a State or local retirement system, that old-age and survivors insurance coverage may be extended to cover services performed in such positions only after compliance with referendum procedures set forth in the 1954 amendments to the Social Security Act.

The Federal Act provides, in other words, that if a position in a political subdivision and the occupant of that position, are covered by a retirement system, extension of coverage under the Federal Act to employees in such positions is dependent upon an approving referendum resulting in the inclusion of the retirement system under an agreement.

Reference to this same limitation appears in Sec. 2b, Article I of Chapter 84, P. L. 1954 (N. J. S. A. 43:18A—2b) which states:

> "The agreement shall not be made applicable to services in such positions so long as such positions are barred from coverage by the provisions of the Social Security Act."

In order to assist you in the certification which you will be called upon to make as to whether or not, in any given case, a retirement system may be said to cover services rendered in any position to which it is proposed to extend the benefits of the Social Security Act, you have requested that this Office examine into the pension laws applicable to political subdivisions of our State and appropriately classify them in light of the limitation above referred to, set forth in the Federal Social Security Act.

Local pension laws in New Jersey are many and varied. An interesting and exhaustive compilation of these laws, disclosing their great variety and many characteristics, is contained in a study prepared by the Bureau of Government Research of Rutgers University entitled "Pension Legislation for Public Employees in New Jersey" (December 1950). By way of general comment, it may be

here stated that the Rutgers study discloses as of that date, there were in effect, in New Jersey, one hundred and ten different types of pensions authorized for public employees, including both contributory systems and non-contributory systems, of which over eighty relate specifically to political subdivisions of the State.

Our local retirement laws may be broadly classified for our purposes herein, as mandatory or permissive.

If a mandatory retirement law was in operation in a political subdivision on September 1, 1954, as to any given position, and the occupants thereof, then it is clear that the benefits afforded by the Social Security Act, may be extended only upon compliance with the referendum requirements.

We turn then to the permissive retirement acts. A study of these would indicate that such permissive retirement acts fall within the four following categories:

1) Where no action has been taken by the local governing body to adopt or utilize any applicable permissive retirement statute.

2) Where the local governing body has taken action to adopt or utilize an applicable permissive retirement statute to retire one, or some, but not all, employees with equal qualifications.

3) Where the local governing body has adopted or utilized permissive retirement statutes to retire all qualified employees.

4) Where the local governing body has adopted or utilized applicable permissive retirement statutes, but terminated prior to September 1, 1954, the future effect of such law or laws in the political subdivision concerned.

In connection with the certification which you will be called upon to make, agreement has been reached with the appropriate Federal authorities that your certification as to each political subdivision to which it is proposed to extend the benefits of the Social Security Act, may be confined to local action occurring during the period January 1, 1951 to September 1, 1954.

The first situation outlined above, namely, where no permissive retirement statute was adopted by the political subdivision, was the subject of Formal Opinion No. 42 (1952) of this Office, dated December 17, 1952, in which opinion this office advised that in such case, no local retirement system may be said to have been established in such political subdivision which would bar coverage under the provisions of the Federal Social Security Act, for the positions mentioned in the permissive retirement laws, and the occupants thereof.

In that opinion, this Office was essentially concerned with the following question; which likewise is the general question hereinbefore us in connection with the various categories referred to above, and hereinafter discussed:

> "The nub of the question for determination is whether the political subdivisions of the State have already "established" a retirement system for their employees which would bar coverage under the Social Security Act."

The answer to the question above propounded, as set forth in Formal Opinion No. 42 of 1952 was:

> "A retirement system is deemed to be established when an employer has in operation an existing plan entitling his employees to specified benefits in consideration of services rendered or in recognition of merit. The usual indicia of an established plan are that: Coverage available for all employees or specified classes; eligibility requirements are definitely specified; stated benefits are payable, the amount and duration dependent on the length of service and salary of the employee. If such factors are existent then, without doubt, a plan has been established and would operate to deny coverage under the Social Security Act to those employees eligible."

Now as to our second category, namely, where the local governing body has taken action to adopt a permissive retirement statute to retire one or more, but not all, eligible employees.

This situation was alluded to in Formal Opinion No. 42 (1952) supra, in the following language:

> "If a political subdivision has, by ordinance or resolution, pursuant to a statute, adopted an ordinance or resolution for the benefit of employees holding certain positions or offices, some question of discrimination may arise, if the municipality does not invoke the provisions of the statute for the benefit of other employees who have served meritoriously for the required period of time. However, it has been held that a pension granted by public authorities is not a contractual obligation but a gratuitous allowance and that the pensioner has no vested right. *Moran v. Firemen's and Policemen's Pension,* (November 1942) Hudson C. C., 28 Atl. (2nd) 885. . . ."

We assume that the reference to discrimination in the above exerpt from Formal Opinion No. 42 (1952) arose in the mind of the author of the opinion by reason of Section 5 of Article I of the 1947 State Constitution which provides:

> "No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right. . . ."

We note that the Constitution, in the section cited, protects *rights.* But does an employee otherwise eligible, have the *right,* as such, to demand the benefits of a permissive retirement statute, even though others, similarly eligible, have already had extended to them the benefits of the permissive statute?

The answer to the question above propounded, appears to us to be in the negative, from what our Courts have consistently adopted as their concept of these permissive pension laws. The rule has been stated thusly:

> "The unquestioned rule is that a pension granted by the public authorities is not a contractual obligation, but a gratuitous allowance, in the continuance of which the pensioner has no vested right; and that a pension is accordingly terminable at the will of the grantor." 54 A. L. R. at 943; 98 A. L. R. 505.

Illustrative of the holdings of our Courts on the subject, are a long line of decisions among which may be cited the following:

In *Bader v. Crone,* 116 N. J. L. 329 at 331 (Sup. Ct. 1936), the Supreme Court held:

> "It appears to be the general rule, and is certainly the rule in this State, that compulsory deductions from the salaries of governmental employes by the authority of the government for the support of a pension fund create no contractual or vested right between such employes and the government, and neither such employes nor those claiming under them have any rights except their claims be based upon and within the statute governing the fund. *Bennett v. Lee,* 104 N. J. L. 453; *Plunkett v. Board of Pension Commissioners,* 113 Id. 230. affirmed, 114 Id. 273 . . . We believe that the enforced contributions from the pension of a policeman who desires to preserve his pension privileges to his wife in the event that she outlives him are of a kind, in so far as legislative control thereover is concerned, with those mandatorily made from his salary payments during the years of his active service. Obviously the intention of the legislature is to preserve a solvent fund against the happening of the pivotal event,

retirement in the one case and death in the other, upon which the right to a pension depends." . . .

To same effect see *Sally v. Firemen's and Policemen's Pension Fund Com.*, 124 N. J. L. 79 (Sup. Ct. 1940).

In *Walter v. Police and Fire Commission of Trenton*, 120 N. J. L. 39, at 42 (Sup. Ct. 1938) the Court, citing with approval *Bader v. Crone*, supra, termed a pension given by a municipality as "in effect, but the taxpayer's *reward*, given pursuant to legislative mandate, for honest and efficient service.

In *De Lorenzo v. Newark*, 134 N. J. L. 7, at 9 (E. & A. 1945), the Court stated:

"We agree with the court below that what the plaintiffs receive under the Pension Act (for municipal employees) is a *reward for past services* and safeguard against want in old age. . . ."

In *Eckert v. New Jersey Highway Department*, 1 N. J. 474, at 480 (Sup. Ct. 1949), our Supreme Court considered, inter alia, the nature of pensions granted under the State Employees' Retirement System statute (R. S. 43:14—37) and stated:

"It is said, and may be argued, that a pension paid by the State being in the nature of a *gratuity* it is against public policy to allow benefits in addition thereto from another source payable to the State. The Legislature is the arbiter of the public policy of the State, that is solely its prerogative with which, when declared, the Courts have no concern except to see it kept within constitutional bounds. *Canter & c., Inc. v. Retail Furniture & c., No. 109*, 122 N. J. Eq. 575, 589 (Ch. 1937); *Kobylarz v. Mercer*, 130 N. J. L. 44 (E. & A. 1942)."

See also *McFeely v. Pension Comm. of Hoboken*, 8 N. J. Super. 575.

In *Ballurio v. Castellini*, 29 N. J. Super. 383 at 389, (App. Div. 1954) the Court held:

"A pension is a bounty springing from the appreciation and graciousness of the sovereign; it is an inducement to conscientious, efficient and honorable service. . . ."

The decisions hereinbefore cited and discussed are to be distinguished from cases involving mandatory pension systems, as *Schliske v. Firemen's & Policemen's Pension Fund Commission*, 133 N. J. L. 249 (Sup. Ct. 1945) and *Beronio v. Pension* Commission, 130 N. J. L. 620 (E. & A. 1943). In the latter case, wherein the Court was sought to enforce claimed pension rights, the Court pointed out that the duty of the Pension Commission to grant the pension was clear and specific, "no element of discretion" existing with respect to the execution of the applicable statute. In the former case, where like relief has been sought, the Court held that "under the clear mandate of the statute" the relator had a right to retirement and there was no discretionary right to withhold it from him. And even in such situations, the Appellate Division in *Ballurio v. Castellini*, supra, expresses the doubt that even mandatory statutes are to be regarded as "self-executing" under all circumstances.

We, therefore, are guided by the rule of *Barringer v. Miele*, 6 N. J. 139, at 144 (Sup. Ct. 1951):

"The construction of a statute by the courts, supported by long acquiescence on the part of the Legislature, or by continued use of the same language, or failure to amend the statute, is evidence that such construction is in accordance with the legislative intent.",

and accordingly are of the opinion that insofar as our second category is concerned, namely, situations in which action has been taken by the local political subdivision to retire only some employees, but not all employees similarly eligible under a permissive retirement act, that no local retirement system has been established.

As we indicated in Formal Opinion 42 (1952) supra, we hold that a retirement system may be deemed to be established in a political subdivision of our State only when there is a system under a "self-executing" statute to the benefits of which, every eligible employee is entitled automatically and without further legislative action, when the elegibility requirements set forth in the statute are satisfied. This situation, however, does not exist under permissive statutes, where the *entitlement* of thte employee is based, not upon his satisfying the eligibility requirement or requirements of the statute alone, but is more essentially based upon what discretionary action, if any, is taken by the local governing body to extend the benefits of the statute to the specific employee concerned.

Let us turn now to the third category—namely, where the local governing body has adopted permissive retirement statutes to retire all qualified employees, similarly situate.

If, in this situation, local action has merely consisted in retiring *by name* each eligible employee, as and when the employee became eligible for retirement benefits, then we are of the opinion that this general practice could not destroy the discretion lodged in the local governing body to withhold the same pension from some other employee, in the future, and accordingly, no local retirement system has been established, in our opinion, under these circumstances, for the reasons heretofore stated. In other words, local action, in this case, has consisted only in individual treatment.

On the other hand, if local action has consisted in the adoption of a resolution or ordinance, stating in effect that occupants of a named position or positions, would automatically be retired on satisfying stated eligibility requirements, then, in our opinion, and based on what has heretofore been expressed, a general local retirement system may be said to exist, until such time as the local resolution or ordinance is rescinded, or the effect thereof terminated by appropriate local legislative action.

Turning now to our fourth and last category, namely, where the local governing body did, prior to September 1, 1954, take appropriate local legislative action to prohibit or preclude the retirement of additional employees, Section 218 (d) authorizes the extension of old-age and survivors benefits to services in such positions, on submission of appropriate proof of such termination to the Federal authorities, the precise nature of such proof being the subject matter of a letter dated June 25, 1954, addressed to you by Mr. Joseph B. O'Conner, Regional Director, Department of Health, Education and Welfare, 42 Broadway, New York 4, New York.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: DANIEL DE BRIER
Deputy Attorney General

ddb:b

DECEMBER 17, 1954.

HON. JEROME B. McKENNA
Acting Commissioner of Banking and Insurance
State House Annex
Trenton 7, New Jersey

FORMAL OPINION 1954—No. 23

DEAR COMMISSIONER McKENNA:

Our opinion has been requested as to the maximum investment a bank under your jurisdiction might make in the bonds of local federal housing authorities under The Banking Act of 1948, N. J. S. A. 17:9A-1 et seq. We understand that the bonds are issued by local housing authorities and are secured by a pledge of the revenues of the housing project and an unconditional contractual obligation of the Public Housing Administration, an agency of the Unitetd States Government. The obligation of the Public Housing Administration is to make payments of annual contributions in amounts which, together with other funds of the local housing authorities, will be sufficient to pay the amount due on the bonds and the interest thereon. See 42 U. S. C. 1410.

The United States Attorney General has issued an opinion to the effect that—

> "A contract to pay annual contributions entered into by the Public Housing Administration in conformance with the provisions of the act is valid and binding upon the United States, and that the faith of the United States has been solemnly pledged to the payment of such contributions in the same terms its faith has been pledged to the payment of its interest-bearing obligations." 41 Ops. Attorney General #24 (1953).

Section 25 of The Banking Act of 1948, N. J. S. A. 17:9A-25 (1) empowers banks to purchase bonds. Article 13 of the Act, N. J. S. A. 17:9A-60 et seq., imposes certain limitations on the liability of any person (including a corporation, association or body politic) to a bank. By its terms, however, N. J. S. A. 17:9A-61, the Article does not apply to—

> "(1) loans to or investments in obligations of the United States, this State or any county of this State, or investments in obligations unconditionally guaranteed both as to principal and interest by the United States or this State;"

Savings banks are specifically empowered by N. J. S. A. 17:9A-175 to invest in,—

> "(1) stocks, bonds, and notes or obligations of or guaranteed by the United States, or those for which the credit of the United States is pledged for the payment of the principal and interest or dividends thereof;"

We note also that N. J. S. A. 55:14A-26.1 provides that banks and savings banks among others,—

> " * * * may legally invest any sinking funds, moneys or other funds belonging to them or within their control in any bonds or other obligations issued by a housing authority created pursuant to the local housing authorities law (P. L. 1938, C. 19) and any amendments thereto or issued by any public housing authority or agency in the United States, when such bonds or other obligations are secured by a pledge of the revenues of a housing project and additionally secured by a pledge of annual contributions to be paid by the United States Government or any agency thereof,"

We are persuaded by the opinion of the Attorney General of the United States that the contract of the Public Housing Administration is an obligation of the United States. And in view of the above statutory authority we are of the opinion that there are no limitations upon the amount which a savings bank or bank may invest in the bonds of local housing authorities when secured in the manner you have described.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General
By: JOHN F. CRANE
Deputy Attorney General

JFC:b

DECEMBER 28, 1954.

HON. JOSEPH E. McLEAN
Department of Conservation and Economic Development
State House Annex
Trenton, New Jersey

FORMAL OPINION 1954—No. 24

DEAR COMMISSIONER McLEAN:

I have your letter of December 22, 1954, in which you requested a formal opinion upon the following question:

> Do municipalities in which rent control was operative on December 20, 1954, pursuant to Chapter 216, P. L. 1953, have to pass additional resolutions or take any other action under the Extender in order to continue rent control in effect within their confines?

Section 28, Chapter 216, of the Laws of 1953, provides:

> "Rent control under this act shall be operative in any municipality in which the governing body shall adopt a resolution reciting that there is a housing space shortage therein and that rent control is required in such municipality for the protection, safety, health and general welfare of the people of such municipality. . . . "

Section 13 of Chapter 260 of the Laws of 1954 provides:

> "13. *This act shall not affect the resolutions*, orders, determinations or certificates of eviction, designations, and appointments and regulations *heretofore made* or promulgated under the act to which this act is amendatory and supplementary, *but such resolutions*, orders, determinations or certificates of eviction, designations and appointments and regulations *shall, notwithstanding the provisions thereof, continue in full force and effect until amended, supplemented, modified, rescinded or repealed pursuant to law.*" (Italics added).

Section 11 of the same act provides:

> "11. After December 20, 1954, rent control under this act shall be operative only in a municipality which on that date has in full force and effect a resolution theretofore adopted that rent control is required. The governing body of any such municipality may by resolution rescind any resolution theretofore adopted that rent control is required in such municipal-

ity but in the event of any such recission rent control may not be thereafter reinstated."

It seems clear that under Section 13 of this latter act that the resolutions of the municipalities shall continue in full force and effect until amended, supplemented, modified, rescinded, or repealed by the municipality or by other appropriate action. The obvious intent of the legislature in enacting these two sections was to continue the operation of rent control in those municipalities which were under rent control on December 20, 1954, without any further action by the municipality involved, until the municipality took the necessary affirmative action to remove such control or until July 1, 1956, whichever occurred sooner.

The resolutions theretofore adopted continue in effect until July 1, 1956, unless rescinded prior to that date.

You also ask whether any variations in the language of the particular resolutions would require further action by the municipalities by reason of the enactment of Chapter 260.

Under Section 28 of the original act, the municipalities were authorized to adopt a resolution reciting certain factual findings. Upon the adoption of such a resolution, rent control became operative in that municipality.

Rent control, under Section 29 of that act, could be removed by the rescission of such resolution. It therefore appears that in the original resolution the municipality could not provide for the operation of rent controls in any specific period inasmuch as such provision would violate the section authorizing the municipality to remove the operation of rent control at any time. Such a provision would also create a means of removing rent control in addition to the sole method provided in the statute.

It should be further noted that Section 13 of Chapter 260 of the Laws of 1954, specifically provides that such resolutions, *notwithstanding the provisions thereof,* shall continue in full force and effect. Section 11 of that act also sets forth the method whereby the operation of rent control may be removed in any municipality, namely by rescission of the resolution. This procedure is exclusive.

It is therefore our conclusion that regardless of the provisions and specific language of the resolutions adopted by the municipality making rent control operative in that municipality, rent control will continue to be operative in those municipalities in which it was effective on December 20, 1954, without the passage of further resolutions by the municipalities or any other municipal action.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: DAVID C. THOMPSON
Deputy Attorney General

dct/t

DECEMBER 31, 1954.

DR. WILLIAM C. COPE, Director
Division of Planning and Development
Dept. of Conservation and Economic Development
520 East State Street
Trenton, New Jersey

FORMAL OPINION 1954—No. 25

DEAR DIRECTOR COPE:

You request our opinion on the authority of the Bureau of Navigation to license power vessels and operators and to police the operation of power vessels on privately owned bodies of water above tidewater in the State of New Jersey.

We refer to Chapter 236 of the Laws of 1954. That enactment is comprehensive legislation governing the licensing and regulation of power vessels on non-tidal waters. The Department of Conservation and Economic Development issues licenses for power vessels and operators, while the Bureau of Navigation is vested with policing authority. We deal with your inquiry as if directed to the Department's powers in general, not to the narrower scope of the Bureau of Navigation's powers under Chapter 236 of the Laws of 1954.

Our opinion is that the Department has authority to license power vessels and operators and to police the operation of power vessels on privately owned bodies of water above tidewater.

Chapter 236 of the Laws of 1954, as well as its predecessor statute (R. S. 12:7-1 to 34), applies generally, without limitation to the regulation of power vessels on public bodies of water only. *Cf.* Motor Vehicle Act, excluding regulation of private roads (R. S. 39:4-1).

There are numerous parallels in the law for the exercise of the police power over the use of waters on private property. At common law, public nuisances maintained on private property are subject to abatement. Ponds containing stagnant or unwholesome waters constitute a nuisance. Farnham, Vol. 3, *Waters and Water Rights,* 2628 (1904). Privately owned water courses may be regulated for flood control purposes. See *Passaic* v. *Clifton,* 14 N. J. 136 (1953). The right to take water from the owner's land by subsurface wells is lawfully made subject to the approval of the Water Policy and Supply Council. R. S. 58:1-1 et seq.. *In re Plainfield-Union Water Co.,* 14 N. J. 296 (1954).

In the leading case of *McCarter, Attorney General* v. *Hudson County Water Co.,* 70 N. J. Eq. 695 (E. & A. 1906), aff'd, 209 U. S. 349 (1908), the statute (P. L. 1905, c. 238) barring diversion of the waters of any fresh water lake or stream for use in another state was upheld as constitutional. Mr. Justice Holmes sustained the restriction on private property rights as a valid exercise of the police power. The legislative objective of preventing the diversion of waters outside the state was granted precedence over the property rights of individual riparian owners, because of the threat to the public welfare and health in such diversion. *Cf.* Farnham, Vol. 1, *Waters and Water Rights* 282 (1904), stating that the rights of riparian owners are always subordinate to public rights.

In other fields of law, regulations of activities on private property with penalties for violations are commonplace. The shooting of firearms (N. J. S. 2A:151-11, 50) and firecrackers (R. S. 21:3-2) and the possession of explosives (R. S. 21:1A-15) are prohibited under or except for specified circumstances on private property. The statutes governing hunting and fishing make special exemptions for such activities on private property (R. S. 23:3-1 and R. S. 23:1-2).

Compelling reasons in the public welfare sanction governmental invasions of what otherwise constitute inviolable property rights. Considerations for the protection of the public safety are present in Chapter 236 of the Laws of 1954, with respect both to public and private bodies of water. Unsafe operation of power vessels by unqualified operators imperils the safety of citizens of the State. It clearly serves the public interest that power vessels and operators be licensed and regulations be enforced on private, as well as public, fresh water lakes and streams.

The right of regulation includes the right of entry by inspectors of the Bureau of Navigation. Only persons with a proprietary interest or other right of entry can lawfully engage in power boating on privately owned bodies of water; an operator's license issued by the Department of Conservation and Economic Development confers no privilege on unauthorized persons to operate power vessels on private lakes and streams. See *Walden* v. *Pines Lake Land Co.*, 126 N. J. Eq. 249, 251 (E. & A. 1939); *Cobb* v. *Davenport*, 32 N. J. L. 369 (Sup. Ct. 1867).

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: DAVID D. FURMAN
Deputy Attorney General

DDF:MRL-k

DECEMBER 31, 1954.

HON. FREDERICK M. RAUBINGER
Commissioner of Education
175 West State Street
Trenton, New Jersey

FORMAL OPINION 1954—No. 26

DEAR COMMISSIONER:

You have requested our opinion on a question arising under Chapter 249 of the Laws of 1954, which provides a schedule of minimum salaries and increments for school teachers. You ask whether the time spent by a teacher in serving under an emergency certificate is included in the employment experience which determines the teacher's position on the salary schedule.

In our opinion, the answer is no.

The act defines "teacher" as including "any full-time member of the professional staff of any district * * * who holds a valid permanent, limited or provisional certificate appropriate to his office, position, or employment." The salary schedule provided in the act is for "teachers in this State", and is based upon "years of employment". The term "year of employment" is defined in the act as meaning "employment by a teacher for one academic year" in one of the institutions listed. Section 9 of the act reads as follows:

> "The provisions of this act shall not apply to any person whose appropriate certificate, valid for his office, position or employment is an emergency certificate and to persons employed as substitutes on a day-by-day basis."

The foregoing provisions plainly indicate that only "teachers" as defined in the act are entitled to the benefits thereof. In order that time spent in teaching may be credited towards years of employment for purposes of the salary schedule, such time must have been served as a "teacher", which means a person holding a permanent, limited or provisional certificate, and not one who teaches only on an emergency certificate.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: THOMAS P. COOK
Deputy Attorney General

tpc;v;b

FEBRUARY 4, 1954.

HONORABLE FREDERICK M. RAUBINGER,
Commissioner of Education,
175 West State Street,
Trenton, New Jersey.

MEMORANDUM OPINION P-1

DEAR COMMISSIONER:

Your office has requested our construction of Section 18:14-17.3 of the Revised Statutes (Chapter 273, P. L. 1953, Sec. 1), which reads:

> "Whenever a board of education, now or hereafter furnishing high school education for the pupils of another school district pursuant to section 18:15-7 of the Revised Statutes, finds it necessary to provide additional facilities for the furnishing of education to high school pupils, it may, as a condition precedent to the provision of such additional facilities, enter into an agreement with the board of education of such other district for a term not exceeding ten years whereby it agrees to provide such education to the pupils of such other district during the term of such agreement, in consideration of the agreement by the board of education of such other district that it will not withdraw its pupils and provide high school facilities for them in its own district during the term of said agreement, except as provided in this act."

Your specific question is whether the ten-year period mentioned in the statute must begin to run not later than the date of the agreement between the two boards of education, or whether such period may by the terms of the agreement begin to run not from the date of the agreement itself but from the date that such additional facilities are actually provided to the sending district.

In our opinion, the latter alternative is permissible under this statute. The purpose of the law is to protect a school district which is to undergo the expense of providing additional facilities in order to accommodate pupils from another district. The protection is furnished by allowing the receiving district to secure from the sending district a binding agreement that the latter district will not withdraw its pupils (except with the consent of the Commissioner of Education) for a specified period, over which the capital expenditures by the receiving district can

be at least partly amortized. To effectuate this beneficial purpose, the law should be construed so as to afford to the receiving district the right to bargain for the maximum protection which the law makes possible.

The statute provides that the agreement may be "for a term not exceeding ten years"; that education shall be provided to the pupils of the sending district "during the term of such agreement", and that the sending district will not withdraw its pupils "during the term of said agreement" unless the consent of the Commissioner of Education is obtained. The statute thus plainly indicates that the term not exceeding ten years should coincide with the period that the facilities are actually provided to sending district and the pupils of the latter are using those facilities. There is no reason to infer, however, that the agreement cannot be made before the term commences. Experience has shown that the financing and construction of additional or new facilities by school districts may take at least two years; yet a receiving district which is planning an expansion of its facilities to take care of a sending district has no security in its relations with the latter until the two have entered into a binding contract. The receiving district, therefore, should be allowed to make the agreement before it proceeds to expand its facilities.

All of these considerations are respected by an interpretation of the statute which will allow the agreement to be entered into when the increase in facilities is still in the planning stage, but which will also permit the agreement to run for a term not exceeding ten years to commence at the time the facilities are actually provided to the pupils of the sending district.

Yours very truly,
GROVER C. RICHMAN JR.,
Attorney General.

By: THOMAS P. COOK,
Deputy Attorney General.

tpc.d

MARCH 26, 1954.

HON. ARCHIBALD S. ALEXANDER,
State Treasurer,
Trenton, New Jersey.

MEMORANDUM OPINION P-2

RE: Delegation of authority by Director of Division of Purchase and Property

DEAR TREASURER:

We have been requested for an opinion as to whether the action of Fred V. Ferber, Director of the Division of Purchase and Property, in delegating Mr. Joseph J. Shields, Buyer, to exercise the power and duties imposed upon Mr. Ferber by law is in accordance with the provision of N. J. S. A. 52:18A-17 and related statutes.

The delegation of authority referred to is contained in a memorandum dated February 4, 1954 and states as follows:

"DESIGNATION OF AGENT

I, Fred V. Ferber, Director of the Division of Purchase and Property do hereby authorize Joseph J. Shields, Buyer, to exercise the powers and duties imposed upon me by any law which requires my approval or signature on architectural drawings, specifications, "notices of award", contract agreements with the "Trades", Invoices in connection with construction and architects' fees, "change orders", certificates of final acceptance of completed construction work, construction materials and other forms and correspondence pertinent to the administrative functions of Architectural Section of the Division of Purchase and Property. Mr. Shields' designation is "Acting Approval Officer."

This designation is effective immediately and is to continue until April 1, 1954.

/s/ Fred V. Ferber, Director"

It is apparent that the contents of this memorandum accomplish a clear delegation of Mr. Ferber's authority to Mr. Shields. In order to determine Mr. Ferber's authority to delegate his authority we have examined the statutes to determine the intention of the Legislature. We find that N. J. S. A. 52:18A-16 provides as follows:

"The Division of Purchase and Property of the existing State Department of Taxation and Finance together with all its functions, powers and duties is continued, but such division is hereby transferred to and constituted the Division of Purchase and Property in the Department of the Treasury".

and N. J. S. A. 52:18A-18 provides as follows:

"The functions, powers and duties of the Director of the Division of Purchase and Property of the existing State Department of Taxation and Finance are continued, but such functions, powers and duties are hereby transferred to and vested in the Director of Purchase and Property established hereunder in the Department of the Treasury".

We have reviewed the statutes relating to the functions, powers and duties of the Director of Purchase and Property as they are presently constituted and also the functions, powers and duties of the Director of the Division of Purchase and Property as they were constituted under the State Department of Taxation and Finance. We find that the only authority given by the Legislature to the Director of Purchase and Property under the present statute and to the Director of Purchase and Property which is incorporated in the present statutes is for the appointment of assistants; to wit: N. J. S. A. 52:25-10 provides:

"The Commissioner shall appoint such clerical, technical and other assistants as may be necessary, fix their compensation and prescribe their duties, subject to existing laws and appropriations made therefor".

An assistant has been defined, 67 Corpus Juris Secundum "Officers" Section 148:

"The term "assistant," when used with respect to an assistant to a public officer, has been held to refer to one who helps a public officer in the performance of the latter's duties, that is, one who stands by and helps or aids an officer. An assistant has been held not to be a deputy or agent of his chief".

A review of the authorities reveals that it is a well settled principle of law that where official duties involve the exercise of discretion and judgment for the public weal, they cannot be delegated and must be performed only in person in the absence of any statutory authority to the contrary. 43 American Jurisprudence "Public Officers" Section 461, page 219 provides:

> " * * *. Official duties involving the exercise of discretion and judgment for the public weal cannot be delegated. They can be performed only in person. * * *"

This principle has been followed in *Brown* v. *Newburyport*, 95 N. E. 504, 508, (Mass. 1911); *Broderick* v. *City of New York*, 67 N. E. (2d) 737, 740, (N. Y. 1946); *State, Danforth, pros.* v. Paterson, 34 N. J. L. 163, 168 (Sup. Ct. 1870). 67 Corpus Juris Secundum "Officers" Section 104 provides:

> "In the absence of statutory authority a public officer cannot delegate his powers, even with the approval of a court. An officer to whom a power of discretion is intrusted, cannot delegate the exercise thereof, except as prescribed by statute. He may, however, delegate the performance of a ministerial act, as where after the exercise of discretion, he delegates to another the performance of a ministerial act to evidence the result of his own act of discretion".

It is my opinion, therefore, that in the absence of specific statutory authority authorizing Mr. Ferber, the Director of Purchase and Property, to delegate his duties, his action in the present instance is not in conformance with the statute as it is presently constituted.

N. J. S. A. 52:18A-34 gives to the State Treasurer the authority to exercise any power vested in a director. Therefore, whenever any of the directors in his department are absent for any reason, the only person authorizd to exercise the powers of the Director of Purchase and Property would be the State Treasurer. N. J. S. A. 52:18A-30 (e) provides:

> "* * * The State Treasurer shall designate as Deputy State Treasurer any officer or employee in the Department. Such designation shall be in writing and shall be filed with the Secretary of State . . ." "The Deputy State Treasurer shall have and exercise the powers and perform the functions and duties of the State Treasurer during the absence or disability of the State Treasurer . . .".

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

By: ANDREW A. SALVEST,
Deputy Attorney General.

GCR:AS;jaw

APRIL 5, 1954.

MR. JOHN A. WOOD, 3RD,
Secretary Teachers Pension and Annuity Fund,
State House Annex,
Trenton, New Jersey.

MEMORANDUM OPINION P-3

DEAR MR. WOOD:

Your inquiry of March 22, 1954 concerning Mr. Harry W. Estelle who was retired by your Board, for physical disability on October 24, 1950, is acknowledged.

Apparently this disability retirement was based upon a lung condition which Mr. Estelle claimed he developed during his services as a janitor, employed by the Red Bank Board of Education.

At about the time of his retirement it appears that Mr. Estelle also filed a petition with the Workmen's Compensation Division claiming a compensable accident on April 26, 1950. Prior to the hearing in the Compensation Division Mr. Estelle in June 1951, instituted an action for damages in the Law Division of the Superior Court, alleging that he had sustained injuries by reason of the negligence of the defendant Board of Education to provide him with a safe place in which to work. In the Law Division proceedings, one of the separate defenses pleaded by the defendant was that the plaintiff's exclusive remedy was in the Workmen's Compensation Division.

At the conclusion of the hearing before the Workmen's Compensation Division, the Deputy Director granted a motion to dismiss the petition on certain grounds not herein material. No appeal was taken from that decision.

On June 9, 1952 the plaintiff recovered a judgment of $80,000 in his law action. The Appellate Division of the Superior Court reversed this judgment, remanding the case for a new trial on the ground that the trial court had erred in the charge to the jury (26 N. J. Super. 9, 1953). The Supreme Court granted defendant's petition for certification.

The Supreme Court held that the trial court was without jurisdiction and therefore its judgment was null and void; further holding that in the absence of a written rejection by the plaintiff of his benefits under the Compensation Act, his remedy for his injury was under that Act. (102 Atl. 2nd. 44-1954)

We are informed that the petitioner has now re-opened the proceedings before the Workmen's Compensation Division, where the matter is at this moment pending.

We are of the opinion, and so advise you, that Mr. Estelle may not receive the benefits of a disability retirement allowance from your fund, and benefits under the Compensation Act, for the same injury.

In *DeLorenzo* v. *Newark* 134 N. J. L. 7 (E. & A. 1946) the Court had before it the issue as to whether a public employee receiving compensation payments for injury arising out of and in the course of his employment with the defendant, might also receive a pension from the defendant. In regard to this issue the Court held as follows:

> "We agree with the court below that what the plaintiff 'receives under the Pension Act is a reward for past services and safeguard against want in old age; what he receives under the Workmen's Compensation Act is

compensation for the disability resulting from the injury he sustained. The payment of workmen's compensation is based upon a contract of employment of which the terms of the act are a part; if the workingman is injured he is entitled to be compensated for that injury under the Workmen's Compensation Act but based largely on his rate of pay.'

"We distinguish between the status of a person receiving a pension and a person receiving workmens compensation. The relationship of an employer and an employee is not consistent with the position of a pensioner as such, for the reason that a pensioner severs all relationship of employer and employee, he has no further duty to his employer nor is he entitled to any of the benefits which may accrue to an employee. An employee receiving workmens compensation is under the relationship of employee and employer, as is indicated by the fact that such employee must continue to be carried on the public payroll pursuant to R. S. 34:15—44. The plaintiff must be one or the other and as he admittedly now receives workmen's compensation he is an employee. We therefore hold that the plaintiff cannot have the benefits of both statutes. Judson v. Newark Board of Works Pension Association, 32 N. J. L. 106; affirmed, 133 Id. 28."

This same rule, is now incorporated in our statutes, R. S. 34:15—43, as amended, stating, inter alia:

"No former employee who has been retired on pension by reason of injury or disability shall be entitled under this section (public employees within Workmen's Compensation Act) to compensation for such injury or disability; . . ."

In *Breheny v. Essex County* 136 N. J. L. 524 (E. & A. 1948) the Court citing *the DeLorenzo decision* (*supra*) as well as the statute above cited, stated:

"A person cannot have the benefit of both the pension and Compensation Acts. It is axiomatic that to be entitled to compensation the relationship of employer and employee must exist and that there is no such relationship in the case of a pensioner. A person cannot be both an employee and a pensioner, he must be one or the other."

In view of the statute and the decisions cited above, I see no way in which, to use your words you can "bargain with the insurance company carrying the Workmen's Compensation business for the Red Bank Board of Education so that Mr. Estelle's income can be paid partly by us and partly by the insurance company."

Assuming, as I have stated, that the cause of Mr. Estelle's retirement for physical disability is the same injury for which he seeks benefits from the Workmen's Compensation Division, it would be necessary for you to discontinue the disability retirement allowance, should he receive and accept an award from the Workmen's Compensation Bureau.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

By: DANIEL DE BRIER,
Deputy Attorney General.

gcr;ddb;c

APRIL 12, 1954.

THE CIVIL SERVICE COMMISSION,
State House,
Trenton, New Jersey.

MEMORANDUM OPINION P-4

Re: *Position of Counsel to Sheriff, Passaic County*

GENTLEMEN:

Your recent inquiry seeks advice as to whether the position of Counsel to the Sheriff of Passaic County is within the classified service of the county and whether an appointment to such a position must be accomplished in the manner provided by the Civil Service Act and the regulations made pursuant thereto. We are informed that Passaic County has adopted the provisions of the statutes relating to civil service. We also understand that the Counsel to the Sheriff is not a member of the County Law Department but is an employee of the Sheriff appointed by him pursuant to R. S. 40:41—31.

It has been held that, in counties where the Civil Service Act has been adopted, employees of the sheriff are within the classified service of the county with respect to protection against discharge at will, *Sullivan v. McOsker*, 84 N. J. L. 380 (E. & A., 1913), and aritrary reduction in salary, *Scancarella v. Dept. of Civil Service*, 24 N. J. Super. 65 (App. Div. 1952). The opinions in the above cited cases contain language to the effect that the *sole* power of selection of employees is vested in the sheriff by virtue of R. S. 40:41—31 inferentially without regard to the Civil Service Act. However, the language referred to was not necessary to the decisions. And it would appear to be contrary to the constitutional mandate contained in Article VII, Section 1, paragraph 2 of the Constitution of 1947 requiring "Appointments . . . to be made according to merit and fitness to be ascertained, as far as practicable, by examination, which, as far as practicable, shall be competitive . . ." It is therefore our opinion that these dicta are not controlling.

We are next met with the underlying statutory philosophy expressed in R. S. 11:22—3, which provides that:

"The classified service shall include *all persons* in the paid service of a county, municipality or school district operating under this subtitle not included in the unclassified service as enumerated in section 11:22—2 of this title." (emphasis supplied)

The position under discussion is not specifically placed in the unclassified service by the provisions of R. S. 11:22—2, as amended. Paragraph e of the statute relating to law officers of a county would not seem to apply, nor would paragraph k relating to legal assistants of the law departments of the counties, since the position does not encompass the rendering of legal services to the county as such but only to a single officer.

The Civil Service Commission has, by the provisions of N. J. S. A. 11:22—50, see also R. S. 11:22—2 (o), as amended, been granted the power to determine whether positions (other than those enumerated in R. S. 11:22—2, as amended) shall be in the classified or unclassified service. In so doing the Commission must adhere to the legislatively prescribed standards. That is, the Commission must determine:

"***whether or not it is practicable to determine merit and fitness *** on the basis of—First, competitive examination, or Second, examination which is not competitive, or Third, minimum qualifications therefor ***."

If the Commission determines that it is not practicable to determine the merit and fitness by any of the aforementioned means the position shall, according to the provision of N. J. S. A. 11:22—51, be placed in the unclassified service.

It should be observed that if the position is one which has heretofore been treated as belonging in the classified service it would be necessary, under the requirements of N. J. S. A. 11:22—52, to hold a public hearing and publish findings stating the basis of the determination.

We are not unmindful of the confidential relationship which would exist between the sheriff and his counsel; however, this does not of itself remove the position from the classified service. It is one of the factors which should be taken into consideration by the Commission in making its determination.

We conclude therefore that the position of Counsel to the Sheriff of Passaic County as presently constituted is within the classified service of the county. The Civil Service Commission, however, has the requisite statutory authority to place the position in the unclassified service if, but only if, it finds that it is impracticable to determine the merit and fitness for such a position by means of competitive or non-competitive examination or by means of minimum qualifications. Until such a determination has been made the position would remain in the classified service. Appointment to such a position would have to be accomplished in the manner prescribed by the statute and the appropriate Civil Service Regulations.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General

By : JOHN F. CRANE,
Deputy Attorney General

GCR:JFC:kms

APRIL 14, 1954.

MR. GEORGE M. BORDEN, *Secretary,*
State Employees' Retirement System,
State House Annex,
Trenton, New Jersey.

MEMORANDUM OPINION P-5

DEAR MR. BORDEN:

I have your inquiry concerning Mrs. Anna R. Johnson, wife of Harvey C. Johnson, a former employee of the State Hospital at Trenton, New Jersey, who has made application for the amount standing to her husband's credit in the annuity savings fund of the State Employees' Retirement System.

Mrs. Johnson's application is made under the provisions of Chapter 157, P. L. 1953 (N. J. S. A. 43:14—29) which provides that if a contributor "dies before retirement", his accumulated deductions shall be paid to such person as he shall have named by written nomination duly executed and filed with the Board of Trustees.

From the information furnished you by Honorable Sanford Bates, Commissioner of the Department of Institutions and Agencies of the State of New Jersey, it would appear that Harvey C. Johnson disappeared from his employment, having taken with him some of the funds of the institution in which he was employed.

It further appears that on October 23, 1953 a judgment was entered in the Probate Division of the Mercer County Court by Judge Charles P. Hutchinson, adjudging that the said Harvey C. Johnson be declared dead as of the date last heard from, namely, January 4, 1946.

You now inquire whether the accumulated dividends should be paid to the alleged widow, Anna R. Johnson, named by Harvey C. Johnson as his beneficiary, on the basis of the judgment of the Mercer County Court declaring the legal death of Harvey C. Johnson.

In the first place, it will be observed that R. S. 43:14—29 referred to above, makes no reference to the type of proof of death that is to be submitted by the beneficiary. Nor is there any requirement in said statute that proof of actual death is required. (Cf. *Kopacka v. Roman and Greek Catholic Gymnastic Slovak Union Sokol,* 14 N. J. Misc. 580 (Circ. Ct. 1936).

Chapter 345, P. L. 1951 (1st Sp. Sess.) (N. J. S. 3A-40-1 to N. J. S. 3A:40—6), sometimes referred to as the Death Act, authorizes under certain circumstances and proof, the presumption of death of any person who absents himself from the place of his last known residence for seven (7) years successively, when, after diligent inquiry, it cannot be ascertained that he was alive during said period, or at any subsequent time, unless it is proved that he was alive within the seven years or at any subsequent time.

The cited statute touching upon the presumption of death after seven years, was adopted originally in 1797 and remained unchanged until 1895 when an amendment was adopted extending the provisions of the act to non-residents and adding a provision on the subject of concealment. *Armstrong v. Armstrong,* 99 N. J. Eq. 19 (Ch. Ct. 1926).

The 1951 statute adopted as part of the new Title 3A of the Revised Statutes, permits a *presumption* of death under the circumstances set forth in the statute. The statute creates the presumption as a rule of evidence and may be rebutted. *Kopacka v. Roman and Greek Catholic Gymnastic Slovak Union Sokol, supra.* In other words, the presumption declared by the statute, as was pointed out by Chancellor Magie in *Meyer v. Madreperla,* 68 N. J. L. 258 (E. & A. 1902) "defeats the presumption of continuance in life, and raises a counter presumption of death. This counter presumption of death is not a presumption of fact, but a presumption of law, which, in the absence of proof rebutting such proof, stands as proof of death. The presumption raised by the statute . . . is not mere presumption of death but is also a presumption fixing the time of death at the expiration of the of the seven successive years of absence unheard from."

In connection with the question before us, the decision of our Court of Errors and Appeals in *Meckert, et al. v. Prudential Insurance Company,* 114 N. J. L. 320 (E. & A. 1934), is interesting. The facts in that case disclose that the Prudential Insurance had issued a policy of insurance on the life of one Boeddinghaus, the

beneficiary being his wife. Not having been heard from for a long period of time, the beneficiary brought suit on the policy, some seven years after the disappearance of the insured. There was adduced by the defendant at trial evidence showing that the insured had been a forger, "a hard drinker", and had been run down physically and mentally at the time of his disappearance. Judgment was rendered for plaintiff, and defendant appealed.

On appeal, defendant argued that the fact that the insured was a fugitive from justice (as is apparently inferred by the letter from Commissioner Bates in the present claim) overcomes the presumption of death authorized by the Death Act. Rejecting this contention, the Court stated:

> "The fact that the insured was wanted for forgery or other crimes may have been a motive for disappearing but such reason would not be sufficient for remaining away for a period of over seven years and, therefore, such facts would not overcome the presumption of death as a matter of law. *Ewing v. Metropolitan Life Insurance Co.*, 191 wis. 299; 210 N. W. Rep. 819; *Rodskier v. Northwestern Mutual Life Insurance Co.*, 248 N. W. Rep. 295; *Parker v. New York Life Insurance Co.*, 107 So. Rep. 198; 44 A. L. R. 1487. The weight of authority in this country seems to sustain the above views."

In *Apfelbaum v. Prudential Insurance Co.*, 12 N. J. Misc. 62 (Sup. Ct. 1933), suit was brought on a policy, by the beneficiaries thereof, when the company refused to pay the proceeds on the mere declaration of the legal death of the insured, after seven years absence, and not having been hard from within that time or subsequently. Judgment below went for the plaintiff.

The defendant argued, on appeal, that it was incumbent upon the plaintiffs to prove the actual death of the insured as a condition precedent to recovery on the policy, which required proof of death. The policy did not, by its terms, require proof of *actual* death. The Court held that all contracts, including the policy of insurance before the Court, "are subject to the law of the sovereignty" and the Death Statute is part of that law. The judgment for plaintiffs accordingly was affirmed.

Another interesting case, the facts of which parallel in some instances the claim now before you, is *Policemen's Benevolent Association of Chicago v. Ryce*, Ill., 72 N. E. 764 (1904). It appears that Ryce, a member of the Chicago Police Department, and hence a member of the defendant pension fund, disappeared on May 16, 1895, and had not been heard from for a period of over seven years, in spite of diligent search. The evidence also disclosed that at one time Ryce had been discharged for absence from duty without permission, drunkeness and neglect of duty.

Presuming Ryce was dead, his wife brought suit to recover her husband's dues and assessments, under a clause of the policy issued by defendant to her husband, reading that the beneficiary was entitled to such monies "within thirty days after satisfactory evidence of the death" of the member.

Defendant appealed from a judgment for plaintiff, which judgment, however, was affirmed for plaintiff.

In view of the foregoing, I am of the opinion, and so advise you, that it is legally proper for your Board of Trustees to accept, in the absence of proof to the contrary, the judgment of the Mercer County Court declaring the legal death of Harvey Johnson on January 4, 1946, and based on said judgment, to honor his wife's request for payment to her of the accumulated dividends.

In passing, it may also be said that there is no question here involved as to the right of an employee to collect a pension when the matter of honorable service is raised due to alleged questionable conduct of the employee. The claim of Mrs. Johnson is only for a return of deductions heretofore taken from her husband's salary.

In connection with Commissioner Bates' statement that these funds might be claimed by the insurance company which had made good the loss sustained by the institution, you will recall that Sec. 22 of Chapter 109, P. L. 1921 (R. S. 43:14—42) specifically exempts pension rights and payments from your fund from "levy and sale, garnishment, attachment or any other process."

In view of Commissioner Bates' concern, we made detailed inquiry into this point. The insurance company in question, namely, the Fidelity and Deposit Company, has stated that it feels that by reason of having paid the amount of the alleged loss to the State, under the bond issued by them, that it may be subrograted to the position of the State as to any funds that may otherwise be available to the State. A copy of its communication on the subject dated March 16, 1954 is enclosed.

Subrogration has been defined by our Supreme Court in *Pennsylvania Greyhound Lines, Inc. v. Rosenthal*, 14 N. J. 372, 389 (Sup. Ct. 1954) as giving "to the payor of the common obligation all the rights and remedies of the obligee." In the matter before us the common obligation was to make the State whole for the monies which had been wrongfully taken from it. These monies were paid to the State by the Fidelity and Deposit Company. However, we must here again note the existence on our statute books of Sec. 22 of Chapter 109 P. L. 1921 referred to, *supra*, which statute, it will be recalled, specifically exempts pension rights and payments from levy and sale, garnishment, attachment or other process. It may be argued, and perhaps with merit, that this statute cannot be asserted against the State itself if the State desired to appropriate the pension deductions in order to reimburse itself for monies wrongfully taken by a pensioner. We are not concerned here, however, with the State as such, but with an insurance carrier who reimbursed the State by virtue of an indemnity contract. This contract cannot be said, in my opinion, to extend to the insurance company such sovereign rights of the State as would permit the insurance company in question to ignore the provisions of a specific statute exempting pension payments in question from legal or judicial appropriation.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General

By : DANIEL DE BRIER,
Deputy Attorney General

GCR:DDeB: kms
Enc.

APRIL 23, 1954.

MR. GORDON S. KERR,
Director of the Division of Investment,
Department of the Treasury,
State House,
Trenton 7, New Jersey

MEMORANDUM OPINION P-6

DEAR MR. KERR:

Your letter of April 20, 1954, requesting the opinion of this Office on the general question as to whether money held by the State Treasurer at interest in time accounts is to be considered as an investment, is acknowledged.

It is assumed from our several conferences on the subject that your question relates to moneys which are not required by the State Treasurer for immediate purposes, and which, accordingly, are deposited by him in open time accounts, with interest, subject to withdrawal upon such specified notice as has been, or may be agreed upon, between the State Treasurer and the depositary concerned.

Specific authority authorizing the State Treasurer to deposit moneys in interest-bearing time accounts is contained in R. S. 52:18—17 and R. S. 52:18—18, as amended.

R. S. 52:18—17 states:

> "The state treasurer shall, except as otherwise provided, deposit to his credit as treasurer, all public moneys coming into his hands, within three days after receiving same, in such of the national banks located in this state, and institutions authorized by this state to carry on a banking business, as he may select, that will allow interest not exceeding two per cent per annum on all balances. All interest so earned shall be credited to the state. Before making any such deposit of public moneys the state treasurer may require from any such institution a deposit of bonds of the United States or bonds of the State of New Jersey designed to secure any deposit made pursuant to the provisions of this section."

R. S. 52:18—18, as amended (Chap. 79, P. L. 1944) states:

> "The State Treasurer may, when in his judgment it is not compatible with public safety to deposit the public moneys, or portion thereof, upon interest bearing terms, as provided by section 52:18—17 of this Title, deposit the same without interest or open time accounts with interest subject to withdrawal upon thirty days' notice, in such of the national banks located in this State and institutions authorized by this State to carry on a banking business as he may select, until such a condition has, in his judgment, ceased to exist. In all cases where a deposit is made, pursuant to this section, the State Treasurer may require from any such institution a deposit of bonds of the United States, or bonds of the State of New Jersey, designed to secure any deposit made pursuant to this section; provided, that such requirement shall be deemed to be met if the Federal Reserve Bank of New York or the Federal Reserv Bank of Philadlphia certifies to the State Treasurer that, pursuant to authority given by the depositary, it holds bonds, owned by the depositary, of the kind and in the amount required by the State Treasurer to secure any such deposit."

At this point, it is interesting to note that R. S. 52:18—18, supra, uses the words "time accounts". In a series of conversations held with a senior official of the Department of Banking and Insurance in connection with the research incident to the preparation of this opinion, we were informed that by the use of the words "time account", what was meant was "savings account", the word savings" being avoided, however, by reason that at the time the statute was enacted, the word "savings" was considered as the exclusive property of savings banks as then defined by our banking statutes.

What do we mean by the word "investment"? The word apparently has no precise legal definition. This fact was early observed by Vice Chancellor Van Fleet in *Una v. Dodd,* 39 N. J. Eq. 173, 186 (Ch. 1884), when he stated:

> "So far as I am aware there is no technical legal definition of the word 'investment' as applied to money."

In *Burkhard Investment Co. v. U. S.,* 100 F. 2d 642 (9 Circ. 1938), the Court quoted with approval the following definition of "investment", taken from Webster's New International Dictionary (Merriam 2nd Ed. 1935):

> "The investing of money or capital in some species of property for income or profit; the sum invested in the property purchased."

In *Genessee Trustee Corp. v. Smith,* 102 F. (2d) 125 (6 Circ. 1939), the Court considered the meaning of the word "investment" as it appears in the National Banking Act and held:

> "The word 'investment' has no technical definition as applied to money and usually its meaning must be determined from the contents. In its most comprehensive sense, it is generally understood to signify the laying out of money in such a manner that it may produce revenue whether the particular method be a loan or the purchase of stocks, notes, securities, or other property . . . It ordinarily means the use of capital for a specified time for the purpose of deriving an income therefrom as distinguished from a temporary or speculative use of it."

Now, as to whether money on deposit at interest in a bank is to be considered as an investment, the Court of Chancery of Delaware in *Sapp v. Sapp,* 96 A. (2nd) 741 (1953), in construing a will specifically held that the word "investment" included a bank deposit at interest.

In an earlier case, namely, *In re; Owne's Estate,* 36 N. Y. S. (2d) 60, 178 Misc. 957 (N. Y. Surrogate Ct. 1942) the New York Court in construing a will pointed out that "The word 'investment' is a vague term, and no general rule can be laid down as to its meaning." The Court further pointed out that although strictly the term might be limited to stocks, bonds and other evidence of indebtedness, that it likewise, "has been construed as including money on deposit in a bank".

In view of the foregoing, it is our opinion that the deposit of monies, not required by the State Treasurer for immediate state needs, in interest-bearing bank accounts, subject to withdrawal upon stated notice, may be regarded as an investment.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General

By : DANIEL DE BRIER,
Deputy Attorney General

DDeB:kms

JUNE 1, 1954.

HON. CARL HOLDERMAN,
Commissioner of Labor and Industry,
State House,
Trenton, New Jersey.

MEMORANDUM OPINION P-7

DEAR COMMISSIONER:

You have asked if, in our opinion, R. S. 34:6—110 applies to vehicles from which are sold baked goods (and other foodstuffs as specified in R. S. 34:6—105), which baked goods are manufactured outside of the State of New Jersey, and the manufacturers of which baked goods are, consequently, not licensed by the Department of Labor and Industry.

You have indicated by correspondence that similar vehicles of New Jersey manufacturers always have been considered subject to this statute and to inspection by your Department.

In our opinion the provisions of R. S. 34:6—110 apply to all vehicles from which the articles enumerated in R. S. 34:6—105 are sold in New Jersey, whether the articles are manufactured in New Jersey or not.

R. S. 34:6—110 reads:

> "Biscuits, pies, bread, crackers, cake, macaroni and other foodstuffs and confectionery shall be kept in dry and airy rooms. The floors, shelves, pans, trays and every kind of appliance used for storing the same shall be so arranged that they can be easily and thoroughly cleaned. Proper receptacles for holding coal and ashes and covered garbage pails shall be provided by the proprietor of any place where any of said articles are made or manufactured for sale. All baked goods on display in the sales rooms must be well protected from flies, dust and dirt. All vehicles from which any of the articles specified in section 34:6—105 of this title are sold shall be kept in a clean condition and all baskets or other containers in which such foodstuffs or confections are conveyed to the streets shall be closely covered in a way to exclude flies, dust or other sources of contamination."

The plain language of the last sentence of the statute seems hardly capable of "interpretation". It has one easily discernible meaning, and no other. The word "vehicles" is modified by a clause and an adjective. The clause is restrictive; it confines the application of the statute to a class of vehicles: those "*** from which any of the articles specified in section 34:6—105 of this title are sold ***". This is the only restriction in the sentence; the adjective "all" makes the provisions of the statute applicable to every vehicle in the class. Nowhere in this sentence, the only reference in the entire act (Article 11 of Chapter 6 of Title 34 of the Revised Statutes; R. S. 34:6—105 to 119) to these vehicles, is any mention made of the source of the products sold from the vehicles.

Nor do the other three sentences of R. S. 34:6—110 supply such a restriction. They are merely an enumeration of sanitary provisions for three other areas not involving actual manufacture: storage, garbage disposal and sales rooms.

But you have indicated that some of your doubts as to the interpretation of this statute arise from the reference in the last sentence of R. S. 34:6—110 to R. S. 34:6—105. This latter statute is the first section of the Article entitled "Bakeries and Confectioneries" (Article 11), and concerns licensing of foodstuffs manufacturers by the Commissioner of Labor and Industry. Its application is confined specifically to such businesses located in New Jersey. R. S. 34:6—105 reads as follows:

> "No person shall engage in the business of making or manufacturing biscuits, pies, bread, crackers, cake, macaroni, candy, ice cream, frozen sweets or other foodstuffs or confections for the purpose of sale unless licensed so to do by the commissioner.
>
> "The application for any such license shall state the location of the place where the applicant intends to conduct such business and the license shall not issue unless the commissioner is satisfied that such place conforms to all the requirements of this article.
>
> "No person, whose license has expired or been revoked, shall engage or continue in such business in this state until he has procured a renewal or a new license in accordance with the terms of this article.
>
> "The license shall specify the place where the business shall be conducted and shall not authorize the business at any other place. It shall unless sooner revoked, remain in force for one year from date of issue. It may be renewed upon application of the holder if the place of business is conducted in accordance with the terms of this article.
>
> "Whenever it shall be made to appear to the commissioner that any place of business is not conducted in accordance and conformity with the requirements of this article the commissioner may revoke the license after giving not less than forty-eight hours' notice in writing. The notice may be served by any representative of the department personally on the proprietor or by affixing the same on the inside of such place of business.
>
> "Each applicant for a license or renewal thereof shall pay to the commissioner a fee of one dollar which fee shall be returned to the applicant in case the license is not granted. No other license shall be required by any other state or municipal authority."

This reference to R. S. 34:6—105 does not restrict the application of R. S 34:6—110 to vehicles owned by New Jersey manufacturers.

To repeat, the language of the last sentence of R. S. 34:6—110 is quite plain The reference therein to R. S. 34:6—105 is not to that statute as a whole, or to its licensing provisions. It is merely to "*** the articles specified in ***" that statute. These are: "*** biscuits, pies, bread, crackers, cake, macaroni, candy, ice cream, frozen sweets or other foodstuffs or confections ***"—a rather lengthy enumeration. Obviously the reference in question is a convenient drafter's device to eliminate the necessity of repeating the enumeration. It will be found again in R. S. 34:6—111 and R. S. 34:6—114.

Moreover, the Legislature found no difficulty, when it desired to restrict the application of other sections of Article II to places licensed under R. S. 34:6—105, in saying so. R. S. 34:6—106, 107, 108, 109, and 112 all contain such provisions. It could have so restricted the last sentence in R. S. 34:6—110; but it did not.

Any lingering doubt is disspelled, however, by an examination of the source of this legislation. Article II was originally Chapter 127 of the Laws of 1912. With but two exceptions not pertinent to this opinion (P. L. 1918, c. 9 and P. L. 1953, c. 33, Sec. 15), the only legislative action affecting Chapter 127 was the Revision of 1937.

Section 3 of Chapter 127 is the source of R. S. 34:6—110:

"3. Biscuits, pies, bread, crackers, cake, macaroni and other foodstuffs and confectionery after the same are made or manufactured for the purpose of sale shall be kept in dry and airy rooms; the floors, shelves, pans, trays and every kind of appliances used for storing the same shall be so arranged that they can be easily and thoroughly cleaned; proper receptacles for holding coal and ashes and covered garbage pails shall be provided by the proprietor for any place where any of said articles are made or manufactured for the purpose of sale. All baked goods on display in the sales rooms must be well protected from flies, dust and dirt. All vehicles from which any of the articles specified in section one are sold shall be kept in a clean condition and all baskets or other containers in which any of the said articles are conveyed to the streets shall be closely covered in a way to exclude flies, dust or other sources of contamination."

Note that reference in the last sentence is to "* * * the articles specified in section one * * *". Section One read:

"1. All buildings or rooms where biscuits, pies, bread, crackers, cakes, macaroni and other food stuffs, confectionery, candy, ice cream or frozen sweets are manufactured or made for the purpose of sale, shall be drained and plumbed in a manner that will conduce to the proper and healthful sanitary condition thereof and shall have air shafts, windows or ventilating pipes sufficient to insure ventilation and sufficient light to prevent any place being operated entirely by artificial light, and all doors, windows and other openings shall be thoroughly screened so as to prevent the entrance of flies or other insects, between the first day of April and the thirty-first day of October. Expectorating is prohibited within any building or room used for the aforesaid purposes, except into a proper receptacle provided for that purpose. The smoking, snuffing or chewing of tobacco in any building or room used for aforesaid purposes is prohibited. Plain notices shall be posted in every such place forbidding any person to use tobacco or spit on the floor of such place. No cellar, basement or place which is below the street level shall hereafter be used or occupied as a place in which to manufacture or make for the purpose of sale any of the above mentioned articles, except where the same was used for such purposes on the fourth day of July, nineteen hundred and five; provided, however, that this act shall not prevent the use, for the manufacture of candy, ice cream or frozen sweets only, of any cellar or basement which shall, after due inspection and examination by representatives of the Department of Labor, be certified to by the Commissioner of Labor as sanitary in all respects and proper to be used for such purposes, which certificate may be revoked at any time."

Immediately obvious is the absence in Section One of any reference to licensing. The licensing provisions which are the source of R. S. 34:6-105 will be found in Section 9 of Chapter 127, as amended by P. L. 1918, c. 9. Section 3 makes no reference to Section 9. In enacting Chapter 127 of the Laws of 1912, the Legislature, therefore, cannot be said to have intended that its strictures on vehicles be read in pari materia with its licensing provisions. The reference in the sentence concerning vehicles was merely to the enumeration of foodstuffs and nothing more; the enumeration then appeared in a section which said nothing about licensing.

In its incorporation into the Revised Statutes of 1937, the various sections of Chapter 127 were re-arranged. Having determined that convenience would be best served by placing the licensing provisions in the first section (R. S. 34:6-105), it

was necessary for the revision commissioners, to avoid repetition of the long enumeration of foodstuffs, to remove it from Section One (which became R. S. 34:6-106) and insert it in the new first section. In no wise can this be the basis for a suggestion of a change of legislative intent. To the contrary, it is an excellent illustration of the situation foreseen in R. S. 1:1-5:

"The classification and arrangement of the several sections of the Revised Statutes have been made for the purpose of convenience, reference and orderly arrangement, and therefore no implication or presumption of a legislative construction is to be drawn therefrom."

Nor does the resultant Revision contain any specific language indicating a change in the legislative intent.

"The intention to effect a change in substance must be expressed in language excluding a reasonable doubt." *BASS v. ALLEN HOME IMPROVEMENT CO., 8 N. J. 219, 224* (1951); *MURPHY v. ZINK, 136 N. J. L. 235 (Sup. Ct. 1947), aff'd. 136 N. J. L. 635 (E. & A. 1947).*

In its present form and as originally enacted, Article 11 (R. S. 34:6-105 to 119) is a combination of an employment conditions and a public health law, with enforcement confided in the Commissioner of Labor and Industry, rather than the Commissioner of Health, as a matter of convenience. The provision of R. S. 34:6-110 relating to vehicles is purely a public health measure. As such, it should receive a liberal construction, even though, as a part of Article 11, it may be penal in nature.

"Where public or social interest in penal legislation is especially great, the policy of giving penal laws a very strict construction may and should be relaxed. Thus laws pertaining to public health, and public safety, though penal in nature, must be given substantial effect." *SUTHERLAND, STATUTORY CONSTRUCTION, Sec. 5609 (3d Ed., 1943).*

Since the power of inspection conferred upon you by R. S. 34:6-113 always has been construed administratively to include the power to inspect vehicles, in view of the foregoing you have the power to inspect all vehicles without regard to the place of manufacture of the articles which they transport.

"Powers conferred for the preservation of the public health should receive a liberal construction so that they may be rendered effective." *LA PORTA v. BOARD OF HEALTH OF HOBOKEN, 71 N. J. L. 88 (Sup. Ct. 1904).*

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: FREDERICK J. GASSERT, JR.,
Deputy Attorney General.

JUNE 9, 1954.

HONORABLE WILLIAM F. KELLY, JR.,
President, Civil Service Commission,
State House,
Trenton 7, New Jersey.

MEMORANDUM OPINION P-8

RE: Reinstatement of probationary municipal employee after resignation.

DEAR PRESIDENT KELLY:

You have requested advice as to whether a municipal probationary employee may be restored to the eligible list from which he was appointed. The facts set forth in your request are that a probationary policeman in Newark resigned from the police force before completing his probationary period. He has changed his mind and now seeks to be restored to the eligible list; it appears that the appointing authority is willing to reappoint the employee.

R.S. 11:9-12 permits the reinstatement or placement on a re-employment list of state employees who have resigned in good standing if the resignation is withdrawn within one year with the consent of the Commission and the appointing authority. No such provision is contained in the Civil Service Act with respect to municipal employees. Civil Service Rule 60 reiterates the conditions under which a state employee may be reinstated or restored to an eligible list but provides with respect to municipal employees that:

> "Resignation in local government service shall be final and the resigned employee shall not be eligible for reinstatement."

The provision of the rule with respect to local government employees is consistent with the general body of law on the subject. In 4 McQuillan, *Municipal Corporations* Sec. 12.268 p. 411 (3rd Ed. 1949) the author says, "Generally there can be no reinstatement after a voluntary resignation." In 37 Am. Jur. 879 it is stated that, "Where the resignation, however, has become complete, either by transmission or acceptance, it is held that it cannot then be withdrawn, even with the consent of the power authorized to accept it." And in 62 C.J.S. Section 732 page 1052 the following language appears. "A resignation terminates the employment, it constitutes a complete break in the service, and the termination of relations, and thereafter the person resigning has no rights or duties." See *Andrews* v. *Lamb,* 136 N.J.L. 548, 551, 551, 61 A. 2d 233 (Sup. Ct. 1948); *Whitney* v. *Van Buskirk,* 40 N.J.L. 463, 467 (Sup. Ct. 1878). See Opinions Attorney General Dec. 22, 1914 & June 15, 1915.

