

OPINIONS  
OF THE  
ATTORNEY GENERAL  
OF  
NEW JERSEY  
1964-1973

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1962-1970

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March 10, 1964

HONORABLE RICHARD J. HUGHES  
Governor of New Jersey  
Trenton, New Jersey

FORMAL OPINION 1964—No. 1.

Dear Governor Hughes:

In June 1963, the United States Supreme Court held unconstitutional a Missouri law which authorized the State to seize a public utility where the continuance of the company's operations is threatened or interrupted by a labor dispute.<sup>1</sup> Because of this decision you have asked for our opinion as to the legality of New Jersey's law regulating labor disputes in public utilities and providing for the seizure of public utilities by the State. N.J.S.A. 34:13B-1 *et seq.* For the reasons stated below it is my opinion that the New Jersey law in question is unconstitutional as it applies to a bus company whose operations are subject to the provisions of the National Labor Relations Act of 1935, as amended by the Labor Management Relations Act of 1947.<sup>2</sup>

Descriptions of the New Jersey statute are contained in *Van Riper v. Traffic Telephone Workers' Federation of New Jersey et al.*, 2 N.J. 335 (1949) and *New Jersey Bell Telephone Co. v. Communication Workers of America*, 5 N.J. 354 (1950). In brief, the New Jersey law, referred to herein as the Public Utility Strike Seizure Law, begins with a declaration of State policy that "heat, light, power, sanitation, transportation, communication and water are life essentials of the people \* \* \*" (N.J.S.A. 34:13B-1) and that it is necessary for the welfare and health of the people to regulate public utilities operating under State franchise. Although the statute recognizes that employees shall have the right to organize and bargain collectively through representatives of their own choosing (N.J.S.A. 34:13B-2), it provides for seizure and operation of the utility by the State, through action of the Governor, where there is "a threatened or actual interruption of the operation of such public utility as the result of a labor dispute \* \* \* strike, a lockout or other labor disturbance \* \* \*." N.J.S.A. 34:13B-13. The law further provides that after seizure by the State, the persons employed by the public utility shall be deemed employees of the State, and they may not lawfully participate in any strike, work stoppage or refusal to work for the State as a means of enforcing their demands. N.J.S.A. 34:13B-19. Thereafter, the dispute "then existing between the public utility and the employees" must be submitted to a Board of Arbitration appointed in accordance with the law. N.J.S.A. 34:13B-20. The Board of Arbitration is required to arbitrate the dispute, hold hearings and render a decision and order which is to be "conclusive and binding upon all of the parties to the dispute \* \* \*." N.J.S.A. 34:13B-21 and N.J.S.A. 34:13B-23. The statute also provides various penalties for violations, including a penalty of \$10,000.00 per day for each day during a lockout, strike, work stoppage or failure to abide by the decision or order of the Board of Arbitration. N.J.S.A. 34:13B-24.

In the *Van Riper* case, *supra*, the Supreme Court held that Federal legislation in the labor relations field did not preclude the enactment of this State law, but that adequate standards had not been established to regulate the compulsory arbitration proceedings, and the court, therefore, declared the act unconstitutional in its entirety. The act was subsequently amended and its constitutionality upheld in the *New Jersey Bell Telephone* case, *supra*, decided by our Supreme Court in 1950. In this latter case our highest court expressly rejected the argument that Congress had preempted

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1704, Alexander Griffith; 1714, Thomas Gordon; 1719, Jeremiah Basse; 1723, James Alexander; 1728, Lawrence Smith; 1733, Joseph Warrel; 1754, Cortlandt Skinner; 1776, William Paterson; 1783, Joseph Bloomfield; 1792, Aaron D. Woodruff; 1811, Andrew S. Hunter; 1817, Theodore Frelinghuysen; 1829, Samuel L. Southard; 1833, John Moore White; 1838, Richard S. Field; 1841, George P. Molleson; 1844, Richard P. Thompson; 1845, Abraham Browning; 1850, Lucius Q.C. Elmer; 1852, Richard P. Thompson; 1857, William L. Dayton; 1861, F.T. Frelinghuysen; 1867, George M. Robeson; 1870, Robert Gilchrist; 1875, Joel Parker; 1875, Jacob Vanatta; 1877, John P. Stockton; 1897, Samuel H. Grey; 1902, Thomas N. McCarter; 1903, Robert H. McCarter; 1908, Edmund Wilson; 1914, John W. Wescott; 1919, Thomas F. McCran; 1924, Edward L. Katzenbach; 1929, William A. Stevens; 1934, David T. Wilentz; 1944, Walter D. Van Riper; 1949, Theodore D. Parsons; 1954, Grover C. Richman, Jr.; 1958, David D. Furman; 1962, Arthur J. Sills; 1970, George F. Kugler, Jr.

the field by the National Labor Relations Act of 1935 and the Labor-Management Relations Act of 1947.

In the Missouri case mentioned above, decided in 1963 by the United States Supreme Court, a similar statute of the State of Missouri was declared unconstitutional. In that case, the Governor of Missouri issued an Executive Order to take possession of the plant, equipment and facilities of the Kansas City Transit, Inc. located in the State of Missouri for the use and operation by the State of Missouri in the public interest. 374 U.S. at 76. The Governor of Missouri had issued a proclamation that the public interest, health and welfare were jeopardized by the threatened interruption of the company's operations as a result of a strike called by members of a union after negotiations for a new contract had failed. The Supreme Court of Missouri upheld the constitutionality of the Missouri law and rejected the contention that it conflicted with Federal labor legislation. The United States Supreme Court reversed, holding the Missouri law unconstitutional on the express ground that it is in conflict with Federal law that has occupied the field. The Court said, 374 U.S. at 82:

"The short of the matter is that Missouri, through the fiction of 'seizure' by the State, has made a peaceful strike against a public utility unlawful, in direct conflict with federal legislation which guarantees the right to strike against a public utility, as against any employer engaged in interstate commerce. In forbidding a strike against an employer covered by the National Labor Relations Act, Missouri has forbidden the exercise of rights explicitly protected by Sec. 7 of that Act. Collective bargaining, with the right to strike at its core, is the essence of the federal scheme. As in Wisconsin Board, a state law which denies that right cannot stand under the Supremacy Clause of the Constitution."<sup>3</sup>

The United States Supreme Court also rejected the contention that the State law may validly operate as "emergency legislation", citing its earlier decision in *Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America, Division 998 v. Wisconsin Employment Relations Board*, 340 U.S. 383, 71 S. Ct. 359, 95 L Ed 364 (1951). It was there held that a State may not deny the Federally guaranteed right of collective bargaining and the right to strike in cases of alleged emergencies where Congress itself has provided express limitations on these rights in cases of national emergencies only.

The Missouri statute is very similar to the existing New Jersey Public Utility Strike Seizure Law. The Missouri statute defines certain public utilities as "life essentials of the people" and declares that the possibility of labor strife in utilities operating under governmental franchise is a threat to the welfare and health of the people. 374 U.S. at 78. The act imposes requirements in connection with the duration and renewal of collective bargaining agreements similar to the New Jersey laws. 374 U.S. at 78, fn. 5; N.J.S.A. 34:13B-4. The Missouri statute creates a State Board of Mediation to aid in the settlement of labor disputes. Where the continued operation of the utility is threatened, it empowers the Governor of Missouri to "take immediate possession of" the utility "for the use and operation by the State of Missouri in the public interest." 374 U.S. at 79.

In the Missouri case, the United States Supreme Court found that the seizure of the utility under Executive Order of the Governor of Missouri did not in fact create "a state-owned and operated utility whose labor relations are by definition excluded

from the coverage of the National Labor Relations Act." 374 U.S. at 81. The Court held that the employees of the utility did not, in fact, become employees of the State; the State did not pay their wages; the State did not direct or supervise their duties; the State did not manage the company or change the conduct of the company's business; and the company's property was not actually conveyed, transferred or otherwise turned over to the State. Similarly, although the New Jersey law authorizes the Governor to take possession of a public utility through "such departmental agency of the government" as the Governor may designate (N.J.S.A. 34:13B-13), the law does not provide for acquisition of title to the property by condemnation, purchase or otherwise, nor could it appropriate current funds for such purpose. The same section of the New Jersey statute authorizing seizure requires the return of the utility's plant and facilities as soon as practicable "after the settlement of said labor dispute."

The New Jersey statute does not set up adequate machinery for the complicated operations of various utilities in the state. It simply recites that after the utility is seized "for the use and operation of the State" (N.J.S.A. 34:13B-19) the relationship between the State and the persons employed at the public utility "shall be that of employer and employee." In apparent reliance upon the provisions of the New Jersey Constitution of 1947, Article I, paragraph 19, this section of the statute makes it unlawful for any person employed at the utility to participate in any strike or refusal to work for the State "as a means of enforcing demands of employees against the State or for any other purpose contrary to the provisions of this act."

It is unlikely, however, that the employees are to be deemed State employees, whose employments are normally governed by the Civil Service laws of the State. See Article VII, Section I, par. 2 of the *1947 Constitution of New Jersey*. The statute does not contain any detailed provisions regulating the employment relationship between the State and the so-called new State employees. The employees could not be paid by the State with State moneys, in the absence of a current appropriation made by law. Article VIII, Section I, par. 2, *1947 Constitution of New Jersey*. It must be assumed, therefore, that the employees would be paid from funds of the utility and would continue on the payroll of the utility. Certainly "the dispute" continues to be a dispute between the private management of the utility and its "former" employees.

Of course we recognize the serious impact upon the welfare of the State and its citizens of a strike which interrupts the service of a public utility operating throughout a vast section of our State. We do not lightly disregard the public policy of the State desired by the Legislature, especially where this statute had previously been upheld by the highest court of our State. But that decision of our highest court was not tested in the United States Supreme Court and had been rendered before the highest court of our land announced its decision in the Wisconsin Employment Relations Board case, *supra*, which dealt with a public utility anti-strike law, and before the recent decision in the Missouri case. Decisions of the United States Supreme Court are the supreme law of the land, and conflicting decisions of State courts must bow to the mandate of the United States Supreme Court where Federal law controls.<sup>4</sup>

Mr. Justice Stewart, writing for a unanimous Court in the Missouri case, noted that in enacting the Taft-Hartley Act, Congress expressly rejected the suggestion that public utilities be treated differently from other employers. In footnote 9, 374 U.S. at 82, the late Senator Taft is quoted as saying:

"If we begin with public utilities, it will be said that coal and steel are just as important as public utilities. I do not know where we could draw the

the line. So far as the bill is concerned, we have proceeded on the theory that there is a right to strike and that labor peace must be based on free collective bargaining."

See also the *Wisconsin Employment Relations Board* case, *supra*, 340 U.S. at 392, fn. 15, which recites that the Case Bill passed in 1946 proposed special treatment, including a denial of the right to strike, in connection with a labor dispute, affecting commerce, involving a public utility whose rates are fixed by some governmental agency. The President vetoed this bill and criticized the special treatment accorded to public utilities. Congress did not override the veto. Although such special treatment for public utilities was again proposed in 1947, it was not included in the Labor Management Relations Act of 1947, but provision was made for special procedures to deal with strikes which might create *national* emergencies.

At the present time employees of the Public Service Coordinated Transport are on strike. These are employees of various locals of the Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America, A.F. of L.-C.I.O. This is the same national union that was involved in both the Wisconsin and Missouri cases referred to above in which the laws in question of those States were declared unconstitutional. The intrastate and interstate bus operations of the Public Service Coordinated Transport have been halted by the strike, with substantial inconvenience to the public. However, Congress has declared it to be the policy of our nation that the employees of such a company be guaranteed the right to bargain collectively through representatives of their own choosing and to strike, if necessary, as an incident to that collective bargaining process. It is clear that the Federal labor law applies to all industries affecting interstate commerce, and even to a privately-owned public utility whose business and activities are carried on wholly within a single state. *Wisconsin Employment Relations Board* case, *supra*, 340 U.S. at 391.

In rare instances we are compelled to express the view that a statute enacted by the New Jersey Legislature, expressive of the public policy of this State is unconstitutional because of conflict with the New Jersey Constitution or with the United States Constitution. See *Wilentz v. Hendrickson*, 133 N.J. Eq. 447 (Chan. 1943), *aff'd* 135 N.J. Eq. 244 (E.&A. 1944). The Attorney General is a constitutional officer. Article V, Sec. IV, par. 1, 3, *1947 Constitution of New Jersey*. Like other State officers, I have taken an oath required by the New Jersey Constitution to support the Constitution of this State and of the United States. Art. VII, Sec. I, par. 1. It would be a violation of that oath to say that New Jersey and its Governor are not bound by the holding of the United States Supreme Court in the *Missouri* case. See *Cooper v. Aaron*, 358 U.S. 1, 16-20, 78 S. Ct. 1401 (1958), where the court held that because the Federal Constitution is the supreme law of the land, its decision in *Brown v. Board of Education*, 347 U.S. 483 (1954) and companion cases, involving racial segregation in school districts of Kansas, South Carolina, Virginia and Delaware, was binding on those states as well as all other states. In the *Cooper* case, *supra*, the court said at p. 18, "No state legislator or executive or judicial officer can war against the (Federal) Constitution without violating his undertaking to support it." See also *Lionel Corp. v. Grayson-Robinson Stores*, 15 N.J. 191, 197-198 (1954); and *McKinney v. Blankenship*, 154 Tex. 632, 282 S.W. 2d 691 (Sup. Ct. Texas 1955), where the highest court of Texas also rejected the contention that Texas was not bound by the United States Supreme Court's decision in the *Brown* school segregation case simply because the constitution and statutory provisions requiring segregation in Texas schools were not before the United States Supreme Court in the *Brown* case.

Here we are concerned with the applicability of a decision of the United States Supreme Court in the *Missouri* case. In 1954, in its Report to Governor Robert B. Meyner, at p. 48, the Governor's Committee on Legislation Relating to Public Utility Labor Disputes noted the following:

"In Missouri, which has a statute almost verbatim identical with ours, (Mo. Rev. Stat. Annot. Section 10178.101 *et seq.*) the State Attorney General, in a letter to the members of the House, dated March 19, 1951, advised that the statute was unconstitutional and void.

"Although all of these statutes remain on the books, enforcement of compulsory arbitration has practically ceased in most places since the Wisconsin case. \* \* \*"

It is noted also that Attorney General Theodore D. Parsons filed a brief for the State of New Jersey as *amicus curiae* in the *Wisconsin Employment Relations Board* case, calling to the attention of the Supreme Court of the United States the New Jersey statute and the decision of our highest court upholding that statute. The attorneys general for Michigan and Pennsylvania also appeared as *amici curiae* in an effort to uphold the constitutionality of the Wisconsin Public Utility Anti-Strike Law, but, as noted above, that effort failed. The declaration of unconstitutionality of the Wisconsin statute in a case in which the Attorney General of this State participated made it clear as early as 1951 that the New Jersey statute was of questionable validity. In my opinion, the decision of the United States Supreme Court in 1963 in the *Missouri* case removes all doubt from this conclusion.

For the reasons stated above, in my opinion the New Jersey statute is unconstitutional as applied to the interruption of service of a bus company whose operations are subject to the Federal labor laws.

Respectfully yours,  
ARTHUR J. SILLS  
*Attorney General*

By: THEODORE I. BOTTER  
*First Assistant Attorney General*

1. *Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, et al. v. State of Missouri*, 374 U.S. 74, 83 S. Ct. 1657, 10 L. Ed. 2d 763 (1963).

2. 49 Stat. 449, Ch. 372, 29 U.S.C. sec. 151 *et seq.*; 61 Stat. 136, Ch. 120, 29 U.S.C. (Supp. III) sec. 141 *et seq.*

3. The Court noted, however, that its decision does not affect the right of the State to own or operate a public utility or any other business, nor the right of the State to deal with emergency conditions of public danger, violence or disaster under appropriate provisions of State law.

4. The legality of New Jersey's law had been questioned apart from the cases in the New Jersey courts testing its validity. See Bernard Cushman, *Compulsory Arbitration in Action—the New Jersey Bell Telephone Case*, 2 *Syracuse Law Review* 251 (1951); Charles Christenson, *Legality of New Jersey's Anti-Strike Law*, 3 *Labor Law Journal* 767 (1952). See also The Governor's Committee on Legislation Relating to Public Utility Labor Disputes, *Report to Governor Robert B. Meyner of Sept. 9, 1954*, starting at page 47: "Therefore, the constitutionality of the New Jersey statute is now a matter of considerable uncertainty." This committee (at page 54) recommended the repeal of the New Jersey statute.

March 18, 1964

HON. GEORGE C. SKILLMAN, *Director*  
*Division of Local Government*  
 137 East State Street  
 Trenton, New Jersey

## FORMAL OPINION 1964—No. 2.

Dear Mr. Skillman:

You have requested our opinion as to whether a municipality which receives payments from the State of New Jersey as compensation for loss of tax revenue under the Round Valley act of 1956<sup>1</sup> or the Spruce Run act of 1958<sup>2</sup> has the right to retain these moneys exclusively for local municipal purposes or must pay a portion thereof for county and school purposes.

In our opinion, for the reasons set forth herein, a municipality receiving moneys from the State in lieu of taxes for property acquired by the State for use in the Round Valley or Spruce Run Reservoir projects cannot retain such receipts exclusively for local municipal needs but must apply such moneys to local municipal, county, and school purposes in accordance with the proportions established under the general tax rate of the municipality in the year preceding the year of receipt.

N.J.S.A. 58:20-1 *et seq.* authorized and directed the Commissioner of Conservation and Economic Development to acquire in the name of the State an area of land in Hunterdon County for the purpose of establishing a reservoir to be known as the Round Valley Reservoir. N.J.S.A. 58:21-1 *et seq.* authorized and directed the Commissioner to make a comparable acquisition of an area also located in Hunterdon County for the purpose of establishing a water supply system, to be known as the Spruce Run Reservoir. The State was authorized to make the necessary land acquisitions by purchase or by the exercise of its eminent domain powers.

When originally enacted, the Round Valley act of 1956 contained the following provision:

"To the end that municipalities may not suffer loss of taxes by reason of the acquisition and ownership by the State of New Jersey of property therein, the State Treasurer upon certification of the Commissioner of Conservation and Economic Development shall pay annually to each municipality in which property is acquired pursuant to this act a sum equal to that last paid as taxes upon such land for the taxable year immediately prior to the time of its acquisition" (L. 1956, c. 60, §5).

In 1957 this section was amended as follows:

"To the end that municipalities may not suffer loss of taxes by reason of the acquisition and ownership by the State of New Jersey of property therein, the State Treasurer upon certification of the Commissioner of Conservation and Economic Development shall pay annually on October 1 to each municipality in which property is acquired pursuant to this act (a) a sum equal to that last paid as taxes upon such land for the taxable year immediately prior to the time of its acquisition and (b) in addition, for a period of 13 years beginning with the year 1958 the following amounts: in

the first year a sum of money equal to that last paid as taxes upon improvements upon such land for the taxable year immediately prior to the time of its acquisition; and thereafter the following percentages of the amount paid in the first year, to wit, second year 92%; third year 84%; fourth year 76%; fifth year 68%; sixth year 60%; seventh year 52%; eighth year 44%; ninth year 36%; tenth year 28%; eleventh year 20%; twelfth year 12%; thirteenth year 4%.

"All sums of money received by the respective municipalities as compensation for loss of tax revenue pursuant to this section shall be applied to the same purposes as is the tax revenue from the assessment and collection of taxes on real property of the said municipalities, and to accomplish this end such sums shall be apportioned in the same manner as the general tax rate of the municipality for the tax year preceding the year of receipt" (L. 1957, c. 215, §3).

L. 1958, c. 33, §6, N.J.S.A. 58:21-6, which is contained in the statute establishing the Spruce Run Reservoir, is identical in all respects to the above-quoted 1957 amendment of the Round Valley act.

The interdict of each statute is that "all sums of money received by the respective municipalities as compensation for loss of tax revenue pursuant to this section shall be applied to the same purposes as is the tax revenue from the assessment and collection of taxes on real property of the said municipalities \* \* \*". The purposes to which revenues derived from the assessment and collection of taxes on real property may be applied are specified by statute. They are local municipal purposes (N.J.S.A. 54:4-42), public school purposes (N.J.S.A. 54:4-39, 54:4-45), state purposes (N.J.S.A. 54:4-40), and county purposes (N.J.S.A. 54:4-41). *See e.g.: Village of Ridgefield Park v. Bergen County Bd. of Taxation*, 31 N.J. 420 (1960), *appeal dismissed* 365 U.S. 648, 81 S. Ct. 834 (1961). It is clear, therefore, that a municipality receiving moneys from the State under N.J.S.A. 58:20-5 or N.J.S.A. 58:21-6 cannot retain such receipts exclusively for local municipal needs and avoid appropriate payments for other statutory purposes.

The statutes also specify the method by which moneys received by municipalities from the State must be applied for the respective needs of municipalities, school districts and the county. It is thus provided that "\* \* \* Such sums shall be apportioned in the same manner as the general tax rate of the municipality for the tax year preceding the year of receipt" (N.J.S.A. 58:20-5; N.J.S.A. 58:21-6). Thus, to formulate an example, if in the year preceding the year of receipt, under the general tax rate of the municipality, 15% of all tax revenues were apportioned for county purposes, 75% were apportioned for local and regional school purposes and 10% were apportioned for local municipal purposes, then the same respective proportions of the moneys received by the municipality from the State would have to be applied to the county, the school districts and the municipality.

If the Legislature intended to permit municipalities to retain for local purposes all payments made by the State, it obviously would not have amended L. 1956, c. 60, §5 by enacting L. 1956, c. 215, §3, which amendment was repeated verbatim in L. 1958, c. 33, §6, and which states specifically that such receipts must be applied to the same ends and for the same purposes as ordinary revenues from real estate taxes. Nor can it be urged that the absence of a specific directive in the statutes permitting municipalities to retain such payments was a mere matter of legislative inadvertance.

Certainly, if the Legislature intended that such payments or contributions be retained by the recipient municipalities, it would have made explicit provision to accomplish this result. As stated in *Duke Power Co. v. Patten*, 20 N.J. 42, 49 (1955), "If that had been intended, it could have been easily provided for". The Legislature, for example, in connection with contributions in lieu of taxes which are made by the Palisades Interstate Park Commission, did make such an explicit provision permitting their retention for municipal purposes, L. 1947, c. 73, §4; N.J.S.A. 54:4A-7.

These payments or distributions by the State are designed to compensate municipalities for the loss of tax revenues; they may be considered in the nature of voluntary contributions in lieu of taxes. As stated in *State v. Lanza*, 27 N.J. 516, 524, 525 (1958), *appeal dismissed* 358 U.S. 333, 79 S. Ct. 351 (1959):

"\* \* \* [I]t is an inherently voluntary subsidiary measure to avert economic crisis in the functioning of its [the State's] own local subdivisions of government as a direct result of its own action for the common good of its inhabitants in a critical area of state responsibility, the basic object of the legislation. It was a secondary or minor means of warding off undue hardship and failure in local administration of government by its own agencies that would otherwise be an incident of a course taken to meet a great necessity of the people as a whole. The losses thus reimbursed have no direct relation to the compensation to be made for the real property to be acquired for the service of the general current and reasonably foreseeable needs. \* \* \* And, moreover, the recompense thus provided for the loss of tax revenue shall be applied 'to the same purposes as is the tax revenue' from the assessment and collection of taxes on real property of the particular municipality, and 'apportioned in the same manner as the general tax rate of the municipality for the tax year preceding the year of receipt,' a course of action in which the State is directly interested. \* \* \*".

Affected municipalities are not unjustly deprived of the "contributions in lieu of taxes" paid by the State under the statutes merely because they must pay a proportion thereof to the county and local or regional school districts. Upon the acquisition of municipal lands by the State for reservoir purposes, the municipalities, of course, were deprived of ratables and tax revenues. So also were the county and school districts. The municipalities, however, also received a corresponding benefit in connection with taxes to be raised by them for county and school purposes since the loss of these ratables would result in proportionate decreases in county and school taxes. And, the tax payments for school and county purposes of other municipalities which did not lose such ratables, would be proportionately increased. If affected municipalities were not required by the statutes to make some partial payment of the revenues received from the State for county and school needs, they would clearly be enriched at the expense of other municipalities within the county required to share in these costs. Moreover, even if these partial payments to the county and school districts by affected municipalities create surplus revenues for the school districts and the county in the year in which payments are made, the annual budgets for the year succeeding the year of payment would be diminished and all municipalities would benefit proportionately in these reduced budget requirements.

Thus, while it is apparent that the statutes do not furnish full compensation for the losses of tax revenues, there is no constitutional precept which would require an

arithmetically perfect adjustment. "It is well-recognized that absolute equality in taxation is a practical impossibility and that the Legislature in setting up taxing procedures is not held to a standard of perfection". *Totowa v. Passaic County Bd. of Taxation*, 5 N.J. 454, 464 (1950); cf. *Berkeley Heights Tp. v. Div., etc., Dept. Taxation*, 68 N.J. Super. 364, 369 (App. Div. 1961), *certif. denied* 36 N.J. 138 (1961). Moreover, the State has the right to determine, as it has by these statutes, the manner in which its own subdivisions for local self-government shall share in revenues for their respective public purposes. *State v. Lanza, supra*; *City of Passaic v. Passaic County Bd. of Taxation*, 31 N.J. 413 (1960).

We advise you, therefore, that under N.J.S.A. 58:20-5 and N.J.S.A. 58:21-6, municipalities receiving payments from the State of New Jersey may not retain these receipts exclusively for local municipal purposes but must pay an apportioned share thereof to the county and school districts in accordance with the general tax rate of the municipality for the tax year immediately preceding the year in which any such payment is received.

Very truly yours,  
 ARTHUR J. SILLS  
*Attorney General*  
 By: ALAN B. HANDLER  
*Deputy Attorney General*

1. L. 1956, c. 60, §1 *et seq.*; N.J.S.A. 58:20-1 *et seq.*, as amended L. 1957, c. 215, §1 *et seq.*
2. L. 1958, c. 33, §1 *et seq.*; N.J.S.A. 58:21-1 *et seq.*

May 6, 1964

MR. JOSEPH P. LORDI, *Director*  
*Division of Alcoholic Beverage Control*  
 Department of Law and Public Safety  
 1100 Raymond Boulevard  
 Newark, New Jersey

FORMAL OPINION 1964 - NO. 3

Dear Director Lordi:

We have been asked for an interpretation of Chapter 152, Laws of 1962, as it applies to specific situations hereinafter described. Chapter 152 generally limits the direct or indirect ownership of alcoholic beverage retail licenses to no more than two per person.

The first question posed is whether a landlord who is the owner of more than two alcoholic beverage retail licenses may make a lease with a tenant who operates a retail liquor store with rent based in part upon a percentage of gross sales. The question is whether such a lease gives the landlord a beneficial interest in an additional license contrary to the provisions of Chapter 152.

The second question posed is whether a corporation which is the holder of an alcoholic beverage retail license acquired prior to the effective date of Chapter 152 may thereafter purchase and retire the shares of stock held by some stockholders having a 50% interest in the corporation, thereby giving the remaining group of stockholders complete control of the corporation.

Subject to the qualifications expressed below, for the reasons hereinafter stated we find in general that neither of these transactions is prohibited by Chapter 152, Laws of 1962.

Section 1 of the Act provides that after the effective date of the Act, with certain exceptions, no person shall acquire a beneficial interest in more than two alcoholic beverage retail licenses. The same section provides that no person who holds a beneficial interest in more than two such licenses on the effective date of the Act shall be required to give up his interest in any or all of such licenses.

Section 2 of the Act provides that the Act shall not apply to the acquisition of "an additional license or licenses or an interest therein" when such license is issued in connection with a hotel containing at least 50 sleeping rooms.

Certain other exceptions and limitations are set forth in the remainder of the Act. For example, section 6 provides generally that nothing in the Act shall affect the right of any person having a beneficial interest in a retail license or licenses to hold or acquire an interest of not more than 10% of any corporation whose shares of stock are publicly traded.

The constitutionality of the Act has been upheld in *Grand Union v. Sills*, 81 N.J. Super. 65 (Law Div. 1963), appeal pending. In the course of that opinion the purpose of the Act was explained as follows, at 67:

"Briefly put, the statute in question limits the number of retail alcoholic beverage licenses that may be held by any one person to two. The curb is prospective only. Plaintiffs and those similarly situated will not be disturbed in their present multiple license holdings, but they are prohibited from acquiring additional licenses."

The first question is whether a landlord who is the owner of more than two alcoholic beverage retail licenses may enter into a "gross sales lease" with a tenant who operates a retail liquor store without thereby acquiring a "beneficial interest" in another license contrary to the statutes. A specific lease proposal has not been submitted. Therefore, it is necessary to answer this question in a general manner.

"Percentage leases" are those in which the amount of rent is based on a percentage of gross sales, or gross or net profits of the lessee's business, usually with a stipulated minimum. Percentage leases are used frequently in order to fix the landlord's return in proportion to the value of the store's location, and to adjust for fluctuations in economic conditions and dollar values. Note: "The Percentage Lease—Its Functions and Drafting Problems", 61 *Harv. L. Rev.* 317, 318 (1948); *Silverstein v. Keane*, 19 N.J. 1, 12 (1955). For examples of such leases, see also *Farber v. Shell Oil Co.*, 47 N.J. Super. 48 (App. Div. 1957) and *Plassmeyer v. Brenta*, 24 N.J. Super. 322 (App. Div. 1953).

Leases calling for the payment of rent based upon gross receipts have been commonly used in the past in connection with licensed premises subject to the jurisdiction of the Division of Alcoholic Beverage Control. In fact, the Division has previously considered whether such leases give a landlord an interest in the license. This ques-

tion has arisen because N.J.S.A. 33:1-26 contains a provision which has been part of the Alcoholic Beverage Law since 1933:

"Any person who shall exercise or attempt to exercise, or hold himself out as authorized to exercise, the rights and privileges of a license except the licensee and then only with respect to the licensed premises, shall be guilty of a misdemeanor."

The same section of the law contains the following provision:

"No person who would fail to qualify as a licensee under this chapter shall be knowingly employed by or connected in any business capacity whatsoever with a licensee\*\*\*."

Accordingly, licensing officials have always sought to determine whether any person other than the licensee has an interest in the license. See: *The Boss Co., Inc. v. Board of Commissioners of Atlantic City*, 40 N.J. 379, 388 (1963). In *Matter of Club Parsippany, Inc.*, Bulletin 411, Item 8, decided June 20, 1940, Acting Commissioner E.W. Garrett considered a lease which provided that the licensee should pay as rent 10% of the annual gross receipts from the sale of alcoholic beverages up to \$15,000, and 15% of all gross receipts in excess of that sum, but in no event less than \$1200 per year. The Acting Commissioner held that because of this arrangement the landlord "is so interested in the license applied for and the business to be conducted thereunder that its interest must be disclosed" by the applicant for the license. The Acting Commissioner said:

"Normally, rental agreements provide for the payment of a fixed sum by the tenant to the landlord. Such agreements give the landlord no interest (within the contemplation of Question 28) in the licensed business since the rent is due and payable without reference to the receipts of the business. Hence applicants who lease premises, paying a fixed rent, need not disclose in answer to Question 28 the rental agreement as an interest of the landlord.

"On the other hand, where the rent is computed with reference to the receipts of the licensed business, disclosure of the arrangement must be made so that the issuing authority may determine whether the leasing agreement is *bona fide*, or a mere subterfuge to conceal either an actual partnership of the landlord and tenant in the licensed business or a situation where the tenant is a mere front for the landlord."

See also *Weston & Co., et al. v. Municipal Board of A.B.C. of Newark, et al.*, Bulletin 719, Item 2, decided June 28, 1946 where it was held that a sub-landlord does not have an unlawful interest in the licensed business by virtue of his receipt of 4% of the gross sales in consideration for the sub-lease.

An agreement to pay by way of rent, salary or otherwise a portion or percentage of the gross or net profits or income from the licensed business must be disclosed in response to Question 31 of the application for municipal retail licenses, as promulgated in Bulletin 996 dated January 4, 1954. On a number of occasions since that time the Division of Alcoholic Beverage Control has stated in reply to inquiries that

the payment of a substantial percentage of receipts by way of rent due a landlord would in effect give the landlord an interest in the licensed business in violation of N.J.S.A. 33:1-26. The Division has taken the position, however, that if the leasing arrangement is *bona fide* and not a subterfuge to conceal a partnership of the landlord and tenant, or an arrangement whereby the tenant is a mere "front" for the landlord, an agreement to pay as rent a reasonable percentage, generally not more than 6% of the gross receipts, would not be considered unlawful.

The mere receipt of a share of gross sales, "unless coupled with such factors as sharing the losses, right of control, community of interest, and the use of partnership terms in the instrument" will not create a partnership. Note, *supra*, 61 *Harv. L. Rev.*, at 320, fn. 21. This has been the law of New Jersey since the decision in *Perrine v. Hankinson*, 11 N.J.L. 181 (Sup. Ct. 1829), which held that an agreement to pay as rent a portion of the profits of a farm and tavern did not constitute the parties partners so as to disable one from suing the other at common law. See also: *Austin, Nichols & Co. v. Neil*, 62 N.J.L. 462 (sup. Ct. 1898); *United States ex rel. Kessler et al. v. Mercur Corp. et al.*, 83 F. 2d 178, 182 (2 Cir. 1936); *Annotation*, "Lease or tenancy agreement as creating partnership relationship between lessor and lessee," 131 A.L.R. 508, 536 (1941).

In the *United States ex rel. Kessler* case, *supra*, the court reviewed several cases which held that the sharing of gross receipts did not convert a landlord-tenant relationship into a partnership or joint venture. In other cases cited therein, however, courts had found that various factors, such as control over earnings and the treatment of assets as jointly owned property, justified treating the relationship as one of joint venture rather than of landlord-tenant. But it is not necessary to find that a partnership or joint venture relationship exists before determining that Chapter 152 has been violated. Other elements short of a partnership or joint venture may combine to establish the acquisition by the landlord of a beneficial interest in a new license contrary to the provisions of Chapter 152.

As stated above, by virtue of N.J.S.A. 33:1-26, a liquor license in New Jersey must be free "from any device which would subject it to the control of persons other than the licensee." *The Boss Co., Inc. v. Board of Commissioners of Atlantic City*, *supra*, 40 N.J. at 388. See also: *Mannion v. Greenbrook Hotel, Inc.*, 138 N.J. Eq. 518, 520 (E. & A. 1946); *Lachow v. Alper*, 130 N.J. Eq. 588, 590 (Chan. 1942); *Walsh v. Bradley*, 121 N.J. Eq. 359, 360 (Chan. 1937). Similarly, where a lease entitles the landlord to a share of gross receipts the relationship of the parties and all conditions of the transaction should be scrutinized to determine whether a normal, arms-length landlord-tenant relationship has been established or whether the landlord's interest or control has been carried so far as to give him a beneficial interest in an additional license contrary to the proscription of Chapter 152.

There are many factors that could be considered. These include the extent of participation in gross receipts, pre-existing relationships of the parties, whether or not the landlord has any right to control the manner of conducting the business and how the lease compares with other leases for similar premises. In an arms-length transaction it would be expected that a fluctuating rent provision would be of benefit to the tenant as well as the landlord under varying conditions. However, if the percentage lease provides a minimum, inflexible, guaranteed rent equal to the full fair rental value of the property, the lease would give the landlord additional rent if gross receipts are high but gives the tenant no relief if business is bad. See: Note, "The Percentage Lease", *supra*, 61 *Harv. L. Rev.* at 323, fn. 36. Thus, if the landlord is guaranteed what would clearly be considered the maximum fair rental value of the

property, any additional rent by way of a percentage of gross receipts might be considered a share in the value of the licensed business.

Without seeing a specific lease and knowing all the facts of the transaction, we can go no further than to indicate the care with which each leasing arrangement must be examined by the Division. It would not be unreasonable for the Division to establish, as has been done in the past, a standard that limits the share in gross receipts that can be paid to the lessor, even where the relationship of the parties suggest no intent to use the lease arrangement as a means of evading the effect of Chapter 152, Laws of 1962.

If the rental agreement, considered as a whole, represents an acceptable landlord-tenant arrangement, not entered into for the purpose of circumventing the provisions of Chapter 152, such an agreement would not constitute a "beneficial interest" within the meaning of the statute. The test should be whether the agreement represents solely a reasonable method of compensating the landlord for the use of the premises or whether it is a device whereby the landlord can also derive benefits equivalent to a participation in the business conducted therein.

The second question involves a corporation which is the holder of a number of alcoholic beverage retail licenses acquired prior to August 3, 1962, the effective date of the aforesaid Act. The shares of the corporation are held by two families, each family having 50% of the outstanding stock. The corporation now proposes to purchase and retire all shares of stock held by one of the families if such a transaction is permissible under the law. This would result in the remaining family members becoming the sole stockholders of the corporation.

In the instant situation, the corporation does not contemplate acquiring additional licenses or interests in additional licenses. It merely proposes to redistribute among some of the existing stockholders the extent of ownership of its stock, and, indirectly, of the licenses already held by it, through the repurchase of outstanding shares of stock. The proposed action does not constitute the acquisition of an additional license by the corporation; nor is it the acquisition by any stockholder of a beneficial interest in a new or different license not held by the corporation on the effective date of the Act. Therefore, this transaction is not prohibited by the Act. This opinion in no way attempts to deal with the situation that would exist if a person holds not more than 10% of a publicly traded corporation and thereafter seeks to increase his stockholdings in that corporation above the 10% level.

Therefore, you are advised that where a closed corporation, before the effective date of the Act, was the holder of two or more licenses, the Act does not prevent the corporation from buying and retiring the shares of stock held by some of the stockholders even if the effect is to increase the control by the remaining stockholders of the outstanding shares of stock of the corporation.

Very truly yours,  
ARTHUR J. SILLS  
*Attorney General*

By: THEODORE I. BOTTER  
*First Assistant Attorney General*



July 22, 1964

THELMA PARKINSON SHARP  
*President, Civil Service Commission*  
 State House  
 Trenton, New Jersey

## FORMAL OPINION 1964 - NO. 4

Dear Mrs. Sharp:

We have been asked whether the freeze on appointments imposed by the Faulkner Act\* between the date of the municipal election and the date the newly elected officers take office applies only in the year of the effective date of an optional plan of government adopted pursuant to the Act or both in that year and in all subsequent years in which elections are held.

In our opinion, the freeze applies only in the year of the effective date of an optional plan of government adopted pursuant to the Act.

The freeze on appointments is stated in N.J.S.A. 40:69A-208(a) in the following language:

"No subordinate board, department, body, office, position or employment shall be created and no appointments shall be made to any subordinate board, department or body, or to any office, employment or position, including without limitation patrolmen and firemen, between the date of election of officers and the date the newly elected officers take office under any optional plan."

This language taken by itself, would admit of either construction. However, a consideration of N.J.S.A. 40:69A-26 and an analysis of the structure of the Faulkner Act indicate that N.J.S.A. 40:69A-208(a) applies only during the year in which a new plan of government was adopted.

N.J.S.A. 40:69A-26 states that upon the adoption of any of the optional forms of government under the Faulkner Act, the municipality shall be governed by the plan adopted, by those provisions of the Faulkner Act which are common to all plans, and by the general law, "subject to the transitional provisions of Article 17" of the Act (N.J.S.A. 40:69A-150 to 40:69A-210). N.J.S.A. 40:69A-208(a) is a transitional provision of the Faulkner Act. Therefore, N.J.S.A. 40:69A-208(a) is applicable only as a transitional measure, at the time of the adoption of the new plan.

An analysis of the structure of the Faulkner Act leads to the same conclusion. The Faulkner Act enacted as L. 1950, c. 210, was divided into seventeen articles. Article 17 is captioned, "Additional Provisions Common to Optional Plans".

Subarticle H of article 17 is entitled "Succession in Government". This subarticle did not originally contain the above quoted paragraph (a) of N.J.S.A. 40:69A-208. The four sections that it did contain dealt only with the transitional aspects of instituting a new form of government in the year of the effective date of an optional plan.

The above quoted language of paragraph (a) of N.J.S.A. 40:69A-208 was incorporated into the law by the enactment of section 7 of L. 1954, c. 69. The amendatory act re-enacted what had been section 17-59 of the Faulkner Act as paragraph (b) of that act, which today appears as N.J.S.A. 40:69A-208(b).