We recognize that the former employee is not seeking reinstatement to the status he enjoyed immediately prior to his resignation. See *Harcher* v. *Hurley,* 116 N.J.L. 18, 181 A. 309 (Sup. Ct. 1935) where at 116 N.J.L. 20 reinstatement was defined as "restoration to a former position, office or rank." He seeks not restoration to his former position by action of the Department of Civil Service but restoration to the eligible list from which he had been appointed. This would place him in a position to be appointed and as a probationary policeman.

It has been ascertained that there is no departmental practice, usage or custom which would furnish a precedent. Seldom does a probationary employee resign and it is an extremely unusual circumstance that a resigned probationary employee seeks to be restored to the eligible list.

Application of Civil Service Rule 60, *supra,* requires a denial of the request for restoration to the eligible list. The language of the rule seems to be clear and unambiguous with respect to the finality of the act of resignation. In the absence of statutory authority it should be regarded as a voluntary relinquishment of all the employee's rights to the position. Cf. *Moreno* v. *Cairns,* 20 Cal. (2d) 531, 127 P. 2d 914 (Sup. Ct. 1942). We think this includes the rights gained by having been placed on the eligible list. Support for this position is also found in Civil Service Rule 40 which permits removal from an eligible list of the name of an individual who signifies an unwillingness to accept employment.

It is noted that Civil Service Rule 45 provides that the name of an employee whose service is "discontinued" may be restored to the employment list for re-employment in other departments or organization units. We think the term "discontinued" as used in this rule refers to a discontinuance by the appointing authority as permitted by Civil Service Rule 45 (2) on the ground that—

> "* * * the appointee is unable or unwilling to perform the duties of his position satisfactorily or is of such reputation, habits and dependability as not to merit continuance in the service."

Apparently no such discontinuance was effected in the instant situation and, even if it had been effected, reinstatement to the list would only have permitted re-employment in other departments or organization units.

It is our opinion that the employee in question cannot under the rules of the Civil Service Commission be reinstated to his position, nor, since a resignation amounts to "a complete break in the service, and the termination of relations" 62 C.J.S. Section 732, *supra,* can he be restored to the eligible list. If he again desires to seek employment as a policeman he must qualify in the usual manner. Although the case involved a discharge for having failed to return to duty within the time prescribed by departmental rules after military leave, appropriate language is found in the case of Redding v. City of Los Angeles, 81 Cal. App. (2d) 888, 185 P. (2d) 430 (Dist. Ct. App. 1947). At 185. P. (2d) 435, the Court said,

> "Moreover, appellant having by due process of law forfeited his right to be on the police force, the Chief of Police is without authority to restore him. In order for him to regain membership in that organization he must pursue the route followed by any citizen who seeks to become a police officer."

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General,

By: JOHN F. CRANE,
Deputy Attorney General.

JFC:b

AUGUST 6, 1954

MR. THOMAS E. HEATHCOTE, *Secretary*
State Board of Professional Engineers
and Land Surveyors,
921 Bergen Avenue,
Jersey City, New Jersey.

MEMORANDUM OPINION P-9

DEAR MR. HEATHCOTE:

This will acknowledge your request for an opinion concerning the eligibility of an applicant for a license as a professional engineer or land surveyor who is not a citizen of the United States.

In your letter you state in part that ". . . it would appear that a declaration of intention to become a citizen of the United States can no longer be made . . ." and you request our advice as to whether the Board must require that applicants of foreign birth be citizens of the United States in order to be eligible for a license.

It is not true that a declaration of intention to become a citizen of the United States can no longer be made. The making of such a declaration is no longer required as a condition precedent to the filing of a petition for naturalization, but the Federal Law still permits the making of such declaration by an alien.

Section 334 (f) of the Immigration and Nationality Act of 1953 (66 Stat. 254; U.S.C.A. Section 1445) provides, in part, as follows:

> "Any alien over eighteen years of age who is residing in the United States pursuant to a lawful admission for permanent residence may, upon an application prescribed, filed with, and approved by the Service, make and file in duplicate in the office of the clerk of (a naturalization) court, regardless of the alien's place of residence in the United States, a signed declaration of intention to become a citizen of the United States, in such form as the Attorney General shall prescribe. Nothing in this subsection shall be construed as requiring any such alien to make and file a declaration of intention as a condition precedent to filing a petition for naturalization, * * *."

A declaration of intention to become a citizen of the United States is a quasi-judicial proceeding and may be initiated by an applicant on a form prescribed (Form N-300, United States Department of Justice, Immigration and Naturalization Service, revised January 8, 1953) entitled "Application To File Declaration of Intention." We are advised by the Immigration and Naturalization Service, United States Department of Justice, that on the basis of such an application, a certificate called a "Declaration of Intention," Form N-315, is issued by the clerk of the court providing, of course, that the applicant meets all the requirements of the Immigration and Nationality Act.

Chapter 149 of the Laws of 1950 provides in part, that in order "to be eligible for license as a professional engineer or land surveyor an applicant shall be a citizen of the United States of America or shall have made declaration of his intention to become a citizen of the United States of America (N.J.S.A. 45:8-35).

In our opinion, an applicant for a license under this act must either be a citizen of the United States or have obtained a Declaration of Intention from the clerk of a naturalization court pursuant to the provisions of the Immigration and Nationality Act of 1953 outlined above.

Very truly yours,
GROVER C. RICHMAN, JR.,
Attorney General,
By: FREDERICK G. WEBER,
Deputy Attorney General.

FGW:HK:kms

SEPTEMBER 2, 1954

HON. WILLIAM F. KELLY, JR., *President,*
Department of Civil Service,
State House,
Trenton 7, New Jersey.

MEMORANDUM OPINION P-10

DEAR PRESIDENT KELLY:

Your request for advice reveals that the Department of Defense desires to credit its employees for the time served by them in the active military service of the United States in time of war for the purpose of computing length of state service in conjunction with the Employee's Awards Program which is under the supervision and administration of your department. N.J.S.A. 11:2c-1.

The statute, R.S. 38:14-9, under which it is asserted such time may be credited provides as follows:

> "For all purposes, officers and enlisted men who entered the active service of the United States in time of war by appointment or enlistment, or under call, order or draft by the President, or who shall hereafter enter such service under like conditions, shall be entitled to credit for the time served in the active service of the United States, as if such service had been rendered in the State."

The quoted section is a component part of Chapter 49 of the Laws of 1937 which is entitled "An Act concerning the militia of the State (Revision of 1937)." Thus the language of the section must be construed as relating to the status of officers and enlisted men of the militia. No purpose is perceived to affect the computation of time of service of an individual serving the state in a civilian capacity. We have noted the memorandum opinion of the previous Attorney General dated January 25, 1951, wherein it was ruled that time served in the active military service of the United States could be credited for retirement and pension purposes to a member of the New Jersey National Guard who is currently on full time duty. That opinion also inferentially recognized that the statute in question was limited in its application to members of the state militia.

N.J.S.A. 11:2c-1 et seq., establishing the Employee's Awards Program, provides for awards to "state employees." The statutory purpose is to promote efficiency and to reward individual employees. We understand that the Employee's Awards Committee has from its inception regarded members of the militia in a full time duty status with the Department of Defense as "state employees" for the purpose of the Employee's Awards Program. Such a contemporaneous construction by an administrative body may be used as an aid in statutory interpretation. *State* v. *Clark,* 15 N.J. 334, 340 (1954). We find the construction to be reasonable and not inconsistent with the objectives of the statute. We agree that for the purpose of the Employee's Awards Program such members of the militia as are serving in a full time capacity in the Department of Defense may be regarded as "state employees." Cf. *Andrews* v. *State,* 53 Ariz. 475, 90 P. 2d 995 (Sup. Ct. 1939) (members of the national guard held to be state employees for purpose of workmen's compensation statute). contra: *Hays* v. *Illinois Terminal Transp. Co.,* 363 Ill. 397, 2 N.E. 2d 309 (Sup. Ct. 1936).

Accordingly, it is our opinion and we advise you that for the purpose of the Employee's Award Program those members of the militia who are serving in a permanent duty status in the Department of Defense are entitled to be credited with the time served by them in the active military service of the United States in time

of war whether or not such service was performed prior to entry in the state militia. Such time spent prior to entry in the employ of the state by persons currently employed by the Department of Defense in a civilian capacity is not entitled to be so credited.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General,
By: JOHN F. CRANE,
Deputy Attorney General.

JFC/JC

SEPTEMBER 2, 1954.

HON. WILLIAM F. KELLY, *President,*
Civil Service Commission,
State House,
Trenton 7, New Jersey.

MEMORANDUM OPINION P-11

Re: *Award Program.*

DEAR COMMISSIONER KELLY:

Your recent request concerning the New Jersey State Employees Awards Committee raises the question whether an employee may be given an award for professional accomplishment completed prior to the establishment of the Awards Program.

The governing statutory provision is Section 6 of Chapter 125, P.L. 1953, N.J.S.A. 11:2C-6, which provides as follows:

> "The committee shall, under the supervision and direction of the president of the Civil Service Commission, establish, maintain and administer plans for award programs for State employees designed to promote efficiency and economy in State Governmental functions, to reward individual employees for meritorius performances and suggestions. Award programs may include any or all of the following: a suggestion award program, awards for heroism, an efficiency and incentive award program, awards for professional accomplishment, and awards for service."

It is generally presumed that statutes are to operate prospectively and not retrospectively. "Ordinarily statutes establish rules for the future, and they will not be applied retrospectively unless that purpose plainly appears." *Brewster* v. *Gage,* 280 U.S. 327, 337, 50 S. Ct. 115, 118 (1930). "A cardinal rule in the interpretation of statutes is that words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intent of the Legislature cannot otherwise be satisfied." *Kopczynski* v. *County of Camden,* 2 N.J. 419, 420 (1949).

Bearing these principles in mind we do not find any clear statement of intention to benefit those who may have rendered outstanding service prior to the adoption of the statute. The legislative purpose of promoting efficiency and economy in State Governmental functions can adequately be met by rewarding accomplishments achieved after the enactment of the statute. This being so it logically follows that the statute must be given prospective application only.

We therefore advise you that awards for professional accomplishments should be limited to those achieved after the effective date of the statute, April 29, 1953.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General,
By: JOHN F. CRANE,
Deputy Attorney General.

GCR:JFC:kms

SEPTEMBER 2, 1954.

DR. DANIEL BERGSMA,
State Commissioner of Health,
Department of Health,
State House,
Trenton, New Jersey.

MEMORANDUM OPINION P-12

DEAR DR. BERGSMA:

We acknowledge receipt of your letter dated June 1, 1954, requesting an opinion on the following question:

> "May the Board of Beauty Culture Control make rules and regulations controlling the fee that may be charged for beauty culture services rendered by students in the clinic of a beauty culture school."

Initially ,we wish to advise that the Legislature alone has the authority to fix prices or fees in businesses. This power can be exercised only in businesses affected with a public interest. *State Board of Milk Control* v. *Newark Milk Co.,* 118 N.J. Eq. 504 (E. & A. 1935); *Gaine* v. *Burnett,* 122 N.J.L. 39 (Sup. Ct. 1939), affirmed, 123 N.J.L. 317 (E. & A. 1939); *Nebbia* v. *New York,* 291 U.S. 502 (1934).

There is serious doubt whether the business of rendering beauty culture services by students in beauty culture schools involves any paramount public interest justifying price fixing. Cf. *Lane Distributors, Inc.* v. *Tilton,* 7 N.J. 349 (1951).

The effectuation or execution of such legislative policies may be delegated to an administrative agency to be exercised under certain prescribed standards. *State Board of Milk Control* v. *Newark Milk Co.,* supra; *Abbotts Dairies* v. *Armstrong,* 14 N.J. 319 (1954).

At the present time, however, the Legislature has not seen fit to enact legislation fixing prices or fees which may be charged in beauty culture schools or in beauty shops or to delegate to the Board of Beauty Culture Control legislative authority to promulgate regulations fixing such prices or fees. As a consequence, the question posed in your letter is purely academic.

In view of the above circumstances, you are accordingly advised that at the present time neither the Board of Beauty Culture Control nor the Board of Education has the power to prescribe what fees may be charged in beauty culture schools or beauty shops.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General,
By: JOHN W. KEOGH,
Deputy Attorney General.

SEPTEMBER 13, 1954

MR. HENRY J. PARCINSKI,
Secretary of the Board of Trustees
of Schools for Industrial Education,
of Trenton, N. J.,
Trenton, New Jersey.

MEMORANDUM OPINION P-13

DEAR MR. PARCINSKI:

You have requested, on behalf of the Board of Trustees of Schools for Industrial Education of Trenton, N. J., the opinion of this Office as to whether members of the faculty of Trenton Junior College (one of the schools under the jurisdiction of your Board), otherwise qualified, are eligible for the pension established by the provisions of our Veterans' Pension Law (R.S. 43:4-1 to 43:4-5 incl.).

The Veterans' Pension Law authorizes a pension for certain veterans on reaching age of sixty-two years, after twenty years of service continuously or in the aggregate "in office, position or employment of this State or of a county, municipality or school district or board of education." (R.S. 43:4-2).

Essentially, insofar as this Office is concerned, your inquiry raises the question whether employment by Trenton Junior College constitutes State office, position or employment.

Whether or not such personnel are to be considered employees of the City of Trenton or employees of a school district or board of education is a determination which more appropriately must be made by the local authorities concerned. This opinion deals only with the relationship of the employees in question to the State of New Jersey.

The burden of the pension, when granted, is placed by the statute on "the department of the public service from which the person shall be retired." (R.S. 43:4-4).

We have been informed by you that Trenton Junior College was established under the provisions of R.S. 18:15-24 which provides:

> "Whenever in any city the board of trustees of schools for industrial education shall acquire by gift, grant, devise, or otherwise, the sum of one hundred thousand dollars, to be expended for the purchase of land and the erection and equipment of a building or buildings to be used for the purposes for which the board is constituted, and whenever such board of trustees shall have certified to the governor that a sum of money not less than three thousand dollars has been contributed by voluntary subscription of citizens, or otherwise, as authorized in section 18:15-18 of this title, for the establishment in the city of a school or schools for industrial education, the governor shall cause to be drawn by warrant of the comptroller, approved by himself, out of any moneys in the state treasury, directly appropriated for such purpose, an amount equal to that so contributed by the city for such object.
>
> "When any such school or schools shall have been established in any city there shall be contributed annually by the state, in the manner aforesaid, for the maintenance and support thereof a sum of money equal to that contributed each year in the city for such purpose.

> "The moneys contributed by the state as aforesaid shall not exceed in any one year the sum of thirty thousand dollars for each school established and maintained as provided in this section."

The statute also provides that industrial schools, when established, be operated and managed by boards of trustees, consisting of the Governor and the mayor of the municipality as ex officio members, and eight other persons, resident in the city in which the school is located, to be chosen and appointed by the Governor (R.S. 18:15-20, as amended.).

The trustees are constituted by the statute as a body corporate (R.S. 18:15-22), and are vested with broad powers by R.S. 18:15-21, including the right to hire and remove faculty members. This statute states:

> "The board of trustees shall have control of the buildings and grounds owned and used by such schools, the application of the funds for the support thereof, the regulation of the tuition fees, the appointment and removal of teachers, the power to prescribe the studies and exercises of the school, and rules for its management, to grant certificates of graduation, to appoint some suitable person treasurer of the board, and to frame and modify at pleasure such by-laws as it may deem necessary for its own government. It shall report annually to the state and local boards of education its own doings and the progress and condition of the schools."

The *contribution* of the State of New Jersey to Trenton Industrial Schools, for the current fiscal year, being so termed by the statute, is contained in a single appropriation item in the Appropriation Bill, Chapter 36, P.L. 1954, being captioned Account No. P 80-801-07 under the Department of Education, and reading:

> "For payments to districts for industrial schools, pursuant to R.S. 18:15-24 ..... 70,000.00"

Of this amount, $30,000 is allocated and disbursed by the State fiscal authorities to the Trenton Industrial Schools.

In the first place, it may be observed from the foregoing that faculty members of Trenton Junior College are not hired by the State of New Jersey nor does the State determine the character or nature of the employment, working conditions or compensation. In this regard, the Civil Service Commission has advised this Office that it does not fix the qualifications for members of the faculty of the Trenton Junior College, does not fix their salaries or prescribe salary ranges. Further, it is also evident that the State of New Jersey does not direct faculty members in the discharge of their duties, nor does the State of New Jersey have the right to discharge these members.

Therefore, the attributes and incidents of the employer-employee relationship insofar as faculty members of Trenton Junior College are concerned, are determined by the Board of Trustees and not by the State of New Jersey, the Board of Trustees exercising complete control, pursuant to the statute, over faculty members.

Our Courts have emphasized that the element of *control* is the necessary ingredient in the employer-employee relationship. The Supreme Court, in *Outdoor Sports Corp.* v. *American Federation of Labor*, 6 N.J. 217, at 228 (1951) held:

> "It is of the essence of the employer-employee relationship that there be a hiring for a fixed or definite period of time for either fixed wages or some form of remuneration fixed or agreed upon *and that the employee's work should be subject to the direction and control of the employer.*" (*Underscoring* supplied).

On the same point, our Superior Court in the earlier case of *Ford* v. *Fox*, 8 N.J. Super. 80, at 83 (1950) said:

"Our courts have recognized that 'control by the master over the servant is of the essence of that relationship.'"

In the case of *Reilly* v. *Board of Education*, 127 N.J.L. 490 at 491, (Sup. Ct. 1941), the Court had before it for review a decision of the State Board of Education which had denied a veteran's pension to a disabled school janitor. The facts disclosed that the petitioner, a veteran, had been employed for over twenty years as a janitor in the Camden Public Schools. The decision of the Commissioner of Education held that the Veterans' Pension Law (in its then form) did not apply to an employee of a board of education. In this case the Supreme Court, affirming the Commissioner's decision, stated:

"The case turns on the meritorious question of whether or not the statute applies to an employee of a Board of Education. The statutes, N.J.S.A. 43:4-2, supra, and 43:4-3 provide for a pension for life of an honorably discharged soldier, sailor or marine who 'shall have been for twenty years continuously or in the aggregate in public office or position in this State or in the service of a county or municipality thereof * * *.' We conclude that Reilly was not employed by a municipality within the words or the intention of this statute. We think that there is a distinction between those employed by municipalities as such and those employed in the school systems by boards of education."

Subsequent to this decision, R.S. 43:4-2 was amended to bring within its provisions employees of school districts or boards of education. However, the reasoning of the Supreme Court, as set forth in the excerpt of the *Reilly* decision cited above, is applicable, indicating, as it does, that the employment covered by the statute is not to be extended beyond the precise terms of the statute.

Another decision bearing on the present question is *Rubright* v. *Civil Service Commission*, 137 N.J.L. 369 (1948). In this case, the Supreme Court had before it a certiorari proceeding instituted by the prosecutor against the Civil Service Commission, seeking to review a determination by the Commission as to the prosecutor's permanent state civil service status. The prosecutor had been employed in the State Employment Service Division, the records, facilities and personnel of which were subsequently transferred to the Federal government. Subsequently, the Federal service was terminated and records and facilities, and personnel on temporary leave including the prosecutor, were returned to State service. The prosecutor, in order to uphold his State civil service status contended that he continued to be an employee of the State while on "temporary loan" to the federal government. The Court held that workers temporarily on loan to the Federal government, being compensated for their labors by the Federal government, were not, while in Federal service "also employees of the State" as they were not subject to State control, while thus assigned.

The fact that members of the faculty of your institution are appointed by a board of trustees appointed by the Governor, does not make such members of the faculty State officers or employees.

For the foregoing reasons, it is our opinion that members of the faculty of Trenton Junior College are not officers or employees of the State of New Jersey, and therefore are not eligible for a veteran's pension at the exepense of the State.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General,

By: DANIEL DE BRIER,
Deputy Attorney General.

ddb;b

SEPTEMBER 17, 1954

HON. WILLIAM P. KELLY, JR., *President,*
Department of Civil Service,
State House,
Trenton 7, New Jersey.

HON. DANIEL BERGSMA,
State Commissioner of Health,
State House,
Trenton 7, New Jersey.

MEMORANDUM OPINION P-14

GENTLEMEN:

You have requested advice as to whether employees in the Department of Health may be given special leaves of absence, with or without pay, for the purpose of specialized training or education in fields related to the functions of that Department, pursuant to the "Personnel Training Program" of the Department.

The purpose of the program is to train State employees in various technical fields related to preventive medicine and public health. This objective is accomplished by authorizing an employee to attend a particular class or course, part or full time, while he receives full salary from the State. The employee is also, in some instances, reimbursed for tuition, travel and other costs where he does not receive academic credit for the instruction.

The Chief Examiner and Secretary of the Civil Service Commission, under P.L. 1951, c. 215, N.J.S.A. 11:14-1, is required to prepare regulations regarding *inter alia*, "special leaves of absence with or without pay or with reduced pay for permanent employees in the classified service." He is also charged with the duty, under P.L. 1947; c. 201, N.J.S.A. 11:6-2(e), to devise, install and administer service rating systems and training courses; arrange for and pass upon transfers; regulate annual sick and special leaves of absence."

There is no statutory specification in Title 11 as to what is encompassed by the terms "leave" or "special leave". The definition of these terms is left to the Civil Service Commission. In this connection, however, R.S. 11:21-9 should be noted. This section, which provides seniority rights, was amended by P.L. 1948, c. 348, with the addition of the following paragraph:

"In computing the length of service of officers and employees for purposes of determining their seniority rights under this section, all time hereafter during which they shall be absent from duty on leave, without pay, shall be deducted therefrom; *provided, however,* that if an officer or employee shall be absent on leave, without pay, pursuant to assignment by or approval of the appointing authority and for further education or training directly related in character to the employment from which he is on leave and designed to improve his competence or increase his capacity therein, the time so spent shall not be deducted under this paragraph."

This section provides that where an employee is on leave of the nature contemplated by the "Personnel Training Program", he shall receive seniority credit for such time even though the leave is without compensation.

The legislative history of the amendment is significant. The bill, Senate Bill No. 167, did not contain the *proviso* and its object was set forth in the attached statement which read:

"The purpose of this bill is to provide for deduction of time, during which employee is absent on leave without pay, from the computation of length of service for seniority rights."

The bill, after passage, was returned to the Legislature with the conditional veto of Acting Governor Summerill. The message stated, in part:

> "There are situations in which an officer or employee is granted a leave of absence, without pay, to pursue some special work or training related to his regular employment and undertaken for the purpose of improving his competence or increasing his capacity therein. I am constrained to believe that in the indicated situation an officer's or employee's time spent in such special work or training should not in reason and fairness be deducted in the computation of length of service for seniority rights."

The Legislature in reenacting the bill in accordance with this message recognized the authority to grant such special leaves of absence.

It is our conclusion that the Chief Examiner and Secretary of the Civil Service Commission may devise, install and administer training courses, including, if deemed advisable, a "Personnel Training Program" for permanent, classified employees of the Department of Health in accord with the powers and duties of the Department, particularly as set forth in P.L. 1947, c. 177, s 37, N.J.S.A. 26:1A-37, and that employees may be granted special leaves of absence, with or without pay.

In this connection, it must be noted that under P.L. 1948, c. 121, as amended by P.L. 1952, c. 293, N.J.S.A. 11:4-4(k), the positions held by students in educational institutions employed less than half time are not within the classified service.

As to the payments for tuition and other costs of the training courses, that is a matter which depends upon the appropriation act and applicable Federal grants.

Yours very truly,
GROVER C. RICHMAN, JR.,
Attorney General,

By: DAVID C. THOMPSON,
Deputy Attorney General.

dct/t

OCTOBER 26, 1954

HONORABLE ARCHIBALD S. ALEXANDER,
State Treasurer
State House,
Trenton, New Jersey

MEMORANDUM OPINION P-15

Attention: Abram M. Vermeulen, Acting Budget Director

DEAR STATE TREASURER:

You have requested our opinion as to whether or not it is legally possible to recapture for the General Treasury, to be used for current purposes, a portion of the "veterans loan guaranty and insurance fund" set up pursuant to the provisions of the "Veterans' Loan Act (1944), as amended and supplemented (N.J.S.A. 38:23B-1 et seq.).

The Veterans' Loan Act was originally enacted in 1944 (P. L. 1944, C. 126) and has since then been supplemented and amended. (P.L. 1954, C. 185, P.L. 1946, C. 121, P.L. 1947, C. 187, C. 188, C. 189, C. 190, P.L. 1949, C. 165, P.L. 1950, C. 216, P.L. 1951, C. 89.)

The Veterans' Loan Act was enacted:

> "to make it possible for certain qualified veterans to obtain: a. venture capital, at low rates of interest, which may be necessary to establish or re-

> establish themselves in a business or profession; and b. loans, at low rates of interest, which may be necessary to enable them to purchase household furnishings and household appliances required by them for use in their homes." (N. J. S. A. 38:23B-1).

To accomplish these purposes, the act created, in the Department of Conservation and Economic Development, a "Veterans' Loan Authority," * * * "a body corporate and politic with corporate succession." (N.J.S.A. 38:23-B-2), "with power to contract, to sue and be sued" and to make rules and regulations, but prohibited from directly or indirectly pledging the credit of the State. (N.J.S.A. 38:23B-3).

A capitalization of $5,000,000.00 was initially provided for by Section 4 of the Act (P.L. 1944, C. 126, Sec. 4, N.J.S.A. 38:23B-4), which reads as follows:

> "The authority shall have an original capitalization of five million dollars $5,000,000.00) which shall be subscribed by the Treasurer of the State of New Jersey, and which is hereby appropriated out of the Post-War Reserve Account of the General State Fund or the balance held as reserve for post-war needs or to meet expenditures of an emergency nature in the State Highway System Fund."

of 1946, which provided that the Authority shall have an additional capitalization of $6,000,000.00:

> "which shall be subscribed by the Treasurer of the State of New Jersey, and which is hereby appropriated out of the Post-War Reserve Account of the General State Fund or the balance held as reserve for post-war needs."

By Section 5 of the Veterans' Loan Act (N.J.S.A. 38:23B-5) all capital and revenues of the Authority were constituted a "veterans loan guaranty and insurance fund", that section providing as follows:

> "All capital and revenues of the authority shall be held in trust in a veterans loan guaranty and insurance fund, hereinafter referred to as the 'fund', to meet the obligations of the authority under this act; *but any amounts in the fund in excess of the total amount of guaranteed or insured loans outstanding at any time shall be subject to such disposition as may be provided by law.* Such amounts in the fund as the authority shall estimate are not needed for its current operations shall be invested and re-invested by the State Treasurer in such obligations as are legal for savings banks of this State." (Underlining ours).

(In the original act, which provided for guaranty of loans to veterans but not for insurance thereof, the fund was designated as a "veterans loan guaranty fund." The designation of the fund was changed to its present form in 1946 when the act was amended to permit a bank to elect to have its loans insured rather than guaranteed. (P.L. 1946, C. 121).

You will note that the quoted section expressly provides a means by which "any amounts in the fund in excess of the total amount of guaranteed or insured loans outstanding at any time" may be recaptured for general State purposes. Such excess is "subject to such disposition as may be provided by law." An act making a disposition of all or part of such excess for state purposes would, in our opinion, be a valid exercise of the reserved power set forth in the act creating the fund.

In view of the express reservation of the right to dispose by law of the excess of the fund, there is no need to consider whether that power would exist in any event if the reservation were not contained in the quoted section.

As a matter of information, we call to your attention that under the provisions of the Veterans' Loan Act:

(a) The Veterans' Loan Authority will cease to function on June 30, 1955. N.J.S.A. 38:23B-22.2, added to the law by Chapter 216 of the Laws of 1950, provides that:

"On June thirtieth, one thousand nine hundred and fifty-five, all of the powers, duties and functions of the Veterans' Loan Authority and all of its records, papers, documents, evidences of obligations, securities, trust funds and property shall be transferred to the State Department of Law and Public Safety and, thereupon, the Attorney-General shall, as speedily as possible, complete any and all unfinished transactions of the said Authority and wind up its affairs. The Attorney-General is authorized and empowered to do and perform any and all acts to effectuate the provisions of this section. Upon the filing with the Secretary of State of a certificate by the Attorney-General that said transactions and affairs have been concluded, the act amended and supplemented by this act shall cease to be operative."

Assembly Bill No. 229, which has not yet been acted upon by the Legislature, would, if enacted, amend this section to change the date for the transfer to the Attorney General from June 30, 1955, to June 30, 1958.

(b) Qualified veterans (as defined in the Act) who served in the active military or naval service of the United States prior to December 31, 1946, are no longer eligible to apply to a bank for a loan under the provisions of the Act; their right to do so expired on June 30, 1951. A qualified veteran who served in the active military or naval service of the United States at any time after June, 23, 1950, and prior to December 16, 1950, or during the period of "national emergency" proclaimed by the President of the United States on December 16, 1950 may apply to a bank for a loan under the provisions of the act not later than two years after his discharge or release from active service (N.J.S.A. 38:23B-8).

(c) Subject to the rules and regulations of the Veterans' Loan Authority, any veteran's loan made under and pursuant to the Act for a period of less than six years may be extended or refinanced in the discretion of the bank without affecting the obligation of the Authority with respect thereto; provided provision is made for complete discharge of the obligation, and interest thereon, not later than six years from the date of the original loan. (N. J. S. A. 38:23B—14)

(d) The sum total of all reserve funds set aside by the Authority in accordance with the insurance provisions of the Act (N. J. S. A. 38:23B—14.3) together with such amount as the Authority may set aside, out of the veterans guaranty and insurance fund, to meet the payment by the Authority of approved veterans' notes submitted to it for purchase in accordance with the guaranty provisions of the Act (N. J. S. A. 38:23B—14.4) is required to be not less than 20% of the total face amount of all approved veterans loans from time to time outstanding (N. J. S. A. 38.23B—14.4a).

(e) The total amount of guaranty and insurance liability of the Authority which may be outstanding at any time may not exceed the sum of $11,000,000.00 (N. J. S A 38.23B—14 5)

(f) The Authority may:

"Authorize payment from the Veterans' Guaranty and Insurance Fund and any income received by the investment of said fund, subject to rules and regulations of the Authority, disbursements, costs, commissions, attorney's fees and other reasonable expenses related to and necessary for the making and protection of guaranteed or insured loans and the recovery of moneys loaned or management of property acquired in connection with such loans." (N. J S A 38 23B—22 1g)

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: HAROLD KOLOVSKY,
Assistant Attorney General

K:P

OCTOBER 27, 1954.

MR. JAMES F. FINN,
Senior Engineer,
Bureau of Navigation,
1060 Broad Street,
Newark 2, New Jersey

MEMORANDUM OPINION P-16

DEAR MR. FINN:

You have submitted to us a copy of application entitled "Application of upland owner on tidal water for a lease or grant of riparian lands" filed with you by one Alexander S. Walker.

The application sets forth that Mr. Walker is the owner, in fee simple, of an island known as "Sedge Island" located in the mouth of Debbies Creek, where the creek joins the Manasquan River in the Borough of Brielle, Monmouth County, and seeks a grant in fee simple of the lands under the tidewaters of the Manasquan River.

You have also forwarded copies of your correspondence, a certificate of title, a map showing the island in question and a copy of the deed by which Mr. Walker claims to have obtained title to "Sedge Island", viz. deed dated June 4, 1954 made by the General Board of Proprietors of the Eastern Division of the State of New Jersey to Alexander S. Walker.

You have also advised us that the island was created from the bed of the Manasquan River, by what means you are unable to state; that the island is flowed by tidewater at mean high water, and that one Carl Yard of Sea Girt, New Jersey, has also asserted a claim of title to the island. You ask whether the application can be processed as a normal grant to an upland owner.

The fundamental question raised by your inquiry is whether or not the General Board of Proprietors of the Eastern Division of New Jersey was seized of title to "Sedge Island" so that the deed from them to Mr. Walker was effective to transfer to him fee simple title to the island. In our opinion, the answer to this question is "No".

"Sedge Island" was created from the bed of the Manasquan River, which, at the place in question, is one of the tidal waters of this state. Title to such tidal rivers and the beds thereof is in the State of New Jersey. The General Board of Proprietors of the Eastern Division of New Jersey, since their surrender of governmental rights in Colonial times, never held title to the tidal waters of the state nor to the beds thereof, nor could they convey the same and convert them into private property. This was settled by our former Supreme Court as far back as 1821 in the case of *Arnold v. Mundy*, 6 N. J. L. 1, in which the New Jersey Supreme Court held that the Proprietors of New Jersey did not, under the grants from the Duke of York, take title to navigable rivers where the tide ebbs and flows and that such tidal waters and the lands under them were the property of the State of New Jersey. Chief Justice Kilpatrick, after setting forth the history of the land ownership in this State in colonial times and following the Revolution, said at 6 N. J. L. 78:

"And I am further of opinion, that, upon the Revolution, all these royal rights (to tidal waters and the beds thereof) became vested in the people of New Jersey, as the sovereign of the country, and are now in their hands; and that they, having, themselves, both the legal title and the usufruct, may make such disposition of them, and such regulation concerning them, as they may think fit and this power of disposition and regulation must be exer-

cised by them in their sovereign capacity; that the legislature is their rightful representative in this respect, and, therefore, that the legislature, in the exercise of this power, may lawfully erect ports, harbours, basins, docks and wharves on the coasts of the sea and in the arms thereof, and in the navigable rivers; that they may bank off those waters and reclaim the land upon the shores; that they may build dams, locks, and bridges for the improvement of the navigation and the ease of passage; that they may clear and improve fishing places, to increase the product of the fishery; that they may create, enlarge, and improve oyster beds, by planting oysters therein in order to procure a more ample supply; that they may do these things, themselves, at the public expense, or they may authorize others to do it by their own labour, and at their own expense, giving them reasonable tolls, rents, profits, or exclusive and temporary enjoyments; but still this power, which may be thus exercised by the sovereignty of the state, is nothing more than what is called the jus regium, the right of regulating, improving, and securing for the common benefit of every individual citizen. The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be grievance which never could be long borne by a free people.

"From this statement, it is seen that, in my opinion, the proprietors, as such, never had, since the surrender of the government, any such right to, interest in, or power over, these waters, or the land covered by them, as that they could convey the same and convert them into private property, and that, therefore, the grant in question is void, and ought not to prevail for the benefit of the plaintiff, and, of course, that the rule to show cause must be discharged."

In our opinion, the grant of "Sedge Island" made by the proprietors to Mr. Walker is void and ineffective for the same reason expressed by Chief Justice Kilpatrick one hundred thirty years ago with respect to another purported grant by the Proprietors—the Proprietors did not have title to the tidal waters of the Manasquan River or the bed thereof.

Mr. Walker does not hold title to "Sedge Island". His application cannot be processed as a normal grant to an upland owner.

I am returning to you herewith the documents which you sent me.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General

By : ROBERT PEACOCK,
Deputy Attorney General

rp/hk ;d

OCTOBER 27, 1954.

HON. EDWARD J. PATTEN,
Secretary of State,
State House,
Trenton 7, New Jersey.

MEMORANDUM OPINION P-17

DEAR MR. SECRETARY:

This will acknowledge your request for an opinion as to when the term of Mr. Ben Horowitz, a member of the State Board of Examiners of Ophthalmic Dispensers and Opthalmic Technicians, expires.

The facts indicate that Mr. Horowitz was one of the original members of the Board created pursuant to L. 1952, c. 336, that the date of his original appointment for the term of one year was September 18, 1952 and that he was re-appointed for a term of five years on September 29, 1953.

You inquire whether his five year term should expire September 18, 1958 or September 29, 1958.

Section 1 of Chapter 336 of the Laws of 1952 (52:17B—41.2 N. J. S. A.), after creating the State Board of Examiners of Ophthalmic Dispensers and Ophthalmic Technicians composed of five members, provides that:

"One ophthalmic dispenser member shall be appointed for a term of one year; another ophthalmic dispenser member shall be appointed for a term of two years; another ophthalmic dispenser member shall be appointed for a term of three years; another ophthalmic dispenser member shall be appointed for a term of four years; and the optometrist member shall be appointed for a term of five years; and upon the expiration of the term of said optometrist member, his successor shall be an ophthalmic dispenser member of said board, so that at the expiration of the optometrist member's term on the board, the board shall thereafter be composed of five ophthalmic dispenser members.

Upon the expiration of the terms of members herein named, the Governor shall annually fill each vacancy resulting from the expiration of a term of office of a member for a term of five years by an appointment of an ophthalmic dispenser in the same manner as an original appointment is to be made.

Each appointee, within thirty days after receipt of his commission, shall take, subscribe and file in the office of the Secretary of State the oath or affirmation prescribed by law.

A vacancy resulting from any cause other than the expiration of a term shall be filled for the unexpired term by an appointment of an ophthalmic dispenser by the Governor in the same manner as an original appointment is to be made."

We are of the opinion that the intendment of this section is a continuity in the terms of office of the members of the Board, that all terms should commence as of the same day and month of the respective year in which the appointment falls due, and that an appointment for a new term is called for annually.

That the legislature has specifically mentioned that the term is for a specified number of years, has made no provision for holdover, but has expressly provided that a vacancy resulting from any cause other than the expiration of a term shall be filled for the unexpired term is helpful in arriving at a determination of the intent. See *Marvel v. Camden County,* 137 N. J. L. 47, Page 49 (E. & A. 1947).

In Clay v. Browne, 96 N. J. L. 303; (Sup. Ct., 1921) affirmed, 97 N. J. L. 315, (E. & A. 1921), in dealing with a statute which provided that "all vacancies in offices in any city of this state arising from or created by any other cause than expiration of term of office shall be filled for the unexpired term only," the court said.

> "When the legislature, by statute, creates an office, and affixes a term to it for which each and every incumbent shall hold it, *****, the resignation of an incumbent thereof, before the expiration of the term so fixed, leaves an uncompleted term, and the vacancy can only be filled in the manner provided by the ***** act ****; that is, for the period that the term has yet to run ******".

In the instant matter, the term is for a specified number of years and the legislature has made no provision for holding over. The incumbent's power to perform the duties of his office ceases upon expiration of his term of office. See 43 Am. Jur. 162, citing *Badger v. United States,* 93 U. S. 599, 23 L. Ed. 991, 1876, wherein the Court stated:

> "By the common law, as well as by the statutes of the United States and the laws of most of the states, when the terms of office to which one is elected or appointed expires, his power to perform its duties ceases."

The clear intent of the Legislature is that the entire Board should not go out of office at once, but that the various members should retire at regularly recurring intervals. Such orderly rotation is necessary in order to create and maintain a continuing body. See *Monte v. Milat,* 17 N. J. Super. 260, 268 (App. Div. 1952).

Chapter 336 of the Laws of 1952 fixes by inteudment the time from which the term of a member of the Board begins to run and, by the same token, the time when the term expires.

Accordingly, the term of Mr. Horowitz should expire September 18, 1958.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General
By : FREDERIC G. WEBER,
Deputy Attorney General

CCR:FOW:kms

HON. ARCHIBALD S. ALEXANDER,
State Treasurer of New Jersey,
State House,
Trenton 7, New Jersey

December 6, 1954.

MEMORANDUM OPINION P-18

Re: *Printing Specifications*

DEAR MR. ALEXANDER:

We acknowledge your inquiry as to whether, under the present purchasing statutes, non-union printers could be excluded from bidding on public advertising for bids on printing work.

Examination of the pertinent statutes fails to disclose any reference to union or non-union suppliers, printers or bidders being denied the right to bid.

The award of contracts for printing to the lowest responsible bidder, after advertisement, has been a requirement since the enactment of P. L. 1895, c. 433,

entitled "An Act relative to public printing, stationery and blanks." In this connection it should be observed here that there are three types of printing, namely, (a) printing of opinions of the courts, (b) general public printing, and (c) departmental printing.

Contracts for printing opinions of the court are not required to be advertised or awarded to the lowest responsible bidder, (*Gann Law Books v. Ferber,* 3 N. J. Super. 236, App. Div. 1949). The Act of 1895 required contracts for both public printing and departmental printing to be awarded to the lowest responsible bidder.

Since 1895 the Legislature has enacted several statutes relating to printing and stationery, and in each instance, although creating or abolishing the name and powers of the agency through which the contracts were let, retained the requirement that contracts for printing be awarded, after advertisement, to the lowest responsible bidder. See P. L. 1895, c. 433; P. L. 1916, c. 68; P. L. 1930, c. 70; P. L. 1931, c. 179 and c. 180 (R. S. 52:25—1, et seq.); P. L. 1944, c. 112, art. 6, sec. 9; P. L. 1948, c. 92 (N. J. S. A. 52:18A—19).

In 1954, the Legislature enacted a statute, (P. L. 1954, c. 48), requiring contracts in excess of $2,500.00 to be advertised. There are provisions in the act for exception to this rule, but they are limited to those situations where it has been determined by the proper officials that advertising is of no practical utility, or where the nature of the transaction is such that time is of the essence and delay occasioned by such advertising may prevent the State from securing the most favorable terms.

This statute expressly repealed P. L. 1930, c. 70, par. 1, p. 298, (R. S. 52:34—1) which required public advertising for bids, and R. S. 52:34—3, which required the awarding of contracts to the lowest responsible bidder, but its legislative intent to promote the maximum competition among sellers and suppliers is clearly evident in all cases, whether contracts are advertised or not, by Section 7 (d) which provides:

> "Whenever advertising is required, * * * (d) award shall be made with reasonable promptness by a written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the State, price and other factors considered."

The requirements of the 1895 act and subsequent legislation down to the present act (P. L. 1954, c. 48) make it clear that the Legislature's sole purpose was to secure economy, prevent fraud and favoritism by requiring awards of contracts to the lowest responsible bidder, and thus protect the interests of the taxpayer.

It is our opinion that non-union printers cannot be excluded from bidding on printing work to be done for the State.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General
By: ROGER M. YANCEY,
Deputy Attorney General

RMY:BK

DECEMBER 6, 1954.

HON. DWIGHT R. G. PALMER,
State Highway Commissioner,
1035 Parkway Avenue,
Trenton, New Jersey.

MEMORANDUM OPINION P-19

DEAR COMMISSIONER PALMER:

You request our opinion on the right of set-off by one department of the State for liability in favor of another department of the State.

Specifically, the State Highway Department owes White & McColl, Inc., a Delaware corporation, an unpaid balance of $10,758.13 on a highway construction contract. White & McColl, Inc. is itself indebted to the Division of Employment Security of the Department of Labor and Industry under the provisions of the unemployment compensation law (R. S. 43:21—1 et seq.) in the amount of $13,877.42.

We are satisfied that such a set-off is permissible. White & McColl, Inc. should be thus notified. The mechanics of the transfer of $10,758.13 from the State Highway Department to the Division of Employment Security account can be worked out by the Division of Budget and Accounting through a certificate charging the State Highway Department account with that amount and crediting it to the Division of Employment Security as an appropriated receipt.

In the absence of a statutory bar or a trust obligation, the right of the State to set off in its dealings with contracting parties is incidental to its sovereign right to contract for the accomplishment of public purposes. Denial of the right to set off would put the State at an extraordinary disadvantage in dealing with contracting parties, compelling extra litigation. There is no such statutory restriction.

Two decisions of the courts in recent years have denied the State or a governmental subdivision the right to set off claims in its favor because of the status of the claimant against it as a trust beneficiary. In *National Surety Corp. v. Barth,* 11 N. J. 506 (1953); the State of New Jersey attempted to set off its claims for unemployment and disability taxes in an action against it for moneys owed on veterans housing construction contracts. The Supreme Court disallowed a set-off on the ground that the moneys for payment of veterans housing contractors were derived from the proceeds of a bond issue and from federal government grants for purposes of public housing only, thus constituting a trust fund.

The same result was reached in *Goodwillie v. City of Bayonne,* 2 N. J. 88 (1949). The City of Bayonne was compelled to pay over funds held by it as a fiduciary for the express purpose of construction of a marine terminal from the proceeds of a bond issue and from federal government grants, despite its claim in an individual capacity against the trust fund beneficiary plaintiff.

These cases are not decisive authorities here. The moneys for the highway project out of which the White & McColl, Inc. indebtedness arose were not federal highway grants but were appropriated by the State for this purpose. Further, N. J. S. 2A:44—147 is not available to protect White & McColl, Inc. against set off. This statute impresses a trust upon funds paid over by the State to a general contractor.

The amount of $10,758.13 retained by you pursuant to the Division of Employment Security's request should therefore be credited forthwith to that division.

Very truly yours,
GROVER C. RICHMAN, JR.,
Attorney General
By: DAVID D. FURMAN,
Deputy Attorney General

DDF:rk

DECEMBER 15, 1954.

MR. A. H. UNDERHILL, *Director,*
Division of Fish and Game,
Department of Conservation and Economic Development,
State House,
Trenton, New Jersey.

MEMORANDUM OPINION 1954 P-20

DEAR MR. UNDERHILL:

We have your request for an opinion as to the meaning of the word "miles" in N. J. S. A. 23:3—47, providing for the issuance of a license for a vessel to take with shirred or purse seine, otter or beam trawl, fish of any kind, excepting striped bass, in the waters of the Atlantic Ocean within the jurisdiction of this State at a distance of not less than two miles from the coast line.

In our opinion, the word "miles" as used in the quoted statute, refers to the geographical, marine, or sea mile of 6086.7 feet on the sea, not the land or statute mile of 5280 feet.

The word "mile" is a measure of length or distance, which may refer either to a land mile or a geographical, marine or sea mile (40 C. J. 658), the particular meaning being determined by the subject of measurement to which it was intended to be applied.

Since the cited statute refers to distances on the Atlantic Ocean measured from the coast line, it seems clear to us that this measurement over the waters of the Atlantic Ocean requires the use of the geographical, marine, or sea mile, not the land mile.

Very truly yours,
GROVER C. RICHMAN, JR.,
Attorney General
HAROLD KOLOVSKY,
Assistant Attorney General

HK:g

DECEMBER 15, 1954.

MR. WILLIAM J. JOSEPH,
Secretary, Old Age and Survivor's Insurance,
State House Annex,
Trenton 7, New Jersey.

MEMORANDUM OPINION P-21

DEAR MR. JOSEPH:

This is in further answer to your letter of December 7th, 1954 in which you ask whether certain categories are covered under the Federal Social Security Act, and also whether the persons employed within these categories are within State service or in the service of some other public employer. We understand from you that groups of members are properly coverable under the Federal Social Security Act if they are employed by the State of New Jersey, a political sub-division of the State or a wholly owned instrumentality of the State or its political sub-divisions.

In deciding the various questions put to us, we have been mindful of N. J. S. A. 43:22—1, which provides:

"In order to extend to certain persons holding office, position or employment in the service of the State and of any county, municipality or school district and of any public department, board, body, commission, institution, agency, instrumentality or authority of, or in, the State and of, or in, any county, municipality or school district in the State and to the dependents and survivors of such persons, the basic protection accorded to others by the old-age and survivors insurance system embodied in the Federal Social Security Act, it is hereby declared to be the public policy of this State, subject to the limitations of this Act, that such steps be taken as to provide such protection to such persons, on as broad a basis as is permitted under the Social Security Act."

(1) EMPLOYEES OF COUNTY DISTRICT COURTS

Employees of County District Courts are properly coverable since they are employed by the various counties which are political sub-divisions of the State. They are in the service of the various counties.

N. J. S. 2A:6—26 provides:

"The salary or compensation of the clerks, deputy clerks, clerical assistants, sergeants at arms, and other personnel, excepting district court judges, holding positions, office or employment, in the county district courts of this state, shall be fixed by the respective boards of chosen freeholders charged with the payment of such salary or compensation, but nothing in this section shall be deemed to authorize a decrease in compensation of any such officers or employees heretofore granted by any board of chosen freeholders."

N. J. S. 2A6—31 provides:

"In each county the board of chosen freeholders shall provide for and maintain the county district court of the county and shall provide suitable quarters, furnishings and equipment for the court and for the branch parts of the court, if any, and may provide convenient places in the county for the holding of sessions of the court in addition to the place of its principal location. The said board of chosen freeholders shall also provide a central place for the keeping of the permanent records of the court. The said board of chosen freeholders shall appropriate annually in their annual budget such moneys as are necessary to provide for the salaries and other expenses of the county district court."

(2) MEMBERS OF COUNTY TAX BOARDS

Members of county tax boards are properly covered since they are employed by the State of New Jersey, and are within the service of the State. They are appointed by the Governor.

R. S. 54:3—6 provides that "the salaries of the members of the several County Boards of Taxation shall be paid by the State Treasurer upon warrants drawn by the Director of the Division of Budget and Accounting in the Department of the Treasury".

In Warren v. Hudson County 135 N J L 178, (Ct. of E&A., 1946), the court stated:

". . . The county boards of taxation are an integral part of the State tax system, and as such their status is necessarily that of State agencies having specified functions in the administration of a system for the assessment and collection of taxes . . "

Furthermore, in Dr. Feo v. Smith, 31 N J Super 474 (App. Div. 1954), the court states:

"The County board of taxation is not subordinate to the board of chosen freeholders. While the county board of taxation exercises a jurisdiction that is confined within definite territorial limits, its duties concern the state at large in a government field of major importance . . . Its status is necessarily that of a state agency having specific functions in the admininistration of a system for the assessment and collection of taxes."

(3) MEMBERS OF THE CIVIL SERVICE COMMISSION

Members of the Civil Service Commission are properly coverable since they are employed by the State of New Jersey, and are within the service of the State. R. S. 11:1-1. Et seq. They are appointed by the Governor, and paid by the State.

(4) MOTOR VEHICLE AGENTS AND THEIR EMPLOYEES

Motor vehicle agents and their employees are not properly coverable. They are not in State service. Motor vehicle agents are appointed pursuant to R. S. 39:3-3. No provision is made under this legislation for employees of a motor vehicle agent.

In *Carluccio v. Ferber 18 N. J. Super. 473,* (App. Div. 1952) the court states:

". . . the agent designated under R. S. 39:3—3 may act only until his authority is revoked by the Director, and his compensation is based upon registration certificates issued by him and for every license granted by him, and the Director has authority to limit the fee so paid to a maximum. The legislature obviously intended to, and did, place in the hands of the Director large and unusual determinative powers, including the designation and removal, and the fixing of the number and the compensation of such agents. Plainly, the agent is not within the class of persons in public service contemplated by the legislature to be limited to persons holding 'employment, position or office and receiving a salary from such State.' "

(5) LICENSING AGENTS OF THE DIVISION OF FISH AND GAME:

Licensing agents of the Division of Fish and Game do not properly constitute a coverage group and are not State employees.

R. S. 23:3-7, as amended, provides that licenses to hold or fish shall be procured from the Clerk of any County or municipality "or any agent designated by the Division of Fish and Game to issue licenses".

R. S. 23:3-9, as amended, provides that the issuance fees may be retained by the municipal and county clerks, "but in a case of the agents designated by the Division to issue licenses, the retention of the issuance fees shall be at the discretion of the Division".

(6) MEMBERS OF THE BOARD OF BARBER EXAMINERS AND THE BOARD OF BEAUTY CULTURE CONTROL

Members of these boards are properly coverable, and are within State service.

The Board of Barber Examiners is created pursuant to R. S. 45:4-45, as amended, et seq. Its members are appointed by the Governor. R. S. 45:4-48, as amended, provides that the member of the Board who is elected Secretary-Treasurer "shall receive a compensation of Fifty-Five Hundred Dollars per annum and devote his full time to the supervision of office and field workers."

It further provides that the other members of the Board shall receive a compensation of Five Thousand Dollars per annum and devote full time to their duties.

R. S. 45:4-49 provides as follows:

"All moneys received pursuant to the provisions of this act shall be paid into the treasury of this State. Of said revenues, a sum is hereby appropriated sufficient to pay the expenses incurred by the State Board of Barber Examiners in the administration of this act and shall be paid from the moneys so received as aforesaid. All such expenditures shall be made by the treasurer on warrant of the comptroller after approval by the secretary-treasurer of the State Board of Barber Examiners; provided however, that any such expense of administration shall at no time exceed the moneys so received to the end that the commission created by the provisions of the

act shall, at all times, be self-sustaining; and provided further, that any surplus remaining in such fund in the hands of the treasurer at the close of any fiscal year shall revert to and become a part of the general fund of the State. The board shall report annually to the Governor of its receipts and expenditures and also, a full statement of its work during the year together with such recommendations as it may deem expedient."

With respect to the Board of Beauty Culture Control, it was created pursuant to N. J. S. A. 45:4A—2. Members are appointed by the Governor, and receive an annual compensation of Twenty-Five Hundred Dollars per annum, plus travelling expenses.

N. J. S. A. 45:4A-3 provides that "the member elected Chairman shall receive an additional One Thousand Dollars per annum".

(7) MEMBERS OF THE BOARD OF BAR EXAMINERS

Members of the Board of Bar Examiners properly constitute a coverage group, and are within State service.

The Board of Bar Examiners is constituted pursuant to Supreme Court Rule 1:19—1. Members are appointed by the Supreme Court for a term of three years.

N. J. S. 2A:13-7 provides that each bar examiner shall be paid a salary to be fixed by the Supreme Court.

(8) MEMBERS OF THE STATE BOARD OF TAX APPEALS

Members of the State Board of Tax Appeals are properly coverable and are within State service.

R. S. 54:2-3 et seq., as amended, provides for the creation of a Division of Tax Appeals within the State Department of Taxation and Finance, consisting of 7 members. The members receive annual salaries from the state as fixed by law.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

By: CHARLES S. JOELSON,
Deputy Attorney General.

CSJ:lmv

JANUARY 12, 1955.

HONORABLE FREDERICK M. RAUBINGER,
Commissioner of Education
175 West State Street,
Trenton, New Jersey.

FORMAL OPINION—1955. No. 1

DEAR COMMISSIONER:

You have requested our opinion on the following question arising under Chapter 249 of the Laws of 1954, providing for a minimum salary schedule for teachers:

> "Does a teacher, who is employed at a salary above the minimum prescribed by the statute, receive an annual increment of $150 until he has reached the maximum required by the statute for his classification; or, is the board of education within its rights in withholding such increments until his experience matches his salary as provided in the minimum salary schedule?

In our opinion, the latter alternative embodies the correct interpretation of the law.

Section 2 of the act states that "Except as hereinafter provided, the salary schedule for teachers in this State shall be as follows". Then follows a schedule of three columns headed "Years of Employment", "Salary", and "Employment Increment", respectively. For the first year of employment, the salary column shows $3,000, and the increment column is blank. For the second and succeeding years ending with 17, the salary is $150 higher than for the previous year, and under the employment increment column appears for each year the figure $150. Thus, for the thirteenth year of employment, a teacher is entitled to a salary of $4,800, having received the benefits of twelve previous employment increments of $150 each, totaling $1,800. By a footnote to the schedule, only teachers who hold a bachelor's degree or the equivalent, are "entitled to the salary set forth in steps 14 and 15", and only teachers who hold a master's degree or the equivalent are "entitled to the salary set forth in steps 16 and 17."

Section 3 of the act provides:

> "Any teacher now holding office, position, or employment in any school district of this State at the time of the effective date of this act shall be entitled annually to an employment increment until he shall have reached the maximum salary provided in section 2 of this act."

The plain implication of Sections 2, and 3, in our opinion, is that no board of education can be compelled to give a teacher without a bachelor's degree or the equivalent a salary of more than $4,800, or a teacher with any kind of degree more than $5,400.

We are thus faced with the question whether a teacher who is receiving at any time a higher salary than that prescribed by the schedule for his number of years of employment is nevertheless entitled to an annual increment of $150 until he reaches $4,800 in case he has no degree, $5,100 if he has a bachelor's degree, and $5,400 if he has a master's degree. The affirmative position on this question might be supported by a literal interpretation of section 3, which governs teachers already employed: and by the first sentence of section 7, which reads:

> "The schedule set forth in this act is intended to prescribe a minimum salary at each step, and any increment prescribed shall also be considered a minimum."

The argument might also point to the definition of "Employment increment", in Section 1 of the act, which is stated to mean "an annual increase of $150" granted to a teacher for one "year of employment" and the definition of "Adjustment increment", which is stated to mean "in addition to an 'employment increment', an increase of $150 granted annually as long as shall be necessary to bring a teacher, lawfully below his place on the salary schedule according to years of employment, to his place on the salary schedule according to years of employment". From these sections, it might be argued that a teacher must receive a minimum increment of $150 for each year of employment until he reaches his maximum on the schedule, regardless of his starting or present salary. We do not believe, however, that this view can be squared with the purpose or intent of the law, which is the controlling consideration in construing legislation. *Wright* v. *Vogt*, 7 N. J. 1, 6 (1951).

Section 8 provides that "Nothing contained in this act shall be construed * * * to prevent the adoption of any salary schedule which shall meet its minimum requirements". Section 4 allows any board hereafter employing a teacher to fix his initial salary at less than that provided in the schedule set forth in Section 2. Section 5 provides that on or after September 1, 1955, any teacher "who is below his place on the salary schedule according to years of employment shall receive on

said date and annually thereafter an adjustment increment until he shall have attained his place on the schedule according to his years of employment". These last noted sections, coupled with Section 2, manifest an overall design in the statute to prescribe merely the minimum compensation to which a teacher is entitled at any particular point until he reaches the maximum salary shown on the schedule. If an annual employment increment of $150 were mandatory regardless of the fact that the teacher was already receiving a higher salary than that prescribed in Section 2, the board would be obliged every year thereafter to pay the teacher more than the minimum salary required by the law for his years of employment, until he had reached the maximum provided on the schedule for a person of his qualifications. For example, a teacher who has no degree and who started, without previous experience, at a salary of $4,000, would be receiving the $4,800 maximum in six years, although on the schedule such a salary would not be required for a person with less than 13 years of employment if his starting salary had been at or below $3,000. We do not believe that the act was intended to bind local boards of education to any such acceleration to the maximum required under the schedule.

Moreover, the evident aims of the act include attracting good teachers into New Jersey from other States and making teaching attractive to young people as a career. One of the surest ways of attracting teachers is to give them high starting salaries. Many boards of education now have schedules or school guides which provide starting salaries considerably greater than those fixed by the act for teachers with the same degree of experience but which provide smaller or fewer increments because of the higher starting salaries. If such boards were obliged by law to award annual increments of $150 each regardless of starting or present salaries, many boards would be forced by budget considerations to lower the amount of their starting salaries—a result obviously not intended by the Legislature. An interpretation of the statute which leads to an undesirable result is not to be favored. *In the Matter of Application of Vaccaro*, 1 N. J. Super. 591, 599 (Law Div. 1948); *State* v. *Gratale Brothers, Inc.*, 26 N. J. Super.. 581, 585 (App. Div. 1953).

For the foregoing reasons, we have come to the conclusion that the provisions of the act regarding annual employment increments do not apply to any teacher so long as he is receiving a salary in excess of that provided on the schedule of Section 2 for his number of years of employment.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General,

By: THOMAS P. COOK,
Deputy Attorney General.

tpc;b

JANUARY 31, 1955.

HONORABLE WILLIAM F. KELLY, JR.,
President, Civil Service Commission,
State House,
Trenton 7, New Jersey.

FORMAL OPINION—1955. No. 2.

DEAR COMMISSIONER KELLY:

Your department has inquired as to the propriety of the appointment of a Township Engineer in Parsippany-Troy Hills. The correspondence attached to the request indicates that in Parsippany-Troy Hills on July 1, 1954 there was placed in effect a Council-Manager form of government known as Council-Manager Plan "A" as provided for by the Optional Municipal Charter Law, N. J. S. A. 40:69A-81, et seq. We understand that previously the electorate of the township had voted by referendum to be governed by the provisions of the Civil Service Law with respect to personnel matters. Anthony J. Mara, Public Works Superintendent since 1936, complains that on July 20, 1954 the Manager appointed one Henry H. Ahlers, Township Engineer, without compliance with the Civil Service Law and that the duties of the Public Works Superintendent were transferred to the newly appointed Township Engineer. Mr. Mara claims to have suffered a demotion and demands a hearing. The Manager, on the other hand, requests that " * * * the position of 'Superintendent of Public Works' be reexamined by your classification section."

Whether Mr. Mara has suffered a demotion or reduction is a factual question which should be determined, after a hearing, in accordance with the appropriate provisions of the statutes and rules. See: R. S. 11:21-4, R. S. 11:22-38; N. J. S. A. 11:2A-1; Civil Service Rule 58, 59 (4); *Scancarella* v. *Department of Civil Service*, 24 N. J. Super. 65, 69, 93 A. 2d 637 (App. Div. 1952). This is a matter properly within the jurisdiction of the Commission.

We cannot agree, however, that the Commission has the authority to establish different duties than those heretofore established for the office of Superintendent of Public Works as requested by the Manager. This we conceive to be the function of the municipal council. N. J. S. A. 40:69A—29 grants to each municipality the power to

> "organize and regulate its internal affairs, and to establish, alter, and abolish offices, positions and employments and to define the functions, powers and duties thereof and fix their term, tenure and compensation;"

N. J. S. A. 40:69A-90 provides,

> "The municipal council shall continue or create, and determine and define the powers and duties of such executive and administrative departments, boards and offices, in addition to those provided for herein, as it may deem necessary for the proper and efficient conduct of the affairs of the municipality, including the office of deputy manager which shall not be included in the classified service under Title 11 of the Revised Statutes. Any department, board or office so continued or created may at any time be abolished by the municipal council."

The Commission has great power with respect to the creation of positions and the assignment of duties thereto in the state service. It has the power to adopt classification and compensation plans, R. S. 11:5-1, as amended: R. S. 11:7-1, to supervise the division, combining, altering or abolishing of positions; R. S. 11:7-2, and through its Chief Examiner investigate the " * * * need for every existing

position in the classified service * * * ", R. S. 11:7-5. All of the foregoing powers relate to officers and positions in the state service. Significantly, we find no counterpart in Subtitle 3 of Title 11 of the Revised Statutes and the several amendments and supplements thereto dealing with Counties, Municipalities and School Districts. The inference to be drawn from this obvious omission is that the legislature intended the municipalities to exercise a degree of what has been commonly called "home rule" with relation to the creation of offices and positions and the assignment of duties to them. See also: N. J. S. A. 40:69A—29, R. S. 40:48—1. Public employees have no vested right in having their positions continued unchanged; so long as reclassification powers are exercised reasonably and in good faith their use should not be hindered. Cf. *Carls v. Civil Service Commission,* 17 N.J. 215 (decided January 10, 1955). Whether a change in duties of a municipal employee is a reasonable and *bona fide* exercise of the locally vested power or whether it amounts to a demotion or reduction is a question to be determined by the Commission based upon evidence which might be adduced at a hearing.

We turn now to the question whether the Manager has the power to appoint a Township Engineer in the unclassified service. We find no specific mention of this office or position in R. S. 11:22-2, as amended, wherein unclassified offices and positions are listed. There is no specific provision in the Optional Municipal Charter Law permitting the appointment of a Municipal Engineer for a fixed term. And we are aware of no reason why the post could not be filled by competitive examination, non-competitive examination, or minimum qualifications as set forth in N. J. S. A. 11:22-50. It is possible that the position may be regarded as heading a department and thus be unclassified pursuant to the provisions of R. S. 11:22-2(d), as amended, but facts bearing on this question have not been presented to us.

It is true that under the form of government previously in effect in Parsippany-Troy Hills (Township Committee) the Township Engineer was appointed for a definite term, R. S. 40:145-12 and 13. Hence, his position was regarded as unclassified and not subject to the provisions of the Civil Service Law, *Browne v. Hagen,* 91 N. J. L. 544 (E. & A. 1918). The provisions of that statute are no longer applicable to Parsippany-Troy Hills, however. Under the Optional Municipal Charter Law after a new form of government has been adopted by the voters, " * * * the municipality shall thereafter be governed by the plan adopted, by the provisions of general law * * *." N. J. S. A. 40:69A-26. The term "general law" is defined as "* * * any law or provision of law, not inconsistent with this act, heretofore or hereafter enacted which is by its terms applicable or available to all municipalities * * *." The statutes governing townships not being applicable or available to all municipalities are not within the scope of the term "general law" as used in the Optional Municipal Charter Law and are thus not applicable any longer to Parsippany-Troy Hills. The Civil Service Law on the other hand is available to all municipalities through referendum, R. S. 11:20-1, as amended, and is thus applicable as "general law" to the selection of employees in Parsippany-Troy Hills.

N. J. S. A. 40:69A-29 empowers each municipality governed by the provisions of the Optional Municipal Charter Law

> " * * * *subject to the provisions of this act or other general law* * * * to establish, alter, and abolish offices, positions and employments and to define the functions, powers and duties thereof and *fix their term, tenure and* compensation * * *." (Emphasis supplied.)

An argument might be made that the power to fix terms grants power to appoint individuals to positions in a manner which would result in the position's being treated as unclassified on the authority of *Browne v. Hagen,* supra. We have emphasized the language quoted above "subject to the provisions of this act or other general law" because in our opinion the language incorporates by reference the Civil Service Law. In *Davaillon v. Elizabeth,* 121 N. J. L. 380 (Sup. Ct. 1938) it was held that section 40:48-1 of the Revised Statutes granting the governing body of every municipality the authority

> " * * * to prescribe and define, *except as otherwise may be provided by statute,* the duties and *terms* of office of all officers, clerks and employees * * *",

did not permit a municipality to create for a fixed term and fill, without adherence to the Civil Service Law, the position of city clerk. At 121 N. J. L. 383 the Court said,

> "But the Civil Service act of 1908 (Comp. Stat. 1910, p. 3795; R. S. 1937, 11:1-1 et seq), adopted by the defendant municipality on November 4th, 1913, plainly falls into the category of general legislation, and therefore the qualifying phrase 'except as otherwise provided by law,' contained in section 40:48—1, R. S. 1937, serves to subject the exercise of the power so conferred to the provisions of that enactment."

The rationale of the *Davaillon* case dealing with the position of City Clerk is equally applicable to the case at hand wherein the position or office of Township Engineer is concerned.

Therefore, for all of the foregoing reasons, we advise you that under the facts presented the appointment of a Township Engineer for a fixed term without adherence to the Civil Service Law must be regarded as improper.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General,

By: JOHN F. CRANE,
Deputy Attorney General.

JFC:b

FEBRUARY 10, 1955.

DR. FREDERICK M. RAUBINGER,
Commissioner of Education,
175 West State Street,
Trenton, New Jersey.

FORMAL OPINION—1955. No. 3.

DEAR COMMISSIONER:

You have requested our opinion as to whether school nurses who are employed without a certificate, pursuant to chapter 133 of the laws of 1947 (N. J. S. A. 18:14-56.3), qualify for placement on the minimum salary schedule for teachers established by chapter 249 of the laws of 1954.

In our opinion, the answer is in the affirmative.

The salary schedule referred to is for "teachers in this state", and the act provides that the term teacher "shall include any full-time member of the professional staff of any district or regional board of education or any board of education of a county vocational school, the qualifications for whose office, position, or employment are such as to require him to hold an appropriate certificate issued

by the State Board of Examiners in full force and effect in this State and who holds a valid permanent, limited or provisional certificate appropriate to his office, position, or employment". The narrow question here is whether school nurses fall within the classification of "teacher" as that term is used in Chapter 249, P. L. 1954.

Chapter 133 of the Laws of 1947 initiated the requirement of certification of school nurses by the State Board of Examiners, thus placing such nurses on a par with school teachers in this respect. However, that act contained the following section (N. J. S. A. 18:14-56.3):

> "No board of education shall terminate the employment, or refuse to continue the employment or re-employment, of any nurse appointed prior to the effective date of this act for the reason that such nurse is not the holder of any such certificate and the State Board shall make no rule or regulation which will affect adversely the rights of any nurse under any certificate issued to her prior to the effective date of this act."

The plain intent of the above quoted section was to eliminate the requirement of certification in the case of nurses already employed at the time the law took effect, thus avoiding the disruption which would ensue if the certification requirement were retroactively applied to such nurses.

We have come to the conclusion that full-time school nurses who either hold a permanent, limited or provisional certificate issued by the State Board of Examiners, or who are employed without a certificate pursuant to N. J. S. A. 18:14-56.3, are "teachers" entitled to the benefits of Chapter 249, P. L. 1954.

Although one does not ordinarily associate the word "teacher" with the nursing profession, a school nurse is a special kind of nurse who, in addition to receiving her basic training in that profession, is qualified to—and frequently does—*teach* in the schools such subjects as personal hygiene, home nursing, first aid and nutrition. In order to obtain certification by the State Board of Examiners as a school nurse, she must have successfully completed courses in each of several specified fields including public school curriculum, materials and methods in health education, school health services and problems, and child growth and development. *See Rules Concerning Teachers' Certificates,* issued by the State Department of Education, 18th Edition (July 1, 1951), pages 64-65.

Full-time school nurses who do hold one of these prescribed certificates are literally included in the legislative definition of "teacher" as noted above. We find no reason to narrow, by construction, the broad sweep of that definition.

Nurses who hold their positions by virtue of Section 18:14-56.3 do not fall within the express terms of the definition, but neither are they excluded. The act provides, as we noted, that the word "teacher" shall "include" professional persons holding certificates, etc.; the word "include" denotes that other persons may also meet the description if the sense of the statute warrants it. See *State v. Rosecliff Realty Co.,* 1 N. J. Super. 94, 101 (App. Div. 1948).

Chapter 249 of the laws of 1954 must be read in conjunction with chapter 133 of the laws of 1947 in order to effectuate the general legislative policy, since the statutes are *in pari materia. Miller v. Board of Chosen Freeholders of Hudson County,* 10 N. J. 398, 415 (1952); *Lynch v. Borough of Edgewater,* 8 N. J. 279, 286 (1951). Moreover, in the interpretation of the statutes, "exceptions are implied to give effect to the general legislative intent shown by the context; they may arise by the law of reason, though not expressly mentioned." *Wright v. Vogt,* 7 N. J. 1, 7 (1951).

Applying these canons of construction, we are convinced that the law-makers did not intend that the benefits of chapter 249, P. L. 1954. should be available to nurses who hold the qualifying certificates and not to those who hold their positions by virtue of the earlier statute without such certificates. There would be no reason to so discriminate against the older nurses who had acquired experience and even tenure before the 1947 act. In our opinion, that part of the definition of "teacher" which requires the holding of an appropriate certificate issued by the State Board of Examiners is intended to denote generally the classes of positions which require certification of an applicant who is now entering the school system for the first time.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

By: THOMAS P. COOK,
Deputy Attorney General.

MARCH 2, 1955.

HONORABLE ARCHIBALD S. ALEXANDER,
State Treasurer,
Trenton, New Jersey.

FORMAL OPINION—1955. No. 4.

DEAR MR. TREASURER:

This will acknowledge receipt of your recent communication by which you request our opinion on the following question:

> Where a claim for repayment of money, in the custody of the State Treasurer pursuant to a custodial judgment entered under the provisions of Article 3, Chapter 37, Title 2A, N. J. S., is made as provided in Section 2A:37-32 N. J. S. may the State Treasurer delegate the duty of determining the validity of such claim to one or more subordinate officers or employees within the department of the Treasury?

The procedure by which a claim for the repayment of money, in the custody of the State Treasurer under the provisions of Article 3, Chapter 37, Title 2A N. J. S., is to be made and paid may be found in Section 2A:37—32 N. J. S. which provides in part:

> "* * * If a claim is made to the state treasurer within such period of 2 years, and he shall determine that the claim is valid, he shall pay the moneys so claimed to the person entitled thereto. If the state treasurer shall determine that the claim is not valid, he shall reject the claim. The claimant may thereupon apply to the superior court, chancery division, for a review of his determination, and the claim shall thereupon be heard and determined, de novo."

It is a general rule of law that, in the absence of a statute to the contrary, a public officer may delegate those powers which are ministerial in nature but not those which are discretionary. *The Law of Public Offices and Officers,* Mechem Sections 567, 568, *Public Officers,* Throop Section 570.

In 67 *C. J. S. Officers* Section 104, it is stated:

> "In the absence of statutory authority a public officer cannot delegate his powers, even with the approval of a court. An officer, to whom a power of discretion is intrusted, cannot delegate the exercise thereof except as prescribed by statute. He may, however, delegate the performance of a ministerial act, as where, after the exercise of discretion, he delegates to another the performance of a ministerial act to evidence the result of his own act of discretion."

Also, in 43 *Am. Jur. Public Officers* Section 461, it is said:

"Official duties involving the exercise of discretion and judgment for the public weal cannot be delegated. They can be performed only in person."

This rule has been followed in *State v. Howard,* 74A 392 (Sup. Ct. Vt. 1909) *State, Danforth, pros. v. Paterson* 34 N. J. L. 163, (Sup. Ct. 1870) *Sodekson v. Lynch, et al.* 9 N. E. 2nd, 372 (Sup. Jud. Ct. Mass. 1937) *Broderick v. City of New York* 67 N. E. 2nd 737, (N. Y. Ct. App. 1946).

While the Courts have experienced some difficulty in giving the terms "ministerial" and "discretionary" a practical working definition, *Note,* 26 *Mich. L. Rev.* 933 (1928), they have recently been defined with approval as follows:

"A ministerial act is one which a person or board performs upon a given state of facts, in a prescribed manner, in observance of the mandate of legal authority and without regard to or the exercise of his own judgment upon the propriety of the act being done.

"Discretion may be defined, when applied to public functionaries, as the power or right conferred upon them by law of acting officially under certain circumstances, according to the dictates of their own judgment and conscience, and not controlled by the judgment or conscience of others." Inde-..... *pendent School Dist. of Danbury v. Christiansen,* 49 N. W. 2nd 263 (Sup. Ct. Iowa 1951).

While it is manifest that the proper exercise of any delegated ministerial function involves some degree of discretion, where the legislative intent may be reasonably said to include the judgment and discretion of the public officer, there can be no delegation of the discretion so conferred. Cf. *Schwartze v. Camden,* 77 N. J. Eq. 135 (Ch. 1910). When it is considered that the claims made under Section 2A:37-32 N. J. S. may be repaid without limitation as to amount, No. 21 *Opinions of the Attorney General of New Jersey,* 1954, it is reasonable to say that the legislative intent included the judgment and discretion of the State Treasurer.

Accordingly, there being no statutory authority to delegate, the duty imposed upon the State Treasurer by Section 2A:37-32 N. J. S. to determine the validity of claims for repayment of money in his custody cannot be delegated.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: CHARLES J. KEHOE,
Assistant Deputy Attorney General.

CJK:MG

MARCH 4, 1955.

HON. FREDERICK J. GASSERT, JR.,
Director, Division of Motor Vehicles,
State House,
Trenton, New Jersey.

FORMAL OPINION—1955. No. 5.

DEAR DIRECTOR GASSERT:

Our opinion has been requested (1) as to the power of a municipality, (the Borough of Demarest in this case) to pass an ordinance establishing "no through" streets on which all traffic will be prohibited other than that whose destination is to some point on that street, and (2) if such power exists, is such an ordinance subject to your approval.

N. J. S. A. 39:4-197 provides that:

"No municipality shall pass an ordinance or resolution on a matter covered by or which alters or in any way nullifies the provisions of this chapter (the Motor Vehicle and Traffic Act) or any supplement to this chapter; except that ordinances and resolutions may be passed regulating special conditions existent in the municipality on the subjects and within the limitations following:

(1) Ordinance

a. Altering speed limitations as provided in section 39:4-98 of this Title;
b. Limiting use of streets to certain class of vehicles;
c. Designating one-way streets;
d. Designating stops, stations or stands for omnibuses;
e. Regulating the stopping or starting of street cars at special places, such as railroad stations, public squares or in front of certain public buildings;
f. Regulating the passage or stopping of traffic at certain congested street corners or other designated points;
g. Regulating the parking of vehicles on streets and portions thereof including angle parking as provided in section 39:4-135 of this Title;
h. Regulating the parking of vehicles upon grounds, other than a street or highway, owned or leased and maintained by the municipality, or any school district board of education therein, including any lands devoted to the public parking of vehicles, the entrances thereto and exits therefrom.

(2) Ordinance or resolution

a. Designating through streets as provided in article 17 of this chapter (39:4-140 et seq.);
b. Designating and providing for the maintenance as 'no passing' zones of portions of highway where overtaking and passing or driving to the left of the roadway is deemed especially hazardous."

The power to designate "no through" streets is not among the powers granted to a municipality by this section, nor is such power granted by any other provision of our statutes. The power to designate main traveled or major highways within the municipality as a "through street," to be marked at the entrance thereto from intersecting streets by "stop" signs is given by N. J. S. A. 39:4-197 and 39:4-140, but an ordinance designating such through street cannot be effective until it is approved by you, this because N. J. S. A. 39:4-202 provides:

"No resolution, ordinance or regulation passed, enacted or established under authority of this article, shall be effective until submitted to and approved by the director as provided in section 39:4-8 of this Title."

There is no inherent power vested in a municipality by which it may legally restrict the right of the public to the free use of streets and roads. Any right of the municipality to pass ordinances and resolutions regarding the flow of traffic over its streets and highways can arise only by legislative grant; and there has been none.

Even where the subject matter of the ordinance is within the power granted by the statute, the regulation must bear a reasonable relationship to public safety; there cannot be arbitrary action. (See *Garneau v. Eggers,* 113 N. J. L. 245, 248, 249 (Sup. Ct. 1934); *Giant Tiger Corporation v. Trenton,* 11 N. J. Misc. 836, (Sup. Ct. 1933); *Pivnick v. Newark,* 14 N. J. Super., 134 (Sup. Ct. 1951); and *Terminal Storage, Inc. v. Raritan Township,* 15 N. J. Super, 547 (Sup. Ct. 1951).

A recent New York case (*People v. Grant,* 306 N. Y. 258, 117 N. E. (2d) 542 (Ct. of App. N. Y. 1954) is in accord with our conclusion.

In the cited case, an ordinance of the Town of North Hempstead prohibited "through or transient vehicular traffic" on streets in or near the area of New Hyde Park, the ordinance being passed as a result of complaints from residents who objected to the volume of traffic at particular hours of the day, mainly because of the large number of automobiles driven by persons going to and from work at the Sperry Gyroscope Company plant situated just north of the area. In holding the ordinance invalid the Court said,

> "Political subdivisions and municipal corporations hold * * * streets for the benefit of the public, consisting of the whole of the people, and regulation of the streets is the exercise of a governmental function in that they are subject exclusively to regulation and control by the state as a sovereign except to the extent that the Legislaure delegates power over them to political subdivisions and municipal corporations."

It is our opinion that the "no through street" ordinance proposed by the Borough of Demarest, and similar ordinances proposed by other municipalities, have no legislative sanction.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: JAMES T. KIRK,
Deputy Attorney General.

JTK/LL

MARCH 4, 1955.

HONORABLE WILLIAM F. KELLY, JR.,
President, Civil Service Commission,
State House,
Trenton 7, New Jersey.

FORMAL OPINION—1955. No. 6.

DEAR PRESIDENT KELLY:

You have recently requested advice concerning the power of a municipal governing body to set minimum and maximum age limits for Patrolmen and Firemen. Your memorandum states that the City of Union City adopted two ordinances in 1925 the effect of which is to establish the minimum age at 21 and the maximum age at 30 for Patrolmen and Firemen. These age limits coincide with those set by R. S. 40:47-4, as amended. However, prior to its amendment, approved April 24, 1945, the statute provided for a thirty-five year maximum age.

N. J. S. A. 38:23A 2, enacted in 1944, provides as follows.

> "When the qualifications for any examination or test for, or appointment or election to any office, position or employment under the government of this State, or of any county, municipality, school district or other political subdivision of this State, or under any board, body, agency or commission of this State, or of any county, municipality or school district, includes a maximum age limit, any person, who, heretofore and subsequent to July first, one thousand nine hundred and forty, entered or hereafter, in time of war, shall enter the active military or naval service of the United States or the active service of the Women's Army Corps, the Women's Reserve of the Naval Reserve or any similar organization authorized by the United States to serve with the Army or Navy, shall be deemed to meet such maximum age requirement, if his actual age, less the period of such service, would meet the maximum age requirement in effect on the date the person entered into such service of the United States."

The public announcements issued by your Department for examinations for Patrolmen and Firemen contain the following provision with respect to age.

> "Not less than 21 nor more than 30 years of age at the announced closing date for filing applications for these examinations, except that for veterans who entered active service with the armed forces after July 1, 1940 and prior to April 24, 1945, the maximum age limit is 35 years.

We are of the opinion that the age limits set by the municipal ordinance are valid and must be regarded as controlling. The governing body of each municipality is empowered by R. S. 40:47-1 to make ordinances for the establishment and regulation of a police force. R. S. 40:47-3, as amended, and R. S. 40:47-4 set up restrictions within which the municipalities must operate in the appointment of police officers. We see no reason, however, why a municipality may not make more stringent regulations so long as they comply as well with the statutory prohibitions on the subject. In 62 C. J. S., Municipal Corporations, p. 1094 it is stated,

> "The appointment of police officers is generally regulated by statute setting up rules of eilgibility of prospective appointees; and the municipality may prescribe requirements in addition to, although not in contravention of, those prescribed by statute."

Your announcement is correct as to municipalities which have not set any age limits and as to those in which the age limits were set at 21 years of age to 35 years of age prior to April 24, 1945. However, with respect to Union City and other municipalities with similar ordinances where the age limit was or is more restrictive than that in effect by state law, the more restrictive provisions of the municipal ordinance are controlling. Thus veteran applicants for police and fire positions in Union City must be no older at the time of appointment than 30 years of age, plus a period of time, computed in accordance with the terms of the statute. Even though prior to April 24, 1945 the statutory maximum age was 35, the age of 30 set by the ordinance was "the maximum age requirement in effect" within the meaning of N. J. S. A. 38:23A—2, supra.

One other aspect of your announcement requires attention. The statute R. S. 40:47—4, as amended, provides,

> "No person shall be appointed a member of the paid fire or police department or force of any municipality who is less than twenty-one or more than thirty years of age * * *."

The critical time is the time of appointment. At that time the appointee must be above the minimum and below the maximum. See *Wentzell v. Steelman*, 8 N. J. Misc. 503 (Sup. Ct. 1930). Your announcement makes the announced closing date the critical time. In this respect it is incorrect. Language should be substituted to make it clear that at the time of appointment the applicant must be within the prescribed age limits.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General

By: JOHN F. CRANE,
Deputy Attorney General

JFC:b.

MARCH 9, 1955.

MR. GEORGE M. BORDEN,
Public Employees' Retirement System,
48 West State Street,
Trenton, New Jersey.

FORMAL OPINION—1955. No. 7.

DEAR MR. BORDEN:

This is in answer to your letter of February 3, 1955, in which you ask whether the Board of Trustees of the Public Employees' Retirement System may make a regulation defining the term "in service" as used in N. J. S. A. 43:15A—41 (c) and N. J. S. A. 43:15A—57 which refer to death benefits of members of the Public Employees' Retirement System who die "in service".

You have suggested that a rule be promulgated which treats a person to be "in service" for a period of three months while on official leave of absence without pay, for the purposes of the above-cited Sections of the Public Employees' Retirement Act.

You have pointed out that the Department of Civil Service treats an employee as "in service" for the purposes of acquiring seniority and promotion rights, only if said employee is actively employed with pay or on official sick leave of absence with pay.

N. J. S. A. 43:15A—39, as amended, deals with the term "in service" for the purpose of computing service for retirement purposes. It provides as follows:

> ". . . In computing service or in computing final compensation, no time during which a member was absent on leave without pay shall be credited, unless such leave of absence was for three months or less, or unless the service rendered to an employer other than the State or a political subdivision thereof was allowed for retirement purposes by the provisions of any law of this State. Any such member shall be required to contribute, either in the lump sum or by installment payments, an amount calculated, in accordance with the rules and regulations of the Board of Trustees, to cover the contributions he would have paid for any service or compensation credited for the period of such official leave of absence without pay, unless the service rendered to an employer other than the State or a political subdivision thereof was allowed for retirement purposes by the provisions of any law of this State".

Although N. J. S. A. 43:15A—39 deals with the term "in service" for the express purpose of computing service for retirement, the legislation appears to be silent on the term as it might affect death benefits of a person who died while on leave of absence without pay.

N. J. S. A. 43:15A—17 provides as follows:

> "The General administration and responsibility for the proper operation of the Public Employees' Retirement System and for making effective the provisions of this act shall be vested in the board of trustees. Subject to the limitations of the law, the board shall, from time to time, establish rules and regulations for the administration and transaction of its business and for the control of the funds created by this subtitle and shall perform any other functions required for the execution of this act . . ."

N. J. S. A. 43:15A—17 gives the Board of Trustees a limited rule-making power, which is confined to establishing rules and regulations "for the administration and transaction of its business and for the control of funds . . .".

The fact that the Legislature saw fit to define the term "in service" in N. J. S. A. 43:15A—39 for the purpose of computing service creditable for retirement indicates that the Legislature considered this definition to be within the proper sphere of legislation enactment. The Board of Trustees cannot take upon itself legislative prerogatives merely because the legislation is silent in the area of definition of the term "in service" as used in N. J. S. A. 43:15A—41 (c) and N. J. S. A. 43:15A—57, which referred to death benefits of members of the Public Employees' Retirement System who die "in service".

The correction of this omission is a matter for supplemental legislation.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General

By: CHARLES S. JOELSON,
Deputy Attorney General

MARCH 23, 1955.

MR. GEORGE BORDEN, *Secretary,*
Public Employees' Retirement System,
48 West State Street,
Trenton, New Jersey.

FORMAL OPINION—1955. No. 8.

DEAR MR. BORDEN:

This is in answer to your communication of March 15, 1955, in which you ask whether a county, municipality, or department of the State may upon request effect the retirement by the Board of Trustees of the Public Employees' Retirement System of a member of the system who is sixty years of age or over, but under the age of seventy.

N. J. S. A. 43:15A—47 provides as follows:

"Retirement from service shall be as follows:

> a. A member who shall have reached 60 years of age may retire from service by filing with the board of trustees a written statement duly attested, stating at which time subsequent to the execution and filing thereof he desires to be retired. The board of trustees shall retire him at the time specified or at such other time within 30 days after the date so specified as the board finds advisable.
>
> b. A member who shall have reached 70 years of age shall be retired by the board for service forthwith, or at such time within 90 days thereafter, as it deems advisable, except that an employee reaching 70 years of age may be continued in service from time to time upon written notice to the board of trustees by the head of the department where the employee is employed."

It should be noted that retirement by the Board in the case of a member who is sixty years of age or over, but not yet seventy years of age, shall be at the application of the member himself.

The only exception to this requirement made by our Public Employees' Retirement Act is with regard to disability retirement. N. J. S. A. 43:15A—42 provides as follows with respect to such cases:

"A member, who shall have been an employee in each of the 10 years next preceding his retirement, shall, upon the application of the head of the department in which he shall have been employed or upon his own application or the application of one acting in his behalf, be retired for ordinary disability by the board of trustees, on a regular disability allowance if he is under 60 years of age and on a service allowance if he has reached or passed that age. The physician or physicians designated by the board shall have first made a medical examination of him at his residence or at any other place mutually agreed upon and shall have certified to the board that the member is physically or mentally incapacitated for the performance of duty and should be retired."

N. J. S. A. 43.15A—43 deals with accident disability retirement of members who have not attained the age of seventy, and also requires medical proof of physical or mental incapacity for the performance of duty.

In view of the foregoing, it is our opinion that the Board cannot retire a person under the age of seventy at the request of his public employer unless the conditions set forth in N. J. S. A. 43:15A—42 and N. J. S. A. 43:15A—43 dealing with disability retirements are fully met.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General

By: CHARLES S. JOELSON,
Deputy Attorney General

MAY 4, 1955.

MR. STEPHEN E. SCHANES,
Bureau of Public Employees' Pensions,
State House Annex,
Trenton, New Jersey.

FORMAL OPINION—1955. No. 9. (Revised)

DEAR MR. SCHANES:

This is in answer to questions raised with reference to the status of employees of the Compensation Rating and Inspection Bureau for purposes of Social Security coverage and eligibility for membership in the Public Employees' Retirement System.

BACKGROUND AND HISTORY

By virtue of P. L. 1911, c. 95, there was established a system of workmen's compensation insurance. Every insurance company or mutual association insuring employers against liability to employees was required to file its classification of risks and premiums and rules pertaining thereto, together with the basis rates and system of merit or schedule ratings applicable to such insurance, with the Commissioner of Banking and Insurance, hereinafter called the "Commissioner," and obtain his approval thereof before same could take effect (P. L. 1917, c. 178).

To secure an impartial application of such filed and approved matter, the commissioner was "authorized to create, organize, and supervise such rate, and inspection bureau or bureaus with such jurisdiction under his supervision as hereinafter provided." (P. L. 1917, c. 178, par. 15).

Pursuant to this power, and in the same law (Article II), the Compensation Rating and Inspection Bureau of New Jersey, hereinafter called the "bureau," was created and presently functions (R. S. 34:15—89 through 91).

Members of the bureau consist of mutual associations and stock associations writing workmen's compensation insurance, who must, as a condition precedent to writing such insurance, become members (N. J. S. A. 34:15—89).

The duties and objects of the bureau, under N. J. S. A. 34:15—89, are that:

A. "It shall establish and maintain rules, regulations and premium rates for workmen's compensation and employer's liability insurance and equitably adjust the same, as far as practicable, to the hazard of individual risks, by inspection by the bureau.

B. "It shall adopt means for assuring uniform and accurate audit of payrolls as they relate to policies of workmen's compensation and employers' liability insurance by auditors, appointed by the bureau, with the approval of the said commissioner or by such other means as the bureau may, with the approval of the commissioner of banking and insurance, establish.

C. "It shall furnish upon request to any of its members or to any employer upon whose risk a rating has been promulgated by it, information as to such rating, including the method of its computation, and shall encourage employers to reduce the number and severity of accidents by offering reduced premium rates for improved working conditions under such uniform system of merit or schedule rating as may be approved by the said commissioner."

Each member of the bureau is represented by one person who has one vote in the administration of bureau affairs. The bureau adopts such rules and regulations for its procedure and provides such income as is necessary for its maintenance and operation (N. J. S. A. 34:15—90).

The Commissioner appoints a special deputy to be ex-officio chairman of the bureau. Besides this appointing power the Commissioner is specifically empowered to

a. approve and ratify all officers, members of committees, and employees of the bureau (N. J. S. A. 34:15—90);

b. employ an actuary and necessary assistants and fix their compensation, subject to the provisions of Title 11, *Civil Service* (N. J. S. A. 34:15—91);

c. compel the production of books, data, papers and records necessary for the actuary to compile statistics for determining workmen's compensation insurance costs (N. J. S. A. 34:15—91);

d. examine personally, or through a person appointed by him, payroll records, policies and other data to determine compliance by employers with the general law (N. J. S. A. 34:15—91).

The board functions under the direction of a manager elected by its members. As a matter of practice, said manager has always been, and is, the special deputy who is appointed by the Commissioner pursuant to statute to serve as chairman of the bureau.

The employees of the Compensation Rating and Inspection Bureau are in two separate categories. The first category consists of those employees who are employed by the Commissioner of Banking and Insurance pursuant to R. S.

34:15—91 subject to Title 11 of the Civil Service Act. The second category consists of those employees who are employed by the Rating and Inspection Bureau subject to the approval of the Commissioner of Banking and Insurance pursuant to R. S. 34:15—90. The employees in the first category are paid by the State Treasurer out of State funds, but those in the second category are paid by the Rating and Inspection Bureau out of its own funds, raised by assessments levied against its members under rules and regulations adopted pursuant to R. S. 34:15—90.

R. S. 34:15—93 provides that companies writing workmen's compensation insurance shall "defray the expenses of the Commissioner of Banking and Insurance in carrying out the provisions of this article" by a payment of a sum of money equivalent to one-quarter of one percent of the net premiums received by such companies for workmen's compensation insurance written within the State. These payments are not used to pay employees of the Rating and Inspection Bureau in the second category described above.

AS TO SOCIAL SECURITY COVERAGE: Sec. 218 (a) (1) of the Federal Social Security Act (Title 42 U. S. C. A. § 418) provides that the Secretary of Health, Education and Welfare of the United States may enter into an agreement with any State for the purposes of extending social security insurance to "services performed by individuals as employees of such State or any political subdivision thereof." The Federal statute cited further provides, in Section 218 (b) (2) thereof, that the term "political subdivision" includes "an instrumentality" of a State. The term "coverage group" is defined in Section 218 (b) (5) of the Federal Social Security Act to include "employees of a political subdivision of a State other than those engaged in performing service in connection with a proprietary function."

Upon examining the general duties and responsibilities of the Compensation Rating and Inspection Bureau as set forth in the statutes referred to above, it is evident that this body was created in the public interest. It also appears that in order to meet the statutory requirement that the bureau be impartial, the Commissioner of Banking and Insurance, either directly or through his special deputy, has authority over all activities of the bureau. It is, therefore, our opinion that the bureau constitutes an "instrumentality" of the State within the meaning of the Federal Social Security Act, and that its employees are eligible for social security coverage.

AS TO MEMBERSHIP IN THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM: For the reasons stated above, we are of the opinion that the employees in the first category who are State employees are eligible as such State employees for membership in the Public Employees' Retirement System, but that the employees in the second category, who are as we have stated, not State employees, are not so eligible.

We are further of the opinion that the employees in the second category cannot be admitted as employees of a public agency or organization within the meaning of N. J. S. A. 43:15A—65 and N. J. S. A. 43:15A—71.

N. J. S. A. 43:15A—65 provides as follows:

> "All employees of any public agency or organization of this State, which employs persons engaged in service to the public, shall be eligible to participate in the Public Employees' Retirement System provided, the employer consents thereto by resolution and files a certified copy of such resolution with the board of trustees of the Public Employees' Retirement System and the board of trustees approves thereof by resolution. Such organization shall be referred to in this act as the employer. If the participation of such employees is so approved then the employer shall contribute to the contingent reserve fund on account of its members at the same rate per centum as would be paid by the State if the members were State employees."

N. J. S. A. 43:15A—71 provides as follows:

> "The words 'public agency or organization' as used in this act shall be construed to mean and include any agency or organization which operates public works or is engaged in service to the public for 1 or more municipalities, local boards of health, or counties, and whose revenue is derived from other than State funds, but shall not be construed to include any subdivision of any county, municipality, school district, privately owned public utility or service or any religious, educational or charitable organization."

Although the Rating and Inspection Bureau's revenue is derived from other than State funds, as provided in N. J. S. A. 43:15A—71, it does not operate public works or engage in service to the public for one or more municipalities, local boards of health, or counties as provided for in that section.

You have asked us whether the Rating and Inspection Bureau may adopt its own separate retirement system for those employees in the second category described above who are not to be considered as State employees. We understand that the employer's contributions to such a separate system would be made by the member insurance companies, and would not come out of the contributions of one-fourth of one percent of net premiums of participating companies provided for in R. S. 34:15—93 to defray the expenses of the Commissioner of Banking and Insurance in carrying out the provisions of the law pertaining to the Rating and Inspection Bureau.

We are of the opinion that such a separate retirement system may be adopted provided it is approved by the Commissioner of Banking and Insurance. The approval of the Commissioner would be required in view of R. S. 43:15—89 which provides as follows:

> ". . . To secure the impartial application of . . . approved classifications, rules, rates or system of merit or schedule rating, the Commissioner of Banking and Insurance is hereby authorized to create, organize, and supervise such rating and inspection bureau . . ."

We are, therefore, of the opinion that even though a separate retirement system for those employees of the Rating and Inspection Bureau who are not State employees would not be supported in any way by State funds, the approval of such a system by the Commissioner of Banking and Insurance is required under the quoted statute.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General

By: CHARLES S. JOELSON,
Deputy Attorney General

csj;b
cc: HON. CHARLES R. HOWELL

MARCH 24, 1955.

HON. WILLIAM F. KELLY, JR.,
President, Civil Service Commission,
State House,
Trenton 7, New Jersey.

FORMAL OPINION—1955. No. 10.

DEAR PRESIDENT KELLY:

Your letter of January 24, 1955 asks our advice as to the power of the Civil Service Commission to revoke the certification of eligibility for appointment of an employee after appointment has been made. Your letter points out that occasionally it is discovered that false representations have been made with respect to residence, age, veteran status or past criminal record.

We have noted that you have been previously advised by an opinion dated January 18, 1918 that the Civil Service Commission has no power to revoke or direct the revocation of an appointment. That opinion stated,

> "I am unable to find anything in the Civil Service Law authorizing the Commission to revoke the appointment of any officer or employe appointed to or to require the person having the power of appointment to revoke the appointment. The appointment having once been made in accordance with the provisions of the Civil Service Act and by the proper authority, I think it unquestionable that the Civil Service Commission has no further power in the matter."

While unquestionably a certification should not ordinarily be disturbed, we cannot agree that the Commission is completely without power in the matter. The Commission is specifically empowered to enforce the provisions of the Civil Service Law and the rules and regulations promulgated thereunder, R. S. 11:1—7. If it is found that an applicant for a position has violated a provision of the statute by furnishing false information, see R. S. 11:23—1, R. S. 11:23—2, the Commission, in the exercise of its enforcement powers, could revoke the certification upon which the appointment or promotion was based. In keeping with the basic policy of the act to afford employees an opportunity to be heard before action affecting their position is taken, we think a hearing should be held by the Commission with full opportunity being given to the employee to offer evidence in justification or mitigation. See Rule 40, which provides, in part,

> "* * *. On the approval of the president and the commission the name of any person who has been dismissed from some other position in the public service or whose character, qualifications and record are found to be such as not to warrant employment in a public position, may be removed from any employment list upon which it may appear. In all such cases the person whose name is considered for removal will be notified of such contemplated action and given *reasonable opportunity to be heard.*" (emphasis supplied)

No reported decisions have been found in New Jersey relating to this subject. However, in other jurisdictions, particularly in New York, where a civil service system similar to our own prevails, the problem has been treated judicially in several cases. In *Application of Katz,* 260 App. Div. 495, 23 N. Y. S. 2d 150 (Sup. Ct. N. Y. 1940), an applicant for the position of stenographer-typist had misstated her age. This was not discovered until after she had been working for more than six months. The Civil Service Commission held a hearing after which it revoked the certification and informed the appointing authority it should terminate the employee's services. On appeal the procedure was approved and it was held not to be necessary to hold a hearing before the appointing authority.

In *Marinick v. Valentine,* 263 App. Div. 564, 33 N. Y. S. 2d 486, (App. Div. N. Y. 1942) it was discovered more than four years after a patrolman had been appointed that he had attempted to perpetrate a fraud by placing identifying marks on his test papers. The Civil Service Commission revoked the certification and directed the appointing authority to terminate his services. The action of the Civil Service Commission was approved by the court saying, 33 N. Y. S. 2d 488,

> "At the time the examiners of the Civil Service Commission rated petitioner's papers they were not aware of the employment by him of the identifying marks which he admitted were deliberately used. If they had had knowledge of the purpose of these objectionable markings, petitioner's papers would not have been rated, his name would not have been placed on the eligible list and he could not have been certified or appointed. It seems too clear for argument that petitioner may not benefit by reason of the fact that his attempted fraud was not discovered until the lapse of several years. The law is now settled that the Municipal Civil Service Commission has power and is under a duty to rescind a certification obtained by fraud or where there is an attempt to defraud. Matter of Shraeder v. Kern, 287 N. Y. 13, 38 N. E. 2d 110; Matter of Resnick v. Huie, 287 N. Y. 607, 39 N. E. 2d 258. Matter of Katz v. Goldwater, 260 App. Div. 495, 23 N. Y. S. 2d 150, affirmed 285 N. Y. 830, 35 N. E. 2d 500. The power may be exercised upon discovery of the fraud even if the appointment has become permanent. Matter of Smith v. Hodson, 287 N. Y. 609, 39 N. E. 2d 259; People ex rel. Hornstein v. Moskowitz, 51 N. Y. L. J. 1296, affirmed 165 App. Div. 979, 150 N. Y. S. 1104. In the Hornstein case, Lehman, J. (now Chief Judge of the Court of Appeals) said:
>
> 'It is urged, however, that the Commission having once certified the relator's name have no power thereafter to reconsider their action. It seems to me that while they have no power to reconsider a certification not due to fraud or mistake, where their action is based upon mistake caused by the applicant's own fraud such fraud and mistake invalidate the original certification and they have power to correct their records to show its invalidity, and have power also to determine the question of fact involved in the claim of fraud and mistake.'
>
> In People ex rel. Finnegan v. McBride, 226 N. Y. 252, at page 258, 123 N. E. 374, 376, Pound, J., in stating the applicable law, said: 'The action of the commission, had with due deliberation, upon such a matter as the establishment of an eligible list, should, for obvious reasons, be regarded as a finality, but the commission's authority thereon does not wholly cease. It certifies names therefrom for appointment. Error may be corrected by setting it aside if it was the result of illegality, irregularity in vital matters, or fraud. The commission may not act arbitrarily. Public officers or agents who exercise judgment and discretion in the performance of their duties may not revoke their determinations nor review their own orders once properly and finally made, however much they may have erred in judgment on the facts, even though injustice is the result. A mere change of mind is insufficient. Further action must, where power is not entirely spent, be for cause, with good reasons and proper motives for the correction of improper action.'

In the public interest, civil service examinations must be kept free from fraud and dishonesty and it is the obligation of a civil service commission to give no place on an eligible list to any candidate who perpetrates a fraud or attempts to practice any deception in an open competitive examination. Confidence in the fairness and integrity of the merit system would be completely undermined if practices like those indulged in here were overlooked or condoned."

The exercise of such a power is not limited to cases of fraud or misrepresentation. It has been held to extend to instances where mistakes affecting the eligibility of the individual for appointment are made. *Romanchuck v. Murphy,* 200 N. Y. Misc. 987, 103 N. Y. S. 2d 704 (Sup. Ct. N. Y. 1951) was a case involving an error in computation of the final grade of the applicant. The court held that such a circumstance would justify rescission of the certification. See also: *People ex rel. Laist v. Lower,* 251 Ill. 527, 96 N. E. 346 (Sup. Ct. Ill. 1911) where before appointment it was discovered that an applicant for appointment as an architect did not have a license, and *Application of O'Brien,* 255 App. Div. 385, 7 N. Y. S. 2d 596 (App. Div. N. Y. 1938), aff'd. 280 N. Y. 697, 21 N. E. 2d 202 (Ct. App. N. Y. 1939) where certification was rescinded before appointment on the ground that the employee seeking promotion was no longer employed in the division in which the position was located as required by the civil service rule.

We wish to emphasize, however, that matters of judgment involving subjective appraisals of an applicant's qualifications should not be the subject of a revocation of certification proceeding. As indicated in *People ex rel. Finnegan v. McBride* quoted *supra* in the opinion in *Marinick v. Valentine,* "A mere change of mind is insufficient." The stability of the public service requires that such subjective determinations not be rescinded. We recognize, therefore, that the power to revoke a certification after an applicant has been appointed is limited to cases of fraud, misrepresentation or mistake of a nature which affects the legality of the certification.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: JOHN F. CRANE,
Deputy Attorney General.

b.

MARCH 25, 1955.

HON. CHARLES R. HOWELL,
Commissioner of Banking and Insurance,
State House Annex,
Trenton 7, New Jersey.

FORMAL OPINION—1955. No. 11.

MY DEAR COMMISSIONER HOWELL:

Your letter of March 4, 1955 requests advice as to whether it is permissible under our law for an insurance company to issue a group life insurance policy in New Jersey to insure the payment of the balance remaining unpaid at the time of death on a periodic payment plan mutual fund investment contract. Another question raised by your letter is whether, if the issuance of such a policy is not permissible

under the laws of New Jersey, the inclusion of New Jersey residents within the protection of such a policy issued and delivered in another State amounts to a violation of our statutes.

Attached to the correspondence is a specimen copy of a document of the First Investors Corporation entitled, "Periodic Payment Plan With Insurance." The plan provides for the payment of an aggregate amount in equal monthly installments from which shares in an investment fund corporation are purchased. The planholder is obligated to pay the aggregate sum but

"* * * may, at any time prior to his death, terminate his Plan prior to completion of agreed payments by surrendering the Plan Certificate to the Custodian for complete withdrawal and cancellation, with written instructions either to deliver his shares to or upon his order or to sell his shares and remit the net proceeds to or upon his order."

The Plan provides for insurance on the life of the Planholder as follows:

"VII. Insurance: The Company has arranged with certain Life Insurance Companies for life insurance, under group or other form of policies, on the life of the Planholder, provided he or she be acceptable to the insurance company at the time of acceptance by the Planholder of delivery of this Plan, and coverage thereunder shall be given to the Planholder at the actual cost thereof, or less, to the Company. The rate of insurance, as is set forth in the application, is subject to revision on September 30 of each year, but shall not exceed $1.00 per month per $1,000 for Standard risk and $1.50 per month per $1,000 for Sub-standard risk of insurance in force. Each of said policies provides in substance that, subject to the limitations, terms, conditions and privileges set forth therein, and upon receipt of due written proof of death of the Planholder, occurring while said policy is in force and while the Planholder is insured thereunder, the insurance company issuing said policy will pay to the Custodian, as agent of the Company, an amount equivalent to the difference between the total of all payments previously made hereunder by the Planholder and the total payments agreed to be made; provided, however, that the maximum liability of any one insurance company upon the life of any Planholder is limited to $10,000.00.

Upon the death of the Planholder, all privileges to terminate this Plan prior to completion of the agreed payments shall cease, and the total amount of the unpaid payments on this Plan shall immediately become due and owing to the Company; such amount shall constitute an obligation of the estate of the Planholder and of his personal representatives and shall be paid to the Custodian as agent for the Company. Upon receipt by the insurance company or companies of due written proof of the death of the Planholder, and upon payment by the insurance company or companies to the Custodian of the money due under such policy or policies, or upon payment by the estate or the personal representatives of the Planholder of the balance due on this Plan, the Custodian shall apply all monies so received to the payment of the total amount of the unpaid payments on this Plan, which monies shall be applied to the purchase of Shares as set forth in Paragraph IV subject to (a) the Custodian fees, and (b) the Company fees remaining unpaid; these monies when so applied shall constitute complete discharge of the obligation of the estate of the Planholder and of his personal representatives set forth in the preceding sentence."

The policy used in conjunction with the plan is called a Creditor's Group Life Policy. A specimen copy of the policy issued by Connecticut General Life Insurance Company indicates that the policy is issued for a term of one year renewable for a further one-year term. The policy provides,

"* * *. The insurance hereunder upon the life of any individual shall become effective when the Company has notified the Creditor of the approval of the evidence of insurability of such individual and when, in addition, such individual has accepted delivery of his Plan Certificate duly executed by the Creditor and the Custodian under the Plan.

* * * *

Each individual who purchases from the Creditor share certificates of Wellington Fund, Inc. under an installment purchase agreement shall be insured, subject to evidence of insurability satisfactory to the Company, for the amount of the installments remaining payable to the Creditor by the individual or by his estate and personal representatives under such installment purchase agreement or $10,000, whichever is the lesser amount. Installment purchase agreement shall be construed to mean only installment purchase agreements extending for periods of twenty years or less. The amount of insurance on the life of each such individual purchaser insured hereunder shall automatically decrease as and when installment repayments are made on such individual's indebtedness with the Creditor until said indebtedness is completely paid."

The pertinent statute is found in R. S. 17:34—31, as amended, which provides in part as follows:

(A) No policy of group life insurance shall be delivered in this State unless it conforms to one of the following descriptions:

(1) A policy issued to an employer, * * *.

(2) A policy issued to a creditor, who shall be deemed the policyholder, to insure debtors of the creditor, subject to the following requirements:

(a) The debtors eligible for insurance under the policy shall be all of the debtors of the creditor whose indebtedness is repayable in installments, or all of any class or classes thereof determined by conditions pertaining to the indebtedness or to the purchase giving rise to the indebtedness. The policy may provide that the term "debtors" shall include the debtors of one or more subsidiary corporations, and the debtors of one or more affiliated corporations, proprietors or partnerships if the business of the policyholder and of such affiliated corporations, proprietors or partnerships is under common control through stock ownership, contract, or otherwise.

(b) The premium for the policy shall be paid by the policyholder, either from the creditor's funds, or from charges collected from the insured debtors, or from both.

* * * *

(c) The policy may be issued only if the group of eligible debtors is then receiving new entrants at the rate of at least 100 persons yearly, or may reasonably be expected to receive at least 100 new entrants during the first policy year, and only if the policy reserves to the insurer the right to require evidence of individual insurability if less than 75% of the new entrants become insured.

(d) The amount of insurance on the life of any debtor shall at no time exceed the amount owed by him which is repayable in installments to the creditor, or $10,000.00, whichever is less.

(e) The insurance shall be payable to the policyholder. Such payment shall reduce or extinguish the unpaid indebtedness of the debtor to the extent of such payment.

We have no difficulty with the question of whether the planholders are debtors of the policyholder. They have obligated themselves to pay an aggregate amount and it is binding upon the estate of the planholder according to the terms of the contract.

That the planholder may terminate a portion of the obligation by abandoning certain rights does not detract from its validity. See Rest., Contracts, Sec. 84 (f), Williston, Contracts, (Rev. Ed. 1936) Section 105. Thus, unless cancellation has taken place there continues a valid and binding obligation to pay the remainder of the aggregate sum agreed upon which may be characterized as a debt. Nor does a supposition that the details of the arrangement were devised so as to bring the arrangement within the terms of the statute impugn its validity. The attorneys general of Massachusetts, Opinion April 8, 1954, and New York, Opinion April 17, 1953, have ruled that such arrangements are permissible under statutes similar in purport to ours with respect to the existence of a debt. The Massachusetts statute, Sec. 133, Chapter 175, Anno. Laws Mass., permits the issuance of group creditor insurance covering "A group of persons who * * * are debtors * * * of the vendor of any property for its purchase price, under an agreement to pay any such indebtedness * * *." The New York statute, McKinney's Cons. Laws, Ins. Sec. 204 (c), permits "A policy issued to a creditor or vendor * * * which policy shall insure * * * a group of debtors or vendees * * *."

We next consider whether the fact that the plan and the policy both contain provisions reserving to the insurance company the privilege of determining the insurability of the planholder, violates the statutory requirement that the policy cover *"all* of the debtors of the creditor * * * or *all* of any class or classes thereof determined by conditions pertaining to the indebtedness or to the purchase giving rise to the indebtedness." R. S. 17:34—31, as amended. We conclude that it does not because R. S. 17:34—32, as amended, requires the policy to contain a provision setting forth the conditions under which evidence of insurability will be required. This requirement impliedly permits the policy to require evidence of insurability and the policy meets the mandate of the statute by stating in effect that in all cases evidence of insurability will be required. Moreover, the language of R. S. 17:34—31 (2) (c), as amended, quoted above, specifically requires the policy to contain a provision reserving "* * * to the insurer the right to require evidence of individual insurability if less than 75% of the new entrants become insured."

Your inquiry suggests that the issuance of the policy in conjunction with the purchase of securities might be prohibited by the terms of N. J. S. A. 17:29B—4, paragraph (8) of which defines as an unfair method of competition in the business of insurance,

> "* * * giving, or selling, or purchasing or offering to give, sell, or purchase as inducement to such insurance or annuity or in connection therewith, any stocks, bonds, or other securities * * *."

As you have presented the facts, it would not appear that the securities involved in the transactions under consideration are sold as an inducement to the purchase of the insurance. The opinion of the Massachusetts Attorney General also touched upon this point saying,

> "* * * there is no inducement passing from the life insurance company in connection with the placing of such group life insurance. Therefore the arrangement you have submitted to me is not a violation of section 121 of chapter 175."

Our view that the arrangement is not a violation of the quoted section is buttressed by the language of its companion sections.

N. J. S. A. 17:29B—3, prohibits any "person" from engaging in any of the enumerated trade practices, and N. J. S. A. 17:29B—2, defines "person" as any "legal entity engaged in the business of insurance." The individual selling the plan would not come within the statutory definition of "person" as he is not en-

gaged in the business of insurance. This is consistent with the administrative construction given to the licensing provisions of the statute with respect to employers, union representatives, bank employees, etc., who as an incident to their primary occupation make individuals aware of the fact that group insurance is available to them, perform certain clerical tasks with relation thereto, but do not derive any commission or other financial benefit from the inclusion of individuals within the coverage of a group policy.

We have examined the Creditor's Group Life Policy of Connecticut General Life Insurance Company which has been submitted and find that it is in conformity with the provisions of R. S. 17:34—31, as amended, and R. S. 17:34—32, as amended, with one possible exception.

The statute, R. S. 17:34—32, as amended, requires the policy to contain certain enumerated provisions unless in the opinion of the Commissioner the policy provisions are more favorable to persons insured or at least as favorable to the persons insured and more favorable to the policyholders than the specified provisions. Among such specified provisions is the following,

> "(3) A provision that a copy of the application, if any, of the policyholder shall be attached to the policy when issued, that all statements made by the policyholder or by the persons insured shall be deemed representations and not warranties, and that no statement made by any person insured shall be used in any contest unless a copy of the instrument containing the statement is or has been furnished to such person or to his beneficiary."

The policy contains a provision that a copy of the application shall be attached but no provision that the statements shall be deemed representations or that no statement shall be used in any contest unless furnished to the person insured or his beneficiary.

Such a provision is probably unnecessary in view of the terms of the incontestability clause. It provides that "Except for nonpayment of premiums, this policy shall be incontestable after date of issue." However, this is a matter for the determination of the Commissioner under R. S. 17:34—32, as amended.

Thus, if the Commissioner determines that the provisions of the incontestability clause are more favorable than those required by R. S. 17:34—32 (3), as amended, the policy may be issued and delivered in this State.

The Connecticutt General Policy which we have examined contains no qualifying age bracket. You state, however, that some of the policies issued by other insurers in this type of transaction contain certain restrictions based upon the age of the individual whose life is the subject of insurance. In our view, such policies do not qualify as group creditor life policies under our law since they do not include "all of the debtors of the creditor * * * or all of any class or classes thereof determined by conditions pertaining to the indebtedness * * *," as required by R. S. 17:34—31, as amended. The fact that an insurer may require evidence of insurability, as has been pointed out above, would not permit the establishment of arbitrary age limitations. The term insurability has been interpreted as relating to "* * * those physical and moral factors reasonably taken into consideration by life insurance companies in determining coverage or matters affecting the risk." *The Colonial Life Ins. Co. of America v. Mazur,* 25 N. J. Super. 254, 262 (Ch. Div. 1953). Although age may be one of the factors which can reasonably be taken into consideration along with others in determining insurability, we do not think it reasonable to establish absolute and arbitrary age limitations. It should also be pointed out that an attempt to create a class of debtors within specified ages by the creditor would not be permissible. Such an attempt would amount to a violation of the statutory requirement that such a class be determined by "conditions pertaining to the indebtedness or to the purchase giving rise to the indebtedness." R. S. 17:34—31, as amended.

In view of the position we have taken it will not be necessary to determine whether the inclusion of residents of New Jersey within the protection of the type of policy under consideration, if issued and delivered in another state, would amount to a violation of our statutes, unless the Commissioner determines the question of the incontestability clause adversely to the insurer.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

By: JOHN F. CRANE,
Deputy Attorney General.

b.

MARCH 29, 1955.

DR. F. LOVELL BIXBY,
Acting Commissioner, of the Department of Institutions and Agencies,
State Office Building,
Trenton, New Jersey.

FORMAL OPINION—1955. No. 12.

DEAR DR. BIXBY:

We have your request for an opinion as to whether the several counties are required by law to make payments to the State Board of Child Welfare to cover the cost of the welfare program known as Home Life Assistance.

It is our opinion, and we so advise you, that the several counties are authorized and obligated to pay a share of the cost of the New Jersey program for Home Life Assistance to children. It is our further opinion that the county share of such cost is 25% of the amount allowable under the Federal program in those cases where Federal aid is available plus one-half of the excess of such payments over the amount allowable under the Federal program, as provided in R. S. 30:5—7 and 8, (sections of the law which are still in full force and effect insofar as the Home Life Assistance program is concerned). In those cases where no Federal aid is available, the state and the county share the cost equally. Opinion of Attorney General No. 86, dated November 30, 1950.

The question here presented has apparently arisen because of inquiries received from county welfare boards as to the meaning and effect of P. L. 1951, c. 138, which amended and revised the then existing programs for maintenance of children.

The statutory provisions for maintenance of, and assistance to, children, as it existed immediately prior to the adoption of P. L. 1951, c. 138 was contained in Chapter 5 of Title 30 of the Revised Statutes. Chapter 5, made up of four articles, was originally enacted as P. L. 1936, c. 33. It set up two separate and distinct programs of aid for children. One program, dealt with in Article III, provided for the "Care, Custody, Guardianship and Support of Abandoned Children." Under this program, the State Board of Children's Guardians, the predecessor of the present State Board of Child Welfare, acquired legal custody of such children and could place the children in homes, or temporarily in institutions.

The other program, dealt with in Article IV, was the "Home Life Assistance Program". It provided for payments of assistance to the mother or other female standing in *loco parentis* in whose custody the child remained.

Articles I and II of Chapter 5 contained provisions for the administration of both programs, including in Article II thereof provisions for the financing thereof and for the contributions to be made by the county and State respectively.

R. S. 30:5—6 provided:

> "Subject to payments of the counties' share as provided in section 30:5—7 of this title, and subject to payment of the state's share as provided in section 30:5—8 of this title, payments of assistance authorized under both article 3 and article 4 of this chapter shall be made by the state board of children's guardians.
>
> "The treasurer of the state board of children's guardians is hereby empowered to receive from the county treasurer of each county such sums as shall represent the county's share, and to receive from the state treasurer such sums as shall represent the state's share, and shall cause such sums to be set up in a special account or accounts subject to disbursement by the state board of children's guardians in accordance with this chapter."

So, too, as to both programs, R. S. 30:5—7 provided for the amount of assistance chargeable to counties, and how those payments were to be made; R. S. 30:5—8 provided for the amount of assistance chargeable to the State and how those payments were to be made; and R. S. 30:5—9 authorized negotiations with the Federal Government for financial assistance to the State, as authorized under the Federal Social Security Act, for the carrying out of the two programs.

R. S. 30: 5—7, as amended, and R. S. 30:5—8, as amended, dealing with the respective contributions to be made by the State and county, provided, at the time of the adoption of P. L. 1951, c. 138, for the county to contribute 25% of the amount allowable under the Federal program in those cases where Federal aid is available, plus ½ of the excess of such payments over the amount allowable under the Federal program. Further, if Federal aid were not available, the State and county were to share the cost equally. The State's share under these statutory provisions was ¾ of the amount allowable under the Federal program where Federal aid to the State was available and ½ of the cost in other cases.

By P. L. 1951, c. 138, (N. J. S. A. 30:4C—1 et seq.) the program for the "Care, Custody, Guardianship and Support of Abandoned Children" found in Article III of Chapter 5 of Title 30 was repealed and there was substituted therefor a new comprehensive program for the "Care, Custody, Guardianship and Support of Abandoned and Neglected Children".

As part of that repeal and the substitution of the new program, the legislature repealed Articles I and II of Chapter 5 insofar as they were applicable to the administration and financing of the old program for the "Care, Custody, Guardianship and Support of Abandoned Children" found in Article III which was also repealed.

But the legislature left intact and did not repeal the "Home Life Assistance Program" found in Article IV of Chapter 5 of Title 30. On the contrary, P. L. 1951, c. 138 expressly recognized that that program was to continue, providing in section 2 thereof (N. J. S. A. 30:4C—2) that:

> "The term 'assistance' means money payments made to, or in behalf of, persons determined to be eligible therefor in accordance with the provisions of Article IV, chapter five, Title 30, of the Revised Statutes."

Nor did P. L. 1951, c. 138 repeal Articles I and II of Chapter 5 insofar as they were applicable to the administration and financing of the Home Life Assistance Program found in Article IV.

It is true that section 38 of P. L. 1951, c. 138 (N. J. S. A. 30:4C—38) does provide in part as follows:

> "The following acts and statutes together with all amendments thereof and supplements thereto are repealed:
>
> "Articles one, two and three of chapter five of Title 30 of the Revised Statutes;"
>
> * * * *
>
> "An act concerning the care, maintenance, supervision and guardianship of dependent and neglected children, promoting home life therefor, providing penalties for violation thereof, and amending sections 30:5—7 and 30:5—8 of the Revised Statutes', approved May sixth, one thousand nine hundred and forty-two (P. L. 1942, c. 140);"

But it is not sufficient nor legally proper to deal with this repealing section as if it were an independent enactment separate and apart from the remainder of the act. A clause in a statute purporting to repeal other statutes is subject to the same rules of interpretation and construction as are other provisions of the statute; the act must be read as a whole. The intent must prevail over literal interpretation; other parts of the act are to be referred to in determining the meaning and effect of the repealer section. (*Smith v. People,* 47 N. Y. 330 (1872); *Attorney General v. Duncan,* 76 N. H. 11, 78 Atl. 925, 927 (Sup. Ct. 1911); *Golden Valley County v. Lundin,* 52 N. D. 420, 203 N. W. 317, 319, 320 (Sup. Ct. 1925); *State v. Moorhouse,* 5 N. D. 412, 67 N. W. 140 (Sup. Ct. 1896); *State v. Joyce,* 307 Mo. 49, 269, S. W. 623, 624 (Sup. Ct. 1925); *Hogg v. Board of Commissioners,* 57 Colo. 463, 141, P. 478, 480 (Sup. Ct. 1914); *Indianapolis Union R. Co. v. Waddington,* 169 Ind. 448, 82 N. E. 1030, 1032 (Sup. Ct. 1907); *Cory v. Nethery,* 19 Wash. 2d 326, 142 P. 2d 488, 491 (Sup. Ct. 1943); *Ex Parte Copeland,* 130 Tex. Co. R. 59, 91 S. W. 2d 700 (Ct. of Crim. App. 1936); 59 C. J. 901, 1103, Statutes † 502, 652; 82 C. J. S. 474, 914 Statutes † 282, 386; 50 Am. Jur. Statutes s 518, 519; 1 Sutherland, Statutory Construction s 2006.)

This settled rule is stated in 50 Am. Jur. 527, Statutes, Section 518 as follows:

> "* * * in determining whether a repeal has been effected, the intention of the legislature in enacting the alleged repealing act, is controlling. Such intent even prevails over the literal import of the words used, the general rule that a statute must be construed as a whole, being applicable."

In the leading case of *Smith v. People,* supra, the New York Court of Appeals said, in holding that an express repealer should not be given literal effect, at page 336 of 47 N. Y.:

> ". . . The practical effect of a judgment giving full and literal effect to the repealing clause in the act of 1870, would be to annul all the proceedings in, and judgments of both courts for the last two years, and the consequences would seriously affect the public as well as individuals. A statute should not be so construed as to work a public mischief, unless required by words of the most explicit and unequivocal import. . . .
>
> "In the construction of statutes, effect must be given to the intent of the legislature whenever it can be discerned, though such construction seem contrary to the letter of the statute. That intent must be primarily sought in the language of the statute, and if the words employed have a well understood meaning, are of themselves precise and unambiguous, in most cases

no more can be necessary than to expound them in their natural and ordinary sense. The words in such case ordinarily, best declare the intention of the legislature . . . *These rules are elementary, but it is equally well settled that words, absolute of themselves, and language the most broad and comprehensive, may be qualified and restricted by reference to other parts of the same statute in which they are used, and to the circumstances and facts existing at the time, and to which they relate, or are applied.* A literal interpretation of words in most common use, and having a well defined meaning as ordinarily used, would not unfrequently defeat rather than accomplish the intent of the party using them. If in reading a statute in connection with other statutes passed at, or about the same time, a doubt exists as to the force and effect the legislature intended to give to particular terms, that is as to the meaning which it was intended they should bear and have in the connection in which they are used, it is also competent to refer to the circumstances under which, and the purposes for which a statute is passed, to ascertain the intent of the legislature. The ground and cause of the making of a statute explains the intent. . . ."

pages 338 to 339:

". . . The question whether a repeal of a prior statute, absolute in terms, can be limited in its operation and effect for any reason has frequently arisen; and the decisions of the courts have been uniform, that while the language of the repealing clause must be accepted as the expression of the will of the legislature, and effect given to it according to its terms, unless it appears although the language of the repeal was general and unqualified that it was intended to be used in a qualified or limited sense; that whenever that intent is discovered effect must be given to it, as in the interpretation of other acts. . . .

"If the repeal of a statute is by express and positive terms, and there is no legitimate evidence in or out of the act of an intent to qualify and restrict the operation, that is, no limitation or qualification, express or implied, the only question is as to the effect of the repeal, and the rule is that for all purposes the law repealed is as if it had never existed. . . . A *clause in a statute purporting to repeal other statutes is subject to the same rules of interpretation as other enactments, and the intent must prevail over literal interpretation. One part of an act of the legislature may be referred to in aid of the interpretation of other parts of the same act.* So in case of doubt or uncertainty, acts *in pari materia,* passed before or after, and whether repealed or unrepealed, may be referred to in order to discern the intent of the legislature in the use of particular terms; and within the same rule, and the reason of it, cotemporaneous legislation, although not precisely in *pari materia,* may be referred to for the same purpose. Statutes in *pari materia* relate to the same subject, the same person or thing, or the same class of persons or things, and are to be read together, for the reason that it is to be implied that a code of statutes relating to one subject is governed by the same spirit, and are intended to be harmonious and consistent. They are to be taken together as if they were one in law, as one statute . . ."

and on page 341:

". . . The last act reflects light upon the first, and is a very significant indication that the legislature did not intend by the comprehensive terms of repeal to abrogate the organizing law of the criminal courts in New York, which had a place in the acts purporting in terms to be repealed, and did not suppose that the organization of these courts had been affected. Both acts can stand together by giving the repealing clause a qualified and restricted operation in harmony with the evident intent of the legislature, and not otherwise. . . ."

In determining the legislative intent,

"An arbitrary construction is not true exegesis. The meaning of a statute is not ruled by the strict letter, but rather by the sense and meaning fairly deducible from the context. The reason of the provision prevails over the literal sense of the words; the obvious policy is an implied limitation on the sense of general terms, and a touchstone for the expansion of narrower terms. The spirit gives character and meaning to the particular symbols of expression. The evident policy is the true key to open the understanding of the act. *Fischer v. Fischer,* 13 N. J. 162 (1953)." *In re Roche,* 16 N. J. 579 at 584 (1954) per Mr. Justice Oliphant.

To construe the language of Section 38 as having the effect of completely repealing the provisions of Articles I and II of Chapter 5 would be to nullify the clear legislative intent that the Home Life Assistance program, set forth in Article IV of Chapter 5 of Title 30, should continue. If R. S. 30:5—7, R. S. 30:5—8 and R. S. 30:5—9 are no longer in effect insofar as the Home Life Assistance program is concerned, then there exists no provision for financing that program either by the State, by the county, or through Federal aid under the social security act.

The provisions for the Home Life Assistance program found in Article IV, which the legislature expressly continued in existence, provide that those benefits are to be paid out of the funds raised pursuant to the provisions of R. S. 30:5—7, 8 and 9. R. S. 30:5—36, which deals specifically with the benefits under the Home Life Assistance Program, provides, in part, as follows.

"* * * there shall be paid to the mother through the State Board of Children's Guardians from funds provided as set forth in sections 30:5—5 to 30:5—8 of this Title for the support of her child * * *"

In our opinion, an examination of Chapter 138 of the Laws of 1951 as a whole clearly establishes that the repealing language in section 38 thereof, although absolute in terms, is actually limited in its operation and effect to the repeal of the administrative and financing provisions of Articles I and II as they apply to the maintenance program which had been set up under Article III, which was thereupon repealed and superseded. The repealer does not and was not intended to affect Article I and II in its applicability to the Home Life Assistance program under Article IV.

The construction reached by us from an analysis of the statute itself is confirmed by an examination of the legislative history of Senate Bill No. 215 of 1951, which became Chapter 138 of the Laws of 1951.

At the time of the introduction of Senate Bill No. 215 in the Legislature, there was pending a companion measure, Assembly Bill No. 17, providing for the replacement of the Home Life Assistance program. As the two bills were drawn, the express repealer of Article IV of Chapter 5 setting forth the Home Life Assistance program was contained in Senate Bill No. 215, along with the express repealers of the other articles of Chapter 5. When it became apparent that Assembly Bill No. 17 might fail of enactment, it became necessary to amend Senate Bill No. 215 to preserve the existing Home Life Assistance program. Amendments were thereafter introduced under the caption "Suggested Amendments (To provide for continuation of the present program of Home Life Assistance if Assembly Bill No. 17 should fail of legislative support.)" These amendments deleted the prior repealer of the

entire Chapter 5 in order to preserve the Home Life Assistance program. Article IV was saved from repeal in toto. In addition, there were deleted express repealers of several specific statutes which had amended portions of Articles I and II which contain provisions for the financing and administration of the Home Life Assistance program set up in Article IV. The acts thus saved from repeal included P. L. 1947, c. 128, P. L. 1944, c. 194, P. L. 1940, c. 118, P. L. 1939, c. 377, and P. L. 1938, c. 151. These, it will be noted, included the most recent amendments to R. S. 30: 5—7 and R. S. 30:5—8.

Further, the practical construction adopted by the State, county and federal agencies concerned with the administration of the Home Life Assistance program since the adoption of P. L. 1951, c. 138 is in accordance with the opinion we have expressed herein. It is a well established principle of law that the interpretation placed upon statutes by officials charged with their administration or application will receive considerable weight in resolving any ambiguity which may be thought to inhere in a statute. See *Weinacht v. Board of Chosen Freeholders,* 3 N. J. 330 (1949); *Ford Motor Company v. N. J. Department of Labor and Industry,* 7 N. J. Super. 30 (App. Div. 1950), aff'd. 5 N. J. 494 (1950).

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General,

By: HAROLD KOLOVSKY,
Assistant Attorney General.

MARCH 30, 1955.

MR. STEVEN E. SCHANES,
Bureau of Public Employees' Pensions,
State House Annex,
Trenton, New Jersey.

FORMAL OPINION—1955. No. 13.