Subarticle I of article 17 of the Faulkner Act is entitled "General Provisions". It contains three sections. The first is a severability provision, the second gives the short title and the third gives the effective date. Subarticle A or article 17 deals with elections in general. Subarticle B deals with regular municipal elections. Subarticle C deals with officers and employees. General provisions for incorporation and powers of a municipality governed by a form of government under the Faulkner Act are found in Article 2 (N.J.S.A. 40:69A-26 to 30). If the language with which we are concerned was intended to be applicable to election years generally, it would have been much more appropriate for the draftsmen of the amendatory legislation to have included it in one of the other subarticles of article 17 referred to above or in article 2.

The language with which we are concerned stands in sharp contrast to the freeze on appointments in certain Walsh Act cities that took effect after every election. For example, R.S. 40:73-5 banned appointments "between the first Tuesday in May and the third Tuesday in May in any year in which an election of a board of commissioners for that city shall be held." See *Abbott v. Donohoe*, 10 N.J. Misc. 1037 (Sup. Ct. 1932). As is well known, the Walsh Act was carefully considered by the draftsmen of the Faulkner Act. The difference in the language used in the amendment to the Faulkner Act is significant and suggests a different meaning.

Because N.J.S.A. 40:69A-208(a) is a transitional provision referred to in N.J.S.A. 40:69A-26 and because the aforesaid section has been deliberately placed in a subtitle which applies only to the year of the date of the adoption of a new form of government, it is our opinion that the freeze on appointments imposed by the Faulkner Act applies only in the year of the effective date of the optional plan of government adopted pursuant to the Act.

Very truly yours,

ARTHUR J. SILLS  
*Attorney General*

By: MARILYN H. LOFTUS-SCHAUER  
*Deputy Attorney General*

\*N.J.S.A. 40:69A-1 *et seq.*, officially entitled the Optional Law, N.J.S.A. 40:69A-210.

December 29, 1964

HONORABLE JOHN A. KERVICK  
*State Treasurer*  
 State House  
 Trenton, New Jersey

## FORMAL OPINION 1964—NO. 5

Dear Mr. Kervick:

You have requested our opinion as to whether veterans in the employ of the bi-state commissions, the Delaware River Basin Commission and the Delaware River Joint Toll Bridge Commission, and who are members of the Public Employees' Retirement System, are entitled to the benefits provided war veterans by Chapter 15A of Title 43.

It is our opinion for the reasons stated herein that such veteran members are entitled to the same benefits from the retirement system as other State employees who are war veterans.

N.J.S.A. 43:15A-60 and N.J.S.A. 43:15A-61 grant certain special credit and retirement privileges to veteran public employees. N.J.S.A. 43:15A-60(a) provides in part:

"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 by such veteran member previous to the effective date of this section . . . shall be credited to him as a 'Class B' member . . ."

N.J.S.A. 43:15A-61 gives special retirement privileges on varying conditions to (a) "any public employee veteran member in office, position or employment of this State . . . on January 2, 1955 . . .", (b) "Any veteran becoming a member after January 2, 1955 who shall be in office, position or employment of this State . . .", and (c) "any public employee veteran member who has been for 20 years in the aggregate in office, position or employment of this State . . ."

Since employees of the Delaware River Basin Commission and the Delaware River Joint Toll Bridge Commission are not strictly in the employment of this State alone, the question posed is whether veteran employees of these agencies are eligible for the benefits provided in Sections 60 and 61 for service rendered "in . . . employment of this State."

P.L. 1953, c. 84, N.J.S.A. 43:15A-73 authorized and directed the Board of Trustees of the Public Employees' Retirement System to enroll in the Public Employees' Retirement System established by that statute those employees of the New Jersey Turnpike Authority, the New Jersey Highway Authority, the Palisades Interstate Park Commission, the Interstate Sanitation Commission and the Delaware River Joint Toll Bridge Commission who consented and filed application for membership. In the case of the Delaware River Joint Toll Bridge Commission, the employees were to be only those who were employed on the free bridges across the Delaware River under the control of said commission. In a 1963 amendment to N.J.S.A. 43:15A-73, employees of the Delaware River Basin Commission, created in 1961, were permitted to enroll. P.L. 1963, c. 19.

From the initial enactment of Section 73 and without any change or qualification on amendment, the statute provided that "upon such enrollment, the said employees shall be subject to the same contribution and benefit provisions of the retirement systems as State employees." The sweeping language of section 73 demonstrates that the Legislature intended to put employees of these interstate instrumentalities on a parity with State employees. Moreover, by tracing the origin of these agencies and the roles they play in fulfilling the functions of government, the legislative intent to provide equality of benefits between employees of interstate instrumentalities and State employees is made abundantly clear.

The Delaware River Joint Toll Bridge Commission and the Delaware River Basin Commission are bodies corporate and politic and perform governmental functions which project beyond State lines. The former was created because additional bridge facilities were needed between New Jersey and Pennsylvania "for the accommodation of the public and the development of both states," and it was thought that such facilities "should be developed without the expenditure of large sums from the public revenues" and "that there be a single agency for both states." See Preamble to the Compact Creating the Delaware River Joint Toll Bridge Commission, N.J. S.A. 32:8-1. Article I of the interstate compact provides in part:

"The commission shall constitute the public corporate instrumentality of the Commonwealth of Pennsylvania and the State of New Jersey for the following public purposes, and shall be deemed to be exercising an essential governmental function in effectuating such purposes, . . ." N.J. S.A. 32:8-2.

The Delaware River Basin Commission was also created "as a body politic and corporate" and "as an agency and instrumentality of the governments of the respective signatory parties." N.J.S.A. 32:11D-7. New Jersey had joined with New York and Pennsylvania, with the consent of Congress, and formed the Commission because this State realized that "the water resources of the basin are affected with a local, state, regional and national interest and their planning, conservation, utilization, development, management and control, under appropriate arrangements for inter-governmental cooperation, are public purposes of the respective signatory parties . . . The water resources of the basin are functionally inter-related, and the uses of these resources are interdependent. A single administrative agency is therefore essential . . ." N.J.S.A. 32:11D-3.

Every state is expected to carry out certain basic governmental functions. The construction, maintenance and operation of highways, bridges and tunnels is one of these functions. *Miller v. The Port of New York Authority*, 18 N.J. Misc. 601 (Sup. Ct. 1939). Control over the use and the conservation of a state's water resources is another and should be exercised in the general public interest and for public benefit. *McCartier v. Hudson County Water Co.*, 209 U.S. 349 (1907); *City of Trenton v. State of New Jersey*, 262 U.S. 182 (1923). Each one of the multi-state authorities and commissions listed in Section 73 performs an essential governmental function. Adequate handling of such governmental functions requires multi-state cooperation and the formation of a distinct instrumentality to act in behalf of sovereign states involved. These joint governmental corporations enabled comprehensive treatment of common problems and the better performance of governmental functions through coordinated effort. See generally Delaware River Basin Compact, P.L. 1961, c. 13,

N.J.S.A. 32:11D-1, *et seq.*; Palisades Interstate Park Compact, P.L. 1937, c. 148, N.J.S.A. 32:17-1 *et seq.*; Tri-State Compact Creating Interstate Sanitation Commission, P.L. 1935, c. 321, N.J.S.A. 32:18-1, *et seq.*; Compact Creating the Delaware River Joint Toll Bridge Commission, P.L. 1934, c. 215; P.L. 1947, c. 283; P.L. 1952, c. 333; N.J.S.A. 32:8-1 *et seq.* When the adequate handling of a governmental function requires multi-state action and a distinct entity acting on behalf of two or more sovereign states is created to perform that function, such entity's work is that of the state itself; for the entity "is undoubtedly a direct state agency, exercising an essential governmental function and is, therefore, an alter ego of the state . . ." *Miller v. The Port of New York Authority, supra*, at 607.

It is clear that the employees of the interstate authorities and commissions discussed above render vital and important public services to the states affected by them. The Legislature in Section 73 gave the employees of these instrumentalities the opportunity to be covered by the Public Employees' Retirement System. We can infer that this opportunity was granted in recognition of the fact that these employees render important public services to the State comparable to the services of ordinary State employees. It was this consideration that led the Legislature to provide in N.J.S.A. 43:15A-73 that "upon such enrollment, the said employees shall be subject to the same contribution and benefit provisions of the retirement system as State employees." If employees of the agencies enumerated in Section 73 are entitled to the "same contribution and benefit provisions of the retirement system as State employees," they should be entitled to the special veterans credit and retirement privileges of Sections 60 and 61. Although Sections 60 and 61 both use the phrases "public employee veteran member . . . in . . . employment of this State," while Section 73 equates the employees of the enumerated instrumentalities with "State employees," this slight difference in phraseology should not be construed to effect disparate results. Nothing in Sections 60 and 61 imply that the services rendered must be rendered "within the State," i.e., within the geographical limits of the State, as long as they are rendered by one "in office, position or employment of this State." In fact, a rationale based on the geographical locale where the services are rendered would be antithetical to the Legislature's explicit creation of interstate bodies to handle multi-state problems. Additionally, all permanent employees of the State are State employees and members of the System. N.J.S.A. 43:15A-7(b). When Sections 60 and 61 refer to "public employee veteran members . . . in . . . employment of this State," they include "State employees." The drafters used the phrases interchangeably. This is further evidenced by the language of Section 60(b) which begins "The accrued liability on behalf of State employee veteran members . . ."

If veteran employees of the Delaware River Joint Toll Bridge Commission, the Delaware River Basin Commission and the other agencies listed in Section 73 are denied the retirement credit and privileges of Sections 60 and 61, the phrase "subject to the same . . . benefit provisions . . . as State employees" is emasculated. No proviso or condition is attached to the mandate in Section 73 that "said employees shall be subject to the same . . . benefit provisions . . . as State employees." This means that all "the said employees" of these agencies who are members of the Public Employees' Retirement System are to be considered "State employees." If a member of one of these interstate instrumentalities can meet the specific qualification requirements for special credit or privileges under Chapter 15A of Title 43, such member is entitled to such "benefit provisions of the retirement system as [other] State employees." No exception is made for "veteran employees" of these agencies. If the Legislature had intended to confer only partial or limited benefits on such veteran employees, (i.e.,

all benefits of the system except the special veteran benefits of Sections 60 and 61) it would have been a simple matter to have expressed that purpose by directly appending a qualifying phrase. See *Transcontinental Gas Pipe Line Corporation v. The Department of Conservation and Economic Development of the State of New Jersey*, 43 N.J. 135, 146 (1964). The fact that the Legislature did not qualify the benefits to be received by the employees of these agencies manifests an intent that these employees have the same benefits accorded to State employees, including all the veterans benefits.

For the foregoing reasons, we conclude that war veterans in the employ of the bi-state commissions, the Delaware River Basin Commission and the Delaware River Joint Toll Bridge Commission, who are members of the Public Employees' Retirement System, are entitled to the benefits provided war veterans in Sections 60 and 61 of Chapter 15A of Title 43.

Very truly yours,  
ARTHUR J. SILLS  
*Attorney General*  
By: RICHARD NEWMAN  
*Deputy Attorney General*

December 29, 1964

HONORABLE JOHN A. KERVICK  
*State Treasurer*  
State House  
Trenton, New Jersey

FORMAL OPINION 1964-NO.6

Dear Mr. Kervick:

You have requested our opinion whether the Issuing Officials, being the Governor, yourself as the State Treasurer, and the Comptroller of the Treasury, may lawfully issue bonds known as "State Higher Education Construction Bonds of 1964" pursuant to the provisions of the Higher Education Construction Bond Act (1964), L. 1964, c. 142, as amended, L. 1964, c. 143, (herein sometimes referred to as the Act).

For the reasons hereinafter set forth, we are of the opinion that the Issuing Officials may lawfully and properly issue the aforesaid bonds.

In reaching our conclusion we have considered the following facts, viz.: On May 18, 1964, the Legislature passed Senate Bill No. 371. This bill became L. 1964, c. 142. This Act authorized the creation of a debt of the State of New Jersey through the issuance of bonds as direct obligations of the State in the sum of \$40.1 million for public higher education facilities. Specifically, it authorized capital expenditures in that amount for Rutgers, the State University, the State Colleges and the Newark College of Engineering. The Act contained the usual provisions with respect

to the issuance of State bonds. It placed a ceiling upon interest in the amount of \$27.06 million. It also provided that the proposed bonds shall mature in installments commencing not later than the fifth year and ending not later than the fifteenth year from the date of issuance of each series but not later than thirty years from the effective date of the Act (L. 1964, c. 142, §§ 4, 17). Of significance is the following provision of the Act:

"For the purpose of complying with the provisions of the State Constitution this act shall, at the general election to be held in the month of November, 1964, be submitted to the people. In order to inform the people of the contents of this act it shall be the duty of the Secretary of State, after this section shall take effect, and at least 15 days prior to the said election, to cause this act to be published in at least 10 newspapers published in the State and shall notify the clerk of each county of this State of the passage of this act, and the said clerks respectively shall cause to be printed on each of the said ballots, the following:\*\*\*

#### COLLEGE BOND ISSUE.

Shall the act entitled 'An act authorizing the creation of a debt of the State of New Jersey by the issuance of bonds of the State in the sum of \$40,100,000.00 for public higher education facilities; providing the ways and means to pay the interest of said debt, not to exceed in the aggregate the sum of \$27,060,000.00, and also to pay and discharge the principal thereof; and providing for the submission of this act to the people at a general election,' be approved?" (L. 1964, c. 142, §20.)

Shortly thereafter, the Legislature enacted an amendatory law, Senate Bill No. 399, which was approved by the Governor as L. 1964, c. 143 on July 13, 1964, simultaneously with his approval of Senate Bill No. 371. The purpose of Chapter 143 is evident from the Statement accompanying the bill, namely, that the bill "contains certain technical amendments" designed to conform the Higher Education Construction Bond Act with a companion measure known as the New Jersey Institutions Construction Bond Law (1964), L. 1964, c. 144.

The changes in Chapter 143 provided for the "acquisition of land" to be included in the capital expenditures (L. 1964, c. 143, §1); discretion with respect to the maturity of each bond series for a term shorter than 30 years from the date of issuance (*Id.* § 2); changes in phraseology with respect to voter approval and of the interchangeability of issued bonds (*Id.*, § 3). There are other changes pertaining to the handling and disposition of the proceeds from the bond sale including accrued interest and premiums (*Id.*, §§4, 5 and 6). It was further provided that the bonds of each series shall mature in installments ending no later than the 30th year from the date of issue rather than the 15th year, with additional discretion vested in the issuing officials with respect to redemption and refundability under appropriate circumstances (*Id.*, § 7). Chapter 143, it is to be noted, did not change the maximum aggregate interest cost of the proposed bond issue. Consequently the extension of the permissible maturity date from 15 to 30 years in Chapter 143 could not affect the limitation upon the total interest cost. Thus, the changes contemplated by Chapter 143 in no way affect the essential objective of the Higher Education Construction

Bond Act (1964) which, it is to be emphasized, was the incurrence of the public debt by the people of the State of New Jersey in the amount of \$40.1 million, with a maximum interest limitation of \$27.06 million for the purpose of constructing higher educational facilities for Rutgers, the State University, the State Colleges, and the Newark College of Engineering.

Pursuant to section 20 of Chapter 142, the Secretary of State certified to the county clerks of the respective counties that there should appear on the ballot to be voted upon by the voters of the entire State at the General Election to be held on November 3, 1964, as Public Question No. 2, the statement of the question appearing in section 20 of Chapter 142. Pursuant to this notification, there did appear on the ballot at the General Election held on November 3, 1964 as Public Question No. 2 the question as stated in Chapter 142. The question so published and stated in the official ballot was also contained in the General Election Sample Ballots distributed to voters in advance of the General Election. With respect to newspaper publication, however, there was published the unamended version of L. 1964, c. 142, including its recitals and the question which ultimately appeared on the ballot for the General Election.

It further appears from the Statement of the Determination of Result of the General Election of November 3, 1964 on public questions submitted to the people made by the Board of State Canvassers that of the total vote cast for Public Question No. 2, the "College Bond Issue," 992,669 votes were cast in the affirmative and 804,278 votes were cast in the negative.

On November 24, 1964 there was enacted L. 1964, c. 223 making appropriations for the purposes of the Higher Education Construction Bond Act. Chapter 223 appropriated the proceeds to be derived from the sale of the State Higher Education Construction Bonds of 1964 "the issuance of which is provided for in chapter 142 of the laws of 1964 (as amended by chapter 143 of the laws of 1964) which said act was submitted to the people and approved by the people at the General Election held on November 3, 1964." L. 1964, c. 223, § 3.

You further advise us that the Issuing Officials propose to issue bonds under the Higher Education Construction Bond Act (1964) as amended, the interest cost on which will not exceed in the aggregate the authorized maximum interest of \$27.06 million.

In view of the fact that the newspaper publication of L. 1964, c. 142 did not encompass the specific amendments thereto contained in L. 1964, c. 143, the precise question is whether bonds may be issued by the State of New Jersey under and pursuant to the Higher Education Construction Bond Act (1964).

In our opinion no constitutional questions arise by reason of the manner in which the Act was published. The New Jersey Constitution does not require the newspaper publication of a statute specifically creating a debt of the State of New Jersey. The constitution provides:

"The Legislature shall not, in any manner, create in any fiscal year a debt or debts, liability or liabilities of the State, which together with any previous debts or liabilities shall exceed at any time one per centum of the total amount appropriated by the general appropriation law for that fiscal year, unless the same shall be authorized by a law for some single object or work distinctly specified therein. Regardless of any limitation relating to taxation in this Constitution, such law shall provide the ways and means,

exclusive of loans, to pay the interest of such debt or liability as it falls due, and also to pay and discharge the principal thereof within thirty-five years from the time it is contracted; and the law shall not be repealed until such debt or liability and the interest thereon are fully paid and discharged. No such law shall take effect until it shall have been submitted to the people at a general election and approved by a majority of the legally qualified voters of the State voting thereon. All money to be raised by the authority of such law shall be applied only to the specific object stated therein, and to the payment of the debt thereby created. This paragraph shall not be construed to refer to any money that has been or may be deposited with this State by the government of the United States. Nor shall anything in this paragraph contained apply to the creation of any debts or liabilities for purposes of war, or to repel invasion, or to suppress insurrection or to meet an emergency caused by disaster or act of God." *N.J. Const.* (1947), Art. VIII, Sec. II, par. 3.

The Act, as evidenced by the statement of the public question set forth in the ballot, has "been submitted to the people at a general election" and it has been "approved by a majority of the legally qualified voters of the State voting thereon." Thus the requirements of the constitutional provision have been met by the enactment of L. 1964, c. 142 (as amended) and by its submission to the people of the State of New Jersey at the General Election of November 3, 1964.

Analysis of the pertinent statutes and decisional law leads to the conclusion that there was no legal defect with respect to the publication which prevents issuance of bonds pursuant to the Higher Education Construction Bond Act (1964). In our opinion, the publication as hereinabove set forth constitutes substantial compliance with the provisions of the Act and the omission from the publication of the amendments set forth in L. 1964, c. 143 does not constitute a failure to make the publication required by the Act.

The general election laws of the State of New Jersey do not disclose an overriding State policy requiring the newspaper publication of public questions which are to be submitted to the people at a general election. R.S. 19:14-33. The provisions of section 20 of Chapter 142 demonstrate an awareness on the part of the Legislature that the New Jersey Constitution required only the submission of the public question to the people on the ballot at the general election. Newspaper publication was directed by the Legislature in section 20 merely "[i]n order to inform the people of the contents of this act." The statement of question which section 20 directed to be submitted on the ballot discloses what the Legislature considered to be the essential provisions of the bond act in order to permit the electorate to exercise an intelligent choice.

The amendments contained in Chapter 143 did not in any respect alter the purpose of the proposed bonds, the principal amount of bonds to be issued or the aggregate interest costs. Significantly, the Legislature in amending Chapter 142 did not change the statement of the public question to be submitted to the people in section 20. This statement of the public question emphasized that the important features of the bond issue are the specific objective of the bonds and the principal amount and the total interest costs thereof. It is to be noted that one of the changes contemplated by Chapter 143 permitted a maturity period not exceeding 30 years instead of 15 as originally prescribed in Chapter 142. This, however, is not a change in the basic

bond issue as defined by the Legislature. The only constitutional limitation with respect to maturity is 35 years. As previously stated, the change in maturity limits is not a factor which could result in aggregate interest costs exceeding the statutory restrictions of \$27.06 million. Thus, in overall effect, the amendments of Chapter 143 involved technical and non-critical financial provisions and minor changes in phraseology. Consequently, the publication of Chapter 142, without the amendments of Chapter 143, suffices to inform the people of the contents as to the Higher Education Construction Bond Act (1964).

The great weight of authority recognizes that a defect in a statement or public notice of the technical or financial details of a bond issue is unlikely to affect in a meaningful way the choice of the electorate. Note, 70 *Harv. L. Rev.* 1077, 1079 (1956-57). Consequently, courts have regarded such defects as insubstantial. *E.g.*, *City of Louisville v. Kesselring*, 257 S.W. 2d 599 (Ky. Ct. of App. 1953). In *State v. City of Miami*, 41 So. 2d 888 (Fla. Sup. Ct. 1949), the Florida Supreme Court considered the validity of bonds to be issued by the City of Miami. The proposed bonds were to be issued pursuant to a resolution in five series and dated at such time in the future as the City Commission should determine and each to mature in two to twelve years after that date. It was urged that such bonds would be contrary to those actually approved by the vote of freeholders in a special bond election which prescribed the bonds to be sold in single series with a fixed maturity schedule commencing July 1, 1948 and ending July 1, 1958. The proposed bonds would have been issued after the July 1, 1948 commencement date and would have matured beyond the schedules originally fixed. The Court nevertheless approved the bonds:

"... The Charter of the City authorized the issuance of the bonds. The freeholders approved the amount and purpose of the bonds, which were the same in both issues. Other requirements, such as denomination, maturities and series, are matters that may be imposed in the discretion of the issuing authority, so long as constitutional and statutory limitations are not transgressed. All the maturities here were within the time prescribed by the constitution. The fact that the bonds as issued were in five series instead of one, and that they were to mature from two to twelve years after date, as fixed by the Commission, is not material." 41 So. 2d at 889.

Even in instances where there have been mistakes, misstatements or omissions concerning financial provisions of proposed bond issues which appear in the ballot itself, bond statutes so approved by the voters have not been declared invalid; such irregularities do not have the tendency to mislead, deceive or confuse the people and are not considered substantial. *Cf.*, *Dunlap v. Williamson*, 369 P. 2d 631 (Okla. Sup. Ct. 1962); *State v. Beidleman*, 121 N.E. 2d 561, 564 (Ohio Ct. of App. 1953). Where the ballot itself correctly sets forth the essential provisions of the bond proposition to be passed upon by the electorate (as in the present situation involving the Higher Education Construction Bond Act (1964)), a misstatement, irregularity or omission of an insubstantial nature in a public election notice will not suffice to vitiate the law authorizing the proposed bonds. *Cf.*, *State v. McGlynn*, 135 N.E. 2d 632 (Ohio Ct. of App. 1955).

Decisions which have declared bond acts invalid because of defects in election notices or in the statement of the public question submitted usually have involved

instances where particular provisions or terms of proposed bonds have been in conflict with specific statutory requirements, *Mann v. City of Artesia*, 76 P. 2d 941 (N.M. Sup. Ct. 1938), or where general statutory provisions have been construed by state courts to require the inclusion of the subject matter omitted, *Eastern Shore Public Service Co. v. Town of Seaford*, 137 Atl. 115 (Del. Ct. of Ch. 1936); *Peterman v. City of Milford*, 104 A. 2d 382 (Del. Ct. of Ch. 1954).

New Jersey decisions pertaining to elections in general clearly support the conclusion that the bond act has been lawfully adopted. Cf., *Sharrock v. Keansburg*, 15 N.J. Super. 11 (App. Div. 1951). In *Lindabury v. Clinton Township*, 93 N.J.L. 96 (Sup. Ct. 1919), it was contended that an election should be invalidated because of the failure of the local clerk to advertise the specific fact that the question propounded by the statute would be submitted to the voters. The Court noted that there was no specific requirement in the act itself for special publication. It emphasized, however, that:

"There is no serious contention in the case that a full and fair expression of local sentiment upon this question was not obtained at this election; that any voter was misled, deluded or ignorant of the situation, or failed to receive a sample ballot presenting the legislative query, and such being the fact that the rule of law is settled that a mere clerical oversight, omission or deliction will not avoid the result." 93 N.J.L. at 98. See also, *Brown v. Street Lighting District*, 70 N.J.L. 762, 766 (E. & A. 1904); *Winters v. Warmolts*, 70 N.J.L. 615, 618 (Sup. Ct. 1903); *Hartley v. Board of Elections*, 93 N.J.L. 313, 314-15 (Sup. Ct. 1919).

It has been recognized consistently by the New Jersey courts in recent decisions that technical irregularities in election procedures cannot serve to invalidate the results of an otherwise fair election and thus frustrate the expressed will of the electorate. In *re Livingston*, 83 N.J. Super. 98, 107 (App. Div. 1964); In *re Bethlehem Tp.*, 74 N.J. Super. 448, 463 (App. Div. 1962). In *Wene v. Meyner*, 13 N.J. 185, 196 (1953) this essential policy was aptly expressed:

"Where, as here, there is an unwitting omission of a formal requirement otherwise supplied in substance, the ballots are invulnerable; the overturning of the result in such circumstances would frustrate the will of the voters for errors and omissions of form not related to the merits; and this would do violence to the legislative will. In this regard, acts and omissions by the district board mandatory before election may for reasons of policy be deemed directory after the election, if it undubitably appears that the election result was not thereby prejudiced. The question is essentially one of fairness in the election. An election is not vitiated by the defaults of election officers not involving malconduct or fraud, unless it be shown that thereby the free expression of the popular will in all human likelihood has been thwarted."

To the same effect is the statement in *In re Hackensack Recall Election*, 31 N.J. 592, 595 (1960):

"\*\*\* In the absence of malconduct or fraud, we cannot overturn a concluded election for an irregularity in the ballot unless in all human likelihood the irregularity has interfered with the full and free expression of the popular will, and has thus influenced the result of the election."

As previously demonstrated, the amendments of Chapter 143 pertained to technical changes, non-critical financial provisions and minor alterations in phraseology. The published Act, in its recitals, fully set forth the proposals for capital expenditure and itemized the specific amounts to be allocated for higher education purposes. The publication contained the question to be voted upon by quoting verbatim the title of the Act. The title specified the amount of the public debt to be created, the maximum amount of interest to be paid thereon and the purpose for which the bonds were to be issued. This is what the Legislature deemed important. It is thus clear that the amendments reflected in L. 1964, c. 143 did not alter materially the substantive provisions of the Higher Education Construction Bond Act (1964). Under the foregoing authorities the Higher Education Construction Bond Act (1964), L. 1964, c. 142, as amended by L. 1964, c. 143, was duly and validly approved by the people of the State of New Jersey at the General Election held on November 3, 1964.

For the reasons expressed herein, we are of the opinion that the Issuing Officials may lawfully issue bonds in accordance with the provisions of the Higher Education Construction Bond Act (1964), L. 1964, c. 142, as amended by L. 1964, c. 143.

Very truly yours,

ARTHUR J. SILLS  
Attorney General

By: DONALD M. ALTMAN  
Deputy Attorney General

December 29, 1964

HONORABLE JOHN A. KERVICK  
State Treasurer  
State House  
Trenton, New Jersey

FORMAL OPINION 1964—NO.7

Dear Mr. Kervick:

You have requested an opinion as to the exemption from personal property taxation of certain enumerated classifications of vehicles registered under the provisions of Title 39 of the Revised Statutes of the State of New Jersey, and upon which registration fees have been paid.

More specifically, you have asked whether the following types of vehicles are exempt from taxation under the provisions of N.J.S.A. 54:4-3.21, viz:

- a. Private utility and house type semitrailers and trailers (N.J.S.A. 39:3-8).
- b. Trailers and semitrailers used to haul machinery (N.J.S.A. 39:4-26).
- c. Road building machinery, traction engines and other machinery (N.J.S.A. 39:4-30).
- d. Motor vehicles owned or controlled by manufacturers of motor vehicles, dealers in motor vehicles, transporters of vehicles, persons engaged in the business of financing the purchase of motor vehicles, corporations engaged in the business of insuring motor vehicles (N.J.S.A. 39:3-18).
- e. Farm tractors and traction equipment, motor vehicles used exclusively as farm machinery or farm implements which may travel upon the public highways from one farm, or portion thereof, to another farm, or portion thereof (N.J.S.A. 39:3-24).

In addition, you ask whether equipment which is mounted on an exempt vehicle should be considered a part of that vehicle and also entitled to exemption.

The exemption of motor vehicles from personal property taxation is derived from N.J.S.A. 54:4-3.21 which provides as follows:

"All motor vehicles registered by the motor vehicle department of the State of New Jersey and upon which registration fees have been paid, in accordance with the provisions of Title 39, Motor Vehicles and Traffic Regulations, shall be exempt from taxation under this chapter."

The exemption was originally enacted as *L. 1927, c. 338, §1, p. 790* which amended the personal property tax law to exempt motor vehicles as defined therein from its provisions. The amendment provided:

"...203. The following property shall be exempt from taxation under this act, namely: \*\*\*

"(17) All motor vehicles registered by the Motor Vehicle Department of the State of New Jersey and upon which registration fees have been paid, in accordance with an act entitled 'An act defining motor vehicles and providing for the registration of the same and the licensing of drivers thereof; fixing rules regulating the use and speed of motor vehicles; fixing the amount of license and registration fees; prescribing and regulating process and the service thereof and proceedings for the violation of the provisions of this act and penalties for said violations,' also known as chapter two hundred and eight of the Laws of New Jersey, one thousand nine hundred and twenty-one, its supplements and amendments; *provided, however*, that nothing in this act contained shall be construed to interfere in any way with the provisions of an act entitled 'An act concerning auto busses commonly called jitneys, and their operation in cities,' approved March seventeenth, one thousand nine hundred and sixteen, or any act amendatory thereof or supplemental thereto, or in any way be construed to relieve any autobus from the payment of any license fee, franchise tax or other imposition in the nature thereof whether such fee, tax or imposition be paid to the state of New Jersey, or to any municipality or municipalities thereof."

"The purpose of this act is to abolish the property tax on motor vehicles."

At the time of the passage of this legislation in 1927, motor vehicles were defined in *L. 1291, c 208*, the predecessor to Title 39, Revised Statutes, as follows:

"... 'motor vehicle' includes all vehicles propelled otherwise than by muscular power, excepting such vehicles as run only upon rails or tracks." *L. 1921, c. 208, §1, p. 643.*

This early definition was recodified in Title 39, Revised Statutes, without change (*R.S. 39:1-1*). Nowhere within the context of *L. 1927, c. 338* does the Legislature refine its definition sufficiently to make clear whether it intends to include specifically within the class of motor vehicles exempted from personal property taxation each of the vehicles which are the subject of the within inquiry.

In construing a statute,

"... [I]t is fundamental that statutes cannot be considered in a vacuum. They must be understood in their relation and interaction with other laws which relate to the same subject or thing; they must be construed together with these related sections in order to learn and give effect to the true meaning, intent and purpose of the legislation as a whole." *Appeal of New York State Realty & Terminal Co.*, 21 N.J. 90, 98 (1956).

It has been further indicated that:

"... [I]n construing statutes the inquiry is to determine the purpose and intent of the Legislature. If the statute alters or amends the previous law or creates or abolishes types of action, it is important to discover the intention of the Legislature to ascertain the old law, the mischief, and the proposed remedy." *DeFazio v. Haven Savings and Loan Ass'n.*, 22 N.J. 511, 518-519 (1956).

It is therefore necessary to seek the legislative intention in enacting the exemption amendment with reference to the background of the 1927 legislation.

In 1924 by *Assembly Joint Resolution No. 12*, the Legislature indicated its concern with the methods then available to finance construction and repair of the expanding system of roads and highways throughout the State. In accordance with that resolution it provided for the appointment of a special commission to study the question of motor vehicles taxation and report thereon, with recommendations to the Legislature.

The committee so appointed reported to the Legislative Session of 1925 that motor vehicles were subject to two forms of taxation:

"In the case of the general taxes levied on motor vehicles as personal property, these have the same origin and destinations as the general taxes

assessed upon and collected from other forms of personalty such as household goods, horses, wagons, etc., etc. As for special taxes on motor vehicles and their drivers, these first were justified and measured by the annual cost involved in issuing registration plates and license cards but now are called upon to meet an ever-increasing share of the highway financing burden." *Final Report and Recommendation of Special Commission Appointed to Investigate Motor Vehicle Taxation in New Jersey* (1925) at p. 3.

The Committee recommended an increase in special taxation on motor vehicles and drivers to the end that additional revenues for highway financing purposes might be obtained.

"In the eyes of the general public and indeed of the motorist himself the special taxes levied upon him in addition to the general tax which he must pay through the present property tax are justified and are acceptable because they are used to maintain and reconstruct the highways over which he operates.

"In return for his outlays, which are indeed virtually a double tax, the motorist obtains hard and smooth highways, convenient for travel at all seasons with a resulting lowering of the cost of operation and upkeep of his machine." *Ibid.*, at p. 13.

The Commission recommended that passenger cars and commercial cars pay a 2 cent per gallon tax; that commercial cars should in addition pay a fee based upon gross weight of the vehicle and its load; that trailers and semitrailers should be charged on the weight basis provided for commercial vehicles. *Ibid.*, at pp. 14, 15.

A second report of the commission recommended that:

"Provision should be made for refunds of taxes paid on gasoline used for other purposes than on highway travel, which may include motor boats, farm tractors and machinery, stationery [sic] engines and dry cleaning." *Majority Report of the Legislative Commission on Motor Vehicle Taxation* (1975) at p. 15.

In 1926 attempts were made in the Legislature to implement the commission's purposes. *Assembly Bill* No. 12 (1926) was introduced on January 18, 1926. This bill sought to increase the registration fees on commercial motor vehicles weighing more than 6,000 pounds. The bill was sent to the judiciary committee and did not emerge. On January 19, 1926, *Assembly Bill* No. 92 (1926) was introduced. This bill would have exempted motor vehicles from personal property taxation. The bill was sent to the taxation committee and also did not emerge. *Assembly Bills* No. 117 and 118 (1926) were introduced on January 25, 1926. Bill No. 117 would have modified the motor vehicle act to conform it to possible gas tax requirements. Bill No. 118 provided for the collection and distribution of revenue from a tax on motor fuels. On March 8, 1926 both bills were reported out for second reading. Thereafter nothing further was heard of them.

In 1927 new attempts were made to enact gas tax legislation. *Assembly Bill* No. 19 (1927) provided for a 2 cent per gallon gas tax on motor vehicles and defined both "motor vehicles" and "fuels" as follows:

"(1) The term 'motor vehicle' shall include any vehicle propelled or drawn along any public road by any power other than muscular, and motor boats or any boat or scow propelled wholly or in part from power derived from a gasoline engine, except road rollers, street sprinklers, fire engines or fire department apparatus, police patrol wagons, ambulances owned by municipalities or hospitals, motor cycles of State and municipal police, motor vehicles of the United States government, auto busses; commonly called jitneys, which now pay a municipal or franchise tax on their gross receipts, agricultural tractors, and such vehicles as run only on rail or tracks.

"(2) The term 'fuels' shall include gasoline, benzol or other products to be used by the purchaser thereof in the propelling of motor vehicles using combustible type engines over the highways of this State."

One week later *Assembly Bill* No. 222 (1927) was introduced in the Assembly. This bill amended the personal property tax law and abolished the tax on motor vehicles as defined.

Both *Assembly Bill* No. 19 and *Assembly Bill* No. 222 passed both houses of the Legislature, were vetoed by Governor Moore and passed by the Legislature the next day over the Governor's veto. *Assembly Bill* No. 19 became *L. 1927, c. 334*, and *Assembly Bill* No. 222 became *L. 1927, c. 338*. The Governor's veto message on *Assembly Bill* No. 19 indicated his belief that a bond issue coupled with an increase in motor vehicle fees would be sufficient for the revenue purposes sought by the gas tax. In his veto message accompanying *Assembly Bill* No. 222 the Governor stated:

"I return herewith *Assembly Bill* 222 without my approval, because this is a companion bill to the Gasoline Tax Act, which would probably not have been passed were it not for the latter bill. It would hardly be fair for me to disapprove one bill and approve the other.

"I find that the various cities and counties throughout the State would lose approximately \$3,888,300.51 by the enactment of this bill into law. Their budgets are predicated upon the assumption that they would raise that much money from this source, and of course, if they do not obtain it from automobiles they will place it on other property, so that, in the final analysis, the bill does not afford the relief indicated." *Veto Messages of A. Harry Moore to the 151st Legislature* (1972) at p. 13.

It would thus appear that the purpose of the Legislature in passing both bills over the Governor's expressed veto was to reaffirm the principle that the gasoline taxes on motor vehicles and their use were to be special taxes directed to the purposes expressed, and that the revenue obtained should not be expended for the general use of the State. In substituting one form of tax for the other, the Legislature also included within the broad class of motor vehicles those vehicles which utilized or, by virtue of their being drawn by motor powered vehicles, engendered the use of motor fuel in travelling the highways. As further evidence of this legislative intention, it should be noted that in the case of auto busses, commonly called jitneys, which paid a special municipal or franchise tax, the Legislature specifically exempted this class of motor vehicle from the requirement to pay a gasoline tax, and concomitantly denied them



exemption from said license fee or franchise tax under the provisions of the exemption amendment. *L. 1927, c. 338, §1, p. 790*. In this way the Legislature again focused its purpose on a single *quid pro quo*, that of a special tax on gasoline, specifically directed, as replacement for a general tax on motor vehicles as personal property.

Chapters 338 and 334 of the Laws of 1927 must be construed in *pari materia* for:

"It is a cardinal principle of statutory construction that statutes relating to the same or similar subject matter—statutes *in pari materia*—are to be construed together. *Sutherland, Statutory Construction* (3rd ed. 1943), §5201." *Palmer v. Kingsley*, 27 N.J. 425,429 (1958).

So construed it is clear that the Legislature established two criteria to be applied in determining the class into which a particular type of motor vehicle falls, namely: (1) Is the vehicle in question a motor vehicle duly registered in New Jersey and upon which registration fees have been paid? (2) Does the vehicle use or cause the use of motor fuel in travelling the highways? Both criteria must apply for the exemption to become effective.

The legislative attitudes here developed are not unique to the State of New Jersey. The question of which types of vehicles are included within the term "motor vehicles" has arisen in other states and in other contexts. It has been observed that:

"The ubiquitous trailers are so much a part of ordinary motor traffic that it would be putting too narrow a construction upon § 3513 to exclude them from its scope. Although the motor which pulls it is that of another vehicle, the trailer is yet so exclusively dependent upon it for movement that it also must be considered a motor vehicle within the meaning of this law." *Gendreau v. State Farm Fire Ins. Co.*, 288 N.W. 225 (Minn. Sup. Ct. 1939).

To the same effect see, *Fruehauf Trailer Co. v. South Carolina Elec. & Gas Co.*, 75 S.E. 2d 688 (S.C. Sup. Ct. 1953), *State v. Schwartzmann Service, Inc.*, 40 S.W. 2d 479 (Mo. Ct. of App. 1931), and *Department of Motor Transportation v. Trailer Convoys*, 279 S.W. 2d 815 (Ky. Ct. of App. 1955). Thus, there is much support for the use by the Legislature of the criteria hereinabove set forth to be used in determining the application of the exemption amendment.

Within the context of these criteria, it is our opinion that:

(1) Trailers, commercial trailers, semitrailers and private utility trailers including those trailers used to haul machinery, which have been duly registered are exempt from personal property taxation. These trailers, commercial trailers, semitrailers and private utility trailers are registered individually under Title 39. They are drawn by a power other than muscular involving the consumption of motor fuels and are clearly within the contemplation of the Gasoline Tax Act definition.

(2) Road building machinery, traction engines and other machinery are not exempt. This category of machinery is operated pursuant to N.J.S.A. 39:4-30 on a general registration and the plates evidencing the general registration may be freely transferred from one vehicle or machine to another. "Such plates do not register

or serve to identify the piece of equipment, but simply identify the owner." *Borough of Bogota v. Brewster Equipment Company*, 83 N.J. Super. 586 (App. Div. 1964), *certif. granted* 43 N.J. (1964). Accordingly, this equipment is not such as would be considered registered under Title 39, Revised Statutes, for purposes of compliance with N.J.S.A. 54:4-3.21.

(3) Motor vehicles owned or controlled by manufacturers of motor vehicles, dealers in motor vehicles, transporters of motor vehicles, persons engaged in the business of financing the purchase of motor vehicles and corporations engaged in the business of insuring motor vehicles, are not exempt. These vehicles are subject to a general registration (N.J.S.A. 39:3-18) and fall in the same category as the class enumerated in No. 2 above.