DEAR MR. SCHANES:

You have asked our opinion as to whether, under P.L. 1954, Chapter 84, providing for the Public Employees' Retirement System, personnel of the State Militia or New Jersey National Guard, who serve in the Department of Defense in a permanent capacity, are entitled to "prior service credit" for time spent, prior to their so becoming state employees, in the active military service of the United States in time of war.

You have advised us that such credit has been claimed by virtue of R.S. 38:14-9. This legislation was originally enacted as Section 9 of Chapter 49 of the Public Laws of 1937, entitled "An Act concerning the militia of the State." It provides as follows:

> "For all purposes, officers and enlisted men who entered the active service of the United States in time of war by appointment or enlistment, or under call, order or draft by the president, or who shall hereafter enter such service under like conditions, shall be entitled to credit for the time served in the active service of the Unitetd States, as if such service had been rendered in the state."

Reference should also be made to R.S. 38.12-8 (Section 7, Chapter 95, Public Laws 1939) which provides as follows:

> "Officers and enlisted men serving the State in a permanent duty status shall be eligible for the disability and retirement privileges and benefits available to all other employees of the State . . ."

N.J.S.A. 43:15A-1 through N.J.S.A. 43:15A-86 (Chapter 84, Public Laws 1954) set forth and created a comprehensive retirement system for public employees. It provides, in detail, the rights and privileges which are to be accorded under the Act to all public employees, and also the special rights and privileges to be accorded to public employees who are "veterans".

N.J.S.A. 43:15A-6(1) defines the periods of active military service which constitute a public employee a "veteran" for purposes of the Public Employees' Retirement Act. It includes the active military or naval service of the United States during World War I between April 6, 1917 and November 11, 1918, during World War II between September 16, 1940 and September 2, 1945, and also such active service during other specified periods of war or emergency.

N.J.S.A. 43:15A-60(a) provides that public employees who have been in active military or naval service during such specified periods must be accorded prior service credits for service rendered in the employ of the State, a county, municipality, school district, or board of education. This section does not deal with the question of whether or not public employees are to be given prior service credits for time spent in the active military or naval service in time of war or emergency.

The section which deals with the question of credit for military or naval service is N.J.S.A. 43:15A-10, which provides:

> "Any state employee who had entered or shall hereafter enter into the active air, military, or naval service of the United States before making application for enrollment in the retirement system shall be accepted as a member upon his filing application, provided such application is made within three months after entry into such active air, military, or naval service, and his regular salary deductions as determined by the board of trustees shall be paid to the retirement system by the employing department as provided by chapter 252 of the laws of 1942 as amended by chapter 326 of the laws of 1942 . . ."

The section quoted above deals with State employees who are not or were not members of the retirement system at the time of their entry into the armed forces. It makes specific reference to chapter 252 of the laws of 1942 as amended by chapter 326 of the laws of 1942 (N.J.S.A. 38:23-5) which deals with State employees who are or were members of the retirement system at the time of their entry into the armed forces, and which provides as follows:

> "No person holding any office, position or employment under the government of the State of New Jersey or of any county, municipality, school district, or other political subdivision of the State, or under any board, body, agency or commission of the State or of any county, municipality or school district who, heretofore and subsequent to July first, one thousand nine hundred and forty, entered or hereafter, in time of war, shall enter, or heretofore or hereafter in time of emergency entered or shall enter, the active military or naval service of the United States or the active service of the Women's Army Auxiliary Corps, the Women's Reserve of the Naval Reserve or any similar organization authorized by the United States to

serve with the Army or Navy and who, at the time of such entry was or is a member in good standing of any pension, retirement, or annuity fund, shall suffer the loss or impairment of any of the rights, benefits or privileges accorded by the laws governing such pension, retirement or annuity funds; and the time spent in such service by any such person shall be considered as time spent in the office, position or employment held by him at the time of his entry into such service, in all calculations of the amount of pension to which he is entitled and of the years of service required to entitle him to retire . . ."

It thus appears that no general provision has been made by the legislature for the granting of prior service credits to state employees who were in active military service before entering into the employ of the state. Furthermore, there is no indication in Chapter 84 of the Public Laws of 1954 that the legislature intended to give to veteran members of the State Militia or the New Jersey National Guard serving in the Department of Defense in a permanent status any greater benefits than are given to any other state employees who are veterans. There is no indication that the legislature intended to ingraft any exceptional benefits for any class of public employees upon the comprehensive plan and system set up by Chapter 84 of the Public Laws of 1954. This is consonant with R.S. 38:12-8 which requires that "officers and enlisted men serving the State in a permanent duty status shall be eligible for the disability and retirement privileges and benefits available to all other employees of the State," and which was enacted subsequent to R.S. 38:14-9, upon which the claim for exceptional prior service credit is based.

It is, therefore, our opinion that active military service in the armed forces of the United States prior to the date that any member of the retirement system became eligible for membership in the system by virtue of his public employment cannot be used as a basis for prior service credit in the Public Employees' Retirement System by any public employee.

In view of the foregoing, we do not, in this opinion, find it necessary to pass upon the question of whether or not, under R.S. 38.14-9, and for a purpose other than Chapter 84 of the Public Laws of 1954, a member of the State Militia or New Jersey National Guard serving in the Department of Defense in a permanent capacity is entitled to service credit for active service in the armed forces of the United States in time of war in cases where such active service was rendered before the person became a State employee.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General
of New Jersey.

By: CHARLES S. JOELSON,
Deputy Attorney General.

caj;b

APRIL 7, 1955.

HONORABLE WILLIAM F. KELLY, JR.,
President, Civil Service Commission,
State House,
Trenton 7, New Jersey.

FORMAL OPINION—1955. No. 14.

DEAR PRESIDENT KELLY:

You have requested advice as to whether municipal employees of a Veterans Housing Project are covered by the Civil Service Law in a municipality which has adopted Civil Service by referendum. Your letter states.

> "This Department has consistently held that such employees are not under civil service based on the advice of former Deputy Attorney General Theodore Backes in a letter dated February 14, 1949 and addressed to Paul T. Stafford, Acting Chief Examiner and Secretary. This same matter with reference to State employees are considered and determined in Formal Opinion No. 27 of 1949, issued from your Department.
>
> By Memorandum dated October 22, 1953, this Department requested a review of this formal opinion with the hope that it might be reversed, but such action was deemed inadvisable.
>
> In the light of the above, I do not believe that this Department has any alternative other than to affirm our ruling in the present case, unless some other determination is made by your office.
>
> I would appreciate your advising me as to whether or not you are inclined to effect a reconsideration and redetermination of this matter, so that we may advise the local authorities."

We have ascertained that the employees about whom you have inquired are employed by the City of Perth Amboy which, by a contractual arrangement, see N.J.S.A. 55:14G-17, manages the housing project for the Commissioner of Conservation and Economic Development. This being the case, it is clear that the employment of such persons is not specifically excluded from the provisions of the Civil Service Law by the terms of N.J.S.A. 55:14G-12 "b" and "c". The latter section has application only to persons employed by the Commissioner of Conservation and Economic Development.

Your letter states that the City of Perth Amboy elected, on November 13, 1953, to be governed by the provisions of the Civil Service Law. That statute provides that upon the adoption of its provisions by the voters of a municipality all persons in the classified service shall continue to hold their offices and employments subject to the provision of the subtitle relating to municipalities, R. S. 11:21-6. The effect of this section is to "blanket in," as eligible to the protection afforded by the Civil Service Law, all those who are not unclassified employees as defined by R. S. 11:22-2, as amended. Finding no provision in the latter section which would place the subject employees in the unclassified service, we conclude that they are in the classified service, R. S. 11:22-3. As previously indicated, those who were employed prior to the adoption of the Civil Service Law by the voters of Perth Amboy and who continued to serve thereafter were automatically brought within the protection of the Civil Service Law. The employment of individuals at a subsequent date would have to comply with the procedures set down in the Civil Service Law. Thus, if persons have been hired for work at the Veterans Housing Project subsequent to November 3, 1953, an examination of their status should be made and

steps taken to fill the positions from eligible lists after examination or such other means of selection as the Commission deems appropriate for the position concerned. It should be borne in mind that temporary appointments in the municipal service are limited in duration to a period of two months with only one two-month renewal permitted, R. S. 11:22-15.

Formal Opinion 1949 No. 27, advised you that State employees of the Veterans Emergency Housing Program, in the State Department of Conservation and Economic Development were not subject to the provisions of the Civil Service Law. The reason assigned was that the statutory provisions setting up the program were designed to expire by their own limitation and, consequently, the employees were regarded as temporary. The opinion states,

> "From the foregoing, it will be seen that Chapter 323 of the Laws of 1946 is to expire by its own limitation and, in my opinion, the employees of that department not now under civil service or under tenure by Chapter 435 of the Laws of 1948, are temporary employees and in nowise subject to the jurisdiction of the Civil Service Commission."

We have reexamined the above opinion in the light of the statutory provisions relating to temporary appointments and have concluded that the opinion is erroneous. In the state service, temporary appointments are governed by the provisions of R. S. 11:11-1, which provides as follows,

> "The appointing authority shall, when by reason of pressure of work he determines that an extra position in the classified service must be established for a period of not more than six months, notify the chief examiner and secretary of that fact stating the cause therefor, the probable length of time such position will be required and the duties the appointee is to perform. The chief examiner and secretary shall thereupon make such investigation as he deems necessary to satisfy himself as to whether the extra position must, in fact, be established and if he finds that it must, he shall, with the approval of the commission, issue the certificate provided by section 11:7-5 of this title and shall thereupon authorize the appointment of a qualified person with or without competitive tests. Temporary appointment to extra positions shall be made, as far as practicable, following certification from re-employment and employment lists. No such appointment shall be authorized for a period exceeding three months or renewed more than once within a fiscal year."

It will be noted that such temporary appointments are permitted only when, by reason of pressure of work, it is necessary to establish an extra position for a period not to exceed six months. The appointments are limited, by the terms of the above quoted section, to periods of three months with only one renewal permitted. The positions, created to carry out the terms of Chapter 323, P. L. 1946, N.J.S.A. 55:14G-1 et seq., must have been intended to continue for a greater period than six months. The program established by the statute was to continue from its effective date, October 1, 1946 to July 1, 1948. Section 26, Chapter 323, P. L. 1946, N.J.S.A. 55:14G-26. From time to time, however, the expiration date of the program was extended by the Legislature, Chapter 12, P. L. 1948, Chapter 5, P. L. 1949, Chapter 186, P. L. 1949, Chapter 25, P. L. 1954, Chapter 206, P. L. 1954. It is thus seen that the program was originally set up for a period longer in duration than six months and, in fact, it has continued for a much longer period. These facts do not justify any sweeping conclusion that all of the employees engaged in such a program are to be regarded as temporary employees. In order to have been so regarded, it would have been necessary to comply with the provisions of R. S. 11:11-1, supra, by the issuance of the certificate, to which reference is made therein,

and by the authorization of a temporary appointment. At the end of a six month period, after appointment to such a position, it would have been necessary, if it was determined to continue the position, for the appointing authority to have reported his intention to establish the position, R. S. 11:7-3, for the Chief Examiner to have certified that the position was necessary, R. S. 11:7-5, for the position to have been classified, R. S. 11:7-3, N.J.S.A. 11:7-11, 11:7-12, and the requisite employment list to have been prepared in the appropriate manner, R. S. 11:7-3, R. S. 11:9-9 and R. S. 11.10-1.

At the time Formal Opinion 1949 No. 27 was written, the statute, Chapter 323, P. L. 1946, authorizing the administrator (Commissioner of the Department of Economic Development) to hire employees, was silent as to the manner of selection of employees. In such a circumstance, the provisions of the Civil Service Law should have been complied with. Article VII, Section II, Paragraph II, of the New Jersey Constitution requires that appointments in the civil service of the State "* * * shall be made according to merit and fitness to be ascertained, as far as practicable, by examination * * *." This provision would seem to require that appointments should be made in accordance with the Civil Service Law unless there has been a legislative determination by statute or an administrative determination of the Civil Service Commission that it is not practicable to determine merit and fitness by examination. We know of no such legislative or administrative determination concerning these positions. Subsequently, on May 21, 1949, shortly after the date of Formal Opinion 1949 No. 27, Chapter 186, P. L. 1949 was enacted. The amendment provided, among other things, that the employment of the state employees authorized should not be subject to the Civil Service Law, N. J. S. A. 55:14G-12, paragraphs "b" and "c". After that date it was no longer necessary to comply with the provisions of the Civil Service Law as to the selection of new state employees of the Veterans Emergency Housing Program in the State Department of Conservation and Economic Development. The statute, however, continued to remain silent as to the manner of the selection of municipal employees engaged in the management of such Housing Projects.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: JOHN F. CRANE,
Deputy Attorney General.

APRIL 15, 1955.

HON. HARRY A. WALSH,
Chief Examiner and Secretary,
Department of Civil Service,
State House,
Trenton 7, New Jersey.

FORMAL OPINION—1955. No. 15.

DEAR MR. WALSH:

You have requested advice as to whether an examination for the position of Chief of the Fire Department of the Town of Morristown should be limited to the paid members of the Fire Department or extended to include the volunteer members as well. R. S. 40:47—21 provides as follows:

"In municipalities having a permanent paid fire department, other than cities of the first class, all promotions in such department shall be made from the membership thereof as constituted at the time of the promotion, but no person shall be eligible to a superior position unless he shall have served for a period of at least three years in the grade of permanent paid fireman."

We understand from the information you have supplied that the Morristown Fire Department consists of several volunteer companies each of which have paid drivers. The status of the drivers is described as that of regular firemen. The latest effective ordinance entitled "An Ordinance relating to the Fire Apparatus Drivers of the Town of Morristown", passed July 5, 1929, (Ordinance Book No. 1, page 224) provides,

"1. Hereafter the full time drivers of the fire apparatus of the Town of Morristown, who are now so employed or who may be hereafter appointed shall be and are hereby designated *firemen.*

* * * * *

4. Said fire drivers, as *such firemen,* shall receive such compensation and shall be paid in the manner as is now provided by ordinance."

Other ordinances have established the compensation for the chief and drivers so that it now appears that Morristown has a fire department consisting of volunteer as well as paid firemen headed by a chief who is paid.

To establish a paid fire department the municipality would have had to adopt an ordinance and submit it to the voters for approval, R. S. 40:47—32. We assume this has not been done for we find nothing in the file so to indicate. Assuming this to be the case, it would appear that Morristown does not have a permanent paid fire department within the meaning of the statute, R. S. 40.47—21, *supra,* which limits eligibility for promotion to members of such department.

Assuming it is practicable to determine the merit and fitness of applicants for the office of Fire Chief by competitive examination as contemplated by R. S. 11:22—30 (and we know of no reason why it should not be so) we think the situation calls for an exercise of the discretion granted by R. S. 11:22—34, as amended, (see also Civil Service Rule 24) as to the lower grade or grades to be encompassed, *Falcey v. Civil Service Commission,* 16 N. J. 117 (1954), and as to whether or not the examination should be open to members of the general public, *DeStefano v. Civil Service Commission,* 130 N. J. L. 267. (E. & A. 1943).

Accordingly, we advise you that the provisions of R. S. 40:47—21, do not apply to the instant situation; thus eligibility for promotion to the office of Chief is not limited to the paid members of the Fire Department.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: JOHN F. CRANE,
Deputy Attorney General.

b.

APRIL 15, 1955.

HON. ARCHIBALD S. ALEXANDER,
State Treasurer,
State House,
Trenton, New Jersey.

FORMAL OPINION—1955. No. 16.

DEAR MR. ALEXANDER:

This is in answer to your communication of March 9, 1955.

Your first question concerns whether or not any payments received or receivable by a plaintiff or his personal representative for temporary disability benefits, or benefits under an accident and health policy, hospitalization policy, or similar insurance policies shall be deducted from the amount due upon the judgment for payment of which claim is made upon the Unsatisfied Claim and Judgment Fund.

Under the common law, in an action for personal injuries, damages are not mitigated by reason of insurance paid to a plaintiff under a contract to which the tort-feasor was a stranger. This rule or law was adopted in New Jersey as early as 1873 when the old Supreme Court stated in *Weber v. Morris and Essex Railroad Co.,* 36 N. J. L. 213 (Supreme Ct. 1873):

". . . A person committing a tort cannot set up in mitigation of damages that somebody else, with whom he had no connection, has either in whole or in part indemnified the party injured."

This rule of law has been cited with approval in *Cornish v. North Jersey Street Railway Co.,* 73 N. J. L. 273 (Supreme Ct. 1906; *Skillen v. Eagle Motor Co.,* 107 N. J. L. 211 (Supreme Ct. 1930); *Rusk v. Jeffries,* 110 N. J. L. 307 (Err. & App. 1932).

However, this rule does not apply to the Unsatisfied Claim and Judgment Fund Law which provides in N. J. S. A. 39:6-71, as amended, in part, as follows:

". . . Any amount for compensation or indemnity for damages or other benefits which the plaintiff has received or can collect from any person other than the judgment debtor shall be deducted from the amount due upon the judgment for payment of which claim is made."

Furthermore, N. J. S. A. 39:6-83, as amended, provides that "a judgment against the director shall be reduced by any amounts which such plaintiff has received from any person mentioned in subparagraph (m) of section 10 (N. J. S. A. 39:6-70)." Subparagraph (m) of section 10 (N. J. S. A. 39:6-70) refers to "a judgment in an action against any other person against whom he has a cause of action in respect of his damages for bodily injury or death or damage to property arising out of an accident and . . . the amounts recovered upon such judgments or the amounts, if any, received for indemnity or other benefits for such injury or death or damage to property from any person other than the operator or owner of the motor vehicle causing such injury, death or damage."

In light of the above-cited statutory provisions, it is our opinion that payments received or receivable by a plaintiff or his personal representative for temporary disability benefits, or benefits under an accident and health policy, hospitalization policy, or similar insurance policies would constitute "other benefits" within the meaning of these statutes, which should be deducted from the amount due upon the judgment for payment of which claim is made against the Fund.

Your second question concerns how payment shall be made from the Fund in a case where there is an accident involving two or more persons whose total claims exceed $10,000.00.

N. J. S. A. 39:6-73 (1) limits to $5,000.00, exclusive of interest and costs, the amount payable from the Fund to one person in any one accident; N. J. S. A. 39:6-73(2) limits to $10,000.00, exclusive of interest and costs, the amount payable from the Fund as the result of any one accident.

You have asked specifically whether, in a case where there is an accident involving two or more persons whose total claims exceed $10,000.00, payment is to be made from the Fund on a pro rata basis after all claims have been adjudicated, or "in the order judgments are received."

N. J. S. A. 39:6-69 provides for application to the court in which the unsatisfied judgment was entered that said judgment be directed to be paid out of the Fund subject to the limitations cited above as to amounts. N. J. S. A. 39:6-70 provides for a court hearing upon the application for payment of judgment from the Fund. N. J. S. A. 39:6-71, as amended, which provides for an order for payment of judgment, is as follows:

> "The court shall make an order directed to the treasurer requiring him to make payment from the fund of such sum, if any, as it shall find to be payable upon said claim, pursuant to the provisions of and in accordance with the limitations contained in this act. . . ."

Examination of the Unsatisfied Claim and Judgment Fund Law reveals no express provision for the apportionment on a pro rata basis of claims under unsatisfied judgments of more than one person, totalling $10,000.00 or more as the result of a single accident. Neither does it deal with the problem which would arise in the event the Unsatisfied Claim and Judgment Fund Board were required, at one meeting, to pass upon the priority of two or more orders bearing the same date, for payment of judgments arising out of the same accident, and totalling more than $10,000.00. Nor does it deal with the problem which would arise if the Board were required, at one meeting, to pass upon the priority of two or more orders. either bearing different dates, or filed with the Board on different dates. Furthermore, it does not go into the problem of the rights of a person who gives the Board notice of an accident, but delays institution of a legal action, as against the rights of a person who gives notice and promptly reduces his claim to judgment.

Examination of the statutes and case law on the general subject of the operation and effect of writs of execution after judgment would be of no avail towards a solution of the problem in point since we are here involved with a separate and distinct statuory field which is sui generis. Furthermore, an examination of cases dealing generally with insurance policies which fix limits of liability upon the part of the insurer discloses that the law is in an unsettled state.

A leading case which holds that judgment creditors are entitled to share pro rata in payments under a policy which restricts the amount of the insurer's liability is *Century Indemnity Co. v. Kofsky, et al.,* 115 Conn. 193, 161 Atlantic 101, (Supreme Court of Errors of Connecticut, 1932). We quote from this case, in which the insurance company paid the money into court, and interpleaded the contesting parties:

> "We would, in the absence of strong considerations to support such a ruling, be reluctant to apply legal principles which would recognize any priority between the judgment creditors. Where several creditors are restricted for satisfaction of their claims to a single fund inadequate to pay all, the general rule adopted is that of equality . . . Particularly would we be reluctant to recognize either of the claims of priority advanced in this case. A rule of priority dependent upon the time when actions are begun against the insured would be likely to lead to a race to begin such actions, with an added burden of litigation to parties and the courts and a tendency to prevent or render more difficult the settlement of claims. A rule of priority made dependent upon the time when judgments were rendered against the insured would often make controlling the adventitious circumstances attending litigation, often beyond the control of the parties . . .
>
> "The plaintiff has submitted to the court in a proceeding in equity the question of its liability to pay to the various defendants the amounts due, under the policy; justice requires that they share in equal proportions in the sums due under it on account of the particular kind of injuries suffered; and in the circumstances of this case, that result can be accomplished without violating any legal principle."

In *Bleimeyer v. Public Service Mutual Casualty Insurance Corporation,* 250 N. Y. 264, 165 N. E. 286, (Ct. of Appeals of N. Y., 1929), Justice Cardozo extended the pro rata doctrine in the case of a bond bearing limited liability on the part of the insurer. In that case, the plaintiff had filed a bond for an omnibus company under a New York statute which required that the bond need only be for a total sum of $5,000.00 for any one accident, "to be apportioned ratably among the judgment creditors according to the amount of their respective judgments." The question before the court was whether or not the limited fund had to be apportioned so as to include persons who had not reduced their claims to judgment, or who had not yet instituted legal action. In ruling in the affirmative, the court said:

> "We think the proper form of remedy, where several persons have been killed or injured as the result of a single casualty and the wrongdoer is insolvent, is an equitable action by a judgment creditor suing in his own behalf and in behalf of any others similarly situated, to administer the proceeds of the bond as a fund created by the statute for ratable protection. *Guffanti v. National Surety Co.,* 196 N. Y. 452, 456, 457, 90 N. E. 174 (134 Am. St. Rep. 848); *Bottlers' Seal Co. v. Rainey,* 243 N. Y. 333, 153 N. E. 437; *Mann v. Pentz,* 3 N. Y. 415, 423. The statute is explicit to the effect that the moneys due under the bond are 'to be apportioned ratably among the judgment creditors according to the amount of their respective judgments.' This scheme will be frustrated if a single claimant may gain a preference over others and appropriate to his own use something more than his proportionate share of the general security. *Guffanti v. National Surety Co.,* supra. The appropriate remedy in such conditions is an action in equity for proportionate division. *Mann v. Pentz,* supra. We do not hold with the courts below that a claimant must postpone his action on the bond until the rights of other claimants have been barred by limitation. This might result in postponement for 21 years or longer, which would make the remedy illusory. The action is not premature, but its form must be adapted to the needs of the occasion. In an action in equity, the court may direct an interlocutory judgment requiring other judgment creditors to prove their claims within a stated time if they wish to share in the security. *Brinckerhoff v. Bostwick,* 99 N. Y. 185, 194, 1 N. E. 663; *Hirshfeld v. Fitzgerald,* 157 N. Y. 166, 51 N. E. 997, 46 L. R. A. 839. If claims are in litigation, but have not yet been reduced to judgment, there may be a reasonable allowance of time, six months, or a year, or whatever other period may be fair in the light of all the circumstances, within which claims may be perfected. When the allotted time shall have elapsed, final judgment may be rendered for the division of the fund among the judgment creditors entitled."

However, there is a line of cases which rule against pro rata apportionment in analogous cases. In *Price v. Price,* 122 West Virginia 122, 7 S. E. 2d 510 (West Virginia Supreme Ct. of Appeals, 1940) the court preferred the equitable maxim that "equity aids the vigilant" to the maxim that "equity is equality." Thus, it gave priority to a judgment creditor upon the bond of a city treasurer over other

creditors who had not reduced their claims to judgment where the bond was insufficient to pay all claims in full. Many jurisdictions support this result.

In view of the failure of the Unsatisfied Claim and Judgment Fund Act to deal with the problem, and in further view of the impossibility of discerning a clear and consistent rule of law from the reported cases, we suggest that steps be taken by means of supplementary legislation to clarify this area of the law. When the Board has established a policy on the matter which it wishes to recommend to the Legislature, we shall be pleased to confer with the Board on the preparation of the proposed legislation. If no supplemental legislation is enacted, the safest policy would be for the Board to pay the money into court, and have the court adjudicate the conflicting claims by way of an interpleader action.

Your third question concerns whether or not the Board, under N. J. S. A. 39:6-72, as amended, has authority to arrange installment payments for the judgment debtor. This section gives the Board authority, under certain stated conditions, to consent to settlements in excess of $1,000 between the plaintiff and defendant, subject to the approval of the court. It also gives an insurer to whom a claim has been assigned authority to settle, under certain stated conditions, any claim involving less than $1,000 with the approval of the Director of Motor Vehicles and any other one member of the board, without court approval. This section deals with lump sum settlements, and makes no provision for installment payments to the Board for payment made by the Fund pursuant to such settlements.

The only reference to installment payments which the legislation appears to make is found in N. J. S. A. 39:6-87, which provides as follows:

> "Where the license or privileges of any person, or the registration of a motor vehicle registered in his name, has been suspended or cancelled under the Motor Vehicle Security-Responsibility Law of this State, and the treasurer has paid from the fund any amount in settlement of a claim or towards satisfaction of a judgment against that person, the cancellation or suspension shall not be removed, nor the license, privileges, or registration, restored, nor shall any new license or privilege be issued or granted to, or registration be permitted to be made by, that person until he has
>
> (a) Repaid in full to the treasurer the amount so paid by him together with interest thereon at four per centum (4%) per annum from the date of such payment; and
>
> (b) Satisfied all requirements of said Motor Vehicle Security-Responsibility Law in respect of giving proof of ability to respond in damages for future accidents, provided, that the court in which such judgment was rendered may, upon ten days, notice to the board, make an order permitting payment of the amount of such person's indebtedness to the fund, to be made in installments, and in such case, such person's driver's license, or his driving privilege, or registration certificate, if the same have been suspended or revoked, or have expired, may be restored or renewed and shall remain in effect unless and until such person defaults in making any installment payment specified in such order. In the event of any such default, the director shall upon notice of such default suspend such person's driver's license, or driving privileges or registration certificate until the amount of his indebtedness to the fund has been paid in full . . ."

It should be noted that under this section, only the court may permit the restoration or renewal of a driver's license or a registration certificate while installment payments set by the court are being made. Otherwise, the section specifically provides against such restoration or renewal until the judgment debtor has "repaid in full to the Treasurer the amount paid by him together with interest thereon at the rate of 4% per annum from the date of such payment."

It is our opinion that there is no prohibition in the legislation against the Board arranging for the collection by an installment method of the entire amount paid by the Treasurer plus 4% interest. However, there is no authority for said installment payments being used as a basis for renewal or restoration of driving privileges without the express authority of a court order to that effect as provided by N. J. S. A. 39:6-87 (b).

Very truly yours,
GROVER C. RICHMAN, JR.,
Attorney General.
By: CHARLES S. JOELSON,
Deputy Attorney General.

csj;b

APRIL 20, 1955.

ALFRED T. DAVIS, Chairman,
Hudson County Board of Elections,
591 Summit Avenue,
Jersey City 6, New Jersey.

FORMAL OPINION—1955. No. 17.

DEAR MR. DAVIS:

Receipt is acknowledged of your request for my opinion as to the legal qualifications for newspapers publishing resolutions, official proclamations, notices or advertising in this State.

R. S. 35:1-2.1 (P. L. 1953, Chapter 411, page 2067, section 1) provides:

> "Whenever it is required to publish resolutions, official proclamations, notices or advertising of any sort, kind or character, including proposals for bids on public work and otherwise, by this State or by any board or body constituted and established for the performance of any State duty or by any State official or office or commission, the newspaper or newspapers selected for such publication *must* meet and satisfy the following qualifications, namely: said newspaper or newspapers shall be entirely printed in the English language, shall be printed and published within the State of New Jersey, shall be a newspaper of general paid circulation possessing an average news content of not less than thirty-five per centum (35%), shall have been published continuously in the municipality where its publication office is situate for not less than two years and shall have been entered for two years as second-class mail matter under the postal laws and regulations of the United States. * * *"

It will be noted that this section requires that such newspaper or newspapers shall be entirely printed in the English language, shall be printed and published within the State of New Jersey, shall be a newspaper of general paid circulation possessing an average news content of not less than thirty-five per cent, shall have been published continuously in the municipality where its publication office is situate for not less than two years and shall have been entered for two years as second-class mail matter under the postal laws and regulations of the United States.

These statutory conditions are prerequisites for advertising of the kind mentioned in the statute.

Yours very truly,
GROVER C. RICHMAN, JR.,
Attorney General.
By: JOSEPH LANIGAN,
Deputy Attorney General.

jl/d

APRIL 20, 1955.

MR. ELMER G. BAGGALEY, Secretary,

Consolidated Police and Firemen's Pension Fund Commission and Police and Firemen's Retirement System of New Jersey.

State House Annex,
Trenton, New Jersey.

FORMAL OPINION—1955. No. 18.

DEAR MR. BAGGALEY:

You have asked our opinion as to the responsibilities of the Consolidated Police and Firemen's Pension Fund Commission and the Police and Firemen's Retirement System of New Jersey in considering retirement applications from

"(a) persons under departmental charges
(b) persons under indictment for a crime of moral turpitude and
(c) persons convicted or dismissed under either circumstances."

We shall deal first with the problem relating to persons already dismissed upon departmental charges, or who were convicted in court as referred to in your category (c) above.

A leading case which establishes the principle that pension rights are to be denied to a public employee who has been convicted of a crime is *Walter v. Police and Fire Pension Commission of the City of Trenton,* 120 N. J. L. 39 (Sup. Ct. 1938), The opinion in that case opens as follows:

> "Does a police officer, who continues in service after having served twenty years and after having attained the age of fifty years, forfeit his right to a pension under 2 Rev. Stat. 43:16-1 (Pamph. L. 1920, ch. 160, p. 324), by reason of his conviction for malfeasance in office, the malfeasance having occurred after the police officer had become eligible for the pension? We think so."

The court further stated (p. 42):

> "Deductions from salary, moreover, create no vested right to a pension. *Bader v. Crone,* 116 N. J. L. 329; 184 Atl. Rep. 346. A pension is, in effect, but the taxpayer's reward, given pursuant to legislative mandate, for honest and efficient service. *Plunkett v. Pension Commissioners of Hoboken,* 113 N. J. L. 230; 173 Atl. Rep. 923; affirmed, 114 N. J. L. 273; 176 Atl. Rep. 341. To bestow that reward upon one whose record of public service is marred by a conviction for malfeasance in office would be to place premium upon dishonesty and inefficiency; to burden the taxpayer with the necessity of providing for one who has betrayed the trust imposed upon him. Such a result will never be countenanced by any word, act, or judgment of this court."

The court in this case also stressed R. S. 2:160-9, which is now 2A:135-9, and reads as follows:

> "Any person holding an office or position, elective or appointive, under the government of this State or of any agency or political subdivision thereof, who is convicted upon, or pleads guilty, non vult or nolo contendere to an indictment, accusation, or complaint charging him with the commission of a misdemeanor or high misdemeanor touching the administration of his office or position, or which involves moral turpitude, shall forfeit his office or position and cease to hold it from the date of his conviction or entry of plea . . ."

In discussing the applicability of the above-cited statute to the retirement rights of a member of the police department under R. S. 43:16-1, the court stated (p. 41):

> ". . . It is clear that under R. S. 43:16-1, in order for an officer to retire with pension, he must have been a member of the police department at the time his application is made. And it is equally clear that this prosecutor was not, on March 15, 1937, when he applied for a pension, a member of the police department of the city of Trenton. His office had been forfeited on March 20, 1935, because of his conviction for malfeasance in office."

Since the old R. S. 2:160-9 is still in effect as N. J. S. A. 2A:135-9, it must be held to have the same effect upon applications for retirement under N. J. S. A. 43:16-1, et seq., and N. J. S. A. 43:16A-1, et seq., which also limit benefits thereunder to "members" of the police and fire departments. One who has forfeited his office or position under N. J. S. A. 2A:135-9 cannot, obviously, be any longer considered a "member" of a police or fire department.

Plunkett v. Pension Commissioners of Hoboken, 113 N. J. L. 230 (Sup. Ct. 1934), affirmed 114 N. J. L. 272 (E. & A. 1934) deals with the pension rights of a fireman who was dismissed upon departmental charges of misconduct. In denying pension rights to such a person who had, concededly, reached voluntary retirement age, the court stated (p. 233):

> "And it cannot be gainsaid that the applicant is confessedly guilty of misconduct of a disqualifying character. His conduct, while a member of the fire department, did not meet the standard prescribed by the statute. 'Honorable service' is that characterized by or in accordance with principles of honor. One so serving is scrupulously upright, and shows a fine regard for obligations as to conduct. He is entitled to honor or high respect. *The New Century Dictionary.* One who embezzles funds entrusted to his care does not, therefore, render the service that is an essential prerequisite to the awarding of a pension under the act. This offense involves moral turpitude, and palpably justifies the denial of a pension to one so offending. Such misconduct afforded ample justification for the removal of prosecutor from the department. He thereby forfeited his right of membership, and, by the same token, his offense characterized his service as dishonorable.
>
> But it is said that when a member of such a department has rendered honorable service therein for a period of twenty years, and attained the age of voluntary retirement, a vested property right to the statutory pension accrues, and he cannot thereafter be deprived of this right by his dismissal from the department for reasons not 'made by statute grounds for the termination of a pension.' This contention is utterly lacking in substance. The rule is that compulsory deductions from the salaries of governmental employes, by the authority of the government, for the support of a pension fund, create no contractual or vested right between such employes and the government, and neither the employes, nor those claiming under them, have any rights except such as are conferred by the statutes creating and governing the fund."

We now turn to the case of a person who, although not dismissed upon departmental charges or convicted in court, has departmental charges or an indictment pending against him. In *McFeely v. Board of Pension Commissioners of Hoboken,* 1 N. J. 212 (Sup. Ct. 1948), the court dealt with the problem of a person under indictment. It stated as follows (p. 217):

> "The statute lays upon the Pension Commission the clear and specific duty of affirmative action where there is a concurrence of the statutory factual

prerequisites. *Beronio v. Pension Commission of Hoboken,* 130 N. J. L. 620 (E. & A. 1943). While in some jurisdictions there is a specific statutory provision that action upon the application for a pension of this class shall be deferred until the disposition of a pending indictment against the claimant, there is none such in this state. Yet it is implicit in the statute that, in aid of the performance of their duty to determine the existence of the prerequisite condition of honorable service, these tribunals may, and in most cases should, certainly where the offense charged involves moral turpitude, stay action upon the pension claim awaiting the trial or other disposition of a pending indictment against the claimant; and, possessing as they do, in analogy to the authority of courts of general jurisdiction at common law, the inherent power of reconsideration, they may also, in the exercise of a sound discretion, vacate a pension grant and suspend further action on the claim until a pending indictment against the claimant is finally determined.

This power arises by necessary implication to serve the statutory policy. Inadvertent or premature or clearly erroneous action is not put beyond corrective measures by the tribunal itself. Apart from the inherent power of judicial tribunals, on their own motion, to correct injustice and prevent fraud or imposition upon the law, there is the added consideration that conviction of a misdemeanor touching the administration of one's office, or which involves moral turpitude, results in a forfeiture of the office. R. S. 2:160—9."

In *Ballurio v. Castellini,* 29 N. J. Super. 383 (App. Div. 1954), the question of a person under departmental charges was considered. In that case, the plaintiff sought a veteran's pension under N. J. S. A. 43:4—1 while under suspension pending a hearing on departmental charges which were preferred against him after he had been arrested on a charge of committing the crime of abortion. The court stated (p. 390):

"What then was the effect of Ballurio's suspension from employment prior to the application for retirement? The fact that he had veteran status, the age qualification, and the minimum service requirement, does not signify that he had a vested right to the pension and had become a special type of employee, no longer subject to discharge for cause. *Plunkett v. Board of Pension Commissioners of City of Hoboken,* supra. Obviously, suspension is not synonymous with discharge or dismissal; when it occurs the employment continues but becomes subject to the suspension. Cf. *Murley v. Township of Raritan,* 117 N. J. L. 357 (Sup. Ct. 1936). And in such case it must be considered that not only are the duties and obligations of the employment removed temporarily but the rights and privileges as well. Thus, the Civil Service Department rules define suspension as, among other things, 'removal preliminary to hearing and discharge from the service.' Rule 64.

Accordingly, when Ballurio was suspended, he was deprived of the privilege of obtaining a pension until the criminal charge was disposed of." . . .

It might possibly be argued that since N. J. S. A. 43:15—1 et seq. which creates the Consolidated Police and Firemen's Pension Fund provides throughout for retirement for age and disability for firemen and policemen "who shall have served honorably", whereas N. J. S. A. 43:16A—1 et seq. which involves the Police and Firemen's Retirement System of New Jersey refers to merely "creditable service", some distinction can be made. However, this line of reasoning was disposed of in *Ballurio v. Castellini* (*supra*) in which the court stated (p. 389):

"The industry of counsel has supplied us with the statistical data that Title 43 of the Revised Statutes contains 60 separate pension acts. Of these, nine speak of 'honorable service' or use equivalent words, and 51 contain no such reference. In the nine instances, the employees affected are certain categories of policemen and firemen and municipal water department employees. The 51 others include a heterogeneous group of employees, including policemen and firemen. One class cannot be distinguished from the other on any rational basis. Study of the various groups discloses no legislative pattern from which the deduction may be made that a deliberate intention is manifested to demand honorable service in some employments and not in others.

Consideration of all these acts in the light of the sui generis character of a public pension inevitably leads to the conviction that 'honorable' service is implicit in every such enactment. A pension is a bounty springing from the appreciation and graciousness of the sovereign; it is an inducement to conscientious, efficient and honorable service. And its utility would be destroyed if a person who is properly subject to discharge because of guilt of a crime involving moral turpitude can be said to have an indefeasible claim to a pension simply because he has served the required length of time and reached the necessary age and happens to win a headlong race to file his application for retirement before the public authorities can try him on the charges pending against him arising from such crime."

In view of all the foregoing, it is our opinion that the Consolidated Police and Firemen's Pension Fund Commission of the State of New Jersey and the Board of Trustees of the Police and Firemen's Retirement System of New Jersey should deny applications for retirement to persons within your category (c) above, and should withhold action on applications for retirement within your categories (a) and (b) above until a decision has been reached upon the departmental charges or indictments pending against them.

Very truly yours,
GROVER C. RICHMAN, JR.,
Attorney General.
By: CHARLES S. JOELSON,
Deputy Attorney General.

csj;b

MAY 11, 1955.

MR. ELMER G. BAGGALEY, *Secretary,*

Consolidated Police and Firemen's Pension Fund Commission and Police and Firemen's Retirement System of New Jersey,
State House Annex,
Trenton, New Jersey.

SUPPLEMENT TO FORMAL OPINION—1955. No. 18.

DEAR MR. BAGGALEY:

We hereby supplement Formal Opinion No. 18 of the year 1955 by calling your attention to R. S. 43:16—13, which provides as follows:

"No member of the police or fire department in any municipality or county in this State who shall have served honorably in any such department

for a period of twenty years shall be deprived of his pension privileges under chapter sixteen of Title 43 because of any violation of the rules and regulations established for the government of such department, but he may be fined, reprimanded or discharged. A member of the department found guilty before a court of competent jurisdiction may be dismissed or punished in any manner provided by law."

Under this statute, the application of which is limited to pensions under R. S. 43:16—1, et seq, any member who shall have served honorably for twenty years who is under departmental charges of "violation of a deparmental rules and regulations", or who is adjudged guilty of such charges may, nevertheless, be granted pension privileges.

This statute is to be limited to such cases, and is not to be extended to cases where a member is brought under departmental charges because indicted for a crime, or is dismissed for conviction of a crime. In the former case, pension payments are to be withheld pending the outcome of the indictment pursuant to McFeely v. Board of Pension Commissioners of Hoboken, 1 N. J. 212 (Sup. Ct. 1948). In the latter case, pension payments are to be denied for the reasons set forth in our original opinion.

Will you please attach this Supplemental Opinion to the original Opinion so that the two may be treated together.

Very truly yours,
GROVER C. RICHMAN, JR.,
Attorney General.

By: CHARLES S. JOELSON,
Deputy Attorney General.

CSJ:gc

APRIL 20, 1955.

HON. ARCHIBALD S. ALEXANDER,
State Treasurer,
State House,
Trenton, New Jersey.

FORMAL OPINION—1955. No. 19.

DEAR TREASURER ALEXANDER:

You have sought advice relating to your power to promulgate regulations as to which persons may file returns with the Inheritance Tax Bureau, Division of Taxation, Department of the Treasury. Such returns must be filed as provided by statute (N. J. S. A. 54:33—1 to 54:36—7).

You have submitted to us in connection with your request a proposed code of regulations governing the conduct of District Supervisors in the Bureau of which Rule 8 is pertinent. This Rule limits persons who may file such returns by stating that:

"No District Supervisor, or other employee, shall accept an inheritance tax report on the estate of a resident decedent from or negotiate with any person with regard to resident decedent estate matters unless said person is:

(a) An attorney at law of the State of New Jersey, or
(b) The personal representative of the estate, or
(c) An heir at law, next of kin, grantee, transferee, legatee or devisee of the decedent."

With regard to proposed Rule 8 you have asked the following specific questions:

(1) Can the Bureau refuse to accept a return filed by an accountant or other person other than an attorney acting in behalf of the legal representative of the estate?

(2) Can the Bureau refuse to accept a return on a resident estate from counsel of another state and insist that New Jersey counsel be employed?

(3) May this proposed code of regulations be adopted by a regulation of the Department of the Treasury, Division of Taxation, or is this a matter for legislation?

The object of proposed Rule 8 is to prevent the practice of law before the Bureau by unlicensed persons. Such practice is illegal; the offender may be adjudged a disorderly person which is punishable by fine or imprisonment (N. J. S. 2A:170—78; N. J. S. 2A:169—4). The Supreme Court by virtue of *N. J. 1947 Constitution,* Art. VI, Sec. II, Par. 3, has jurisdiction over the admission to the practice of law and the discipline of persons admitted. It has the power to regulate the practice of law and punish for contempt those who practice without authority (*In Re Baker,* 8 N. J. 321 (1952). To this end, the Supreme Court has adopted rules and regulations governing the practice of law. R. R. 1:12—1 (b) provides that:

"No person shall practice law in this State unless he has been admitted to practice as an attorney at law of this State and is in good standing."

R. R. 1:12—4 (b) provides that:

"No attorney or other person not residing in this State, or person not regularly admitted and enrolled, shall practice in the name of any attorney in this State, nor shall any attorney thereof permit another so to practice, on pain of being stricken from the roll."

And R. R. 1:12—5 states:

"No fee to any attorney or counsellor shall be allowed and no allowances by way of such fee shall be made in any cause, matter or proceeding in any court in this State, except for or on account of actual service rendered by a member of the bar of this State engaged in the practice of law and maintaining an office in this State; except that in any cause, matter or proceeding requiring the services of an attorney, counsellor or other member of the bar of any foreign jurisdiction, the court, in allowing a fee or making an allowance by way of fee, as aforesaid, shall take cognizance thereof and shall make allowance therefor as though actually rendered by the member of the bar of this State by whom such services were engaged."

These are not only applicable to our courts of law but to administrative tribunals that exercise quasi-judicial powers. In *Stack v. P. G. Garage,* 7 N. J. 118 (1951), a layman had sued for services rendered by representing a taxpayer in an appeal to a County Tax Board. In affirming the trial court's holding that an agreement for such services was illegal and unenforceable, the Supreme Court stated at page 120 that:

"In determining what is the practice of law it is well settled that it is the character of the acts performed and not the place where they are done that is decisive. The practice of law is not, therefore, necessarily limited to the conduct of cases in court but is engaged in whenever and wherever legal knowedge, training, skill and ability are required. As was stated in *Tumulty v. Rosenblum,* 134 N. J. L. 514, 517-18 (Sup. Ct. 1946):

'The practice of law is not confined to the conduct of litigation in courts of record. Apart from such, it consists, generally, in the rendition of legal service to another, or legal advice and counsel as to his rights and obligations under the law, * * * calling for * * * a fee or stipend, i.e., that which an attorney as such is authorized to do; and the exercise of such professional skill certainly includes the pursuit, as an advocate for another, of a legal remedy within the jurisdiction of a quasi-judicial tribunal. Such is the concept of R. S. 2:111—1, classifying as a misdemeanor the practice of law by an unlicensed person.'"

People ex rel Chicago Bar Association v. Goodman, 366 Ill. 346, 8 N. E. 2d 941 (Sup. Ct. 1937), contempt proceedings were brought against a layman who conducted a business of handling and adjusting workmen's compensation claims. In affirming a judgment of contempt, the court stated at p. 945 that:

"It is urged that the practice by the respondent before the Industrial Commission is before an administrative body, and that the respondent, therefore, is not practicing law because he is not before a court. That precise question is one of first impression in this Court. It is elementary that a great portion of the present-day practice of law is conducted outside the courtroom. The respondent urges that because the legislative act relating to the Industrial Commission grants to that body the right to promulgate rules governing the procedure before it, and the commission has adopted a rule permitting a party to appear before it by his attorney or 'agent' he, as agent of the claimant, may lawfully appear before the commission as the representative of the client and try his claim there. Even though the Industrial Commission is merely an administrative body, yet, if what the respondent did for a fee, in the presentation of and hearing of a petitioner's claim before that body, amounted to the practice of law, a rule of the commission purporting to grant him that privilege is of no avail to him. The General Assembly has no authority to grant a layman the right to practice law. In re Day, supra. It follows that any rule adopted by the commission, purporting to bestow such privilege upon one not a duly licensed attorney at law, is void. Nor can the General Assembly lawfully declare not to be the practice of law, those activities the performance of which the judicial department may determine is the practice of law."

New Jersey recognizes in its Constitution the supremacy of the Supreme Court in matters dealing with the practice of law.

The Transfer Inheritance Tax Bureau administers the transfer inheritance tax statutes (N. J. S. A. 54:33-1 to 54:36-7). It is our opinion that the preparation and filing of an inheritance tax return constitutes the practice of law before a bureau that exercises quasi-judicial functions. A person preparing and filing a return must have a thorough knowledge not only of the specific tax law involved but of the statutes and case law dealing with property, wills, deeds, trust, family relationships and many other subjects. (See *In Re Bugasch,* 12 N. J. Misc. 788 (Sup. Ct. 1934).)

Whether a person prepares and signs a return or simply prepares same makes no difference. Such conduct by a person not licensed to practice law is clearly prohibited. (See *Gardner v. Conway,* 48 N. W. 2d 788 (Minn. 1951). *Application of New York Lawyers' Association,* 78 N. Y. S. 2d 209 (N. Y. Sup. Ct. 1948) affd. 87 N. E. 2d 451 (Ct. App. N. Y. 1949).) Thus, it is our opinion that the preparation, signing and filing of a return with the Transfer Inheritance Tax Bureau by an unauthorized person not licensed to practice law and not representing the estate in a representative capacity would constitute the unlawful practice of law.

In answer to your first question, it is our opinion, therefore, that you not only may but should refuse to accept a return filed by an accountant or other person other than an attorney acting in behalf of the legal representative of the estate, because such action constitutes unauthorized practice of the law.

For reasons expressed in our answer to your first question, you should refuse to accept a return on a resident estate from counsel of another state, because such out-of-state counsel is not licensed to practice law in New Jersey and would be in the same position as any layman. (R. R. 1:12-1 (b); R. R. 1:12-4 (b); R. R. 1:12-5. See also *Chicago Bar Association vs. Kellogg,* 88 N. E. 2d, 519 (Ill. App. Ct. 1949); *Petition of Kearney,* 63 So. 2d 630 (Fla. Sup. Ct. 1953).)

In answer to your last question, it is our opinion that even without any regulations you would have the power to enforce the prohibition against unauthorized practice of law for reasons stated above.

Aside from that, you do have the statutory power to promulgate Rule 8. The Transfer Inheritance Tax Bureau in the Division of Taxation of the Department of the Treasury (N. J. S. A. 52:18A-24) is under your general supervision (N. J. S. A. 52:18A-3; 52:18A-30). The Director of the Division of Taxation, formerly the State Tax Commissioner, has the power to administer statutes dealing with transfer inheritance taxes and the duty to assess and collect same (N. J. S. A. 54:33-5; 52:27B-48 et seq.). You have the power to supervise the organization of the Department and, pursuant to N. J. S. A. 52:18A-30 (d), to:

"formulate and adopt rules and regulations for the efficient conduct of the work in the general administration of the Department * * *."

Furthermore, since the Legislature has declared the unauthorized practice of law an illegal act, you would have an implied power to prohibit that which the legislature has declared unlawful. (See *In Re Port Murray Dairy Co.,* 6 N. J. Super. 285 (App. Div. 1950); *Abelson's Inc. v. N. J. State Board of Optometrists,* 5 N. J. 412 (1950).)

Very truly yours,
GROVER C. RICHMAN, JR.,
Attorney General.

By: DAVID M. SATZ, JR.,
Deputy Attorney General.

DMS:JC

MAY 4, 1955.

HONORABLE ARCHIBALD S. ALEXANDER,
State Treasurer,
State House,
Trenton, New Jersey.

FORMAL OPINION 1955. No. 20.

DEAR MR. ALEXANDER:

You forwarded to this Office, for our opinion, a communication from Russell E. Watson, Esq., counsel for Rutgers University, relative to the status and rights of certain employees of Rutgers University, under the Public Employees' Retirement System Law (N. J. S. A. 43:15A-1 to 43:15A-86).

Mr. Watson's letter was submitted with reference to questions raised by the Bureau of Pensions of your Department, as to the disposition to be made of applications by veteran employees of Rutgers University for certain rights and privileges, hereinafter discussed, under the Public Employees' Retirement System legislation.

The specific question presented by the Bureau of Pensions is whether veterans employed by Rutgers University, are to be regarded as being engaged in public service with the State, entitling such veteran employees to certain privileges granted public employee veteran members of the Public Employees' Retirement System under N. J. S. A. 43:15A-7c, N. J. S. A. 43:15A-60 and N. J. S. A. 43:15A-61.

This Office, in a number of opinions, has considered the relationship of Rutgers University, the State University, to the State itself. Thus, under date of August 5, 1952, Attorney General Parsons, in an opinion written by Deputy Attorney General Cook and addressed to the then Acting Commissioner of Education held, inter alia:

> "By Chapter 49 of the Laws of 1945, the State University of New Jersey was established in its present form as "an instrumentality of public education in this State". The law provided, among other things, for an agreement between the State University and the State of New Jersey whereby the former would be utilized by the latter as such an instrumentality, the University to have the care, custody and control of all property and facilities, constituting a part of the University, but subject to the visitorial power of the State Board of Education. The University in its new status was thus constituted an educational institution conducted under contract with the State Board of Education. Although an "Instrumentality of the State," it is a corporation with a special status created by law, separate and distinct from the State itself, and accordingly its employees are not employees of the State.
>
> "This conclusion is reinforced by several statutory provisions. Section 11 of the above cited act provided for membership in the State Employees' Retirement System by employees of the State University "upon the same terms and conditions as employees of the State." This provision would obviously have been unnecessary if the employees of the University were employees of the State. Chapter 27 of the Laws of 1949, providing for readjustment of compensation for State employees, defines "State employee" so as to exclude a person employed "in any educational institution conducted under contract with the State Board of Education". The act goes on to provide that each person "whose compensation is paid, directly or indirectly, in whole or in part, from State funds by contract with the State Board of Education shall be entitled to the same readjustment of rate * * * in the same manner as if he were a State employee." Virtually identical provisions were contained in the recently enacted Chapter 50 of the Laws of 1951, establishing the compensation schedule of the State employees for the coming fiscal year. By these statutory provisions the Legislature has recognized that employees of the State University are not employees of the State itself, and special legislation in their behalf has accordingly been passed when the Legislature has seen fit to do so.
>
> "In view of the foregoing, I have reached the conclusion that employees of the State University are not "under the government of this State" within the meaning of Section 43:3-2, and that their employment is not "public" within the meaning of Section 43:3-1. Rather, such persons are employees of a corporation separate and distinct from the State itself, having several sources of income besides State appropriations, and operating under contract with but independently of the State Board of Education."

R. S. 43:3-1 to 43:3-5, as amended, referred to in the Opinion quoted above, prohibits certain public pensioners from receiving pensions during the same period that they hold "any public position or employment other than elective in the State or in any county, municipality or school district . . .", and further provides (R. S. 43:3-2) that its provisions shall "affect all officers, employees or persons under the government of this state, even though they may not be paid directly from the state treasury, but are paid from proceeds derived from appropriations, license fees or other sources."

The quoted opinion of August 5, 1952 held that since employment by Rutgers University was not to be construed as "public position or employment other than elective in the State" that therefore R. S. 43:3-1 et seq. did not prevent a pensioner of the State Teachers' Pension and Annuity Fund from being employed by, and receiving compensation from, Rutgers University.

Does employment by Rutgers University now become, because of the enactment of N. J. S. A. 43:15A-73b, public employment with the State, at least for purposes of the various veterans' provisions of the Public Employees' Retirement System Law?

N. J. S. A. 43:15A-73b provides that:

> "The State University of New Jersey, as an instrumentality of the State, shall, for all purposes of this act, be deemed an employer and its employees, both veterans and nonveterans, shall be subject to the same membership, contribution and benefit provisions of the retirement system as are applicable to State employees."

It is our opinion, and we so advise you, that the foregoing inquiry must be answered in the negative. Such service is, and remains, private employment, as distinct from employment by the State; the status of Rutgers University, as a partially-owned instrumentality of the State, notwithstanding.

We understand N. J. S. A. 43:15A-73b as simply authorizing employees of Rutgers University, the State University, to enroll in the Public Employees' Retirement System, on the same basis, and with the same rights and privileges as State employees. But otherwise, an employee of Rutgers University is to enter the Retirement System with the same status as a State employee.

In light of this concept of the statute under consideration, we now proceed to examine the alleged rights asserted by your inquiry.

a) Are veteran employees of Rutgers University entitled to automatic enrollment in the System, which right is extended to every "State employee veteran

in the employ of the State on the effective date of the section . . ." pursuant to N. J. S. A. 43:15A-7c?

The foregoing inquiry must be answered in the negative, in view of the specific language of this section of the statute, limiting its application to State employee veterans "in the employ of the State." As we have heretofore observed, employees of Rutgers University are not in the employ of the State.

b) Are veteran employees of Rutgers University entitled, pursuant to N. J. S. A. 43:15A-60 (a) to (1) the return of accumulated deductions standing to their credit in the State Employees' Retirement System (2) to prior service credit for service rendered Rutger's University?

N. J. S. A. 43:15A-60 (a) provides:

> "Each public employee veteran member shall have returned to him his accumulated deductions as of the effective date of this section. All service rendered in office, position, or employment of this State or of a county, municipality, or school district or board of education by such veteran member previous to the effective date of this section, for which evidence satisfactory to the board of trustees is presented within 6 months of the effective date of this section, shall be credited to him as a "Class B" member and such credit shall be known as prior service credit and the obligation of the employer on account of such credit shall be known as the accrued liability on behalf of such veteran member. Service by a veteran member as a member of the Congress of the United States from the State of New Jersey, if any, pursuant to election or appointment as a United States Senator or member of the United States House of Representatives shall be included within the calculation of prior service, as though such service had been rendered in office, position or employment of this State."

b-1) N. J. S. A. 43:15A-60 (a) authorizes the return to each public employee veteran of his accumulated deductions. This provision thus serves to start all public employee veterans, whether or not members of the old State Employees' Retirement System, on the same basis in the new Public Employees' Retirement System, insofar as *free* credit for service prior to January 1, 1955 is concerned. The reason is obvious when we note that all public employee veterans were entitled to certain non-contributory pension and retirement rights under the provisions of the Veterans' Pension Law (R. S. 43:4-1 to R. S. 43:4-5, as amended), which applied to service by veterans in "office, position or employment of this State or of a county, municipality or school district or board of education." N. J. S. A. 43:15A-56 provides, however, that these benefits are no longer available to any public employee veteran who is eligible for membership in the new Public Employees' Retirement System; hence the requirement, satisfied by N. J. S. A. 43:15A-60, of "saving" the free prior service credit for those entitled to it.

Veteran employees of Rutgers, not being public employees, never were eligible, however, for the benefits of the free Veterans' Pension Law. We do not construe N. J. S. A. 43:15A-73b (supra) as now extending to them the pre-existing privilege heretofore available only to veterans who are public employees. On the contrary, since veteran employees of Rutgers Univrsity are not, for the reasons hereinbefore set forth, engaged in public employment, the right to the return of accumulated deductions extended by N. J. S. A. 43:15A-60 (a) to veteran public employees, is not available to them.

b-2) N. J. S. A. 43:15A-60 (a) further provides for the granting of prior service credits to all veterans for "service rendered in office, position or employment of this state or of a county, municipality or school district or board of education." This does not, however, entitle veteran employees of Rutgers University to prior service credit for service rendered as an employee of Rutgers University.

As we have stated, service with Rutgers University is not service rendered in office, position or employment of the State, and N. J..S. A. 43:15A-73b supra, does not so constitute it. If a present State employee claimed prior service credit for prior service rendered as an employee of Rutgers University, such claim would have to be denied on the ground that such employment was private and not public. A present employee of Rutgers can claim no better position under N. J. S. A. 43:15A-73b supra, as that statute did not state that employment by Rutgers University is public service with the State. The legislative will is to be interpreted and enforced as written, and not according to some supposed unexpressed intention. *Camden v. Local Government Board*, 127 N. J. L. 175, 178 (Sup. Ct. 1941); *Petrangeli v. Barrett*, et al., 33 N. J. Super. 378, 386 (App. Div. 1954).

c) Are veteran employees of Rutgers University entitled to credit such service for the special veterans service and disability retirement rights, extended by N. J. S. A. 43:15A-61?

The cited statute grants retirement and disability rights to "any public employee veteran member in office, position or employment of this State or of a county, municipality, or school district or board of education," for service "in office, position or employment of this State or of a county, municipality or school district or board of education."

The limiting words requiring the applicant to be in, and to have rendered service to State, county, municipality, school district or board of education, necessitates a negative answer to this inquiry. Unless the precise requirements of the statute are met, no rights can be held to ensue.

Accordingly this inquiry is answered in the negative.

What has been hereinabove expressed in answer to your various inquiries is not affected by reason of the provisions of Chapter 175, P. L. 1945 (R. S. 38:23A-3). That statute which, by its terms, is a supplement to Title 38 (Militia-Soldiers, Sailors and Marines) of the Revised Statutes, provides that:

> "Whenever in any law, any rights, privileges or benefits are granted to a person holding any appointive office, position or employment in either the State, county or municipal government by reason of having been honorably discharged from the armed services of the United States in any of its wars, such persons shall include any of those engaged in the public service in any of its branches within this State. No distinction shall be made by reason of the source of the benefits from which such pension is made or the changes in or from the governmental office, position or employment to any other branch of the government within this state."

This statute was most recently considered by our Supreme Court in the case of *DeVita v. Housing Authority of the City of Paterson*, 17 N. J. 350, 359 (Sup. Ct. 1955). In this case, the Court was particularly concerned as to whether one who had been appointed secretary-treasurer of a municipal housing authority was entitled to the benefits of the Veterans' Tenure Act (R. S. 38:16-1). In regard to this point, the Supreme Court held:

> "It seems clear to us that by its enactment of L. 1945, c. 175 (N. J. S. A. 38:23A-3) the Legislature intended to include within the protection of R. S. 38:16-1, officers and employees of governmental agencies within the State, whether they be employed strictly by the State or a county or municipality or broadly by a state, county or municipal instrumentality or agency engaged in the discharge of a public function. We regard as entirely groundless the respondent's suggestion that L. 1945, c. 175 was apparently enacted "solely for the benefit of the employees of the Passaic Valley Sewerage Commission". The Brickett dismissal undoubtedly focused attention on the fact that in the Veterans' Tenure Act the Legislature may have

neglected to extend protection to employees of independent governmental agencies such as the Passaic Valley Sewerage Commission, but there is no basis for believing that in its corrective action the Legislature intended to protect such employees and exclude others comparably situated. Indeed, the introducer's statement attached to the bill which became L. 1945, c. 175, expresses its purpose as being to effectuate the legislative policy the veterans' protection "should be general and apply equally to all veterans and not to any individual or group"; and in the legislation itself there could have hardly been more appropriately comprehensive language than the phrase "all those engaged in the public service in any of its branches within this State." See *State v. McCall,* 14 N. J. 538, 545 (1954.)"

It will be observed from the foregoing, that the Court considered Chapter 175, P. L. 1945 in relation only to the act it was designed to supplement, namely the Veterans' Tenure Law. (See *Brickett v. Lagay,* 134 N. J. L. 1 (E. & A. 1945). The Veterans' Tenure Act, however, applies only to persons "holding any employment, position or office under the government of this state . . ." and as we have noted hereinbefore, we are of the opinion that employees of Rutgers University do not hold such employment.

The contention made on behalf of Rutgers University regarding the alleged public nature of employment by it, would result in extending to the statute under discussion a construction greatly beyond, and different from, its words. We are bound by the canon of construction which requires that a statute be given no broader construction or effect than its language justifies. *Belfer v. Borrelli,* 6 N. J. Super. 557 (1949) aff'd. 9 N. J. Sup. 287, (1950).

Except where uncertainty and ambiguity appear, a statute must speak for itself and be construed according to its own terms. *Bass v. Allen Home Improvement Co.,* 8 N. J. 219 (Sup. Ct. 1951).

Had the Legislature intended to constitute service with Rutgers University as public employment with the State for purposes of the act establishing the Public Employees' Retirement System, the Legislature could have so stated.

Very truly yours,
GROVER C. RICHMAN, JR.,
Attorney General.
By: HAROLD KOLOVSKY,
Assistant Attorney General.

MAY 25, 1955.

MR. ELMER G. BAGGALEY,
Consolidated Police and Firemen's Pension Fund Commission,
State House Annex,
Trenton, New Jersey.

FORMAL OPINION—1955. No. 21.

DEAR MR. BAGGALEY:

You have requested our opinion as to whether the widow of a fireman who was killed in the performance of his duties after having served honorably for more than twenty-five years and after having reached the age of sixty-five, should be granted a widow's pension under R. S. 43:16-4, or the lesser widow's pension provided by R. S. 43:16-3.

It is clear that under the provisions of R. S. 43:16-1, as amended, the deceased should not have been employed as a fireman at the time of his injury in the line of duty which resulted in his death, since this statute provides for the mandatory

retirement of members who have reached the age of sixty-five, and have served honorably for twenty-five years. R. S. 43:16-1, as amended, follows:

"In all municipalities any active member of a police department or of a paid or part paid fire department or of a county police department including active members of the paid or part paid fire departments of any fire district located in any township which has adopted the provisions of an act entitled "An act providing for the retirement of policemen and firemen of the police and fire departments in municipalities of this State, including all police officers having supervision or regulation of traffic upon county roads, and providing a pension for such retired policemen and firemen and members of the police and fire departments, and the widows, children and sole dependent parents of deceased members of said departments," approved April fifteenth, one thousand nine hundred and twenty (P. L. 1920, c. 160) or of chapter sixteen of Title 43 of the Revised Statutes, who shall have served honorably in the police or fire department for a period of twenty-five years and reached the age of fifty-one years, or any employee member of any such department who shall have served honorably in such department for a period of twenty-five years and who has reached the age of sixty years shall, on his own application, be retired on a service retirement pension equal to one-half of his average salary. Any active member of the police or paid or part paid fire department including active members of the paid or part paid fire department of any fire district as aforesaid who shall have served honorably for a period of twenty-five years and reached the age of sixty-five years and any employee member of any such department who shall have served honorably in such departments for a period of twenty-five years and reached the age of seventy years shall be retired on a service retirement pension equal to one-half of his average salary."

You have informed us that in this case, as in all other similar cases, the Consolidated Police and Firemen's Pension Fund Commission followed a policy of calling the mandatory nature of the above legislation to the attention of the proper authorities in the various employing municipalities, and directed the retirement of persons subject to compulsory retirement. We further understand that your Commission accepted no contributions in behalf of the member in question after he reached the age of compulsory retirement.

We now turn to a consideration of R. S. 43:16-3 and R. S. 43:16-4. The former provides a pension for the widow of a member of a police or fire department "who shall have been retired on a Service retirement pension or who shall have continued in service after becoming eligible for such pension and shall not have lost his life while on duty, or shall have been retired on a service disability pension, and which member shall have paid into the fund the amount of his annual assessments or contributions required . . ." The latter provides a greater pension for the widow of a member of a police or fire department "who shall have paid into the fund the full amount of his annual assessments or contributions and shall have lost his life while on duty."