(4) Farm tractors and traction equipment are exempt. These vehicles are registered on an individual basis (N.J.S.A. 39:3-24), traverse the highways, and were implicitly recognized to be within the class of motor vehicles for gas tax purposes. Such recognition takes the form of the specific exception thought necessary by the Legislature to exclude this class from the provisions of the Gasoline Tax Act.

(5) Motor vehicles used exclusively as farm machinery formerly covered by N.J.S.A. 39:3-24.1 have been specifically covered since the repeal of this section, by N.J.S.A. 39:3-24. They are individually registered and are exempt.

(6) House trailers are not exempt. In reaching this conclusion reference is necessarily made to the determination of the Division of Tax Appeals, Department of the Treasury, State of New Jersey, in the case of *Keane v. Township of Elk*, Case No. 42 (October 21, 1958). It was therein held that such house trailers are not exempt from the *ad valorem* personal property tax. No appeal was taken from that determination and judgment. Accordingly, the Division's conclusions represent the unchallenged authority of the highest tax administrative agency.

(7) Equipment mounted on a vehicle may be considered part of the vehicle itself if that equipment is an integral part of the basic vehicle and the basic vehicle will lose its identity should the equipment be removed. Conversely, equipment merely carried on a vehicle affects neither the status of the carrying vehicle nor the independent status of the equipment carried. See *State v. Johnson Lumber Company, Inc.*, 68 N.J. Super. 276, 278 (App. Div. 1961). Consequently, an exemption will be granted or denied based exclusively on a consideration of the status of the vehicle itself without reference to any equipment added thereto. If the vehicle and the equipment are not severable the determination shall be made on the status of the vehicle without regard to the equipment. If the vehicle and the equipment are severable the determination of the status of the vehicle shall not affect the status of the equipment considered independently.

Very truly yours,  
ARTHUR J. SILLS  
*Attorney General*

By: ELIAS ABELSON  
*Deputy Attorney General*

December 29, 1964

HONORABLE JOHN A. KERVICK  
 State Treasurer  
 State House  
 Trenton, New Jersey

## FORMAL OPINION 1964—NO. 8

Dear Mr. Kervick:

You have requested our opinion as to whether a child, who is the legal ward of her grandmother, a State employee, is encompassed within the statutorily defined coverage of the State Employees Health Benefit Act, L. 1961, c. 49; N.J.S.A. 52:14-17.25 *et seq.* You have posed the following factual situation. The child's parents were divorced and the court granted custody of said child to the father. The mother's whereabouts are and have been unknown since 1955. In 1958, because of personal reasons, the father placed the child with the grandmother under a temporary custody agreement. Upon the death of the father in 1960, the grandmother was appointed legal guardian of the child by the Hudson County Court. The grandmother, a State employee, assumes full responsibility for the support and care of the child and has claimed this child as a dependent under the Health Insurance Policy in question. It is also noted that the child receives a modest income from the Veterans' Administration and the Social Security Administration. The specific issue is whether the ward in question is a "dependent" as defined by N.J.S.A. 52:14-17.26(d) which is here set forth:

"The term 'dependents' means an employee's spouse and the employee's unmarried children under the age of 19 years who live with the employee in a regular parent-child relationship. 'Children' shall include stepchildren, legally adopted children and foster children provided they are reported for coverage and are wholly dependent upon the employee for support and maintenance. A spouse or child enlisting or inducted into military service shall not be considered a dependent during such military service."

It is our opinion that this child is a dependent within the terms of the Health Benefits Act.

The Hospital Service Plan of New Jersey has apparently denied the employee benefits under the Act on the grounds that the child is not and never has been a "foster child." This assumption is correct if the reference was solely to the statutory definition of "foster child." There is a generic concept of foster child which would include any child receiving nurture and parental care from one not standing in a consanguineous or legal relationship. *E.g., Cicchino v. Biarsky*, 26 N.J. Misc. 300 (Ct. Dist. Ct. 1948); *In re Norman's Estate*, 295 N.W. 63 (Minn. Sup. Ct. 1940). In order that a statutory foster child-foster parent relationship may exist, the child must have been at the time of placement a ward of the State and under the guardianship of the State Board of Child Welfare. N.J.S.A. 30:4C-26 *et seq.* The child in question was voluntarily placed with the employee by her father and the relationship subsequently created is that of guardian and ward. This fact does not exclude the child from coverage.

It is evident that the word "dependent" means something more than a natural

child. The term "natural child" does not appear in the law. Moreover, the definition recites that "children" shall include stepchildren, legally adopted children, and foster children. The critical question is whether the word "include" was intended by the Legislature to mean that the enumerated persons which follow are the only persons to be regarded as "dependents" or that such enumerated persons are merely exemplary and constitute only some of the kinds of persons intended to be covered by the statute as "dependents." Stated differently, was the word "include" intended by the Legislature to be self-limiting and restrictive or expansive in meaning?

The New Jersey Supreme Court has recently made the following observation in *Cuna v. Bd. of Fire Com'rs, Avenel*, 42 N.J. 292, 304-305 (1964):

"Moreover, we feel that the Legislature did not intend to limit the activities from which compensation might arise to those expressly stated in *N.J.S.A. 34:15-43*. When the Legislature stated 'As used in this section, the terms "doing public fire duty", as applied to active volunteer firemen, \* \* \* shall be deemed to include participation \* \* \*,' (emphasis added) it did not intend to limit the activities to those thereafter enumerated but intended, as the words plainly indicate to make sure that they would be held to include what was there expressed. It was not intended that 'shall' \* \* \* include should exclude other activities. 'Include' is susceptible to two shades of meaning: (1) that the thing which is stated is the only thing intended; or (2) that the thing which is stated constitutes only one of the things intended. *Schluckbier v. Arlington Mutual Fire Ins. Co.*, 8 Wis. 2d 480, 99 N.W. 2d 705, 707 (Sup. Ct. 1959). Ordinarily the term 'include' is a word of enlargement and not of limitation. *Gray v. Powell*, 314 U.S. 402, 62 S. Ct. 326, 86 L. Ed. 301 (1941); *People v. Western Air Lines, Inc.*, 42 Cal. 2d 621, 268, P. 2d 723 (Sup. Ct. 1954). For example, referring to a statute allowing a city to answer calls for assistance from nearby towns, a New York court stated that 'a call for assistance' includes any call for aid resulting from the operation of a recognized plan for furnishing of mutual aid in case of fire or other public emergency and that the word 'include' was used as 'a word of enlargement or as indicating the reverse of a restrictive intention, specifying a particular case inserted out of abundant caution.' *City of Watertown v. Town of Watertown*, 207 Misc. 433, 139 N.Y.S. 2d 198, 206 (Sup. Ct. 1952). (Emphasis added).

"The Legislature enumerated certain activities in order to make crystal clear to any court that, as to such enumerated activities, there should be no doubt that injuries incurred in performing any such activity would be compensable. But the Legislature did not thereby preclude recovery as to other activities which have been held within the ambit of compensability with respect to injuries sustained by paid employees."

The words "shall include" in the subject statute indicate a legislative intent that the class of children encompassed by the statutory definition is not exhausted by those types of relationships expressly set forth. The Legislature, in effect, wanted to make certain that unmarried minor children under the age of 19 years living in a regular or continuous parental relationship, such as stepchildren, adopted children, and foster children, who are specifically enumerated, would be deemed dependent "children." But this specific list of children was not intended to exclude other chil-

dren with similar characteristics. This interpretation is supported by the fact that the only specific exclusion from the statutory definition of "children" involves a child in the military service.

It is also important to note that among the types or categories of children who may constitute "dependents" are foster children. The statutory relationship of foster child-foster parent is not as binding or strong as the relationship of legal guardian-ward. In 1962, the Legislature created the Bureau of Children's Services which was a continuation of the former State Board of Children's Guardians or the State Board of Child Welfare. L. 1962, c. 197; N.J.S.A. 30:4C-1 *et seq.* It is contemplated under the operative statutes that the control and guardianship of children is retained by the Bureau of Children's Services with only a delegation of the right to control and custody and maintenance to "foster parents" for "temporary or long-term care." N.J.S.A. 30:4C-2(h). An order placing a child under the guardianship of the State vests in the State, not the natural or foster parents, the power to consent to the adoption of the child. Atty. Gen. *Formal Opinion* 1959, No. 12; *Lavigne v. Family and Children's Society, Elizabeth*, 18 N.J. Super. 559, 571 (App. Div. 1952). The guardianship of the Bureau of Children's Services encompasses the power to control the property of wards, to prosecute and defend suits on behalf of wards and to demand, receive, hold and administer the real and personal property of wards (N.J.S.A. 30:4C-22) as well as the authority to expend sums for the medical, dental, psychological and general maintenance and care on behalf of wards (N.J.S.A. 30:4C-27). "Foster parents" under the operative statutes exercise only the delegated responsibilities of the State which has over-riding jurisdiction of wards.

In contrast, the legal guardian of a child has direct and nondelegable responsibilities with respect to his care. The relationship of guardian-ward may arise "when the parents of any minor child are dead or cannot be found, and there is no other person, legal guardian or agency exercising authority over such child." N.J.S.A. 9:2-9. The "care and custody" is transferred to an appropriate person as determined by the court. N.J.S.A. 9:2-10. A legal guardian's responsibilities include "far greater duties than the mere receipt of income, investment of corpus and the disbursement of said income. He [the guardian] is charged not only with the payment of the costs, but as well the selection of proper schools, custodians, housing, clothing, maintenance and general welfare of his wards." *Strawbridge v. Strawbridge*, 35 N.J. Super. 125, 131 (Ch. Div. 1955).

It appears forcibly from the foregoing that the relationship of guardian-ward within the structure of applicable statutory and decisional law is continuing, strong, and binding. In many respects it entails greater legal responsibilities toward the child than flow from the relationship of foster parent to foster child. Since the word "children" in the State Employees Health Benefit Act shall include, but not be limited to, foster children, as well as stepchildren and legally adopted children, considerations of policy and sound rules of statutory construction dictate that the child who is a legal ward comes within the ambit of the legislative definition of "children."

The only remaining question is the interpretation of the qualifying phrase "wholly dependent upon the employee for support and maintenance." A review of the history of this legislation indicates that these statutory qualifications apply to all "children" in determining whether they are eligible "dependents." The present Act was passed in 1961 but similar bills had been introduced in the Legislature during the previous ten years. Sections 17 and 18 of A-309 (1955) which dealt with such health insurance for State employees, spoke broadly in terms of "dependents" and "dependent children." The same language was used in A-464 (1955) and A-201 (1956), while

Section 1 of A-467 (1957) and A-167 (1957) dealing with similar insurance for county and municipal employees used such terms as "for themselves and their families." Section 3 of A-404 (1957) and Sections 17 and 18 of A-70, A-471 and A-203 (1958) used the same terms as the initial bills. However, A-203 (1958) was amended so that "families" were changed to read "husbands or wives and dependent children under 19 years of age." The words "dependents", "dependent children" and "for their families" were again used in A-244, A-459 (1959), A-178, A-288 and A-433 (1960). Section 4 of A-621 (1960) again referred to "husbands or wives and dependent children under the age of 19 years" as did Section 4 of A-622, A-623, A-670, S-188, S-190 (1960) and A-322, A-333 and A-336 (1961). Finally, in A-620 (May 1, 1961), the definitions similar to those in the present act were placed together in Section 1. Section 1(d) used the present wording of the bill in reference to dependent children under 19 years and also added the following clarification: "'Children' shall include adopted children and stepchildren." On May 15, 1961, A-620 was amended to read as it does at present. It deleted the terms "adopted children and stepchildren" and substituted therefor "stepchildren, legally adopted children, and foster children, provided that they are reported for coverage and are wholly dependent upon the employee for support and maintenance." Thus all "children" in the enumerated list, adopted children, stepchildren, foster children, as well as all other children falling sensibly within the legislative classification may be considered as eligible "dependents" provided they are reported for coverage and they are "wholly dependent" upon the employee for support and maintenance.

The phrase "wholly dependent" must be construed in accordance with the objectives and policy of the basic statute. *E.g., Cammarata v. Essex County Park Commission*, 46 N.J. Super. 262, 270 (App. Div. 1957), *aff'd* 26 N.J. 404 (1958); *Laboda v. Clark Twp.*, 40 N.J. 424 (1963); *Safeway Trails, Inc. v. Furman*, 41 N.J. 467 (1964). Remedial statutes such as the subject legislation designed to provide benefits for the public welfare must be accorded a liberal and flexible interpretation consistent with their social purposes. *Cf. Alexander v. New Jersey Power and Light Co.*, 21 N.J. 373 (1956); 3 *Sutherland, Statutory Construction* (1943) Sec. 5505, p. 41.

These principles of statutory construction support the conclusion that the phrase "wholly dependent" was intended to express a standard of substantial, and actual dependence. With respect to other remedial and social welfare legislation in which "dependency" is a criterion, courts have found the essential test to be substantial or actual dependency. *E.g., Ricciardi v. Damar Products Co.*, 82 N.J. Super. 222, 226-227 (App. Div. 1964) (Under the Workmen's Compensation Act, "[a] showing of actual dependency does not require proof that, without decedent's contributions, claimant would have lacked the necessities of life. The test is whether his contributions were relied upon by the claimant to maintain the claimant's accustomed mode of living."); *Carianni v. Schwenker*, 38 N.J. Super. 350, 361-362 (App. Div. 1955); *Jackson v. Erie R.R. Co.*, 86 N.J.L. 550, 551 (Sup. Ct. 1914) ("[D]ependents \* \* \* mean dependent for the ordinary necessities of life, one who looks to another for support or help \* \* \*").

We have also noted that in a rider to the policy contract of the Major Medical Plan under the State Employees Health Benefit Act it is provided that:

"An employee's children shall include any stepchildren, legally adopted children, and foster children, provided such children are dependent upon

the employee for support and maintenance and have been reported to the policy holder for the insurance."

This contract evinces an understanding on the part of the persons charged with the implementation and administration of the statute that the dependency requirement with respect to "children" covered by the act encompasses the generally accepted meaning of this term as involving actual or substantial dependence. The administrative interpretation and application of a statute, when consistent with the overall objectives of the legislation, are persuasive of the true meaning of the statute and the intent of the Legislature. *Lane v. Holderman*, 23 N.J. 304 (1957); *Walsh v. Dept. of Civil Service*, 32 N.J. Super. 39, 48 (App. Div. 1954), *certif. granted* 17 N.J. 182 (1955); *Swede v. City of Clifton*, 39 N.J. Super. 366, 377 (App. Div. 1956), *aff'd* 22 N.J. 303 (1956). Moreover, we are satisfied from the facts which you have furnished that the child in question is actually dependent upon her legal guardian for the necessities of life and is thus "wholly dependent" upon her guardian within the meaning and intent of the Act, notwithstanding the nominal receipts of income which she receives from the Social Security and Veterans' Administrations.

In sum, it is our opinion that an unmarried child under the age of 19 years residing with an employee who is the legally appointed guardian of the child in a regular parent-child relationship and who is substantially and actually dependent on the employee for basic support and maintenance is a dependent within the meaning of N.J.S.A. 52:14-17.26(d).

Very truly yours,

ARTHUR J. SILLS  
*Attorney General*

By: ALAN B. HANDLER  
*First Assistant Attorney General*

December 29, 1964

HONORABLE JOHN A. KERVICK  
*State Treasurer*  
State House  
Trenton, New Jersey

FORMAL OPINION 1964—NO. 9

Dear Mr. Kervick:

You have asked for our opinion concerning the effect to be given to an application for accidental disability pension, in the case where the application is denied but an affirmative finding of permanent disability is made by the Pension Board involved.

It is our opinion, for the reasons stated herein, that an application for accidental disability which is denied but with respect to which there has been an affirmative

finding of permanent disability should be treated as an ordinary disability application.

You have stated that frequently an application is filed with one of the Pension Boards for accidental disability retirement with a claim therein that the applicant-member is permanently and totally disabled, that he is not capable of performing his regular duties, and that there are no other duties which the employer can assign to him. Claim is also made therein that the disability sustained was service-connected in origin. These are the statutory requisites of accidental disability retirement, in one form or another, of all five of the State Pension Systems, the Public Employees' Retirement System (N.J.S.A. 43:15A-43); the Consolidated Police and Firemen's Pension Fund (N.J.S.A. 43:16-2), as amended and supplemented by P.L. 1964, c. 242; the Police and Firemen's Retirement System (N.J.S.A. 43:16A-7), as amended and supplemented by P.L. 1964, c. 241; the Teachers' Pension and Annuity Fund (N.J.S.A. 18:13-112.41); and the Prison Officers' Pension Fund (N.J.S.A. 43:7-12).

All the Funds, except for the Prison Officers' Pension Fund, allow an accident disability retirement pension of two-thirds of the applicant's annual compensation at the time of the occurrence of the accident. On the other hand, the quantum of recovery for an ordinary (non-service connected) disability claim varies amongst the Systems, but, in all cases, is substantially less than the recovery allowed for a proven accidental disability.<sup>1</sup> As a result, many exaggerated claims have been registered by applicants with the hope that the higher two-thirds accidental claim will be obtained, but if it is not, that the applicant may continue to work rather than be the recipient of a substantially lower benefit and a forced retirement. The question is, therefore, whether the applicant may be required to retire upon his own claim of permanent disability and the Board's finding that he is permanently disabled but that the injury causing the disability was not work-connected.

With the exception of the Prison Officers' Pension Fund, (N.J.S.A. 43:7-1, *et seq.*, and more particularly N.J.S.A. 43:7-12, which appears to be silent respecting a provision for ordinary disability retirement benefit,<sup>2</sup>) all the Pension Systems contain provisions for both accident and ordinary disability retirement benefits. The various Boards in considering the law and facts presented in these applications, and by making determinations and findings pursuant to the authority granted to them by the Legislature in the above mentioned statutes, are exercising a quasi-judicial function. *McFeely v. Board of Pension Com'rs*, 1 N.J. 212, 215 (1948). The Boards must decide whether the disability was the result of a work-connected accident and not the applicant's "wilful negligence." However, the Boards also have the affirmative duty to make the following determination:

"[A finding must be made] 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." *Atty. Gen. F.O. 1954, No. 7*. See also, *Getty v. Prison Officers' Pension Fund, supra*, at p. 387; *Cf. Roth v. Board of Trustees, etc.* 49 N.J. Super. 309 (App. Div. 1958).

Thus, a finding that an injury or disability was work-connected is not made to the exclusion of, but in addition to, an affirmative finding that the applicant is permanently disabled and that no other suitable employment can be obtained for him. The word "and" is employed as a connecting word between the double requirement of work-connection and permanent disablement in the provisions of all five Pension Boards. See N.J.S.A. 43:15A-43 (Public Employees' Retirement System); N.J.S.A. 43:16-2, as amended and supplemented by P.L. 1964, c. 242, (Consolidated Police & Firemen's Pension Fund); N.J.S.A. 43:16A-7, as amended and supplemented by P.L. 1964, c. 241, (Police and Firemen's Retirement System); N.J.S.A. 43:7-12 (Prison Officers' Pension Fund) and R.S. 18:13-112.41 (Teachers' Pension and Annuity Fund). Both of the requirements must be fulfilled in order to qualify for an accidental disability. *Fattore v. Police and Firemen's Retirement System of N.J.*, 80 N.J. Super. 541 (App. Div. 1963); *Kochen v. Consolidated Pol., etc. Pension Fund Comm.*, 71 N.J. Super. 463 (App. Div. 1962). A determination that the injury was not work-connected precludes a grant of accidental disability of two-thirds of final compensation, but can still leave standing a finding that the disability is permanent and that no other suitable employment can be obtained for the applicant.

The ordinary disability provisions in all but the Prison Officers' Pension Fund, require in general that the applicant be physically or mentally incapacitated for the performance of his duty. The requirement that an accidental disability be of a permanent nature varies amongst the systems, but entails within each of the Systems, exactly the same quantum of proof necessary to establish ordinary disability.<sup>3</sup>

In conclusion, we are of the opinion that if the pensioner's application for accidental disability is denied because the accident was not work-connected and if the member is found to be permanently disabled and he has been employed for the statutory number of years necessary to permit retirement for ordinary disability, he should be retired on the basis of such an ordinary disability.

Very truly yours,  
ARTHUR J. SILLS  
*Attorney General*

By: RICHARD F. ARONSOHN  
*Deputy Attorney General*

<sup>1</sup>The ordinary disability allowance provisions are to be found in the following sections of the statutes: N.J.S.A. 43:15A-45(b) (Public Employees' Retirement System); N.J.S.A. 18:13-112.43 (Teachers' Pension and Annuity Fund); N.J.S.A. 43:16-2 (Consolidated Police and Firemen's Pension Fund); N.J.S.A. 43:16A-6(2) (b) (Police and Firemen's Retirement System). No provision for an ordinary disability allowance is made in the Prison Officers' Pension Fund. See N.J.S.A. 43:7-7, *et seq.*, with particular attention to N.J.S.A. 43:7-12.

<sup>2</sup>The matter was briefed and argued in *Getty v. Prison Officers' Pension Fund*, 85 N.J. Super. 383 (App. Div. 1964), *pet. for certif. pending* N.J. ; filed Dec. 10, 1964, but the Court did not specifically address itself to this question, while remanding the cause for a further hearing.

<sup>3</sup>(a) *Public Employees' Retirement System*: that the applicant is "physically or mentally incapacitated for the performance of duty and should be retired." N.J.S.A. 43:15A-42 and 43. (b) *Teachers' Pension and Annuity Fund*: that the "member is physically or mentally incapacitated for the performance of duty and should be retired." R.S. 18:13-112.41 (paragraphs 1 and 3). (c) *Consolidated Police and Firemen's Pension Fund*: "The determination shall specify whether or not such member is permanently disabled from performing his usual duty and any other available duty in the department which his employer is willing to assign to him . . ." N.J.S.A. 43:16-2 (paragraph 3). (d) *Police and Firemen's Retirement System*: that "such member is mentally or physically incapacitated for the performance of his usual duty and of any other

available duty in the department which his employer is willing to assign to him and that such incapacity is likely to be permanent and to such an extent that he should be retired." N.J.S.A. 43:16A-6(1) and N.J.S.A. 43:16A-7(1).

December 30, 1964

HONORABLE RAYMOND F. MALE  
*Commissioner, Department of Labor & Industry*  
John Fitch Plaza  
Trenton, New Jersey

FORMAL OPINION, 1964-NO. 10

Dear Commissioner Male:

You have requested our opinion as to whether or not the following situations are covered by the New Jersey Prevailing Wage Act, N.J.S.A. 34:11-56.25, *et seq.*:

- a. A sewerage authority created by a municipality having a population of less than 45,000 people; and
- b. A school district having a population of less than 45,000 people.

It is our opinion for the reasons stated herein that the foregoing governmental bodies are covered by the New Jersey Prevailing Wage Act.

The Act states *inter alia*:

"Every contract in excess of \$2,000.00 for any public work to which any public body is a party shall contain a provision stating the prevailing wage rate which can be paid (as shall be designated by the commissioner) to the workmen employed in the performance of the contract and the contract shall contain a stipulation that such workmen shall be paid not less than such prevailing wage rate . . ." N.J.S.A. 34:11-56.27.

The Act is remedial in nature in that it seeks to insure payment of a minimum wage to all employees engaged on a public works project. The Legislature declared it to be the public policy of this State that there should be established:

" . . . a prevailing wage level for workmen engaged in public works in order to safeguard their efficiency and general well being and to protect them as well as their employers from the effects of serious and unfair competition resulting from wage levels detrimental to efficiency and well-being." N.J. S.A. 34:11-56.25.

Similar acts have been upheld as a valid exercise of the state's police power for the

public welfare. *E.g., Roland Electrical Co. v. Mayor & City Council*, 124 A. 2d 783, 789-790 (Md. Ct. of App., 1956); also see *Annotations* at 50 A.L.R. 1480, and 132 A.L.R. 1297. The Act is one of modern social legislation as it regulates business practices. 3 *Sutherland Statutory Const.* (3rd. ed.) § 5702 (1964 P.P.). Even though such laws constitute a regulation of business, they must be given "a liberal interpretation to accomplish their long-range social objectives." *Ibid.* § 7207. The usual strict interpretation of laws involving a penalty are not applicable in such cases. *Ibid.* It is a remedial statute which should be liberally construed. See *Tobin v. Blue Channel Corp.*, 198 F. 2d 245, 248 (4th Cir., 1952) and cases cited therein dealing with interpretation of the Federal Fair Labor Standards Act.

A municipality or any other political subdivision of the State derives its existence and power from the Legislature. The Legislature, therefore, has the power to regulate the practices and define the scope of the powers of such a political subdivision. *Atkin v. Kansas*, 191 U.S. 207, 24 S. Ct. 124, 48 L. Ed. 148 (1903).

As stated above, the Act covers "every contract . . . for any public work to which any public body is a party . . ." N.J.S.A. 34:11-56.27. (Emphasis supplied).

A "public body" is defined as:

" . . . the State of New Jersey, any of its political subdivisions, except municipalities having a population of less than 45,000, any authority created by the Legislature of the State of New Jersey and any instrumentality or agency of the State of New Jersey or any of its political sub-divisions." N.J.S.A. 34:11-56.26(4).

"Public work" as defined by the Legislature,

" . . . means construction, reconstruction, demolition, alteration, or repair work, or maintenance work, including painting and decorating, done under contract and paid for in whole or in part out of the funds of a public body, except work performed under a rehabilitation program." N.J.S.A. 34:11-56.26(5).

The only exception mentioned in the Prevailing Wage Act is a *municipality* having a population of less than 45,000 people. Prior to its enactment, the bill read: "\*\*\*\*except municipalities having a population of less than 35,000." This figure was, however, raised to 45,000 prior to the enactment. The legislative history of the Act does not disclose any express reason for the exception.

The apparent legislative purpose of the Prevailing Wage Act was to encompass all public works projects except those specifically excepted. Had the Legislature intended to except other public works, they could have done so. The definition of a "public body", N.J.S.A. 34:11-56.26(4) is clear, and the *only* exception is a *municipality* having a population of less than 45,000. In any event, the guiding principle in the interpretation of statutes is to ascertain and effectuate the legislative intention and purposes. The intention is the essence of the law. *N.J. State Bd. of Optometrists v. S.S. Kresge Co.*, 113 N.J.L. 287 (Sup. Ct. 1934), modified and affirmed 115 N.J.L. 495 (E. & A. 1935). Since it is the avowed public policy of this State to establish a prevailing wage level for workmen engaged in public works, any exception to contracts covered must be narrowly construed. In interpreting the Fair Labor Standards

Act of 1938, 29 U.S.C. § 213(a)(2), the United States Supreme Court refused to give a narrow interpretation to an exemption for "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." In discussing the aforementioned exemption, the Supreme Court stated,

" . . . Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. *To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people.*" *Phillips Co. v. Walling*, 324 U.S. 490, 493, 89 L. Ed. 1095, 65 S. Ct. 807 (1944). (Emphasis supplied).

A sewerage authority is a *public body* created by a municipality pursuant to N.J. S.A. 40:14A-4. N.J.S.A. 40:14A-4(b) states that:

"The governing body of any municipality may, by ordinance duly adopted, create a *public body* corporate and politic under the name and style of 'the . . . sewerage authority' . . ." (Emphasis supplied).

A sewerage authority is an independent body which is a political subdivision of the state.

"Every sewerage authority shall be a public body politic and corporate constituting a *political sub-division* of the State established as an instrumentality exercising public and essential governmental functions to provide for the public health and welfare and shall have perpetual succession and have the following powers:

\*\*\*

"(11) to enter into any and all contracts, execute any and all instruments, and do and perform any and all acts or things necessary . . ." N.J.S.A. 40:14A-7 (Emphasis supplied).

Therefore, since a sewerage authority is a "political subdivision" of the State as defined by the Sewerage Authority Act and a "public body" as defined by the Prevailing Wage Act, (N.J.S.A. 34:11-56.26(4)), you are advised that any sewerage authority created by a municipality regardless of population is a public body within the meaning of the Prevailing Wage Act.

A school district is also "a separate corporate entity, distinct and free from the government of the municipality except to the extent that the Legislature has provided for its connection or interdependence. R.S. 18:6-21; N.J.S.A. 18:6-23 and 34." *Gualono v. Bd. of Estimate of Elizabeth School Dist.*, 39 N.J. 300, 303 (1963).

R.S. 18:6-21 states: "The board shall be a body corporate . . ." A board of education is a completely independent body: "The board shall have power, in and by its corporate name, to sue and be sued; and may submit to arbitration and determination any and all matters of dispute or controversy which arise, within the terms and provisions of chapter twenty-four of Title 2A, Administration of Civil and Criminal Justice, of the New Jersey Statutes (N.J.S. 2A:24-1, *et seq.*)." N.J.S.A. 18:6-23. A

board of education has the further powers to: "purchase, lease, receive, hold, and sell property, real and personal, and to take and condemn land and other property for school purposes . . ." N.J.S.A. 18:6-24.

Although it may seem that the Act creates an anomalous situation when a sewerage authority or school district in a municipality of less than 45,000 persons is within the Act, while the municipality itself is not, the Legislature so prescribed the law. Remedial legislation of this type must be given a broad interpretation to effect the public policy of this State.

For the foregoing reasons, it is our opinion that both a sewerage authority and a school district with a population of less than 45,000 persons come within the meaning of a "public body" as defined in N.J.S.A. 34:11-56.26(4) and are therefore subject to the provisions of the Prevailing Wage Act.

Very truly yours,  
**ARTHUR J. SILLS**  
*Attorney General*  
 By: **MORRIS YAMNER**  
*Deputy Attorney General*

December 29, 1964

HONORABLE JOHN A. KERVICK  
*State Treasurer*  
 State House  
 Trenton, New Jersey

FORMAL OPINION 1964—NO. 11

Dear Mr. Kervick:

You have asked for our opinion as to the effect of N.J.S.A. 43:10-18.6a on the eligibility for membership in the Public Employees' Retirement System of those persons employed by Essex County subsequent to March 26, 1961 and those persons in the employment of Essex County prior to the aforesaid date.

The statute, N.J.S.A. 43:10-18.6a, reads as follows:

"Any person employed by a county of the first class after the effective date of this act having a population of over 800,000 shall become a member of the Public Employees' Retirement System of New Jersey as a condition of employment and shall be entitled to all the rights and benefits and subject to all obligations of other members of said system, provided that the board of chosen freeholders of such county has adopted and submitted to the Public Employees' Retirement System a resolution providing for such membership and agreeing that said county shall be subject to the same liabilities with respect to such members as all other counties participating in the Public Employees' Retirement System. Such employees shall not be

eligible to be members of any pension fund maintained by said county for persons employed by the county prior to the effective date of the resolution adopted by said county."

N.J.S.A. 43:10-18.6a was designed to close the membership of the Essex County Employees' Retirement System to all new employees as of the effective date of a resolution to be adopted by the Board of Chosen Freeholders. Pursuant to this section, the resolution was adopted effective March 26, 1961.

For the reasons stated herein, it is our conclusion that the interpretation to be given to N.J.S.A. 43:10-18.6a is that those persons employed by the county subsequent to March 26, 1961 shall become members of the Public Employees' Retirement System.

It is axiomatic that the ability to enroll in the State retirement system is a statutorily conferred privilege. With regard to the Public Employees' Retirement System, county employees who were not previously covered by the former "State Employees' Retirement System" were not eligible for enrollment in the Public Employees' Retirement System until a referendum adopting such coverage was acted upon favorably by a majority of the voters voting on the question at a general election. N.J.S.A. 43:15A-74. No such referendum has ever been submitted to the voters in Essex County. In the absence of the passage of a referendum extending the coverage of the State-administered system to the county employees, they would not be eligible for membership in said system.

N.J.S.A. 43:10-18.6a, in effect, qualifies N.J.S.A. 43:15A-74 to the extent that it permits certain county employees to be enrolled in the State retirement system upon the adoption of an appropriate resolution without submission of a referendum to the people on a county level. However, the scope of any resolution adopted pursuant to N.J.S.A. 43:10-18.6a could not extend the coverage of the State system to any county employees who were not included within the ambit of the statutory section. The focus, therefore, must be on those employees of the county who were statutorily contemplated by N.J.S.A. 43:10-18.6a to be enrolled in the Public Employees' Retirement System.

N.J.S.A. 43:10-18.6a requires membership in the Public Employees' Retirement System as a condition of employment for any person employed by a first class county having a population of over 800,000 after the effective date of this act. The word "employed" is the key to the construction of this statute. Ordinarily, words in statutes are given their everyday, commonly accepted meaning unless the context clearly indicates otherwise. *Lane v. Holderman*, 23 N.J. 304, 313 (1957); *State v. Sperry & Hutchinson Co.*, 23 N.J. 38, 46 (1956). The word "employed" in the present context does not require a deviation from its normal, everyday definition. "Employed" means ". . .to make use of the services of; to give employment to; to entrust with some duty or behest. . . ." *Webster's New International Dictionary*, (2d ed.) Unabridged (1943), p. 839. The synonym associated with "employ" is "hire".

"EMPLOY is used to emphasize the idea of service to be rendered, HIRE, of wages to be paid; as, to employ an expert accountant, to hire a drayman. But the words are often interchangeable." *Webster's New International Dictionary*, (2d ed.) Unabridged, *supra*.

The interchangeability of the words "employed" and "hired" would be most

appropriate in the context of N.J.S.A. 43:10-18.6a. Essentially, N.J.S.A. 43:10-18.6a is addressed to the "hiring" of a person after a certain date and requires that such person become a member of the Public Employees' Retirement System *as a condition of employment*. In such a case, the person is "entitled to all the rights and benefits and subject to all obligations of other members of said system."

The closing of membership in the Essex County Employees' Retirement System, however, was conditioned on the adoption of a resolution by the Board of Chosen Freeholders of such county "providing for such membership and agreeing that said county shall be subject to the same liabilities with respect to such members as all other counties participating in the Public Employees' Retirement System." The effect of the qualifying proviso is to make the cutoff date coincide with the date of adoption of the resolution by the county freeholders. The second sentence of N.J.S.A. 43:10-18.6a dovetails into the aforesaid proviso to underscore the cutoff date to be effective date of the freeholders' resolution. That sentence reads:

"Such employees shall not be eligible to be members of any pension fund maintained by said county for persons employed by the county prior to the effective date of the resolution adopted by said county."

"Such employees" in the above section refers to those persons hired by the county for the first time subsequent to the effective date of the resolution adopted by the county freeholders. The language clearly renders these newly hired employees ineligible for membership in the county system. The necessity for spelling out that these employees are ineligible for the county system is occasioned by the requirements of the Public Employees' Retirement System and Social Security Law. In order for these newly-hired employees to be eligible for membership in the Public Employees' Retirement System, Social Security coverage has to be extended to them. N.J.S.A. 43:15A-1, 2. To qualify for Social Security coverage under the Social Security Law, 42 U.S.C. 418(d) (1), they cannot be eligible for membership in another retirement system for the same employment. By specifically barring their membership in the county system, the Federal law is satisfied.

The line of demarcation for eligibility for membership in the Public Employees' Retirement System is March 26, 1961. Those persons hired by Essex County subsequent to March 26, 1961 are eligible for membership in the Public Employees' Retirement System. Those persons in the employment of Essex County prior to said date are not eligible for membership in the statewide system. As to the ineligibility of the pre-March 26, 1961 group, there has been no referendum adopted by the voters of the county to extend coverage to these employees in accordance with N.J.S.A. 43:15A-74, and the resolution adopted by the Board of Freeholders on March 26, 1961 pursuant to N.J.S.A. 43:10-18.6a did not contemplate their inclusion. Moreover, it should be noted that the actual members of an existing retirement system and those who would be eligible for membership in the existing retirement system could not qualify for Social Security coverage under the Social Security Law. Without being able to extend Social Security coverage to them, they could not be eligible for membership in the Public Employees' Retirement System. N.J.S.A. 43:15A-1, 2.

The Legislature, in its enactment of N.J.S.A. 43:10-18.6a, sought to seal off the enrollment of newly-hired persons in the county pension fund after March 26, 1961 and require such persons to become members in the Public Employees' Re-

tirement System as a condition of employment. Accordingly, it is our conclusion that the interpretation to be given to N.J.S.A. 43:10-18.6a is that only those persons employed by the county subsequent to March 26, 1961, the effective date of the resolution, shall be eligible for membership in the Public Employees' Retirement System.

Very truly yours,  
ARTHUR J. SILLS  
*Attorney General*

By: Richard Newman  
*Deputy Attorney General*

December 31, 1964

HONORABLE CHARLES R. HOWELL  
*Commissioner, Department of Banking & Insurance*  
State House Annex  
Trenton, New Jersey

FORMAL OPINION, 1964 - No. 12

Dear Commissioner Howell:

You have requested our advice as to whether savings banks and banks may, for investment purposes, acquire by assignment from the Administrator of Veterans Affairs an installment sale contract of real property.

It is our opinion, for the reasons stated hereinafter, that savings banks and banks may hold as such investments installment sale contracts of real property.

In reaching our opinion we have considered the following facts which you have furnished. The installment sale contract, VA Form 26-169 (3009), is a result of the mortgage loan guarantee program of the Veterans Administration. Under this program, title to a parcel of real property is conveyed to the Administrator following a default in an obligation which has been guaranteed by the Administration under the aforementioned mortgage loan guarantee program. 38 U.S.C. 1820 (a). The underlying obligation is cancelled. The policy of the Administrator is to sell the real property so acquired as soon as possible. If a purchaser cannot make a sufficient down payment, the Administrator will enter into an installment sale contract, this being in lieu of the conventional deed and bond and purchase money mortgage. The term of this agreement provides that title to the real property, which is the subject matter of the sale, will remain in the Administrator or his assignee until there is a performance of the payment schedule specified in the agreement. In the event that the buyer is in default for 30 days or more, the Administrator has the right to declare the entire unpaid balance due, and, if this balance is not paid, he may terminate all of the buyer's rights under the agreement. Any payments made under the agreement and all improvements constructed in or on the property are retained by the Administrator or his assignee as compensation for the use and occupancy by the buyer. Under the terms of this agreement, no foreclosure proceedings are necessary to divest the buyer of his interest in the property. *Dorman v. Fisher*, 31 N.J.



13 (1959) affirming 52 N.J. Super. 70 (App. Div. 1958).

Should the Administrator desire to convey his interest in the installment sale contract, he does so by assignment; simultaneously, he also conveys the title to the real property, which is not only the subject matter of the contract but also security for the payment of the obligation to the assignee of the contract. The conveyance of title to the real property is evidenced by a deed which is recorded with the proper county official.

An assignee of the Administrator takes the installment sale contract under the provisions of the mortgage loan guarantee program. Two or more months after a default by the buyer, the assignee may require that the Administrator repurchase the installment sale contract at the price paid by the assignee, less principal payments received prior to default.

The installment sale agreement further provides that upon receipt of the payment in accordance with the terms of the specified payment schedule, " \* \* \* the Seller shall execute and deliver a Special Warranty Deed conveying to the Buyer the aforementioned title to said property, \* \* \*." VA Form 26-169 (3009) para 18.

The Administrator has adopted the use of installment sale contracts to facilitate the re-sale of real property acquired through defaults. As is apparent from the foregoing, under an installment sale contract, title to the real property, which is the subject matter of the contract, remains in the name of the vendor or his assignee for the purpose of securing the performance of the contract.

The first problem to be considered is whether the Banking Act of 1948, as amended, N.J.S.A. 17:9A-1, *et seq.*, expressly or impliedly permits a bank or savings bank to hold an installment sale contract of real property as an investment.

The analysis of this question must consider separately the investments which may be made by a bank and those investments which may be made by a savings bank. N.J.S.A. 17:9A-24 deals with certain basic powers which both a bank and a savings bank shall possess, whether or not such powers are specifically set forth in its certificate of incorporation. The powers of banks, not including savings banks, are amplified by N.J.S.A. 17:9A-25 which provides in part:

"In addition to the powers specified in section 24, every bank shall, subject to the provisions of this act, have the following powers, whether or not such powers are specifically set forth in its certificate of incorporation:

(1) to discount, buy, invest in, hold, assign, transfer, sell, and negotiate promissory notes, drafts, bills of exchange, mortgages, trade acceptances, bankers' acceptances, bonds, debentures, bonds or notes secured by mortgages, installment obligations, balances due on conditional sales, and other evidences of debt for its own account, or for the account of customers; \* \* \*." (P.L. 1948, c. 67, p. 205, §25; P.L. 1962, c. 219, §1).