The language of R. S. 43:16-4 requires that a member who loses his life while on duty have paid in full his annual assessment or contributions up to the time he so loses his life in order for his widow to be eligible for the greater benefits therein provided. Since no contributions are accepted in behalf of a member remaining on duty after the compulsory retirement age, such a member cannot be regarded as having satisfied all of the requirements of R. S. 43:16-4.

Furthermore, if a widow's pension were granted, under R. S. 43:16-4, to the widow of a fireman who continued as a member of a fire department in contravention of R. S. 43:16-1, as amended, the Consolidated Police and Firemen's Pension Fund Commission would be in the position of condoning a violation of the Act under which it is created.

Nor does the provision in R. S. 43:16-3 which establishes a pension to the widow of a member of a police or fire department "who shall have continued in service after becoming eligible for pension and shall not have lost his life while on duty" sanction any member being kept on duty after the age of compulsory retirement. It is evident that this provision deals with a member, under the age of sixty-five who, although eligible for permissive retirement, remains as a member of a police or fire department as expressly allowed by R. S. 43:16-1, as amended. It also applies to a fire or police chief who may be retained in service after the age of sixty-five by the governing body of a municipality pursuant to the express authority of R. S. 43:16-1.1.

In view of the foregoing, it is our opinion that no pension rights may be granted under R. S. 43:16-4 to the widow of a member of a fire or police department who continues in such employment beyond the mandatory retirement age provided in N. J. S. A. 43:16-1.

Pension rights may, however, be granted to the widow herein of the lesser pension benefits provided under R. S. 43:16-3, since it provides for the widow of a member "who shall have been retired on a service retirement pension . . ." The member herein should be so regarded since he should have been in retirement status at the time of his death.

Very truly yours,
GROVER C. RICHMAN, JR.,
Attorney General.

By: CHARLES S. JOELSON,
Deputy Attorny General.

CSJ/gc

MAY 25, 1955.

HONORABLE CHARLES R. HOWELL,
Commissioner of Banking and Insurance.
State House Annex,
Trenton 7, New Jersey.

FORMAL OPINION—1955. No. 22.

Re: Taxation of annuity considerations, deductibility of considerations returned under provisions of annuity policies.

DEAR COMMISSIONER HOWELL:

Our advice has been requested as to whether it is proper for an insurance company in filing its annual report as required by Section 8, Chapter 132, P. L. 1945, N. J. S. A. 54:18A-8, to deduct from gross considerations on annuity policies sums paid at death or surrender of the policy. We understand that the companies concerned have asserted a right to a deduction only as to sums paid on annuity contracts under which annuity payments have not commenced and we limit our opinion to a consideration of that situation.

In connection with this problem we have examined the provisions of several policies. One provides, "If the annuitant dies before the policy anniversary on which the annuitant's age, nearest birthday, is 65, the Company will pay to the beneficiary a sum equal to the premiums for this policy * * *. The owner can surrender this policy at any time before the pension date and receive its cash value. * * *." Another of such policies provides that if a participant shall die before the effective annuity date there shall be refunded to his beneficiary the contributions made with respect to such annuity with interest. Likewise, if the employment of a participant

is terminated (this is a group employees' contract) the participant may elect to have his contributions refunded with interest. Provision is also made for credit to the employer of a percentage of its contributions in the event of cancellation of an annuity for reasons other than death of its participant. A third contract examined requires no contributions from participants and provides no benefits on death or termination of service.

Chapter 132, P. L. 1945, N. J. S. A. 54:18A-1 et seq., imposes a tax on the premiums collected by insurance companies. Section 5 of the act, N. J. S. A. 54:18A-5, excludes from the definition of taxable premiums " * * * premiums or considerations (but excluding cash surrender values) returned on policies or contracts." The question presented thus, is whether sums paid to a beneficiary, owner or participant in accordance with the terms of a policy on account of death or withdrawal from participation are within the statutory exclusion.

The phrase "Return of Premium" has been defined in Black's Law Dictionary, (4th Ed. 1951) p. 1481 as,

> "The repayment of the whole or a ratable part of the premium paid for a policy of insurance, upon the cancellation of the contract before the time fixed for its expiration."

In an opinion of a previous Attorney General dated May 25, 1945 you were advised that payment made at death under annuity contracts were not premiums returned even though the amount was measured by the premiums paid. We have examined that opinion and find no reason to depart from that view. Such a payment occurs not on the cancellation of a policy, but on the fulfillment of one of its alternative objects.

Whether payments made upon the cancellation of an annuity contract prior to the commencement of annuity payments under it are "premiums or considerations returned" within the meaning of the statute would depend upon the circumstances under which the cancellation was effected. A payment made to an owner upon the voluntary surrender of a policy would appear to be in the nature of a cash surrender value as that term is commonly understood in the field of insurance law. The term has been defined as "* * * the cash value, ascertainable by established rules, of a contract of insurance which has been abandoned and given up for cancellation to the insurer by the person having the contract right to do so." *In re Knight's Estate,* 31 Wash. 2d 813, 199 P. 2d 89, 191 (Sup. Ct. Wash. 1948); see also—*in re Welling,* 51 C. C. A. 151, 113 F. 189, 192 (C. C. A. 7, 1902). Although the term is most frequently used in connection with policies of life insurance the definition is applicable to policies of the kind here under discussion. It would seem then that payments made upon the voluntary surrender of the policy ought to be logically regarded as cash surrender values which are not deductible under the statute. Our view is buttressed by the language used in one of the policies to which reference has heretofore been made. That policy speaks of surrender of the policy and the payment of its "cash value".

Other situations may give rise to a proper deduction under the statute. For example if the policy is cancelled for fraud or some similar reason so that it appears the risk never attached, the policy would be cancelled and the premium returned. Such a payment would not be a cash surrender value, it would be a return of the premium and would hence be deductible under the statute.

In cases arising in California, and Kansas, it has been broadly stated that amounts returned to annuity purchasers upon the cancellation of an annuity policy are deductible. *Equitable Life Assurance Society v. Johnson,* 53 Cal. App. 2d 49, 127 P. 2d 95 (Dist. Ct. App. 1942), *Equitable Life Assurance Soc. of U. S. v. Hobbs,* 155 Kan. 534, 127 P. 2d 477 (Sup. Ct. 1942). The California case turned on the interpretation of a constitutional provision which taxed "gross premiums received

upon its business done in this State, less return premiums". The provision did not exclude cash surrender values as does our statute. In the Kansas statute a deduction was provided for any premiums returned on account of cancellation. Again no mention of cash surrender values was made. Neither case considered the problems arising out of a situation where an annuitant dies before the commencement of payments under the policy.

Accordingly, we advise you that it is not proper for insurance companies to deduct sums paid at death or surrender of annuity policies from gross considerations reported under the requirements of Section 8, Chapter 132, P. L. 1945, N. J. S. A. 54:18A-8.

Very truly yours,
GROVER C. RICHMAN, JR.,
Attorney General of New Jersey.

By: JOHN F. CRANE,
Deputy Attorney General.

JFC:b

JUNE 10, 1955.

HONORABLE WILLIAM F. PARKER,
Sheriff, Burlington County,
County Court House,
Burlington, New Jersey.

FORMAL OPINION—1955. No. 23.

DEAR MR. PARKER:

You have asked for our opinion whether you, as Sheriff of Burlington County, have the authority to appoint Special Deputies Sheriff under the following circumstances.

On or about April 1, 1955, desiring to institute a motor vehicle patrol of the highways in your County, you appointed, by deputation in writing, 12 persons as Special Deputies Sheriff to conduct such patrol, without compensation.

You issued to such deputies, uniforms purchased by the Board of Freeholders, and a gun, shells, blackjacks, handcuffs and a number of blank summonses.

Since the above date, such deputies have patroled the State, County and Municipal highways, in teams of two, in motor vehicles owned by the County of Burlington and furnished to the deputies by you.

During the course of such patrols, the deputies have on many occasions issued a summons to a person apprehended for a violation of the Motor Vehicle Act.

The deputies also have been making inspections of premises in the County to determine if any violation of the criminal laws has occurred, and on at least one occasion, have made an arrest on a charge of disorderly conduct.

It is our opinion that a Sheriff has no authority to appoint Special Deputies Sheriff under the foregoing circumstances.

A County Sheriff is an official recognized by the Constitution of this State. Art. 7, Sec. 2, Par. 2 of the 1947 Constitution provides:

> "County clerks, surrogates and sheriffs shall be elected by the people of their respective counties at general elections. The term of office of county clerks and surrogates shall be five years, and of sheriffs three years. Whenever a vacancy shall occur in any such office it shall be filled in the manner to be provided by law."

The authority of a County Sheriff to appoint and employ assistants is found in R. S. 40:41-28 and 40:41-31.

R. S. 40:41-28, as amended, concerns the appointment of Undersheriffs, etc. It provides as follows:

> "The appointment of an undersheriff shall be by writing under the hand and seal of the sheriff. Every undersheriff, before he assumes his office, shall take and subscribe before a judge of the County Court of the county, an oath that he will well and faithfully execute the office of undersheriff, according to the best of his skill and judgment. He shall file his appointment, with the certificate of his oath endorsed thereon and attested by the judge, in the office of the county clerk. Nothing in this section contained shall prevent the sheriff from removing an undersheriff at pleasure."

R. S. 40:41-31 allows a County Sheriff to select and employ necessary deputies, chief clerks and other employees, and provides:

> "The sheriff shall select and employ the necessary deputies, chief clerks and other employees, who shall receive such compensation as shall be recommended by the sheriff and approved by the board of chosen freeholders, except that in counties of the second class having a population in excess of two hundred thousand the salaries of the undersheriff and chief clerk or executive clerk shall be fixed by the sheriff. In such counties the amount fixed for the undersheriffs shall not be in excess of three-fourths, and that fixed for the chief clerk or executive clerk shall not be in excess of three-fifths, of the salary of the sheriff, nor shall such compensation be less than was received by such officers prior to March thirtieth, one thousand nine hundred and twenty-seven. The compensation of all such officers shall be paid semimonthly by the proper disbursing officer of the county on warrant approved by the sheriff."

Deputies to a County Sheriff are of two classes, to wit, general deputies or undersheriffs and special deputies. The distinction between deputies to a Sheriff was defined in the case of *Allen v. Smith,* 12 N. J. Law 184, (Sup. Ct. 1831) where the Court said at page 188:

> "There are two kinds of deputies of a sheriff well known in practice. 1st. A general deputy, or under sheriff, who, by virtue of his appointment, has authority to execute all the ordinary duties of the office of sheriff. (Com. Dig. tit. *163) Viscount 542, B. 1. *He executes process without special power from the sheriff, and may even delegate authority in the name of the sheriff for its execution to a special deputy. 2d. A special deputy, who is an officer pro hac vice; to execute a particular writ on some certain occasion. He acts under a specific, not general appointment and authority."

The authority of a sheriff to appoint a special deputy sheriff was decided in the case of *Meyer v. Bishop,* 27 N. J. Eq. 141 (Chan. 1876), affirmed, sub nom, *Meyer v. Patterson,* 28 N. J. Eq. 239 (E. & A. 1877). In that case the petitioner claimed to have a lien on mortgaged premises sold by the Sheriff of Middlesex County under a writ of fieri-facias issued out of the Court of Chancery. The petitioner sought to have the sale set aside on the ground that the sale had been made in the Sheriff's absence by a person acting as the sheriff's assistant pursuant to a verbal contract to take charge of the Sheriff's office in making all sales, etc. on a particular day. The Court said at p. 144:

> "The appointment under consideration was not accompanied by the delivery of any process, and does not seem to have been limited to the performance of a specific act, in a single case, but to have been designed to operate as a complete transfer of the general powers of the office, for that day at least, for the discretion was to make all the sales and adjournments necessary on that day. The appointee was, pro tempore, to exercise all the powers of the office, and to be as fully invested with the sheriff's pre-

rogatives as though he had been elected, commissioned and sworn. He was to exercise the discretionary power of adjournment conferred by the statute, (Revision 753, Sec. 5); to decide the order in which the several sales advertised for that day should be made; also, whose bids should be accepted and whose refused, (*Merwin v. Smith*, 1 Green's Ch. 197); whether the sales had been properly advertised or not, and also whether the sum bid for any specific piece of property was sufficient to justify a sale, or was so grossly inadequate as to render a sale of it nugatory. (*Cummins v. Little*, 1 C. E. Green 49.) To permit a sheriff to delegate the large and important discretionary powers with which he is invested in making sale of real estate. by simply uttering a verbal command to any subordinate he may call to his aid, and to allow such subordinate to exercise these powers in the sheriff's absence, without even an oath that he will use them faithfully, would manifestly inaugurate a new and dangerous practice, and give countenance to a palpable violation of the obvious purpose of the law. Whatever may have been the real purpose of the sheriff, his conduct, in the instance under examination, must, in legal contemplation, be regarded as an attempt to appoint an under-sheriff, in utter defiance of the plain requirements of the statute."

Although *Meyer v. Bishop*, supra, was concerned with a verbal authorization to a special deputy sheriff, it cannot be said that if the deputation were in writing, the writing would cure the defective appointment. The evil which *Meyer v. Bishop*, supra, sought to prevent was a *"complete transfer of the general powers of the sheriff's office to an unauthorized person."*

The Legislature has seen fit to allow a sheriff to appoint persons who may exercise all of the powers and duties of a county sheriff, which persons are known as under-sheriffs. However, the Legislature in its wisdom has also imposed a limitation on the number of undersheriffs who may be appointed in any particular county. (R. S. 40:41-30.)

R. S. 40:41-30 provides:

"In counties bordering on the Atlantic ocean having a population of between fifty and one hundred thousand the sheriff may appoint not more than four undersheriffs. In all other counties the sheriff may appoint not more than two undersheriffs. All such undersheriffs shall hold office during the pleasure of the sheriff making the appointment or his successor, and shall be included in the unclassified service of the civil service."

The group in question here are neither undersheriffs nor special deputy sheriffs. They are not undersheriffs because their number exceeds the statutory limitation imposed by R. S. 40:41-30, and their oath of office is not sworn to and subscribed before the proper official, nor are their appointments and oaths filed in the proper office, (R. S. 40:41-28). They are not special deputies sheriff because "their appointment does not seem to have been limited to the performanc of a specific act, in a single case." *Meyer v. Patterson*, supra. Their duties are general and discretionary, including general law enforcement. The appointment of special deputies, under the circumstances presented here, is an unauthorized delegation of the power and duties of a County Sheriff.

Very truly yours,
GROVER C. RICHMAN, JR.,
Attorney General.
By: SAUL N. SCHECHTER,
Deputy Attorney General.

SNS:BK

JUNE 10, 1955.

ESSEX COUNTY BOARD OF ELECTIONS,
Hall of Records,
Newark 2, New Jersey.

FORMAL OPINION—1955. No. 24.

GENTLEMEN:

You have requested our advice as to whether the Board of Elections in its capacity as a Board of Canvassers should canvass the results of a municipal election in a municipality which has selected, by referendum, Council Manager Plan "B" Form of Government as provided by N. J. S. A. 40:69A—99 et seq., or whether such a function should be performed by the Municipal Clerk.

The municipality in question, namely, Cedar Grove, was formerly governed by the provisions of the Walsh Act, R. S. 40:70—1 et seq. Under the specific provisions of that act it was the duty of the city clerk to "canvass said returns so received from all the election districts, and immediately make and file in his office the result thereof." R. S. 40:75—22, as amended.

The provisions of the Faulkner Act contain no such specification of duties on the part of the municipal clerk. It does provide, however, in N. J. S. A. 40:69A—151 that "the municipal election shall be held at the same place or places and *conducted in the same manner*, so far as possible, as the general election * * *." and in *Horowitz v. Reichenstein*, 15 N. J. 6 (1954) it was held that the Faulkner Act is not to be construed as an entirely independent legislative scheme but is, in many instances, dependent upon the general election laws.

The Faulkner Act itself provides that after a new form of government has been adopted by the voters "the municipality shall thereafter be governed by the Plan adopted, by the provisions of this Act common to optional plans and by all applicable provisions of general law * * *." N. J. S. A. 40:69A—26. The term "general law" is defined as * * * "any law or provisions of law not inconsistent with this Act heretofore or hereafter enacted which is by its terms applicable or available to all municipalities * * *." N. J. S. A. 40:69A—28. The provisions of the election law by reason of their broad applicability to municipalities generally, are certainly to be regarded as within the scope of the term "general law" as used in the Faulkner Act. Many provisions are found in Title 19 of the Revised Statutes dealing with municipal elections. Among them, R. S. 19:12—6, as amended, requires municipal clerks to notify the county clerk of the offices to be filled in the general election. R. S. 19:20—1, provides that the Board of County Canvassers (consisting of the Board of Elections and the County Clerk acting as clerk of the Board, R. S. 19:6—26) shall determine what officers have been elected in municipal elections. Likewise, R. S. 19:20—9, requires the Board of Canvassers to issue a certificate to the successful municipal candidates.

In view of the foregoing provisions it is our opinion, and we advise you, that it is the duty of the Board of Elections acting in its capacity as the County Board of Canvassers to canvass, ascertain and certify the results of a municipal election in a municipality governed by the provisions of the Faulkner Act.

Yours very truly,
GROVER C. RICHMAN, JR.,
Attorney General.
By: JOHN F. CRANE,
Deputy Attorney General.

b.

JUNE 24, 1955.

NEW JERSEY STATE BOARD OF ARCHITECTS,
1060 Broad Street,
Newark, New Jersey.
and
State Board of Professional Engineers,
and Land Surveyors,
921 Bergen Avenue,
Jersey City, New Jersey.

RE: FORMAL OPINION—1955. No. 25.

GENTLEMEN:

We have had several inquiries for our opinion as to whether a municipal building inspector or a State official to whom plans and specifications for a building are presented for filing, as required by an applicable ordinance or law, may refuse to accept them for filing even though the seal of a licensed architect or licensed engineer is affixed thereto, if he believes that the work shown on the plans indicates that the preparation thereof constituted illegal practice of architecture by an engineer, or, alternatively, illegal practice of engineering by an architect.

The question posed must be answered in the negative in view of the provisions of Chapters 293 and 294 of the Laws of 1948, which amended R. S. 52:32—3 and R. S. 40:55—52 respectively.

R. S. 52:32—3, as amended, provides:

> "No department in the State created for the purpose of filing plans and specifications for buildings under the several laws shall receive or file any plans or specifications unless the same bear the seal of a licensed professional engineer or a licensed architect of the State, or in lieu thereof an affidavit sworn to by the person who drew or prepared the same."

R. S. 40:55—52, as amended, provides:

> "No department in a municipality, created for the purpose of filing plans and specifications for buildings, shall receive or file any plans or specifications unless they bear the seal of a licensed professional engineer or a licensed architect of the State of New Jersey, or in lieu thereof an affidavit sworn to by the person who drew or prepared them."

Where the plans and specifications offered for filing bear the seal of either a licensed architect or a licensed engineer of this State, they meet the requirements of the quoted statutes. The municipal building inspector or the State official to whom the plans are submitted for filing must so recognize them. It is not his function to determine whether plans which bear the seal of a licensed engineer indicate that there has been a violation of R. S. 45:3—10 prohibiting the unlicensed practice of architecture, nor whether plans which bear the seal of a licensed architect indicate that there has been a violation of R. S. 45:8—27 and 28 as amended, prohibiting the unlicensed practice of engineering.

Prosecution for violation of R. S. 45:3—10 and R. S. 45:8—27 and 28 is committed by law to other tribunals; not to a municipal building inspector nor a State official to whom plans are submitted for filing.

Very truly yours,
GROVER C. RICHMAN, JR.,
Attorney General.
By: ANDREW A. SALVEST,
Deputy Attorney General.

aas;d

JUNE 17, 1955.

HON. JOSEPH E. MCLEAN, *Commissioner,*
Department of Conservation and Economic Development,
State House Annex,
Trenton, New Jersey.

FORMAL OPINION—1955. No. 26.

DEAR MR. MCLEAN:

You have asked whether the following facts are sufficient objection to preclude issuance of a grant to Robert Wilson for lands under water in front of his property on Luppatatong Creek, Keyport, New Jersey.

Robert Wilson has applied to the Council of Planning and Development as provided by R. S. 12:3—10 for a riparian grant to lands under the tide water of Luppatatong Creek, Keyport, New Jersey, in front of upland to which he claims title by appropriate deeds.

Arthur C. Schultz objects to the making of the grant on the ground that he owns all of the lands under the waters of Luppatatong Creek, and particularly in front of the Wilson property, by reason of a chain of title to said tidal lands which begins with an Indian deed to John Bowne, dated June 22, 1686, and recorded in the office of the Clerk of Monmouth County. The grantors in the Indian deed are described as the chief Sachems and proprietors. His contention is that the State has no title to the lands below high water mark of Luppatatong Creek.

As proof of his title, Schultz has furnished a search, copies of two Indian deeds and recent deeds purporting to convey to him not only the lands for which the grant is sought but all of the lands under the waters of Luppatatong Creek.

The early history of ownership of American lands, both above and below high water mark, is fairly familiar and is described in many early and later cases, among them being *Arnold v. Mundy,* 6 N. J. L. 1 (Sup. Ct. 1821); *Gough v. Bell,* 21 N. J. L. 156 (Sup. Ct. 1847); *Martin v. Waddell's Lessee,* 16 Peters 367, 41 U. S. 367, (1842.)

By the law of nations and of England, a conqueror has a right to impose such laws on the conquered as he would think proper. Such was the law of England. Such became the law in the colonies.

In 1664 King Charles II of England, owner of what is now New Jersey, by right of discovery and conquest from the Dutch, granted those lands by letters patent to his brother, the Duke of York. The Duke, in turn, granted the land to Lord Berkeley and Sir George Carteret, who divided the territory into two divisions called East Jersey and West Jersey. East Jersey they conveyed to a group of men called the proprietors of East Jersey, and West Jersey they conveyed to one Edward Billings, also called a proprietor.

In the cases cited above, the majority of the judges took the position that the proprietors by these conveyances had control of the tidewater areas since they held both governmental and proprietary rights, but that the surrender of governmental rights to Queen Anne, April 17, 1702, carried with it the surrender of the control and ownership of the tidewater areas since the same was an incident of sovereignty.

With the American Revolution, all of these royal rights became vested in the people of New Jersey as a sovereign of the country. But the sovereign power itself could not make a direct and absolute grant of the waters of the state, divesting all of the citizens of their common right. It could lease, or grant, or dispose of tide waters, but only in such a way as not to interfere with or impair the public right of navigation or the power of the general government to regulate commerce, navigation and the enjoyment of the waters by or of the people.

From the foregoing, it is established that title to lands under tidewaters is in the state; that prior to 1702, any grant to tidal lands made by the proprietors would be made in a governmental sense, and so as not to deprive the colonists of their right to use these waters in common with each other; that from 1702 such a grant could be made only by the sovereign, the extent of the grant depending on the law of the land and the common rights of the people; and that title to tidewaters remained in the sovereign unless granted in accordance with the law. Schultz does not claim title based on any grant made by the sovereign but depends solely on his Indian deeds for his title.

An examination of the cases involving the question of property rights of aboriginal Indians to lands, and the effect of conveyances made by them, leads to one conclusion only, and that is that the only rights of Indians in lands, which were and are respected, are tribal rights of possession in the lands occupied by a tribe. In 42 C. J. S., p. 688, sec. 28, the rights of the aboriginal Indians in lands is summarized.

> "On the discovery of the American continent, the principle was asserted or acknowledged by all European nations that discovery followed by actual possession gave title to the government by whose subjects or by whose authority it was made, not only against other European governments, but against the natives themselves. While the different nations of Europe respected the rights of the natives as occupants, they all asserted the ultimate dominion and title to be in themselves.
>
> In the United States the rights of the European discoverers, having been succeeded to by the states or by the general government, the Indian title to land is a right of possession and occupancy, the fee being in the general government, or in the state where the land is situated, if it is one of the thirteen original states.
>
> The right of occupancy and possession is lost by abandonment, and possession, when abandoned by the Indians, attaches itself to the fee without further grant.

So it is concluded that at the time of the execution of the Indian deeds in 1686 that the Indian tribes had only a possessory right to lands they occupied, and that the legal title to these lands was in the sovereign, and that when these lands were abandoned by the Indians the right of possession merged into the legal title leaving nothing outstanding. In passing, it will be stated that no one can hold adversely to the people.

> "Moreover, there can be no title by prescription against the public."
> *Quinlan v. Borough of Fairhaven,* 102 N. J. L. 443 (E & A) 1926.

You are, therefore, advised that you may disregard the objection made by Schultz to the application of Robert Wilson for a grant, and proceed with the merits of that application. We suggest that the Planning and Development Council note upon its minutes that the Attorney General has advised that the objection by Arthur C. Schultz be disregarded.

Very truly yours,
GROVER C. RICHMAN, JR.,
Attorney General.

By: SIDNEY KAPLAN,
Deputy Attorney General.

June 30, 1955.

HON. FREDERICK J. GASSERT, JR.,
Director, Division of Motor Vehicles,
State House,
Trenton, New Jersey.

FORMAL OPINION—1955. No. 27.

DEAR MR. GASSERT:

You have requested our opinion as to the effect of chapter 86 of the Laws of 1955, which amended N. J. S. A. 39:3—84.3 to modify the scale of penalties to be imposed for violation of the overloading and overweight provisions of the Motor Vehicle Law, on prosecutions for offenses which occurred prior to June 21, 1955, the effective date of P. L. 1955, c. 86.

We advise you that the penalty to be imposed for a violation of N. J. S. A. 39:3—84.3 which occurred prior to the effective date of P. L. 1955 c. 86 is that provided for in the statute prior to such amendment.

Chapter 86 of the Laws of 1955 provides that it is to take effect immediately but it contains no declaration that it is to apply to any prior offense and therefore does not apply to any violation of N. J. S. A. 39:3—84.3 theretofore committed. (*R. S. 1:1—15; State v. Low,* 18 N. J. 179 (1955), affirming 31 N. J. Super. 566 (Law Division, 1954); *State v. Crusius,* 57 N. J. L. 279 (Sup. Ct. 1894); *State v. Startup,* 39 N. J. L. 423, Sup. Ct. 1877).

R. S. 1:1—15, which is dispositive of the question raised, provides in part as follows:

> "No offense committed, and no liability, penalty or forfeiture, either civil or criminal, incurred, previous to the time of the repeal or alteration "of any act or part of any act, * * * by any act heretofore or hereafter enacted, shall be discharged, released or affected by the repeal or alteration of the statute under which such offense, liability, penalty or forfeiture was incurred, unless it is expressly declared in the act by which such repeal or alteration is effectuated, that an offense, liability, penalty or forfeiture already committed or incurred shall be thereby discharged, released or affected; and indictments, prosecutions and actions for such offenses, liabilities, penalties or forfeitures already committed or incurred shall be commenced or continued and be proceeded with in all respects as if the act or part of an act had not been repealed or altered, * * *".

Very truly yours,
GROVER C. RICHMAN, JR.,
Attorney General.

By: HAROLD KOLOVSKY,
Assistant Attorney General.

HK: MG

JULY 6, 1955.

MR. W. LEWIS BAMBRICK,
Unsatisfied Claim and Judgment Fund Board,
222 West State Street,
Trenton, New Jersey.

FORMAL OPINION—1955. No. 28.

DEAR MR. BAMBRICK:

You have asked our opinion as to whether the Unsatisfied Claim and Judgment Fund Board may accept as timely notice under N. J. S. A. 39:6—65, a notice bearing a postmarked date which is within thirty days after an accident, but which is not received by the Unsatisfied Claim and Pension Fund Board within said thirty day period.

N. J. S. A. 39:6—65 provides as follows:

"Any qualified person, or the personal representative of such person, who suffers damages resulting from bodily injury or death or damage to property arising out of the ownership, maintenance or use of a motor vehicle in this State on or after the first day of April, one thousand nine hundred and fifty-five, and whose damages may be satisfied in whole or in part from the fund, shall, within thirty days after the accident, as a condition precedent to the right thereafter to apply for payment from the fund, give notice to the board, on a form prescribed by it, of his intention to make a claim thereon for such damages if otherwise uncollectible and otherwise comply with the provisions of this section;" . . .

In *Poetz v. Mix,* 7 N. J. 436 (Sup. Ct. 1951), the Court considered the question of when a pleading may be considered as "filed". The Court stated:

". . . In contemplation of law, a paper or pleading is considered as filed when delivered to the proper custodian and received by him to be kept on file. . ."

It should be noted that N. J. S. A. 36:6—65 does not require that a prospective claimant against the Unsatisfied Claim and Judgment Fund "file" his claim within thirty days from an accident, but merely that he "give notice to the board" within said period. However, there are several cases which rule that where a statute requires a notice to be given within a certain number of days after a certain event, the notice must be actually received, and not merely mailed, within the prescribed period of time.

In *Rapid Motor Lines v. Cox,* 134 Conn. 235, 56 A 2d 519 (Conn. Sup. Ct. of Err. 1947), where a statute provided that no action would lie against the state highway commission for damages caused by a defect in the highway unless notice of injury "shall have been given within thirty days thereafter to the highway commissioner," the court said:

". . . the clause 'notice shall be given' requires a completed act within the number of days prescribed by the statute . . . It is our conclusion that these words require that the notice shall be delivered to the commissioner within the sixty day period specified in the statute, and that sending on the sixtieth day a notice which is not received by him until the sixty-first day does not constitute compliance with the statute."

In *Chase v. Surry,* 88 Maine 468, 34 Atl. 270 (1896) where a statute required that the claimant "notify" municipal officers by letter or otherwise in writing, the Court stated:

"The statute expressly provides the time in which such notice may be given, and also the manner of giving it . . . The writing and mailing a notice within the time is not notifying the officers of the town as the statute requires."

In the above case the Court rejected the contention that the mailing of the notice, properly addressed within the prescribed period of time, was a legal notification, whether or not it was actually received by the town officers.

In *O'Neil v. Boston,* 257 Mass. 414 (1926), a notice to a municipality of an injury due to a defective condition on a sidewalk, which notice was mailed on the tenth day after the injury, but not received until the eleventh day, was held not a sufficient compliance with a statute requiring notice within ten days after the injury as a condition precedent to the maintenance of an action against the city.

We have also found that, with regard to cases involving the question of whether or not notice was given within the time limited by an insurance policy, the weight of authority is to the effect that notice must actually be received, not merely mailed, within the prescribed time. No cases in New Jersey are to be found on the general subject, with the exception of cases involving "filing" of a paper or pleading with a court. (Poetz v. Mix, supra).

In view of the foregoing, it is our opinion that the Unsatisfied Claim and Judgment Fund Board may not accept as timely notice under N. J. S. A. 39:6—65, a notice bearing a postmarked date which is within thirty days after an accident, but which is not actually received by the Unsatisfied Claim and Judgment Fund Board within said thirty day period.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: CHARLES S. JOELSON,
Deputy Attorney General.

csj;b

JULY 13, 1955.

MR. STEVEN E. SCHANES,
Administrative Secretary,
Public Employees' Retirement System,
State House Annex,
Trenton, New Jersey.

FORMAL OPINION—1955. No. 29.

DEAR MR. SCHANES:

You have asked our opinion as to whether a holder of a "Discharge from Draft" should be entitled to be treated as a veteran under Chapter 15A of Title 43, the Public Employees' Retirement Act. You have attached to your request for an opinion letters from several state employees who hold such documents, as well as a photostatic copy of such a document issued on September 5, 1918 to Mr. Anthony F. Vitoritto, who is now a state employee.

We are advised that this type of document was issued during World War I, but not thereafter. In World War I, a person drafted into military service was sent to an army camp where he underwent a medical examination. In the event he failed to pass such medical examination, he was returned to civilian life, and given a "Discharge from Draft".

We have considered the photostatic copy of the document which you have furnished us concerning Mr. Vitoritto. It is specifically entitled "Discharge from Draft", and although it states that the holder of same "is hereby discharged from the military service of the United States by reason of defective vision", a footnote at the bottom thereof states as follows:

"This form will be used for discharge of aliens and alien enemies and of men rejected on account of physical unfitness, dependency, etc.

It will not be used in cases of men who have been accepted for military service and are subsequently discharged."

N. J. S. A. 43:15A—6 (1) provides that the term "veteran" shall mean "any officer, soldier, sailor, marine, airman, nurse or army field clerk, who has served in the active military or naval service of the United States, and has or shall be discharged or released therefrom under conditions other than dishonorable" in certain stated times of war.

In view of the clear language to be found in the footnote on the Discharge from Draft quoted above, it appears that the holder of such a document cannot be regarded as having been in the "active military service of the United States", and therefore, cannot be held to be a "veteran" within the meaning of N. J. S. A. 43:15A—6 (1).

In the letter from Mr. Vitoritto which you have sent us, he states:

> "I wrote to the Department of the Army and they have advised me that 'Those men who were inducted into the military service during World War I, under the provisions of the Selective Service Act, were in the military service of the United States from the date ordered to report.'"

We have obtained a copy of the letter from which the excerpt was quoted by Mr. Vitoritto. Same was addressed to Mr. Vitoritto's attorney by the commanding officer of the Military Personnel Records Center of the Office of the Adjutant General of the Department of the Army, and is herewith quoted in full:

"Mr. Michael Felcone,
Counsellor at Law,
217 East Hanover Street,
Trenton 8, New Jersey.

Dear Mr. Felcone:

> "Reference is made to your letter of 14 March 1955 requesting information as to whether Anthony Frank Vitoritto, who was discharged from draft, is considered a veteran of World War I.
>
> "Those men who were inducted into the military service during World War I, under the provisions of the Selective Service Law, were in the military service of the United States from the date ordered to report. However, unless accepted for service by the military authorities upon arrival at camp, they were only entitled to a certificate of discharge from draft. The certificate of discharge from draft was adopted by the Department of Army as the appropriate form of certificate to be furnished to registrants discharged after induction, but before acceptance by the military authorities. It is, however, under the circumstances described, an honorable separation from the military service.
>
> "The Department of the Army has never attempted to define the term 'veteran' and deals with it only in connection with an Act of Congress wherein the term has been defined insofar as it pertains to the specific Act. The question as to whether an individual is entitled to rights and privileges extended to veterans under some particular laws or regulations is one for decision by the agency charged with the administration thereof.

Sincerely yours,

DAVID H. ARP,
Colonel, AOC,
Commanding".

A careful reading of the above-quoted letter leaves no doubt that the holder of a Discharge from Draft may be considered as having been discharged or released from his obligation to serve "under conditions other than dishonorable" as required by N. J. S. A. 43:15A—6 (1), but it furnishes no support to a claim that the holder of such discharge from duty may be regarded as having been a "soldier . . . who has served in the active military service of the United States" as further required by N. J. S. A. 43:15A—6 (1).

Mr. Vitoritto's letter which you have sent us also bases his asserted right to be recognized as a veteran upon an Attorney General's opinion of November 23, 1920. We have read this opinion, and find that it deals with the rights of a holder of a Discharge from Draft under chapter 298 of the laws of 1920, which gave certain preferential treatment with regard to a Civil Service examination to "an honorable discharged soldier, sailor, or marine of the United States, having been in the military or naval service of the United States in any war in which this country has been engaged."

The Attorney General's opinion to which reference is made deals chiefly with the question as to the nature of the discharge, i.e., whether it is honorable or dishonorable. We quote the following from that opinion:

> "A discharge from draft . . . casts no reflection upon the applicant, as under the circumstances, there was no attempt to evade military service upon the part of the applicant, but the applicant was discharged for reasons over which he had no control, and under the construction placed upon what constitutes military service by the War Department of this State and the United States, the applicant is honorably discharged from military service whether he actually participated in the war or was discharged after his induction for a cause which is not dishonorable.
>
> "Military service as used in the Federal Statutes was construed by our United States Court, In Re Burns Fed. 796, as to include the Volunteer Army of the United States. It differs from the expression 'actual military service' which has been construed by the United States Supreme Court as meaning actual participation in war where the life of the individual is placed in jeopardy.
>
> "I am, therefore, of the opinion that the term 'honorable discharge' as used in this statute being construed when read in conjunction with the balance of the section would take in an applicant who produces a released certificate entitled Discharge from Draft. . . ."

It is important to bear in mind that there was no requirement under the statute considered in the above-quoted opinion that the applicant have had "active military service" as is required by N. J. S. A. 43:15A—6 (1) in order to constitute a person a veteran. As a matter of fact, the opinion takes care to point out that "actual military service" was not required. It should also be pointed out that by chapter 84 of the laws of 1942 (R. S. 11:27—1, as amended), the definition of the term "veteran" in the Civil Service Title was amended so as to require service "in the active military or naval service of the United States," thereby adding a requirement of "active" service not theretofore present.

In view of all the foregoing, it is our opinion that the holder of a Discharge from Draft cannot be regarded as a veteran within the meaning of N. J. S. A. 43:15A—6 (1), since he was not in the active military service of the United States in time of war.

Very truly yours,
GROVER C. RICHMAN, JR.,
Attorney General.
By: CHARLES S. JOELSON,
Deputy Attorney General.

csj;b

JULY 18, 1955.

CHARLES J. TYNE, ESQ., *Chief Counsel,*
N. J. Law Enforcement Council,
1060 Broad Street,
Newark 2, New Jersey.

FORMAL OPINION—1955. No. 30.

DEAR MR. TYNE:

We have your letter of July 13, 1955 in which you advise that the Law Enforcement Council has requested our opinion on the following questions which concern them in view of the suit instituted by the Attorney General against Katherine K. Neuberger, Halsey W. Stickel, Evelyn N. Seufert and Harrison L. Todd, (hereinafter referred to as the "defendants"), viz:

"1. The right of the Council to continue its activities under the law.
2. Its right to make expenditures of funds in the usual manner, and
3. the validity of its acts pending determination of the suit instituted against the four members of the Council."

Basically, the three questions raise one single issue, whether action taken by the Law Enforcement Council since July 1, 1955 may be successfully attacked by the public or interested third parties if it should be determined in the pending suit that the terms of office of the defendants as members of the Law Enforcement Council expired on July 1, 1955.

In our opinion, the terms of office of the defendants as members of the Law Enforcement Council expired on July 1, 1955 and so much of P. L. 1955, C. 68 as provides that, "The terms of the members of the council now in office are hereby extended until July 1, 1956" is unconstitutional and invalid. Nevertheless, it must be recognized that the defendants are *de facto* officers, whose acts are valid so far as the public and interested third parties are concerned. (*Erwin v. Jersey City,* 60 N. J. L. 141 (E. & A. 1897); *Beattie v. Passaic Tax Board,* 96 N. J. L. 72, 74 (Sup. Ct. 1921); *State v. Zeller,* 83 N. J. L. 666 (E. & A. 1912); see also *Byrnes v. Boulevard Commissioners* 121 N. J. L. 497 (E. & A. 1938).

The settled rule is thus stated in the Annotation in 71 A. L. R. 849:

"After the expiration of his term of office, a person holding over and continuing to perform the functions and duties of the office without legal authority, but with a color of right or title to the office, is a defacto officer, whose acts are valid so far as the public and interested third persons are concerned."

So, too, Chief Justice Magie said in *Erwin v. Jersey City, supra,* at 60 N.J.L. 144:

"When an official person or body has apparent authority to appoint to public office, and apparently exercises such authority, and the person so appointed enters upon and performs the duties of such office, his acts will be held valid in respect to the public, whom he represents, and to third persons, with whom he deals officially, notwithstanding there was a want of power to appoint him in the person or body which professed to do so."

In *Beattie v. Passaic Tax Board,* supra, the Secretary of the Tax Board held over after the expiration of his term relying on an appointment by the President of the board, which the court held to be invalid. In that case, Mr. Justice Minturn said, at 96 N.J.L. 74:

"As between the public and the board the prosecutor was therefore a de facto officer, whose acts in the performance of public duty were binding upon the board and conclusive upon co-ordinate public bodies dealing with the board, but his legal status could be adjusted by the board only in the manner prescribed by the statute. Pending such adjustment he was holding over and performing the duties not as a de jure but as de facto officer." *Salter v. Burk,* 83 N.J.L. 52; *State v. Poulin,* 74 Atl. Rep. 119; *Murphy v. Freeholders,* 91 N.J.L. 40.

We therefore advise you that, in our opinion, action taken by the Law Enforcement Council between July 1, 1955 and the date of entry of judgment in the pending suit will not be subject to successful attack by the public or interested third parties even though it is determined in the pending suit that the defendants' terms did expire on July 1, 1955.

Very truly yours,
GROVER C. RICHMAN, JR.,
Attorney General.

By: HAROLD KOLOVSKY,
Assistant Attorney General.

K:p—

JULY 28, 1955.

HONORABLE FREDERICK J. GASSERT, JR.
Director, Division of Motor Vehicles,
State House
Trenton, New Jersey.

FORMAL OPINION—1955. No. 31.

DEAR MR. GASSERT:

You have asked our opinion as to whether, when a statute requires that certain notice be given by means of registered mail, the use of certified mail will constitute compliance with such statute.

Certified mail is a new postal service which was put into effect on June 7, 1955, by the Post Office Department. It is designed for the use of dispatchers of mail who require proof of delivery of mail that has no intrinsic value. The cost of certified mail is fifteen cents. Until the adoption of the certified mail system, there was a minimum registry fee of thirty cents for so-called "no value mail." This minimum fee of thirty cents has now been eliminated, and the lowest fee for registered mail, covering an indemnity up to $5.00, is forty cents. Certified mail is handled as first class mail, without the security, handling precautions attendant upon registry mail.

There is no doubt that the newly adopted system of certified mail serves the same purpose as registered mail insofar as proof of delivery is concerned. However, it does not replace the system of registered mail, even for items having no intrinsic value. Postal Bulletin No. 19843 issued on May 17, 1955 contains the following:

"After the 30 cents fee has been discontinued, articles having no intrinsic value may be registered on payment of the 40 cent fee or any of the higher fees which provide insurance coverage."

It is our opinion that since registered mail is still available for items having no intrinsic value, this type of postal service must be utilized to comply with statutes which provide for the use of "registered mail." This conclusion is fortified by the fact that the Supreme Court considered it necessary to amend its

rules in order to allow the use of certified mail or registered mail in certain cases where registered mail was heretofore required by the Supreme Court Rules, and in at least one case maintained the necessity of registered mail only. The Court has adopted amendments to the Supreme Court Rules, which will become effective Septemeber 7, 1955, allowing certified mail to be used in most cases in which registered mail has heretofore been required by the Rules. The Supreme Court also adopted an order on June 27, 1955, that "pending the effective date of the amendments to the Rules promulgated to be effective September 7, 1955, certified mail will be permitted wherever registered mail is prescribed by the Rules, except that certified mail shall not be permitted under Rule 4:96-4(c)." Rule 4:96-4(c) pertains to service of a copy of the complaint upon the defendant in an action for divorce or nullity when the defendant cannot be served personally within the state.

The legislature may, of course, in its discretion, enact general legislation providing that, with regard to any statute requiring the use of registered mail, certified mail may be used on or after a prescribed date. Until such time as such legislation is enacted, however, the use of certified mail cannot be regarded as compliance with a statute which provides for the use of registered mail.

Very truly yours,
GROVER C. RICHMAN, JR.,
Attorney General.
By: CHARLES S. JOELSON,
Deputy Attorney General.

csj;b

AUGUST 15, 1955.

MR. STEVEN E. SCHANES,
Bureau of Public Employees' Pensions,
State House Annex.
Trenton, New Jersey.

FORMAL OPINION—1955. No. 32.

DEAR MR. SCHANES:

On March 30, 1955, we rendered an opinion advising you that personnel of the State Militia or New Jersey National Guard, who serve in the Department of Defense in a permanent capacity, are not entitled to prior service credit in the Public Employees' Retirement System for time spent in the active military service of the United States in time of war, if such service in time of war was at a time prior to their becoming permanent personnel as above set forth.

You now ask if such personnel would be entitled to prior service credit for time spent in the active military service of the United States in time of war, subsequent to their becoming state employees as members of the State Militia or New Jersey National Guard who served in the Department of Defense in a permanent capacity.

R. S. 38:12-8 provids as follows:

> "Officers and enlisted men serving the State in a permanent duty status shall be eligible for the disability and retirement privileges and benefits available to all other employees of the State . . ."

R. S. 38:1-8, which is part of Chapter 95 of the Public Laws of 1939 dealing with the organization of the New Jersey National Guard, constitutes officers and enlisted men who serve in a permanent duty status as state employees for retirement purposes. They should, therefore, be accorded the same rights to prior

service credit for time spent in the active military service of the United States as is granted to all other state employees for military service after becoming permanent employees. It should be pointed out, however, that R. S. 38:12-8 does not constitute as state employees for purposes of disability and retirement privileges and benefits those members of the New Jersey National Guard or State Militia who are not in a permanent duty status.

The rights of state employees generally to prior service credit for time spent in military service are based upon three statutes, N. J. S. A. 38:23-4, N. J. S. A. 38:23-5, and N. J. S. A. 43:15A-10. The most recent of these statutes, N. J. S. A. 43:15A-10, which was enacted in 1954 as part of the Public Employees' Retirement Act, provides as follows:

> "Any state employee who had entered or shall hereafter enter into the active air, military, or naval service of the United States before making application for enrollment in the retirement system shall be accepted as a member upon his filing application, provided such application is made within three months after entry into such active air, military, or naval service, and his regular salary deductions as determined by the board of trustees shall be paid to the retirement system by the employing department as provided by chapter 252 of the laws of 1942 as amended by chapter 326 of the laws of 1942 . . ."

This section deals specifically with state employees who are not or were not members of the Public Employees' Retirement System at the time of their entry into armed service, and makes provision for such membership after entry into the armed forces. It refers to state employees who enter the active air, military, or naval service of the United States, making no requirement that such entry be during the time of war. It has effect only after the effective date of January 1, 1955.

Although the Public Employees' Retirement Act does not specifically provide for free credit in the Public Employees' Retirement System for state employees who are already members of that system, and who enter the armed service, such a grant of credit may be found in Chapter 252 of the Public Laws of 1942, as amended by Chapter 326 of the Public Laws of 1942 (N. J. S. A. 38:23-5), which is referered to in N. J. S. A. 43:15A-10, and which provides as follows:

> "No person holding any office, position or employment under the government of the State of New Jersey, or of any county, municipality, school district, or other political subdivision of the State, or under any board, body, agency or commission of the State or of any county, municipality or school district who, heretofore and subsequent to July first, one thousand nine hundred and forty, entered or hereafter, in time of war, shall enter, or heretofore or hereafter in time of emergency entered or shall enter, the active military or naval service of the United States or the active service of the Women's Army Auxiliary Corps, the Women's Reserve of the Naval Reserve or any similar organization authorized by the United States to serve with the Army or Navy and who, at the time of such entry was or is a member in good standing of any pension, retirement, or annuity fund, shall suffer the loss or impairment of any of the rights, benefits or privileges accorded by the laws governing such pension, retirement or annuity funds; and the time spent in such service by any such person shall be considered as time spent in the office, position or employment held by him at the time of his entry into such service, in all calculations of the amount of pension to which he is entitled and of the years of service required to entitle him to retire. . . ."

The case of state employees who were not members of a retirement system prior to the adoption of the Public Employees' Retirement Act, and who entered into the armed services of the United States in time of war, is covered by N. J. S. A. 38:23-4, which provides as follows:

> "Every person holding office, position or employment, other than for a fixed term or period, under the government of this State or of any county, municipality, school district or other political subdivision of this State, or of any board, body, agency or commission of this State or any county, municipality or school district thereof, who after July first, one thousand nine hundred and forty, has entered, or hereafter shall enter, the active military or naval service of the United States or of this State, in time of war or an emergeneey, or for or during any period of training, or pursuant to or in connection with the operation of any system of selective service, or who, after July first, one thousand nine hundred and forty, has entered or hereafter, in time of war, shall enter the active service of the United States Merchant Marine, or the active service of the Women's Army Auxiliary Corps, the Women's Reserve of the Naval Reserve or any similar organization authorized by the United States to serve with the Army or Navy, shall be granted leave of absence for the period of such service and for a further period of three months after receiving his discharge from such service . . . *During the period of such leave of absence such person shall be entitled to all the rights, privileges and benefiits that he would have had or acquired if he had actually served in such office, position or employment during such period of leave of absence except, unless otherwise provided by law, the right to compensation. . .*" (Underscoring supplied).

In view of the foregoing, it is apparent that the service credits of state employees who have entered the military service of the United States in time of war have been protected, at least since the outbreak of World War II. Therefore, they are entitled to receive such prior service credit from the Public Employees' Retirement System if they are presently members of that system.

You have also asked whether, by reason of R. S. 38:14-9, a person who is presently an officer in the New Jersey National Guard, serving in a permanent duty status, but who was merely in active status in the New Jersey National Guard, and in permanent duty status, at the time he entered into the military service of the United States in time of war, is entitled to prior service credit in the Public Employees' Retirement System for such period of time in the United States military service. Investigation reveals that a member of the New Jersey National Guard who is in active status must present himself for a certain number of drills, and a required period of field training each year. He is to be distinguished, however, from a New Jersey National Guard member in permanent duty status, who is a full time state employee under the jurisdiction of the Department of Defense.

R. S. 38:14-9, which was originally enacted as Chapter 49, Article XVII, Section 9 of Public Laws of 1937, entitled "An Act concerning the militia of the State," provides as follows:

> "For all purposes, officers and enlisted men who entered the active service of the United States in time of war by appointment or enlistment, or under call, order or draft by the president, or who shall hereafter enter such service under like conditions, shall be entitled to credit for the time served in the active service of the United States, as if such service had been rendered in the State."

The important feature of the above quoted section which must be noted for the purpose of your inquiry is that the service referred to therein by officers and enlisted men of the State Militia or National Guard who entered the active service of the United States in time of war is to be regarded as service rendered "in the state" for the period of such active service. The statute does not constitute such service as being service rendered "for the state," which would make such service properly creditable.

As a matter of fact, a reading of Chapter 49, Article XVII, of the Public Laws of 1937, of which R. S. 38:14-9 is a part, leads to the conclusion that the service therein referred to was designated as service rendered "in the state" so as to qualify the officers or enlisted men who rendered such service for eligibility to receive a faithful service medal provided by Chapter 49, Article XVII, Section 2 of the Public Laws of 1937, R. S. 38:26-1, which provides as follows:

> "The governor may issue to officers and enlisted men who have served faithfully in the organized militia, after ten years of active service, an appropriate medal, and for each and every five years of subsequent faithful, active service, a suitable numeral therefor. Any person who shall consider that he is entitled to receive a faithful service medal or numeral, shall submit to the adjutant general an application therefor. If it shall appear to the adjutant general that the applicant is entitled to the medal or numeral, he shall direct the quartermaster general to issue such medal or numeral."

The conclusion that it was not the intention of Chapter 49, Article XVII, Section 9 of P. L. 1937 (R. S. 38:14-9) to constitute the service therein referred to as tantamount to state service is fortified by a consideration of Chapter 49, Article XVII, Section 7 (R. S. 38:14-7) which provides as follows:

> "Any citizen of this state may accept and hold a commission in the militia of this state, the national guard of the United States or any reserve component of the United States army, navy or marine corps, without thereby vacating any civil office, position or commission held by him. The acceptance or holding of any such commission shall not constitute such holding of an office of trust and profit under the government of this state or of the United States as shall be incompatible with the holding of any civil office, position or commission under the government of this state."

In view of the foregoing, it is our opinion that a person who is presently a state employee by reason of his being an officer of the New Jersey National Guard in permanent duty status, but who was merely in active status of the New Jersey National Guard, not in permanent duty status, at the time he entered into the military service of the United States in time of war is not entitled to prior service credit in the Public Employees' Retirement System for such period of time in the United States military service.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: CHARLES S. JOELSON,
Deputy Attorney General.

csj;b

AUGUST 31, 1955.

HONORABLE CHARLES R. HOWELL,
Commissioner of Banking and Insurance,
State House Annex,
Trenton, New Jersey.

FORMAL OPINION—1955. No. 33.

DEAR COMMISSIONER HOWELL:

You have recently requested our advice as to the propriety of a course of operation contemplated by Hospital Service Plan of New Jersey, hereinafter called the Plan. The correspondence attached to your letter indicates that the Plan proposes to contract with a foreign corporation, Health Service, Inc., hereinafter called Health Service. Health Service has issued a group health and accident policy covering employees of a New Jersey industry. The contract between Health Service and the Plan would provide that the plan would pay for hospital services rendered to policyholders of Health Service and that Health Service would subsequently reimburse the Plan and in addition pay charges for services rendered by the Plan.

The Plan was organized as a non-profit corporation under the provisions of legislation now contained in Title 15 of the Revised Statutes. Subsequently it qualified and was authorized to operate a non-profit hospital service plan under the provisions of N. J. S. A. 17:48-1 et seq.

The term hospital service plan is defined as a "plan whereby hospital service is provided by a hospital service corporation or by a hospital with which the corporation has a contract for such hospital service *to persons who become subscribers under contracts with the corporation*" (emphasis supplied) N. J. S. A. 17:48-1. The proposed arrangement thus would not come within the definition of a hospital service plan since the hospital services would be rendered to beneficiaries of a policy issued by a different corporation, not subscribers to the plan.

This would also contravene the intent of N. J. S. A. 17:48-2. That section provides "Every such corporation shall be operated for the benefit of the subscribers with whom it has contracted to provide hospital service." We think this is intended to preclude activities not directly related to the rendering of services to subscribers.

It cannot be contended that the proposed arrangement is authorized under the general powers of non-profit corporations. It is only as a hospital service corporation that the Plan can contract for the furnishing of hospital services. N. J. S. A. 17:48-2 provides that "No person, firm, association or corporation, other than a hospital service corporation, or an insurance company * * * shall establish, maintain or operate a hospital service plan *or otherwise contract in this State with persons to furnish hospital service.*" (emphasis supplied)

You also pose another question: whether a non-profit corporation other than a hospital service corporation could contract in the manner outlined for the furnishing of hospital services? This question is also answered in the negative by reference to the above quoted portion of N. J. S. A. 17:48-2. Only a hospital service corporation or an insurance company may contract for the furnishing of hospital services.

We advise you accordingly that the proposed arrangement of the Plan would not be permitted under our law.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.
By. JOHN F. CRANE,
Deputy Attorney General.

JFC;jeb

AUGUST 31, 1955.

HON. CARL HOLDERMAN, COMMISSIONER,
Department of Labor and Industry,
1035 Parkway Avenue,
Trenton 25, New Jersey.

FORMAL OPINION—1955. No. 34.

DEAR COMMISSIONER HOLDERMAN:

You have asked for our opinion concerning the effect to be given Chapter 196, P. L. 1955 which became effective August 5, 1955, upon its approval by the Governor. More particularly, you state. "Heretofore, papers normally filed on a Saturday have been filed as of Saturday. Because of the new statute, it would appear that any papers normally received on Saturday should be filed as of the following Monday, unless Monday happens to be a holiday, in which event the papers would be filed as of Tuesday." You then ask: "Will you kindly inform us whether our understanding is correct?"

Prior to the 1955 amendment, N. J. S. A. 36:1-1.1, as amended, provided: "Each Saturday between June 15 and September 15 in each year shall, for all purposes whatsoever as regards the transaction of business in the public offices of this State, and the counties and municipalities in this State, be considered as the first day of the week, commonly called Sunday, and as public holidays." (P. L. 1946, c. 129, sec. 1, as amended P. L. 1954, c. 196, sec. 1). It became effective July 23, 1954, upon approval by the Governor. The present enactment (Ch. 196, P. L. 1955) is amendatory thereof, the extent of the amendment being the deletion of the phrase "between June 15 and September 15." Thus, the new law makes effective all year long the summertime practice you had been following during the stated summer period.

As pointed out by the Assistant Attorney General in his letter to you of August 15, 1955, the statutory language expressly provides that Saturday be considered Sunday "for all purposes whatsoever as regards the transaction of business in the public offices of this State."

Therefore, in answer to your question, if for some valid reason your offices are open on Saturdays for the receipt of papers, such papers should be filed as of the Monday immediately following; if the Monday immediately following is a legal holiday, then they should be filed as of the next day, Tuesday.

Since Saturday is to be treated as Sunday within the statutory intendment, the following brief observations regarding Sunday may be helpful.

Sunday is recognized by our courts to be *dies non juridicus.* In *State v. Rhodes,* 11 N. J. 515 (1953), it was said, at 521: "* * * * our courts have consistently described Sunday as *dies non* and have in manifold circumstances sanctioned legal action on the following Monday when the last day prescribed therefore fell on Sunday." In that case, the Supreme Court held an indictment to be timely found within the two-year limitational period where the indictment was returned on a Monday, the Sunday immediately preceding which was the last day of the two-year period. In the earlier case of *City of Newark v. Smith,* 120 N. J. L. 56, 59 (Sup. Ct. 1938), Heher J. stated: "* * * * Sunday is *dies non juridicus.* This is a general policy that has always pervaded our law * * * *". There, the Essex Circuit Court Judge by formal order of December 2, 1932, had fixed Decemeber 9, 1932, as the time for hearing objections to commissioners' assessments for local improvements in Newark, and directed that notice thereof be given to the affected property owners by publication "in at least two of the official papers of the city of Newark, for five successive days prior to such date." The prescribed notice was published on December 3, 5, 6, 7, and 8. No publication was had on Sunday, December 4. The statute there in question provided that the Circuit Court "shall cause such

notice to be given as it shall direct." The Court found no merit in the claim of non-compliance with the direction of the order that the notice be published "for five successive days."

In *Poetz v. Mix,* 7 N. J. 436 (1951), the effect to be given R. S. 36:1-1.1 was directly involved. (At that time, the statute related only to Saturdays in July and August, but otherwise was the same.) The question for decision was whether the action had been timely commenced within the two-year limitation period (then contained in R. S. 2:24-2). *Inter alia,* the Court held that if a clerk accepts a paper or pleading for filing without payment of filing fee until a later date, the paper or pleading shall be considered filed upon its receipt by the clerk notwithstanding that the fee has not yet been paid. Plaintiff's cause of action having accrued on July 16, 1947, the two-year limitatiton period established by the statute was reached on July 16, 1949, a Saturday. At 445, the Court stated it to be "well settled in this State that where, by statute, an act is due arithmetically on a day which turns out to be a Sunday or legal holiday, it may be lawfully performed on the following day, and if that day be also a *dies non* on which the public offices are closed to the transaction of business, according to the 'holiday acts' *supra,* a similar rule applies cognizant of the conflict of authority in other jurisdictions regarding the statute of limitations, the Court accepted as "the better view * * * that where the last day of the period prescribed by statute of limitation for commencing an action (in the absence of a controlling statute to the contrary) falls on a Sunday or a legal holiday (Saturdays during July and August by R. S. 36:1-1.1) when public offices are legally closed to the transactions of business, such an action commenced on the next day which is not a *dies non* is not too late" (at 446). The complaint was held to be timely filed.

In *Potter v. Brady Transfer & Storage Co.,* 21, N. J. Super., 175 (App. Div. 1952) the question was stated to be: "Whether, when the last day in which to commence an action under the New Jersey Workmen's Compensation Act. R. S. 34:15-51 N. J. S. A., falls on a Sunday, and a claim petition is filed on the following day, the Division of Workmen's Compensation of the Department of Labor and Industry has jurisdiction to hear and dispose of the claim of the petitioner?" The respondent attempted to distinguish between the ruling in *Poetz v. Mix, supra* and the situation presented in the above question "upon the circumstance that the provision of the compensation law fixing the time for filing is not an ordinary statute of limitations but rather goes to the jurisdiction of the tribunal." The Court found the distinction untenable and concluded: "In construing the compensation statute the court must read it with the statute making Sunday a holiday for the reason that both statutes are in *pari materia.* Whenever the Legislature fixes a time period, it should be assumed that it is enacting the law in the light of those other statutes. Oherwise, each such statute would have to have tagged onto it words 'or upon the following business day when the last day falls on a legal holiday' or words to a similar purport."

It might be noted that Supreme Court Rules 1:27, 7:19-4 and 8:12-4 have been amended effective September 7, 1955, to give Saturdays the same status as Sundays and legal holidays for the purposes set out in the rules.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: LAWRENCE E. STERN,
Deputy Attorney General.

Les:jeb

SEPTEMBER 29, 1955.

WARREN COUNTY BOARD OF TAXATION,
Court House Annex,
Belvidere, New Jersey.

FORMAL OPINION—1955. No. 35.

Re: Bank Stock Tax.

GENTLEMEN:

You have requested our opinion as to the method of computing the value of bank stock under the provisions of R. S. 54:9-1 et seq.

Your request states:

"Some banks, or possibly all banks, set up in their records a 'reserve for contingencies' which amount is deducted from the undivided profits. Would you kindly give me your interpretation as to whether under the Statute the banks are permitted to deduct this reserve out of undivided profits in rendering their statement to the County Tax Board for figuring the tax, or must the banks report full undivided profits even if in their own bookkeeping procedures they do set aside this reserve."

R. S. 54:9-5, as amended, provides that:

"For the purposes of assessment, the chief fiscal officer of every such bank, shall annually, on or before January tenth, file with the secretary of the board of taxation of the county within which its principal place of business is located, a true statement under the oath of its president, cashier, or treasurer, setting forth:

a. Its name and principal place of business;

b. The amount of capital surplus and undivided profits, *as indicated by the books of the company,* as of the close of business December thirty-first previous for which the statement is filed;" (emphasis supplied throughout)

The wording of the statute indicates that the statement must reflect the figures as to capital, surplus and undivided profits as they appear on the books of the bank. It would seem, therefore, that, if in computing undivided profits an allowance of a reserve for contingencies was set up on the books, a statement showing the figure so computed would be in compliance with the statute.

This does not mean, however, that the board must necessarily restrict itself to figures so reported in ascertaining the value of the common stock. R. S. 54:9-9, as amended, sets forth a list of facts which must be found by the board independently in ascertaining the value of the shares of stock. The statute provides:

"Each county board shall annually, on or before March first, ascertain from an inspection of the statements filed, *and from any other sources of information which may be open to it*:

a. The names and places of business of all banks in the county;

b. The number of shares of common and preferred capital stock of each isseud and outstanding;

c. The aggregate amount of the capital, surplus and undivided profits of each."

Chapter 90, P. L. 1914, a predecessor statute containing substantially similar language was construed by the former Supreme Court to mean that the county tax board was not limited to the figures as reported to it, but it could resort to other sources of information. The Court said, *Com. Trust Co. v. Hudson Bd. of Taxation,* 86 N. J. L. 424, 432 (Sup. Ct. 1914), aff'd. 87 N. J. L. 179 (E. & A. 1914):

"The legislature could not have thought that the books of the corporation would be an infallible test of the amount of capital, surplus and undivided profits; they would be no more infallible than the method of section 2; the statement was no doubt required because it would furnish information that would assist in determining the true value. So, the value of each share ascertained under section 2 would give valuable information; but the county board is not limited by section 6 to the facts ascertained from the books (book value), and from adding together the amount of capital, surplus and undivided profits (liquidation value). It is authorized to resort to other sources of information which may be open, and required to ascertain the true value of all the capital stock issued and outstanding."

See also *Second Nat. Bank & Trust Co. of Red Bank v. State Board of Tax Appeals,* 114 N. J. L. 573 (Sup. Ct. 1935).

We now turn to the question of whether reserves for contingencies should be taken into account in determining the amount of undivided profits and ultimately the value of the stock.

Contingency reserves are a recognized means of providing for an adjustment to surplus or earned profits to reflect anticipated losses. See Paton, *Advanced Accounting* (1939) p. 595; Kester, *Principles of Accounting* (1939) p. 465. Paton states, however, at page 596 that,

"The practice of appropriating surplus in the form of one or more loss reserves should not be carried to extremes. Reservations which are nothing more than gestures in the direction of conservatism are more likely to obscure than to illuminate and are to be avoided. The foregoing of dividends and the accumulation of a general surplus buffer, without the use of fancy labels, give sufficient indication of conservative policy except in situations where a definite basis for anxiety exists."

In view of the statutory requirement stated above that the board ascertain the value of the bank stock from any sources of information which may be open to it, the duty devolves upon the board to examine the books of the bank and form an independent judgment as to the reasonableness of the amount of the reserve entered upon its books. In so doing, the board should take into consideration the past experience of the bank, general and local economic conditions and reasonable expectations for the immediate future. If it is satisfied, after having considered these and any other related factors of which it may have knowledge, that the reserve is proper, it may use the figures as reported by the bank. If on the other hand, it believes that the amount of the surplus entered upon the books is not justified by the circumstances, it may make such adjustments as it deems necessary to arrive at the true value of the stock.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: JOHN F. CRANE,
Deputy Attorney General.

OCTOBER 17, 1955.

MR. W. LEWIS BAMBRICK,
Unsatisfied Claim and Judgment Fund Board,
222 West State Street,
Trenton, New Jeersey.

FORMAL OPINION—1955. No. 36.