The term "installment obligation" as it is employed in N.J.S.A. 17:9A-25(1) is not defined, nor is it made subject to words of limitation. The term, "installment obligation", as used therein should be interpreted according to the most natural and obvious import of the language, and without resorting to a subtle or a forced construction for the purpose of either limiting or extending its operation. *Weinacht v. Bd. Freeholders, Bergen County*, 3 N.J. Super. 174 (App. Div. 1949), *aff'd* 3 N.J. 330 (1949). The most obvious and natural import of the term, "installment obliga-

tion" is that of a debt, which by its terms, is to be repaid in installments. The installment sale contract VA Form 26-169 (3009) is evidence of a debt, which by its terms is to be repaid in installments, and, therefore, meets the requirements of N.J.S.A. 17:9A-25(1). Therefore it is our opinion that pursuant to the powers enumerated in N.J.S.A. 17:9A-25(1), a bank may invest in installment sale contracts of real property.

The powers of savings banks are controlled by N.J.S.A. 17:9A-181Q, which reads in part:

"Q. A savings bank may invest in

\* \* \*

(2) (a) mortgages or deeds of trust or other securities of the character of mortgages which are first liens on the fee of real property or a lease of the fee of real property, wherever located, which \* \* \* (iv) any other officer or agency of the United States or of this State which the commissioner shall have approved for the purposes of this section as an insurer or guarantor, has fully insured or guaranteed or made a commitment to fully insure or guarantee. \* \* \*." (P.L. 1948, c. 67, p. 319, §181; P.L. 1950, c. 313, p. 1061, §2; P.L. 1951, c. 186, p. 687, §1; P.L. 1953, c. 210, p. 1567, §1; P.L. 1954, c. 98, p. 561, §1; P.L. 1955, c. 170, p. 718, §1; P.L. 1957, c. 164, p. 585, §1; P.L. 1962, c. 227, p. 1112, §1).

Savings Bank Regulation Number 13, which was promulgated on April 25, 1962, approved the Administrator as an insurer for the purposes of the preceding section.

A mortgage has been held to be essentially security for the payment of a debt. *Vineland Savings and Loan Assn. v. Felmev*, 12 N.J. Super. 384, 391 (Chan. Div. 1950). A lien at common law signified such a hold or claim upon an object for satisfaction of a debt so that the object of the lien could not be taken away until the debt was satisfied or paid. This right to hold was a right superior to that of any other person claiming an interest in the object. *Agnew v. American Ice Company*, 2 N.J. 291 (1949). With the exception of certain statutory liens, *e.g.*, local real property taxes, the priority of a lien on real property is determined by the doctrine of first in time, first in right. See *Camden County Welfare Bd. v. Federal Deposit Ins. Co.*, 1 N.J. Super. 532 (Chan. Div. 1948).

The security interest of the Administrator or his assignee arises upon the signing of the contract, VA Form 26-169 (3009). The retention of title by the Administrator or his assignee subject to conveyance upon the complete execution of the contract, is a "lien". Under particular facts, it may constitute a first lien on the underlying property under the doctrine, "first in time, first in right". Hence the installment sales contract, VA Form 26-169 (3009), which is security for the payment of a debt, has the character of a mortgage and may constitute a first lien on the fee of real property within the meaning and intent of N.J.S.A. 17:9A-181Q authorizing investments for savings banks. Such a contract, however, may still be regarded as an installment obligation under N.J.S.A. 17:9A-25(1) since the terms of the respective statutes are not mutually exclusive.

The second question which must be decided is whether the statutory provisions which limit the holding of real property by regulated financial institutions prohibit a bank or savings bank from investing in VA installment sale contracts of real estate as described herein.

N.J.S.A. 17:9A-24(5) provides as follows:

"Every bank and savings bank shall, subject to the provisions of this act, have the following powers, whether or not such powers are specifically set forth in its certificate of incorporation:

\*\*\*

(5) to purchase, hold, lease and convey real property or any interest therein for the following purposes, and for no others:

(a) such as may be necessary or convenient for the use, operation or housing of its principal office or any branch office, or an auxiliary office, or for the storage of records or other personal property, or for office space for use by its officers or employees, or which may be reasonably necessary for future expansion of its business, or which is otherwise reasonably incidental to the conduct of its business; and which may include, in addition to the space required for the transaction of its business, other space which may be let as a source of income. In exercising the powers conferred by this subparagraph, the bank or savings bank shall be subject to the limitations imposed by paragraph (13) of this section;

(b) such as may be conveyed to it in whole or part satisfaction of debts previously contracted in the course of its dealings;

(c) such as it shall purchase at sale under judgments and decrees in its favor, and on foreclosure of mortgages held by it; and

(d) such as it shall purchase or acquire to minimize or prevent the loss or destruction of any lien or interest therein; provided that all real property not held for any purpose specified in subparagraph (a) of this paragraph, shall be sold within 5 years of its acquisition, or within 5 years after the time it ceases to be held for any purpose specified in subparagraph (a) of this paragraph, unless the commissioner shall extend the time within which such sale be made; \*\*\*" P.L. 1948, c. 67, p. 201, §24; P.L. 1956, c. 222, p. 782, §1).

The precise question to be considered is whether the proscriptions set forth in N.J.S.A. 17:9A-24(5) include the holding of title to real property as security for the performance of an obligation owed to the bank or savings bank in connection with an otherwise lawful investment.

It is our opinion that the above statute does not prohibit a bank or savings bank from holding title to real property to secure the payment of an obligation owed to it as an investment. The purpose of this legislation was to circumscribe and regulate the acquisition and disposition of real estate by banks. The rationale of this limitation on the ownership of realty by banks was expressed in the early case of *Leggett, et al. v. The N.J. Manufacturing and Bank Co., et al.*, 1 N.J. Eq. 541, 549 (Chan. 1832) where the Court said:

"No bank should be allowed to speculate in real property. It is contrary to the spirit and design of such institutions, and is liable to abuse. It always results in injury, and sometimes in ruin."

The Federal law contains similar limitations. 12 U.S.C. 29. The legislative his-

tory of the National Bank Act of 1864 reveals several instances of debate in the Senate on the preceding section; the views expressed therein show that the primary purposes of this section were to prevent banks from accumulating a large amount of real estate, and to prevent them from having the power to acquire and to hold indefinitely this real property. Cong. Globe, 36 Cong., Second Sess. 2020 (1864). The underlying purposes of the restriction were construed in *Union Nat. Bank v. Matthews*, 98 U.S. 188, 189 (1879) wherein the Supreme Court stated:

"The object of the restrictions was obviously threefold. It was to keep the capital of the banks flowing in the daily channels of commerce; to deter them from embarking in hazardous speculations; and to prevent the accumulation of large masses of such property in their hands, to be held, as it were, in mortmain. The intent, not the letter of the statute, constitutes the law."

The obvious intent of N.J.S.A. 17:9A-24(5) is to prohibit banking institutions from accumulating and speculating in real property and to keep their capital flowing through the daily channels of commerce. However, subparagraphs (b), (c) and (d) of 17:9A-24(5) are evidence that the prohibition was not to be all inclusive. These subsections permit a bank or savings bank to hold title to real property to protect their investment in other obligations.

It is apparent that the transaction described hereinbefore is an executory contract for the sale of land. Under this type of contract, the seller becomes a trustee holding legal title for the benefit of the buyer. The seller can do nothing to defeat the transfer of title to the buyer, *Amster v. Tenny*, 139 N.J. Eq. 335 (Chan. 1947), and therefore the seller does not hold unrestricted title to the property. However, by the terms of the contract the parties thereto may covenant that if the terms of the contract are not fulfilled, there will be specific sanctions including termination of all the buyer's rights under the contract. *Dorman v. Fisher, supra*. Absent a breach of the contract, it follows that the seller must upon full payment by the buyer convey title to the real property once he has entered into the contract for sale. The termination provisions of the contract are inserted so that the seller may be secured as to his underlying obligation.

The termination of the buyer's rights and unrestricted title revesting in the buyer is analogous to the situations contemplated by 17:9A-24(5), (6). Therefore, in the present situation, we conclude that the Administrator of Veterans Affairs, or his assignee, as seller, does not have unrestricted title to the real property, but retains title only for the purpose of securing the payment of an underlying obligation which is an otherwise valid investment. The acquisition of such an installment sales contract would not constitute a purchase, holding or conveyance of real estate or any interest therein prohibited by N.J.S.A. 17:9A-24(5).

For the reasons stated hereinbefore, it is our opinion that installment sale contracts of real property are installment obligations and securities of the character of mortgages and may therefore be acquired from the Administrator of Veterans Affairs by banks and savings banks for investment purposes.

Very truly yours,  
ARTHUR J. SILLS  
Attorney General

By: HAROLD LEIB  
Deputy Attorney General

December 31, 1964

HONORABLE CHARLES R. HOWELL, *Commissioner*  
*Department of Banking and Insurance*  
 State House Annex  
 Trenton, New Jersey

## FORMAL OPINION 1964—NO. 13

Dear Commissioner Howell:

You have requested our opinion whether a domestic life insurance company may grant options to purchase its capital stock to its officers, directors or trustees under the provisions of Title 17 of the Revised Statutes of New Jersey. The proposed stock option plans provide generally for the granting of options to purchase capital stock of the life insurance company by officers, agents or employees, at a price to be established by the board of directors as of the date the option is granted, together with certain restrictions upon the time during which such options may be exercised.

For the reasons stated herein, it is our opinion that a domestic life insurance company may grant stock options to officers, directors and trustees provided the issuance of such options is authorized by the board of directors and is incorporated as a part of the annual agreement for compensation for services between such individuals and the company.

Life insurance companies can be organized and become empowered to commence business and operate in the State of New Jersey under Title 17 of the Revised Statutes of New Jersey. R.S. 17:7-1 *et seq.* The powers which such companies may exercise are set forth at length in this regulatory statute. R.S. 17:18-1 *et seq.* It has long been the established policy of this State that insurance companies "have all the powers granted and be subject to all the duties and obligations imposed by Title 14, Corporations, General except so far as they may be inconsistent with the provision of this subtitle." R.S. 17:18-1. *Aetna Casualty & Surety Co. v. International Re-Insurance Corporation*, 117 N.J. Eq. 190 (Ch. 1934); *Camden Mortg. Guaranty & Title Co. v. Haines*, 110 N.J. Eq. 461 (E. & A. 1932); *Amabile v. Lerner*, 64 N.J. Super. 507, 511 (Ch. Div. 1960), *aff'd* 74 N.J. Super. 443 (App. Div. 1962).

Under Title 14, general stock corporations have long been empowered to grant stock options subject only to authorization therefor in the certificate of incorporation or by the board of directors. The pertinent statute provides in part:

"Every corporation organized under this Title may create optional rights to purchase or subscribe, or both, to stock of any class or classes or of any series thereof on such terms, at such price, in such manner and at such time or times as, unless otherwise provided elsewhere in this Title, shall be expressed in the certificate of incorporation, or in a resolution adopted by the board of directors pursuant to authority conferred upon it by the certificate of incorporation, and may issue such warrants or other evidence of such rights." R.S. 14:8-4.

Further, general corporations under Title 14 may grant stock options in conjunction with plans to enable employees and others to participate in the acquisition of capital stock. Thus a domestic stock corporation may undertake:

"... the issue or the purchase and sale of its capital stock to any or all of its employees and those actively engaged in the conduct of its business . . . , and for aiding any such employees and other persons in paying for such stock by contributions, compensation for services, or otherwise." R.S. 14:9-1.

With respect to insurance companies, several statutes deal generally with remuneration to directors, officers and employees for services rendered. R.S. 17:21-2 provides:

"The directors of any insurance company of this state, when acting as its officers, and also for each occasion of their attendance at meetings of the board or its committees, may receive such compensation as a majority of the board deems just and reasonable."

R.S. 17:34-4 further provides as follows:

"No domestic life insurance company shall:

- a. Pay any salary, compensation or emolument to any of its officers, directors or trustees, or any salary, compensation or emolument amounting in any year to more than five thousand dollars to any person, unless the payment is first authorized by a vote of its board of directors;
- b. Make any agreement with any of its officers, trustees or salaried employees whereby it agrees that for any service rendered or to be rendered he shall receive any salary, compensation or emolument that will extend beyond a period of twelve months from the date of the agreement, but nothing herein shall be construed to prevent a life insurance company from entering into contracts with its agents for the payment of renewal commissions. No officer, director or trustee who receives for his services in that capacity a salary of more than one hundred dollars per month shall receive any other compensation or emolument for his services; or
- c. Grant any pension to any officer, director or trustee thereof or to any member of his family after his death, except that it may grant to its salaried officers and employees retirement and disability allowances and death benefits, according to a plan submitted to and approved by the commissioner."

The question as to whether an insurance company may grant stock options to officers, directors or trustees arises because of the apparent limitation or restriction contained in the last sentence of subsection b of R.S. 17:34-4 and whether the grant of such stock options pursuant to Title 14 may be inconsistent with the provisions of R.S. 17:34-4. We are satisfied that the issuance of such stock options would not conflict with this latter statutory provision and may be undertaken by domestic life insurance companies provided that they are properly authorized.

The touchstone for the proper interpretation of any legislation is the essential policy of the particular statute, the objectives to be accomplished and the underlying intent of the Legislature. *Cammarata v. Essex County Park Commn.*, 46 N.J. Super. 262, 270 (App. Div. 1957) *aff'd* 26 N.J. 404 (1958); *Loboda v. Clark Tp.*, 40 N.J. 424

(1963); *Safeway Trails, Inc. v. Furman*, 41 N.J. 467 (1964). The objectives of the Legislature in enacting R.S. 17:34-4 are disclosed by a review of its history. This statute was enacted as part of the Laws of 1907, c. 72, sec. 8, on April 15, 1907. At that time, both North Dakota (S.L. 1907, c. 154, sec. 1, March 19, 1907) and Illinois, (Senate Bill No. 158, sec. 1, May 20, 1907) had enacted statutes in language practically verbatim to that of New Jersey's law. Shortly thereafter, New York enacted a similar statute. N.Y. Consol. Laws, Insurance, Sec. 214; L. 1909, c. 33, sec. 98.

The language of these statutes originated in certain bills proposed in a report of the so-called Committee of Fifteen, submitted at a conference on Uniform Insurance Legislation, December 1, 1906. The Committee had been appointed at a conference of governors, attorneys-general and insurance commissioners at Chicago, proposed uniform acts regulating the business of insurance and was made a part of the Report of Superintendent of Insurance of the District of Columbia, etc., Message from the President of the United States, January 24, 1907, 59th Congress, 2nd Session, House of Representatives, Document No. 559.

The report proposed "A bill relating to the salaries of officers and agents of life insurance companies". The following language is found in Sec. 1 of this proposed bill: ". . . and no officer, director, or trustee, who is paid a salary for his services of more than \$100.00 permonth shall receive any other compensation or emolument." *Ibid.* p. 45.

The New Jersey Senate Select Committee on Life Insurance, which conducted hearings between June, 1906 and March, 1907 placed considerable reliance upon the above report. "One of the most valuable contributions to this subject is the report of the so-called Committee of Fifteen . . .", and "We have reported a bill for the amendment of the General Insurance Law, embodying those proposals of the Committee of Fifteen, which we have adopted, and certain other changes". Report of Senate Committee on Life Insurance Investigation, Vol. IV, 1907, p. 14 and 15.

Excerpts from the New Jersey Committee's report graphically reveal the Committee's attitude and tend to establish the intention behind L. 1907, c. 72, sec. 8, R.S. 17:34-4. In referring to one of the large domestic life insurance companies, it noted the existence of substantial surpluses, characterized as a "vast accumulation of money". It is to be remembered, too, that the principal stockholders are the officers, who have complete control of the funds of the company, and that they have paid themselves therefrom salaries which are doubtless by far the highest salaries ever known in this State." *Ibid.* p. 20.

Later, The Committee stated that "We have considered the question of the expenses of life insurance companies and the salaries paid to the chief officers." *Ibid.* pp. 23 to 24. Of the three companies, salaries in one were "moderate", in the second, "liberal", and in the third, "very large". "Our impression is that the extravagance is chiefly among the officers and employees occupying the chief places and receiving the largest salaries." *Ibid.* p.24.

The Committee had earlier set out their philosophy:

"While an insurance company cannot be said to be a public corporation in the strict sense that a railroad company is, yet a sound public policy would seem to dictate that it should be held to a somewhat similar strict responsibility in administering its trust funds for the benefits of its constituents, in giving equal privileges and terms to them all, and in saving and apportioning the trust funds for their benefit." *Ibid.* p. 21.

It is evident that this committee and the Legislature as a whole were concerned over the disposition of insurance company surpluses. They were fearful that undisclosed large salaries and cash bonuses might siphon off funds more properly belonging to the stockholders or policyholders. This history indicates that the Legislature contemplated the correction of this abuse alone by the enactment of Section 8 of the 1907 law.

As noted, R.S. 17:34-4(b), in part prohibits any officer, director, or trustee, receiving a "salary" of more than \$100 per month from receiving "any other compensation or emolument for his services". Initially, it must be determined whether such a plan constitutes "other compensation or emolument" within the meaning and intent of this prohibition. This depends upon the meaning which the Legislature intended to accord the term "salary" and whether "salary" in this context must be limited to periodic cash payments or was intended in a broader or more general sense. If construed narrowly, then stock options would be considered "other compensation or emolument" and would be in conflict with this section.

The words "salary", "compensation", and "emolument" each appear four times in three distinct contexts: requiring approval by the board of directors of any compensation to officers, directors or trustees, and compensation of others in excess of \$5,000; limiting employee contracts of officers, trustees, and salaried employees to a period of one year; and restricting the amount of compensation payable to an officer, director, or trustee. In all but the final instance, where the word "salary" is separated from the others, these words are combined in the phrase "salary, compensation or emolument".

It is apparent that these three words were meant to be used interchangeably, for the Legislature clearly recognized that corporate officers and directors might receive not only salaries in the narrowest sense (periodic cash payments) but also other things of value as compensation or emolument. Any construction limiting the word "salary" to its narrowest meaning could only lead to one of two untenable results: either that no officer, director, or trustee may receive any recompense other than a salary; or that only salaried officers, directors, or trustees are prohibited from receiving other compensation or emolument while those who receive some other form of recompense than salary would not be so restricted.

It is our opinion that the Legislature intended the word "salary" to be used in this section in its broadest sense, being synonymous with the words "compensation" and "emolument". While there is no uniformity in court decisions through the country as to the meaning of the word "salary", in most cases courts have chosen to equate this word with "compensation" or "emolument" when the particular context calls for such treatment. There is ample authority construing the words "salary", "compensation", or "emolument" to be synonymous and interchangeable. As to "salary" and "emolument", see: *Vansant v. State*, 53 Atl. 711, 714 (Del. Ct. of App., 1902); *Town of Bruce v. Dickey*, 6 N.E. 435, 439 (Ill. Sup. Ct., 1886); *State ex rel. Benson v. Schmahl*, 145 N.W. 794, 795 (Minn. Sup. Ct., 1914); *Dugger v. Bd. of Supervisors of Panola Cty.*, 104 S. 459, 461 (Miss. Sup. Ct., 1925); *State v. Dishman*, 68 S.W. 2d 797, 798 (Mo. Sup. Ct. 1934); *State ex rel. Lyons v. Guy*, 107 N.W. 2d 211, 215, 216 (N.D. Sup. Ct., 1961); *Sellers v. School District of Twp. of Upper Moreland*, 122 A. 2d, 800, 801 (Pa. Sup. Ct., 1956); *Taxpayers' League of Carbon Cty. v. McPherson*, 54 P. 2d 897, 901 (Wyo. Sup. Ct., 1936); as to "salary" and "compensation", see: *Treu v. Kirkwood*, 255 P. 2d 409, 413 (Cal. Sup. Ct., 1953); *Cook Cty. v. Healy*, 78 N.E. 623 (Ill. Sup. Ct., 1906); *State ex rel. DeGhant v. Kelsner*, 14 N.E. 2d 350 (Ohio Sup. Ct., 1938); *Scroggie v. Scarborough*, 160 S.E. 596, 599 (S.C. Sup. Ct., 1931); *Christopherson v. Reeves*, 184 N.W. 1015, 1019 (S.D.

Sup. Ct. 1921); *Higgins v. Glenn*, 237 Pac. 513, 515 (Utah Sup. Ct., 1924).

Clearly, stock options may be considered "compensation" for services. Such options obviously are possessed of value. See *Eliasberg v. Standard Oil Co.*, 23 N.J. Super. 431 (Ch. Div. 1952), *aff'd per curiam* 12 N.J. 476 (1953), and *Diamond v. Davis*, 38 N.Y.S. 2d 103, 113 (1942), *aff'd*, 39 N.Y.S. 2d 412, *app. den.* 41 N.Y.S. 2d 191, *aff'd*, 54 N.E. 2d 683 (Ct. of App., 1944). Since the price to be paid for the stock when ultimately purchased is set as of the date of issue of the option, a profit may be anticipated, even though not guaranteed, through a potential appreciated market value of the stock itself. Compensation is payment or remuneration, in the case of corporate officers, for services rendered, or to be rendered. A stock option is no less compensation because it is not money but an expectancy of profit.

Although stock options are compensation, it is our opinion that they are part of salary and do not constitute the "other compensation or emolument" prohibited by R.S. 17:34-4 when granted as part of the contract of employment. This form of compensation may be in lieu of or in addition to cash salary but nevertheless, it may constitute a part of the officer's overall salary. Salary is "the recompense or consideration paid, or stipulated to be paid, to a person at regular intervals for services". *Webster's New International Dictionary*, 2nd Ed., (1943) p. 2203. "Salary in its general sense is a compensation for services rendered by one to another . . ." *United Boxboard & Paper Co. v. McEwan Bros., Co.*, 76 A. 550, 554 (Ch. 1910). "It frequently happens that an employee is paid a stipulated and fixed salary, and in addition thereto, receives compensation at a fixed percentage on the amount of his sales or other considerations; but, call the extra percentage what you will, it is the compensation or salary allowed to the employee for the specified period." *Ibid.* at p. 554.

While there are no reported cases passing upon stock options as part of salary, numerous cases have so held in connection with retirement and pension plans. "The retirement plan of the company and the benefits thereunder are a form of contingent deferred compensation for personal services of the employees and an integral part of the wage and salary structure of the company. The benefits provided by the plan constitute 'salary, compensation or emolument' as these terms are used in the statute." *Ledwith v. Bankers Life Insurance Co.*, 54 N.W. 2d 409, 417 (Neb. Sup. Ct. 1952) and cases therein cited.

It is to be emphasized that the evil which R.S. 17:34-4 was intended to rectify was the improper misappropriation or invasion by directors, officers, and key employees of corporate surpluses. Stock options, otherwise complying with applicable statutory limitations, do not engender this evil. They are a form of compensation which stimulates incentive without involving cash disbursements. They provide, upon their exercise, contributions to the corporation which augment corporation capital stock. This clearly does not constitute an invasion of corporate surplus or a detriment to the company within the contemplation of the statute.

It may be noted that salary increases can be granted in the sole discretion of the board of directors. Stock options, in contrast, require stockholder ratification if not authorized in the certificate of incorporation. R.S. 14:8-17. Where new companies are being formed and the corporate certificate contains reference to stock options, purchasers of capital stock would be apprised of the situation in advance. Thus, there must be disclosure and specific authorization for the issuance of stock options. Moreover, under R.S. 17:34-4, the stock option must constitute a part of the salary for services. If total salary is in excess of \$5,000 per year, such salary inclusive of any stock options, must be specifically authorized by the board of directors. Additionally, stock options as a part of salary for services must be explicitly provided for in the

employment agreement which by its terms may not extend beyond one year. Thus, any proposed stock options for officers, directors or trustees must be issued or granted during the term of the annual employment agreement even though they may be exercised at a later date.

In conclusion, for the foregoing reasons, you are advised that domestic life insurance companies may grant stock options to officers, directors, and trustees under the general provisions of Title 14 provided such options comply with applicable limitations set forth in R.S. 17:34-4 as indicated herein.

Very truly yours,  
ARTHUR J. SILLS  
*Attorney General*

By: AVROM J. GOLD  
*Deputy Attorney General*

January 23, 1964

MR. CHARLES F. SULLIVAN, *Director*  
*Division of Purchase and Property*  
Department of the Treasury  
State House  
Trenton, New Jersey

MEMORANDUM OPINION - NO. 1

Dear Mr. Sullivan:

You have requested our opinion as to the nature and scope of your authority to make agreements for the leasing of space in state buildings to private corporations for the installation of vending machines which dispense various commodities. For the reasons set forth below, it is our opinion that complete control of vending machine contracts, areas of installation, types of machines installed, and the revenue to be derived therefrom is vested in the Department of the Treasury to be exercised through the Division of Purchase and Property and its director. This applies to all buildings owned by the State, except where a statute may otherwise specifically provide.

In 1931 the Legislature gave certain powers to the State House Commission regarding control of State buildings and the leasing of office space. By P.L. 1931, c. 184 (now N.J.S.A. 52:20-7) it was provided:

"The commission shall have custody of the state house, the property contained therein and the adjacent public grounds and all buildings owned by the state, including the state barracks, which are used by the departments, agencies and officials of the state in connection with the conduct of the state's business, and shall lease from time to time such office space as may be required for the conduct of the state's business at such terms and under such conditions as it may deem appropriate."

Thereafter the Legislature transferred these powers of the State House Commission to the Director of the Division of Purchase and Property (hereinafter sometimes referred to as the "Director"). P.L. 1944, c. 112 (now, N.J.S.A. 52:27B-64), which provides:

"The powers and duties vested in the State House Commission by sections 52:20-7, 52:20-13, 52:20-14, 52:20-20 and 52:20-25 of the Revised States are hereby transferred to the Division of Purchase and Property and to the director thereof.

"The director, with the commissioner's [State Treasurer's] approval, shall to every practicable extent arrange, and from time to time rearrange, the office space assigned to the various departments and other agencies of the State Government in a manner to provide for the most efficient conduct of the business of such departments and agencies."

By P.L. 1948, c. 92 (N.J.S.A. 52:18A-16) the Division of Purchase and Property of the existing State Department of Taxation was transferred to and constituted the Division of Purchase and Property in the Department of the Treasury, retaining all its former functions, powers and duties. The functions, powers and duties of the director thereof were also continued by P.L. 1948, c. 92 (N.J.S.A. 52:18A-18) but were transferred to the Division of Purchase and Property in the Department of the Treasury.

It may further be noted that by P.L. 1949, c. 132 (N.J.S.A. 52:18A-19.1) the Director of the Division of Purchase and Property in the Department of the Treasury was authorized and empowered to lease in the name of the State any lands owned by the State, not needed or used for State purposes, to any municipality of the State or parking authority for public parking purposes. This expresses the legislative intent to give authority to the Director to control the use of surplus lands, just as it has expressly given him the power to dispose of surplus personal property which is "in the custody and control of any State department, institution, commission, board, body or other agency of the State \*\*\*" N.J.S.A. 52:27B-67.

The foregoing laws clearly make manifest the intention of the Legislature, unless otherwise expressly provided, to vest control of all State owned buildings in the Division of Purchase and Property, Department of the Treasury, to be exercised by the Director thereof. They further show the area of operation of the Director, including the right to lease lands owned by the state which are not needed for state use. Although the statutes do not expressly authorize the Director to lease portions of state buildings for vending machine purposes, it is a power that may be impliedly found in the office of the Director. It may be considered a necessary incident to the leasing and allocation of office space for the efficient conduct of the State's business. Moreover, no statute gives this power to any other state office or body; it is the Director who is given the custody and control of "all buildings owned by the state \*\*\*" N.J.S.A. 52:20-7.

With respect to the disposition of revenues derived for vending machine leases, New Jersey Constitution, Art. VIII, Sec. III, par. 3 is pertinent. This provides:

"No donation of land or appropriation of money shall be made by the State or any county or municipal corporation to or for the use of any society, association or corporation whatever."

Therefore, it would be a violation of the Constitution to allow revenues realized from the lease or rental of surplus State owned property to be diverted to any private use. *Cf. In re Voorhees*, 123 N.J. Eq. 142 (Prerog. Ct. 1938), *aff'd* 121 N.J.L. 594 (Sup. Ct. 1939), *aff'd* 124 N.J.L. 35 (E. & A. 1940); *Wilentz v. Hendrikson*, 133 N.J. Eq. 447 (Chan. 1943), *aff'd* 135 N.J. Eq. 244 (E. & A. 1944). N.J.S.A. 52:18A-8 requires that all state revenues collected by any official, agency or department must be paid into the general treasury for deposit to the credit of the State of New Jersey. The statute authorizing the Director of the Division of Purchase and Property to sell surplus personal property also expressly requires the Director to "pay the proceeds arising from such disposition into the general fund of the State." N.J.S.A. 52:27B-67. Since the placement of vending machines involves the use of State property, no other group or individual may receive the revenue therefrom and no gift of such revenues may be made by the State for private purposes. Of course it may benefit state personnel to afford them the convenience of access to such vending machines.

Accordingly, it is our opinion that, unless otherwise expressly authorized by statute, the authority and responsibility for leasing space in state buildings for vending machine purposes is vested solely in the Director of the Division of Purchase and Property, and all revenues derived therefrom must be paid into the general treasury pursuant to N.J.S.A. 52:18A-8.

Very truly yours,  
ARTHUR J. SILLS  
*Attorney General*  
By: ROBERT L. SOLAN  
*Deputy Attorney General*

February 6, 1964

MR. ALVIN E. GERSHEN, *President*  
*Board of Professional Planners*  
1100 Raymond Boulevard  
Newark 2, New Jersey

MEMORANDUM OPINION — NO. 2

Dear Mr. Gershen:

You have asked whether a licensed professional engineer, land surveyor, or registered architect of New Jersey who applies for a license as a professional planner must comply with all of the formal requirements of the law regarding the practice of professional planning, including the submission of references and educational qualifications and taking an examination.

For the reasons hereinafter stated, it is our opinion that duly licensed professional engineer, land surveyor or registered architect need not meet the formal statutory requirements and qualifications imposed upon other applicants for a license as a professional planner.

By L. 1962, c. 109, N.J.S.A. 45:14A-1 *et seq.*, the legislature has regulated the practice of professional planning in New Jersey and has prohibited the use of the title of "professional planner" except by persons licensed under that Act. Professional planning is defined as doing work in the development of master plans and other related work in guiding governmental policies for the "development of municipal, county, regional, and metropolitan land areas and the State or portions thereof." The law is administered by the State Board of Professional Planners (N.J.S.A. 45:14A-5) in the Division of Professional Boards of the Department of Law and Public Safety (N.J.S.A. 45:14A-4).

Applicants for a license as a professional planner are divided by the statute into three categories, namely, (1) persons who have been licensed by another state as professional planners, (2) persons who are professional engineers, land surveyors or architects licensed by the State of New Jersey and (3) all other applicants.

Section 8 of the Act (N.J.S.A. 45:14A-8) provides that applications for licenses as professional planners shall be on forms prescribed by the Board and shall contain statements showing the applicant's education, planning experience and certain references as defined by statute. Section 9 of the Act (N.J.S.A. 45:14A-9) provides detailed qualifications to be considered "as minimum evidence satisfactory to the board that an applicant is qualified for license as a professional planner." An applicant under this section must meet certain minimal educational and experience requirements and must pass an examination in specified subjects.

Section 11 of the Act (N.J.S.A. 45:14A-11) provides that examinations are to be given at least once a year. The same section goes on to provide for the licensing in New Jersey of professional planners who have been licensed by another state. This section provides:

"The board, upon application therefor on its prescribed form and the payment of the application and license fees fixed by this act, may issue a certificate of license as a professional planner without written examination to any person holding a certificate of license as a professional planner issued to him by any State, when the applicant's qualifications meet the requirements of this act and the rules established by the board."

It is noted that persons who are licensed by another state need not take a written examination, but must make application for a New Jersey license on a form prescribed by the Board and must meet the qualifications set forth by the statute and the rules established by the Board. Following the above quoted provisions for licensing of out-of-state professional planners, the following provision also appears in Section 11 of the Act (N.J.S.A. 45:14A-11):

"The board upon application therefor and the payment of the application and license fees fixed by this act shall issue a certificate of license as a professional planner to any duly licensed professional engineer, licensed land surveyor or registered architect of New Jersey."

Thereafter, Section 11 provides that "Any applicant who has passed the examination and has otherwise qualified hereunder as a professional planner, upon payment of the license fee fixed by this act, shall have a certificate of license issued to him

as a professional planner, signed by the president and secretary-director of the board under the seal of the board."

Obviously this last provision in Section 11 applies only to those persons who are required to take the examination. It is significant that in dealing with persons licensed as professional planners by another state the legislature expressly provided that no written examination is required, but continued to provide that the board should ascertain whether the applicant's qualifications meet all of the requirements of the Act. But when dealing with persons who are professional engineers, licensed land surveyors and registered architects of New Jersey, the legislature did not provide that the Board should ascertain whether these applicants have the educational experience and other qualifications mentioned in the Act. The statute does not require these applicants to take the written examination; nor does it exempt them from doing so. The statute is silent in this regard.

The clear language of the statute provides for the issuance of a license as a professional planner to persons who are duly licensed in New Jersey as professional engineers, land surveyors or registered architects simply "upon application therefor \*\*\*."

It is clear that the legislature intended special treatment for persons who are licensed in New Jersey as professional engineers, land surveyors and registered architects. Without being licensed as a professional planner, the act expressly recognizes the right of persons who are licensed in New Jersey as professional engineers, land surveyors or registered architects to perform professional planning services, provided that such persons do not hold themselves out as professional planners. N.J.S.A. 45:14A-3. It is significant also that although professional engineers, land surveyors and architects may do planning work, the Act provides that the work of a professional planner "shall not include or supersede any of the duties of \*\*\* a licensed professional engineer, land surveyor or registered architect of the State of New Jersey." N.J.S.A. 45:14A-2(c).

The statute further distinguishes, in a less significant way, between professional engineers, land surveyors and architects and other persons who apply for a license as a professional planner. The provision that deals with professional planners who are licensed by another state requires that the application for a license in New Jersey be made on the "prescribed form" of the Board. N.J.S.A. 45:14A-11. Applications by other persons must also be "on forms prescribed and furnished by the Board \*\*\*." N.J.S.A. 45:14A-8. But the provision dealing with professional engineers, licensed land surveyors or registered architects of New Jersey simply states that "upon application therefor and the payment of the application and license fees"; the Board "shall issue a certificate of license" to such persons. N.J.S.A. 45:14A-11. No mention here is made of the requirement that the application be on forms "prescribed" or "furnished" by the Board.

From the foregoing, it is our conclusion that the legislature intended that persons who have been licensed by the State of New Jersey as professional engineers, land surveyors and architects may be licensed as professional planners merely upon application made and the payment of the application and license fees provided by the Act. It is not necessary that such persons establish that they meet the qualifications of a professional planner as set forth in the Act; nor need they take the written examination. As indicated above, the Act expressly provides that it shall not be construed as to prohibit any licensed professional engineer, land surveyor or registered architect in the State of New Jersey from engaging or performing any or all services re-

ferred to as professional planning. But in order to hold themselves out as professional planners, as well as professional engineers, land surveyors or architects, such persons must apply for and become separately licensed as professional planners.

Very truly yours,  
**ARTHUR J. SILLS**  
*Attorney General*

By: **NICHOLAS SAROS**  
*Deputy Attorney General*

March 24, 1964

**COLONEL DOMINIC R. CAPELLO**  
*Superintendent*  
 Division of State Police  
 West Trenton, New Jersey

MEMORANDUM OPINION - NO. 3

Dear Colonel Capello:

You have asked whether experience gained as an investigator in the Office of Special Investigations (OSI) of the United States Air Force satisfies the experience requirement of the Private Detective Act of 1939. N.J.S.A. 45:19-8 *et seq.* The pertinent section of the act provides in part:

"No license shall be issued to a person under the age of twenty-five years, nor to any person, firm, association or corporation unless such person or at least one member of the firm and one officer or director of the association or corporation has had at least five years' experience as an investigator or as a police officer with an organized police department of the State or a county or municipality thereof, or with an investigative agency of the United States of America or any State, county or municipality thereof."

For reasons expressed below, the Office of Special Investigations is construed to be "an investigative agency of the United States of America," within the meaning of the act, and an applicant may be licensed if he has actually engaged in the law enforcement investigative activities of this agency for the statutory period.

There can be little question that the Office of Special Investigations is a component part of an agency of the United States. Cf. *United States of America vs. Steiner Plastics Manufacturing Company*, 231 Fed. 2d 149, 152 (2nd Cir. 1956). But the basic inquiry must be whether that agency is within the intent and purpose of the statutory modifier, "investigative". In making such an inquiry:

"It is proper to give effect to the obvious purpose of the Legislature, and to that end 'words used may be expanded or limited according to the manifest reason and obvious purpose of the law. The spirit of legislative direction prevails over the literal sense of the terms.' " *New Capitol Bar and Grill Corp. v. Division of Employment Security*, 25 N.J. 155, 160 (1957).

Within the limits of the foregoing direction as to statutory interpretation it is not an unwarranted expansion of the words of the act to find a meaning which requires investigative experience in a law enforcement agency, i.e., one charged with the duty of investigating and preparing for prosecution or other disposition violations of the criminal law. This is in accord with our Memorandum Opinion dated October 9, 1961, which stated, in part, that an applicant "must establish that he has been predominantly engaged in criminal or related investigative work in order to meet the statutory requirements set forth in N.J.S.A. 45:19-12."

That the Office of Special Investigations is an "investigative agency" within the meaning of the Private Detective Act of 1939 is readily ascertainable from a reading of the United States Air Force Regulation (U.S.A.F. Regulation No. 124-1) which sets forth the mission and responsibilities of the agency and provides in part:

"5. Functions of the OSI. OSI will conduct and supervise investigative operations within the Air Force to include the following:

a. The investigation of an alleged major offense committed against a person, personal property, or the United States Government or its property, as defined by regulation or law, and in accordance with jurisdictional agreements (for example, see AFR § 124-11 and 124-12). These offenses include but are not limited to:

(1) Arson, bribery, homicide, counterfeiting, sodomy, rape and other sex offenses, impersonation, improper use or diversion of Government property or employees, forgery, robbery, housebreaking, narcotics, violations of the Uniform Code of Military Justice, Federal, and other statutes and directives.

(2) A fraud against the Government in contract and pay and allowance matters, conflicts of interest, and other criminal irregularity in connection with appropriated and nonappropriated funds, procurement or disposition of Air Force property, and related activities.

(3) Matters pertaining to treason, sedition, subversion, security violations, disaffection, espionage and sabotage."

Therefore, where an applicant provides adequate proof that he has been actually engaged as an investigator in the law enforcement investigative activities of the United States Air Force Office of Special Investigations, this activity may be used to satisfy the experience requirements of N.J.S.A. 45:19-12.

Very truly yours,  
**ARTHUR J. SILLS**  
*Attorney General*

By: **EVAN WILLIAM JAHOS**  
*Assistant Attorney General*



May 14, 1964

HONORABLE JOHN A. KERVICK  
*State Treasurer*  
 State House  
 Trenton, New Jersey

## MEMORANDUM OPINION - NO. 4

Dear Mr. Kervick:

You have asked who are the proper beneficiaries of the death benefits of Albert Galinn and of Charles L. Payton, both of whom are deceased members of the Public Employees' Retirement System. For the reasons stated below, in our opinion, the beneficiaries are those named as beneficiaries in the retirement applications of these members, notwithstanding that they died before their proposed effective retirement dates.

The facts in the Galinn matter are as follows: In 1943 Albert Galinn became a member of the State Employees' Retirement System (now the Public Employees' Retirement System). On May 28, 1956 Albert Galinn executed a designation of beneficiary form wherein he named as beneficiaries Stanley I. Galinn, Leatrice E. Williams and Janet E. Friedman, or survivor, share and share alike. Said form was filed with the System on June 4, 1956. On October 4, 1963 Albert Galinn executed an application for service retirement to become effective June 30, 1964 under Option 1. In the application Mr. Galinn designated Stanley I. Galinn to receive any and all amounts to become due upon his death. The application for service retirement was received by the System on October 7, 1963. On October 14, 1963 Albert Galinn died. The Board of Trustees of the Public Employees' Retirement System never took any action on the retirement application. There is presently owing to the beneficiaries of Albert Galinn the sum of \$18,296.33 (\$7,605.00 - Non-contributory Group Life Insurance; \$5,070.00 - Contributory Group Life Insurance; \$3,779.30 - Employee Contributions; \$1,842.03 - Interest on Contributions).