DEAR MR. BAMBRICK:

On April 15, 1955, we advised you that payments received or receivable by a plaintiff or his personal representative for temporary disability benefits, or benefits under an accident and health policy, hospitalization, or similar insurance policies should be deducted from the amount due upon an unsatisfied judgment, for payment of which claim is made against the Unsatisfied Claim and Judgment Fund. You now ask our opinion as to whether payments made by reason of a life insurance policy or accidental death policy should be similarly deducted.

N. J. S. A. 39:6-71, as amended, provides in part as follows:

". . . Any amount for compensation or indemnity for damages or other benefits which the plaintiff has received or can collect from any person other than the judgment debtor shall be deducted from the amount due upon the judgment for payment of which claim is made."

Furthermore, N. J. S. A. 39:6-83, as amended, which relates to judgments against the Director of the Division of Motor Vehicles based upon a hit-and-run accident, provides that "a judgment against the director shall be reduced by any amounts which such plaintiff has received from any person mentioned in subparagraph (m) of section 10 (N. J. S. A. 39:6-70)." Subparagraph (m) of section 10 (N. J. S. A. 39:6-70) refers to "a judgment in an action against any other person against whom he has a cause of action in respect of his damages for bodily injury or death or damage to property arising out of an accident and . . . the amounts recovered upon such judgments or the amounts, if any, received for indemnity or other benefits for such injury or death or damage to property from any person other than the operator or owner of the motor vehicle causing such injury, death or damage."

It is our opinion that money received or receivable under a policy of life insurance which is not predicated upon accidental death should not be considered to be deductible as "any amount for compensation or indemnity for damages or other benefits" within the intendment of N. J. S. A. 39:6-71, as amended, or the similar language to be found in N. J. S. A. 39:6-70(m). Since such money is payable under a policy of life insurance upon the occurrence of death regardless of the cause of death, the payment of benefits under such a life insurance policy does not constitute the type of indemnity or benefits contemplated by the statute. Such benefits are payable upon the happening of death, and would be payable whether or not death resulted from an accident.

We now turn to the question of whether payments received or receivable under a policy insuring against accidental death, or providing for double indemnity in the event of accidental death, should be deducted from the amount due upon an unsatisfied judgment, or upon a judgment obtained against the Director of the Division of Motor Vehicles based upon a hit-and-run accident, for payment of which judgment, claim is made against the Unsatisfied Claim and Judgment Fund. Since such insurance payments are made only by reason of the same accidental death which was the basis of the unsatisfied judgment or the judgment against the Director of the Division of Motor Vehicles resulting from a hit-and-

run accident, they appear to be "indemnity for damages or other benefits" within the meaning of N. J. S. A. 39:6-71, as amended, and the similar language to be found in N. J. S. A. 39:6-70(m). However, it must be borne in mind that N. J. S. A. 39:6-71, as amended, and N. J. S. A. 39:6-83, as amended, provide only for the deduction of indemnity or benefits which *the plaintiff* has received. In a case of death resulting from a motor vehicle accident, the plaintiff is either the administrator ad prosequendum of the decedent, the executor of the decedent, or the administrator with the will annexed of the decedent.

A cause of action for wrongful death does not exist as a common law right, but stems from the statutory provisions of N. J. S. A. 2A:31-1, et seq., commonly referred to as the Wrongful Death Act. N. J. S. A. 2A:31-1 provides that "when the death of a person is caused by a wrongful act, neglect, or default . . ., the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages . . ." N. J. S. A. 2A:31-2 provides that every such action "shall be brought in the name of an administrator ad prosequendum of the decedent for whose death damages are sought, except where the decedent dies testate and his will is probated, in which event the executor named in the will and qualifying, or the administrator with the will annexed, as the case may be, shall bring the action."

N. J. S. A. 2A:31-4 provides as follows:

> "The amount recovered in proceedings under this chapter shall be for the exclusive benefit of the persons entitled to take any intestate personal property of the decedent, and in the proportions in which they are entitled to take the same. If any of the persons so entitled were not dependent on the decedent at his death, the remainder of the persons so entitled shall take the same as though they were the sole persons so entitled. If all or none of the persons so entitled were then dependent on him, they shall all take as aforesaid."

N. J. S. A. 2A:31-6 provides as follows:

> "When an action is commenced by an administrator ad prosequendum under this chapter, no payment in settlement thereof or in satisfaction of a judgment rendered therein shall be made to him, but such payment shall be made only to the duly appointed general administrator of the estate of the decedent, who has filed a bond or supplemental bond adequate to protect the persons entitled to receive the amount so paid.
>
> No release or cancellation of a judgment, whether by warrant or otherwise, by an administrator ad prosequendum or by his attorney of record or attorney in fact shall release the person making payment from liability to the persons entitled to any intestate personal property of the decedent, shall operate as a valid cancellation of the judgment or be an authority to the clerk of any court to cancel the judgment of record."

N. J. S. A. 3A:6—13 provides that the surrogate's court of the county in which an accident resulting in death occurred, or the Superior Court, "may grant letters of administration ad prosequendum to the person entitled by law to general administration." It further provides that no bond shall be required of the administrator ad prosequendum.

Since N. J. S. A. 39:6—71, as amended, and N. J. S. A. 39:6—83, as amended, provide for the deduction of indemnity or benefits received or receivable by the plaintiff, we must decide whether a designated beneficiary who is entitled to

payments under an accidental death policy may be regarded as a plaintiff within the meaning of such statutes, and in view of N. J. S. A. 2A:31—1, et seq. and 3A:6—13. In this respect, we shall consider both a situation where the designated beneficiary of the accidental death policy is the estate of the decedent, and a situation where the designated beneficiary of the accidental death policy is a specified individual.

Since N. J. S. A. 2A:31—6 clearly establishes the fact that in every action based upon the Wrongful Death Act, payment in settlement thereof, or in satisfaction of a judgment rendered therein shall be made only to the general administrator of the estate of the decedent, it might be argued that in a situation where the estate of a decedent is the beneficiary of an accidental death policy, payment to the estate under said policy should be deductible as a payment to the "plaintiff" within the meaning of N. J. S. A. 39:6—71, as amended, and N. J. S. A. 39:6—83, as amended. However, the possibility of reaching such a conclusion is considerably hindered by the fact that N. J. S. A. 2A:31—4 limits the distribution of proceeds obtained by reason of a wrongful death action to "persons entitled to take any interstate personal property of the decedent," and further limits such distribution to persons "depenedent on the decedent at the time of his death." Proceeds paid to the estate by reason of an accidental death insurance policy, on the other hand, are distributed without regard to any such limitations as are found in N. J. S. A. 2A:31—4. Therefore, it would be palpably unfair to deduct from any payment due from the Unsatisfied Claim and Judgment Fund the amount received by the estate by way of a payment on an accidental death policy, since the persons who share in the proceeds of such policy may not be the same persons who are entitled to the full proceeds of the judgment based upon wrongful death. Furthermore, to attempt to deduct portions of the proceeds of an accidental life insurance policy payable to an estate to the extent that persons who share in the proceeds of a judgment or settlement of a wrongful death action also share in the proceeds of an accidental life insurance policy would present administrative difficulties of such magnitude as to be practically insurmountable.

On the other hand, when payments are payable to a specified beneficiary under an accident death policy, such payments cannot be regarded as deductible, since such specified beneficiary, not being the plaintiff in a wrongful death action, is not within the purview of N. J. S. A. 39:6—71, as amended, and N. J. S. A. 39:6—83, as amended. Actually, the person who receives benefits under the accidental death policy may not even be entitled to any of the proceeds of the wrongful death judgment, or may only be entitled to a portion of same. Furthermore, even if it were possible to regard a person who is entitled to benefits under an accidental death policy and who also shares in a wrongful death judgment as a "plaintiff" in the wrongful death action on the theory that said action is brought in his behalf, great difficulties would arise with regard to the administration of any deductions to be made. Difficult questions would arise as to whether such person who received the proceeds of an accidental death benefit policy would be entitled to share in the wrongful death judgment and, if so, the amount of his share in said judgment.

In view of all the foregoing, it is our opinion that benefits payable by reason of an accidental death policy should not be deducted under N. J. S. A. 39:6—71, as amended, and N. J. S. A. 39:6—83, as amended.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: CHARLES S. JOELSON,
Deputy Attorney General.

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OCTOBER 28, 1955.

HON. GEORGE C. SKILLMAN,
Director of Local Government,
Commonwealth Building,
Trenton, New Jersey.

FORMAL OPINION—1955. No. 37.

DEAR DIRECTOR:

You have requested our opinion as to the authority of a municipality to invest in its own bonds or other obligations. The inquiry falls into two parts:

a. May a municipality subscribe for its own bonds or notes at the time they are issued?

b. May a municipality purchase its own bonds or notes after they have first been sold to someone else?

We have reached the conclusion that New Jersey municipalities have the power to purchase their own obligations in the latter case, but not in the former.

N. J. S. A. 40:5—7.1 reads as follows:

"It shall be lawful for the board of chosen freeholders of any county, the governing body of any municipality or the board of education of any school district to use moneys, which may be in hand, for the purchase of war savings bonds or other obligations of the United States of America or bonds of any Federal Intermediate Credit Bank or Federal Home Loan Bank, which have a maturity date not greater than twelve months from the date of purchase, or bonds or other obligations of the county, municipality or school district. Said bonds or other obligations, if suitable for registry, may be registered in the name of the county, municipality or school district and the authorization to purchase these bonds or other obligations shall be by resolution adopted by a majority vote of all of the members of any such board of chosen freeholders, governing body, or board of education, as the case may be."

Section 40:5—7.3 further provides:

"Whenever the board of chosen freeholders of any county, the governing body of any municipality or the board of education of any school district shall purchase any bonds or other obligations of said county, municipality or school district, pursuant to this act, the said bonds or other obligations shall not be cancelled but may be sold as and when directed by resolution adopted by a majority vote of all the members of such board of chosen freeholders, governing body or board of education."

In our opinion, Section 40:5—7.1 contains an express grant of authority to a county, municipality or school district to buy its own bonds; and Section 40:5—7.3 authorizes each such governmental unit to resell such bonds by resolution of a majority of all the members of its governing body. One qualification should be added to the authority granted by the former section: it should not be construed to authorize the purchase of the issuer's own obligations at a price in excess of face value. Purchase at such a price is expressly authorized by N. J. S. A. 40:1—60.1 for the sole purpose of retiring the obligation, and the procedure in that case is subject to the safeguards established in that statute. Purchase under Section 40:5—7.1, however, can not be made for retirement, but only for purposes of investment or resale. See Section 40:5—7.3, *supra.* It would be against public policy for a municipal corporation to pay a price above the face value except in connection with retirement of the obligation: such a purchase would be speculative, to say the least; and the bonds could be resold at a lower price at private sale. The abuses made possible by the existence of such powers would be obvious. A reading together

of Sections 40:1—60.1 and 40:5—7.1 leads to the inference that if the Legislature had intended to allow purchases above face value under 40:5—7.1, it would have expressly said so as it did in 40.1—60.1.

As to the second inquiry, we do not read Section 40:5—7.1 as authorizing a municipality to use its surplus funds to subscribe for its bonds or other obligations at the time of the initial offering. For one thing, R. S. 40:1—43, et seq. requires that any permanent bond issue of more than $10,000.00 shall be sold in the first instance at public sale to the highest bidder. It would seem somewhat incongruous for a municipality to be competing with other bidders at an initial offering of its own obligations. Indeed, if such competition by the municipality were to be permitted, it would enable an unscrupulous governing body to evade the statute by bidding in the bonds and then disposing of them at private sale.

Furthermore, it is generally considered an unsound practice for a public agency to issue more debt than necessary for its corporate purposes. Thus, if a municipality has a surplus available for the purposes for which its bonds are proposed to be issued, the surplus should be appropriated for that purpose, and the amount of the proposed bond issue should be reduced accordingly. If, on the other hand, the municipality needs its surplus for expenses to be incurred over the near term, such moneys should not be subject to diversion to other purposes.

For these reasons, we construe the word "purchase", as used in the sections above quoted, to mean the acquisition from some other seller, and not the taking of moneys from one fund and putting them into another by going through the formality of subscribing to one's own bonds.

A municipality has no power to loan or invest its surplus moneys except as authorized by statute. See McQuillin *Municipal Corporations* (1950 Ed.), Section 38.14, and cases there cited.

In view of the policy considerations previously referred to, we believe that the statutes above quoted do not grant broader powers than those we have indicated. There being no other statutory or judicial authority on the point at issue, we conclude that a municipality does not have the power to invest in its own obligations at the time of the initial offering, or to purchase them at any other time at more than their face value.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.
By: THOMAS P. COOK,
Deputy Attorney General.

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NOVEMBER 4, 1955.

HON. JOSEPH E. MCLEAN, *Commissioner,*
Department of Conservation and Economic Development,
State House Annex,
Trenton, New Jersey.

FORMAL OPINION—1955. No. 38.

DEAR COMMISSIONER:

You have requested our advice as to the right of the State and of the City of Atlantic City, respectively, to the sum of $906,000 allocated by the Federal Government to the construction of a beach erosion project in Atlantic City, pursuant to Public Law 727—79th Congress, approved August 13, 1946. That law provides for

financial assistance to beach protection measures, and provides that "when the Chief of Engineers shall find that any such project has been constructed in accordance with the authorized plans and specifications he shall cause to be paid to the State, municipality, or political subdivision the amount authorized by Congress." The aforesaid sum represents approximately one-third of the total cost of the project in question, which has been constructed over the past several years. The other two-thirds of the expense incurred has been paid from advances by the State and by the City, respectively, on a 50-50 basis.

The same situation has also arisen with respect to Ocean City and Cape May City.

N. J. S. A. Section 12:6A—1 authorizes your department to construct bulkheads, breakwaters and other strutures on beaches along the Atlantic Ocean in order to prevent erosion thereof. Section 12:6A—2 authorizes the Division of Navigation in your department to use "any funds which may now be available or which may hereafter be appropriated by the Federal Government, or any division of the State Government, or of any county or municipality within the State for the purpose of beach erosion and beach protection." For the past several years the general appropriation act has provided a sum for beach protection projects along the Atlantic coast and in certain other areas, stipulating in each case as follows.

> "Fifty per centum of the cost of each project shall be borne by each municipality participating. Any municipality participating in beach protection projects or the maintenance of projects already constructed shall deposit its fifty per centum (50%) share of participation with the State Treasurer through the Department of Conservation and Economic Development, and all projects are to be constructed under contract with and under the supervision of the Department of Conservation and Economic Development."
> (See for example Chapter 102, P. L. 1953; Chapter 46, P. L. 1954).

We are informed that each of the above-named cities has applied to the Federal Government for payment to them of the total Federal moneys allocable for each of the projects aforementioned. The question thus arises as to the relative rights of the State and the respective municipalities to the Federal moneys available with respect to each project.

In our opinion, any sum received either by the State or by the city pursuant to Public Law 727—79th Congress should be distributed equally between the city and the State so that the cost of the project, less the Federal contribution, would in accordance with the policy of the appropriation acts be borne equally by the city and the State.

As noted above, N. J. S. A. 12:6A—2 authorizes the Division of Navigation to use any funds made available by the Federal Government for beach protection purposes, and the pertinent appropriation acts provide that all projects are to be constructed under contract with and under the supervision of the Department of Conservation and Economic Development. Fifty per cent of the cost, however, must be contributed by any municipality as a condition to its participation in any beach protection project. By these provisions the Legislature clearly intended, in our opinion, that funds made available by the Federal Government for defraying the construction cost of such projects should be paid over to your department, which in turn should remit 50% of such moneys to the municipalities participating.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

By: THOMAS P. COOK,
Deputy Attorney General.

tpc;b

NOVEMBER 10, 1955.

HON. CARL HOLDERMAN,

Commissioner of Labor and Industry,
1035 Parkway Avenue,
Trenton, New Jersey.

FORMAL OPINION—1955. No. 39.

DEAR COMMISSIONER HOLDERMAN:

You have requested our opinion with reference to certain questions involving the Supplemental Unemployment Benefit Plans embodied in contracts recently negotiated by the United Automobile Workers of America, C.I.O., one with the Ford Motor Company and the other with General Motors Corporation.

In each case, we have procured copies of the Plan and the agreement to which it is attached. Since there appear to be no significant differences insofar as your inquiries are concerned, they will hereafter be referred to as "the Plan" and the automobile companies will be referred to simply as "the Company".

In summary, the Plan contemplates the establishment by the Company of a trust fund or funds (hereinafter referred to as "the Trust Fund" or "the Fund"). Contributions to the Fund are made solely by the Company, at the rate of 5 cents per hour for each hour an employee has received pay from the Company. This is the sole obligation of the Company. There is a limitation as to the total amount of money to be built up in the Fund. This limitation is called "Maximum Funding" and will be computed once a month in accordance with a formula set out in the Plan. The Fund is to be used solely for the payment of benefits to eligible applicants and the expenses of administration of the Fund. In no event does the Fund revert to the Company. The express purpose of the Plan is to supplement State system unemployment benefits to the levels provided for in the Plan, and not to replace or duplicate them. Beginning June 1, 1956, eligible laid off workers will be paid benefits by the trustee out of the Trust Fund in exchange for certain "credit units" they have accumulated while employed by the Company. The rate of exchange for such "credit units" will depend on the seniority of the applicant and the relative value of the assets of the Fund as compared with the current "Maximum Funding" figure. Within the limitation of a $25.00 maximum, the benefits, when added to State Unemployment Compensation, could give an eligible applicant an amount equal to 65% of his weekly after-tax straight-time wage, for a limited number of weeks, and an amount equal to 60% for a maximum of 22 additional weeks.

An applicant is eligible for a supplemental benefit only if he is on layoff from the Company with respect to the week for which application is made and if, among other things, (a) such layoff occurred as the result of a reduction in force or temporary layoff, including a layoff because of the discontinuance of a plant or an operation, (b) with respect to such week, the applicant has registered at and has reported to an employment office maintained by the applicable State system and has not failed or refused to accept employment deemed suitable under such State system, and (c) with respect to such week, the applicant has received a State system unemployment benefit not currently under protest by the Company or was ineligible to receive the State unemployment benefit for certain limited reasons not pertinent here.

The Plan provides that no benefit paid thereunder shall be considered a part of any employee's wages for any purpose and that no person who receives any benefit shall for that reason be deemed an employee of the company during such period.

In your letter of request you state that:

"Particularly the matters it is desired to be ruled on are:

a. Whether or not these [supplemental unemployment] benefits may be received simultaneously without interfering with the workers rights to receive [state unemployment benefits].

b. Whether or not the company and/or worker are required to pay unemployment insurance contributions on the supplemental benefits paid under the . . . plan."

In dealing with the questions you have propounded it is necessary to keep in mind the declaration of public policy made by the legislature concerning the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment. The declaration is contained in Section 2 of the Unemployment Compensation Law, R. S. 43:21—2:

"As a guide to the interpretation and application of this chapter, the public policy of this State is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this State. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the Legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The Legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this State require the enactment of this measure, under the police powers of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed after qualifying periods of employment."

It would seem that the Plan as outlined above constitutes a voluntary effort to further the purposes expressed in this statement of policy. The terms of the Plan are clearly consistent with the terms of the declared public policy.

The Unemployment Compensation Law of our state provides that an unemployed individual, under certain conditions and limitations, is eligible to receive benefits from the state fund with respect to any week of unemployment. R. S. 43:21—4.

An individual is deemed "unemployed" for any week (1) during which he is not engaged in full time work and (2) with respect to which his remuneration is less than his weekly benefit rate under the state system. R. S. 43:21—19 (m) (1).

Since an eligible applicant under the Plan described above must be on layoff with respect to the week for which application is made, it is obvious that an applicant is not engaged in full time work for that week. Thus, the first clause of the definition of "unemployed" is satisfied.

As to the second clause of the definition, if the payments to an applicant under the Plan are considered not to be remuneration with respect to the week of layoff, then that clause too is satisfied. It is appropriate, therefore, to determine whether supplemental unemployment benefits are remuneration within the terms of the Law.

Remuneration is defined in R. S. 43:21—19 (p) to mean:

"all compensation for personal services, including commissions and bonuses and the cash value of all compensation in any medium other than cash."

It is to be noted that the benefits under the Plan are not paid by the employers to employees, nor does the Company have a legal obligation to make benefit payments. Payments are made from the Trust Fund to the beneficiaries by independent trustees. Fund benefits are non-alienable. The employees have no vested interest in the assets of the Fund. Some or all of the employees may never receive benefits from it. The Plan affords them the possibility of receiving benefits in the future, in varying amounts and for varying periods. It can hardly be said that such benefits are "compensation for personal services." (See *Radice v. N. J. Department of Labor and Industry*, 4 N. J. Super, 364 (App. Div. 1949) and *Bartholf v. Bd. of Review, Div. of* Employment Sec., 36 N. J. Super. 349 (App. Div. 1955).

In *Radice v. N. J. Department of Labor and Industry*, supra, the court, in dealing with strike benefits, stated, p. 369:

"We do not believe the strike benefits were in any real sense a payment of the services . . . They came from a fund to which appellants [members of striking union] had contributed and might be analogized to savings funds or to private insurance for which they had paid premiums."

In that case the striking employees of a newspaper plant performed work for another newspaper founded by the union in furtherance of its strike activities. Since the strike benefits were not payment for the services, the members were deemed unemployed so as to be eligible for unemployment compensation benefits for the period of the dispute following restoration of normal operations at the struck plant.

In *Bartholf v. Bd. of Review, Div. of Employment Sec.*, supra, the court held that sickness disability benefits paid under the company's state-approved plan were not remuneration earned in employment or wages or compensation for personal services. The court distinguished vacation, holiday and back pay cases where payments and wages earned in employment could logically be equated. In that case the success of a claim for unemployment compensation benefits depended on the claimant's being able to count certain weeks, during which he received sickness disability benefits, toward the number of "base" weeks required by the Unemployment Compensation Law. A base week is one in which the individual has earned from an employer remuneration equal to not less than $15.00. In holding that the benefits were not remuneration the court stated, at p. 359:

". . . the act places the status of wages only on those monies which represent remuneration for services rendered and which are paid *for* employment rather than *because* of employment."

Our conclusion is that supplemental unemployment benefits are not remuneration within the provisions of our Unemployment Compensation Law.

In light of the foregoing, an applicant entitled to benefits under the Plan for any week would still be deemed an unemployed individual for such week under our statute and, if otherwise eligible and not disqualified, would be entitled to receive benefits for such week out of the State unemployment compensation fund. It likewise follows that the state benefits would not be reduced by the amount of the benefits under the Plan.

To phrase our opinion in the terminology of the Plan (Article X, Section 5 (a) of the Ford Plan; Article IX Section 5 (a) of the General Motors Plan) a person has a right to receive both unemployment benefits under the New Jersey Unemployment Compensation Law and a weekly supplemental benefit under the Plan for the same week of layoff at approximately the same time and without the reduction of the State unemployment benefit because of the payment of the weekly supplemental benefit under the Plan.

Our answer to your first question, therefore, is "Yes."

With reference to your second question, our conclusion that the supplemental unemployment benefits are not remuneration is controlling.

Contributions to the state unemployment compensation fund by both the employer and employee are based on a percentage of wages paid. R. S. 43:21—7.

Wages are defined in R. S. 43:21—19 (o) which provides, in part:

"'Wages' means remuneration payable by employers for employment . . ."

Having concluded that the supplemental unemployment benefits are not remuneration, it follows by definition that such payments are not wages and, consequently, are not to be considered in the determination of contributions required of employers and employees under the Unemployment Compensation Law.

In light of this, our answer to your second inquiry is in the negative.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: THOMAS L. FRANKLIN,
Deputy Attorney General.

TLF:lc

NOVEMBER 16, 1955.

HON. ABRAM M. VERMEULEN,
Director, Division of Budget and Accounting,
State House,
Trenton, New Jersey.

FORMAL OPINION—1955. No. 40.

DEAR DIRECTOR VERMEULEN:

You have requested advice as to whether the Treasury Department or the Legislative Budget and Finance Director (N. J. S. A. 52:11—32 et seq) has responsibility for the fiscal control of the following state agencies:

South Jersey Port Commission
Commission on Interstate Cooperation
Interstate Sanitation Commission
Commission on State Tax Policy
State Beach Erosion Commission
Commission on Narcotic Control
New Jersey Metropolitan Rapid Transit Commission
Commission on Election Laws Study
Commission on Inter-Governmental Relations
Juvenile Delinquency Study Commission
Legislative Commission on Water Supply
Advisory Commission on Lesser Offenders
Commission to Study Sea Storm Damage

N. J. S. A. 52:27B-12, P. L. 1944, C. 112, Article 3, Section 3, provides that the Commissioner of Taxation and Finance "* * * shall carry into effect and execute the formulation of the annual budget * * *." By the terms of N. J. S. A. 52:18A-6, P. L. 1948, C. 92, Section 6, the powers, functions and duties of the Commissioner of Taxation and Finance exercised through the Bureau of the Budget were transferred to the State Treasurer to be performed through the Division of Budget and Accounting. This places the responsibility of preparing the budget in your hands.

N. J. S. A. 52:27B-14 requires each agency to file with the Commissioner (now Treasurer) its request for appropriation. Subsequently, the Treasurer or a member of the department designated by him is required to examine the requests and determine the necessity for them, N. J. S. A. 52:27B-18. The requests are then transmitted to the Governor together with findings, comments and recommendations. The statute then provides that the Governor shall consider the requests, findings and recommendations and formulate a budget message for transmission to the Legislature, N. J. S. A. 52:27B-20.

The Office of Legislative Budget and Finance Director was created by P. L. 1954, Chapter 267, N. J. S. A. 52:11—32 et seq. Agencies in the legislative branch are required to present requests for appropriation to the Legislative Budget and Finance Director who is required to receive, examine and certify them to the Governor, N. J. S. A. 52:11—34.

The intention of P. L. 1954, Chapter 267, as gathered from its context and comparison with the prior law, would seem to be to relieve the Treasurer and the Division of Budget and Accounting of responsibility for preparation of that portion of the budget dealing with the Legislature and its agencies and to transfer that function to the Legislative Budget and Finance Director. The Report and Recommendations of The New Jersey Commission on Legislative Procedure and Research submitted November 15, 1954 also indicates that such was the legislative intent. At page 60 of the report the Commission recommends that a Legislative Budget and Finance Office be established in charge of a Legislative Budget and Finance Officer who shall

> "* * * exercise the functions now exercised by the Director of Budget and Accounting in the Department of the Treasury in connection with the preparation of the budgets of, and the examination, auditing and adjustment of encumbrances and statements of indebtedness incurred by, the Legislature and its agencies so that the Legislature shall be in full and complete control of the administration of its own appropriations and those of its agencies."

To the extent that they deal with the Legislature and legislative agencies, therefore, the provisions of N. J. S. A. 52:27B-10 et seq., may be regarded as impliedly repealed.

The question of responsibility for the fiscal control of the agencies, as to which you have requested advice, turns upon whether they are in the executive or legislative branch. In determining the branch of our trichotomous form of government in which a particular agency lies we must look to the statutes by which they were created and attempt to discern their essential functions.

Article 4, Section 5, Paragraph 2 of the Constitution provides as follows:

> "The Legislature may appoint any commission, committee or other body whose main purpose is to aid or assist it in performing its functions. Members of the Legislature may be appointed to serve on any such body."

Paragraph 5 of the above section prohibits the Legislature from electing or appointing "any executive, administrative or judicial officer except the State Auditor."

Article 3 provides:

> "The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution."

The constitutional intention is thus seen to permit the Legislature to appoint commission to aid it in its legislative functions, but to prohibit it from making appointments to executive bodies. The manner of the appointment of the members of the various commissions is thus significant. Bearing these considerations in mind, we shall attempt to categorize the agencies concerning which you have requested advice.

SOUTH JERSEY PORT COMMISSION

The Commission was created by Chapter 336, P. L. 1926: It was continued by R. S. 12:11—3 and by Chapter 167, P. L. 1942. R. S. 12:11—3 placed the appointive power in the governor with the advice and consent of the senate; Chapter 167, P. L. 1942, amending R. S. 12:11—3, provided that the members of the commission should be elected by the Legislature by concurrent resolution. The latter provision became ineffective on the adoption of the Constitution of 1947 in view of the above-cited provisions. Subsequently, appointments have been made by the chief executive pursuant to the power vested in him by Article 5, Section 1, Paragraph 1, vesting the executive power in him, Article 5, Section 1, Paragraph 11, enjoining him to "take care that the laws be faithfully executed" and Article 5, Section 1, Paragraph 12, giving him the power to "appoint, with the advice and consent of the Senate, all officers for whose election or appointment provision is not otherwise made by this Constitution or by law."

Governor Driscoll made appointsments to the South Jersey Port Commission with confirmation following by the Senate during the years 1949 to 1953. Those so appointed are:

Archibald W. Brown
J. Oscar Hunt
Charles E. Gant
William De Long, Jr.
Carl R. Youngberg
William W. Chalmers

R. S. 12.11-6, as amended, gives the commission

> "* * * authority subject to the approval of the board of commerce and navigation, over the survey, development, control and operation of port facilities in the district and the coordination of the same with existing or future agencies of transportation * * *. It shall make an annual report to the legislature."

R. S. 12:11-7 sets forth the general powers and duties of the commission. That section grants power to confer with municipal bodies, to confer with railroad, steamship, warehouse and other officials in the district on transportation facilities, to determine the location; type; size and construction of requisite port facilities, to acquire real property, to regulate construction and operation, to expend monies when appropriated and to employ clerical and engineering assistants. R. S. 12:11-8 permits it to make recommendations to the legislature and to Congress. R. S. 12:11-10 permits the commission to make orders to municipalities, corporations or individuals concerning the development of the district. R. S. 12:11-11 authorizes it to make investigations.

An analysis of the above functions and powers leads to the conclusion that the commission is essentially an administrative body exercising executive powers. We, therefore, are of the opinion that its fiscal control lies with the Treasury Department rather than with the Legislative Budget and Finance Director.

COMMISSION ON INTERSTATE COOPERATION

Chapter 21, P. L. 1936, N. J. S. A. 52:9B-1 created the Commission on Interstate Cooperation. It is composed of five members of the Senate, five members of the Assembly and five officials of the state named by the Governor, N. J. S. A. 52:9B-4. Its primary functions, as outlined in N. J. S. A. 52:9B-1, are to

> "* * * carry forward the participation of the state as a member of the council of state governments * * * to confer with officials of other states * * * to formulate proposals for co-operation between this state and other states and with the federal government, and to organize and maintain governmental machinery for such purposes."

N. J. S. A. 52:9B-6 requires that "the commission shall report to the governor and to the legislature * * *."

It is seen that the essential functions of the Commission on Interstate Co-operation are to confer with officials of other states, to formulate proposals for co-operation between states and to report to the Governor and the legislature. In our opinion, these functions are principally in aid of the legislative process and, therefore, we advise you that its fiscal control should be exercised by the Legislative Budget and Finance Director.

INTERSTATE SANITATION COMMISSION

The Interstate Sanitation Commission has been created pursuant to a compact between the States of New Jersey, New York and Connecticut, R. S. 32:18-1 et seq. Appointments of New Jersey members are made by the Governor. It is required to make an annual report to the Governor and Legislature of each State making recommendations for legislative action, if advisable, R. S. 32:18-6. It is empowered to fix a date after which a municipality shall discharge only treated sewage into the waters under its jurisdiction, R. S. 32:18-11. It also has power to investigate and determine if its orders have been complied with and to bring actions to enforce compliance, R. S. 32:18-12. The New Jersey statute, R. S. 32:19-3, grants power to make rules, regulations and orders. See *Interstate San. Com'n. v. Township of Weehawken*, 1 N. J. 330 (1949). While some of the functions may be described as quasi-legislative, the statutes outlined above grant powers of an administrative nature, which, in our opinion, are vested in the executive branch. We, therefore, advise you that fiscal control of the Interstate Sanitation Commission is the function of the Treasury Department.

COMMISSION ON STATE TAX POLICY

The Commission on State Tax Policy was created by Chapter 157, P. L. 1945, as amended by Chapter 6, P. L. 1949, N. J. S. A. 53:pI-1. It consists of seven members, one a member of the Senate appointed by the President of the Senate, one a member of the Assembly appointed by the Speaker, and five citizen members appointed by the Governor.

N. J. S. A. 52:91-3 provides that:

> "The Commission shall engage in continuous study of the State and local tax structure and related fiscal problems, with particular attention to (a) all laws relating to the assessment and collection of taxes in this State; (b) all proposals for change in such laws; and (c) the impact of Federal tax laws on the state financial structure."

N. J. S. A. 52:9I-5 requires the commission to report the results of its studies to the Governor and the Legislature together with its recommendations for changes in the tax laws.

We conclude that the function of the Commission on State Tax Policy is to aid the legislature in the formulation of changes in the tax laws. The fiscal control of this agency, therefore, lies with the Legislative Budget and Finance Director.

STATE BEACH EROSION COMMISSION

Chapter 14, P. L. 1949, N. J. S. A. 52:9J-1 created the State Beach Erosion Commission.

> " * * * to investigate and study the subject of the protection and preservation of beaches and shore front of the State from erosion and other damage from the elements, to effectuate such protection and preservation of the said beaches and shore front, and other purposes incidental thereto."

The commission is composed of four members of the Senate, four members of the Assembly and four members appointed by the Governor, N. J. S. A. 52:9J-2.

N. J. S. A. 52:9J-3 provides that "the commission shall consider and provide ways and means to protect and preserve the beaches and shore front of the State." State departments are enjoined by the terms of N. J. S. A. 52:9J-4 to render assistance to the commission "in making its studies." N. J. S. A. 52:9J-5 requires it to report annually to the Legislature and to the Governor with its recommendations and findings. N. J. S. A. 52:9J-6 provides that appropriations are to be used in "preparing a State program for coast protection based upon the regional planning concept."

We conclude that the functions of the commission are principally to make studies of beach erosion and related problems and to make recommendations to the legislature. The Legislative Budget and Finance Director therefore has responsibility for the fiscal control of the State Beach Erosion Commission.

COMMISSION ON NARCOTIC CONTROL.

The Commission on Narcotic Control is also a commission created to aid the legislature. It has the duty of engaging "in the continuous study of the laws of the State relating to narcotic drugs." N. J. S. A. 24:20-3. That section further imposes upon the commission the duty of making recommendations "as to changes and improvements in such laws." In our opinion, fiscal control is vested in the Legislative Budget and Finance Director.

NEW JERSEY METROPOLITAN RAPID TRANSIT COMMISSION.

Chapter 194, P. L. 1952, N. J. S. A. 32:22-1: created the commission. However, it was consolidated with a similar commission of the State of New York into a bi-state commission known as the Metropolitan Rapid Transit Commission. Chapter 44, P. L. 1954, N. J. S. A. 32:22-12.

Its functions are described in N. J. S. A. 32:22-15 as follows:

> "The commission shall study present and prospective rapid transit needs of the New Jersey-New York metropolitan area and develop, recommend and report as soon as possible measures for meeting such needs. The commission may enter upon public or private property of either State in order to carry out its functions."

We conclude that its functions are to make a study and advise the legislature. In our opinion fiscal control is vested in the Legislative Budget and Finance Director.

ELECTION LAWS STUDY COMMISSION.

Joint Resolution No. 14 of 1953, P. L. 1953, p. 2215, created the commission. It consists of nine members.

> " * * * three of whom shall be named by the Governor from the State at large; one of whom shall be a senator to be named by the President of the Senate, two of whom shall be named by the President of the Senate from the State at large, one of whom shall be an Assemblyman to be named by the Speaker of the General Assembly, and two of whom shall be named by the Speaker of the General Assembly from the State at large."
>
> "3. The commission is authorized, empowered and directed to study the statutes relating to elections, to call upon State, municipal and county officials for their co-operation in advancing the work of the commission, and to conduct hearings from time to time in an endeavor to ascertain in what respects the election laws shall be simplified, correlated and revised.
>
> 4. The commission shall make such recommendations as it shall deem proper and prepare such legislation as it shall deem necessary to accomplish the purpose and shall make its report no later than January, one thousand nine hundred and fifty-four, to the Governor and the next session of the Legislature."

The time for filing the report has been extended by a more recent resolution.

It is seen that the commission was created to assist in the preparation of legislation concerning election laws. Because of its purpose we find that its fiscal control should be directed by the Legislative Budget and Finance Director.

STATE COMMISSION ON INTER-GOVERNMENTAL RELATIONS.

The State Commission on Inter-Governmental Relations was created by Joint Resolution No. 15, P. L. 1955, p. 2455 (in 1954) volume.

Section 1 of the Resolution provides that

> "The commission shall consist of two members of the Senate to be appointed by the President of the Senate, and two memebers of the General Assembly to be appointed by the Speaker thereof, and five members to be appointed by the Governor."

Section 4 provides:

> "The commission shall study the subjects of inter-governmental relations referred to in the preamble of this resolution, shall make itself available to co-operate with the Federal Commission on Inter-Governmental Relations, and shall from time to time report to the Governor and the Legislature results of its studies."

We conclude that the functions of the commission relate to the powers of the legislature and, therefore, advise you that fiscal control is vested in the Legislative Budget and Finance Director.

JUVENILE DELINQUENCY STUDY COMMISSION.

Joint Resolution No. 4 of 1954, P. L. 1954, p. 1010, created the above-named commission for the purpose of engaging "in a continuous investigation and study of the causes of juvenile delinquency. It is composed of 2 members of the Senate, 2 members of the Assembly and 8 citizens of the State, 4 of whom are appointed by the Governor, 2 by the President of the Senate and 2 by the Speaker of the Assembly. The Commissioner of Education is also a member. It is required to report to the Governor and the Legislature and to make such recommendations as it shall deem fit.

We are of the opinion that the commission is in the legislative branch and its fiscal control, accordingly, lies with the Legislative Budget and Finance Director.

LEGISLATIVE COMMISSION ON WATER SUPPLY.

Joint resolution No. 3 of 1955 provides for a commission to study and report to the Legislature as to the acquisition and development of the water supply resources of the State. It is composed of 7 members. One citizen-at-large appointed by the

Governor, 3 Senators and 3 Assemblymen. The Commission is empowered to hold hearings, engage engineers and employ assistants in making its study. It was required to make a report by August 1, 1955.

In view of its legislative character, we advise you that fiscal control lies with the Legislative Budget and Finance Director.

ADVISORY COMMISSION ON LESSER OFFENDERS.

The above commission was created by Joint Resolution No. 10 of 1954, P. L. 1954, p. 1021.

Section 1 provides, in part, as follows:

> "The commission shall consist of 11 members: A Senator to be designated by the President of the Senate, an Assemblyman to be designated by the Speaker of the General Assembly and the following to be designated by the Governor: A municipal magistrate, a prosecutor, a Superior Court judge, a County Court judge, a freeholder, a sheriff, a representatitive of the Department of Institutions and Agencies, a probation officer and a chairman having special training and qualifications in this field."

Section 2 directs the commission to study the problem of "providing adequate care, treatment, confinement and satisfactory types of employment for persons convicted of lesser offenses * * *". It is also directed to examine into the probation systems and suggest methods of improvement. Section 3 directs that the commission shall study the possibility of using work farms to relieve idleness. Section 4 requires the commission to report its recommendations to the Governor and the Legislature.

We conclude that the commission is within the legislative branch of the State government and that the Legislative Budget and Finance Director is charged with its fiscal control.

COMMISSION TO STUDY SEA STORM DAMAGE.

Assembly Concurrent Resolution No. 2 of 1954 created this commission consisting of 4 members of the Senate and 4 members of the Assembly.

Section 3 of the Resolution imposed upon the commission the duty of studying sea storm damage to bridges, highways, etc., and required it to recommend to the legislature ways and means of affording assistance to counties and municipalities to restore facilities damaged by storms.

This agency is also in the legislative branch, in our opinion.

We advise you that fiscal control is, therefore, vested in the Legislative Budget and Finance Director.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: JOHN F. CRANE,
Deputy Attorney General.

November 30, 1955.

MR. GEORGE M. BORDEN, *Secretary,*
Public Employees' Retirement System,
48 West State Street,
Trenton, N. J.

FORMAL OPINION—1955. No. 41.

DEAR MR. BORDEN:

This is in answer to your request for an opinion as to whether a member of the Public Employees' Retirement System may purchase credit towards retirement for a period of time covering a leave of absence without pay which exceeded three months. You have asked us to consider both the case of a member whose leave of absence without pay in excess of three months was at a time prior to January 1, 1955, and the case of a member whose leave of absence without pay in excess of three months was subsequent to January 1, 1955. It should be understood that we are not herein dealing with cases of leaves of absence for which service credits are allowed for retirement purposes by the provisions of any law of this state, but only with routine leaves of absence pursuant to discretionary authority given to the head of the employment unit.

The Public Employees' Retirement Act (N. J. S. A. 43:15A-1, et seq.) went into effect on January 1, 1955. N. J. S. A. 43:15A-39, which is a part of that act, provides as follows:

> ". . . In computing the service or in computing final compensation, no time during which a member was absent on leave without pay shall be credited, unless such leave of absence was for 3 months or less, or unless the service rendered to an employer other than the State or a political subdivision thereof was allowed for retirement purposes by the provisions of any law of this State." . . .

Under the above section, it is clear that a member shall not be entitled to purchase credit for a leave of absence without pay which exceeds three months

> "unless the service rendered to an eemployer other than the State or a political subdivision thereof was allowed for retirement purposes by the provisions of any law of this State."

The corresponding section when the old State Employees' Retirement Act was in effect was R. S. 43:14-27, now repealed, which provided as follows:

> ". . . In computing the service or in computing final compensation, no time during which a member was absent on leave without pay shall be credited, unless such leave of absence was for three months or less, *or unless the service was allowed for retirement purposes, at the time the leave of absence was granted, both by the head of the department, or other branch of the State service not included in a department in which the member was employed, and the board of trustees.*" (underscoring supplied).

It appears from the foregoing that if an employee was on leave of absence without pay for more than three months, and such period was not allowed for retirement purposes at the time such leave was granted, both by the head of his department aand the board of trustees of the State Employees' Retirement System, such period of leave of absence could not be used in computing service toward retirement even under the old State Employees' Retirement Act.

Since it is our understanding that in none of the cases in your office at the present time which concern applications to purchase credit toward retirement for a period of time covering a leave of absence of more than three months prior to January 1, 1955, was such leave of absence approved by the head of the department involved and the board of trustees of the State Employees' Retirement System at the time such leave of absence was granted, we are not required to deal with the problem of whether or not such a leave of absence if it had been so approved, could be computed toward retirement by the purchase of credit therefor at the present time.

It is, therefore, our opinion that the Board of Trustees of the Public Employees' Retirement System should deny applications presently under consideration for the purchase of credit towards retirement for a period of time covering leaves of absence without pay which exceeded three months.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: CHARLES S. JOELSON,
Deputy Attorney General.

December 8, 1955.

HONORABLE JOHN P. MILLIGAN,
Director, Division Against Discrimination,
Department of Education,
162 West State Street,
Trenton, New Jersey.

FORMAL OPINION—1955. No. 42.

DEAR MR. MILLIGAN:

You have requested our opinion as to whether the Law Against Discrimination (N. J. S. A. 18:25-1 et seq.) applies to summer camps operated by bona fide religious or sectarian institutions. We understand that your inquiry refers to summer camps maintained for children of school age rather than to recreational vacation facilities for adults.

We have reached the conclusion that if such a camp caters to the public generally, it is covered by the Law Against Discrimination as a "place of public accommodation"; but if attendance at the camp is limited to members of a certain creed or of a particular religious or sectarian institution, it is not subject to that law.

The law prohibits discrimination because of race, creed or color in the admission of persons to "any place of public accommodation" (N. J. S. A. 18:25-12(f)). Section 18:25-5(j) of the law provides in part as follows:

> "'A place of public accommodation' shall include any tavern, roadhouse, or hotel, whether for entertainment of transient guests or accommodation of those seeking health, recreation or rest; * * * swimming pool, amusement and recreation park * * * gymnasium * * * kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey. Nothing herein contained shall be construed to include, or to apply to, any institution, bona fide club, or place of accommodation, which is in its nature distinctly private; nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution, and the right of a natural parent or one in loco parentis to direct the education and upbringing of a child under his control is hereby affirmed."

The term "place of public accommodation" is clearly broad enough to include summer camps for children. The word "accommodation" has been defined as "whatever supplies a want or affords ease, refreshment, or convenience; anything furnished which is desired or needful." *Powell v. Utz,* 87 F. Supp. 811, 814 (D. C. Wash. 1949). In construing the term "place of public accommodation, resort or amusment" in the old civil rights statute of New York, which was penal and therefore strictly construed, the New York Court of Appeals used the following broad language (*Johnson v. Auburn & Syracuse Electric R. Co.* 119 N.E. 72, 73, 222 N.Y. 443 (1918)):

> "Those places include each of those utilities, facilities and agencies created and operated for the common advantage, aid, and benefit of the people, the denial of which to any person would be a discriminatory obstruction or deprivation in achieving prosperity, health, development, or happiness."

The New Jersey law provides (N. J. S. A. 18:25-27) that the act "shall be construed fairly and justly with due regard to the interests of all parties." Since our Law Against Discrimination is not penal, and in view of the mandate of the Legislature just quoted, the term "place of public accommodation" should be construed as embracing all facilities which can fairly be brought within its range.

Summer camps are not mentioned in the long list of facilities contained in Section 18:25-5(j). This fact is not controlling, however, because the enumeration in that section is not all-inclusive. See *State v. Rosecliff Realty Co.,* 1 N. J. Super. 94 (App. Div. 1948), where the Appellate Division held that swimming pools were within the orbit of the old Civil Rights Law (R. S. 10:1-2, 5) even though not specifically mentioned therein.

According to the Court, the Legislature intended that "broad scope" should be given to the phrase "place of public accommodation, rest or amusement," and that any facility reasonably falling within that broad scope was subject to the law.

Adopting that view here, we think that summer camps for children, if open to the public, come within the purview of the Law Against Discrimination. The maxim *ejusdem generis,* applied to the construction of our statute, leads to the same result, since summer camps have many attributes in common with hotels, swimming pools, recreation parks and schools, all of which are included in the statutory definition as examples of places of public accommodation.

Our conclusion is further supported by *Camp-of-the-Pines, Inc. v. New York Times Co.,* 184 Misc. 389, 53 N. Y. S. 2d 475 (Sup. Ct. 1945), where the New York Court ruled that the civil rights law of New York applied to a vacation camp in the Adirondack Mountains. The court found that such a camp was a "place of public accommodation, resort or amusement" within the meaning of that law, even though not specifically defined therein as such.

We turn now to the two exceptions contained in the above quoted proviso to section 18:25-5(j): (1) any institution, bona fide club, or place of accommodation, which is in its nature distinctly private"; and (2) "any educational facility operated or maintained by a bona fide religious or sectarian institution."

We will not attempt to discuss here what circumstances might bring a summer camp for children within the exception of a "place of accommodation, which is in its nature distinctly private." This subject frequently presents difficulties, and the question can only be answered satisfactorily in the light of the particular setting in which it arises. We can say, however, that if attendance at the camp is confined to the members of a bona fide religious or sectarian institutiton, it would be "distinctly private" within the meaning of the exception. On the other hand, the camp would not be exempt merely because of its operation by an agency or institution which itself may be private. It is the nature of the facility in question, rather than the agency maintaining it, that determines whether or not the Law Against Discrimination is applicable. *Delaney v. Central Valley Golf Club,* 289 N. Y. 577, 43 N. E. 2nd 716 (1942).

On the question of whether a summer camp for children is an "educational facility" within the meaning of the exception hereinabove quoted, a broad use of those words might well require an affirmative answer, since the term "education" can denote the developing or cultivating of the entire personality of the individual—body, mind and heart. *In Re Moses' Estate,* 138 App. Div. 525, 123 N. Y. S. 443 (1910). We are persuaded, however, that as used in the above quoted proviso, the phrase "educational facility" refers back to aand denotes only the facilities enumerated in Section 18:25-5(j), i.e. any kindergarten, primary or secondary school, etc.

The statutory phrase "educational facility" appears to have been used synonomously with the term "educational institutiton", the ordinary meaning of which is a place where classes are conducted, such as schools and colleges. *Board of National Missions v. Neeld,* 9 N. J. 349, 354 (1952); *Lois Grunow Memorial Clinic v. Oglesby,* 22 P. 2d 1076, 1078, 42 Ariz. 98 (1933), and cases there cited.

In view of the beneficent purposes of the statute, the language of the exceptiton should not be given a broader import than its ordinary connotation.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: THOMAS P. COOK.
Deputy Attorney General.

December 8, 1955.

MR. GEORGE M. BORDEN, *Secretary,*
Public Employees' Retirement System,
48 West State Street,
Trenton, New Jersey.

FORMAL OPINION—1955. No. 43.

DEAR MR. BORDEN:

You have requested our opinion as to the amount of prior service credit to be granted by the Public Employees' Retirement System to a non-veteran who is presently Deputy Clerk of the Mercer County District Court, and who was so employed at the time Mercer County adopted the former State Employees' Retirement System in November, 1954. Specifically, you have asked us whether this employee is entitled to receive prior service credit for such service performed prior to January 1, 1949, when pursuant to P. L. 1948, ch. 384, every district court of a city became a county district court or a part of a county district court. We understand, that, pursuant to N. J. S. A. 43:15A-74, he has already been granted prior service credit for service rendered subsequent to January 1, 1949 and up until June 30, 1955, which was the date the Public Employees' Retirement System became effective in Mercer County.

N. J. S. A. 43:15A-75 provides that if the Public Employees' Retirement Act is adopted by a county or municipality, "an employee who elects to become a member within one year after this act so takes effect shall be entitled to a prior service certificate covering service to the county or municipality prior to the date this act so becomes effective."

It should be pointed out that the employee in question is not a county employee, but is rather a state employee who is paid by Mercer County. In *Pierson v. O'Connor,* 54 N. J. L. 36 (Supreme Court, 1891) the court considered the status of the district courts which were at that time known as city district courts. The Supreme Court stated (page 39):

> ". . . Can the District Court in any sense be regarded as an institution under the municipal government of the City? True, by law creating the court, it can have existence only in certain cities, and its jurisdiction is, to some extent, bounded by the City limits, but neither the court nor its clerk is in any wise concerned in municipal administration. The city and its officers belong to a department of government quite different from that in which the District Court has its place. One is an administrative agency of the state over territory assigned to it, and the other is part of the judicial power of the State.
>
> "That the city is charged with the payment of the salaries of both the judge and the clerk does not serve to characterize the office as a municipal office. Both the judge and his clerk have their appointment from the state; the judge directly, his clerk indirectly from the judge, and it would be immaterial in giving character to the office whether the legislature had directed their salaries to be paid out of the state, county, or city treasury. It was clearly within the power of the legislature to enforce either mode of making compensation. The District Court has, I think, no relationship with municipal government. The municipality may be a suitor in the court, and bound by its judgments. The government of the city may be changed or abolished

and a new form of government set up, and the court still remain with its powers and duties unimpaired. . ."

In *Varbalow v. Civil Service Commission*, 15 N. J. Misc. 444 (Supreme Court, 1944), the court held a sergeant at arms of a District Court to be "in the state service and not a municipal officer."

However, despite the fact that the employee in question is to be considered a state employee, he is entitled to the same prior service credits as are allowable to county employees by virtue of N. J. S. A. 43:15A-79, which provides as follows:

> "All employees of the state whose compensation is paid in whole or in part by any county or municipality in which chapter 15 of Title 43 of the Revised Statutes has been, or in which this act is, adopted shall be entitled to receive the same benefits as employees of such county or municipality are entitled to receive and the county or municipality paying such compensation shall have the same obligations with respect to such employees of the State as it has to its own employees under this act."

A question arises as to whether the employee in question became entitled to credit for his service as Deputy Clerk in the District Court of the City of Trenton prior to January 1, 1949, since N. J. S. A. 43:15A-79 places upon a county which has adopted the Public Employees' Retirement Act only those obligations which it has to its own employees, namely the allowance of prior service credit for service to that county. However, since there is no question that the employee is entitled to prior service credit for his service as Deputy Clerk rendered subsequent to January 1, 1949, when the city district court in which he had previously served became a county district court, there would appear to be no reason for denying him prior service credit for the period of time during which he served in an identical capacity prior to January 1, 1949.

City district courts became known as county district courts pursuant to P. L. 1948, ch. 384. Section 9 thereof provides as follows:

> "The clerks, deputy clerks, sergeants-at-arms, assistants, clerical assistants and employees of the district courts shall continue in their respective offices, positions and employments and, in the case of city district courts and district courts of judicial districts in counties, the said officers and employees shall be transferred to the county district court of the county wherein the said former courts are located, and they shall continue to perform their respectitve or similar functions and duties, except that one of them may be designated pursuant to rules of the Supreme Court as the supervising clerk of the County District Court."

The employee in question is clearly entitled under N. J. S. A. 43:15A-79 to prior service credit for his service rendered in the employ of the county district court since January 1, 1949. Since the nature of his functions and duties were the same after January 1, 1949 as before that date, he should not be cut off from receiving credits for the earlier period of his employment.

You have suggested that the allowance of credits for the earlier period might be based on R. S. 40:11-5, which provides as follows:

> "Whenever heretofore there has been or hereafter there may be effected by appointment, transfer, assignment or promotion, of a municipal employee, to any other department or position in the municipal employ, or to a position or department of the county government; or when there has been or hereafter may be effected by appointment, transfer, assignment or promotion, of a county employee, to any other position or department in the county employ, or to a department or position of the municipal government, in counties of the first or second class, the period of such prior service in said county or municipal employment, for any purpose, whatsoever, shall be computed as if the whole period of employment of such employee had been in the service of the department, or in the position, to which the said employee had been appointed, transferred, assigned or promoted."

However, since R. S. 40:11-5 refers to appointment, transfer, assignment or promotion of municipal or county employees, it is doubtful that the legislation could be applied to the employee in questiton whom we have already established to be a state employee. We prefer to have our opinion as to the allowance of service credit herein upon N. J. S. A. 43:15A-79 as interpreted in the light of P. L. 1948, ch. 384. A consideration of these statutes leads us to the opinion that the employee under consideration is entitled to receive prior service credit payable by Mercer County for time spent as Deputy Clerk of both the District Court of the City of Trenton and the Mercer County District Court.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: CHARLES S. JOELSON,
Deputy Attorney General.

December 28, 1955.

HONORABLE EDWARD J. PATTEN,
Secretary of State,
State House,
Trenton 7, New Jersey.

FORMAL OPINION—1955. No. 44.

MY DEAR SECRETARY OF STATE:

You have requested our opinion as to the beginning and ending dates of terms of office of County Clerks and Surrogates.

Article 7, Section 2, Paragraph 2 of the Constitution of 1947 provides as follows:

> "County clerks, surrogates and sheriffs shall be elected by the people of their respective counties at general elections. The term of office of county clerks and surrogates shall be five years, and of sheriffs three years. Whenever a vacancy shall occur in any such office it shall be filled in the manner to be provided by law."

It is seen that the Constitution does not provide when the terms shall commence or end.

An analysis of the various statutes pertaining to County Clerks and Surrogates indicates that the legislature has not defined the beginning and ending termini of

their terms. Each of the officers is required to post a bond. No fixed time is prescribed for the posting of the bond by the County Clerk, R. S. 40:38-1, as amended, or by the Surrogate, N. J. S. 2A:5-2.

While there is some contrariety of opinion, see McQuillin, *Municipal Corporations*, (3rd Ed. 1949) Sec. 12.99; C. J. S. Officers, Sec. 45, the better rule in these circumstances is that the term commences on the date of the legal ascertainment of the result of the election. Am. Jur. *Public Officers*, Section 155; *Prowell v. State*, 142 Ala. 80, 39 So. 164 (Sup. Ct. Ala. 1904); *Whitney v. Patrick*, 64 N. Y. Misc. 191, 120 N. Y. Supp. 550 (Sup. Ct. N. Y. 1909) aff'd. 134 App. Div. 988, 120 N. Y. Supp. 1151 (Sup. Ct. App. Div. N. Y. 1909).

In an annotation at 80 A. L. R. 1290 the editor states

> "Generally, although the cases are not uniform, the rule may be stated that, unless some other time is fixed for the beginning of an elective term of office, the general presumption is that the official term dates from the legal ascertainment of the result of the election, and the officer may assume the duties of the office as soon thereafter as he can qualify and receive his commission."

This is consistent with a New Jersey case dealing with appointive officers. In *Haight, v. Love*, 39 N. J. L. 476 (E. & A. 1877), it was held that the term of an appointive officer began to run from the date of his appointment.

Ascertainment of the ending dates of the terms of office requires a construction of the term "years" as used in the constitutional provision. An early Mississippi case, *Thornton v. Boyd*, 25 Miss. 598 (E. & A. Miss. 1853) held that the word "years" as used in a constitutional provision of Mississippi meant political years between elections. At 25 Miss. 604, the court said,

> "As the general elections are to be held biennially on the first Monday and day following in November, it is apparent, if the term of office is held to begin on the day succeeding the general election, and to continue for two calendar years; that in some years there would be a period of several days in which there would be a vacancy in all the county offices except that of coroner, while in other years there would be two sets of officers; each having a right to execute the different offices in the county."

Further at 25 Miss. 605, the Court said,

> "Although it is true that in ordinary dealings and discourse, when the period of a 'year' is mentioned, it will be intended that 'a calendar year' was spoken of; yet that signification is not necessarily always and at all times to be given to that word. On the contrary, the period of time intended to be designated by the term 'year', is to be determined by the subject-matter and the context; and that signification is to be given which accords with the intention of the party using it.
>
> Accordingly, we find that in the case of Pavis v. Hiram, 12 Mass. R. 262, where it became necessary to fix the meaning of the word 'year,' used in a statute having reference to the term of an officer, Parker, Ch. J., said: "We are all of opinion that the term one 'whole year,' used in the statute, must be understood to be a political, or rather a municipal year, viz., from the time the officer is chosen until a new choice takes place at the next annual meeting for the choice of town officers, which may sometimes exceed, and sometimes fall short, of a calendar year."

See also *Kirkpatrick v. King*, 228 Ind. 236, 91 N. E. 2nd 785 (Sup. Ct. Ind. 1950).

A similar situation as that existing in Mississippi with regard to the time of holding elections exists in New Jersey. By the terms of R. S. 19:2-3 the general election is required to be held on the Tuesday after the first Monday in November of each year. It is also to be noted that the date of the legal ascertainment of the election results is the Monday following the general election day. R. S. 19:19-1 provides that the Board of Canvassers of each county shall meet on the Monday following the election day. R. S. 19:19-8 provides that the members of the Board of Canvassers shall determine the votes cast and make statements of the result of the election. The Board of Canvassers is also required to issue a certificate to the successful candidate, R. S. 19:20-5. The Governor is then required to issue a commission to those officers so elected, Constitution, Article 5, Sec. 1, Paragraph 12; *State v. Governor*, 25 N. J. L. 331 (Sup. Ct. 1856).

Accordingly, we advise you that the beginning and ending dates of the terms of office of County Clerks and Surrogates are the Mondays following the general election day in the appropriate year of election.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: JOHN F. CRANE,
Deputy Attorney General.

December 14, 1955.

HONORABLE JOSEPH E. MCLEAN,
Commissioner of Conservation and Economic Development,
State House Annex,
Trenton 7, New Jersey.

FORMAL OPINION—1955. No. 45.

DEAR COMMISSIONER MCLEAN:

You have requested our advice as to your relation to the following councils in your department:

Shell Fisheries Council
Fish and Game Council
Planning and Development Council
Veterans' Services Council
Water Policy anad Supply Council
State Housing Council

Specifically, you ask whether you have the power to approve or disapprove their actions, whether you are required to sign their minutes, and whether signing of the minutes indicates approval of their actions.

Chapter 22, P. L. 1945, established in the Executive Branch of the government the State Department of Conservation consisting of several divisions including the Division of Water Policy and Supply, The Division of Fish and Game and The Division of Shell Fisheries, N. J. S. A. 13:1A-1 et seq. Subsequently, Chapter 448, P. L. 1948, N. J. S. A. 13:1B-1 et seq., created the Department of Conservation and Economic Development. The duty of administering the work of the depart-

ment was assigned to the commissioner, N. J. S. A. 13:1B-3, and all of the powers and functions of the various divisions and councils of the former State Department of Conservation were transferred to the Department of Conservatiotn and Economic Development, N. J. S. A. 13:1B-6.

SHELL FISHERIES COUNCIL

The Shell Fisheries Council was created by Chapter 22, P. L. 1945, N. J. S. A. 13:1A-18. It was the succesor to the Board of Shell Fisheries which was created by Chapter 387, P. L. 1915 and which exercised "full control and direction of the shell fish industry and of the protection of shell fish throughout the entire State." Section 7, Chapter 387, P. L. 1915. This broad power of control continued to reside in the Board of Shell Fisheries through the 1931 act, Section 5, Chapter 187, P. L. 1931, and the Revision of 1937, R. S. 50:1-5.

Section 19 of Chapter 22, P. L. 1945, N. J. S. A. 13:1A-19, provided:

> "The functions, powers and duties, records and property of the Department of Shell Fisheries and of the Board of Shell Fisheries are hereby transferred to and vested in the Division of Shell Fisheries established under this act, to be exercised and used by the council thereof, in accordance with the provisions of this act. No action shall be taken by said council except upon approval by the Comissioner of Conservation."

Section 20 provided:

> "The council, in addition to other powers and duties vested in it by this act, shall, subject to the approval of the commissioner, formulate comprehensive policies for the preservation and improvement of the shellfish industry of the State."

Later, by Chapter 448, P. L. 1948, all of the functions and powers of the Division of Shell Fisheries and of the Shell Fisheries Council of the former State Department of Conservation were transferred to the Department of Conservation and Economic Development to be exercised through the Division of Shell Fisheries, N. J. S. A. 13:1B-42, administered by the Director under the direction and supervision of the commissioner, N. J. S. A. 13:1B-43.

The result of the foregoing statutory enactments is to vest all of the powers formerly exercised by the Board of Shell Fisheries and the Shell Fisheries Council, including control of the shell fish industry, the rule-making power, the licensing power, the power to grant leases, etc., in the Department of Conservation and Economic Development to be exercised through the Division of Shell Fisheries by the Director thereof under your general supervision and direction.

The powers of the Shell Fisheries Council remain only those set forth in Sections 96 and 97 of Chapter 448, P. L. 1948, N. J. S. A. 13:1B-45 and 13:1B-46.

They provide:

> "The Shell Fisheries Council shall, subject to the approval of the commissioner, formulate comprehensive policies for the preservation and improvement of the shell-fish industry of the State.
>
> The council shall also:
>
> a. Consult with and advise the commissioner and the director of the Division of Shell Fisheries with respect to the work of the division.
>
> b. Study the activities of the Division of Shell Fisheries and hold hearings with respect thereto as it may deem necessary or desirable.

> c. Report to the Governor and the Legislature annually, and at such other times as it may deem in the public interest, with respect to its findings and conclusions.
>
> No lease of any of the lands of the State under the tidal waters thereof, to be exclusively used and enjoyed by the lessee for the planting and cultivating of oysters and clams, shall hereafter be allowed except when approved by at least a majority of the Shell Fisheries Council; and no such lease shall thereafter in any case be allowed except when approved and signed by the Commissioner of Conservation and Economic Development."

No requirement that you sign minutes of meetings is found in the statutes. You are required, however, to approve or disapprove the formulation of comprehensive policies. This may be indicated if you so desire by endorsing your approval on the minutes of the council or in any other manner you deem appropriate. The granting of leases would seem to require execution by the Director of the Division of Shell Fisheries, approval by at least a majority of the section of the Shell Fisheries Council concerned and your approval and signature, N. J. S. A. 13:1B-46, *supra*, R. S. 50:1-18, as amended.

FISH AND GAME COUNCIL

The Fish and Game Council was created by Chapter 22, P. L. 1945, N. J. S. A. 13:1A-13. It succeeded the Board of Fish and Game Commissioners which had existed pursuant to R. S. 23:2-1. The powers of the former board, R. S. 23:2-2 (protection of fish and game, enforcement, closing streams, investigation, control of hatching stations, etc.) were transferred to the Division of Fish and Game "to be exercised and used by the council", N. J. S. A. 13:1A-14. The 1945 statute further provided that "No action shall be taken by said council except upon approval by the Commissioner of Conservation." N. J. S. A. 13:1A-14, *supra*.

Chapter 448, P. L. 1948 transferred the powers of the Council to the Department of Conservation and Economic Development to be "exercised and performed through the Division of Fish and Game." N. J. S. A. 13:1B-23. The Division was placed under the supervision of a Director who was given the power to "administer the work of such division under the direction and supervision of the commissioner." N. J. S. A. 13-1B-27.

The council was empowered, by N. J. S. A. 13:1B-28, to formulate comprehensive policies and

> "a. Consult with and advise the commissioner and director of the Division of Fish and Game with respect to the work of such division.
>
> b. Study the activities of the Division of Fish and Game and hold hearings with respect thereto as it may deem necessary or desirable.
>
> c. Report to the Governor and the Legislature annually, and at such other times as it may deem in the public interest, with respect to its findings and conclusions."

The legislature further gave the Council power to adopt regulations to be known as the State Fish and Game Code, N. J. S. A. 13:1B-30. It was also empowered to publish and distribute summaries of the regulations, N. J. S. A. 13:1B-34.

Analysis of these statutory provisions indicates that the executive power of enforcement, appointment of wardens, administration and so forth resides in the Director subject to your direction and supervision. The quasi-legislative power of

studying, recommending and promulgating regulations resides in the Fish and Game Council. The action of the Council taken pursuant to N. J. S. A. 13:1B-28, in formulating comprehensive policies, is subject to your approval. You do not, however, have power to approve or disapprove the promulgation or amendment of the State Fish and Game Code. Again, no mention of minutes of the Council is made in the statutes. You may, therefore, indicate your approval or disapproval in any manner which you deem appropriate.

PLANNING AND DEVELOPMENT COUNCIL.

The Planning and Development Council was created by Section 10, Chapter 448, P. L. 1948, N. J. S. A. 13:1B-10. It is empowered, subject to approval by the commissioner, to formulate comprehensive policies

> "for the development of the natural and economic resources of the State * * * for the preservation and use of all State forests and State Parks * * * and of all historic sites within the State * * * (and) for the prevention and control of beach erosion." N. J. S. A. 13:1B-11.

It is also empowered, without the necessity of approval by the commissioner, to:

> "a. Consult with and advise the commissioner and the director of the Division of Planning and Development with respect to the work of such division.
>
> b. Study the activities of the Division of Planning and Development and hold hearings with respect thereto as it may deem necessary or desirable.
>
> c. Report to the Governor and the Legislature annually, and at such other times as it may deem in the public interest, with respect to its findings and conclusions." N. J. S. A. 13:1B-12.

Riparian leases and grants are subject to approval of the Council concurrently with the Commissioner and the Governor, N. J. S. A. 13:1B-13.

Administration of the Division of Planning and Development is vested in a director, N. J. S. A. 13:1B-8.

With regard to actions of the Council, you are required to exercise the power of approval and disapproval only as to the formulation of comprehensive policies. No statutory requirement is found as to the manner in which your approval or disapproval should be indicated. You are free, therefore, to choose any appropriate method.

VETERANS' SERVICES COUNCIL

The Veterans' Services Council was created by Section 22, Chapter 448, P. L. 1948, N. J. S. A. 13:1B-20. Its powers are described in Section 23, N. J. S. A. 13:1B-21, as follows:

> "The Veterans' Services Council shall, subject to the approval of the commissioner, formulate comprehensive policies for the co-ordination of all services for the benefit of war veterans and their dependents.
> The council shall also:
>
> a. Consult with and advise the commissioner and the director of the Division of Veterans' Services with respect to the work of the division.
>
> b. Study the activities of the Division of Veterans' Services and hold hearings with respect thereto as it may deem necessary or desirable.
>
> c. Report to the Governor and the Legislature annually, and at such other times as it may deem in the public interest, with respect to its findings and conclusions."

Additionally, by Section 24, N. J. S. A. 13:1B-22, it succeeded to the powers of the Economic Council under Chapter 323, P. L. 1946, N. J. S. A. 55:14G-1 et seq., to approve rules and regulations and appointments of personnel of the Administrator of the Public Housing and Development Authority, N. J. S. A. 55:14G-3 and 4. See Memorandum Opinion dated January 19, 1955.

The Division of Veterans' Services is administered by a director under the supervision and direction of the commissioner, N. J. S. A. 13:1B-19.

The functions of the Veterans' Services Council are seen to be principally advisory, except as to those in relation to the Public Housing and Development Authority. Your power of approval or disapproval of their actions, however, exists only as to the formulation of policies. N. J. S. A. 13:1B-21, *supra*. Since no mention of minutes is found in the statutes you may indicate your approval or disapproval in any appropriate manner.

WATER POLICY AND SUPPLY COUNCIL

The Water Policy and Supply Council presently exists within the Division of Water Policy and Supply by virtue of the provisions of Section 100, Chapter 448, P. L. 1948, N. J. S. A. 13:1B-49. Its general powers are set forth in Section 102, N. J. S. A. 13:1B-51. It provides:

> "The Water Policy and Supply Council, in addition to other powers and duties vested in it, shall, subject to the approval of the commissioner:
>
> a. Formulate comprehensive policies for the preservation and improvement of the water supply facilities of the State.
>
> b. Survey the needs of the State for additional water supply facilities and formulate plans for the development of such facilities.
> The council shall also:
>
> a. Consult with and advise the Commissioner and the director of the Division of Water Policy and Supply with respect to the work of the Division of Water Policy and Supply.
>
> b. Study the activities of the Division of Water Policy Supply and hold hearings with respect thereto as it may deem necessary or desirable.
>
> c. Report to the Governor and the Legislature annually, and at such other times as it may deem in the public interest, with respect to its findings and conclusions."

Additional powers were conferred by Section 101. N. J. S. A. 13:1B-50. Its pertinent provisions are:

> "Notwithstanding any of the provisions of this act to the contrary: the Water Policy and Supply Council shall succeed to, and shall exercise and perform, those functions, powers and duties of the Water Policy and Supply Council of the Division of Water Policy and Supply of the existing State Department of Conservation prescribed under and pursuant to the provisions of sections 58:1-8, 58:1-17 to 58:1-33, inclusive, 58:2-2, 58:4-9, 58:4-10, 58:6-1 to 58:6-5, inclusive, and 40:62-84, of the Revised Statutes, and under and pursuant to the provisions of 'An act conferring emergency powers on the State Water Policy Commission, creating an interconnection revolving fund and making an appropriation therefor,' approved March twenty-fifth, one thousand nine hundred and forty-two (P. L. 1942, c. 24), and under and pursuant to the provisions of 'An act concerning diversion of subsurface and percolating waters of the State for domestic, industrial and other uses, and supplementing chapter one of Title 58 of the Revised Statutes,' approved July first, one thousand nine hundred and forty-seven (P. L.

1947, c. 375); provided, however, that any action which may be taken by such council, in the exercise of such functions, powers and duties, shall be subject to the approval of the Commissioner of Conservation and Economic Development."

The powers referred to concern holding hearings, approval of plans for condemnation of land for water supply, fixing of charges by the State for diversion of surface water, prohibiting destruction of dams, approval of plans for diversion of water, approval of contracts by one municipality to sell water to another and related matters. It is noted that actions of the Council pursuant to the exercise of such powers is subject to the approval of the commissioner.

The Water Policy and Supply Council has, by virtue of the above-cited statutory provisions, many administrative functions partaking of executive, quasi-judicial and quasi-legislative characteristics. Its functions are much broader than those of a mere advisory agency. From the working of the statutes it appears that you are required to approve or disapprove all of its actions, except its consulting, studying and reporting functions under N. J. S. A. 13:1B-51, *supra*. Your indication of approval or disapproval may take any form you deem appropriate. No mention of approval of minutes is made in the statutes.

STATE HOUSING COUNCIL

The State Housing Council was established in the Department of Conservation and Economic Development by the State Housing Law of 1949, Chapter 303, P. L. 1949, N. J. S. A. 55:14H-4. The powers and duties of the Council are set forth in N. J. S. A. 55:14H-5. It provides,

"The Council shall have power to make, amend, modify and repeal, such reasonable rules and regulations as it may deem necessary: (a) to adequately effectuate the provisions of this act; (b) for the exercise by the Authority of the functions, powers and duties conferred upon the Authority hereunder; and (c) to safeguard in the public interest the fund or funds heretofore or hereafter appropriated for the purposes herein. Such rules and regulations shall govern the exercise by the Authority of any and all functions, powers and duties vested in or conferred upon it by this act.

The functions, powers and duties conferred upon the Authority by this act shall, subject to the rules and regulations of the Council, be exercised and performed by the Administrator."

The Administrator is by definition the Commissioner of Conservation and Economic Development, N. J. S. A. 55:14H-3. The broad powers given to the Authority by subsequent sections are, therefore, to be exercised by the Commissioner. The Council acts only in establishing policy through the promulgation of regulations and in dividing the state into areas as provided in N. J. S. A. 55:14H-6. No provision for approval or disapproval of the Council's actions by the Commissioner is contained in the statutes and no mention of minutes is made, therefore, there would be no need for you to sign the minutes of the Council.

As we have indicated the manner in which you indicate approval or disapproval of the actions of the various councils in your department is a matter of discretion. Signing the minutes is one way in which it could be done. If you choose to use this means of indicating whether or not you approve of the action taken, you should so indicate by appropriate words preceding your signature such as "The actions of the Fish and Game Council at its meeting of (date) are hereby approved." A signature without more would be ambiguous and require someone

examining the records to inquire further as to whether approval of the action taken was intended. Your signature, of course, does not indicate that the minutes accurately reflect what took place at the meeting. That function should be performed by the individual acting as secretary of the particular council.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

By: JOHN F. CRANE,
Deputy Attorney General.

JANUARY 12, 1955.

MR. GEORGE BORDEN, *Secretary,*
State Employees' Retirement System of New Jersey,
State House Annex,
Trenton, New Jersey.

MEMORANDUM OPINION P-1.

DEAR MR. BORDEN:

This is in answer to your letter of December 23, 1954, in which you ask whether a person drawing a "free veteran's pension" is eligible to apply for an additional veteran's retirement under the new Public Employees' Retirement System.

The employee in question is apparently now drawing his pension pursuant to R. S. 43:4-1, 43:4-2 and 43:4-3. R. S. 43:4-2 provides as follows:

"When an honorably discharged soldier, sailor or marine has or shall have been for twenty years continuously or in the aggregate in office, position or employment of this State or of a county, municipality or school district or board of education, the body, board or officer having power to appoint his successor in case of vacancy may, with his assent, order his retirement from such service, or he may be retired on his own request . . ."

R. S. 43:4-3 provides as follows:

"A person so retired shall be entitled, for and during his natural life, to receive by way of pension, one half of the compensation then being received by him for his service . . ."

"In case of retirement with pension from office or Position under any other law of this State, the person retiring shall waive either his pension under that law or his pension under this article." (Underscoring supplied)

R. S. 43:3-1, as amended, provides:

"Any person who is receiving or who shall be entitled to receive any pension or subsidy from this or any other State or any county, municipality or school district of this or any other State, shall be ineligible to hold any public position or employment other than elective in the State or in any county, municipality or school district, unless he shall have previously notified and authorized the proper authorities of said State, county, municipality or school district, from which he is receiving or entitled to receive the pension that, for the duration of the term of office of his public position or employment he elects to receive (1) his pension or (2) the salary or com-

pensation allotted to his office or employment. Nothing in this chapter shall be construed to affect any pension status or the renewal of payments of the pension after the expiration of such term of office except that such person shall not accept both such pension or subsidy and salary or compensation for the time he held such position or employment".

Section 56 of Chapter 84 of the laws of 1954 goes even further, and provides as follows:

"No public employee veteran eligible for membership in the Public Employees' Retirement System shall be eligible for, or receive, retirement benefits under Sections 43:4-1, 43:4-2, and 43:4-3 of the Revised Statutes."

From the foregoing, it is apparent that a public employee who is a veteran cannot be eligible for pensions under both Chapter 84 of the Laws of 1954 and R. S. 43:4-1 et seq., and that if the applicant is eligible for membership in the Public Employees' Retirement System under Chapter 84 of the Laws of 1954, steps should be taken to terminate pension payments under R. S. 43:4-1 et seq.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: CHARLES S. JOELSON,
Deputy Attorney General.

JANUARY 19, 1955.

MR. GEORGE BORDEN, *Secretary,*
Public Employees' Retirement System,
48 West State Street,
Trenton, New Jersey.

MEMORANDUM OPINION P-2.

DEAR MR. BORDEN:

This is in answer to your letter of January 5, 1955 in which you request an opinion as to whether a state employee who was inducted into military service of the United States on November 11, 1918 and discharged on November 13, 1918 may be considered a veteran for the purposes of Chapter 84 of the laws of 1954.

Article III, Section 6(L) of Chapter 84 of the laws of 1954 defines a veteran as "any honorably discharged officer, soldier, sailor, airman, marine, nurse, or army field clerk, who has served in the active military or naval service . . . in World War I between April 6, 1917 and November 11, 1918."

The great weight of authority holds that where a statute requires that a certain thing shall be done between one day and another, each of such days is to be excluded. The word "between" when used in speaking of the period of time "between" two certain dates generally is held to exclude the dates designated as the commencement and termination of such period. *People v. Hornbeck* 61 N. Y. S. 978; *Kendall v. Kingsley* 120 Mass. 94; *Weir v. Thomas,* 44 Nebraska 507; *Greenberg v. Newman,* 320 Ill App 99. *Arcadia Citrus Growers v. Hollingsworth,* 135 Fla 322.

The New Jersey position accords with the weight of authority. In *Delaware, Lackawanna, and Western Railroad Company et al v. Mehrof Bros. Co.,* 53 N. J. L. 205 (Err & App, 1890) the court stated:

"Between two days does not mean on one or both of the two days. When the word is predicable of time, it excludes both terminal days."

In *Melis et al v. Goldstein et al* 4 N. J. Misc 364 (Circuit Ct. 1926), the Court states:

"It is settled in this State that a period of time defined as between two certain dates does not include either of the terminal dates."

It should be pointed out that in the old New Jersey case of *Morris & Essex Railroad Company v. Central Railroad Company of New Jersey,* 31 N. J. L. 205 (Sup. Ct. 1865), the Court held that the word "between" should be treated inclusively where a railroad was chartered to operate "between Phillipsburg and Easton." In that case, the Court was of the opinion that what it termed a "rigidly verbal interpretation of the clause . . . will fall short of the evident and undeniable object of the law makers."

Nevertheless, the courts of New Jersey and the great majority of the courts of other jurisdictions treat the word "between" as indicating an exclusion in cases involving dates rather than distances.

It is, therefore, our opinion that the claim of the applicant for veteran's status within the meaning of Chapter 84 of the laws of 1954 must be denied.

Returned herewith are the documents with which you furnished us.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: CHARLES S. JOELSON,
Deputy Attorney General.

FEBRUARY 1, 1955.

HON. DWIGHT PALMER,
State Highway Commissioner,
1035 Parkway Avenue,
Trenton, New Jersey.

MEMORANDUM OPINION P-3.

DEAR COMMISSIONER PALMER:

Your recent request for advice asks whether employees of your department may lawfully engage in outside employment and if so, whether there are any limitations on such employment.

Since your request was phrased in general terms our advice must be of a general nature. You are advised that employees of your department may engage in outside employment during a time other than their regular working hours so long as they are able to perform their duties with your department in an efficient and satisfactory manner and so long as such employment does not involve a conflict with the interests of the State. See 35 Am. Jur. 516, 517; 56 C. J. S. 481. Engaging

in activity inimical to the interests of the state, however, might well form the basis of disciplinary action under the provisions of Civil Service Rules 58 and 59. See 56 C. J. S. 430. "An employee commits a breach of duty if he engages in a business or renders services conflicting with his duties to his employer * * *." Note 13 A. L. R. 909. Such conduct, in our opinion, would include the preparation of bids on state projects for private contractors, the preparation of plans or other work for contractors doing work for the state, work for a county or a municipality in a situation in which the State contributes to the cost of the project. In short any situation in which a state employee might possibly be influenced in his official capacity by interests arising out of his private employment should be avoided.

The State is entitled to the complete and undivided loyalty of each of its employees.

> "There is an implied agreement on the part of the employee in every contract of service that he will serve his employer honestly and faithfully. It is his duty to communicate to him all facts which he ought to know." 56 C. J. S. 480.

Language found in the case of *Elco Shoe Manufacturers v. Sisk*, 260 N. Y. 100, 183 N. E. 191 (Ct. App. N. Y. 1932) seems particularly appropriate. At 183 N. E. 192 the court said,

> "* * * no man can serve two masters with equal fidelity when rival interests come into existence. Agents are bound at all times to exercise the utmost good faith toward their principals. They must act in accordance with the highest and truest principles of morality."

It should be pointed out that you have the power under the provisions of R. S. 27:1-8 to "* * * adopt rules and regulations and prescribe duties for the efficient conduct of the business, work and general administration of the department, its officers and employees." If you have specific problems of a recurring nature you may wish to consider the advisability of promulgating rules and regulations on this subject. Since, as has been pointed out above, an employee owes the duty to his employer to disclose facts the employer should know, you may require full disclosure of the outside employment of your employees so that you can determine whether or not such activities are in conflict with the employee's duty to the department.

The foregoing advice is intended to apply generally to all of the officers and employees of your department. One of the officers, however, namely the State Highway Engineer, is required to "* * * devote his entire time and attention to the duties of his office." R. S. 27:1-14, as amended. This requirement effectively bars him from engaging in any other gainful pursuit. See, *First Calumet Trust and Savings Bank v. Rogers*, 289 Fed. 953, 958 (7 Cir. 1923); Cf. *Sheppard Pub. Co. v. Harkins*, 9 Ont. L. Rep. 504, 508 (Div. Ct. 1905).

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

By: JOHN F. CRANE,
Deputy Attorney General.

JFC:b.

FEBRUARY 17, 1955.

HON. ARCHIBALD S. ALEXANDER,
State Treasurer,
State House,
Trenton, N. J.

MEMORANDUM OPINION P-4.

DEAR MR. ALEXANDER:

You have asked whether the State of New Jersey can become a member of and have an interest in a mutual insurance company and whether the fact that an insurance policy issued by a mutual insurance company states that the policy is non-assessable and there is no contingent liability, would eliminate the possibility of an assessment against the State as a member of such a mutual insurance company.

Our opinion is that the State of New Jersey can become a member of and have an intereset in a mutual insurance company where the insurance contract states that the policy is non-assessable and that there is no contingent liability, provided that such provision in the insurance contract is authorized by the statutes of the state in which the insurance company is incorporated and by the constitution and bylaws of such a mutual insurance company.

The statute governing the purchase of insurance by the State is N. J. S. A. 52:27B-62:

> "The director (referring to the Director of the Division of Purchase and Property) shall, subject to the approval of the commissioner, (referring to the former office of State Commissioner of Taxation whose powers in this respect are now vested in the State Treasurer (N. J. S. A. 52:18A-32), effect and maintain insurance against loss or damage by fire upon the State House and the contents thereof in such sum as may be deemed necessary. The director is hereby authorized, and it shall be his duty, after consultation with the heads of State departments and agencies, to purchase and secure all necessary casualty insurance, marine insurance, fire insurance, fidelity bonds, and any other insurance necessary for the safeguarding of the interest of the State. He is hereby authorized, subject to the commissioner's supervision and approval, to establish in the Division of Purchase and Property, a bureau to administer a centralized system of insurance for all departments and agencies of the State Government."

In the case of *State v. Community Health Service, Inc.*, 129 N. J. L. 427, 429 (E. & A. 1943), the Court approved the following definition of insurance:

> "* * * an agreement by which one party for a consideration promises to pay money or its equivalent or to do an act valuable to the insured upon the destruction, loss or injury of something in which the other party has an interest."

Neither the statute itself nor the common-law definition of the term "insurance" limits the term "insurance" to any particular type thereof.

The distinguishing feature of mutual insurance companies, is the power of mutual insurance companies to levy assessments against their members. The question then arises whether a mutual insurance company, by a provision in its contract with a member, can issue a policy which is non-assessable.

A mutual insurance company may, unless prohibited by statute, issue insurance policies for cash only, without contingent liability attaching to the policyholder. *Mygatt v. N. Y. Protective Ins. Co.*, 21 N. Y. 52 (1860); 18 Appleman, Insurance (1945) † 10054, p. 130.

Where neither the constitution nor the bylaws of the mutual insurance company, nor the policy or certificates issued by such company, authorize the levying of assessments to meet losses, the insured is not liable therefor. *Beaver State M. M. F. Ins. Assn. v. Smith*, 97 Or. 579, 192 Pac. 798 (Sup. Ct. Oregon 1920). Only those members who have assumed a contract obligation to pay assessments can be subjected to assessments. *Stanley v. Northwestern Life Assn.*, 36 Fed. 75 (C. C.), *Com. v. Mass. M. F. Ins. Co.*, 112 Mass. 116, *Tolford v. Church*, 66 Mich. 431, 33 N. W. 913 (Sup. Ct. Mich. 1887).

The New Jersey statute allows mutual insurance companies to issues policies for cash premiums only. This statute, 17:28-3, as amended, reads as follows:

> "The maximum premium shall be expressed in the policy of a mutual company organized under any law of this state, and, in a company other than a life insurance company, it may be solely a cash premium or a cash premium and an additional contingent premium which contingent premium shall not be less than the cash premium, but no such company shall issue an insurance policy for a cash premium and without an additional contingent premium until and unless it possesses a surplus above all liabilities of at least three hundred thousand dollars ($300,000.00).
>
> "Wherever any company shall issue policies for cash premiums only, in pursurance of the authority of this section, it may waive all contingent premiums set forth in policies then outstanding. The issuance of policies for cash premiums only in pursuance of this section may not be exercised by any such company until written notice of intention to do so, accompanied with a certified copy of the resolution of the board of directors providing for the issuance of such policies, shall have been furnished the Commissioner of Banking and Insurance."

Nor does the purchase of such insurance violate Art. VIII, Sect. II, Par. 1 of the Constitution of 1947 which provides that "The credit of the State shall not be directly or indirectly loaned in any case." (See *Miller v. Johnson*, 4 Cal. (2d) 265, 48 P. (2d) 956, 958, (Sup. Ct. Cal. 1935). See also *French v. Millville*, 66 N. J. L. 392, 49 Atl. 465, (Sup. Ct. 1901), affirmed on opinion below 67 N. J. L. 349, 51 Atl. 1109, (E. & A. 1902).

Before a contract is entered into by the State with a mutual insurance company, the laws of the State in which the mutual insurance company is incorporated and the certificate of incorporation and bylaws of the company must be inspected to ascertain if they empower the mutual insurance company to issue policies that are non-assessable and without contingent liability and that the insurance contract complies with the statutory conditions, if any.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By. ROBERT E. FREDERICK,
Deputy Attorney General.

REF:R

FEBRUARY 24, 1955.

HON. JOSEPH E. MCLEAN,
Commissioner, Department of Conservation and Economic Development,
State House Annex,
Trenton 7, New Jersey.

MEMORANDUM OPINION P-5.

Re: Public Lands
Agreements to Lease.

DEAR COMMISSIONER MCLEAN:

You have submitted for our consideration two questions which have arisen in connection with the administration of the Department of Conservation and Economic Development.

Question No. 1 is:

> "Does the Department of Conservation and Economic Development have the right to enter into an agreement with a private person to permit him to prospect for minerals in a State forest?"

We are of the opinion that the Department of Conservation and Economic Development does not have the authority to enter into such agreement.

By way of elucidating this answer, it may be helpful to review briefly the legislative history of laws enacted relating to forestry conservation.

The primary purpose of legislation creating the Department of Conservation and Development, (Now the Department of Conservation and Economic Development) was, among other things, for the "acquiring, holding, protecting, managing or developing lands or other properties for the use of the State of New Jersey, for a state park or a forest reserve or other state reservation, whether made for historic, for scenic, for watershed protection or for any other purpose * * *" L. 1929, c. 213, sec, 1, p. 399, suppl. to L. 1915, c. 241, p. 426 (R. S. 13:1-18). The Department was governed by a board which had "full control and direction of all state conservation and development projects" (R. S. 13:1-1; R. S. 13:1-11), and its administrative functions were entrusted to a director selected by the board. (R. S. 13:1-3).

Chapter 22 of the Laws of 1945 established in the Executive Branch of the State Government a State Department of Conservation and created the office of State Commissioner of Conservation with the authority to exercise the powers of the department and to administer its work. (N. J. S. A. 13:1A-5). This act also established the Division of Forestry, Geology, Parks and Historic Sites (N. J. S. A. 13:1A-4) and transferred to said division the "functions, powers, duties, records and property of the Department of Conservation and Development and the Board of Conservation and Development." (N. J. S. A. 13.1A-24). Thereafter the Legislature, by the Laws of 1948, Chapter 448, established in the executive branch of the State Government a principal department known as the Department of Conservation and Economic Development (N. J. S. A. 13:1B-1) and transferred the powers and duties of the Division of Forestry, Geology, Parks and Historic Sites to said principal department. (N. J. S. A. 13:1B-6). Among the powers granted to the Department by the Legislature was the power to use the forest lands for "any other purpose than the maintenance of forests" if the welfare of the state would be advanced.

(R. S. 13:8-10). However, the legislative history is clear that such use must be for the purpose of maintaining and conserving the forest lands of the State for the ultimate enjoyment and benefit of the people.

The State has, in general, "the same rights and powers in respect to property as an individual. It may acquire property, real and personal, by conveyance, will or otherwise and may hold or dispose of the same or apply it to any purpose, public or private, as it sees fit. The power of the State in respect of its property rights is vested in the Legislature, and the Legislature alone can exercise the power necessary to the enoyment and protection of those rights, by the enactment of statutes for that purpose." 59 C. J. Sec. 276. See also *Wilson v. Gloucester County Bd. of Chosen Freeholders,* 83 N. J. Eq. 545, 90 A. 1021, (Ch. Ct. 1914).

The Department of Conservation and Economic Development cannot enter into an agreement with an individual, association or corporation permitting prospecting for minerals in a State forest because the Legislature has not given it the authority to exercise such power.

Question No. 2 is:

> "Does this department have the right to lease mining rights at a rental on a royalty basis, and if so, must there first be advertising and award to the first bidder?"

We are of the opinion that the Department does not have the right to lease or contract for mining rights on any basis.

"A contract of the State must ordinarily rest upon some legislative enactment", (49 Am. Jur. Sec. 62, p. 275), and as we have indicated, no authority has been granted by the Legislature to the Department of Conservation and Economic Development to enter into an agreement with any individual, association or corporation for prospecting rights in State owned lands.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: ROGER M. YANCEY,
Deputy Attorney General.

RMY:BK

March 2, 1955.

HONORABLE WILLIAM F. KELLY, JR.,
President, Civil Service Commission,
State House,
Trenton 7, New Jersey.

MEMORANDUM OPINION P-6.

DEAR PRESIDENT KELLY:

You have requested advice as to the power of the Department of Civil Service to deal with a situation in which it is alleged that an applicant for a promotion in the service of a municipality has made a false response to a question contained in the application for promotion

As we understand the facts the application asked the question "Have you ever been convicted of a crime?" to which response was given in the negative. The application was processed, the employee's name certified as eligible for promotion and the promotion was made by the appointing authority. It has now come to the attention of the Department that the employee was convicted of assault, battery and robbery in 1929. In justification of the negative response the employee maintains that he was pardoned for the offense and has submitted a County Clerk's certificate purportedly evidencing that fact. An examination of the certificate reveals that the former Court of Pardons remitted the forfeiture of the right of being an elector on December 1, 1938.

We shall first consider the effect of the action taken by the former Court of Pardons. It is our opinion that the specific action taken by the Court of Pardons does not have the effect of extinguishing the committed crime. The Court of Pardons, under the New Jersey 1844 Constitution, Article V, paragraph 10, was empowered to remit fines and forfeitures and to grant pardons after conviction in all cases except impeachment. This court has since been abolished. Under R. S. 2:197-2, repealed by P. L. 1948, c. 83, any person after conviction and service of sentence could apply to the Court of Pardons for a pardon and restoration of rights and privileges forfeited as a result of said conviction. The Court of Pardons existed as a creature of the Executive power and could grant full or limited pardons. A restoration of suffrage rights was considered as a limited pardon by *In Re New Jersey Court of Pardons,* 97 N.J. Eq. 555 (E. & A. 1925); and *Cook v. Board of Freeholders,* 26 N.J.L. 326 (Sup. Ct. 1847) aff'd. 27 N.J.L. 637 (E. & A. 1858). Under these cases any pardon, whether full or limited, operated prospectively and not retrospectively and, therefore, did not erase the fact that a crime was committed. See also *State v. Tansimore,* 3 N. J. 516 (1950).

Had these facts been known to the Department before its approval of the application and certificates of the individual as eligible for the promotion sought, the Chief Examiner and Secretary, in the proper exercise of his discretion, could have rejected the application and refused to certify the name of the individual as eligible. Rule 26 of the Civil Service Rules specifically grants such permissive discretionary power to the Chief Examiner and Secretary. It provides as follows

> "The chief examiner and secretary may reject the application of any person for admission to tests for a given position or refuse to test any applicant or to certify the name of an eligible from the employment list for any of the following or other good causes:
>
> * * * *
>
> (d) That the applicant has been guilty of a crime or of disgraceful conduct;
>
> * * * *
>
> (f) That the applicant has intentionally made a false statement in his application with regard to any material fact or has practiced or attempted to practice deception or fraud in connection with such application;
>
> * * * *
>
> The chief examiner and secretary shall notify in writing any person whose application is rejected under this rule specifying the cause for the rejection. Upon receiving a written request from any person whose application is rejected the president may give him an opportunity to show cause why such application should not be rejected, but announced tests shall not be postponed or delayed for this reason."
>
> See also: R. S. 11:9-10, Civil Service Rule 39.

Since the underlying facts were not known to the Chief Examiner and Secretary at the time the employee's name was certified we shall now consider what action can be taken.

We have noted that you have been previously advised by an opinion dated January 18, 1918 that the Civil Service Commission has no power to revoke or direct the revocation of an appointment. That opinion stated,

> "I am unable to find anything in the Civil Service Law authorizing The Commission to revoke the appointment of any officer or employee appointed to or to require the person having the power of appointment to revoke the appointment. The appointment having once been made in accordance with the provisions of the Civil Service Act and by the proper authority. I think it unquestionable that the Civil Service Commission has no further power in the matter."

While unquestionably a certification should not ordinarily be disturbed we cannot agree that the Commission is completely without power in the matter. The Commission is specifically empowered to enforce the provisions of the Civil Service Law and the rules and regulations promulgated thereunder, R. S. 11:1-7. If it is found that an applicant for a position has violated a provision of the statute by furnishing false information, see R. S. 11:23-1, R. S. 11:23-2, the Commission in the exercise of its enforcement powers could revoke the certification upon which the appointment or promotion was based. In keeping with the basic policy of the act to afford employees an opportunity to be heard before action affecting their position is taken we think a hearing should be held by the Commission with full opportunity being given to the employee to offer evidence in justification or mitigation. The power to reconsider action previously taken is one which should be exercised sparingly. Matters which have been closed should not be reopened for trivial reasons. The exercise of the power requires sound discretion, *Klauss v. Civil Service Commission*, 132 N. J. L. 434 (Sup. Ct. 1945).

If after a hearing it is found that the information upon which an appointment or promotion was based was fraudulently falsified it would have the power to take appropriate action. In this case appropriate action would take the form of revocation of the certification upon which the promotion was based. This could be enforced if necessary by withholding approval of the payroll under R. S. 11:22-20, as amended, or by an action for enforcement under the provisions of R. S. 11:1-7.

It should be remembered that even if the applicant had disclosed that he had been convicted of a crime, it does not necessarily follow that he should have been excluded from eligibility. Civil Service Rule 26 allows the Chief Examiner and Secretary to determine in his discretion whether the public interest would be endangered by appointment of an individual who had been convicted of a crime. The wording of the Rule is permissive and not mandatory; if the Chief Examiner and Secretary is of the opinion that the commission of the crime in 1929 does not indicate a present moral unfitness for the position the individual would not be disqualified for the position.

The alleged misrepresentation question is of a different nature. On this issue it should be determined factually whether the applicant intended to deceive the Department or whether he believed in good faith that the document obtained from the Board of Pardons vitiated the crime. Whether he intended to obtain the promotion by fraudulent means is a factual question which should be determined in a quasi-judicial manner with opportunity being extended to the employee to present evidence in his behalf.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

By. DAVID M. SATZ, JR.,
Deputy Attorney General.

DMS:b

March 16, 1955.

HONORABLE D. KNOWLTON READ, *Chairman*
Narcotic Control Commission,
State House,
Trenton 7, New Jersey.

MEMORANDUM OPINION P-7.

DEAR MR. READ:

You have requested our opinion as to the effect of the mandatory sentencing provision of N. J. S. 2:A168-1 on the provisions of N. J. S. 24:18-47 providing the penalties for violations of the Uniform Narcotic Drug Law (Chapter 18 of Title 24 of the Revised Statutes).

N. J. S. 2A:168-1 permits a sentencing court, where it deems it to be in the best interests of the defendant and of the public, to suspend the imposition or execution of sentence and place the defendant on probation for not less than 1 year and not more than 5 years.

However, as to sentences imposed for a violation of any provision of the Uniform Narcotic Drug Law (Chapter 18 of Title 24 of the Revised Statutes), N. J. S. 2A:168-1 provides:

> "The provisions of this section shall not permit the suspension of the imposition or execution of any sentence and the placing of the defendant on probation after conviction or after a plea of guilty or non vult for violation of any provision of chapter eighteen of Title 24 of the Revised Statutes except in the case of a first offender."

It is clear that N. J. S. 2A:168-1 does not permit a judge sentencing a defendant for a violation of Chapter 18 of Title 24, to suspend the imposition of the jail sentence if the defendant is a second or a subsequent offender and that he must impose a jail sentence for the period set forth in R. S. 24:18-47.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: FRANCIS J. TARRANT,
Deputy Attorney General.

April 11, 1955.

COLONEL JOSEPH D. RUTTER,
Superintendent of State Police,
West Trenton, New Jersey.

MEMORANDUM OPINION P-8.

DEAR SIR:

You have asked for our opinion in respect to the following questions relating to the statutes of limitation.

1. Under Title 2A:159-3, is the limitation on this type of crime (public officials, etc.) still five years?

N. J. S. 2A:159-3 provides as follows:

> "Any person holding or having held, or who may hereafter hold, any public office, position or employment, either under this state or under any

political subdivision or agency thereof, whether elective or appointive, or any person being or having been, or who may hereafter be, an executor, administrator, guardian, trustee or receiver, or any officer or director holding or having held, or who may hereafter hold, office, position or employment with any public, quasi public or public quasi corporation or with any charitable, religious or fraternal organization or with any mutual benefit society or association for nonpecuniary benefit or with any bank or building and loan association or savings and loan association or with any trust, insurance, mortgage, guaranty, title or investment company, may be prosecuted, tried and punished for any forgery, larceny or embezzlement, or conspiracy to commit forgery, larceny or embezzlement, or conspiracy to defraud, committed while in such office, position or employment, where the indictment has been or may be found within five (5) years from the time of committing such offense. This section shall not apply to any person fleeing from justice."

There has been no legislative change in the provisions of the above since May 5, 1938, when the foregoing section became effective, by reason of which its provisions are the existing law on the subject.

2. Under Title 2A:159-1, is the limitation of prosecution for the crime of Treason still three years?

N. J. S. 2A:159-1 provides as follows:

"No person shall be prosecuted, tried or punished for treason, unless the indictment therefor shall be found within 3 years next after the treason shall be done or committed. This section shall not apply to any person fleeing from justice."

Since treason is punishable with death (N. J. S. 2A:148-1), the provsions of N. J. S. 2A:159-2, as amended, (see below) do not apply, for the reason that crimes punishable with death are expressly excluded therefrom.

The answer to your question is in the affirmative.

3. Are gambling crimes committed prior to the enactment of N. J. S. 2A:159-4 still in the same two-year limitation as other crimes under section 2A:159-2, prior to its amendment effective June 30, 1953?

Prior to the enactment of N. J. S. 2A:159-4, (effective April 23, 1952), the statute of limitations on prosecutions for all crimes including gambling and gaming (crimes punishable with death and those committed by public officials excepted) fixed a period of two years (N. J. S. 2A:159-2), within which time an indictment must be found.

N. J. S. 2A:159-2, as amended effective June 30, 1953, provides as follows:

"Except as otherwise expressly provided by law no person shall be prosecuted, tried or punished for any offense not punishable with death, unless the indictment therefor shall be found within five years from the time of committing the offense or incurring the fine or forfeiture. This section shall not apply to any person fleeing from justice."

Prosecution of gambling offenses committed prior to April 23, 1950, where no indictment has been found, are now barred by the statutes of limitation.

4. Are all gambling crime limitations now five years?

N. J. S. 2A:159-4, which became effective April 23, 1952, provides as follows:

"Any person who shall, contrary to law, gamble or operate any gambling device, practice or game of chance, or conduct a lottery or sell any lottery ticket, may be prosecuted, tried and punished therefor where the indictment has been or may be found within four years from the time of committing such offense. The limitation of any such criminal prosecution shall not apply to any person fleeing from justice."

N. J. S. 2A:159-4 was amended, effective July 20, 1953, and reads as follows:

"Any person who shall, contrary to law, gamble or operate any gambling device, practice or game of chance, or make or take what is commonly known as a book, upon the running, pacing or trotting, either within or without this State, of any horse, mare or gelding, or conduct the practice commonly known as bookmaking or pool selling, or keep a place to which persons may resort for engaging in any such practice, or for betting upon the event of any horse race or other race or contest, either within or without this State, or for gambling in any form, or conduct a lottery or sell any lottery ticket, may be prosecuted, tried and punished therefor where the indictment has been or may be found within five years from the time of committing such offense. The limitation of any such criminal prosecution shall not apply to any person fleeing from justice."

The statute of limitation on prosecutions for gambling crimes is as follows:

a. Crimes committed prior to April 23, 1950, where no indictment has been found, are barred;

b. Crimes committed after April 23, 1950 are covered by the five year statute of limitations. The statute fixing the period of limitation at four years has no effect presently since all crimes committed after April 23, 1950 were not barred from prosecution prior to the enactment of the five year limitation on July 20, 1953. "An Act extending the time for prosecution of certain offenses from two years to five, though it had no effect on cases in which the limitation had expired, was operative on those where the limitation had not expired prior to its enactment." (*State v. Miller*, 4 N. J. L. J. 252 (Middlesex Oyer & Terminer, May Term 1881).

5. Are any crimes covered by R. S. 2A:159-2 committed prior to the enactment of the amendment of 1953 still to be listed and carried for two years, or does the limitation automatically increase to five years?

All crimes, excluding gambling, those punishable with death and those committed by public officials are subject to the following limitations on the prosecution:

a. Crimes committed prior to June 30, 1951 are barred by N. J. S. 2A:159-2.

b. Crimes committed after June 30, 1951 are covered by the five year statutes of limitation (N. J. S. 2A:159-2, as amended) and are not barred.

It is to be noted that all of the above statutes of limitation do not apply in favor of "any person fleeing from justice."

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

By: SAUL N. SCHECHTER,
Deputy Attorney General.

SNS:BK

April 18, 1955.

HONORABLE CHARLES SUMMERS,
Chairman, Consolidated Police
& Firemen's Pension Fund Commission
State House,
Trenton, New Jersey.

MEMORANDUM OPINION P-9.

DEAR SIR:

Your recent letter requested an opinion as to whether your Commission may pay a subsidy in addition to the salaries of secretaries employed by your Commission.

As a matter of fundamental policy, an employee's salary is generally intended to compensate him for all services rendered to the State, so long as he is not required to work beyond the ordinary hours of duty. See N. J. S. A. 52:14-17.13. Rule 18 of the Civil Service Rules provides, in part,

> "The rates of pay set forth in the compensation plan represent the total remuneration including pay in every form, except as otherwise expressly provided in the compensation schedule for the class."

Civil Service Rule 20 provides, in part, as follows;

> "Extra compensation and overtime payment. 1. State Service. No extra compensation, bonus or special payment for extra work shall be paid any permanent or temporary employee unless the work for which such extra compensation, bonus or special payment is proposed, is performed entirely outside of the regularly prescribed hours of duty and is independent of the regular routine daily duties of the employee for whom such extra pay is proposed. No pay roll, estimate or claim for such extra compensation, bonus or special payment shall be approved for any state employee unless such extra employment for pay, together with the rate of compensation to be paid therefor, is first reported to and authorized by this department and such payment shall be not in excess of the rates established by this department after consultation with appointing authorities and their principal assistants."

The Civil Service Rules thus prohibit the payment of extra compensation unless it is performed entirely outside the regularly prescribed hours of duty.

We conclude, therefore, that it would not be proper for your Commission to pay a subsidy to the salaries of the secretaries of your Commission.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

By. JOHN F. CRANE,
Deputy Attorney General.

May 4, 1955.

HON. FREDERICK J. GASSERT, JR.,
Director, Division of Motor Vehicles,
State House,
Trenton, New Jersey.

MEMORANDUM OPINION P-10.

DEAR DIRECTOR GASSERT:

You have requested our opinion as to whether you have the power under R. S. 39:5-32 to grant a new motor vehicle driver's license to a person whose driver's license was permanently revoked in 1948 upon a second conviction for drunken driving. You inform us that the "first" conviction occurred in the State of North Carolina under the motor vehicle or criminal laws of that State.

R. S. 39:5-32 authorizes the Director of the Division of Motor Vehicles to issue a new driver's license at any time to any person whose license previously was revoked. R. S. 39:4-50 imposes mandatory penalties for drunken driving, as follows:

> "A person who operates a motor vehicle while under the influence of intoxicating liquor or a narcotic or habit producing drug, or permits another person who is under the influence of intoxicating liquor or a narcotic or habit producing drug to operate a motor vehicle owned by him or in his custody or control, shall be subject, for a first offense, to a fine of not less than two hundred nor more than five hundred dollars ($500.00), or imprisonment for a term of not less than thirty days nor more than three months, or both, in the discretion of the magistrate, and shall forthwith forfeit his right to operate a motor vehicle over the highways of this State for a period of two years from the date of his conviction. For a subsequent violation, he shall be imprisoned for a term of three months and shall forfeit his right to operate a motor vehicle over the highways of this State for a period of ten years from the date of his conviction and, after the expiration of said period, he may make application to the Director of the Division of Motor Vehicles for a license to operate a motor vehicle, which application may be granted at the discretion of the director. A magistrate who imposes a term of imprisonment under this section may sentence the person so convicted either to the county jail or to the workhouse of the county wherein the offense was committed.
>
> "A person who has been convicted of a previous violation of this section need not be charged as a second offender in the complaint made against him in order to render him liable to the punishment imposed by this section on a second offender."

The Superior Court, Appellate Division, held in *Mac Kinnon v. Ferber,* 16 N. J. Super. 390 (1951) that the grant of power contained in R. S. 39:5-32 is confined to cases where the Director or a magistrate has revoked a driver's license in the exercise of a discretionary authority and, specifically, not to a case of forfeiture pursuant to R. S. 39:4-50. By amendment in P. L. 1952, c. 286, the penalty under R. S. 39:4-50 for second offenses was reduced from permanent forfeiture to forfeiture for ten years.

Thus, you raise the question whether you as Director can disregard the penalty of forfeiture imposed by a magistrate purportedly pursuant to R. S. 39:4-50, by an independent determination that the applicant for a new license was punishable only as a first offender because his previous conviction was sustained in another jurisdiction.

By the express terms of R. S. 39:4-50, a person who has been convicted of a previous violation of that section may be liable for penalties as a second offender,

although the complaint against him for drunken driving fails to charge him as a second offender. The fact of the first drunken driving conviction in New Jersey is therefore not an issue in determining guilt or innocense of the second charge.

In *MacKinnon v. Ferber, supra,* a magistrate imposed a sentence for a first drunken driving violation. Upon report of the conviction, the then Commissioner of Motor Vehicles discovered a prior conviction in New Jersey and notified the motorist that his license was permanently forfeited. This action by the Commissioner was sustained. Judge Bigelow wrote for the court:

> "The act of operating an automobile while intoxicated does not of itself work a forfeiture, but a conviction effects a forfeiture by force of R. S. 39:4-50, whether or not the judgment expresses the forfeiture. And if the conviction is, in fact, a second one, the forfeiture is permanent . . ."

The former Court of Errors and Appeals in *State* v. *Mowel,* 116 N. J. L. 354 (1936) quoted with approval the language in *State* v. *Rowe,* 116 N. J. L. 48 (Sup. Ct. 1935) that a former conviction for drunken driving in New Jersey "was relevant . . . on the question of punishment only."

Nevertheless, the Supreme Court in *State* v. *Myers,* 136 N. J. L. 288 (1947) set aside a sentence imposing the penalties for a second conviction under R. S. 39:4-50 on the ground that the accused had no opportunity to be heard on the truth or accuracy of the certification of a previous conviction. Chief Justice Case said at p. 291:

> "We do not hold that those factors need be introduced at the trial, but we do find that the defendant should be given knowledge of the contents of the certification of earlier conviction by virtue of which he is to be sentenced and an opportunity to address himself thereto before sentence is pronounced. There was, therefore, error in the fixing of sentence."

The conviction in *State* v. *Myers* was in the Court of Special Sessions on appeal and trial de novo. The then Department of Motor Vehicles submitted the certification of the prior drunken driving conviction in New Jersey between the trial and the imposition of sentence.

State v. Myers is not cited in *Mac Kinnon v. Ferber,* supra; according to the *MacKinnon* decision, the forfeiture is automatic and the function of the Director of the Division of Motor Vehicles in refusing a new license is ministerial upon discovery of the record of an earlier conviction.

The opportunity to be heard prior to the imposition of sentence is a requirement of procedural due process of law according to the rationale of *State* v. *Myers, supra.* The constitutional right presumes that an adjudication of the issue will ensue. *Stanley* v. *Board of Chosen Freeholders,* 60 N. J. L. 392 (Sup. Ct. 1897); *Callen* v. *Gill,* 7 N. J. 312 (1951); *Hyman* v. *Muller,* 1 N. J. 124 (1948).

Reconciling *Mac Kinnon* v. *Ferber* and *State* v. *Myers,* the motorist must be granted a hearing on the validity of the first conviction of drunken driving prior to the imposition of the additional sentence for a second offense, with a right of judicial appeal. If the sentence fails to impose the mandatory penalty for a second offense, the Director must nevertheless treat this an automatic ten year revocation case upon notice to the convicted motorist and an opportunity for him to be heard relative to the validity of the first conviction. Notification of permanent revocation was made to the accused according to the recital of facts in *Mac Kinnon* v. *Ferber.* Under the State Constitution and Rules of Court, adverse action by the Director is reviewable by a proceeding in lieu of prerogative writ. *Mac Kinnon* v. *Ferber* recognizes the practicality that magistrates may not be apprised of earlier drunken driving convictions prior to disposition of such cases.

The question whether a conviction of drunken driving in another State is a first offense, as this term is used in R. S. 39:4-50, is a matter for judicial determination. While there is no authority directly in point in this State, we point out that R. S. 39:4-50 specifies that a person who has been convicted of "a previous violation of this section" need not be charged in the complaint as a second offender. In addition, as an established rule of construction, penal statutes must be strictly construed. See *State* v. *Mundet Cork Corp.,* 8 N. J. 359 (1952). There are no guiding precedents under the Habitual Criminal Act (N. J. S. 2A:85-8 et seq.) or the Uniform Narcotic Drug Law (R. S. 24:18-1 et seq.), both of which expressly authorize the imposition of more severe penalties for second offenses after conviction of comparable crimes under the laws of the United States or of another State.

Hinnekens v. *Magee,* 135 N. J. L. 537 (Sup. Ct. 1947) and *Tichenor* v. *Magee,* 4 N. J. Super. 467 (App. Div. 1949), which uphold the discretionary authority of the Director of the Division of Motor Vehicles to revoke a license because of an out of State drunken driving conviction are not in point. The statutes governing these two decisions are R. S. 39:3-10 and R. S. 39:5-30. The former sets forth that:

> "the director in his discretion may refuse to grant a license to drive motor vehicles to a person who is, in his estimation, not a proper person to be granted such a license . . .",

while R. S. 39:5-30 empowers the Director to suspend or revoke any license for a violation of the Motor Vehicle Title or

> "on any other reasonable grounds."

The Appellate Division said in the *Tichenor* decision at p. 471:

> "We are satisfied that plaintiff's conviction in Maryland is reasonably comprehended within the term 'other reasonable grounds' (R. S. 39:5-30) justifying defendant's revocation of plaintiff's New Jersey license. Upon conviction of a person for operating an automobile while under the influence of intoxicating liquor over the highways of this State, his right to operate a motor vehicle is forfeited for a period of two years. R. S. 39:4-50. It reasonably follows that one holding a New Jersey driver's license, upon proof of a conviction for that offense in another State, should not be permitted to continue to operate a motor vehicle in New Jersey."

In response to your specific inquiry therefore, we advise you that the determination of the magistrate in 1948, imposing sentence for a second drunken driving conviction, is binding upon you and cannot, in effect, be collaterally set aside. No appeal was taken and the magistrate's decision stands invulnerable to collateral attack.

On the broader question, we advise you that you may in your discretion regard a drunken driving conviction preceded by a similar out of State offense as grounds for revocation of the driving privilege. In the absence of a judicial decision to the contrary, you are not compelled to but may revoke a New Jersey driver's license for ten years upon ascertaining that a drunken driving violator had sustained a conviction for that offense in another jurisdiction.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

By: DAVID D. FURMAN,
Deputy Attorney General.

May 11, 1955.

MR. AARON K. NEELD, *Director,*
Division of Taxation,

State House,
Trenton, New Jersey.

MEMORANDUM OPINION P-11.

DEAR MR. NEELD:

You have requested an opinion concerning the running of interest on public utility franchise and gross receipts taxes under L. 1940, c. 5, as amended (R. S. 54:31-45, et seq.).

You inform us that there are presently pending before the Division of Tax Appeals petitions filed by the Atlantic City Transportation Company seeking review of the amount of franchise and gross receipts taxes assessed against it for the years 1951, 1952, 1953 and 1954.

Your letter puts the question as follows:

> ". . . whether the taxes assessed for the years 1951 through 1954 bear interest from the dates when these taxes would ordinarily have become payable or whether no interest is chargeable until the entry of judgments on the appeals above mentioned."

More specifically, you state the question to be "whether section 54:31-58 suspends all interest charges in those cases involving appeals from assessments of franchise and gross receipts taxes."

In our opinion, it is clear that an appeal by a taxpayer of the amount of franchise and gross receipts taxes assessed against it does not toll the running of interest pending the final determination of such an appeal.

R. S. 54:31-58 provides as follows:

> "The taxes payable by each taxpayer hereunder shall be and remain a first lien on the property and assets of such taxpayer on and after the date the same become payable, as herein provided, until paid with interest thereon, and the same shall be collected in the same manner and subject to the same discounts, interest and penalties as personal taxes against other corporations or individuals and the same proceedings now available for the collection of personal taxes against other corporations or individuals shall be applicable to the collection of the taxes hereby imposed and payable to any municipality."

The same section of the act does prevent interest from running pending certain appeals, by providing that:

> "In case of an appeal from any apportionment valuation or apportionment or any review thereof in any court, the portion of any such tax not paid prior to the commencement of any such appeal or proceedings for review, shall not become payable until thirty days after final determination of such appeal or review and the certification or recertification of the apportionment, if required."

But, the very wording of this provision postponing the due date for subject taxes limits the operation thereof to appeals from apportionment and apportionment valuations. Such postponement is not made applicable to appeals from the amount of the assessment, which is the basis for the relief sought in the appeals now pending before the Division.

Only an aggrieved municipality is authorized to appeal the apportionment valuations (R. S. 54:31-53) and thus bring the postponement provision into operation.

Indeed, for the taxpayer to appeal the apportionment valuations or the apportionment would be fruitless for no matter what change was made in either, the amount of the tax assessed against the taxpayer would not be affected. Moreover, even if it desired to do so, the taxpayer would not be permitted to contest either the apportionment valuation or the apportionment. See *New Jersey Water Company* v. *Hendrickson,* 88 N. J. L. 595 (Sup. Ct. 1916); aff'd 90 N. J. L. 537 (E. & A. 1917).

The letter accompanying your request for this opinion indicates that there is a question as to the rate of interest to be charged on franchise and gross receipts taxes paid after the due date. As quoted above, R. S. 54:31-58 provides that these taxes shall be ". . . subject to the same . . . interest . . . as personal taxes . . ." This has reference to the interest rate on personal property taxes, for which a taxpayer is personally liable under R. S. 54:4-1, as amended.

The interest rate on such taxes is arrived at pursuant to R. S. 54:4-67 which states, inter alia:

> "The governing body may also fix the rate of interest to be charged for the nonpayment of taxes or assessment on or before the date when they would become delinquent. The rate so fixed shall not exceed eight per cent per annum."

Thus, a resolution adopted in accordance with this provision operates to fix the rate of interest to be charged on franchise and gross receipts taxes paid after the due date.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

By: THOMAS L. FRANKLIN,
Deputy Attorney General.

May 16, 1955.

HON. ARCHIBALD S. ALEXANDER,
State Treasurer of New Jersey,

State House,
Trenton 7, New Jersey.

MEMORANDUM OPINION P-12.

Re: *Pension Fund Voucher Signatures*

DEAR MR. ALEXANDER:

We have your recent memorandum requesting our opinion as to whether the chairman of the board of trustees of a pension fund may "properly authorize the secretary of the board, or some other official of the board, to affix his signature by machine" to the pension fund vouchers.

The several statutes creating the State Pension Fund Systems vary somewhat in defining the powers and duties of the officers of the board of trustees or commissioners who are charged with the responsibility of administering the pension funds. Some statutes provide that all payments from the funds shall be made by the State Treasurer only upon "vouchers signed by the chairman and countersigned by the secretary of the board of trustees," (N. J. S. A. 43:15A-35), while others provide that all moneys paid out of the pension fund shall be paid by the State Treasurer upon warrants "signed by the president and secretary of said pension commission, or such other officers as the pension commission shall designate," (R. S. 43.7-19,

as amended). Still others provide that all payments from the pension fund shall be made by the State Treasurer "only upon vouchers signed by the chairman and countersigned by such other person as the board of trustees may designate," (R. S. 18:13-104), and R. S. 43:16A-14(2) states that all payments shall be made by the State Treasurer only "upon vouchers signed by two persons designated by the board of trustees." (See also N. J. S. A. 43:8A-17(2), R. S. 43:16A-14(2) and R. S. 43:7-19, as amended.)

In determining the question posed, we think that it turns on the proposition as to whether the statute creating a particular pension fund gives authority to the pension officer to delegate his power to sign the voucher and whether the exercise of that power is discretionary or ministerial.

Generally, it has been held that in the absence of statutory authority, a public officer cannot delegate his discretionary authority. "An officer, to whom a power of discretion is entrusted, cannot delegate the exercise thereof, except as prescribed by statute" (67 C. J. S. Sec. 104). "Where judgment and discretion are required of municipal officers, they cannot be delegated without express legislative authority." (*State, Danforth, pros.* v. *City of Paterson,* 34 N. J. L. 163, (Supreme Court 1870). "A public officer charged with the performance of official duties does not necessarily have the power to delegate his authority to a person not authorized by law to act," (43. Am. Jur. Sec. 461). "Official duties involving the exercise of discretion and judgment for the public weal cannot be delegated. They can be performed only in person." (43 Am. Jur. Sec. 461.)

It is not easy to enunciate a hard and fast rule distinguishing which acts are discretionary from those which are ministerial, but the following definitions have received court approval:

> "A ministerial act has been defined as 'one which a person or board performs upon a given state of facts, in a prescribed manner, in observance of the mandate of legal authority and without regard to or the exercise of his own judgment upon the propriety of the act being done' * * *.
>
> "Discretion may be defined, when applied to public functionaries, as the power or right conferred upon them by law of acting officially under certain circumstances, according to the dictates of their own judgment and conscience and not controlled by the judgment or conscience of others." (*Independent School District of Danbury* v. *Christiansen,* 49 N. W. 2d 263 (Supreme Court Iowa, 1951). See also *Schwartz* v. *Camden,* 77 N. J. Eq. 135 (Ch. 1910).

The officers and members of the several boards of trustees and commissions are legislatively charged with the responsibility of administering the pension funds. The signing of the warrant by the pension officials is evidence of the determination made by them, in the exercise of their judgment and discretion, that the payee is entitled, under the existing facts and law, to the pension payment therein referred to. The power to make this determination cannot be delegated, unless there be specific statutory authorization for such delegation.

Since several of the pension acts contain express authority for the delegation of the power to sign pension vouchers, while others do not, reference should be made in each case to the applicable statute.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: ROGER M. YANCEY,
Deputy Attorney General.

RMY:BK

May 19, 1955.

HON. JOSEPH E. CLAYTON,
Assistant Commissioner of Education,
175 West State Street,
Trenton, New Jersey.

MEMORANDUM OPINION P-13

DEAR COMMISSIONER:

You have requested our opinion as to whether it is lawful for a State Teachers' College to enter into an agreement with an English college for an exchange professorship, whereby a professor in the State Teachers' College will be granted a leave of absence with full pay during the year of his teaching at the English college, while our State Teachers' College will receive during that same period the services of the professor from the English college at no cost to this State. Thus the two professors will exchange places for the academic year, with each continuing to receive his salary from the institution where he is a regular faculty member. The United States Office of Education is fostering such exchange professorships with foreign countries in cooperation with your department and with departments of education in other states.

In our opinion the arrangement above described would be legal and proper. While the statutes pertaining to State teachers' colleges are silent on this particular point, the control and management of these colleges are vested by R. S. 18:16-11 and 18:16-20 in the Commissioner of Education, subject to the approval of the State Board of Education. The latter section provides among other things that the Commissioner, subject to the approval of the State Board, shall "Appoint and remove principals, teachers and other employees, and fix the compensation of those whose compensation is not fixed by statute or otherwise determinable by authority of law." R. S. 18:16-21 provides:

> "The commissioner, with the approval of the state board, may make regulations concerning leaves of absence and payment during such leaves for teachers employed in the state normal schools and state teachers' colleges."

We believe that the granting of a leave of absence with full pay in connection with an exchange professorship as above outlined falls within the powers vested in the Commissioner and the State Board by the statutes just cited, and partciularly R. S. 18:16-21. Under this arrangement the State would receive, from the foreign professor, without added cost, services the same as or equivalent to those regularly performed by the faculty member of our teachers' college, while he in turn would be obtaining valuable experience and knowledge during his year abroad. For these reasons, the proposed exchange professorship would serve the interests of the State and may be entered into pursuant to the legal authority granted by R. S. 18:16-21.

A similar statutory provision is found in R. S. 11:14-1, which authorizes the Chief Examiner and Secretary of the Civil Service Commission to prepare regulations regarding leaves of absence with or without pay for employees in the classified service. In a memorandum opinion to the State Commissioner of Health, dated September 17, 1954, we held that under R. S. 11:14-1, employees of the Department of Health may be given special leaves of absence, with or without pay, for the purpose of training or education in fields related to the functions of that Department. We feel that that opinion should be followed by analogy here, since the experience of the New Jersey professor during his year aboard will give him training and education closely related to his functions in the State Teachers' College which regularly employs him.

In order to literally comply with R. S. 18:16-21, we recommend that the exchange professorship be authorized in the form of a regulation of the Commissioner of Education, with the approval of the State Board.

Yours very truly,
GROVER C. RICHMAN, JR.,
Attorney General.
By: THOMAS P. COOK,
Deputy Attorney General.

tpc:b

June 2nd, 1955.

HON. ROBERT B. MEYNER,
Governor of New Jersey,
State House,
Trenton 7, New Jersey.

MEMORANDUM OPINION P-14

DEAR GOVERNOR MEYNER:

You have requested our opinion concerning the effect of the State Constitution of 1947 on P. L. 1942, c. 167, which vests in the Legislature the power to elect members of the South Jersey Port Commission.

By Article IV, Section V, Paragraph 5 of the 1947 Constitution, the Legislature is barred from the election or appointment of any executive or administrative officer except the State Auditor. While the Legislature may appoint commissions or other bodies whose main purpose is to assist it (Article IV, Section V, Paragraph 2), the South Jersey Port Commission is an administrative agency performing governmental functions in the development of port and transportation facilities along the Delaware Bay and tidal portions of the Delaware River.

The Constitution of 1947 preserves the force and effect of all statutes not "superseded, altered or repealed by this Constitution or otherwise" (Article XI, Section I, Paragraph 3).

Since the election or appointment of executive or administrative officers is ultra vires the Legislature, there is a repugnancy between the Constitution and P. L. 1942, c. 167, amounting to a repeal of the provision of that statute empowering the Legislature to elect the members of the South Jersey Port Commission.

Unlike the Constitution of 1844 (see *Ross* v. *Freeholders of Essex,* 69 N. J. L. 291 (E. & A. 1903)), the Constitution of 1947 vests exclusive appointive authority in the Governor except in those instances where some other provision for appointment is fixed in the Constitution or by law. Article V, Section I, Paragraph 12. "By law" means by a valid law. A law in effect prior to the new Constitution but repugnant thereto is constitutionally invalid. The Legislature cannot exercise prerogatives vested by Constitution in the Governor. Thus, election or appointment of members of the South Jersey Port Commission by the Legislature would be a nullity. In the absence of a valid law vesting the appointive power elsewhere, the Governor should nominate and appoint the members of the South Jersey Port Commission.

We are advised that, subsequent to the Constitution of 1947, nine appointments were made to the South Jersey Port Commission, all by Governor Driscoll.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.
By: DAVID D. FURMAN,
Deputy Attorney General.

DDF:lmv

June 8, 1955.

MR. WILLIAM J. JOSEPH,
Bureau of Public Employees' Pensions,
State House Annex,
Trenton, New Jersey.

MEMORANDUM OPINION P-15

DEAR MR. JOSEPH:

You have asked our opinion as to the rights of a public employee veteran who terminates his public employment after twenty years of service, but before having attained the age of sixty.

N. J. S. A. 43:15A-38 provides as follows:

> "Should a member of the Public Employees' Retirement System, after having completed 20 years of service, be separated voluntarily or involuntarily from the service, before reaching service retirement age, and not by removal for cause on charges of misconduct or delinquency, such person may elect to receive: (a) the payments provided for in section 41.b. of this act, if he so qualifies under said section, or; (b) a deferred retirement allowance, beginning at the retirement age, which shall be made up of an annuity derived from the accumulated deductions standing to the credit of the individual member's account in the annuity savings fund at the time of his severance from the service, and a pension which when added to the annuity will produce a total retirement allowance of 1/70 of his final compensation for each year of service credited as Class A service and 1/60 of his final compensation for each year of service credited as Class B service, calculated in accordance with section 48 of this act, with optional privileges provided for in section 50 of this act; provided, also that such election is communicated by such member to the board of trustees in writing stating at what time subsequent to the execution and filing thereof he desires to be retired; and provided further, that such member, as referred to in subsection (b) may later elect: (a) to receive the payments provided for in section 41.b. of this act, if he had qualified under that section at the time of leaving service, or; (b) to withdraw his accumulated deductions or, if such member shall die before attaining service retirement age then his accumulated deductions shall be paid to such person, if living, as he shall have nominated by written designation duly executed and filed with the board of trustees otherwise to the executor or administrator of the member's estate."

Since N. J. S. A. 43:15A-41b, which is referred to in N. J. S. A. 43:15A-38 refers to the annuity and reduces pension benefits immediately payable to a member who resigns after completing 25 years of service, we shall not be concerned with that section here.

N. J. S. A. 43:15A-61 provides, in part, as follows:

> "a. Any public employee veteran member in office, position or employment of this State or of a county, municipality, or school district or board of education on January 2, 1955, who remains in such service thereafter and who has or shall have attained the age of 60 years and who has or shall have been for 20 years in the aggregate in office, position or employment of this State or of a county, municipality or school district or board of education, satisfactory evidence of which service has been presented to the board of trustees, shall have the privilege of retiring and of receiving a retirement

allowance of 1/2 of the compensation received during the last year of employment upon which contributions to the annuity savings fund or contingent reserve fund are made with the optional privileges provided for in section 50 of this act.

"b. Any veteran becoming a member after January 2, 1955, who shall be in office, position or employment of this State or of a county, municipality or school district or board of education and who shall have attained 62 years of age and who shall present to the board of trustees satisfactory evidence of 20 years of aggregate service in such office, position or employment shall have the privilege of retiring and of receiving a retirement allowance of 1/2 of the compensation received during the last year of employment upon which contributions to the annuity savings fund or contingent reserve fund are made with the optional privileges provided for in section 50 of this act . . ."

In view of the statutes cited above, you have asked whether a public employee veteran who, after having completed twenty years of service, is separated from service not for cause, misconduct, or delinquency, should upon attaining the age of sixty, receive a retirement allowance of one-half of the compensation he received during the last year of his employment pursuant to N. J. S. A. 43:15A-61a, or the lesser benefits provided by N. J. S. A. 43:15A-38.

N. J. S. A. 43.15A-61a provides the privilege of retirement at one-half pay to any public employee veteran member in office, position, or employment "on January 2, 1955, who remains in such service thereafter and who has or shall have attained the age of 60 years and who has or shall have been for 20 years in the aggregate in office, position, or employment." Therefore, a public employee veteran with twenty years of service who was in public service on January 2, 1955, but who does not remain in such service until attaining the age of sixty, can acquire no right to retirement at one-half pay under said section.