The facts in the Payton matter are as follows: Charles L. Payton executed his application for enrollment in the State Employees' Retirement System on October 30, 1939. In his application for membership, he nominated his father and mother, Henri and Albertine Pautot, as his beneficiaries. On November 1, 1956, he enrolled in the State of New Jersey Group Life Insurance Plan and he designated his mother, Mrs. Albertine M. Pautot, as the beneficiary of the death benefit to be paid thereunder. By a letter dated February 13, 1962, Mr. Payton was advised by Doris G. Goulding, Chief, Enrollment & Claims Bureau, that the following primary designations are reported for his account: Group Life Insurance - Mrs. Albertine M. Pautot - Mother; Return of Accumulated Deductions - Henri Pautot - Father; Albertine Pautot - Mother. A change of designation of beneficiary form (P40-5) was enclosed in duplicate, and the decedent was requested to have this form completed and signed in the presence of a Notary Public if he desired that the same beneficiary receive all death benefits that may become due. No reply to the foregoing letter was ever received by the Division of Pensions.

On December 13, 1963, Mr. Payton applied for retirement to become effective July 1, 1964. In the retirement application he selected the maximum allowance without option. He designated Mrs. Albertine M. Pautot and Mrs. Elizabeth A. Payton, his mother and wife respectively, as the beneficiaries to receive payment of any and

all amounts due or to become due upon his death. The beneficiary of the paid-up life insurance benefit of 3/16 of salary paid during the last year of creditable service was his mother and his wife since he did not specify a different beneficiary in the space provided therefor. The form was notarized on December 13, 1963 and acknowledged and filed by the Secretary to the Board on December 27, 1963.

Mr. Payton died on February 15, 1964. The Board had not taken any action on his application. Since the death occurred prior to the retirement date of July 1, 1964, the in service benefits payable in this case will be approximately \$11,200.80 covering accumulated contributions and \$22,800.00 covering both the non-contributory and contributory insurance.

It is our opinion for the reasons set forth herein that the proper beneficiaries are those named in the retirement applications, namely, Stanley Galinn, in the one case, and Mrs. Albertine M. Pautot and Mrs. Elizabeth A. Payton, in the companion situation.

The common issue posed by the stated facts in both cases is whether the beneficiary designation of a retirement application constitutes an amendment or change of a previously filed designation of beneficiary when acknowledged and filed, notwithstanding that the employee dies before the effective date when retirement is to commence.

The payment of non-service connected death benefits to a designated beneficiary is governed by N.J.S.A. 43:15A-41c. By virtue of the aforesaid section, a member's accumulated deductions, with regular interest, and an amount equal to 1-1/2 times the compensation upon which a member's contributions are based, are payable to the member's designated beneficiary. Where the member has made optional contributory payments, an additional amount equal to the compensation received in the member's last year of creditable service is also payable to the member's beneficiary, designated to the insurance company through the policyholder. N.J.S.A. 43:15A-94.

Subsection "d" under N.J.S.A. 43:15A-41 provides for the change of beneficiary for the benefits payable under subsection "c" and reads in pertinent part:

"A member may file with the board of trustees, and alter from time to time during his lifetime, as desired, a duly attested written new nomination of the payee of the death benefit provided under this section . . . ."

To change a beneficiary there are only two requirements: (1) a duly attested written nomination, and (2) the filing thereof with the Board of Trustees. The prerequisites for effecting a change of beneficiary under N.J.S.A. 43:15A-41d do not significantly differ from those required by N.J.S.A. 43:15A-94.

Under N.J.S.A. 43:15A-41d, a duly attested written nomination is necessary to change a beneficiary, filed with the Board of Trustees. N.J.S.A. 43:15A-94 calls for the same duly attested written designation, filed, however, with the insurance company "through the policyholder." The policyholder under both Non-contributory and Contributory Group Life Insurance Policy (Policy No. G-13900) is the Board of Trustees of the Public Employees' Retirement System of New Jersey. (Today, the State Treasurer is the group policyholder for the non-contributory insurance program involving members of the Teachers' Pension and Annuity Fund and the Public Employees' Retirement System, while the respective Boards of Trustees are the group policyholders for the separate contributory insurance policies.) Inasmuch as the policyholder is the Board of Trustees, filing with the Board would satisfy the statutory requisite under N.J.S.A. 43:15A-94.

Moreover, construing the change of beneficiary language in sections 43:15A-41d and 43:15A-94 alike comports with the realities of the situation as it must have been contemplated by the Legislature when the bill was enacted which permits the retirement systems to be funded through private insurers. The scheme of administering the policies has been left to the Division of Pensions. All of the records are maintained at the Division of Pensions. Beneficiary designations are filed with Enrollment and Claims Bureau and Records Section. Designations of individuals are accepted by this Bureau without further approval of the insurance company. Only special designations, such as appointing trustees as beneficiaries, are forwarded to the insurer for approval. The insurance company does not maintain any records pertaining to the designation of a beneficiary who is an individual.

The Director and Assistant Director of the Division of Pensions have been specifically authorized by the State Treasurer, the policyholder, to issue checks for the payment of the non-contributory insurance benefits. In addition to the signature of the Director or his alternate, the Assistant Director, the contributory insurance payments require the counter-signature of the Secretary to the Board of Trustees of the Public Employees' Retirement System or the Secretary to the Teachers' Pension and Annuity Fund, as the case may be.

Thus, the filing of a beneficiary designation, the maintaining of records pertaining thereto, and the payment of both the non-contributory and contributory insurance benefits are administered by and through the Division of Pensions under what is commonly referred to as the "short method of claims administration." Using this short method of claims administration, the group insurance program results in savings which would be lost if the insurance company were to administer the program itself. Since the Division of Pensions through the self-administration of the policies determines who is to be paid and issues the checks for payments, it is reasonable to conclude that the method required to change a beneficiary existing under N.J.S.A. 43:15A-41d should be the same under N.J.S.A. 43:15A-94. Therefore, the clauses in both sections should be construed alike, namely, that the filing with the Board of Trustees effects a change of beneficiary under N.J.S.A. 43:15A-94 just as under N.J.S.A. 43:15A-41d.

The retirement applications filed by Mr. Galinn and Mr. Payton have squarely met the necessary requisites of attestation and filing to effectively change the beneficiaries in each case. No magic language of revocation or alteration is statutorily demanded for the change; it is sufficient to satisfy the statute without resort to the recitation of a formula.

The language utilized in the particular retirement application form (P30-42-961) and executed by the decedents herein reinforces the view that the beneficiaries have been altered as desired. Paragraph 10 of the application reads:

"I hereby nominate the following named person as the beneficiary who shall receive payment of any and all amounts due or to become due upon my death. (Do Not Leave Blank - Name estate if specific beneficiary is not named.)"

The language "any and all amounts due or to become due upon my death" is broad enough to encompass all death benefits payable, regardless of the amount or the time at which death may occur. It is not unreasonable to conclude that an employee's current choice of beneficiary is accurately reflected by the designation he makes on

his retirement application.

Therefore, it is our conclusion that Stanley I. Galinn, and Mrs. Albertine M. Pautot and Mrs. Elizabeth A. Payton, the beneficiaries named in the retirement applications of Albert Galinn and Charles L. Payton, respectively, are the proper beneficiaries, and the payments by you should be governed accordingly.

Very truly yours,  
ARTHUR J. SILLS  
*Attorney General*

By: RICHARD NEWMAN  
*Law Assistant*

July 21, 1964

MR. ROGER H. McDONOUGH  
*State Librarian*  
Department of Education  
State House Annex  
Trenton, New Jersey

MEMORANDUM OPINION - NO. 5

Dear Mr. McDonough:

We have been asked whether or not volunteer fire companies are subject to the provisions of the Destruction of Public Records Act, N.J.S.A. 47:3-15, *et seq.* Specifically, you ask whether volunteer fire companies which receive financial support from municipalities are subject to the "Destruction of Public Records Act (1953)".

It is our opinion that such volunteer fire companies are subject to the Act:

The definition section of Chapter 410, Laws of 1953 (N.J.S.A. 47:3-16) provides in part as follows:

"As used in this act, except where the context indicates otherwise, the words 'public records' mean any paper, written or printed book, document or drawing, map or plan, photograph, microfilm, sound-recording or similar device, or any copy thereof which has been made or is required by law to be received for filing, indexing, or reproducing by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received by any such officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, in connection with the transaction of public business and has been retained by such recipient or its successor as evidence of its activities or because of the information contained therein." (Emphasis supplied).

The critical inquiry, therefore, is whether a volunteer fire company comes within any of the above mentioned categories.

The relationship between a volunteer fire company receiving appropriations from a municipality and that municipality has been set forth by our Supreme Court in *Schwartz v. Stockton*, 32 N.J. 141 (1960). Although the Court in that case discussed the status of a volunteer fire department in the context of municipal immunity from liability, the views set forth therein are pertinent here. The court states, at pp. 150-152:

“\*\*\* It is only the larger and more densely settled centers that can afford or have the need for a full-time complement of fire-fighters, compensated and supplied entirely at municipal expense. But the need for some fire protection exists everywhere and the volunteer company supplies that need where a municipal department is not feasible. While such organizations are independent, incorporated as associations not for pecuniary profit (R.S. 15:8-1 *et seq.*), and frequently supply their own buildings and apparatus, they may, and generally do, have definite relationships with municipal governing bodies, at least through annual appropriations to them for equipment and maintenance, thereby giving them a kind of semi-official status. This relationship is particularly spelled out in the township law (R.S. 40:149-4 to 15, *inc.*), whereby the township committee is empowered, among other things, to contract financially with volunteer companies ‘for the purpose of extinguishing fires,’ the company to be under township supervision and control and ‘considered as doing public fire duty.’ R.S. 40:149-8. While the borough law, pertinent here, does not contain the same detailed provisions, it does expressly authorize the annual appropriation of sizeable sums of money to aid borough volunteer fire companies or those in adjoining municipalities habitually responding to fires therein and to pay for group life and other insurance for the benefit of company members. R.S. 40:47-27 and 28, as amended. L. 1945, c. 47 (N.J.S.A. 40:47-30.1 and 30.2). We have no doubt a borough has the same right as a township to make its annual appropriation on a contractual basis, as Stockton did here, despite the absence of express statutory authority, either by virtue of the broad general powers delegated to all municipalities to enact measures necessary and proper for the preservation of the public safety and welfare (R.S. 40:48-2) or by implication from the express power to appropriate moneys in aid of the fire company. *Cf. Green v. City of Cape May*, 41 N.J.L. 45 (Sup. Ct. 1879).

“Moreover, the Workmen’s Compensation Law covers volunteer firemen doing public fire duty (N.J.S.A. 34:15-43) and each governing body is required to procure insurance to assure payment of such benefits (N.J.S.A. 34:15-74). *Cf. Brower v. Township of Franklin*, 119 N.J.L. 417 (Sup. Ct. 1938), decided before section 43 was amended to its present broad form. Of special significance is the legislative declaration in section 43 that ‘[e]very active volunteer fireman shall be deemed to be doing public fire duty under the control or supervision of any \*\*\* governing body\*\*\* within the meaning of this section \*\*\* if the fire company of which he is a member receives contributions from, or a substantial part of its expenses or equipment are paid for by, the municipality \*\*\*.’ (Emphasis added) It

is, therefore, clear that Stockton’s annual ‘contractual aid’ payment to the fire company is actually carrying on a governmental activity or function by an authorized method rather than a proprietary arrangement.’ *Cf. Cuna v. Bd. of Fire Com’rs Avenel*, 42 N.J. 299 (1964).

The language singled out for emphasis by the Supreme Court signifies clear recognition by that court of the “semi-official” status of certain volunteer fire companies and indicates that any such company should be considered an “agency” or “authority” of a municipality, a “political subdivision” of the State within the terms of N.J.S.A. 47:3-16. The criteria established in the *Stockton* case for determining whether a volunteer fire company enjoys “semi-official” status must be met, however, in order for the Destruction of Public Records Act to be applicable, *i.e.*, the municipality must contribute substantially to the expense and equipment of the volunteer fire company.

Therefore, volunteer fire companies which receive substantial municipal financial support are subject to the provisions of the “Destruction of Public Records Act.”

Very truly yours,  
ARTHUR J. SILLS  
*Attorney General*

By: HOWARD H. KESTIN  
*Deputy Attorney General*

July 22, 1964

HONORABLE ROBERT A. ROE  
*Commissioner, Department of  
Conservation & Economic Development  
Trenton, New Jersey*

MEMORANDUM OPINION – NO. 6

Dear Commissioner Roe:

You have requested our opinion as to whether the provisions of R.S. 23:3-22 concerning revocation of licenses following second convictions may be applied to a license for commercial fishing in the Atlantic Ocean issued by the Division of Fish and Game pursuant to R.S. 23:3-47.

For the reasons expressed herein, we are of the opinion that the provisions of R.S. 23:3-22 do not apply to a license issued pursuant to R.S. 23:3-47.

R.S. 23:3-22 provides:

“If a person shall, within 5 years after conviction of any violation of the fish and game laws of this or any other State or of any provision of the State Fish and Game Code of this State, be again convicted of another

violation of the fish and game laws of this or any other State or of any provision of the State Fish and Game Code of this State, any fishing license or hunting license or bow and arrow license held by the person so convicted shall be void upon such conviction and it shall be the duty of such person to surrender the same to the Division of Fish and Game for cancellation. A license issued to such person within a period of 2 years from the date of such second conviction, except as otherwise provided by law, or of 3 years from the date of his third or subsequent conviction, shall be void. If he shall be convicted of fishing or hunting under any license so made void, or without a license, during any such period, he shall be punished by a penalty of \$100.00 for each offense."

R.S. 23:3-47 provides:

"A person who intends to take fish with shirred or purse seines, otter or beam trawls in the waters of the Atlantic Ocean within the jurisdiction of this State shall make application to the board for a license for that purpose for each vessel proposed to be engaged in the fishing.

"The board, upon the receipt of the application and the payment to it of the sum of fifty dollars (\$50.00) for each vessel proposed to be engaged in the fishing, shall issue to the applicant a license for the 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. The license shall expire on December thirty-first in the year in which it is issued." (Emphasis supplied).

The problem thus resolves itself into whether a license issued pursuant to R.S. 23:3-47 is a fishing license within the intendment of R.S. 23:3-22.

Sport fishing in the Atlantic Ocean with conventional rod and reel requires no license under our laws. It is only when there is a taking of fish in great quantities with the aid of nets and other particular gear for obviously commercial purposes that the State requires licenses. As can be readily discerned, R.S. 23:3-47 does not license fishing, as such, but does license a manner in which fish are to be removed, i.e., "a license for the vessel to take with shirred or purse seine, otter or beam trawl, fish of any kind \* \* \*".

In construing statutes, effect must be given to the intendment of the legislature as expressed in the statute and that intention is to be taken or presumed according to what is consonant with reason and good discretion. *Clarkson v. Ley*, 106 N.J.L. 38 (E. & A. 1929); *In re Merril*, 88 N.J. Eq. 261 (Prerog. Ct. 1917).

R.S. 23:3-49 imposes severe sanctions for violations of R.S. 23:3-47. Any person violating the latter statute is chargeable with a misdemeanor subject to a penalty of \$200 for the first offense and \$500 for any subsequent offense and in either case any fish unlawfully caught, taken or killed are forfeited to the State.

If a license issued under R.S. 23:3-47 is construed to be a fishing license within the intendment of R.S. 23:3-22, then in addition to the foregoing sanctions, the owner and operator of a fleet of vessels conducting an otherwise legitimate operation as a means of his livelihood could well be deprived of such livelihood for infractions of some relatively minor fish and game law such as exceeding the bag limit for up-

land game or shooting a female pheasant. It is not consonant with reason or good discretion to ascribe such an intention to the legislature.

Moreover, examination of the legislative histories of R.S. 23:3-22 and R.S. 23:3-47 and of the two separate articles in which these two statutes appear, would seem to bolster a conclusion that the legislature never intended that the two statutes were to be construed as being in *para materia*. History of legislation may properly be examined to assist in ascertaining legislative intent. *Bass v. Allen Improvement Co.*, 8 N.J. 219, 226(1951).

R.S. 23:3-22, and most of the laws which are found in Article 1 of Chapter 3, is derived from Laws of 1903, c. 246, p. 526, which was entitled:

"An Act for the protection of certain kinds of birds, game and fish, to regulate their method of capture and provide open and closed seasons for such capture and possession."

Although the Act speaks in terms of preventing the taking of fish from "any of the waters of this State" the Act provides at p. 535 that:

"\* \* \* The term 'waters of this State' for the purpose of this Act, shall be construed to mean all of the *fresh* waters of this State." (Emphasis supplied).

On the other hand, the history of R.S. 23:3-47 and all the other sections contained in Article 2 of Chapter 3, is quite different. The origin of R.S. 23:3-47 is readily traced back to the Laws of 1929, c. 238, §§ 2 and 3. The preamble to that Act reads:

"An Act to regulate fishing by vessels other than those engaged in the taking of menhaden, in the *waters of the Atlantic Ocean*, within the jurisdiction of the State of New Jersey, with shirred or purse seines, otter or beam trawls, and to require a license for such fishing." (Emphasis supplied).

Most of the other sections of Article 2 can be traced back to Laws of 1896, c. 103, §§ 1, 2, 3, 4, pp. 151-152. The preamble to this Act reads as follows:

"An Act to regulate fishing by steam and other vessels with shirred or purse seines, in the waters of the State of New Jersey and to require a license for such fishing."

Although this preamble refers to "waters" of the State, the sections of the Act make it abundantly clear that the legislative reference point is to the Atlantic Ocean.

Thus, we have on one hand R.S. 23:3-22, a section in an article referring to fresh water fishing, the subject matter of which is traceable to the 1903 Act, and on the other hand, R.S. 23:3-47, a section in another article which refers to fishing in the Atlantic Ocean and the licensing of vessels therein, as well as the regulation of the method by which fish may be taken from that body of water, the latter article

finding its origin in an 1896 Act.

The use of chapter, article and section headings has often been referred to by the courts in ascertaining the meaning of an ambiguous statute. *Knowlton v. Moore*, 178 U.S. 41, 20 S. Ct. 747, 44 L. Ed. 969 (1900); *Maguire v. Commissioner of Internal Revenue*, 313 U.S. 1, 9, 61 S. Ct. 789, 85 L. Ed. 1154 (1941). See also, *Crawford Statutory Construction* (1940), § 207.

In the matter of *In Re Green's Estate*, 76 N.J. Super. 559 (Cty. Ct. 1962) the court, in discussing the internal revenue code, at page 568 stated:

“\* \* \* it is not likely to be assumed that the difference between the two sections is unintentional.”

Similarly, the presence of R.S. 23:3-22 and R.S. 23:3-47 in different articles of Chapter 3, Title 23 manifests a legislative intent which militates against the conclusion that a license issued pursuant to R.S. 23:3-47 is a license which is revocable upon invocation of R.S. 23:3-22.

We are of the opinion, therefore, that the provisions of R.S. 23:3-22 relating to the revocation of licenses upon second convictions may not be applied with respect to a license issued by the Division of Fish and Game pursuant to R.S. 23:3-47.

Very truly yours,  
**ARTHUR J. SILLS**  
*Attorney General*  
 By: **REMO M. CROCE**  
*Deputy Attorney General*

July 22, 1964

**ROBERT A. ROE**, *Commissioner*  
 Department of Conservation  
 and Economic Development  
 Trenton, New Jersey

MEMORANDUM OPINION — NO. 7

Dear Commissioner Roe:

You have asked whether marine patrolmen, appointed pursuant to the provisions of N.J.S.A. 12:7-34.52, may exercise those police powers conferred upon inland harbor masters under the terms of N.J.S.A. 12:6-6.

For the reasons stated herein we are of the opinion that such marine patrolmen may exercise the powers vested in inland harbor masters.

The laws concerning the regulation of navigation on the waters of this state distinguish between inland waters and tidal waters. The legislature in 1909 authorized

the appointment of harbor masters to serve in any locality where an inland waterway shall have been constructed or improved by the State. N.J.S.A. 12:6-4. The legislature, in the same act, provided that such harbor masters would have the following general powers and duties:

“Such harbor masters shall have authority within the limits fixed by the board at the time of the appointment:

- “a. To supervise the use of the inland waterways in such locality;
- “b. To prevent permanent anchorage or obstruction of any character from being located therein;
- “c. To remove all temporary obstructions therefrom; and
- “d. In all other ways to protect the interests of the state and the public in the waterway by keeping it free from obstruction and open to navigation.” N.J.S.A. 12:6-5.

In addition to the general powers enumerated above, the same act provided for more specific powers with respect to power and other vessels using inland waterways.

“Such harbor masters shall have power:

- “a. To stop any vessel using any of the inland waterways of the State and to examine the same to see that it complies with the requirements of the law, whether in the matter of equipment, identification or otherwise;
- “b. To require the production of permits and licenses;
- “c. To arrest, without warrant, for violations of chapter 7 of this title (§ 12:7-1 *et seq.*) and any other laws of this state, committed in their presence;
- “d. To act as special officers for the detection and arrest of those who violate or infringe upon the provisions of chapter 7 of this title (§ 12:7-1 *et seq.*) and other laws relating or pertaining to the operation of vessels on the inland waterways and for the violations of the rules and regulations of the board; and
- “e. Generally to act as special officers for the enforcement of the laws of this state pertaining to power and other vessels, their operation and maintenance, and the enforcement and observance of the rules and regulations of the board.” N.J.S.A. 12:6-6.

This authority has not been affected by any subsequent legislative enactment, except as hereinafter indicated.

In 1952 the legislature extended the operation of Title 12 to tidal water in:

“An Act for the regulation of power vessels on the tidal waters within the jurisdiction of this State, fixing the penalties for violations, supplementing Title 12 of the Revised Statutes, and repealing ‘An Act for the regulation of power vessels, providing for the registration of the same and the licensing of the operators thereof, fixing the amount of license and registration fees and penalties for violations, and supplementing Title 12 of the Revised Statutes,’ approved June fourth, one thousand nine hundred and thirty-eight (P.L. 1938, c. 306). L. 1952, c. 157, p. 523.”

November 24, 1964

This Act provided *inter alia* for the appointment of harbor masters "to supervise the use of tidal waters within the jurisdiction of this State." N.J.S.A. 12:7-50.

In addition to providing for the appointment of harbor masters, the 1952 Act further provided that the enforcement of such Act should be the same as that provided for inland waters.

The Act of 1952 does not specifically enumerate the powers and duties of harbor masters as did the Act of 1909 which established harbor masters for inland waterways. However, the Supreme Court of New Jersey, in determining the validity of "Navigation Courts", stated that "section 9 of the tidal waters act, N.J.S.A. 12:7-52, in its language 'the procedure for such enforcement [by the Department] shall be the same as in the case of other violations \* \* \* in other than tidal waters,' adopts by reference the provisions of the nontidal waters act \* \* \*." *State v. Osborn*, 32 N.J. 117, 125 (1960).

This same reasoning was the basis of Formal Opinion 1956 No. 11, dated July 13, 1956, addressed to the then Commissioner of Conservation and Economic Development, holding that harbor masters could apprehend juvenile offenders of the State Navigation Laws and further holding that this authority extended equally to tidewater and inland waterway harbor masters.

The legislature subsequently enacted the "New Jersey Boat Numbering Act of 1962", effective June 11, 1962. L. 1962, c. 73; N.J.S.A. 12:7-34.36. This act provides for the numbering of vessels, the procedure for making application for certificate, procedure with respect to accidents, the establishment of a Boat Regulation Commission and for the enforcement of such act. N.J.S.A. 12:7-34.52 provides as follows:

"The department shall be responsible for the enforcement of this act. A supervisory force of marine patrolmen shall be formed and their appointments, rank and pay shall be regulated by the Civil Service Commission in compliance with the provisions of Title 11. Harbor Masters and Power Vessel Inspectors shall hereafter be known as marine patrolmen and those appointed in accordance with Title 12 of the Revised Statutes will serve in accordance with rules and regulations to be promulgated by the commission. L. 1962, c. 73, § 17."

This provision of the act of 1962 provides that harbor masters appointed in accordance with Title 12 shall henceforth be known as marine patrolmen. It further grants authority to hire a force of marine patrolmen under the Civil Service provisions of Title 11. This redesignation of both inland and tidal harbor masters as marine patrolmen does not divest the harbor masters of authority previously conferred but, on the contrary, indicates all harbor masters shall have the same authority.

We are of the opinion, therefore, that tidal water harbor masters, now termed marine patrolmen, have the same powers with respect to arrest and enforcement as conferred upon nontidal water harbor masters by N.J.S.A. 12:6-6.

Very truly yours,  
ARTHUR J. SILLS  
Attorney General  
By: REMO M. CROCE  
Deputy Attorney General

HONORABLE JOHN A. KERVICK  
State Treasurer  
State House  
Trenton, New Jersey

## MEMORANDUM OPINION — NO. 8

Dear Mr. Kervick:

You have asked us whether Mrs. Alice E. Shay, widow of Judge Samuel M. Shay, is entitled to a pension under the provisions of N.J.S.A. 43:6-6.8. It is our opinion that Mrs. Alice E. Shay is not entitled to pension benefits by reason of her husband's death.

Judge Shay served on the Common Pleas Court of Camden County from 1922 to 1934 and on the Circuit Court from 1934 until his death on March 24, 1947. He was born July 22, 1885 and married Alice Shay, the present claimant, on July 8, 1927. His marriage was solemnized before he attained the age of 50 years.

N.J.S.A. 43:6-6.8 provides for pensions to surviving widows of certain enumerated judges, and reads as follows:

"Whenever any person holding the office of Chancellor, Chief Justice of the old Supreme Court, Associate Justice of the old Supreme Court, judge of the circuit court, Vice-Chancellor, Chief Justice of the new Supreme Court, Associate Justice of the new Supreme Court, or Judge of the Superior Court shall die while in office or shall die after retirement on a pension payable under the provisions of this act and, in either case, shall leave a widow surviving him whom he married before he had attained the age of fifty years, an annual pension shall be paid thereafter to such surviving widow, so long as she lives and remains unmarried, in an amount equal to one-fourth of the annual salary received by her deceased husband at the time of his death or retirement, as the case may be."

The quoted section was section 5 of the Laws of 1948, c. 391, and was approved and became effective on September 13, 1948. As the facts indicate, Judge Shay predeceased the enactment of the statutory authority for granting pension benefits to surviving widows of judges of the circuit court. The question, therefore, which must be resolved is whether N.J.S.A. 43:6-6.8 is to be given a retrospective application.

Ordinarily, it is presumed that a statute operates prospectively and not retroactively unless the Legislature otherwise specifies. *In re Borough of Glen Rock*, 25 N.J. 241 (1957); *Nichols v. Board of Education, Jersey City*, 9 N.J. 241 (1952); *Kopczynski v. County of Camden*, 2 N.J. 419 (1949). In judicial construction of statutes, statutory terms are not to be given retroactive operation unless such application is clear, strong and imperative and no other meaning can be given to the statutory language or unless the legislative intent cannot otherwise be satisfied. *LaParre v. Young Men's Christian Ass'n of the Oranges*, 30 N.J. 225 (1959); *Burdett v. Municipal Employees, &c. Newark*, 129 N.J.L. 70 (E. & A. 1942).

The pertinent phraseology in N.J.S.A. 43:6-6.8 is "whenever any person holding the office of etc. \* \* \* shall die while in office \* \* \* and shall leave a widow surviving

him etc." There is nothing in this language which of itself suggests that it was intended to have retroactive effect. If the language of the statute read "shall have died or shall hereafter die while in office," a retroactive intent could readily be discerned and a retroactive application would appear reasonable. The exact language of the statute, however, is explicitly in the present and future tenses, i.e., "any person holding the office \*\*\* who shall die while in office or shall die after retirement \*\*\*." Such language strongly militates against a retrospective application.

N.J.S.A. 43:6-6.8 by its terms purported to provide pension benefits for widows of judges and justices holding judicial offices existing prior to the court system which was created as a result of the adoption of the New Jersey Constitution of 1947. The statute also provided for comparable pension benefits for widows of judges holding judicial office under the present court structure.

It must be noted and emphasized that the former court system did not terminate *eo instante* upon the adoption of the New Jersey Constitution of 1947. The Judicial Article of the 1947 Constitution, Article XI, Section IV, par. 3, provided that the Court of Errors and Appeals, the former Supreme Court, the Court of Chancery, the Prerogative Court and the Circuit Courts be abolished and that the jurisdiction, functions, powers and duties previously vested in each of the aforementioned courts be transferred to and divided between the new Supreme Court and the Superior Court. The abolition of these former courts was to be effective prospectively on September 15, 1948, the date when the Judicial Article of the Constitution became effective. The Judges and Justices and Chancellors of the former courts were to become the new judiciary by virtue of Article XI, Section IV, par. 1 which reads as follows:

"1. Subsequent to the adoption of this Constitution the Governor shall nominate and appoint, with the advice and consent of the Senate, a Chief Justice and six Associate Justices of the new Supreme Court from among the persons then being the Chancellor, the Chief Justice and Associate Justices of the old Supreme Court, the Vice Chancellors and Circuit Court Judges. The remaining judicial officers enumerated and such Judges of the Court of Errors and Appeals as have been admitted to the practice of law in this State for at least ten years, and are in office on the adoption of the Constitution, shall constitute the Judges of the Superior Court. The Justices of the new Supreme Court and the Judges of the Superior Court so designated shall hold office each for the period of his term which remains unexpired at the time the Constitution is adopted; and if reappointed he shall hold office during good behavior. No Justice of the new Supreme Court or Judge of the Superior Court shall hold his office after attaining the age of seventy years, except, however, that such Justice or Judge may complete the period of his term which remains unexpired at the time the Constitution is adopted."

The Chancellors, Chief Justice and the Associate Justices of the old Supreme Court, the Vice Chancellors and Circuit Court Judges who were not nominated and appointed to the new Supreme Court, and the Judges of the Court of Errors and Appeals who had been admitted to the practice of law in this State for at least ten years, were constitutionally assured of becoming the Judges of the Superior Court.

Thus, the entire Judicial Article of the Constitution (Art. XI, Sec. IV, par. 14) was not to take effect until September 15, 1948. It is to be noted, however, that N.J.

S.A. 43:6-6.8 was originally introduced prior thereto, on March 31, 1948, as Assembly Bill No. 39. It passed the Assembly on April 26, 1948 and the Senate on September 8, 1948. Obviously if the bill had been enacted and had become effective during this time, it would have afforded the widows of the justices and judges of those enumerated pre-1948 courts with pension protection prior to the September 15th effective date of the Judicial Article, since these former courts would have still been in existence. Thus, any hiatus which might have occurred had the bill been enacted prior to the effective date of the Judicial Article of the Constitution was avoided by including those enumerated pre-1948 judges and justices who "shall die while in office." The practical effect of the enactment of the bill on September 13, 1948, the same date on which the Judges of the Superior Court were sworn into office (71 N.J.L.J. 332 (1948)), was to provide coverage for the pre-1948 judiciary who were then holding office and "shall die while in office" during such period of time between the effective date of the statute and the date upon which the Judicial Article of the 1947 Constitution became operative.

Judge Shay died while in office and not after retirement. He died on March 24, 1947, prior to the adoption of the 1947 Constitution on November 4, 1947, prior to the introduction of the Assembly Bill No. 39 on March 31, 1948, and prior to the enactment of the bill on September 13, 1948. Viewed in this chronological order, and in light of the interpretation of the statutory language discussed herein, the presumption of prospective application must stand. The elements of clarity, strength and imperativeness that would justify reading a retroactive effect into the statute so as to afford pension benefits to Judge Shay's widow are clearly lacking here. *Burdett v. Municipal Employees &c. Newark, supra*, at p. 73.

For the foregoing reasons, it is our conclusion that Mrs. Alice E. Shay, widow of Judge Samuel M. Shay, is not entitled to a pension under the provisions of N.J. S.A. 43:6-6.8.

Very truly yours,  
ARTHUR J. SILLS  
*Attorney General*

By: RICHARD NEWMAN  
*Deputy Attorney General*

December 14, 1964

HONORABLE JOHN A. KERVICK  
*State Treasurer*  
 State House  
 Trenton, New Jersey

MEMORANDUM OPINION—NO. 9

Dear Mr. Kervick:

You have requested our opinion as to whether two State employees, who are serving as secretaries to Superior Court Judges and are paid by Essex County, are required to become members of the Public Employees' Retirement System. Both secretaries were appointed after N.J.S.A. 43:15A-1, *et seq.* became effective. They are not veterans.

We are of the opinion that enrollment of the secretaries in the Public Employees' Retirement System is not mandatory, but optional, since they do not have the status of permanent employment in the classified service of the State.

Secretaries to Superior Court Judges (whether in the Law or Chancery Division) are appointed to serve at the pleasure of the Judge pursuant to N.J.S. 2A:11-7 and N.J.S. 2A:11-9. R.S. 11:4-4(m) further provides that the secretary of every State Judge shall be in the unclassified service. It is clear, therefore, that the secretaries do not have permanent employment in the classified service of the State.

The provision under which the secretaries are eligible for membership in the System is N.J.S.A. 43:15A-79(c), which provides in part:

"Except as provided in subsection (b) hereof, an employee of the State whose compensation is paid in whole or in part by any such county or municipality or by any board, body, commission or agency of any such county or municipality maintained by funds supplied by such county or municipality shall be eligible for membership in the public employees' retirement system and shall not be a member of any county or municipal pension system by reason of such State Service. \* \* \*"

In effect, State employees compensated in whole or in part by counties are to be treated as other State employees for purposes of participation in public pension systems. The statutory words "shall be eligible" clearly indicate, however, that membership in the State Public Employees' Retirement System is optional and not mandatory for such employees. This is emphasized by N.J.S.A. 43:15A-7, which applies to all State employees. It provides in part:

"The board may deny the right to become members of the retirement system to any class of elected officials or to any class of persons other than veterans not within the classified civil service. \* \* \*. Notwithstanding any other law to the contrary all other persons accepting permanent employment in the classified service of the State shall be required to enroll in the retirement system as a condition of their employment, regardless of age. \* \* \*"

Thus, under this statutory provision, an enrollment under N.J.S.A. 43:15A-79 (c) is mandatory for permanent employees in the classified service of the State. Enroll-

ment, however, is optional for nonveterans who do not have permanent status as a State employee under Civil Service.

It should be noted that the secretaries in question are not eligible for enrollment in any other public pension system, even though their enrollment in the Public Employees' Retirement System is optional. N.J.S.A. 43:15A-79 (c)

In answer to your inquiry, we conclude, therefore, that enrollment in the Public Employees' Retirement System of the secretaries in question who are nonveterans is at the option of the secretaries.

Very truly yours,  
 ARTHUR J. SILLS  
*Attorney General*  
 By: RICHARD NEWMAN  
*Deputy Attorney General*

December 14, 1964

MR. LEO CULLOO  
*Executive Secretary*  
 Police Training Commission  
 24 Commerce Street  
 Newark, New Jersey

MEMORANDUM OPINION—NO. 10

Dear Mr. Culloo:

You have requested our advice as to whether police officers appointed by the Delaware River Port Authority come within the provisions of the Police Training Act (N.J.S.A. 52:17B-66 *et seq.*).

In our opinion such police officers do not come within the provisions of the Police Training Act.

The Delaware River Port Authority was established to operate and maintain bridge and other port facilities between the Philadelphia, Pennsylvania and Camden, New Jersey areas. N.J.S.A. 32:3-1, *et seq.*

The authority for the Delaware River Port Authority to appoint policemen is found in N.J.S.A. 32:4-6, which in part provides:

"The Delaware River Port Authority, a body corporate and politic, functioning under the legislation enacted by the Commonwealth of Pennsylvania and the State of New Jersey, shall have the power, and authority is hereby conferred thereon to appoint such number of policemen as may be found necessary to keep in safety and preserve order upon such bridges and tunnels and approaches thereto as the authority does or may hereafter operate; to administer to such policemen an oath or affirmation faithfully to perform the duties of their respective positions or offices; and to provide



for the payment of such policemen from the tolls and other revenue of Authority.”

The purpose of the Police Training Act is stated in N.J.S.A. 52:17B-66:

“The Legislature of New Jersey hereby finds and declares that a serious need for improvement in the administration of *local and county law enforcement* exists in order to better protect the health, safety and welfare of its citizens; . . .” (Emphasis added).

To effectuate this purpose N.J.S.A. 52:17B-66 provides:

“Any municipality may authorize attendance at an approved school by persons holding a probationary or temporary appointment as a police officer, and any municipality may require that no person shall hereafter be given or accept a permanent appointment as a police officer unless such person has successfully completed a police training course at an approved school.”

N.J.S.A. 52:17B-69 provides:

“Notwithstanding the provisions of Revised Statutes 11:22-6, a probationary or temporary appointment as a police officer may be made for a total period not exceeding 1 year for the purpose of enabling a person seeking permanent appointment to take a police training course as prescribed in this act. . . .”

N.J.S.A. 52:17B-67 defines “police officer” as

“. . . any employee of a law enforcement unit other than civilian heads thereof, assistant prosecutors and legal assistants, special investigators in the office of the county prosecutor as defined by statute, persons appointed pursuant to the provisions of R.S. 40:47-19 and persons whose duties do not include any police function.”

“Law Enforcement Unit” is defined as “any police force or organization in a municipality or county which has by statute or ordinance, the responsibility of detecting crime and enforcing the general criminal laws of this State.” N.J.S.A. 52:17B-67.

“Municipality” is defined as “a city of any class, township, borough, village, camp meeting association, or any other type of municipality in this State which, within its jurisdiction has or shall have a law enforcement unit as defined in this act.” N.J.S.A. 52:17B-67.

“County” is defined as “any county which within its jurisdiction has or shall have a law enforcement unit as defined in this act.” N.J.S.A. 52:17B-67.

The legislative history previous to the passage of the Police Training Act in 1961 discloses that police training was envisioned as pertaining to local law enforce-

ment. This is reenforced by the Title of the Act:

“An Act relating to training of policemen prior to permanent appointment; appointments in certain *municipal and county law enforcement agencies*; establishing a police training commission; and providing an appropriation therefor.” (Emphasis added).

More particularly, the Legislative history demonstrates the intent of the Legislature that police officers eligible for training were not to include such persons as police officers of the Delaware River Port Authority. *A Study and Survey of Municipal Police Departments of the State of New Jersey* dated May 6, 1958, submitted to the Legislature by the New Jersey Law Enforcement Council included a proposed police training bill which was similar in many respects to the adopted Act and to the bills introduced prior and subsequent to it, but which differed in pertinent part from the definition of “police officer” as contained in those bills. Senate Bills Nos. 178, 36, 132, 141 and Assembly Bill No. 382 all contain the same definition of “police officer” as found in the Police Training Act which became law (Section 52:17B-67, *supra*). The proposed bill of the Law Enforcement Council defined “police officer” to mean:

“any employee of a law enforcement unit other than civilian heads thereof, assistant prosecutors and legal assistant; it shall include deputy sheriffs, county detectives, ad hoc district police, and all persons by whatever title or designation who exercise police powers, except persons whose duties do not include any police function. *Police officers of the Port of New York Authority, Palisades Interstate Park Police, and such other interstate police units as are presently authorized or which may in the future be established are specifically included in this definition.*” (Emphasis added).

The Legislature did not incorporate this proposed definition as it was presumptively aware of N.J.S.A. 32:4-6 providing for appointment of Delaware River Port Authority policemen. This is adequate evidence of its intent not to include police officers of the Delaware River Port Authority within the provisions of the Police Training Act.

The legislative history cited and the nature and purposes of the Delaware River Port Authority resolve any ambiguity that might otherwise be found in the definition of “law enforcement unit” contained in the Police Training Act. It is our conclusion that police officers of the Delaware River Port Authority are excluded from the coverage of that Act.

Very truly yours,  
 ARTHUR J. SILLS  
*Attorney General*  
 By: LARRY F. LEFKOWITZ  
*Deputy Attorney General*

June 21, 1965

HON. FREDERICK M. RAUBINGER  
*Commissioner of Education*  
*Secretary, New Jersey State*  
 Board of Education  
 225 West State Street  
 Trenton, New Jersey 08625

## FORMAL OPINION 1965—NO. 1

Dear Commissioner Raubinger:

The New Jersey State Board of Education has requested our opinion with respect to whether voluntary student organizations, which have as their primary purpose the conduct of religious observances and activities and which may be sponsored by or affiliated or identified with specific religious denominations, may function at the State colleges and be permitted the use of college facilities in which to conduct their various activities and programs.

You have stated that there are numerous student organizations which function on the campuses of the State colleges. These organizations, such as debating societies, theatrical groups, intramural athletic teams, language groups, history clubs, political clubs, social organizations, and the like, generally engage in various extracurricular activities. All such student organizations, including the basically religious organizations to which you refer and similar groups, must seek permission in order to operate on campus. It is customary, in this connection, for authorization to be obtained from the student government association at each college or from the president of each college. No organization, whatever its nature or purposes, is permitted to engage in activities at any State college without having first secured such permission. All student organizations thus approved are required to have an advisor, a member of the college faculty, whose function is to oversee the activities of the particular group in a general way in order to provide continuing assurance that the organization will not act in any manner inconsistent with college policies or inimical to the best interests of the college and its students. Such a faculty advisor, therefore, serves as a liaison between the students of the organization and the college officials insofar as general college policy is concerned. Approval of a student organization to function on college campuses, you indicate, does not imply affirmative official approbation of its particular purposes, goals or activities. It merely denotes that such an organization satisfies a reasonable extracurricular need of the students and is not otherwise inconsistent with the overall educational interests of the college, its faculty and students.

With respect to the student religious groups referred to in your inquiry, you inform us that these are voluntarily organized by interested students. These associations are usually sponsored by or affiliated or identified with their respective religious denominations in order that college students of a particular religious faith might effectively be provided with the opportunity to participate in and enjoy religious experiences and activity while in college. Such religious societies have been in existence for some time and presently function at a large number of the colleges and universities, both public and private, throughout the United States. Frequently, the religious denomination with which the particular student religious organization is associated assigns a clergyman to aid, supervise and counsel the students with respect to religious observances and other activities. Such clergymen receive no remunera-

tion or other compensation from the colleges; they are not members of the faculty and do not in any manner enjoy faculty status or privileges. The clergyman supervising each of the student religious groups communicates and deals officially with the college through the faculty advisor assigned to the group.

The primary activities of such religious organizations consist of (1) meetings for the conduct of club business, religious discussions, lectures and other related activity, (2) religious services, and (3) religious counseling and advice. Social and recreational activities are also sponsored by such groups. You have advised us further that a number of organizations, among which are Canterbury Clubs, Lutheran Associations, Newman Clubs and Hillel Societies, fit the foregoing general description.

College facilities commonly utilized for the aforementioned activities of such organizations include classrooms, lecture halls, meeting rooms or student unions not otherwise occupied for educational courses or programs. Students receive no academic credit, official recognition or standing, or special privileges by virtue of their voluntary participation in any of the religious societies.

Your question is prompted by recent decisions of the Supreme Court of the United States dealing with the extent to which the State or any of its instrumentalities is limited by the First Amendment to the United States Constitution with respect to religious activities of students within its jurisdiction. For the reasons stated herein, we have reached the conclusion that permitting religious societies to function at the State colleges, as described herein as other extracurricular organizations now operate at the State colleges, would not contravene Federal constitutional standards.

We reach this conclusion, after a consideration of relevant decisional law, on several bases. First, permitting voluntary student religious organizations so to function would not constitute an intrusion by the State or any of its instrumentalities in the religious observances of its citizens. Second, by permitting such groups to function and to use college facilities for their activities without officially sanctioning their specific programs or objectives and without giving them any standing or recognition as a part of the college curriculum, it is clear that the State colleges would only be accommodating the religious needs and desires of those students in the college community who wish to partake of such activity and could not be deemed to be requiring, prescribing or even suggesting the pursuit of any religious or devotional practices either generally or specifically.

The United States Constitution, in its First Amendment, provides:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .”

Though referring to the powers of Congress, this Freedom of Religion Provision has, by virtue of the passage of the Fourteenth Amendment, long been held to render “the legislatures of the states as incompetent as Congress to enact [laws respecting an establishment of religion or prohibiting the free exercise thereof].” *Cartwell v. Connecticut*, 310 U.S. 296, 303, 60 S. Ct. 900, 84 L. Ed. 1213 (1939). See also, *Everson v. Board of Education*, 330 U.S. 1, 15, 67 S. Ct. 504, 91 L. Ed. 711 (1947). Cf., *Near v. Minnesota*, 283 U.S. 697, 707, 51 S. Ct. 625, 75 L. Ed. 1357 (1931); *Gitlow v. New York*, 268 U.S. 652, 666, 45 S. Ct. 625, 69 L. Ed. 1138 (1925); *Sills v. Hawthorne Board of Education*, 84 N.J. Super. 63 (Ch. Div. 1963), *aff’d*, 42 N.J. 351 (1964). Thus, the interpretations placed upon the Freedom of Religion Provision of the First Amendment by the Supreme Court of the United States, as well as the

very language of the Provision itself, must be considered as absolutely binding upon the States and their instrumentalities and agencies. See *Sills v. Hawthorne Board of Education, supra*.

The Freedom of Religion Provision consists of two distinct but interrelated portions, the "establishment clause" and "free exercise clause". The interrelationship of these two clauses was clearly demonstrated by a recent case decided by the Supreme Court of the United States, *Abington School District v. Schempp*, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963). There, the statutory and regulatory requirements of Maryland and Pennsylvania that the Holy Bible be read or the Lord's Prayer be recited at the opening of each school day were held to violate the "establishment clause".

In striking down these practices, the Court held that the "establishment clause" clearly prohibits the states from instituting any form of prayer or worship for its citizens to follow, whether sectarian or non-sectarian, and whether participation therein is voluntary or required. Patently, what is proscribed by the "establishment clause" in this regard is not the institution of any particular form of prayer, but rather the very establishment by the State of a religious or devotional exercise as part of the prescribed curriculum within any public educational system. See also, *Engel v. Vitale*, 370 U.S. 421, 430-431, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962). It was further recognized that the actual and possible compulsion upon those students who might not wish to participate in such ceremonies but who might do so out of fear or embarrassment would contravene the "free exercise clause", notwithstanding that they could be excused therefrom upon parental request.

While the presence of both "free exercise" and "establishment" questions was clear in *Abington School District v. Schempp, supra*, the interrelationship of these two clauses is often subtle, occurring by way of interaction one with the other. See *Engel v. Vitale, supra*. Thus, the practical or resultant disestablishment of sectarian education, an excessive application of the "establishment clause" effectively limiting or barring religious expression, might well be deemed to be violative of the free exercise guaranty. See *Quick Bear v. Leupp*, 210 U.S. 50, 28 S. Ct. 690, 52 L. Ed. 954 (1908); *Zorach v. Clauson*, 343 U.S. 306, 314, 72 S. Ct. 679, 96 L. Ed. 954 (1952). See also, *Everson v. Board of Education, supra*, 330 U.S. at 16. Cf., *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925). Correlatively, excessive affirmative official action encouraging citizens in the exercise of their respective religions may violate the establishment prohibition. See *McCollum v. Board of Education*, 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 648 (1948). See also, *Abington School District v. Schempp, supra*, 374 U.S. at 246-248, and separate opinion at 296-299.

A basic principle which emerges from the cases is that the religious guarantees of the First Amendment are best observed by "wholesome neutrality" on the part of the State toward matters sectarian. See *Abington School District v. Schempp, supra*; *Engel v. Vitale, supra*. But the duty to be neutral should not be taken to impose a requirement of abstention or abnegation; rather, it obliges a State to steer a careful course between the constitutional prohibition against establishment on the one hand and the constitutional guaranty of free exercise on the other. See *Everson v. Board of Education, supra*.

The act of permitting voluntary student religious groups to function at the State colleges and to use college facilities for their activities would not do violence to the principle of neutrality. Furthermore, it is wholly dissimilar from the practices dealt with in *Abington* and *Engel, supra*. In so acting, the State colleges would not be instituting any form of prayer or other religious observance or exercise contrary

to the "establishment clause" of the First Amendment. They would not be prescribing the time, place or mode of worship. They would not be lending the force of secular authority or official imprimatur to enforce religious practices, nor would they be involving the State in any affirmative way in the religious experiences of its citizens. Additionally, insofar as these religious societies involve the voluntary participation of students, acting without duress, compulsion or restraint, there is involved no transgression of the "free exercise clause" of the First Amendment. Thus, neither *Abington School District v. Schempp, supra*, nor *Engel v. Vitale, supra*, apply to limit the State colleges from acting in the manner contemplated by your inquiry or to require them to prohibit the functioning on campus of voluntary student religious societies.

*McCollum v. Board of Education, supra*, might, at first blush, be thought to require a contrary result. There a program was instituted whereby teachers of various faiths were brought into the school system to teach their respective religions to those students who wished to participate. This instruction was given as part of the public school schedule during the regular school day. Those students who did not wish to participate were assigned to study halls or the like during the period of this instruction. The Court held:

"The . . . facts . . . show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education. The operation of the State's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment (made applicable to the States by the Fourteenth) as we interpreted it in *Everson v. Board of Education*. . . .

"Here not only are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. This is not separation of Church and State." 333 U.S. at 209-210, 212.

The *McCollum* decision is distinguishable from the situation with which we are here concerned. There, it is to be noted, religious instruction was a recognized part of the school curriculum in a compulsory educational system, i.e. one in which pupils were legally obliged to participate. Part of the official educational program of the school district involved, specifically, religious classes. The school authorities in sponsoring such instruction, actually brought religion teachers into the classroom for this express purpose. In contrast, the functioning of voluntary religious societies on the campuses of the State colleges would be a strictly *extra* curricular endeavor. No teachers would be furnished by the State colleges for the purpose of providing

sectarian education. Student participation would in no way be recognized as part of the academic curriculum, nor would students receive any credit toward their academic standing or other privileges as a result thereof. The attendance of pupils at the State colleges is not compulsory. The activities of these organizations at the State colleges, in short, would not be integrated as part of the State's compulsory educational machinery.

This distinction is buttressed by a consideration of *Zorach v. Clauson*, *supra*. There the school authorities did not prescribe religious instruction as part of the curriculum but rather, cooperated with the religious wants and needs of the citizens by permitting students to take religious instruction, if they wished, elsewhere than upon the school premises. Official recognition was accorded this activity, however, to the extent that the students who wished to participate therein were released from school early in the day so that they might do so, while pupils who did not wish so to participate were kept in the classrooms until the close of the school day. The Court held this practice not to be an impermissible combination of the functions or responsibilities of church and state but rather an accommodation by the secular authorities to the religious needs and desires of the citizens.

In this respect, *Everson v. Board of Education*, *supra*, is analogous. Local school authorities made provision for reimbursing the parents of parochial school students for the costs of transporting their children between home and school on public transportation, as permitted by N.J.S.A. 18:14-8. This practice was upheld by the Court as being properly within the purview of the State's concern for the public welfare and because it was a measure in aid of the school children and their parents in contradistinction to being aid given the churches or their parochial schools as such. It should also be noted that the Court, in reaching this conclusion, said:

"We must consider the New Jersey statute in accordance with the foregoing limitations imposed by the First Amendment. But we must not strike that state statute down if it is within the State's constitutional power even though it approaches the verge of that power.\*\*\* New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation." 330 U.S. at 16. See also, *Abington School District v. Schempp*, *supra*, 374 U.S. at 299 (separate opinion).

The basic difference between those of the foregoing cases in which the practices under review were struck down and those in which they were upheld is clear. In *McCullum*, *Engel* and *Abington*, the force of the State's authority through compulsory education had been lent to what were essentially religious observances. A fusion of religious and secular functions occurred when religious or devotional experience was made a part of the program of public secular education. The State, through its instrumentalities, was involving itself, to an appreciable extent, in the

religious practices of its citizens in contravention of the very foundations of the "establishment clause". See *Memorial and Remonstrance Against Religious Assessments*, *II Writings of Madison*, 183.

In *Zorach* and *Everson*, however, while school authorities facilitated observance of religious practices, they did not in any way combine with, direct, or influence them. *Zorach* and *Everson* are clear examples of affirmative governmental action and use of public resources amounting to constitutionally permissible cooperation with the religious interests of the citizenry; *McCullum*, *Engel* and *Abington* are graphic examples of unconstitutional interference or combination one with another.

The functioning of voluntary student religious societies on State college campuses would constitute an accommodation by the State of the religious interests and needs of a segment of the citizenry by rendering more convenient or easy to achieve religious experiences and observances by those who desire to do so. Under the circumstances set forth it would not amount to an institution, prescription, or lending of secular authority to religious activity. Moreover, it is clear that the colleges do not *establish* these organizations on the campuses by way of instituting them, prescribing them or otherwise lending secular authority to their programs or activities, but rather only permit their activities or meetings if the students enrolled desire to have them. The nature of a college campus as a community in itself cannot be overstated. In large part, the students enrolled seek and expect to partake of a full community existence within the confines of the institution. Their academic experiences are provided by the administration and faculty of the college. A large number of many different kinds of organizations, usually having been formed by the students themselves, provide for their social, recreational, political and other extracurricular needs and wants. So here, there is felt a need for religiously oriented organizations as one aspect of life in the college community. In granting permission for such voluntary groups to function and in providing facilities for their activities, the State colleges would merely be accommodating those students who wish to partake thereof and nothing more. To make such voluntary activities conveniently available to those students who wish to participate is not in any way tantamount to prescribing particular methods of religious or devotional observance nor would there be present any degree of compulsion such as was said to have occurred in *McCullum v. Board of Education*, *supra*, when Justice Black noted:

"Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes." 333 U.S. at 209-210. See also, *Abington School District v. Schempp*, *supra*; *Engel v. Vitale*, *supra*. Cf., *Abington School District v. Schempp*, 374 U.S. at 298-299 (separate opinion).

It must further be carefully noted that in *McCullum*, *Engel* and *Abington*, when the school authorities made certain types of religious exercise part of the curriculum, they were dealing with children on the primary and secondary level of public education. As was recognized by Justice Brennan in his concurring opinion in *Abington*, the opportunity not to participate in such exercise upon parental request was illusory for, as a practical matter, young children might well feel compelled to participate either because they would not wish to appear different from their fellow students or because of a real or imaginary fear of being disciplined. 374 U.S. at 298-299. The functioning of voluntary extracurricular religious clubs on college campuses, in con-

trast, involves older college-age students. These are people who have the ability to make a free choice and competently to distinguish between that which is voluntary and that which is mandatory.

It is our opinion, for the foregoing reasons, that the State colleges may permit voluntary, extracurricular student religious organizations, as they have been described herein, to function on State college campuses and make reasonable use of college facilities for their activities. Such action does not contravene the provisions of the First Amendment to the United States Constitution.

Very truly yours,  
ARTHUR J. SILLS  
*Attorney General of New Jersey*

By: HOWARD H. KESTIN  
*Deputy Attorney General*

September 14, 1965

HONORABLE JOHN A. KERVICK  
*Treasurer of the State of New Jersey*  
State House  
Trenton, New Jersey

FORMAL OPINION 1965—NO. 2

Dear Mr. Kervick:

You have requested our opinion with respect to whether there could be established by the State a governmental authority to provide student dormitory and related facilities at the various State public colleges and the State University. You have also requested our opinion with respect to whether such a governmental authority could furnish dormitory and attendant facilities and other academic buildings and projects, such as libraries, laboratories and the like, for the benefit and use of students attending private colleges and universities in the State.

We are advised that this inquiry is prompted by specific requests, information and investigations of the Commissioner of Education who has underscored the great shortage of student residence and other related facilities at the various State higher educational institutions. It has also been indicated that there is a similar need on the part of many private institutions in the State and that there has been expressed an interest in developing a cooperative program between the State and such private institutions in order to facilitate and accelerate the construction of dormitory and incidental facilities and other needed academic buildings and projects. In this context the State Commissioner of Education and you ask whether it is legally possible for the State to embark upon such a program through a governmental instrumentality and whether such an instrumentality or public authority could function in a manner similar to the Dormitory Authority of the State of New York.

We are informed that the Dormitory Authority of the State of New York is a

public corporation which has functioned in the spheres of private as well as public education. With respect to the public colleges and universities of the State, the New York Authority has constructed, maintained and operated dormitories and related facilities such as dining halls and student meeting rooms. The projects which are constructed by the Authority are planned, developed and operated cooperatively with the State and the particular State college. Early in the program projects were financed by both the proceeds of Authority bonds and State appropriations, but at the present time, you inform us, these facilities are financed essentially through student fees and the program is not dependent upon State appropriations. The Authority does not furnish academic buildings such as libraries and laboratories to State institutions. (You have pointed out in your request that such facilities are provided directly by the State colleges and are wholly dependent upon State appropriations. Consequently, you do not presently seek our advice as to whether a New Jersey Authority could be empowered to provide buildings of this type to the public colleges.) In the area of private colleges and universities the New York Authority constructs and provides academic buildings in addition to dormitories and incidental facilities for the benefit and use of students. Plans are developed and executed in cooperation with the particular institution. The Authority charges the private institutions directly for the use and occupancy of all buildings and facilities provided. These projects are self-liquidating being financed primarily through the proceeds of Authority bonds. In its operations of the various facilities, with respect to both public and private institutions, the New York Authority now leases the facilities to the particular institution which operates and maintains the facility and pays rentals and charges sufficient to defray the costs of the Authority including the principal and interest on its obligations and certain operating expenses. During the term of the lease title to the property involved is in the State Authority but it vests in the institution or the State upon the expiration of the term.

In answering your request for advice, based upon such facts and information which you have furnished, we have not concerned ourselves with the feasibility or practicability of such a program to be conducted in the State by a public authority. In reviewing these problems we have addressed ourselves only to the broad question posed, namely, whether it is legally possible for the State of New Jersey to establish a public governmental authority to provide dormitory and related facilities for students in the State colleges and University and such facilities and other academic buildings for students attending private institutions of higher education in the State. We are of the opinion for the reasons herein set forth that such a program is legally possible.

I.

It is widely thought that the decision of *McCutcheon v. State Building Authority*, 13 N.J. 46 (1953) would preclude the establishment by the State of a governmental authority for the purpose of furnishing buildings for State use. In this case the Supreme Court determined that the "State Building Authority" established by L. 1950, c. 255, as amended, N.J.S.A. 52:18A-50, *et seq.* was unconstitutional. This Authority was established in the Department of the Treasury as a body corporate and politic and constituted "an instrumentality exercising public and essential governmental functions". N.J.S.A. 52:18A-51. Its specific functions were the acquisition, construction and operation of buildings for the use and occupancy of various State departments and divisions. It was also to furnish housing for employees of State institutions. N.J.S.A. 52:18A-52. The Authority was given broad powers to acquire

and dispose of property and to construct and maintain projects, and to lease projects and contracts for the use of space, but such leases and contracts could only be with the State or its departments, agencies and instrumentalities. *Ibid.* It could charge rents and other fees to defray expenses of the Authority, the costs of construction, repair and operation of its facilities and the repayment of principal and interest on its obligations. N.J.S.A. 52:18A-60. The State was empowered by the Act to enter into leases or contracts with the Authority, and to pay rentals and other charges, and it was specifically provided that "any such contract shall be valid and binding upon the department, agency, or instrumentality of the State, notwithstanding that no appropriation was made or provided to cover the cost or estimated cost of the contract." N.J.S.A. 52:18A-61. The Authority was empowered to issue bonds payable out of its revenues and to pledge all or any part of its revenue to secure their repayment (N.J.S.A. 52:18A-66), but its bonds were deemed not to constitute a debt or liability of the State or a pledge of the State's faith and credit (N.J.S.A. 52:18A-68), although the State did pledge and agree with the holders of the bonds that it would not limit or restrict the rights vested in the Authority to construct, maintain or operate any project to collect revenues. N.J.S.A. 52:18A-69.

A majority of the Court held that the obligations incurred pursuant to the State Building Authority Act of 1950 were contrary to the *N.J. Const.* (1947) *Art. VIII, Sec. II, para. 3*. This provision prohibits the incurrence in any fiscal year of debts or liabilities of the State, which, together with previous obligations, exceed at any one time 1% of the total appropriation of the particular fiscal year unless duly approved by the voters at a public referendum. It was determined that the law violated this constitutional limitation because, while in form it provided a way of furnishing the State with leasehold interests in building facilities for public use, in reality the design of the act was to enable the State by contracts of purchase to acquire buildings for State use. 13 N.J. at 57. The Court stated:

"While the payments thus made by the State through its governmental agency take the form of 'rentals,' they are in substance and effect the purchase price of the property, for they are to be sufficient in amount to defray the Authority's operating expenses and in the end to liquidate the principal of the bonds and the interest accruing thereon \*\*\* These are not leases, \*\*\* but contracts of purchase, by the sovereign for public use; the 'rentals' constitute appropriations made by the State, not alone to provide operating expenses, but in *quantum* sufficient for the ultimate payment and retirement of the bonds. A true lease rental is compensation for the use of the property, not the consideration price for its purchase. (13 N.J. at 59, 60.)

The specific problem raised by the *McCutcheon* case is whether the operation of a state dormitory authority to provide dormitory and related facilities for the State colleges and University, and these and other academic buildings for students of private institutions in the State would necessarily be violative of the debt limitation clause of the New Jersey Constitution in a manner similar to the former State Building Authority. It is noteworthy that the specific legal infirmities which led to the invalidation of the State Building Authority Act of 1950 have been obviated with respect to other existing state instrumentalities, specifically the New Jersey Turnpike Authority (referred to herein as Turnpike), the New Jersey Highway Authority (referred to herein as Parkway) and the New Jersey Expressway Authority (referred to

herein as Expressway). Each of these authorities is a public body corporate and political, exercising essential governmental functions. N.J.S.A. 27:23-3(A) and 5 (Turnpike); N.J.S.A. 27:12B-4 and 5 (Parkway); and N.J.S.A. 27:12C-4 (Expressway), and is authorized to acquire, contract, maintain and operate its particular project. N.J.S.A. 27:23-1 (Turnpike); N.J.S.A. 27:12B-2 (Parkway); and N.J.S.A. 27:12C-2 (Expressway).

The authorities do not rely on annual appropriations from the Legislature. The Turnpike and Parkway are specifically prohibited from receiving and accepting such appropriations. N.J.S.A. 27:23-5(n) (Turnpike); N.J.S.A. 27:12B-5(r) (Parkway).<sup>1</sup> The authorities are authorized to issue bonds and notes, N.J.S.A. 27:23-7 (Turnpike); N.J.S.A. 27:12B-8(a)(b), and 9(c) (Parkway); and N.J.S.A. 23:12C-21(A) (B) (Expressway), and to fix, charge and collect tolls for the use of their roads and to contract for rents and charges for other necessary uses. N.J.S.A. 27:23-9(a) (Turnpike); N.J.S.A. 27:12B-14 (Parkway); N.J.S.A. 27:12C-26 (Expressway). The State has pledged to the respective bondholders not to limit or restrict the rights vested in the respective authorities until the bonds have been fully paid and discharged. N.J.S.A. 27:23-7 (Turnpike); N.J.S.A. 27:12B-11 (Parkway); and N.J.S.A. 27:12C-41 (Expressway).

In *New Jersey Turnpike Authority v. Parsons*, 3 N.J. 325 (1949) the Supreme Court upheld the constitutionality of the Turnpike Act in the face of contentions similar to those raised in the *McCutcheon* case. The Court found that the Turnpike Act did not violate the debt limitation provisions of the State Constitution, since there was no State liability imposed by the statute creating the Turnpike Authority and that the Authority was expressly limited to the repayment of its obligations from its tolls and other revenues and that the faith and credit of the State was in no wise pledged. While the Authority "is in, but not of the State Highway Department," the Court noted "that fact does not make it any less an independent entity." 3 N.J. at 244. See also *Behne v. New Jersey Highway Authority*, 13 N.J. 14 (1953); compare, *Safeway Trails Inc. v. Furman*, 41 N.J. 467, 475 (1964). In contrast, the Court in the *McCutcheon* case found that the former State Building Authority was "not a toll or self-sufficient facility", that it was obligated to deal only with the State of New Jersey and that the State Treasury was the "sole source of its revenue". 13 N.J. at 62.

It does appear that a state dormitory authority could be created for the purpose of providing needed facilities for the benefit of students attending institutions of higher education in the State of New Jersey without violating the debt limitation clause of the New Jersey Constitution. Such an authority could, for example, be structured on lines similar to the Turnpike, Highway and Expressway Authorities and be constituted an independent public corporation created to discharge "essential governmental functions" of the State and be vested with the general statutory powers and attributes now entrusted to the existing authorities. The operations of the proposed authority would have to be provided in such a manner that it would not necessarily or as a matter of statutory enactment be solely or exclusively dependent upon revenues of the State for the proper and complete discharge of its functions. The authority could have the power to incur debts and liabilities and to issue bonds or notes, to acquire, construct, maintain and operate its lawful projects and to provide the mode for repayment of the principal and interest on its bonded indebtedness. Thus, such an authority could derive revenue from the operation of its projects to defray expenses and for the repayment of its obligations by charging reasonable rents or fees to students and others using and enjoying the facilities which it will provide. Such an authority might also secure revenue through grants and low interest, long-term loans

from the federal government for the purpose of constructing dormitories and similar student housing establishments<sup>2</sup> and other academic facilities.<sup>3</sup> It is also important to emphasize that there does not appear to be any absolute prohibition against such an authority accepting State funds through legislative appropriations from time to time, provided that the Legislature does not pledge to do so or the enabling statute does not obligate the State to make such appropriations.<sup>4</sup> Moreover, to the extent that such an Authority does deal directly with the State or its departments, agencies and instrumentalities, it would be possible to avoid the particular features of the leasing agreements which were considered by the Court in the *McCutcheon* case to constitute present and continuing obligations of the State in the nature of contracts to purchase property without providing the full appropriations for the entire cost of acquisition therefor in violation of the constitutional debt limitation clause.<sup>5</sup>

## II.

Another legal question engendered by the proposal to utilize a state authority to provide residential and educational facilities for institutions of higher education is whether such a program would violate those clauses of the New Jersey Constitution which prohibit the donation, appropriation or expenditure of public property or funds to or for the use of any individual, association, society or corporation. *N.J. Const.* (1947), *Art. VIII, Sec. II*, para. 1, *Sec. III*, paras. 2 and 3. The problem is underscored by the proposal to permit the program to function in the area of private as well as public education.

The essential test in determining whether a particular governmental program violates the constitutional proscription against a donation, appropriation or loan of public property or moneys or an extension of public credit is whether it is enacted for a recognized public purpose. *Whelan v. N.J. Power & Light Co.*, 45 N.J. 237 (1965); *Lynch v. Borough of Edgewater*, 8 N.J. 279, 291 (1951); see also, *City of Camden v. South Jersey Port Commission*, 4 N.J. 357, 367-369 (1951). An expansive understanding of the concept of what constitutes a public purpose is exemplified in the landmark decision, *Roe v. Kervick*, 42 N.J. 191, 207 (1964):

“The concept of public purpose is a broad one. Generally speaking, it connotes an activity which serves as a benefit to the community as a whole, and which, at the same time is directly related to the functions of government. Moreover, it cannot be static in its implication. To be serviceable it must expand when necessary to encompass changing public needs of a modern dynamic society. \*\*\*”

If the objectives of a program relate to the important functions or obligations of government, it is not impermissible for the State to utilize independent public agencies or authorities, or even the services of a third person or a corporation to accomplish the public objective. *E.g., Whelan v. N.J. Power & Light Co.*, *supra*; 45 N.J. at 246; *City of Camden v. South Jersey Port Commission*, *supra*; *Romano v. Housing Auth. of Newark*, 123 N.J.L. 428 (Sup. Ct. 1939), *aff'd*, 124 N.J.L. 452 (E. & A. 1940); *Rutgers College v. Morgan*, 70 N.J.L. 460 (Sup. Ct. 1904), *aff'd* 71 N.J.L. 663 (E. & A. 1905); *cf., McNichols v. City and County of Denver*, 101 Colo. 316, 74 P. 2d 99 (1937); *Hager v. Kentucky Children's Home Soc.*, 119 Ky. 235, 83 S.W. 605 (Ct. App. 1904). As stated by the Supreme Court in *Roe v. Kervick*, *supra*, at 217, “if the purpose of a statute be public \*\*\* the means of accomplishing it laid

down thereby ought to be regarded as a matter of valid legislative policy so long as the means are restricted to the public end by the legislation and contractual obligation.” A program which envisages the application of public moneys or property to discharge a governmental function for the public welfare is not vitiated because incidental benefits may accrue to private persons. *Roe v. Kervick*, *supra*; *Morris & Essex R.R. v. Newark*, 76 N.J.L. 555 (E. & A. 1908); *Redfern v. Jersey City*, 137 N.J.L. 356 (E. & A. 1948); *Roan v. Connecticut Industrial Building Comm'n.*, 150 Conn. 333, 189 A. 2d 399 (Sup. Ct. Err. 1963).

Without question government may take measures to protect and enhance the welfare of its citizens in areas vital to survival and happiness such as housing (*Romano v. Housing Auth. of Newark*, *supra*), employment (*Roe v. Kervick*, *supra*), or transportation (*Morris & Essex R.R. v. Newark*, *supra*). Beyond peradventure a salient function and obligation of government is to provide for the education of its citizens. The right, as well as the duty, of government to assist in the education of its people is not confined to students attending only public institutions of learning but includes also students matriculating at private institutions which constitute a major educational resource available in the State. *Cf., Everson v. Board of Education of Ewing Township*, 133 N.J.L. 350, 353, 355 (E. & A. 1945), *affirmed*, 330 U.S. 1, 91 L.Ed. 711 (1947), *reh. den.* 330 U.S. 855, 91 L.Ed. 1297 (1947) (upholding the appropriation of State funds for transportation of private school students along the regular public school route; the Court emphasized the fact that the program envisioned public assistance for the benefit of the students). It is clearly within the competence of government to provide and further the educational opportunities of its citizens and this may be accomplished directly through public institutions or indirectly through private colleges or universities. As stated by the Court in *Trustees of Rutgers College in New Jersey v. Richman*, 41 N.J. Super. 259, 299 (App. Div. 1956):

“ ‘Rutgers, The State University’, as now constituted, is a public instrumentality for the accomplishment of a public purpose, i.e., public higher education in the State. Nevertheless, a substantial *quid pro quo* for [sic the] latter purpose would justify state appropriations within *Article VIII, Section III*, paragraph 3, even to a predominately private corporation or association. Thus, even were it held (and I do not so find) that ‘Rutgers, The State University’ is a private institution, that institution, acting through its Board of Governors, would be under a substantial and definite obligation to the State for the fulfillment of a public purpose. That obligation is adequate consideration to sustain state donations or appropriations.”

Thus, if governmental assistance is designed to benefit students, and the institutions which are the recipients of such assistance are committed to fulfill the State's educational policies, it would not be an unconstitutional donation or application of public moneys to include private colleges or universities within the ambit of such a program.

## III.

We conclude that the State may develop a program to provide student dormitory and related facilities for the State colleges and the State University and to provide such facilities and other academic buildings for private institutions of higher educa-

tion within the State, and that, in the context of the foregoing analysis, such a program would not be contrary to provisions of the New Jersey Constitution with respect to State debt limitations or donations or appropriations of public funds and property. We are of the opinion, therefore, that, within the framework presented, it would be legally permissible for the State to establish a public authority or governmental instrumentality, the function of which would be to acquire, construct and furnish dormitories and attendant facilities such as dining halls for the State colleges and the State University, and to provide these facilities as well as other academic buildings such as libraries and laboratories for the benefit of students attending private institutions of higher education in the State.

Very truly yours,  
 ARTHUR J. SILLS  
*Attorney General of New Jersey*  
 By: ALAN B. HANDLER  
*First Assistant Attorney General*

1. There is no provision in the Expressway Act covering this situation. The section similar to the above sections omitted the exception as to legislative appropriations. N.J.S.A. 27:12C-5(n). See, N.J.S.A. 27:12C-21(b) pledging contributions from the State. N.J.S.A. 27:12C-27, however, provides that no property of the State, aside from riparian lands, shall be granted, leased or conveyed to the Expressway Authority except upon payment to the State of such price therefor (if any) as fixed by the State House Commission. The Expressway Act does permit political subdivisions to extend aid and cooperation to this Authority. N.J.S.A. 27:12C-27 to 31.
2. Under the National Housing Act of 1950, 12 U.S.C.A. § 1749, a program is provided to permit the erection of new structures and for the rehabilitation or alteration of existing structures for students' dwelling use and for "other educational facilities" including cafeterias, dining halls and student unions. *Id.* § 1749 c(a). The State is not required to produce matching funds and the federal loan may be for the full amount of the development costs which includes the cost of land acquisition, construction and site improvements. *Id.* § 1749 c (c). Included within the definition of a qualified "educational institution" which could apply for federal loans is "any agency, public authority, or other instrumentality of any State established for the purpose of providing or finding housing or other educational facilities for students or faculty of any public educational institution \*\*\*". *Id.* § 1749 c (b)(4).
3. The Higher Education Facilities Act of 1963, 20 U.S.C.A. § 701 (Supp. 1965) *et seq.* is designed to aid the nation's colleges and universities and other institutions beyond the high school level through federal grants and loans in building facilities in the nature of libraries, laboratories, classrooms and uses accessory thereto. It is provided that any state desiring to participate in the grant program designate or establish a state agency to process applications for grants. 20 U.S.C.A. § 715.
4. A payment by the State of funds to such an authority without specific appropriations therefor would probably violate *N.J. Const.* (1947) *Art. VIII, Sec. II, para. 2*, providing that "no money shall be drawn from the State Treasury but for appropriations made by law." *cf. New Jersey Turnpike Authority v. Parsons, supra*, at 247, 248, and compare N.J.S.A. 27:12C-32. The validity of State appropriations for the purpose of the proposed State Dormitory Authority are discussed *infra*.
5. In a dissenting opinion in the *McCutcheon* case, Justice Jacobs, with whom Justice (now United States Supreme Court Justice) Brennan concurred, reached the conclusion that the Act was not unconstitutional. It was emphasized that the future rent did not constitute a presently existing debt or liability, that the only liability of the State, as distinguished from the Authority, occurs when the State actually enters into leases with the Authority and the nature of such obligation could be ascertained only by an examination of the terms of the lease, and that the constitutional provision did not encompass future debts or liabilities. It was also felt that there was a cogent analogy to the Turnpike Authority and the New Jersey Highway

Authority. The opinion was further expressed that "... if the State were to insist that all future leases with the Authority contain provisions authorizing the State to vacate at will and thus terminate the leases, it would appear beyond peradventure that the State would incur no obligation thereon except to pay for current use through current appropriations. We assume that the propriety of incurring such obligation would be acknowledged universally." 13 N.J. at p. 73-74.

October 8, 1965

MR. JOSEPH F. REGAN  
*Commissioner of Registration*  
 Bergen County Board of Elections  
 Bergen County Court House  
 Hackensack, New Jersey

FORMAL OPINION 1965—NO. 3

Dear Mr. Regan:

You have requested our opinion as to whether a registered voter who does not vote at any election during four consecutive years except at a school election must re-register before being allowed to vote at any subsequent election.

In our opinion, a registered voter who has not voted at any election except at a school election during four consecutive years must re-register in order to vote at any subsequent election.

The last paragraph of N.J.S.A. 19:31-5 provides that if any registered voter "does not vote at any election during 4 consecutive years his original and duplicate permanent registration and record of voting forms shall be removed to the inactive file and he shall be required to register before being allowed to vote at any subsequent election." N.J.S.A. 19:1-1 defines election as follows: "'Any Election' includes all primary, general, municipal and special elections, as defined herein."

The latter statute in turn defines "general election" as meaning the annual election to be held on the first Tuesday after the first Monday in November and "primary election" as meaning the procedure whereby political party members nominate candidates to be voted for at general and party elections. It is obvious that a school election falls into neither of these categories.

A "municipal election" is defined by N.J.S.A. 19:1-1 as "an election to be held in and for a single municipality only, at regular intervals". The same statute defines "municipality" as including "any city, town, borough, village, or township." In New Jersey, school districts of every classification, whether or not they are coterminous with municipal boundaries, are and have been local government units governed by a board of education. As such, they are legal entities separate and distinct from the municipality. See R.S. 18:7-82; 18:6-49 *et seq.*; *Board of Education of the City of Hackensack v. City of Hackensack*, 63 N.J. Super. 560 (App. Div. 1960); *George W. Shaner & Sons v. Bd. Ed. Millville*, 6 N.J. Misc. 671 (Sup. Ct. 1928); *Merrey v. Bd. Ed. Paterson*, 100 N.J.L. 273 (Sup. Ct. 1924); *Bd. Ed. Long Branch v. Bd. of Commissioners, Long Branch*, 2 N.J. Misc. 150 (Sup. Ct. 1924); *Montclair v. Baxter*, 76 N.J.L. 68 (Sup. Ct. 1909); *Falcone v. Bd. of Ed., Newark*, 17 N.J. Misc. 75 (C.P.



1939). Furthermore, a school district's independent entity is preserved, whether its governing board is appointed by the chief executive of the municipality, R.S. 18:6-1 *et seq.*; *Gualano v. Bd. of Estimate of Elizabeth School Dist.*, 39 N.J. 300 (1963), or whether the board is elected by the voters of the district, R.S. 18:7-1, 18:8-1; *Botkin v. Westwood*, 52 N.J. Super. 416 (App. Div. 1958), *appeal dismissed*, 28 N.J. 218 (1958); but see, *Roman Catholic Diocese of Newark v. Ho-Ho-Kus Borough*, 42 N.J. 556 (1964). In *Botkin v. Westwood*, *supra*, the court discussed this dichotomy with specific reference to elections as follows:

“... Not only are the members of the board of education elected by the voters at separate school elections held at different times and places than municipal, primary or general elections, but the annual amounts of money to be raised by taxation, the purchase of land, the erection of buildings and the issuance of bonds must all be submitted to and affirmatively authorized by the voters at such elections.” *Botkin v. Westwood*, *supra*, 52 N.J. Super. at 425, 426.

Furthermore, the statutory provisions relating to municipal elections are found in Title 40, which deals with the subject of municipalities, as well as in Title 19 (Elections), *e.g.* N.J.S.A. 19:1-2 and 3; 19:3-1(c). School elections, on the other hand, are completely controlled by Title 18 (Education) with only infrequent and mechanical references to certain provisions of Title 19. It is therefore clear that a school election does not fit within the statutory definition of the phrase “municipal election”. See *Botkin v. Westwood*, *supra*.

A “special election” is defined by statute as “an election which is not provided for by law to be held at stated intervals”, N.J.S.A. 19:1-1. School board elections are by statute required to be held at stated intervals. R.S. 18:7-14; N.J.S.A. 18:8-16. Therefore, a regular school board election cannot qualify as a “special election” within the statutory definition.

On the other hand, there are provisions for school elections which are not necessarily held at stated intervals, *e.g.* R.S. 18:7-61, 78 and 85; N.J.S.A. 18:7-107.1; 18:8-16.1, 26. While these elections might otherwise qualify as “special elections”, it should be noted that N.J.S.A. 18:7-46 provides that “all such elections shall be called in the manner provided for the calling of the annual school election, . . .” and “the qualification of voters, conduct of the election, and establishment of voting districts together with polling places therein shall be governed in all respects by the provisions of the law regulating the annual school election . . .”. Thus, special school elections are wholly regulated by the provisions of Title 18 and, as shall be demonstrated below, are subject to the supervision of the Commissioner of Education rather than any election official. In addition, there are significant reasons to indicate that a special school election or any school election for that matter is not within the statutory definition of “any election” as it appears in N.J.S.A. 19:1-1.

As heretofore noted, the Legislature defined “any election” by using the term “includes”. The use of this word implies that the definition is broader than the specific examples enumerated therein. See *Cuna v. Board of Fire Com'rs, Avenel*, 42 N.J. 292, 304-5 (1964); *Levitt & Sons, Inc. v. Division Against Discrimination, etc.*, 31 N.J. 514, 526 (1960); *Central R.R. Co. of N.J. v. Division of Tax Appeals*, 8 N.J. 15, 28 (1951); *State v. Rosecliff Realty Co.*, 1 N.J. Super. 94, 100 (Sup. Ct. 1948). Despite the requisite broad interpretation of the definition here considered, an

analysis of the mechanics of school elections demonstrates that the Legislature did not intend that the phrase “any election” was to encompass school elections.

When a person votes at any school election he must first sign a “poll list”. N.J.S.A. 18:7-35.5. The signatures on this poll list are then compared with the signatures on the “signature copy register” which is maintained by the appropriate county election officials. N.J.S.A. 18:7-35.6. After the election is completed, the poll list is sealed with the ballots and forwarded to the county superintendent of schools who is directed by law to preserve the poll list for only one year. N.J.S.A. 18:7-45. As a result, county boards of election have no record whatsoever of whether or not a person has in fact voted in a school election. Further, assuming that election officials have the burden of examining the poll lists and assuming that county superintendents of schools have the right to make these records available to such officials, at the expiration of one year such records are no longer available to anyone. If the Legislature had intended that a person who has voted only in school elections during any four consecutive years need not re-register, it would have provided a system whereby registrars could verify that such a vote was cast.