Furthermore, N. J. S. A. 43:15A-38, which is referred to in the index preceding Chapter 15A of Title 43 in the Revised Statutes as pertaining to "vesting," is the only section which provides for a deferred retirement allowance for employees whose employment is terminated before they reach the age of retirement. Since this section makes no distinction between veterans and non-veterans as to the deferred retirement allowances available, its terms must be held to govern the deferred retirement allowances available to all public employees.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: CHARLES S. JOELSON,
Deputy Attorney General.

csj;b

JUNE 10, 1955.

HON. JOSEPH E. MCLEAN, *Commissioner,*
Department of Conservation and Economic Development,

State House Annex,
Trenton, New Jersey.

MEMORANDUM OPINION P-16.

DEAR DR. MCLEAN:

You have asked our opinion as to whether or not a county planning board created pursuant to R. S. 40:27-1 qualifies as a "regional planning agency" under section 701 of Title VII of the Federal Housing Act of 1954.

Section 701 of Title VII of the Federal Housing Act of 1954 provides for two types of Federal planning grants. The Administrator is empowered to make grants to State planning agencies "to facilitate urban planning for smaller communities (under 25,000 population) lacking adequate planning resources" by providing "planning assistance (including surveys, land use studies, urban renewal plans, technical services and other planning work, but excluding plans for specific public works)." Further, "The Administrator is further authorized to make planning grants for similar planning work in metropolitan and regional areas to official State, metropolitan, or regional planning agencies empowered under State or local laws to perform such planning."

As is set forth in section 2.3 of the Regulations issued by the Administrator of the Housing and Home Finance Agency relating to grants under section 701:

"In general, metropolitan planning is construed to mean planning for the urbanized or related area surrounding, and including, a major city or group of cities." * * *

"Metropolitan planning is not limited to the area *outside* of the central city or cities. Its purposes is to secure coordinated planning of the entire area and this may well involve general land use plans, major thoroughfare plans, uniform platting controls and other measures dealing both with the central city and its environs. However, metropolitan planning, as used in Section 701 of the Act, is not intended to include items which are the exclusive concern of individuals cities, such as, for example, plans for the development of the central business district, civic center plans or a detailed zoning code." * * *

"Regional planning may also include areas that are not metropolitan, in the sense of being centered in a major city, but which are characterized by other types of urban development."

Section 2. 4 of those Regulations provides in part:

"The Act states that grants may be made 'to official State, metropolitan, or regional planning agencies empowered under State or local laws to perform such planning.' The applicant agency may be an official State agency which is authorized to plan for metropolitan or regional areas within the State, or it may be an official metropolitan or regional planning agency empowered by State or local laws to do planning work for metropolitan or regional areas." * * *

"Furthermore, there are many county planning agencies which, by virtue of the size, location and urban character of the county, are actually engaged in planning of a metropolitan nature. Finally, there are various

authorizations in State and local laws for joint action by a city and county, or by several adjoining jurisdictions so that they may conduct planning work on a metropolitan or regional basis.

It is not possible to lay down a precise rule as to what types of agency can qualify under Section 701 of the Housing Act. A final determination of eligibility can be made only after submission of documentation establishing the legal basis for the applicant's claim to eligibility and an application describing the work which it proposes to do with the aid of Federal funds." Finally, section 2. 5 of the Regulations provides:

"In order to qualify for grants for metropolitan or regional planning, applicant agencies must be:

a. Legally created as an official State, metropolitan or regional planning agency empowered under State or local laws to perform planning work in metropolitan or regional areas.
b. Legally empowered to receive and expend Federal funds and expend other funds for the purpose stated in a. above, and to contract with the United States with respect thereto.
c. In position to provide non-Federal funds in an amount at least equal to one-half the estimated cost of the planning work for which the Federal grant is requested.
d. Technically qualified to perform the planning work, either with their own staffs or through acceptable contractual arrangements with other qualified agencies or private professional organizations or individuals."

The formation of county planning boards by action of the governing body of the respective counties in this state was authorized by chapter 251 of the Laws of 1935, now R. S. 40:27-1 et. seq.

The duties of the county planning board are set forth in R. S. 40:27-2 which provides:

"The county planning board shall make and adopt a master plan for the physical development of the county. The master plan of a county, with the accompanying maps, plats, charts, and descriptive and explanatory matter, shall show the county planning board's recommendations for the development of the territory covered by the plan, and may include, among other things, the general location, character, and extent of streets or roads, viaducts, bridges, waterway and waterfront developments, parkways, playgrounds, forests, reservations, parks, airports, and other public ways, grounds, places and spaces; the general location and extent of forests, agricultural areas, and open-development areas for purposes of conservation, food and water supply, sanitary and drainage facilities, or the protection of urban development, and such other features as may be important to the development of the county.

The county planning board shall encourage the co-operation of the local municipalities within the county in any matters whatsoever which may concern the integrity of the county master plan and to advise the board of chosen freeholders with respect to the formulation of development programs and budgets for capital expenditures."

The county planning board is authorized to employ experts, with moneys which are appropriated to it by the county, or which are "placed at its disposal through gift" (R. S. 40:27-3). A public hearing is required before adoption of the master plan, with provision being made for the co-ordination of municipal plans with the county master plan (R. S. 40:27-4).

That a planning board set up under the New Jersey Act for a county, which has been defined "as a political organization of certain territory, within the State, particularly defined by geographical limits." (14 Am. Jur. 185) constitutes a "regional planning agency" within the meaning of Section 701 of Title VII of the Federal Housing Act of 1954 is, in our opinion, clear.

However, we understand that some question has been raised as to whether a county planning board can constitute a "regional planning agency" under the Federal Act because the same act which authorizes creation of county planning boards also authorizes, by R. S. 40:27-9, the creation of regional planning boards; this even though in fact no regional planning board has been created in this State.

So, R. S. 40:27-9 provides in part as follows.

"The councils or corresponding administrative bodies of any group of municipalities, independently or together with the board or boards of freeholders of any county or counties in which such group of municipalities is located or of any adjoining county or counties; or the council or corresponding administrative body of any municipality together with the board of freeholders in which such municipality is located; or the boards of freeholders of any two or more adjoining counties, may co-operate in the creation of a regional planning board for any region defined as may be agreed upon by said co-operating councils and board or boards or by said co-operating boards."

Such regional planning board is required to make a master plan applicable to its region (R. S. 40:27-10); its member municipalities may delegate to it the powers and duties of municipal planning boards under R. S. 40:55-1 et. seq., and its member counties may delegate to it "any and all of the powers and duties of a county planning board as provided by sections 40:27-1 to 40:27-8 * * * for the territory of the county so resolving" (R. S. 40:27-11).

A reading of the quoted section authorizing the creation of regional planning boards makes it clear, however, that the legislative intent was not to destroy the status of county planning boards as "regional planning agencies," but rather to authorize the creation of planning boards other than county planning boards, by groups of municipalities, or counties, or both, to deal with an area other than the geographical limits of a particular county.

The region dealt with by a county planning board formed under R. S. 40:27-1 is the county; that dealt with by the regional planning board formed pursuant to R. S. 40:27-9 may be more or less than a county. The statutory authorization for the formation of a "regional planning board" does not destroy the qualification and standing of a "county planning board" as a "regional planning agency" within the meaning of Section 701 of Title VII of the Federal Housing Act of 1954.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: STANLEY COHEN,
Deputy Attorney General.

K:C:P

JULY 6, 1955.

MR. W. LEWIS BAMBRICK,
Unsatisfied Claim and Judgment Fund Board,

222 West State Street,
Trenton, New Jersey.

MEMORANDUM OPINION P-17.

DEAR MR. BAMBRICK:

You have asked our opinion as to whether the Unsatisfied Claim and Judgment Fund Board may accept as timely notice under N. J. S. A. 39:6-65, a notice bearing a postmarked date which is within thirty days after an accident, but which is not received by the Unsatisfied Claim and Pension Fund Board within said thirty day period.

N. J. S. A. 39:6-65 provides as follows:

> "Any qualified person, or the personal representative of such person, who suffers damages resulting from bodily injury or death or damage to property arising out of the ownership, maintenance or use of a motor vehicle in this State on or after the first day of April, one thousand nine hundred and fifty-five, and whose damages may be satisfied in whole or in part from the fund, shall, within thirty days after the accident, as a condition precedent to the right thereafter to apply for payment from the fund, give notice to the board, on a form prescribed by it, of his intention to make a claim thereon for such damages if otherwise uncollectible and otherwise comply with the provisions of this section;" . . .

In *Poetz v. Mix,* 7 N. J. 436 (Sup. Ct. 1951), the Court considered the question of when a pleading may be considered as "filed". The Court stated:

> ". . . In contemplation of law, a paper or pleading is considered as filed when delivered to the proper custodian and received by him to be kept on file . . ."

It should be noted that N. J. S. A. 36:6-65 does not require that a prospective claimant against the Unsatisfied Claim and Judgment Fund "file" his claim within thirty days from an accident, but merely that he "give notice to the board" within said period. However, there are several cases which rule that where a statute requires a notice to be given within a certain number of days after a certain event, the notice must be actually received, and not merely mailed, within the prescribed period of time.

In *Rapid Motor Lines v. Cox,* 134 Conn. 235, 56 A 2d 519 (Conn. Sup. Ct. of Err. 1947), where a statute provided that no action would lie against the state highway commission for damages caused by a defect in the highway unless notice of injury "shall have been given within thirty days thereafter to the highway commissioner," the court said:

> ". . . the clause 'notice shall be given' requires a completed act within the number of days prescribed by the statute . . . It is our conclusion that these words require that the notice shall be delivered to the commissioner within the sixty day period specified in the statute, and that sending on the sixtieth day a notice which is not received by him until the sixty-first day does not constitute compliance with the statute."

In *Chase v. Surry,* 88 Maine 468, 34 Atl. 270 (1896) where a statute required that the claimant "notify" municipal officers by letter or otherwise in writing, the Court stated:

> "The statute expressly provides the time in which such notice may be given, and also the manner of giving it . . . The writing and mailing a notice within the time is not notifying the officers of the town as the statute requires."

In the above case the Court rejected the contention that the mailing of the notice, properly addressed within the prescribed period of time, was a legal notification, whether or not it was actually received by the town officers.

In *O'Neil v. Boston,* 257 Mass. 414 (1926), a notice to a municipality of an injury due to a defective condition on a sidewalk, which notice was mailed on the tenth day after the injury, but not received until the eleventh day, was held not a sufficient compliance with a statute requiring notice within ten days after the injury as a condition precedent to the maintenance of an action against the city.

We have also found that, with regard to cases involving the question of whether or not notice was given within the time limited by an insurance policy, the weight of authority is to the effect that notice must actually be received, not merely mailed, within the prescribed time. No cases in New Jersey are to be found on the general subject, with the exception of cases involving "filing" of a paper or pleading with a court. (Poetz v. Mix, supra).

In view of the foregoing, it is our opinion that the Unsatisfied Claim and Judgment Fund Board may not accept as timely notice under N. J. S. A. 39:6-65, a notice bearing a postmarked date which is within thirty days after an accident, but which is not actually received by the Unsatisfied Claim and Judgment Fund Board within said thirty day period.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

By: CHARLES S. JOELSON,
Deputy Attorney General.

csj;b

JULY 7, 1955.

HON. CHARLES F. SULLIVAN,
Director, Division of Purchase and Property,

State House,
Trenton 7, New Jersey.

MEMORANDUM OPINION P-18.

Re: 200-Bed Housing Unit and New Kitchen Addition—New Jersey State Hospital, Marlboro, New Jersey.

DEAR DIRECTOR SULLIVAN:

We have your letter of June 27th last, together with its enclosures relating to the above entitled matter.

It is to be noted that you desire our opinion as to whether the proposal of Anthony Lewis, Inc. of 14-22 Newark Way, Maplewood, New Jersey, the lowest responsible bidder on General Construction Work at New Jersey State Hospital, Marlboro, New Jersey, should be rejected in view of its request to be relieved of

all obligations by reason of an error made in estimating the cost of performing the job or whether the State should pursue its remedies under the performance bond posted by the bidder in the amount of $35,000.00.

It appears from your letter that on April 19, 1955, sealed proposals were received, after advertisement, for construction of a 200-Bed Housing Unit and New Kitchen Addition at the New Jersey State Hospital, Marlboro, New Jersey. It further appears that the difference between the Lewis' bid and the next low bidder is $63,585.00.

It is noted that time is of the essence since the job to be performed is of an urgent nature.

Anthony Lewis, Inc. cannot exculpate itself from liability because it made an error in estimating the cost of the General Construction Work. It conformed to the requirements of notice to bidders and therefore is the lowest bidder. *Tufano v. Boro of Cliffside Park,* 110 N. J. L. 370 (Sup. Ct. 1932) 165 A. 628. The award of the contract was made to it pursuant to N. J. S. A. 52:34-12 (d) which provides that the

> "* * * award shall be made with reasonable promptness by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the State, price and other factors considered. Any or all bids may be rejected when the State Treasurer or the Director of the Division of Purchase and Property determines that it is in the public interest so to do."

This section also provides for the rejection of any or all bids by the Treasurer or the Director of the Division of Purchase and Property in the exercise of sound discretion.

We are of the opinion that the State may hold Anthony Lewis, Inc. and its surety to the responsibility of proceeding with the contract. The State is not responsible for the bidder's miscalculation or error in making estimates as to the costs of construction of a particular project when notice has been duly given with respect to the requirements of the contract alike to all bidders. However, as indicated by N. J. S. A. 52:34-12 (d) the State may reject any or all bids and advertise anew, if it is determined that the exigencies of the situation require, in the public interest, that such action be undertaken.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: ROGER M. YANCEY,
Deputy Attorney General.

JULY 11, 1955.

HON. JOSEPH E. MCLEAN, *Commissioner,*
Department of Conservation and Economic Development,

State House Annex,
Trenton, New Jersey.

MEMORANDUM OPINION P-19.

DEAR MR. MCLEAN:

You have advised us that the Borough of Edgewater, which is not the upland owner, has applied for a grant of land now under water for use as a public park, and that the application was approved by the Planning and Development Council of the Department of Conservation and Economic Development. You have further advised that subsequent to the approval, several upland owners protested the grant, and as a result, six months notice was given by the applicant of the intention to take such grant; that although that period of time has expired, none of the upland owners applied for a riparian grant; but that those upland owners contend that before the State's grant may issue that the Planning and Development Council of the Department of Conservation and Economic Development must take steps, as provided in R. S. 12:3-9, as amended, to fix the amount to be paid to the upland owners, and that the municipality must make an appropriation of funds sufficient to pay the amount found to be due under R. S. 12:3-9.

Specifically, you have requested our opinion as to whether or not the State's grant may issue to the Borough of Edgewater before determination is made of the value of the upland owners' "rights and interest" pursuant to R. S. 12:3-9.

It is our opinion that R. S. 12:3-9 is not applicable to a grant to be made to a municipality of lands under water for use as a public park; that in such case there are no "rights and interest" of the riparian owners to be valued; and indeed that there is no requirement that six months notice be given to the upland owners, the provisions of R. S. 12:3-7 being inapplicable to the instant case.

The title which the state holds to tidelands is complete and unencumbered by any limitations except as provided by the legislature. In *Stevens v. Paterson and Newark R. R. Co.,* 34 N. J. L. 532 (E. & A.) 1870, the court said:

> "The steps which I have thus far taken have led me to this position: That all navigable waters within the territorial limits of the state, and the soil under such waters, belong in actual propriety to the public; that the riparian owner, by the common law, has no peculiar rights in this public domain as incidents of his estate, and that the privileges he possesses * * * to acquire such rights, can, before possession has been taken, be regulated or revoked at the will of the legislature."

Riparian owners have no inherent right in lands under water in front of their uplands; nor any inherent right to damages or to notice. Such right as they may have with respect to lands under tidewater arises only by legislative grant under the provisions of the applicable statutes.

R. S. 12:3-33 provides.

> "Whenever a public park, place, street or highway has been or shall hereafter be laid out or provided for, either by or on behalf of the state or any municipal or other subdivision thereof, along, over, including or fronting

upon any of the lands of the state now or formerly under tidewater, or whenever a public park, place, street or highway shall extend to such lands, the board of commerce and navigation, upon application of the proper authority of the state, or the municipal or other subdivision thereof, may grant to such proper authority the lands of the state now or formerly under tidewater, within the limits of or in front of said public park, place, street or highway."

Under this section, a municipality, which has laid out or provided for a public park, may obtain a grant of state's lands under tidewater. There is no requirement that notice be given to the upland or riparian owner (*Leonard v. State Highway Department*, 24 N. J. Super. 376 (Ch. Div. 1953), aff'd. 29 N. J. Super. 188 (App. Div. 1954).

Judge Goldmann writing for the Appellate Division in *Leonard v. State Highway Department, supra* said at 29 N. J. Super. 195:

"We agree with the conclusion reached by the Chancery Division that the State Highway Commissioner, as applicant, did not have to notify plaintiffs, as riparian proprietors, of his application for a riparian grant." * * *

"It may also be noted that R. S. 12:3-33, quoted in the opinion below, does not require notice to the riparian owner where a proper authority of the State makes application for a riparian grant for highway purposes, as here. That statute has its source in L. 1916, c. 98, adopted long after the statute from which R. S. 12:3-7 derives."

Although *Leonard v. State Highway Department, supra,* dealt with a grant made to the State Highway Department pursuant to R. S. 12:3-33, what was there said is also applicable to the proposed grant to the Borough of Edgewater for a public park which has been laid out or provided for, pursuant to R. S. 12:3-33.

It should also be noted that the Appellate Division, in *Leonard v. State Highway Department, supra,* further set forth the following additional reason as to why no notice had to be given to the upland owners, which appears equally applicable to the instant case. So, Judge Goldmann said at 29 N. J. Super. 196:

"In addition to the reasons given by the court below, 24 N. J. Super. 376, 383-384 (Ch. Div. 1953), there is the added reason that R. S. 12:3-7 does not, in our view, require the State or the State Highway Commissioner, its agent, to give notice to the riparian owner of an application for a riparian grant. That statute is applicable only to "any person or persons, corporation or corporations, or associations." The proviso refers to "any other than a riparian proprietor," and the words "any other" reasonably have reference only to any other "person or persons, corporation or corporations, or associations" at the beginning of the section. N. J. S. A. 1:1-2 defines "person," when used in the Revised Statutes, as including "corporations, companies, associations, societies, firms, partnerships and joint stock companies as well as individuals," adding that when the word is "used to designate the owner of property which may be the subject of an offense, (it) includes this State * * *." The words "municipality" and "State" are separately defined in the same section. Accordingly, we conclude that the State and the State Highway Commissioner are not included within the meaning of the word "person" or "corporation" in R. S. 12:3-7."

It is, therefore, our opinion that the grant may issue to the Borough of Edgewater for use of the lands for the public park which has been laid out or provided for, and that the provisions of R. S. 12:3-9 relating to the procedure to be followed where there is a grant to a "person" other than the riparian owner, is not applicable to the instant case and need not be followed.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

By. SIDNEY KAPLAN,
Deputy Attorney General.

sk;d

JULY 19, 1955.

MR. GEORGE A. LOUDEN, *Chief Clerk,*
Office of the Secretary of State,
Trenton, New Jersey.

MEMORANDUM OPINION P-20.

DEAR MR. LOUDEN:

This will confirm my oral advice to you in response to your inquiry as to whether or not you should accept for filing a proposed certificate of incorporation of "Carter Corporation", a corporation formed for the sole object of acting "as trustee or successor trustee under intervivos trusts."

As I advised you, the proposed corporation could not be incorporated under the General Corporation Law, since that law prohibits the formation thereunder of a bank or trust company (R. S. 14:2-1). The object for which the "Carter Corporation" is to be formed is within the prohibition as to trust companies (*McCarter v. Imperial Trustee Co.*, 72 N. J. L. 42, (Sup. Ct. 1905)).

The Banking Law of 1948, (R. S. 17:9A-1 et seq.) under which corporations exercising such banking or trust powers may be formed, provides in R. S. 17:9A-28 in part as follows:

"A bank which is a qualified bank shall have the following agency and and fiduciary powers * * *

(9) to receive from any person and hold in trust and dispose of, by sale or otherwise, personal and real property, upon such terms as may be specified;

(10) to accept, administer, and execute all other trusts and to act in all other fiduciary capacities not herein specifically enumerated, not inconsistent with law."

R. S. 17:9A-338 provides:

"Except to the extent specifically made applicable by this act, the provisions of Title 14 of the Revised Statutes as enacted and as heretofore or hereafter amended or supplemented shall not apply to banks and savings banks."

The Banking statute is exclusive, and the powers sought may only be obtained by complying with the terms of that statute. They may not be granted to a corporation organized under the General Corporation Act. (*McCarter, Attorney General v. Imperial Trustee Co.*, 72 N. J. L. 42, 44 (Sup. Ct. 1905)).

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

By: HAROLD KOLOVSKY,
Assistant Attorney General.

hk:d

JULY 21, 1955.

MR. W. LEWIS BAMBRICK,
Unsatisfied Claim and Judgment Fund,
222 West State Street,
Trenton, New Jersey.

MEMORANDUM OPINION P-21.

DEAR MR. BAMBRICK:

You have requested our opinion as to whether the owner of a stolen motor vehicle has a valid claim against the Unsatisfied Claim and Judgment Fund based on an unsatisfied judgment against the person who stole same for damages sustained to such vehicle as a result of an accident occurring while the vehicle was being operated by the thief. You have asked us to assume that the owner of the motor vehicle was not covered by any insurance policy under which he could be reimbursed for his damages.

In order to resolve this problem, it is necessary to consider the purpose for which the Unsatisfied Claim and Judgment Fund Act was enacted. Although no statement was appended to the Unsatisfied Claim and Judgment Fund Act, the purpose of the legislation was obviously to protect holders of judgments in so-called "negligence" actions based upon damage to property or injury to person by means of a motor vehicle. It was designed to eliminate the economic hardship which would otherwise be sustained by a holder of such an unsatisfied judgment who incurred property damage or personal injury by the negligent operation of a motor vehicle by another. In effect, it is a corollary to the Motor Vehicle Security-Responsibility Law, N. J. S. A. 39:6-23, et seq., which provides, among other things, for the suspension of the operator's license and registration certificate of a person who has failed to satisfy a judgment rendered against him for personal injury or property damage resulting from the ownership, maintenance, use, or operation of a motor vehicle.

Although the courts of New Jersey have not yet dealt with the Unsatisfied Claim and Judgment Fund Act, several cases have considered the Motorists' Financial Responsibility Law, R. S. 39:6-1, et seq., which was the predecessor of the

Motor Vehicle Security-Responsibility Law, N. J. S. A. 39:6-23, et seq. In *Garford Trucking, Inc. v. Hoffman*, 114 N. J. L. 522 (Sup. Ct. 1935), we find the following:

> ". . . The Financial Responsibility Law of our State seeks to impose a penalty not for the failure to pay a judgment that is merely incidental, but rather does it impose a penalty for negligent driving . . ."

In the case presently under consideration, the action of the owner of the motor vehicle against the person who stole it is not grounded upon negligence of the thief in the operation of the motor vehicle; it is grounded upon the theft itself, and all damages flowing from same, in an action in the nature of trover and conversion. It is our opinion that an unsatisfied judgment in an action of this nature is not the type of judgment for which the Unsatisfied Claim and Judgment Fund is chargeable.

In *Sutherland on Statutory Construction*, Vol. 2, Sec. 4505, p. 323, we find the following:

> "It must be understood, of course, that a well-drafted statute will in most cases and certainly should, present the words used with sufficient precision and accuracy that additional inquiry by the court will be unnecessary. But as all future circumstances cannot be anticipated by even the most far-sighted legislator the function of judicial interpretation cannot be completely avoided. When such a circumstance arises, certainly the safest starting point for interpretation will be the statute itself. But it is by no means the safest stopping point. Before the true meaning of the statute can be determined consideration must be given to the problem in society to which the legislature addressed itself, prior legislative consideration of the problem, the legislative history of the statute under litigation, and to the operation and administration of the statute prior to litigation."

It is our opinion that the owner of a stolen motor vehicle who obtains an unsatisfied judgment against the person who stole such motor vehicle by reason of damage to such motor vehicle while same was operated by the thief, is not entitled to payment by the Unsatisfied Claim and Judgment Fund.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: CHARLES S. JOELSON,
Deputy Attorney General.

csj:b/mjd

JULY 25, 1955.

HON. CARL HOLDERMAN,
Commissioner, Department of Labor and Industry,

1035 Parkway Avenue,
Trenton, New Jersey.

MEMORANDUM OPINION P-22.

DEAR MR. HOLDERMAN:

You have requested our opinion as to whether or not, prior to the enactment of Chapter 65 of the Laws of 1955, the Director of the Division of Employment Security had the right to abate penalty assessments against employers for failure to supply wage data or for failure to forward unemployment compensation contributions as required by law.

Prior to its amendment by P. L. 1955, C. 65, N. J. S. A. 43:21-14 (a), which provides for the collection of contributions from employers, read as follows:

> "(a) In addition to such reports as the Director of the Division of Employment Security may require under the provisions of subsection (g) of section 43:21-11 of this chapter (R. S. 43:21-1 et seq.), every employer shall file with the division periodical contribution reports on such forms and at such times as the director shall prescribe, to disclose the employer's liability for contributions under the provisions of this chapter (R. S. 43:21-1 et seq.), and at the time of filing each contribution report shall pay the contributions required by this chapter (R. S. 43:21-1 et seq.) for the period covered by such report. The director may require that such reports shall be under oath of the employer. Any employer who shall fail to file any report, required by the director, on or before the last day for the filing thereof shall pay a penalty of one dollar ($1.00) for each day of delinquency until and including the tenth day following such last day and, for any period of delinquency after such tenth day, a penalty of one dollar ($1.00) a day or twenty per centum (20%) of the amount of the contributions due and payable by the employer for the period covered by the report, whichever is the lesser. If there be no liability for contributions for the period covered by any contribution report or in the case of any report other than a contribution report, the employer or employing unit shall pay a penalty of one dollar ($1.00) a day for each day of delinquency in filing or fifteen dollars ($15.00), whichever is the lesser. Any employer who shall fail to pay the contributions due for any period on or before the date they are required by the division to be paid, shall pay interest at the rate of one per centum (1%) a month on the amount thereof from such date until the date of payment thereof. Upon the written request of any employer or employing unit, filed with the division on or before the due date of any report or contribution payment, the director, for good cause shown, may grant, in writing, an extension of time for the filing of such report or the paying of such contribution with interest at the rate of one per centum (1%) a month on the amount thereof; provided, no such extension shall exceed thirty days and that no such extension shall postpone payment of any contribution for any period beyond the day preceding the last day for filing tax returns under Title IX of the Federal Social Security Act for the year in which such period occurs."

It will be noted that although the statute empowered the Director "for good cause shown and upon written request filed with the Division" to grant an extension of time for the filing of a report or the paying of contribution with interest, it did not contain any provision authorizing the Director to waive the payment of a penalty, as does, for example, N. J. S. A. 43:21-16 (b) 2, which requires employers to furnish information for the making of an initial determination as to whether or not the employer is an employer covered by the Act. The last mentioned section provides, in part, as follows:

> " * * * provided, that when such report or reports are not filed within the prescribed time but it is shown to the satisfaction of the director that the failure was due to a reasonable cause, no such penalty shall be imposed. * * *"

Although the Legislature is without constitutional power to authorize the remission of interest due the State (*Wilentz v. Hendrickson,* 135 N. J. E. 244, E. & A. 1944), it does have the constitutional power to remit penalties pursuant to a general law. (23 Am. Jur. 643, "Penalties," Sec. 53; *Wilentz v. Hendrickson,* supra; *Meilink v. Unemployment Reserve Commission,* 314 U. S. 564, 567).

A penalty is "a sum of money of which the law exacts payment by way of punishment for doing some act that is prohibited or omitting to do some act that is required to be done." (70 C. J. S. 387; see also *Wilentz v. Hendrickson,* supra).

It is clear that the Legislature may delegate the power to remit penalties to some administrative agency (See, for example, the delegation of such power contained in N. J. S. A. 43:21-16 (b) 2, referred to above, and delegation of such power to Director of Division of Taxation contained in N. J. S. A. 54:49-11).

But, in the absence of such an express delegation by the Legislature to the administrative agency, the agency is without power to waive the penalty. The agent of the State has no authority to contract to the detriment, disadvantage or injury of his principal without clear delegation of such authority (*State v. Erie Railroad Co.,* 23 N. J. Misc. 203, Sup. Ct. 1945).

It is, therefore, our opinion that, prior to the enactment of P. L. 1955, C. 65, the Director of Employment Security had no authority to abate penalty assessments against employers for failure to supply wage data or for failure to forward unemployment compensation contributions as required by law.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

ROBERT E. FREDERICK,
Deputy Attorney General.

July 29, 1955.

HONORABLE FREDERICK J. GASSERT, JR.,
Director, Division of Motor Vehicles,

State House,
Trenton, New Jersey.

MEMORANDUM OPINION P-23.

DEAR DIRECTOR GASSERT:

You have requested our opinion as to whether or not, as Director of the Division of Motor Vehicles, you have authority to sign a reciprocity arrangement between the Province of Alberta and the State of New Jersey, whereby each grants

to the other full reciprocity as to motor vehicles properly registered in one jurisdiction, operating in the other, while engaged in through or interstate commerce.

Although there is nothing in the New Jersey statutes that expressly gives to the Director the authority to enter into such a written agreement, a reciprocity status exists even without the formality of a written agreement. Therefore, the authority of the Director to so act may be necessarily implied.

R. S. 39:3-15 grants reciprocal touring privileges for any type motor car, omnibus, or motor vehicle used for the transportation of goods, wares and merchandise, motorcycle or motor drawn vehicle belonging to a non-resident, which is registered in accordance with the laws of the State, or Province of the Dominion of Canada, in which the non-resident resides.

R. S. 39:3-16 gives authority to the Commissioner (Director) to suspend the operating privilege of motor vehicles registered in another State or Province of the Dominion of Canada when, in his judgment, any such State or Provinve prohibits the free operation of any class of motor vehicle belonging to residents of this State and properly registered here.

R. S. 39:3-17 extends the touring privileges referred to in the above-mentioned sections to any non-resident chauffeur or driver who has complied with the laws of his resident State or country.

R. S. 39:4-9.1 provides for the reciprocal exchange of information under which the Commissioner (Director), upon receiving a certificate of conviction of a non-resident operator or chauffeur for certain violations of our law, shall transmit a certified copy of such record to the motor vehicle administrator of the State where the non-resident operator or chauffeur resides.

The Legislature, by enacting the above-mentioned provisions, has granted to non-residents reciprocity to the extent that the State or Province in which said non-resident resides grants touring and driving privileges to residents of New Jersey. This is, in effect, reciprocity by reason of the above-mentioned law. Reciprocity is recognized and is actually now in effect.

A reading of the proposed reciprocity arrangement between the Province of Alberta and the State of New Jersey does not reveal that such arrangement contemplates the granting of reciprocity with respect to any matters other than those already covered by the sections of the New Jersey law above referred to.

In view of the foregoing, we can see no objection to the Director entering into an agreement in writing in a matter that peculiarly affects the Motor Vehicle Division, especially since the matters referred to in the proposed reciprocity arrangement are already part of the law of this State. In view of the above, it is our opinion that the Director of Motor Vehicles has the authority to enter into the proposed arrangement with the Province of Alberta.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

JAMES T. KIRK,
Deputy Attorney General.

August 31, 1955.

MR. W. LEWIS BAMBRICK,
Unsatisfied Claim and Judgment Fund Board,
222 West State Street,
Trenton, New Jersey.

MEMORANDUM OPINION P-24.

DEAR MR. BAMBRICK:

You have requested our opinion concerning the validity of a notice given under N. J. S. A. 39:6-65 in the following two cases:

In the first case, a husband was involved in an accident while operating a motor vehicle which was registered in the name of his wife. As a result of the accident, the husband sustained personal injuries, and the motor vehicle belonging to his wife was damaged. The husband gave timely notice under N. J. S. A. 39:6-65 of a notice of accident and intention to file claim. In his notice, he listed his own personal injuries and damages to his wife's motor vehicle. We assume that the notice was accompanied with a physician's certification and automobile repairmen's estimates as required by N. J. S. A. 39:6-65.

In the second case, a wife was involved in an accident while operating a motor vehicle which was registered in the name of her husband. As a result of the accident, the wife and her infant child, who was a passenger in the car operated by her, sustained personal injuries, and the motor vehicle belonging to her husband was damaged. The husband gave timely notice under N. J. S. A. 39:6-65 of a notice of accident and intention to file claim. In his notice, he listed the personal injuries of his wife and child and the damage to his motor vehicle. Again, we assume that the notice was accompanied by the required physician's certification and repairmen's estimates.

The questions raised in the above cases are whether one spouse may give notice in behalf of another under N. J. S. A. 39:6-65, and whether a parent may give notice in behalf of a child under N. J. S. A. 39:6-65.

N. J. S. A. 39-6-65 provides as follows:

> "Any qualified person, or the personal representative of such person, who suffers damages resulting from bodily injury or death or damage to property arising out of the ownership, maintenance or use of a motor vehicle in this State on or after the first day of April, one thousand nine hundred and fifty-five, and whose damages may be satisfied in whole or in part from the fund, shall, within thirty days after the accident, as a condition precedent to the right thereafter to apply for payment from the fund, give notice to the board, on a form prescribed by it, of his intention to make a claim thereon for such damages if otherwise uncollectible and otherwise comply with the provisions of this section; . . ."

The purpose underlying N. J. S. A. 39:6-65 is evidently to insure that the Unsatisfied Claim and Judgment Fund Board receive all required information within the stated period of time. In the cases which you have referred to us for consideration, the Unsatisfied Claim and Judgment Fund Board received such information by means of notice given within the period of time fixed by the statute.

We, therefore, are of the opinion that the Unsatisfied Claim and Judgment Fund Board may accept as valid notices under N. J. S. A. 39:6-65, notices given by one person in behalf of another in the cases set forth above.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

By. CHARLES S. JOELSON,
Deputy Attorney General.

August 31, 1955.

MR. GEORGE M. BORDEN, *Secretary,*
Public Employees' Retirement System,
48 West State Street,
Trenton 7, N. J.

MEMORANDUM OPINION P-25.

DEAR MR. BORDEN:

You have requested our opinion as to whether the Public Empolyees' Retirement System should continue the practice of withholding the payment of an accidental disability retirement allowance to a public employee for such period of time as the public employee is collecting workmen's compensation payments as a result of the same accident upon which his claim for an accidental disability retirement allowance is based. You have attached to your request for an opinion a letter from the attorney of a public employee who claims to be entitled to an accidental disability retirement allowance even though he is presently receiving workmen's compensation payments as a result of the same accident upon which his claim for accidental disability retirement is based. In attempting to support such a position, the attorney for the public employee states:

> ". . . It is my understanding that the Board has rejected claim on the basis of the provisions of R. S. 34:15-43.
>
> If my understanding is true, I respectfully direct the Board's attention to the fact that that statute provides that workmans' compensation shall not be paid to an employee who has been retired. The statute is under the Workman's Compensation Act. It certainly does not indicate that a person may not be retired who is receiving workman's compensation. I do not believe that the Board should concern itself with workman's compensation. . . ."

N. J. S. A. 43:15A-43 which provides for accidental disability retirement for members of the Public Employee's Retirement System makes no reference to the relationship between workmen's compensation benefits and accidental disability retirement under the Public Employee's Retirement System. However, R. S. 34:15-43, which is to be found in the Workmen's Compensation Act, provides as follows:

> "Every employee of the state, county, municipality or any board or commission, or any other governing body, including boards of education, and also each and every active volunteer fireman doing public fire duty under the control or supervision of any commission, council or any other governing body of any municipality or any board of fire commissioners of such municipality or of any fire district within the state, who may be injured in line of duty shall be compensated under and by virtue of the provisions of this article and article 2 of this chapter (§ 34:15-7 et seq.), but no person holding an elective office shall be entitled to compensation. *Nor shall any former employee who has been retired on pension by reason of injury or disability be entitled under this section to compensation for such injury or disability.* . . ." (Underscoring supplied).

In *DeLorenzo v. City of Newark,* 134 N. J. L. 7 (E. & A. 1945), the court considered the case of a public employee who, while receiving workmen's compensation benefits, applied for retirement under R. S. 43:12-1, which provides pension for municipal employees. In rejecting the plaintiff's claim that he was entitled to be granted a pension while receiving workmen's compensation benefits, the court stated:

> "The issue to be determined is whether a public employee receiving workmen's compensation payments for physical disability, which arose out of and in the course of his employment with the defendant, may also receive a pension under the provisions of R. S. 43:12-1. We do not find any legislative authority which expressly permits the payment of both a pension and workmen's compensation payments to a public employee, nor does the plaintiff submit any judicial authority therefor in this state. . . .
>
> We distinguish between the status of a person receiving a pension and a person receiving workmen's compensation. The relationship of an employer and an employee is not consistent with the position of a pensioner as such, for the reason that a pensioner severs all relationship of employer and employee, he has no further duty to his employer nor is he entitled to any of the benefits which may accrue to an employee. An employee receiving workmen's compensation is under the relationship of employee and employer, as is indicated by the fact that such employee must continue to be carried on the public payroll pursuant to R. S. 34:15-44. The plaintiff must be one or the other and as he admittedly now receives workmen's compensation he is an employee. We therefore hold that the plaintiff cannot have the benefits of both statutes. Judson v. Newark Board of Works Pension Association, 132 N. J. L. 106; affirmed, 133 Id. 28."

While it is true that the pension sought by the plaintiff in the above-cited case was one based upon years of service and age, rather than upon disability, the logic of its reasoning would be equally applicable to an application for a disability retirement allowance.

It is, therefore, our opinion that the Public Employees' Retirement System should continue to withhold payment of an accidental disability retirement allowance to a public employee for such period of time as he is collecting workmen's compensation payments.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

By: CHARLES S. JOELSON,
Deputy Attorney General.

csj;b
cc:Mr. Steven Schanes

September 16, 1955.

MR. MAURICE D. MCBRIDE, *Chairman,*
Union County Board of Elections,

Court House,
Elizabeth, New Jersey.

MEMORANDUM OPINION P-26.

DEAR MR. MCBRIDE:

Receipt is acknowledged of your inquiry requesting our opinion as to the operation and effect of the 1955 election statute, which authorizes the Commissioner of Registration, upon application in writing, to register any incapacitated voter at his place of residence or confinement.

The statute limits such registration to those voters who are chronically or incurably ill, or totally incapacitated and unable to attend a place of registration, and requires each such application be accompanied by a physician's affidavit certifying to such fact, and further, that such voter is mentally competent and cannot attend a place of registration.

You seek a construction of the statute and submit two queries as to your jurisdiction in the administration thereof. They are:

1. Is it the intent of the new amendment to R. S. 19:31-6 to take a registration of a Union County resident who may be confined in another County or outside of New Jersey; and

2. May the County Board designate a proper person in another County or outside of the state to take such registration.

The 1955 act is an amendment to Section 19:31-6 of the Revised Statutes (Election Law) concerning municipalities having permanent registration and provides:

> "When any person shall apply to the commissioner in writing setting forth that due to a chronic or incurable illness, or that he is totally incapacitated and he cannot attend a place of registration and such application is accompanied by an affidavit by a physician duly licensed to practice medicine in this State certifying that such person is chronically or incurably ill or totally incapacitated, that such person is mentally competent and that such person cannot attend a place of registration, then the commissioner shall cause such person to be registered at his place of residence or confinement."

The 1955 amendment is but an extension of the method of registration provided by R. S. 19:31-6.

Where, heretofore, registrations might be taken during office hours at the office of the commissioner, or at such other place or places as might be designated, they may now be additionally taken at the place of residence or confinement of the incapacitated voter.

It will be noted that the enlarged statute limits both the commissioner of registration and the several county boards, in their respective jurisdictions, both as to the manner and method of registration, by directing that "The Commissioner shall cause such person to be registered at his place of residence or confinement." "Residence" is a well defined term in the election law and means the fixed domicile or permanent home, and once obtained, continues without intermission until a new one is gained. *Brueckmann v. Frignoca,* 152 A. 780, 9 N. J. Misc. 128.

The best evidence of a voter's residence are his acts rather than his declarations concerning his residence. It is not sufficient to merely designate an address as a "voting residence" since the residence must be real, actual and positive, and to be a "voting residence" there must be not only the intention of having the address for the purpose of voting, but that intention must be accompanied by acts of living, dwelling, lodging or residing sufficient to reasonably establish that it is the real and actual residence of the voter. *Jacobsen v. Gardella,* 38 A. 2d 126, 22 N. J. Misc. 277.

Therefore, registrations must be taken at the domicile or place of residence of the incapacitated voter and within the county in which he claims his vote.

With respect to his place of confinement it must likewise be within the county in which the vote is claimed and within the jurisdiction of the county board of elections.

R. S. 19:6-17 and R. S. 19:6-18, among other things, provide:

> "19:6-17. The county board shall consist of four persons, who shall be legal voters of the counties from which they are respectively appointed. * * *"
>
> "19:6-18. The Chairman of the State Committee of each of such two political parties shall during the month of February in each year, in writing, nominate one person residing in each county, duly qualified for member of the county board in and for such county. * * *"

The 1955 act nowhere indicates a legislative purpose to authorize or permit county boards of election to function beyond their respective county limits. The county board is a statutory creation, and all of its powers must be found in the statute.

Had it been the legislative intent to vest the several county boards with statewide as well as out-of-state powers of registration, the statute would have so provided. While election laws are to be liberally construed so as to effectuate their purpose. *Carson v. Scully.* 89 N. J. L. 458, 465 (Sup. Ct. 1916) affirmed, 90 N. J. L. 295 (E. & A. 1917), the 1955 statute should not be construed to confer an over-lapping county jurisdiction in the absence of clear and explicit language to that effect.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

By: JOSEPH LANIGAN,
Deputy Attorney General.

jl/d

September 23, 1955.

MR. WILLIAM J. JOSEPH,
Division of Pensions,

State House Annex,
Trenton, New Jersey.

MEMORANDUM OPINION P-27.

DEAR MR. JOSEPH:

You have requested our opinion as to whether the employees of the following offices are to be considered as state or county employees: Probation Department, Prosecutor's Office, County Detectives, County Park Commission, Clerk of the Grand Jury, Jury Commission, and Sheriff. We shall deal with each office separately.

PROBATION DEPARTMENT

N. J. S. A. 2A:168-5 provides as follows:

"The judge or judges of the county court in each county, or a majority of them, acting joinlty, may appoint a chief probation officer, and, on application of the chief probation officer, such men and women probation officers as may be necessary. All probation officers appointed subsequent to April 22, 1929, who are to receive salaries shall be appointed in accordance with the rules and regulations of the civil service commission. . ."

N. J. S. A. 2A:168-7 provides as follows:

"The chief probation officer shall have general supervision of the probation work under the direction of the court. He may appoint such other employees as may be necessary to carry out the purposes of this chapter, but the amount expended for this purpose shall not exceed the amount appropriated therefor in the annual county budget. The chief probation officer may make such necessary rules and regulations with respect to the management and conduct of the probation officers and other employees as may be authorized by the judge or judges of the county court."

N. J. S. A. 2A:168-8 provides as follows:

"The judge or judges authorized to appoint a chief probation officer or probation officers shall fix, by order under the hand of such judge or judges, annual salaries to be paid such officers, and such order shall be filed in the office of the clerk of the county court. The amounts so fixed shall be paid in equal semimonthly payments in the same manner as the salaries of other officers of the county.

"The necessary and reasonable expenses of salaried probation officers incurred in the performance of their duties shall be paid out of the county treasury, after itemized statements of such expenses have been approved by the chief probation officer and one of the county court judges. On request of the chief probation officer, the necessary traveling and maintenance expenses in attending probation officers' meetings and conferences of social work shall be included, when previously authorized by the judge or judges authorized to appoint probation officers.

"The salaries of employees appointed by the chief probation officer shall be fixed by the board of chosen freeholders in accordance with the schedules of the civil service commission, and paid in the same manner as the salaries of probation officers."

N. J. S. A. 2A:168-11 provides as follows:

"Probation officers shall have the powers of constables in the execution of their duties. The duties of probation officers shall be, among others:

"a. To make such investigations and reports under sections 2A:168-3 and 2A:168-13 of this title as may be required by the judge or judges of any court having jurisdiction within the county for which the officer is appointed;

"b. To receive under their supervision, on request of the court having jurisdiction, any person ordered to pay any sum for alimony or support in an order or judgment entered in a matrimonial action;

"c. To receive under supervision any person placed on probation by any court within the county for which the officer is appointed;

"d. To collect from persons under their supervision such payments as may be ordered by the court so to be made, and disburse the money so received under the direction of the court;

"e. To furnish each person under their supervision with a statement of the conditions of his probation and to instruct him regarding them;

"f. To keep detailed records of all the work done;

"g. To keep accurate and complete accounts of all money collected and disbursed, and to give and obtain receipts therefor. and

"h. To make such reports to the courts as they may require."

From the foregoing statutes, it appears that probation departments are created to perform services for the various county courts, and also for the superior court with relation to certain matrimonial matters, N. J. S. A. 2A:168-5 provides for the appointment of probation officers by county court judges, and N. J. S. A. 2A:168-7 places probation work generally "under the direction of" the county courts. Furthermore, the duties of probation officers, as listed in N. J. S. A. 2A:168-11, clearly indicate that probation departments are adjuncts of county courts.

In a previous opinion of ours to your department bearing date of March 3, 1955, we advised you that county court judges must be considered as state employees even though paid by the various counties. It should, therefore, follow that probation officers must also be regarded to be state employees. We are mindful of the fact that N. J. S. A. 2A:168-8 states that salary payments to probation officers shall be paid in the same manner as salaries "of other officers of the county." However, we do not regard this language as a strong enough indication of a legislative intention to constitute probation officers as county employees so as to negate their position as state employees in view of their position with relation to the judicial machinery of the State. They are appointed by county judges who are state employees and operate under the general supervision and control of such state employees. It is, therefore, our opinion that probation officers are state employees who are paid by the various counties in which they are employed.

PROSECUTOR'S OFFICE

Article VII, Section II, paragraph 1 of the New Jersey Constitution provides as follows.

"County prosecutors shall be nominated and appointed by the Governor with the advice and consent of the Senate. Their term of office shall be five years, and they shall serve until the appointment and qualification of their respective successors."

N. J. S. A. 2A:158-1 substantially repeats these constitutional provisions. N. J. S. A. 2A:158-3 prescribes the oath of office to be taken by each county prosecutor, in which the holder of that office swears to "execute the duties of county prosecutor of this state."

N. J. S. A. 2A:158-4 provides as follows:

"The criminal business of the state shall be prosecuted exclusively by the prosecutors, except in counties where, for the time being, there may be no prosecutor, or where the prosecutor desires the aid of the attorney general, or as otherwise provided by law."

N. J. S. A. 2A:158-5 provides as follows:

"Each prosecutor shall be vested with the same powers and be subject to the same penalties, within his county, as the attorney general shall by law be vested with or subject to, and he shall use all reasonable and lawful diligence for the detection, arrest, indictment and conviction of offenders against the laws."

N. J. S. A. 2A:158-7 provides that expenses of prosecutors in enforcement of laws, "upon being certified to by the prosecutor and approved, under his hand, by a judge of the superior court or of the county court for such county, be paid by the county treasurer whenever the same shall be approved by the board of chosen freeholders of such county."

N. J. S. A. 2A:158-10 fixes the salaries of prosecutors in the various counties according to population, and N. J. S. A. 2A:158-16 does the same as to assistant prosecutors. N. J. S. A. 2A:158-13 provides that "the salaries of prosecutors shall be paid at the same times and in the same manner as other county salaries are paid." N. J. S. A. 2A:158-16 provides similarly as to assistant prosecutors.

N. J. S. A. 52:17A-5 provides among other things that "whenever the Attorney General shall have taken over the duties of a county prosecutor, he shall have all of the authority conferred by law upon the prosecutor."

N. J. S. A. 52:17A-15 requires the various county prosecutors to make annual reports to the Attorney General "of the performance of their duties and the operations of their offices." It further directs them to "make such other reports to the Attorney General as the Attorney General may require from time to time."

The position of a county prosecutor in our political structure was considered thoroughly in *State v. Longo*, 136 N. J. L. 587 (E.&A., 1947). Although this case was decided in 1947, the constitutional provisions and the statutes therein considered were similar to, if not identical with, the constitutional provisions and statutes now in existence. In that case, the court stated:

"The Attorney-General and the several Prosecutors of the Pleas are constitutional officers (article 7, section 2, paragraph 3). Their duties are not defined by the constitution but are left, by necessary implication, for definition by the legislature. *Public Utility Commissioners v. Lehigh Valley Railroad Co.*, 106 N. J. L. 411; *O'Reardon v. Wilson*, 4 N. J. Mis. R. 1008, 1011. A prosecutor of the pleas is empowered by statute (R. S. 2:182-1), except as otherwise provided by law, to prosecute the pleas of the state in his county and to do and perform such acts and things in behalf of the State in and about such prosecution as were formerly done and performed by the Attorney-General; and (R. S. 2:182-4) "the criminal business of the state shall be prosecuted exclusively by the prosecutors of the pleas, except in counties where, for the time being, there may be no prosecutor, or where the prosecutor desires the aid of the attorney-general or as otherwise provided by law." The Attorney-General, among his other duties, is empowered (R. S. 52:17A-4f, chapter 20, Pamph. L. 1944) to prosecute the criminal business of the state in a county having no prosecutor or render aid in a prosecution at the request of the prosecutor and may be called upon by a Justice of the Supreme Court to prosecute the criminal business of the state therein, and to represent the state in proceedings on error in criminal cases in the Supreme Court and the Court of Errors and Appeals, and (R. S. 52:17A-5) in functioning in a county shall have all the power and authority of the prosecutor including the representing of the state in all proceedings in criminal cases, on error or otherwise, in the Supreme Court and the Court of Errors and Appeals. . . ."

"Thus, by statute, a county prosecutor is, within his county, the person who is to do such acts and things in behalf of the state as were formerly done by the Attorney-General. . . ."

In view of all the foregoing, it is our opinion, that the office of a county prosecutor must be considered a state office, and its employees must, therefore, be regarded as state employees who are paid by the various counties.

COUNTY DETECTIVES

N. J. S. A. 2A:157-2 provides as follows:

"The prosecutor in each of the several counties of this State may appoint such number of suitable persons, not in excess of the number, and at salaries not less than the minimum amounts, in this chapter provided, to be known as county detectives, to assist the prosecutor in the detection, apprehension, arrest and conviction of offenders against the law. Persons so appointed shall be in the classified service of the civil service and shall possess all the powers and rights and be subject to all the obligations of police officers, constables and special deputy sheriffs in criminal matters."

N. J. S. A. 2A:157-3 through N. J. S. A. 2A:157-9 fixes the salaries of county detectives in the various counties according to population. N. J. S. A. 2A:157-10 provides for the creation of the position of county investigators in the office of the prosecutor, to be appointed by the prosecutor. N. J. S. A. 2A:157-11 through N. J. S. A. 2A:157-16 fixes their salaries in the various counties according to population.

N. J. S. A. 2A:157-18 provides that the salaries of county detectives and county investigators shall be paid by the various counties. In *Dodd v. Van Riper*, 135 N. J. L. 167 (E.&A., 1946) the court stated:

"The third basic contention of the appellants is that the respondent did not comply with the proper procedure in terminating their services. The claim is made that the respondent followed the statutes applicable to county empployees (R. S. title 11, subtitle 3); that the position of county detective is governed by the statutes and rules applicable to state employees (R. S. title 11, subtitle 2 and Civil Service rule No. 46); and that the action taken by the respondent was improper and insufficient so that the rights of the appellants were prejudiced thereby.

"An inspection of the proofs submitted below tends to indicate that the respondent, in terminating the services of the appellants, did purport to follow the statutes applicable to the county service. However, this of itself

is not prejudicial to the appellants if there was also substantial compliance with the statutes and rules applicable to the state service, accepting appellants' contention that the position of county detective falls within the state service."

Although the above-quoted case did not squarely decide that county detectives are state employees, an examination of the status of county detectives and county investigators in the light of pertinent statutes leads to the conclusion that they must be so regarded. They are appointed by, and are under the direct control of the various county prosecutors. Since we have found county prosecutors to be state employees, it is, therefore, our opinion that county detectives and county prosecutors are also state employees who are paid by the various counties.

COUNTY PARK COMMISSION

R. S. 40:37-73 provides for the appointment of county park commissions generally by the boards of chosen freeholders in the various counties which have by referenda adopted the provisions of R. S. 40:37-72 through R. S. 40:37-95.

R. S. 40:37-76 provides that such commissions may sue and be sued, and use a common seal. R. S. 40:37-78 requires the boards of chosen freeholders in the various counties to provide offices for the county park commissions, and to appropriate "such moneys as may be necessary for the payment of salaries and wages . . . and the maintenance of parks, parkways, playgrounds, and recreation places acquired or established by the commission."

R. S. 40:37-79 authorizes the various boards of freeholders to issue bonds for park and recreation facilities "on the requisition of the county park commission." R. S. 40:37-81 authorizes county park commissions to acquire real estate by gift, purchase, or condemnation, but provides that "all such property shall be acquired by the commission in the name of the county."

R. S. 40:37-84 authorizes county park commissions to establish county park police.

Separate provisions are made by statute regarding counties having a population of more than two thousand inhabitants in R. S. 40:37-96 through R. S. 40:37-174, but also provides for the adoption of said provisions by referenda in the various counties. R. S. 40:37-97, as amended, provides that the members of such county park commissions are to be appointed by the Superior Court assignment Judges of the various counties.

R. S. 40:37-99 constitutes such county park commissions as bodies corporate and politic, and R. S. 40:37-101, authorizes them to acquire real estate in their corporate name. R. S. 40:37-101, as amended, provides for the financial support of such county park commissions by the various boards of chosen freeholders by annual appropriation after a public hearing.

R. S. 40:37-129 authorizes the various boards of freeholders, on the requisition of the park commission, to "borrow money in the name and on the credit of the county by issuing bonds of the county . . . ".

The status of county park commissions in counties with a population of more than two hundred thousand inhabitants as established by R. S. 40:37-96 et seq., has been considered by our Courts in *Parks v. Union County Park Commission*, 7 N. J. Super 5 (App. Div., 1950). In that case, the court stated:

"It is conceded by the parties that the Park Commission was established under authority of R. S. 40:37-96, et seq. A careful scrutiny of the statutory provisions convinces us that the Union County Park Commission is an agency of the county. Its creation, structure, purpose, and operation manifestly support our conclusion."

The Court reviewed the pertinent statutory provisions of R. S. 40:37-96, et seq., as outlined hereinabove, and then said (page 8):

"It is readily discernible from the foregoing statutory powers vested in the County Park Commission that it is an instrumentality which is undeniably an adjunct of the county government; that it is established for the beautification and resulting attractiveness of the county and for the benefit of all of the residents; that the cost of its acquisition, operation and maintenance becomes the burden and responsibility of all of the taxpayers of the county. As stated *Glick v. Trustees of Free Public Library*, 2 N. J. 579 (1949), at pp. 583, 584:

'* * * It is an agency of the municipality notwithstanding its incorporation as a body politic. That in itself does not give rise to a relationship radically different in character from that which would otherwise exist. It is that substance and not the form of the creation that is the key to the legislative design.'

Cf. *Trustees v. Civil Service Commission*, 83 N. J. L. 196 (Sup. ct. 1912); affirmed, 86 N. J. L. 307 (E. & A. 1914). It necessarily follows that plaintiff is an employee of Union County . . .".

Since the Court ruled that employees of county park commissions established pursuant to R. S. 40:37-96, et seq., are county employees despite the fact that the members of such county park commissions are appointed by Superior Court Judges and have authority to acquire real estate in the name of such county park commissions, it would obviously regard as county employees those employees of other park commissions, whose memebers are appointed by the various boards of chosen freeholders, and which must acquire real estate in the name of the county.

It is, therefore, our opinion that employees of county park commissions are to be regarded as county employees.

CLERK OF GRAND JURY

N. J. S. A. 2A:73-5 provides for the appointment of a clerk to the grand jury by "the county court of each county." N. J. S. A. 2A: 73-6 provides that clerks to the grand juries shall "receive such annual salaries as shall be fixed by the courts appointing them," which salaries are to be paid by the county treasurers of the various counties.

Since we have previously advised you that county courts are to be considered state instrumentalities, and since we have herein advised you that prosecutors are to be regarded as state employees, it should follow that persons employed in the operation of grand juries, which are a part of our state judicial machinery relating to criminal matters should also be treated as state employees.

This conclusion is fortified by a consideration of the oath which is directed to be administered to foremen and members of grand juries by N. J. S. A. 2A:73-3. In the prescribed oath, they swear "to sit in behalf of the State of New Jersey in and for the county. . . ."

It is, therefore, our opinion that the clerk to a grand jury is to be considered a state employee who is paid by the county.

JURY COMMISSION

N. J. S. A. 2A:68-1, as amended, provides that "in each county of the state there shall be appointed by the Supreme Court, two citizens, resident therein who shall not be members of the same political party, who shall constitute and be designated the jury commissioners of the county." N. J. S. A. 2A:68-2 fixes the term of office of the jury commissioners for one year, and N. J. S. A. 2A:68-4, as amended, provides that "the Supreme Court may remove a jury commissioner at any time."

N. J. S. A. 2A:68-7 fixes the compensation to be paid to jury commissioners in the various counties according to population, and directs such compensation to be paid "by the board of chosen freeholders."

N. J. S. A. 2A:68-11 provides that 'the board of chosen freeholders of each county may select a clerk to the jury commissioners appointed therefor, and fix his compensation . . ." . N. J. S. A. 2A:68-12 provides that "the board of chosen freeholders of each county may appoint all necessary clerks and stenographers in the office of the commissioners of juries, subject to the provisions of Title 11, Civil Service, of the Revised Statutes."

Since jury commissioners are appointed by the Supreme Court and subject to removal by the Supreme Court, and since they are an adjunct to the judicial machinery of the state, they must be regarded as state employees. We must, however, further determine whether their clerks and stenographers, who are appointed as well as paid by the various boards of chosen freeholders, are also to be considered state employees. These employees, although appointed and paid by the boards of freholders, are necessarily under the control and supervision of the jury commissioners. The element of control is a vital, if not conclusive, factor in making a determination of this nature. Furthermore, it would not be logical to regard employees of jury commissioners to be county employees when it has been determined that the jury commissioners themselves are employees of the state.

It is, therefore, our opinion that jury commissioners and their employees are to be regarded as state employees who are paid by the various counties.

SHERIFF

Article VII, Section II, paragraph 2 of the New Jersey Constitution provides as follows:

> "County clerks, surrogates, and sheriffs shall be elected by the people of their respective counties at general elections. The term of office of county clerks and surrogates shall be five years, and of sheriffs three years. Whenever a vacancy shall occur in any such office it shall be filled in the manner to be provided by law."

R. S. 40:41-1 provides that "no person shall be sheriff of any county unless he shall have been a citizen of this state and an inhabitant of the county for at least three years next preceding his election."

R. S. 40:41-2, as amended, requires the bond of a sheriff of any county to be fixed and approved by the senior county court Judge or, in certain cases, by the Superior Court Assignment Judge of the county.

R. S. 40:41-4, as amended, sets forth the oath to be administered to every sheriff-elect. In this oath, the sheriff-elect must swear to "well and truly serve the State of New Jersey in the office of sheriff of the county . . .".

R. S. 40:41-5, as amended, provides for a sheriff-elect to be commissioned by the governor after certification of a County Court Judge or Superior Court Judge that the sheriff-elect has executed a proper bond, and subscribed the oath of office in due form of law.

R. S. 40:41-6 through R. S. 40:41-7.10, as amended, fix the salaries of the sheriffs of the various counties according to population.

R. S. 40:41-14, as amended, provides that a vacancy in the office of sheriff shall be filled by the governor, with the advice and consent of the Senate, from the members of the same political party as that of the previous incumbent of the office.

The status of the office of sheriff was considered in *Doyle v. County of Warren*, 15 N. J. Misc. 434, (Circuit Ct., 1937). The court said:

> "It is sufficiently clear that a sheriff, although chosen by the voters to serve in a county, is a public officer in the State government. The duties he performs include services rendered not alone to the inhabitants of the county, but to the people of the State as well."

Although this case was never taken to the appellate courts, and does not appear to have been referred to by such upper courts, indication is to be found that a sheriff would not be regarded as an officer in the State government by such court. This indication is to be found in *Crater v. County of Somerset*, 123 N. J. L. 407, (E. & A., 1939).

Although *Crater v. County of Somerset* (Supra) does not deal directly with the office of sheriff, it does treat exhaustively with the office of county clerk which, along with the office of surrogate and sheriff, is provided for in Article VII, Section II, paragraph 2 of the New Jersey Constitution, and concerning which there are statutory provisions similar to those relating to the office of sheriff. The constitutional and statutory provisions therein referred to antedate the present New Jersey Constitution, but they are similar to, if not identical with, the provisions presently in existence.

In finding the office of county clerk to be a county office, rather than a State office, the court states:

> "True, respondent is the holder of an office established by the State Constitution. Article VII, section II, placitum 6. Yet, the jurisdiction is essentially local in character, albeit the incumbent may on occasions exercise delegated sovereign power. Territorially, his jurisdiction is limited to the county—as a common law political subdivision—whose electors have chosen him to serve in that capacity. The Constitution classifies the incumbents as 'clerks * * * of counties,' and provides for their election 'by the people of their respective counties * * *.' It is of no moment that, as maintained by respondent, 'the duties of the county clerk * * * affect the welfare of the state and its people as a whole.' Nor is it conclusive of this inquiry that the Constitution provides that 'all civil officers elected or appointed pursuant to the provisions' thereof 'shall be commissioned by the Governor,' or that the Governor is empowered to fill pro tempore a vacancy in such office. Article VII, section II, placitum 10; article V, placitum 12. The prescribed service is rendered to the county as a political subdivision of the state. While fixed by the legislature, the salary is paid by the county.
>
> "But, apart from the foregoing, the question is, after all, one of legislative intent. While a public officer may function in a dual capacity, i.e.,

in the exercise of state governmental functions and those strictly municipal (vide *Rodgers v. Taggart*, 120 N. J. L. 243; affirming 118 Id. 542), the determinative inquiry here is whether the legislature, by the designation 'officer * * * of any county,' embodied in R. S. 1937, 40:11-17, designed to include the clerk of such civil division. We find unmistakable tokens of that purpose. Under title 40, 'Municipalities and Counties,' subtitle 1, chapter 11, 'Officers and Employes,' it is ordained that, except as otherwise provided by law, residence in the county is an indispensable qualification for the holder of 'an office, the authority and duties of which relate to a county only * * *.' R. S. 1937, 40:11-1. The statutory provision under review has likewise been incorporated in title 40, subtitle 1, chapter 11, supra; and it is also significant of this legislative view that, in the provision fixing salaries, such officers are designated as 'county clerks.' *Sheriffs are in like manner classified.* R. S. 1937, 40:41-1. So, too, the surrogates, although under a different title. R. S. 1937, 2:7-1, et seq.; 2:31-4, et seq."
(Underscoring supplied)

It should be noted that the court, in *Crater v. County of Somerset* (supra), finds it "significant of the legislative view" that county clerks and sheriffs are classified under Title 40, relating to "Municipalities and Counties". Since *Crater v. County of Somerset* (supra) is not only the product of a higher court than decided *Doyle v. County of Warren*, but was also decided at a later date, it must be regarded as prevailing.

It is, therefore, our opinion that a county sheriff and his employees should be regarded as county employees.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: CHARLES S. JOELSON,
Deputy Attorney General.

CSJ:mjd

DECEMBER 28, 1955.

HON. EDWARD J. PATTEN,
Secretary of State,

State House,
Trenton 7, New Jersey.

MEMORANDUM OPINION P-28.

MY DEAR SECRETARY OF STATE:

This opinion is in response to your request for advice concerning the beginning and ending dates of terms of office of County Clerks, Surrogates and Sheriffs. We have previously in Formal Opinion, 1955—No. 44 dealt with the beginning and ending dates of the terms of office of County Clerks and Surrogates. In this opinion we shall deal with the beginning and ending dates of the term of office of Sheriff.

Article 7, Section 2, Par. 2 of the Constitution of 1947 provides that Sheriffs shall be elected at general elections; that their term of office shall be three years, but does not provide when such terms shall begin or end. R. S. 40:41-11, however, provides as follows:

> "The commission of every Sheriff elected at any general election shall bear date and take effect on the Wednesday after the first Tuesday succeeding such election, and his term of office shall expire on the first Tuesday after the third succeeding general election."

The statutes also require that the Sheriff shall post his bond on the first Tuesday following the general election, R. S. 40:41-2 as amended, R. S. 40:41-3 as amended.

In view of the specific language of the statute we advise you therefore, that the legislative intention was to have the Sheriff's office commence on the Wednesday after the first Tuesday succeeding the general election, and to have his term of office expire on the first Tuesday after the third succeeding general election.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: JOHN F. CRANE,
Deputy Attorney General.

JFC:lc

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