It has long been settled that school elections are *sui generis* and wholly subject to the jurisdiction of the Commissioner of Education. Not only have the courts so held, *Buren v. Albertson*, 54 N.J.L. 72 (Sup. Ct. 1891), but both the Commissioner and the State Board of Education, in a long line of school law decisions, have continually ruled to the same effect. *Shearn v. Middlesex Borough Annual School Election*, 1928 S.L.D. 971 (Supp. 1931); *Joseph Flack in re: Madison Borough Annual School Election*, 1938 S.L.D. 176 (1935); *Koven v. Stanley*, 84 N.J.L. 446 (1913). Long standing administrative interpretation of the scope of an administrative agency's own powers is entitled to great weight in the area of statutory construction. *In re Glen Rock*, 25 N.J. 241, 250 (1957).

For the foregoing reasons we conclude that a school election is not “any election” as defined by N.J.S.A. 19:1-1 and, hence, when a registered voter fails to vote during four consecutive years at any election except school elections he shall be required to re-register in order to vote in any subsequent election.

Very truly yours,  
ARTHUR J. SILLS  
*Attorney General of New Jersey*  
By: JOSEPH A. HOFFMAN  
*Deputy Attorney General*

November 29, 1965

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

## FORMAL OPINION 1965—NO. 4

Dear Commissioner Raubinger:

You have requested our opinion as to whether dual enrollment programs involving the attendance at public elementary and secondary schools of students from private and parochial schools for selected educational purposes violate the First Amendment to the Constitution of the United States. We are advised that dual enrollment programs, a concept commonly referred to as "shared time", encompass a wide variety of situations. You have described "shared time", as involving a formula or concept whereby students attending private schools on a full time basis are permitted to attend public schools and avail themselves of particular educational programs, services or facilities therein.

In connection with this inquiry, you have submitted a list of questions posed by several local school districts pertaining to particular "shared time" programs. They are as follows:

May a school board maintain and finance a program by which private school students, grades K to 8, can participate in the regular Physical Education and Health courses ordinarily provided at the public schools?

May a school board allow private school students to use public school facilities such as the gym, playground or auditorium during the school day?

May a school board include in its regular music classes or orchestral programs private school children and provide instruments for them?

May the school board provide specialized supplementary speech instruction for private school students having a need for such training at the public school?

May a school board provide special services ordinarily provided for public school students, such as psychological evaluations, speech therapy, physical examinations, and the like, to private school children within the district?

All of these related questions can be answered in terms of the one overriding issue: Is the basic concept of shared time constitutional? More specifically, may the State through the instrumentality of its local boards of education permit private school students to attend regular or special classes in the public schools on a part time basis and provide educational services and facilities for such students without violating the First Amendment?

For the reasons set forth herein, we are of the opinion that a local school board may adopt a program of shared time or dual enrollment whereby pupils attending private schools may participate in given educational programs or services offered at the public schools. Initially, it is necessary to consider the question of shared time within the general framework of the State school laws and in the context of the school community. Public schools are financed through public moneys. A large measure of this support is derived from local property taxes which are levied on and paid by all property owners in the community. Such taxes are levied generally and without

regard to whether a particular taxpayer has children or whether his children attend private or public institutions. Further, under our compulsory education law, not only does every child in the district have the right to attend the public schools but he is required to attend either the public school or some equivalent private school. N.J.S.A. 18:14-14. Correlatively, parents have a constitutional right to choose the type and character of education they feel best suited for their children, be it sectarian or secular. *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925). The crucial issue may thus be framed in these terms: Does the exercise by a parent of his constitutional right to send his child to a nonpublic school effectively prohibit boards of education from offering the child *some* of its services and facilities when he would otherwise be entitled to *all* of its services and facilities?

The First Amendment, in pertinent part, provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." It is no longer open to debate that this proscription as fully inhibits state action as it does federal, through the operation of the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940); *Sills v. Hawthorne Board of Education*, 84 N.J. Super. 63 (Ch. Div. 1963), *aff'd* 42 N.J. 351 (1964).

Further, any such inquiry must be made with reference to the Amendment's intrinsic dichotomy, the legal distinction between the Free Exercise and the Establishment Clause. The Supreme Court has distinguished the former as follows:

"The Free Exercise Clause, likewise considered many times here, withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended." *Abington School District v. Schempp*, 374 U.S. 203, 222, 223, 83 S. Ct. 1560, 1572 (1963).

The factual situations under consideration posit the transference of children from sectarian schools to public schools for purposes which are purely educational and wholly unrelated to religion. It is difficult to envision how this voluntary movement of students from sectarian institutions to secular schools for limited educational purposes could possibly infringe upon the Free Exercise Clause. There is no element of governmental compulsion whatsoever directed toward nonobserving persons to partake in religious experiences.

As previously noted, citizens have a constitutional right to provide their children with the type of education they see fit, be it religious or secular. It has never been judicially suggested that the exercise of this basic right to forego a public education in favor of one which is private or sectarian precludes a person from availing himself of any state supported educational service or facility. If the option to have a private or sectarian education were to result in the forfeiture of other public educational programs or activities, this could seriously discourage or inhibit private or sectarian schooling and might well approach that compulsion which the Free Exercise Clause interdicts and belie the position of "wholesome new neutrality" which the State must assume in religious matters. *Abington School District v. Schempp*, *supra*.

The neutrality mandated by the Free Exercise Clause is grounded in a rationale "which recognizes the value of religious training, teaching and observance, and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state." *Abington School District v. Schempp*, *supra* at 374 U.S. 222. The simple economics of modern education is making it increasingly evident that private schools may not be able to keep abreast of the many new developments and innovations which a technological society demands of a school system. Without shared time, a child enrolled in a private school may have to forego many of the necessary but expensive services made available by the public schools. This premise may be superimposed upon the factors already noted, that all taxpayers bear the burden of supporting public schools without regard to whether their children attend them, that each child has the right to attend the public schools, and that parents may constitutionally select some form of equivalent nonpublic education for their children if they deem it in their best interests. We are therefore of the opinion that the concept of shared time does not abridge the Free Exercise Clause.

Dual enrollment or shared time must also be measured against the Establishment Clause of the First Amendment, the infringement of which does not depend upon the element of compulsion. *Abington School District v. Schempp*, *supra*, which invalidated state statutes and regulations which required daily readings from the Holy Bible in the public schools as contravening the Establishment Clause, has served to crystallize the meaning and scope of that provision. The opinion, after noting that the Court in eight decisions had consistently held "that the clause withdrew all legislative power respecting religious belief or the expression thereof", articulated a serviceable rule against which future State action might be measured to determine constitutionality.

"The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Id.* at 374 U.S. 222, 83 S. Ct. 1571.

The purpose of dual enrollment programs is grounded in the State's vital interest in the universal improvement of the educational standards and achievements of its children irrespective of the schools they attend. It is a fact that a large percentage of children attend private schools.<sup>1</sup> It is also a fact that, nationally and locally, the foremost problem confronting government is the provision of an adequate education for all of its citizens so as to make of each and every pupil a productive member of society. It is noteworthy that Congress, in its enactment of the "Elementary and Secondary Education Act of 1965", has adopted the dual enrollment concept. 79 Stat. 27 *et seq.* (P.L. 89-10). The House Committee on Education and Labor articulated the underlying need for the Act as follows:

"The purpose of this legislation is to meet a national problem. This national problem is reflected in draft rejection rates because of basic educational deficiencies. It is evidenced by the employment and manpower

retraining problems aggravated by the fact that there are over 8 million adults who have completed less than 5-years of school. It is seen in the 20-percent unemployment rate of our 18-to 24-year-olds. It is voiced by our institutions of higher learning and our vocational and technical educators who have the task of building on elementary and secondary education foundations which are of varying quality and adequacy." Report No. 143 accompanying H.R. 2362 (March 8, 1965).

It is therefore clear that a state's dual enrollment program aimed at providing improved educational services to educate school pupils to the same extent that they are provided for public school pupils, thereby increasing the general community level of education, has a valid secular governmental purpose.

The remaining issue is whether dual enrollment has "a primary effect that neither advances nor inhibits religion." *Abington*, *Ibid.* It cannot be denied but that dual enrollment programs will result in certain residual advantages to the private schools participating therein. When the private school is a sectarian institution it might be said that these indirect advantages serve to advance religion. The acceptance of this proposition does not solve the problem. There are many areas wherein a state is permitted to adopt a course of action which is advantageous to religious institutions. For example, the state may pave a public road giving convenient access to a church and it may assign policemen to direct traffic during church hours. It may provide for or finance the transportation of students to parochial schools. *Everson v. Board of Education*, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947). It may supply fire and police protection. It may grant organized religions immunity from civil suit. In all of these instances, religion, in general and in particular, is advanced. Yet this result is but an incident to a larger and more direct undertaking by the state, namely, to exercise its police power in the interest of the general welfare. Thus, a governmental act does not approach the stage of constitutional inhibition whenever it results in the advancement of religion but only when that advance represents the direct and primary goal of that act.

The primary effect of dual enrollment is colored by its overriding purpose, that is, to raise the overall level of educational achievement for all pupils within a given jurisdiction without regard to the character of the school attended. The primary effect is, simply, the accomplishment of this end.

But, from a constitutional vantage, whether an effect is primary or incidental is a matter of degree and, more significantly, of methodology. The resolution of the issue is aided by a synthesis of several Supreme Court decisions which have dealt with these questions.

A point of contrast is the case of *McCullum v. Board of Education*, 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 848 (1948). There, the court invalidated a released time program under which sectarian instructors were brought into the public school to teach religion during the school day to those students voluntarily desiring to attend. The court ruled as follows:

"The . . . facts . . . show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education. The operation of the state's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects.

Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment (made applicable to the States by the Fourteenth) as we interpreted it in *Everson v. Board of Education*. . . .” 333 U.S. at 209-210, 212.

*McCullum* is certainly distinguishable from the classic dual enrollment situation. Here, instead of religious teachers coming into the public school to instruct in sectarian doctrine, pupils from private and parochial schools attend the public schools to receive instruction and services which are wholly secular. Tax-supported public schools are not in any way used for the dissemination of religion.

Subsequently, the Court upheld an inverted released time plan by which public school pupils were released during the school day to attend religious classes at the various religious institutions. In *Zorach v. Clauson*, 343 U.S. 306, 72 S. Ct. 679, 96 L. Ed. 954 (1952), the Court determined that the State, through its public schools, was not directly participating in religious instruction. Rather, recognizing that voluntary religious instruction was in the best interests of its students and contributed to their general welfare, it cooperated with organized religions to achieve this goal.

These cases may be viewed from the vantage of the contemporary test set forth in *Abington*, *supra*, to ascertain compliance with the Establishment Clause. Putting aside Free Exercise considerations, the enunciated purposes in both *McCullum* and *Zorach* were the same, namely, to enhance the welfare of public school students by enabling them to secure desired religious instruction. The primary effect of the scheme in *Zorach* was the achievement of this purpose through means which did not entail the State's active participation in promulgating religious instruction but by the mere accommodation of both the students and the churches. In contrast, the methodology of *McCullum* resulted in placing the tax-supported facilities at the disposal of the churches and to surrender that authority normally attendant on the public school teacher to the religious instructor. In *McCullum*, then, the advancement of religion was both direct and primary, while in *Zorach* it was incidental.

Parenthetically, it may be noted that the fact situation in *Zorach* is strikingly similar to that in the concept of shared time, differing only in point of departure. In both situations students receive secular education in the public schools and sectarian education in parochial institutions. In neither situation is the religious instructor cloaked in the authority of public school teachers. In neither situation is religion taught on tax-supported premises. In both cases an incidental advantage accrues to sectarian interests. The only variation, which does not appear significant in terms of constitutional considerations, is that in *Zorach*, public school children adjourn to sectarian institutions for religious learning, while in dual enrollment, sectarian based students attend public schools for secular instruction.

The case of *Everson v. Board of Education*, *supra*, furnishes more direct support for the shared time concept. There, the court upheld a program under which the school district of Ewing Township, New Jersey, financed the transportation on public conveyances of both public and parochial school children pursuant to N.J.S.A. 18:14-8. In *Everson* there was a substantial expenditure of tax monies in behalf of parochial school children. While the State's underwriting of transportation costs advanced religion in the incidental sense that it facilitated attendance at parochial schools, the primary purpose and effect of the scheme was to benefit the resident

school children by ensuring adequate transportation to and from their schools, regardless of the character of the school attended.

Since the purpose of shared time is essentially secular, and its primary effect is not the direct advancement of religion but, rather, the provision of greater educational opportunities for students in general, we are of the opinion that the Establishment Clause is not thereby violated.

With equal reasoning, the New Jersey Constitution in no way inhibits the utilization by the public schools of dual enrollment. The Religious Freedom provision, *N.J. Const.*, Art. I, par. 3, states, *inter alia*, that “no person shall be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience.” The Establishment section, *N.J. Const.*, Art. I, par. 4, provides that “there shall be no establishment of one religious sect in preference to another; . . .”<sup>2</sup> In the context of shared time, there is far less ambiguity with respect to the express language of these provisions than appears in the First Amendment to our Federal Constitution. Furthermore, the New Jersey Court of Errors and Appeals considered them no bar to the Ewing school district's program for public and parochial school transportation discussed heretofore. *Everson v. Board of Education*, 133 N.J.L. 350 (E. & A. 1945). Based upon the limited historical data and available decisional law construing these provisions, it would seem that dual enrollment does not transgress the Church and State provisions of the State Constitution.

It is therefore our opinion that a board of education may maintain a dual enrollment program without violating the First Amendment to the United States Constitution or the comparable provisions of the Constitution of New Jersey.

Very truly yours,

ARTHUR J. SILLS

*Attorney General of New Jersey*

By: JOSEPH A. HOFFMAN

*Deputy Attorney General*

1. The estimated school population for the State of New Jersey in 1965 is as follows: Full-time day elementary and primary public schools; 1,263,800; Full-time day elementary and primary private schools, 334,200. Digest of Educational Statistics (1965 Ed.) Bulletin 1965, No. 4, U.S. Office of Education, Dept. of Health, Education and Welfare.

2. The language of these sections has remained substantially unchanged throughout the history of New Jersey. See *N.J. Const.* 1844, Art. I, pars. 3 and 4, *N.J. Const.* 1776, Arts. 18 and 19. There is a surprising lack of legislative history on these provisions.

November 29, 1965

HONORABLE JOHN A. KERVICK

State Treasurer

State House

Trenton, New Jersey

## FORMAL OPINION NO. 5

Dear Mr. Kervick:

You have requested our advice as to the effect on the Teachers' Pension and Annuity Fund and the Public Employees' Retirement System of Chapter 90 of P.L. 1965. This law amends the Supplemental Annuity Collective Trust of New Jersey Act, N.J.S.A. 52:18A-107, *et seq.* As provided in the Statement attached to the Bill, these amendments "...enable an eligible employee to enter agreements whereby, on their behalf, the employer will purchase annuities from the trust which will qualify for the tax sheltered or tax deferred treatment permitted pursuant to section 403(b) of the Internal Revenue Code."

The specific question posed is whether the employee's contributions to the Teachers' Pension and Annuity Fund or the Public Employees' Retirement System should be based on the employee's salary before the reduction or on the employee's salary after the reduction attributable to the purchase of an annuity.

It is our opinion for the reasons expressed herein that the employee's contributions to the Teachers' Pension and Annuity Fund and the Public Employees' Retirement System should be based on the employee's salary before the reduction and the benefit formula should likewise be expressed as a percentage of the final salary or final average salary before reduction.

Section 403(b) of the Internal Revenue Code concerns the taxation of annuities purchased by certain tax exempt organizations for their employees. It provides generally that if such an employer purchases an annuity contract for an employee and certain conditions are satisfied, the amounts paid by the employer for such annuity contract, subject to specified limitations, are excludable from the gross income of the employee. The Code was amended to include public school systems among those employers who qualify as tax exempt organizations. P.L. 87-370 (1961). The implication of section 403(b) which occasions this opinion relates to the amount of contributions due to the retirement system. In determining the amount of contributions payable to the system, such amounts are expressed as a percentage of contractual salary or base salary. Under a salary reduction agreement entered into pursuant to the authority of P.L. 1965, c. 90, the board of education contractually agrees to reduce the compensation of certain members of the retirement system in order to purchase annuities for such members.

This determination is important to the computation of the contributions due from the member as well as the employer and in fixing the benefits that would be payable upon retirement since the benefit formula is expressed as a percentage of final salary or final average salary.

N.J.S.A. 18:13-112.4 defines the compensation subject to contributions to the Teachers' Pension and Annuity Fund as the "... contractual salary for services as a teacher ... ." The statute governing the Public Employees' Retirement System contains no definition of the term "compensation", but in administering the statute, the Board of Trustees and the Division of Pensions consider the annual "base salary" as the compensation subject to contributions to the retirement system. See, *Memo-*

*randum Opinion P-10, 1961 (1960-63 Opinions of the Attorney General 181-82).*

The relationship between the boards of education of this State and their employees is contractual and the employee's initial place on the minimum salary schedule is determined by contract. N.J.S.A. 18:13-13.4. The purchase of a tax favored annuity would be made pursuant to an agreement between the employee and the board. P.L. 1965, c. 90. The teacher enters into a salary reduction agreement which provides that a portion of his salary will be diverted to the purchase of the annuity. By this voluntary election the employee waives the right to receive payment of his entire salary in cash and agrees that a portion of the salary may be paid in the form of rights of participation under the annuity contract. The take-home pay of the employee is thus reduced but his annual compensation, albeit in a different form, is the same. By this device he defers payment of federal income tax on the portion of his salary used to purchase the annuity. Since the annual compensation of the employee remains the same, his contributions to his retirement system should be based on this "actual" compensation and not the reduced "take-home pay" he voluntarily requested to gain a tax advantage.

The conclusion drawn here is supported by *Memorandum Opinion P-5, 1961 (1960-63 Opinions of the Attorney General 175)*. There, the question under review was whether an employee member of the Teachers' Pension and Annuity Fund, who had been disabled and was receiving workmen's compensation at a reduced rate, was required to make contributions to the retirement system at a percentage of his contractual salary rather than at a percentage of the workmen's compensation benefits which he was then actually receiving. The opinion held that contributions must be made in accordance with the "contractual salary" and not in accordance with the workmen's compensation award. A similar result should obtain here because the same rationale underlies both situations. Simply stated, it is that an employee is entitled to a retirement allowance based upon his annual compensation and makes contributions on that basis, regardless of the dollars and cents amount he actually receives in any given year.

We are therefore of the opinion that where amounts paid toward the purchase of an annuity are derived from an employee's salary, contributions to the respective retirement systems should be based on the compensation before reduction and the benefit formula should be expressed as a percentage of final salary or final average salary before reduction.

Very truly yours,

ARTHUR J. SILLS

*Attorney General*

BY: RICHARD NEWMAN

*Deputy Attorney General*

April 9, 1965

HONORABLE JOHN A. KERVICK

State Treasurer

State House

Trenton, New Jersey

## MEMORANDUM OPINION—NO. 1

Dear Mr. Kervick:

You have requested our advice as to whether the Municipal Court of North Hunterdon may report employees for Social Security purposes pursuant to the State's agreement with the Secretary of Health, Education and Welfare.

It is our opinion for the reasons stated herein that the Municipal Court of North Hunterdon may report employees for Social Security purposes.

The authority for the establishment of municipal courts in the State of New Jersey is contained in N.J.S. 2A:8-1 *et seq.* N.J.S. 2A:8-1 provides in part:

"Any . . . two or more municipalities entering into an intermunicipal agreement as hereinafter provided may, by . . . ordinances, establish a municipal court and determine upon the name thereof . . ."

N.J.S. 2A:8-3 enables two or more municipalities to enter into an agreement to establish a single intermunicipal court with jurisdiction coextensive with the territory of the municipalities party to the agreement. This legislation thereby made it financially possible for rural areas to avail themselves of the advantage of a well-run local court. 10 *Rutgers Law Review* 4, p. 647 (1956); Vanderbilt, Arthur J., *The Municipal Court—Most Important Court in New Jersey: Its Remarkable Progress and Its Unsolved Problems*. It is further noted that N.J.S. 2A:8-20 reaffirms that the territorial jurisdiction of a municipal court embraces all of the municipalities which joined in the formation of such a municipal court.

In the case of the Municipal Court of North Hunterdon, it serves and encompasses the Boroughs of Bloomsbury, Califon, Glen Gardner, Hampton and Lebanon, the Town of Clinton, and the Townships of Clinton, Franklin, Lebanon, Tewksbury and Union. The governing bodies of the various municipalities are required to provide the necessary accommodations and supplies for the court. N.J.S. 2A:8-18. The municipalities are also authorized to provide by ordinance or resolution for a clerk and other clerical assistance and to provide for their compensation. N.J.S. 2A:8-13. The magistrate of a municipal court is nominated and appointed by the Governor with the advice and consent of the Senate. N.J.S. 2A:8-5.

From the foregoing, it is abundantly clear that the Municipal Court of North Hunterdon is a creature of government, supported by government, is not operated for private profit, and is exclusively engaged in performing the essential governmental function of the administration of law at a local level.

The inquiry in this instance is whether such a court may report employees for Social Security purposes. To qualify under the Social Security Act, the municipal court has to fall within the ambit of "political subdivision" as defined therein. The Social Security Law (42 U.S.C.A. § 418 (b) (2) states that:

"Political subdivision includes an instrumentality of . . . (B) one or more political subdivisions of the State . . ."

Municipalities are recognized as subdivisions of the State. A pooling of their resources to create a municipal court through an intermunicipal agreement would provide the means by which the administration of justice would be carried out on a local level.

Although no definition of "instrumentality" is found under the Social Security Law, there is no reason why the common usage of such term would not be applicable. *Safeway Trails, Inc. v. Furman*, 41 N.J. 467, 478 (1964). Webster's New International Dictionary (2d Ed. 1943) p. 1288 defines an "instrument" as "(1) that by means of which any work is performed or result is effected; (2) a tool; utensil; implement." In *Unemployment Comp. Comm. v. Wachovia Bank & Trust Co.*, 215 N.C. 491, 2 S.E. 2d 592, 595-596 (Sup. Ct. 1939), the following factors were considered in determining whether an agency is an "instrumentality" of government: (1) whether it was created by government; (2) whether it is wholly owned by government; (3) whether it is not operated for profit; and (4) whether it is primarily engaged in performing some essential governmental function. See also *Mallory v. White*, 8 F. Supp. 989 (D.C. Mass. 1934) [where a city hospital maintained for poor persons was found to be an instrumentality of political subdivision of the state]. We have many examples in our own State of public bodies being considered governmental instrumentalities. *E.g.*, New Jersey Turnpike Authority, N.J.S.A. 27:23-1 *et seq.*; *New Jersey Turnpike Authority v. Parsons*, 3 N.J. 235 (1949); New Jersey Highway Authority, N.J.S.A. 27:12B-1 *et seq.*; *Behnke v. New Jersey Highway Authority*, 13 N.J. 14 (1953).

The foregoing authorities demonstrate that the Municipal Court of North Hunterdon would qualify as an instrumentality under the generally accepted criteria utilized in determining whether an agency is an instrumentality of government. It is a creature of government, created and wholly owned thereby; it is not operated for profit and is engaged solely in the performance of governmental function. There is nothing in federal law incompatible with this court being deemed an instrumentality. It is to be noted and emphasized that under the federal law the municipal court does not have to be a political subdivision in itself but may be an instrumentality of one or more political subdivisions.

Accordingly, you are hereby advised that the Municipal Court of North Hunterdon constitutes an instrumentality of one or more political subdivisions of the State of New Jersey and would therefor be included within the definition of political subdivision in the Social Security Law. Consequently, this court may report employees for Social Security purposes pursuant to the State's agreement with the Secretary of Health, Education and Welfare.

Very truly yours,

ARTHUR J. SILLS

Attorney General

BY: RICHARD NEWMAN

Deputy Attorney General

November 29, 1965

JUNE STRELECKI, *Director*  
 Division of Motor Vehicles  
 25 South Montgomery Street  
 Trenton, New Jersey

## MEMORANDUM OPINION—NO. 2

Dear Miss Strelecki:

You have requested an opinion as to whether farm tractors and traction equipment may be registered under the provisions of N.J.S.A. 39:3-24(b).

It is our opinion for the reasons stated herein that farm tractors and traction equipment may not be registered under the provisions of this subsection but must be registered in accordance with the provisions of subsection (a) of N.J.S.A. 39:3-24. As a result, the fee for the registration of farm tractors and traction equipment shall be \$3.00 per annum as provided by subsection (a), rather than the \$1.00 per annum registration fee as provided for those motor vehicles which come under the purview of subsection (b).

N.J.S.A. 39:3-24 states:

“(a) The director shall register farm tractors and traction equipment used for farm operation to travel upon the public highways. The fee for such registration shall be \$3.00 per annum, whether the registration is issued for the yearly period or only a portion thereof. Such traction equipment or farm tractors may draw farm machinery and implements while in transit from 1 farm to another without additional registration therefor.

“(b) The director may register motor vehicles, not for hire, used exclusively as farm machinery or farm implements, to travel upon the public highways, from 1 farm, or portion thereof, to another farm, or portion thereof, both owned or managed by the registered owner of the vehicle or vehicles. The fee for such registration shall be \$1.00 per annum, whether the registration is issued for a yearly period or only a portion thereof. Any vehicle so registered pursuant to the provisions of 39:3-25 of this Title may draw not more than 1 vehicle used exclusively on the farm and a vehicle so drawn need not be registered.”

The legislative history of N.J.S.A. 39:3-24(a) originated with the comprehensive provisions of Chapter 208 of the Laws of 1921. Chapter 208 embodied the recommendations of the Motor Vehicle Traffic Commission which was created by the 1920 Legislature for the purpose of investigating traffic conditions in this State, preparing a proposed uniform vehicle law, and suggesting registration or license fees for all types of vehicles using the public highways (Assembly Joint Resolution No. 1, 1920; Assembly Joint Resolution No. 8, 1920; Joint Resolution No. 2, 1920; Statement of Assembly Bill No. 483, 1921).

In 1920, many of the highways of this State were improperly constructed or not intended for the substantial increase of passenger and commercial freight-hauling vehicles resulting from the technological revolution of the automotive industry (Report of the Motor Traffic Commission, 1921). Therefore, Chapter 208, which reflected most of the recommendations of the Commission's Report, was concerned

primarily with the regulation and licensing of these kinds of passenger and commercial freight-hauling vehicles rather than with farm tractors and traction machines which were used only sparingly in farming operations during this period of time (L. 1921, c. 208). Inasmuch as the definition of a motor vehicle<sup>1</sup> applied, however, to farm tractors and traction machines, Section 21(9) of Chapter 208 provided:

“The Commissioner of Motor Vehicles shall license farm tractors and traction machines not equipped with rubber tires<sup>2</sup> to travel upon the public highways at a speed not to exceed four miles per hour . . . in such manner as to present a smooth surface to the highways, and in accordance with such regulations as shall be adopted by the Commissioner of Motor Vehicles. The fee for such licenses shall be three dollars . . .”

The statute continued:

“The Commissioner of Motor Vehicles may in his discretion, allow such traction engines or farm tractors to draw agricultural machinery and implements while in transit from one farm to another without additional license therefor.” (L. 1921, c. 208, §21(9), p. 643).

The only remaining “agricultural machinery and implements” which could have been referred to by the Legislature during this period were those machines that were incapable of being self-propelled, such as field tillers, lister plows, grain drills, disk harrows, soil pulverizers, fertilizer distributors and spreaders, threshers, reapers, mowers, wagons, combines, planters, harvesters, rakers, cultivators, and the like. *Smith, Farm Machinery and Equipment* (4th ed. 1955); *Stone and Gulvin, Machines for Power Farming* (1957). At the time of the enactment of Chapter 208, there was no reason to provide registration or licensing fees for other self-propelled vehicles used in agriculture because, for all practical purposes, these kinds of machines were not in existence.

In 1941 the Legislature enacted Chapter 31 providing for a \$1.00 annual registration fee of motor vehicles used exclusively as farm machinery and implements. This law, which is the legislative source of N.J.S.A. 39:3-24(b), stated:

“The commissioner may register motor vehicles, not for hire, used exclusively as farm machinery or farm implements, to travel upon the public highways from one farm, or portion thereof, to another farm, or portion thereof, both owned or managed by the registered owner of the vehicle or vehicles; provided, that no such vehicle shall traverse more than five miles of highway in traveling from one farm, or portion thereof, to another farm, or portion thereof; . . . and no such vehicle shall be operated on the highway between sunset and sunrise . . . and no such vehicle which is not equipped with rubber tires shall be operated at a speed exceeding four miles per hour . . . and no such vehicle shall draw any other vehicle except that, with the permission of the commissioner, it may draw not more than one vehicle used exclusively on the farm and in such case such drawn vehicle need not be registered.

“The fee for such registration shall be one dollar (\$1.00) per annum . . .” (L. 1941, c. 31, §1, p. 101; R.S. 39:3-24.1).

Within the two decades following 1921, there had been considerable improve-

ment and advancement of farm mechanization resulting in a substantial increase in the number and variety of farm machines that were self-powered and capable of being operated on the public highways while traveling from one farm to another. Therefore, farm machinery (e.g., reapers, plowers, threshers, etc.) which heretofore had been drawn by tractors, could now operate as independent units (*Smith, Farm Machinery and Equipment, op. cit.*). In view of the significance of such technological changes and the intention of the 1920 and 1921 Legislature to provide license fees and regulations for all types of vehicles using the public highways, it appears forcibly that the enactment of Chapter 31 was prompted by these considerations.

Admittedly, in the absence of Section 21(9) of Chapter 208 of the Laws of 1921, it would appear that the common meaning of the phrase "motor vehicles . . . used exclusively as farm machinery or farm implements", as used in Chapter 31 of the Laws of 1941, would apply to "farm tractors and traction equipment". In order to reach a sound construction of legislative interpretation, however, resort may be had to its legislative history and prior statutes on the same subject. *Jersey City v. Department of Civil Service*, 7 N.J. 509, 522 (1951). "Thus, if the particular provision in question is part of a general legislative scheme, a consideration of the entire scheme together may make it apparent in what sense the particular provision was used. If one construction or the other is necessary to prevent conflict with other statutes, that construction which is consistent with legislative intent will be adopted." 3 *Sutherland, Statutory Construction* (3d ed. 1943), §5817, p. 108. As the Legislature is charged with knowledge of its own prior enactments, *Eckert v. New Jersey State Highway Department*, 1 N.J. 474 (1949). 2 *Sutherland, op. cit.*, §4510, p. 327, it must be assumed that Chapter 31 was enacted with legislative awareness that Chapter 208 of the Laws of 1921 (and its amendments) already provided a separate and distinct classification for the licensing of farm tractors and traction equipment. Otherwise, if it could be interpreted that farm tractors and traction equipment could be registered under the \$1.00 fee provisions of Chapter 31 (hereinafter referred to as R.S. 39:3-24.1), then the \$3.00 license provisions of Section 21(9) of Chapter 208 of the Laws of 1921 (hereinafter referred to as R.S. 39:3-24) would be completely ineffectual. Likewise the legislative enactment of 1947 amending some of the provisions of R.S. 39:3-24 would also be meaningless. Such an interpretation, therefore, would be contrary to the well-recognized rule that a "construction that will render any part of a statute inoperative, superfluous or meaningless, is to be avoided". *State v. Sperry & Hutchinson Co.*, 23 N.J. 38, 46 (1956).

In 1951, "farm tractor" was defined by the Legislature as a "motor vehicle designed and used primarily as a farm implement for drawing plows, mowing machines, and other implements of husbandry" (L. 1951, c. 25, §1, p. 122; N.J.S.A. 39:1-1). It may be argued that since "farm tractor" had now been defined by the legislature as a motor vehicle "used . . . as a farm implement", the use of the term "farm implements" in R.S. 39:3-24.1 must, inversely, include "farm tractors" as one of its objects. And, it is the general rule that when the Legislature has specifically defined a term, the courts are bound by the definition. *Eagle Truck Transport, Inc. v. Board of Review, etc.*, 29 N.J. 280, 289 (1959); *Fox v. Standard Oil Co. of New Jersey*, 294 U.S. 87, 55 S. Ct. 333 (1934). Like most rules, however, this one is not without its exceptions. In *Lawson v. Suwanee Fruit & S.S. Co.*, 336 U.S. 198, 201, 69 S. Ct. 503 (1949), the United States Supreme Court held that it was not bound to follow the statutory definition where obvious incongruities in the statute would be created, nor where one of the major purposes of the legislation would be defeated or destroyed. Interpreting farm implements, insofar as used in R.S. 39:3-24.1 as apply-

ing to farm tractors and traction equipment, would obviously defeat the purpose of R.S. 39:3-24. In light of these considerations, we conclude that the phrase "motor vehicles . . . used exclusively as farm machinery or farm implements" as set forth in the context of R.S. 39:3-24.1 must exclude from its scope "farm tractors and traction equipment".

In 1961, the Legislature amended R.S. 39:3-24 into three subsections. L. 1961, c. 71, p. 598. The \$3.00 annual fee provision of R.S. 39:3-24 concerning farm tractors and traction equipment was stated in almost identical language under N.J.S.A. 39:3-24(a). Likewise, the \$1.00 annual fee provision of R.S. 39:3-24.1 regarding motor vehicles used exclusively as farm machinery or farm implements was set forth in similar language under N.J.S.A. 39:3-24(b). Since the statutory language under consideration is to be construed within the framework of the entire enactment and its legislative history, *DeFlesco v. Mercer County Board of Elections*, 43 N.J. Super. 492 (App. Div. 1957), *Richardson v. Essex National Trunc. & Co., Inc.*, 119 N.J.L. 47 (E. & A. 1937), it is to be inferred that the distinctions between R.S. 39:3-24 and R.S. 39:3-24.1 as previously discussed, were also intended to be retained in subsections (a) and (b) of N.J.S.A. 39:3-24.

Otherwise, if farm tractors and traction equipment could be registered under the \$1.00 fee provision of subsection (b), it is obvious that the \$3.00 fee provisions of subsection (a) would be defeated. Such an interpretation would be contrary to the assumption that all the sections of a statute are enacted for the purpose of achieving an effective and operative result. 3 *Sutherland, Statutory Construction, op. cit.* §4510, p. 327. In the case of *Seatrains Lines, Inc. v. Medina*, 39 N.J. 222, 226-227 (1963), our Supreme Court, quoting the rule of statutory construction set forth in *Febbi v. Board of Review, Division of Employment Security*, 35 N.J. 601, 606 (1961), said:

"It is a cardinal rule of statutory construction that the intention of the Legislature is to be derived from a view of the entire statute and that all sections must be read together in the light of the general intent of the act so that the auxiliary effect of each individual part of a section is made consistent with the whole."

Consequently, subsections (a) and (b) of N.J.S.A. 39:3-24 should be construed in context with each other so as to produce a harmonious whole.

In conclusion, therefore, we are of the opinion that farm tractors and traction equipment must be registered under the provisions of subsection (a) of N.J.S.A. 39:3-24 rather than subsection (b) of this statute.

Very truly yours,  
ARTHUR J. SILLS  
Attorney General  
By: JAMES S. OLIVER  
Deputy Attorney General

1. Motor vehicle was defined as including "all vehicles propelled otherwise than by muscular power, excepting such vehicles as run only upon rail or tracks" (L. 1921, c. 208, §1 (1, 3), p. 643; N.J.S.A. 39:1-1.)



2. In 1938, Section 20(9) of Chapter 208 was amended so that the \$3.00 annual license fee applied to "... farm tractors and traction [machines] equipment used for farm operations [not equipped with rubber tires] equipped with or without rubber tires..." (L. 1938, c. 66, §7, p. 176). The effect of this amendment, of course, was that this statute now applied to all farm tractors and traction equipment. The reason for this amendment becomes obvious when one considers the development of rubber tires in the agricultural industry. In 1921, the great majority of farm tractors and traction equipment that was in operation was equipped without rubber tires. It was not until the late thirties that farm tractors became equipped with tires (Smith, *Farm Machinery and Equipment* (4th ed. 1955), p. 5). Until 1941, this was the only statute applicable to farm vehicles excepting a prior enactment in 1933 providing lesser registration fees for trucks used by farmers (L. 1933, c. 124, §§ 1, 2, pp. 261, 262; N.J.S.A. 39:3-25).

November 29, 1965

HONORABLE ROSCOE P. KANDLE, *Commissioner*  
Department of Health  
129 East Hanover Street  
Trenton, New Jersey

MEMORANDUM OPINION — NO. 3

Dear Commissioner Kandle:

You have requested an opinion on the propriety of issuing birth certificates without charging fees therefor to persons seeking to secure Federal Old Age, Survivors and Disability Insurance Benefits under R.S. 26:8-63(a).

It is our opinion that claims for Federal Old Age, Survivors and Disability Benefits are claims for public pension within the purview of the law, and that the Department of Health should not charge fees for such birth certificates.

N.J.S.A. 28:8-63 provides, in pertinent part, that:

"The State Registrar shall:

"(a) Furnish a birth, marriage or death certificate without fee in the prosecution of any claim for public pension or for military or naval enlistment purposes..."

Our Supreme Court has defined the term "public pension" in the case of *Salz v. State House Commission*, 18 N.J. 106, 111, 112 (1955). The Court, speaking through Justice Heher, said:

"A public pension, while not contractual in nature, is akin to wages and salaries in that it is payable in stated installments for the maintenance of the servant after his productive years have ended \*\*\*."

The Court cited with approval the Connecticut case of *Kneeland v. Administrator*,

*Unemployment Compensation Act*, 138 Conn. 630, 88 A. 2d 376 (Sup. Ct. Err. 1952) wherein it was said, in defining the word "pension", that:

"It serves the same purpose as wages to the recipient in that it helps him to meet the expense of living. It is a substitute for the wages which the employee has lost by reason of the loss of his job."

It is manifest that Federal Old Age, Survivors and Disability Benefits come within the scope of the foregoing principles. Old age benefits are clearly installments for the maintenance of an employee after his productive years have ended. Survivors benefits are unquestionably a substitute for wages which have been lost through the loss of a job by reason of death, and disability benefits are also a substitute for wages in much the same manner. All such benefits serve the same purpose as wages in that they assist the recipient in meeting the expense of living, and are in the nature of a pension paid by the Government upon the happening of certain contingencies.

The cases discussing the purpose of Federal Social Security laws are in accord with the cases, discussed above, which deal with the nature and purpose of pensions. The Supreme Court of the United States, speaking through Mr. Justice Reed, clearly stated the object of Federal Old Age Benefits as follows:

"The purpose of the Federal Old Age Benefits of the Social Security Act is to provide funds through contributions by employer and employee for the decent support of elderly workmen who have ceased to labor." *Social Security Board v. Nierotko*, 327 U.S. 358, 364, 66 S. Ct. 637, 640, 90 L. Ed. 718 (1946).

The following year the same court, in an opinion dealing with unemployment benefits, stated that:

"The Social Security Act of 1935 was the result of long consideration by the President and Congress of the evil of the burdens that rest upon large numbers of our people because of the insecurities of modern life, particularly old age and unemployment. It was enacted in an effort to coordinate the forces of government and industry for solving the problems. The principal method adopted by Congress to advance its purpose was to provide for periodic payments in the nature of annuities to the elderly..." *United States v. Silk*, 331 U.S. 704, 710, 68 S. Ct. 1463, 1466, 91 L. Ed. 1757 (1947). (Emphasis added.)

The leading case of *Helvering v. Davis*, 301 U.S. 619, 642, 57 S. Ct. 904, 909, 81 L. Ed. 1307 (1937), discusses in detail the purposes of such legislation. The case stresses the evidence, gathered through extensive hearings, that the number of elderly persons in the United States unable to take care of themselves was, at that time, growing at a threatening pace because of the loss of employment due to old age.

It has been said of State old age assistance, which for our purposes can be equated to Federal Benefits, that its purpose

"is to aid or to pension, to the extent therein provided, aged persons who come within its provisions, and thus prevent or at least tend to prevent their

need of support, care and maintenance." 81 C.J.S., *Social Security and Public Welfare*, Sec. 15.

Moreover, the understanding of the statutory term "pension" as including old age assistance is illustrated by the recognition of the federal old age assistance program accorded by our Legislature in the state pension program. The Public Employees' Retirement System made a part of New Jersey Statutes by P.L. 1954, c. 84, superseded the State Employees' Retirement System and provided additional coverage for members of the former State Employees' Retirement System under the provisions of Title II of the Federal Social Security Act. N.J.S.A. 43:15A-2, *et seq.* For this reason, this act is known as the Public Employees' Retirement-Social Security Integration Act.

Under this Act, public employees were not required to pay the Social Security tax on wages to the extent of rates prevailing as of January 1, 1960; such taxes were paid to the federal government by the Retirement System from pension contributions collected from the members. N.J.S.A. 43:15A-58. The pension system bore the cost for the total tax upon the employee until January 1, 1960 and thereafter in the amount of the prevailing rate as of that date. Thus, it is clear that the federal tax on employees' wages was paid out of Retirement System funds. Because of this federal tax payment from Retirement System funds, the Retirement System was given the economic advantage of the federal benefits purchased for each employee in the form of a corresponding reduction of the State Retirement allowance as provided by N.J.S.A. 43:15A-59. The Public Employees' Retirement-Social Security Integration Act was basically designed to provide a monthly allowance for retired employees to be made up in part by the State fund and in part by the Federal fund. The underlying objective of the integrated system is the same objective that existed before the State and Federal plans were merged, *i.e.*, to enable an aged servant to meet the necessities of life after his release from employment. *Miller v. Bd. of Trustees, etc., Retirement System*, 35 N.J. 19, 23 (1961); *cf. Spina v. Consolidated Police, etc., Pension Fund Com.*, 41 N.J. 391, 401-402 (1964).

This objective, when considered in the light of the definition of public pension as expounded in the *Salz* case, *supra*, in discussing a State pension, and the integration of the Federal and State funds, indicate a legislative intent for the term "public pension" to encompass Social Security.

In conclusion, we are of the opinion that the Department of Health may issue birth certificates without charge to persons seeking to obtain Federal Old Age, Survivors and Disability Insurance Benefits under R.S. 26:8-63(a).

Very truly yours,  
ARTHUR J. SILLS  
*Attorney General*

By: PETER J. SCHWARTZ  
*Deputy Attorney General*

July 8, 1966

MISS JUNE STRELECKI, *Director*  
Division of Motor Vehicles  
25 South Montgomery Street  
Trenton, New Jersey

FORMAL OPINION 1966—No. 1.

Dear Miss Strelecki:

You have requested our opinion as to whether the Director of the Division of Motor Vehicles may require that a motorist pay the fee of an uninsured motorist, as provided by the Unsatisfied Claim and Judgment Fund Law, particularly in N.J.S.A. 39:6-63(d)(1), when the motorist is uninsured for any reason and for any period during the registration year even though he was insured on the day of registration.

You have stated that the actual number of motorists who are insured at the time of registration but subsequently become uninsured during the registration year is unknown. It is estimated, however, based upon an analysis of available statistics, that the Fund's reserves would increase if motorists are required to pay the fees prescribed by N.J.S.A. 39:6-63(d)(1) when at any time during the registration period their insurance lapses. You have further stated that any program developed by the Division of Motor Vehicles where a motorist's insurance has lapsed after the date of registration, such as the additional fees or suspension or revocation of licenses or registrations, would have the effect of discouraging motorists, in the first instance, from permitting this event to happen.

It is our opinion for the reasons expressed herein that the Director of the Division of Motor Vehicles may require a motorist to pay the additional fee chargeable to uninsured motorists if he is without insurance on *any day* during the year of registration.

N.J.S.A. 39:6-63(d) provides that:

"On December 30 in each year, beginning with 1956, the director shall calculate the probable amount which will be needed to carry out the provisions of this act during the ensuing registration license year. . . . If, in his judgment, the estimated balance of the fund at the beginning of the next registration license year will be insufficient to meet such needs, he shall

"(1) Determine the amount to be fixed as the Unsatisfied Claim and Judgment Fund Fee for such registration license year. Such fee shall in no case exceed \$25.00 and shall be paid by each person registering an uninsured motor vehicle during such ensuing year at the time of registration in addition to any other fee prescribed by any other law."

"Uninsured motor vehicle" is defined by N.J.S.A. 39:6-62 as "a motor vehicle as to which there is not in force a liability policy meeting the requirements of sections 3, 24, 25 or 26 [39:6-63, 39:6-46 to 48] of the Motor Vehicle Security Responsibility Law of this State, established pursuant to the provisions of chapter 173 of the Laws of 1952, as amended and supplemented, and which is not owned by a holder of a certificate of self-insurance under said law."

The administration of this statute, with respect to the collection of fees and the Fund's liability, is as follows:

1. If a person who at the time of registering a motor vehicle has in effect an automotive liability policy<sup>1</sup> covering the motor vehicle registered, this person would not be required to pay the \$25.00 fee that is presently collected from an individual registering an uninsured motor vehicle.

2. If an uninsured operator or uninsured owner of a motor vehicle (hereinafter referred to as "uninsured motorist") is, in any manner, involved in an automobile accident resulting in bodily injury or property damage in excess of \$100.00, any other injured parties in the accident may receive payment from the Unsatisfied Claim and Judgment Fund Board<sup>2</sup>, provided that such party has complied with all the requisites of the Unsatisfied Claim and Judgment Fund Law.

3. In the event, however, that a person who had properly registered an insured motor vehicle at the time of registration were later to become uninsured and subsequently involved in an automobile accident, the Fund's exposure for property damage and bodily injury nevertheless remains the same, even though the Fund had not received the \$25.00 fee that is presently collected from the uninsured motorist at the time of registration. The Unsatisfied Claim and Judgment Fund Law makes no distinction as to the liability of the Fund for automobile accidents resulting from the acts of uninsured motorists who have not contributed to the Fund at the time of registering their motor vehicles.

That the Legislature intended to permit an uninsured motorist to escape his obligation of contributing toward the Fund is contrary to the entire legislative history and policy of the Unsatisfied Claim and Judgment Fund Law which indicate that the principal burden of supporting the Fund is placed upon the uninsured motorists. N.J.S.A. 39:6-63(d), as originally enacted, provided for a fee of not more than \$1.00 imposed upon owners of all motor vehicles and another fee of \$2.00 to be imposed on owners of *uninsured* motor vehicles in addition to any other fees. L. 1952, c. 174, p. 572, §3, A 410. In 1956, section 39:6-63(d) was amended to delete the \$1.00 fee required of each person registering a motor vehicle and to increase the amount payable by uninsured motorists from \$2.00 to not more than \$8.00. L. 1956, c. 22, p. 64, §2, S 238. In 1958, the \$8.00 fee requirement payable by the uninsured motorist was again increased to an assessment of not more than \$15.00. The purpose of the 1958 amendment, which increased this fee, was "to increase payments to accident victims of uninsured drivers; to eliminate inequities and objectionable features that have appeared in the Unsatisfied Claim and Judgment Fund Law after three years of operation; to expedite payment of claims that have been settled and to place on the uninsured motorist, who creates the problem, the principal burden of supporting the fund." 1955-1958 R.S. Cum. Supp., p. 680, L. 1958, c. 99, Assembly Bill 422.

The primary object of the Fund is to provide a measure of relief for persons who sustain losses or injury inflicted by financially irresponsible or unidentified owners or operators of motor vehicles, where such persons would otherwise be remediless. *Corrigan v. Gassert*, 27 N.J. 227, 233 (1958); *Dixon v. Gassert*, 26 N.J. 1, 5 (1958); *Gray v. Tice*, 52 N.J. Super. 309, 313 (Law Div. 1958). That the Legislature still intends to further this object and support the Fund with the fees of uninsured motorists is evidenced by the recent passage of Assembly Bill No. 727 (L. 1965, c. 72, p. 198) which increases the registration fee of an uninsured motorist from \$15.00 to \$25.00 without changing the fees payable by insured motorists.

From the foregoing history and from the scheme of the Unsatisfied Claim and Judgment Fund Law, it is clear that the Legislature intends to visit the burden of

maintaining the Unsatisfied Claim and Judgment Fund upon those persons who made the establishment of the Fund necessary—registrants of uninsured motor vehicles. An owner whose insurance lapses during the registration year is no less financially irresponsible than one who has no insurance on the day of registration. He is entitled to no better treatment if he is uninsured because he forgets to renew his policy or cancels it than if he neglects or is unable to obtain insurance in the first place. The evil is being uninsured—even if the period be for only one day.

This interpretation is not prevented by the phrase "... Such fee ... shall be paid ... at the time of registration ..." contained in section (d)(1) of N.J.S.A. 39:6-63. As the total context of a statute must be viewed in seeking legislative intent, *Trugman v. Reichenstein*, 27 N.J. 280 (1958), the import of this phrase must be gained, not alone from the words used within the confines of a particular section, but from the words when read in connection with the entire statute under review. *Petition of Sheffield Farms Co.*, 22 N.J. 548 (1956). Thus, consideration must also be given to the language immediately preceding this phrase which imposes an obligation upon the Director to:

"... calculate the probable amount which will be needed to carry out the provisions of this act during the ensuing registration license year. . . ." and continues:

"... If in his judgement, the estimated balance of the fund at the beginning of the next registration license year will be insufficient to meet such needs, he shall:

"(1) Determine the amount to be fixed as the Unsatisfied Claim and Judgment Fund fee for such registration license year. . . ."

Consequently, though it may be contemplated that the fee for registering an uninsured vehicle will be paid at the time of registration, it is clear that this fee is not merely assessed for the act of registration but that the fee covers the registration privilege for an entire license year.

"An express statutory grant of power or the imposition of a definite duty carries with it by implication, in the absence of a limitation, authority to employ all the means that are usually employed and that are necessary to the exercise of the power or the performance of the duty." *State v. Nestos*, 48 N.D. 894, 187 N.W. 233 (1922).

It is accepted in the construction of statutes that "that which is clearly implied from the purpose which underlies a statute is as much a part of the law as that which is expressed." *Ranney v. Istituto Pontificio Delle Maestre Filippini*, 20 N.J. 189, 197, 198 (1955); *Minardi v. Pacific Airmotive Corp.*, 43 N.J. Super. 460, 468 (Cty. Ct. 1957). See also *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 193-194, 61 S. Ct. 845, 852 (1941), 3 *Sutherland, Statutory Construction*, § 5402 (1943). It is obvious that one of the implied but necessary assumptions upon which the Director must rely, in anticipating the revenue that should be reasonably available to meet the needs of the Fund in the payment of claims, is that motorists, who are insured at the time of registration, intend to be covered for the entire period during which the vehicle is registered. Otherwise, the number of motorists at the time of registration

would not serve as a reliable basis for calculating the potential liability of the Fund.

To construe this statute, therefore, as limiting the power of the Director to collect the uninsured fees that are prescribed only from motorists who were uninsured at the time of registration would (1) exempt motorists who became uninsured for as much as 364 days of the remaining registration period from paying these fees, and (2) interfere with the express statutory duty obliging the Director to ascertain the probable financial needs of the Fund. Such an interpretation would be contrary to the canon of legislative interpretation that all sections of a statute are enacted to achieve a sensible, effective and operative result, *Seatrains Lines Inc. v. Medina*, 39, N.J. 222, 226-227 (1963); 3 *Sutherland, Statutory Construction*, § 4510, p. 327 (3 ed. 1943); that an interpretation is preferred which would not defeat the policy of the Legislature and lend itself to absurdity, 3 *Sutherland, Statutory Construction, op. cit.* § 5505, p. 41; and that statutory language is not to be given a rigid interpretation when it is apparent that such meaning was not intended, *Alexander v. N.J. Power & Light Co.*, 21 N.J. 373, 378 (1956).

Accordingly, it is our opinion that in the administration of the Unsatisfied Claim and Judgment Fund, the Director of the Division of Motor Vehicles may require a motorist to pay the fees prescribed within N.J.S.A. 39:6-63(d)(1) when, at any time during the registration period, the motorist's insurance lapses.

Very truly yours,  
ARTHUR J. SILLS  
*Attorney General*  
By: JAMES S. OLIVER  
*Deputy Attorney General*

1. See N.J.S.A. 39:6-25(c) as to what constitutes insurance.
2. See N.J.S.A. 39:6-23 for limitations on amounts payable from the Fund.

October 26, 1966

Honorable John A. Kervick  
*State Treasurer*  
State House  
Trenton, New Jersey

FORMAL OPINION, 1966—No. 2.

Dear Mr. Kervick:

You have requested an opinion on questions concerning the special veterans retirement benefits in the Teachers' Pension and Annuity Fund and the Public Employees' Retirement System.

You have asked specifically whether a veteran member of the Teachers' Pension and Annuity Fund or Public Employees' Retirement System may vest his special half

pay retirement allowance in the respective funds before 60 or 62 years of age, pursuant to N.J.S.A. 18:13-112.38 or N.J.S.A. 43:15A-38.

## I

With respect to the first question it is our opinion, for the reasons set forth herein, that a veteran member of the Teachers' Pension and Annuity Fund or the Public Employees' Retirement System must attain age 60 or 62 in order to secure the special veterans' retirement privileges provided by N.J.S.A. 18:13-112.73 or N.J.S.A. 43:15A-61(a).

The Teachers' Pension and Annuity Fund and the Public Employees' Retirement System each provide special retirement benefits to members who are veterans.

N.J.S.A. 43:15A-61(a), applicable to the Public Employees' Retirement System (PERS), provides:

"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 been 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 ½ 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." (Emphasis supplied.)

N.J.S.A. 18:13-112.73(a), referring to the Teachers' Pension and Annuity Fund (TPAF), provides:

"Any veteran member in office, position or employment of this State or of a county, municipality, or school district, board of education or other employer on January 1, 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, board of education or other employer, satisfactory evidence of which service has been presented to the board of trustees, shall have the privilege of retiring and receiving a retirement allowance of ½ 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 47 of this act." (Emphasis supplied.)

The special veterans' retirement privileges of the Teachers' Pension and Annuity Fund and Public Employees' Retirement System are the successors to the Free Veterans' Retirement Act, R.S. 43:4-1 *et seq.* The original Veterans' Pension Act was enacted in 1906, as chapter 252 of the Laws of 1906. It granted a free pension to honorably discharged veterans of the Civil War. The Act, subsequently, was

amended on several occasions. In 1919 and 1924 the Legislature made provision for the eligibility of veterans of World War I, the Indian Wars, and the campaign against Mexico. L. 1919, c. 249, p. 599; L. 1924, c. 224, p. 492. The Legislature, mindful of the efforts of thousands of New Jersey servicemen in the Second World War, broadened the scope of the Free Veterans' Retirement Act in 1944 to include all honorably discharged persons in any war in which the United States is or may be engaged. L. 1944, c. 211, p. 749.

The Free Veterans' Retirement Act then provided for veteran members an annual pension equal to one half of the final salary after 20 years of service and upon attaining age 62 or being disabled. The system at that time was non-contributory and only provided a retirement allowance for the retirant. As a result of the added coverage of World War II and Korean War Veterans, the cost of a free veterans' pension became prohibitive to the State of New Jersey. Schanes, *A Report on the Improvement of the Economic Security Benefits of N.J. State Employees*, November 1953, p. 10.

In 1955 the Free Veterans' Retirement Act was incorporated into the Public Employees' Retirement System and the Teachers' Pension and Annuity Fund in substantially identical language by N.J.S.A. 43:15A-61 and N.J.S.A. 18:13-112.73. Modified special veterans' benefits in the Public Employees' Retirement System and Teachers' Pension and Annuity Fund were substituted for the benefits theretofore provided by the Free Veterans' Retirement Act. N.J.S.A. 18:13-112.54; N.J.S.A. 43:15A-56. Under these provisions, the State of New Jersey granted the veteran public employee or teacher free credit towards retirement for every year of state service prior to 1955 but also required future contributions to the respective systems in the same fashion as non-veteran members. L. 1955, c. 261, p. 975. The retirement age for veterans who were in the public service in 1955 was reduced from age 62 to age 60. Veterans enrolling after January 1 or 2, 1955 (depending on the system involved) were required to serve until age 62 in order to obtain the special veterans' benefit. The retirement allowance of the veteran public employee or teacher was at the same benefit he would have received under the former Free Veterans' Retirement Act, but, in addition, he was also entitled to disability coverage, insurance, death benefits and options applicable to non-veteran members of the respective systems. N.J.S.A. 43:15A-42, 43, 49, 50, 57; N.J.S.A. 18:13-112.40, 41, 48, 49, 55.

The Legislature recently amended the vesting provisions of both retirement systems reducing the service requirement for vesting from 20 to 15 years. L. 1966, c. 217, L. 1966, c. 218. The special veterans' retirement benefits in both sectors, however, were reenacted retaining the 20 years of service vesting standard. L. 1966, c. 217, L. 1966, c. 218. It may be inferred from its refusal to extend the scope of reduced vesting time to special veterans' retirement years of service, that the Legislature eschewed any interrelationship between the vesting privileges accorded veteran and non-veteran employees.

Both Public Employees' Retirement System and Teachers' Pension and Annuity Fund give the prospective retirant an opportunity to vest benefits before reaching service retirement age upon completion of the required years of service. N.J.S.A. 43:15A-38 with reference to a deferred retirement allowance in the Public Employees' Retirement System provides in part:

"Should a member of the Public Employees' Retirement System, after having completed 15 years of service, be separated voluntarily or involuntarily from the service, before reaching service retirement age, and not by

removal for cause or charges of misconduct or delinquency, such person may elect to receive . . . (b) a deferred retirement allowance, beginning at the retirement age, . . ."

N.J.S.A. 18:13-112.38 with reference to a deferred retirement allowance in the Teachers' Pension and Annuity Fund provides in part:

"Should a member, after having completed 15 years of service, be separated voluntarily or involuntarily from the service, before reaching service retirement age, and not by removal for inefficiency, incapacity, conduct unbecoming a teacher or other just cause under the provisions of sections 18:13-16 to 18:13-19 of the Revised Statutes, inclusive, such person may elect to receive . . . (b) a deferred retirement allowance, beginning at age 60 . . ."

These vesting provisions, N.J.S.A. 43:15A-38 and N.J.S.A. 18:13-112.38, refer to normal retirement benefits. They entitle a member after 15 years of service to receive a benefit but only beginning at retirement age. The provisions have no application to the special retirement privileges of veteran members of the Public Employees' Retirement System and the Teachers' Pension and Annuity Fund. This has been a consistent interpretation. Memorandum Opinion of the Attorney General, dated June 8, 1955, found that a veteran public employee with 20 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 60 can acquire no right to the one half pay allowance. A letter opinion of the Attorney General, dated July 17, 1931, found that the Free Veterans' Retirement Act is not susceptible to a construction which would permit a veteran to retire from service and thereafter gain the benefits of the Act.

In *Kessler v. Kervick*, 70 N.J. Super. 160 (App. Div. 1961), the court found that the vesting privilege was never intended by the Free Veterans' Retirement Act. Appellant, a veteran, with 20 years of State service, retired when he was 44 and sought the special one half pay benefit upon attainment of age 62. Twenty years of service and attainment of age 60 or 62 were construed by the court to be concomitant requirements and that appellant must have retired with 20 years of service and have been 62 or older in order to receive the one half pay allowance. *Cf. Kessler v. Zink*, 136 N.J.L. 479 (E. & A. 1948).

In *Kelly v. Kearins*, 132 N.J.L. 308, 312 (E. & A. 1944) the court noted:

"While R.S. 43:4-1 and R.S. 43:4-2 have for their source independent statutes, nonetheless, we do not regard them as unrelated statutes. On the contrary, we hold them to be 'cognate' statutes. Their provisions are in 'pari materia.' Accordingly, we have 'taken and construed' them 'together' as part of 'one system' and 'explanatory of each other.' *Cf. In re Books Will*, 90 N.J. Eq. 549, 553, so 'reasonably construed together, as a harmonious whole, they consistently effectuate' the legislative pattern upon which the policy of the state for the retirement on pension of public servants is based. *Cf. Broderick v. Abrams*, 116 N.J.L. 40, 45.

"Relator has failed to satisfy both conditions of the Veterans Act, *supra*, as we construe it (requiring twenty years of service and additionally

the attainment of sixty-two years of age), in support of his asserted right to be retired on pension."

Moreover, as previously noted, the Legislature has purposefully accorded different treatment with respect to the vesting of retirement benefits as between veteran and non-veteran employees. L. 1966, c. 217, L. 1966, c. 218. A veteran public employee or teacher has the privilege of retiring with a minimum of 20 years of service and attaining age 60 or 62 and of receiving a retirement allowance of one half of his final compensation. N.J.S.A. 43:15A-62, N.J.S.A. 18:13-112.73. A non-veteran public employee or teacher who retires with 15 years of service may only receive 20/60ths, a 1/3 benefit, or 20/70ths respectively. N.J.S.A. 43:15A-30, N.J.S.A. 18:13-112.38. The veteran on retirement receives a substantial benefit, one-half of salary, as compared with his non-veteran counterpart in the respective system. If a special veterans' allowance is deemed to vest after a minimum of 20 years of service, the result would enhance an already rather substantial special benefit. Moreover, if veteran members were permitted to vest their special half pay retirement allowance after the minimum of 20 years of service, they would, in effect, be encouraged to retire from State service at the end of 20 years. The result would be contrary to one of the basic objectives of a pension allowance, namely, the promotion of years of long and faithful service to the public. *Salz v. State House Commission*, 18 N.J. 106 (1955).

We are further advised that in the actuarial planning for the funding of the respective systems, it has not been assumed that veteran members would be entitled to vest their special retirement benefits after 20 years of service. If such a privilege were now deemed to be available to veteran members, the cost to the systems would increase substantially and an additional liability not previously recognized in the funding of the systems would result. This practical administrative understanding and application of the pertinent statutory provisions are entitled to great weight. *Pringle v. N.J. Dept. of Civil Service*, 45 N.J. 329, 333 (1965). 2 Sutherland, *Statutory Construction*, §5107, p. 520 (3rd Ed. 1943). Thus, in the absence of an express and clear statutory provision for pre-retirement age vesting of special veterans' pension benefits, this result cannot be inferred.

We, therefore, advise you that a veteran public employee or teacher with 20 or more years of service must attain age 60 or 62 in order to be entitled to the special veterans' half pay retirement allowance provided by N.J.S.A. 43:15A-61 or N.J.S.A. 18:13-112.73.

## II

You have also asked us whether a veteran teacher or public employee with 20 or more years of New Jersey service may qualify for the special veterans' half pay retirement allowance if he is on a leave of absence without pay when he attains age 60 or age 62. This involves a determination of whether a veteran member who is on an approved leave of absence without pay can be considered in the "active service" for the purpose of the veterans' retirement benefit.

It is our opinion, for the reasons set forth herein, that a veteran public employee or teacher must be in the compensated active service when he attains age 60 or 62 to qualify for the special veterans' half pay retirement benefits and such "compensated active service" would include those members who have been granted an approved leave of absence with pay but would not include members upon an approved leave of

absence without pay.

As previously noted, the veterans' special retirement allowance of one-half pay was a privilege extended to those veteran members of the system who attained the age of 60 or 62, as the case may be, and who had aggregated 20 years of service. The dual requirement of age and service must be satisfied before the privilege becomes effective. Only when these requirements are met can it be said that the privilege has ripened. *Kessler v. Kervick*, 70 N.J. Super. 160 (App. Div. 1961), *Kessler v. Zink*, 136 N.J.L. 479 (E. & A. 1948), *Kelly v. Kearins*, 132 N.J.L. 308 (E. & A. 1944).

The general scheme of veterans' retirement presupposes compensated active service as a prerequisite for qualification for the special veterans' half pay retirement upon attainment of age 60 or 62. N.J.S.A. 43:15A-61 and N.J.S.A. 18:13-112.73 provide for a retirement allowance calculated on "One half of the compensation received during the last year of employment upon which contributions to the annuity savings fund or contingent reserve fund are made . . ."

R.S. 43:4-3 of the Veterans' Retirement Act provides:

"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." (Emphasis supplied.)

The plain meaning of the words used by the Legislature contemplate an active paid status at the time of retirement.

In *Watt v. Mayor and Council of Borough of Franklin*, 21 N.J. 274, 278, 279 (1956), the court commented on paid public service and the Veterans' Retirement Act:

"Since lack of compensation is a unique feature of the councilmanic position, and since some portion of the service in that office would have to be counted to make up the statutory period of 20 years, we have directed our attention to it as a necessary inquiry and pass all others. Is such public service within the contemplation of the Veterans' Pension Act? . . ."

"But whatever the actual purpose to be served by the Veterans' Pension Act, *supra*, the benefit here is measured by the *compensation* being paid at the time of retirement. In this respect again the present pension act is no different from those free pension acts which apply to salaried positions the public service in which avowed purpose is recompense for career service. Unless this statute was intended to apply to paid positions only, it is meaningless and totally unreconcilable with any of the policies which could underly the promulgation of such benefits."

It is, furthermore, contemplated by N.J.S.A. 43:15A-61 and N.J.S.A. 18:13-112.73 that a veteran public employee or teacher be "in office, position, or employment" at the time of retirement. Chapter 131 of the Laws of 1910 and all similar veterans' retirement acts prior to the 1937 Revision were prefaced by the title "Act to permit retirement on pension from public office or position." Retirement has been defined as "withdrawal from office, active service, or business." Webster's Third New International Dictionary (1965). The verb "to retire" is de-

defined as "to withdraw from office, a public station or the like . . ." Ordinarily, words in statutes are given their everyday commonly accepted meaning unless the context clearly indicates otherwise. *Lane v. Holderman*, 23 N.J. 304, 313 (1957); *State v. Sperry & Hutchinson Co.*, 23 N.J. 38, 46 (1956). It is the sense of the statutes, inferred from the plain language, that there be active service or the present holding of office or position upon a compensable basis in order for there to be a retirement on a veterans' pension. A veteran teacher or public employee with 20 or more years of service, therefore, may not indirectly vest his special veterans' half pay allowance by taking a terminal leave of absence without pay prior to attainment of age 60 or age 62.

We advise you, therefore, that a veteran member of the Public Employees' Retirement System or the Teachers' Pension and Annuity Fund must be in compensated active "office, position or employment" upon attainment of age 60 or age 62 with 20 or more years of service to qualify for the special veterans' half pay retirement allowance and this would include such a member who is on an approved leave of absence with pay upon the attainment of retirement age, but would not include such a member on an approved leave of absence without pay.

Very truly yours,  
 ARTHUR J. SILLS  
*Attorney General*

By: THEODORE A. WINARD  
*Deputy Attorney General*

September 23, 1966

HONORABLE ROBERT J. BURKHARDT  
*Secretary of State*  
 State House  
 Trenton, New Jersey

MEMORANDUM OPINION

Dear Mr. Burkhardt:

You have advised us that a question has arisen concerning the proper interpretation and application of Chapter 117 of the Laws of 1966. Specifically, the question you raise is to what extent and in what manner must evening registration facilities be made available in connection with the next general election to be conducted on November 8, 1966 and whether such evening registration should be provided beyond the fortieth day next preceding the general election.

For reasons stated herein we are of the opinion that evening voter registration facilities must be provided 5 days a week for each week during the period of registration up to and including the 40th day preceding the general election of November 8, 1966, and that during the period of registration such evening voter registration facilities must be made available at least one evening during each week in each munic-

ipality in every county and at least one evening during each week in each election ward in each municipality which is divided into election wards, except where the commissioner of registration has determined to dispense with such evening registration in municipalities having a population of less than 750 persons, provided facilities for evening registration are made available within a reasonable distance of such municipalities.

N.J.S.A. 19:31-6 provides for permanent registration by the commissioner of registration or members of the county boards or duly authorized clerks "up to and including the 40th day preceding any election. . .". N.J.S.A. 19:31-7 provides that municipal clerks may register applicants ". . . up to and including the 40th day preceding any election. . .".

In 1966 the Legislature enacted Chapter 117 which was amendatory of N.J.S.A. 19:31-2 providing in part for the powers and duties of the commissioner of registration. Chapter 117 added the following:

"In each county, the commissioner of registration as defined in this section shall provide evening registration facilities for the registration of persons who are or may be entitled to vote at general elections in said counties. Such facilities shall include making available places for such registration, which places shall be open for such purpose between the hours of 6 o'clock and 9 o'clock in the evening at least 3 days a week during each of the 9 weeks which precede the close of registration for each and every general election in a year when a President of the United States is to be elected. *In all other years there shall be evening registration 5 days a week during the period of registration preceding the close of registration for each and every general election. During these periods evening registration facilities shall be made available at least once in each municipality in each county; provided, however, that such facilities shall be made available at least once in each election ward in each municipality which is divided into election wards. The commissioner of registration may dispense with evening registration facilities in municipalities having a population of less than 750 persons; provided, however, that such facilities are made available within a reasonable distance of said municipalities.*" (Emphasis supplied.)

The general election to be conducted on November 8, 1966, does not involve the election of President of the United States. Consequently, for the general election in November 1966, and for that matter in any non-presidential general election, the italicized provisions of Chapter 117 are particularly apposite. In constructing this portion of the statute a reasonable and sensible meaning must be found in accordance with the plain terms of the language. *Safeway Trails, Inc. v. Furman*, 41 N.J. 467, 478 (1964), appeal dismissed and *cert. denied*, 379 U.S. 14 (1964).

According to the express terms of the statute there must be provided, during the period of registration, evening registration for 5 days during each week of the registration period. If the Legislature had intended any different result such as, for example, evening registration for at least 5 days throughout the registration period or for at least 5 days during any single week in the registration period, it could have simply and explicitly so provided. *cf. Newark v. Fischer*, 8 N.J. 191, 196-7 (1951). It did not do so by Chapter 117.

In providing for evening registration during the registration period, Chapter

117 prescribes certain minimum requirements. Specifically it provides such evening registration facilities must be made available "at least once" in every municipality within each county "during these periods." Additionally, in any municipality which is divided into election wards, such evening registration facilities must be furnished "at least once," in each election ward "during these periods." Where, however, a municipality has a population of less than 750 persons the commissioner of registration has the power not to make evening registration facilities available therein provided such facilities are made available within a reasonable distance of such excluded municipalities.

This language is not free of ambiguity. It is susceptible of an interpretation that registration facilities must be furnished, at a minimum, for a single evening in each municipality or election ward during the entire registration period. Such implementation of evening registration would appear, however, to be *de minimus* and hardly productive of increasing the opportunities for registration envisaged by the statute. Since the statute, in this regard, designates "periods" (rather than a single registration period) it would seem to be referable to the 5-day weekly period set forth in the preceding sentence. This would comport with an interpretation requiring such registration facilities to be provided at least one evening during each 5-day weekly period during the period of registration.

Chapter 117 provides that the special requirements with respect to evening registration shall apply "during the period of registration preceding the close of registration." Under N.J.S.A. 19:31-6 and 7 the period registration is tolled after the 40th day preceding any election. These statutory provisions have been modified or qualified to some extent by Chapter 177, Laws of 1966. This act provides in part:

"Notwithstanding any other provisions of the Title to which this act is a supplement, any person authorized by law to accept applications for voter registration shall accept, during the 39-day period prior to any election, the application for registration of all eligible voters who shall personally appear for registration before such person but no person so registered shall be entitled to vote in the election immediately following said 39-day period. Any person registered under the provisions of this act shall be advised that he will not be eligible to vote in the election immediately forthcoming but will be eligible to vote in elections held thereafter."

It is to be noted that while Chapter 177 permits the registration of voters after the 40th day preceding an election, such registration does not enable such a registration contemplated by Chapter 117 were intended to permit registrants to be eligible for the next forthcoming election. The period of registration referred to thereunder is described as "registration for each and every general election." In order for registration to bestow voter eligibility for any election next forthcoming, it must occur within the period up to and including the 40th day preceding such election.

It cannot be inferred that the Legislature intended that the special and unique provisions for evening registration under Chapter 117, to be conducted 5 days during each week, would be applicable to the extended period of registration under Chapter 177. Although both statutes were passed on the same day, Chapter 117 was introduced some six months before the introduction of Chapter 177. It would appear that the "period of registration" contemplated by Chapter 117 referred to the then

existing registration period terminating on the 40th day preceding an election. Moreover, the manifest purpose of Chapter 117 is to facilitate registration and to encourage the participation of registrants in the next election. Evening registration is a convenience to the public, designed to furnish persons, otherwise preoccupied in daily routine, with an added opportunity to register to vote. Extensive evening registration was considered by the Legislature as being obviously conducive to increased voter participation in the election process. There would be no overriding or pressing need to furnish such evening registration opportunities to persons registering within 39 days of the next forthcoming election since, in any event, such persons would be ineligible to vote therein.

For the foregoing reasons, we are of the opinion that evening registration must be conducted within every county for 5 days in each week during the period of registration up to and including the 40th day preceding any non-presidential election; in providing for such evening registration during this period of registration, facilities for evening registration must be provided at least once in each municipality within every county, and at least once in each election ward in any municipality divided into election wards, during each week of the registration period, unless any municipality has a population of less than 750 persons and is specifically exempted by the commissioner of registration provided that evening registration facilities are made available within a reasonable distance of any municipality so exempted.

Sincerely yours,

ARTHUR J. SILLS  
*Attorney General*

By: ALAN B. HANDLER  
*First Assistant Attorney General*

March 17, 1967

HON. JOHN A. KERVICK  
*State Treasurer*  
State House  
Trenton, New Jersey

FORMAL OPINION 1967—NO. 1

Dear Mr. Kervick:

You have requested our opinion on a question concerning the payment of interest on the accumulated deductions of members of the Public Employees' Retirement System (hereinafter referred to as PERS) and the Teachers' Pension and Annuity Fund (hereinafter referred to as TPAF).

You have asked specifically whether the "withdrawal" rate of interest authorized by N.J.S.A. 43:15A-41(a) in the PERS and by N.J.S.A. 18:13-112.36 in the TPAF or the "death" rate of interest authorized by N.J.S.A. 43:15A-41(c) in the PERS and by N.J.S.A. 18:13-112.40 in the TPAF is payable on the accumulated



deductions of a member who dies within two years after discontinuing his service as an employee.

It is our opinion, for the reasons set forth herein, that N.J.S.A. 43:15A-41(a) and N.J.S.A. 18:13-112.36 with respect to "withdrawal" are the controlling statutes in paying the applicable rate of interest on the accumulated deductions of a member of PERS or TPAF who has died within two years after termination of service as an employee.

The PERS and the TPAF provide for the withdrawal of accumulated deductions and interest standing to a member's credit in his Annuity Savings Fund account. N.J.S.A. 43:15A-41(a) applicable to the PERS provides in pertinent part:

"A member who withdraws from service or ceases to be an employee for any cause other than death or retirement shall receive all of the accumulated deductions standing to the credit of his individual account in the annuity savings fund, plus regular interest, less any outstanding loan, except that for any period after June 30, 1944, the interest payable shall be such proportion of the interest determined at the regular rate of 2% per annum bears to the regular rate of interest. . . . Except as provided for in sections 8 and 38 of this act, he shall cease to be a member 2 years from the date he discontinued service as an employee, or, if prior thereto, upon payment to him of his accumulated deductions."

N.J.S.A. 18:13-112.36 applicable to the TPAF provides in pertinent part:

"A member who withdraws from service or ceases to be a teacher for any cause other than death or retirement shall receive all of the accumulated deductions standing to the credit of his individual account in the annuity savings fund, plus regular interest on contributions made after January 1, 1956, less any loan outstanding, and except that for any period after June 30, 1944, the interest payable shall be such proportion of the interest determined at the regular rate as 2% per annum bears to the regular rate of interest. . . . Except as provided for in sections 7 and 8 of this act, he shall cease to be a member 2 years from the date he discontinued service as a teacher, or, if prior thereto, upon payment to him of his accumulated deductions."

In the event of the death of a member while in service, the PERS and the TPAF provide for the return of accumulated deductions and interest under a separate and different statutory standard. N.J.S.A. 43:15A-41(c) applicable to the PERS provides in pertinent part:

"Upon the receipt of proper proofs of the death of a member in service on account of which no accidental death benefit is payable under section 49 there shall be paid to such member's beneficiary:

"(1) The member's accumulated deductions at the time of death together with regular interest . . . ."

N.J.S.A. 18:13-112.40 applicable to the TPAF provides in pertinent part:

"Except as provided in section 69, upon the receipt of proper proofs of the death of a member in service on account of which no accidental death benefit is payable under section 46, there shall be paid to such member's beneficiary: (a) The member's accumulated deductions at the time of death together with regular interest after January 1, 1956."

It is evident that the interest prescribed in the "in service death" statutes do not apply with respect to a member who has terminated his service by withdrawal while alive but who subsequently dies, with two years, but has not formally terminated his membership and has not received his accumulated deductions credited to his account prior to his death. In such circumstances the member has terminated his employment or service for a cause other than death or retirement. The fact the member dies prior to the expiration of his formal membership in the respective fund does not alter the fact that this death did not occur while he was in service and that his death as such was not the critical event which brought his service to an end. Consequently, the withdrawal rate of interest shall be deemed the rate paid.

This conclusion turns upon the distinction between "service" in public employment and "membership" in the applicable pension system. Service as referred to in the statutory schemes establishing the PERS and the TPAF implies the existence of an employment relationship. *Friedman v. Board of Trustees Pub. Employ. Ret. System*, 78 N.J. Super. 571 (App. Div. 1963). The plain meaning and commonly understood interpretation of the phrase "in service" within the context of N.J.S.A. 43:15A-1 *et seq.* and N.J.S.A. 18:13-112.1 *et seq.* includes one in an employment relationship, an employee or teacher of the State, political subdivision, government agency or school district for which the retirement system is made available. The title of N.J.S.A. 43:15A-1 *et seq.* is the Public Employees' Retirement System. Creditable school service in the TPAF is service as a teacher. N.J.S.A. 18:13-112.40. Membership in the respective retirement system is available to a person becoming an employee of the State or other employer, N.J.S.A. 43:15A-7(b), or a person becoming a teacher. N.J.S.A. 18:13-112.6. A person may be in service or in an employment relationship if on an approved leave of absence. *Cf.* Formal Opinion of the Attorney General, No. 2—1966.

As previously indicated, N.J.S.A. 43:15A-41(a) and N.J.S.A. 18:13-112.36 provide for payment of accumulated deductions and interest to a member who has withdrawn from service for reasons other than death or retirement. Such withdrawal from service does not *per se* terminate membership in a particular pension system. Membership status in the respective retirement system continues until payment of the member's accumulated deductions and interest, upon expiration of two years from the discontinuance of service as an employee, or at death. A person may thus remain in a status of "inactive" membership for a period of two years by operation of law. N.J.S.A. 43:15A-7(e), N.J.S.A. 18:13-112.9(a). The member does not contribute to the retirement system, nor is he engaged in any public service subject to it.

A membership account in the PERS or the TPAF is always terminated on the death of the member. Thus, accumulated deductions and interest are payable to a designated beneficiary or estate upon the death of a member while in service. N.J.S.A. 43:15A-41(c), N.J.S.A. 18:13-112.40; the death of a member in service as a result of a service connected accident, N.J.S.A. 43:15A-49, N.J.S.A. 18:13-112.48; membership in the TPAF is expressly terminated at death. N.J.S.A. 18:13-112.9(e). Therefore, it is the withdrawal rate of interest which is applicable upon actual with-

drawal of accumulated deductions by a member while in service or employment, or upon his death during an existing "inactive" membership or upon expiration of the "inactive" membership account following the termination of service or employment.

We have been informed that the payment of the lesser withdrawal rate of interest as compared with the greater death rate has acted as a mechanism to encourage prompt termination of "inactive" membership accounts. The cessation of "inactive" membership accounts obviates the continued recognition of potential, substantial liabilities for such members with respect to the funding of the systems and this fact has been taken into account in the actuarial planning of the systems. We are further informed that, in the context of the facts posed, the withdrawal rate has been paid on "inactive" membership accounts for a considerable number of years. This practical administrative understanding and long standing practice are strongly indicative of the legislative meaning and intent and are entitled to great weight in construing the pertinent legislation. Cf. *Pringle v. N.J. Dept. of Civil Service*, 45 N.J. 329, 333 (1965); 2 Sutherland, *Statutory Construction*, § 5107, p. 520, (3rd Ed. 1943).

We, therefore, advise you for the foregoing reasons that the rate of interest which is to be paid on the accumulated deductions in the Annuity Savings Fund Account of a member in the PERS or TPAF who has died within two years after discontinuing his employment shall be at the rates authorized by N.J.S.A. 43:15A-41(a) and N.J.S.A. 18:13-112.36.

Very truly yours,  
ARTHUR J. SILLS  
*Attorney General of New Jersey*

By: THEODORE A. WINARD  
*Deputy Attorney General*

April 7, 1967

HONORABLE JUNE STRELECKI, *Director*  
Division of Motor Vehicles  
25 South Montgomery Street  
Trenton, New Jersey

FORMAL OPINION 1967-NO. 2

Dear Director Strelecki:

You have requested our opinion as to the meaning of the term "arrest" within the context of the Implied Consent Law, N.J.S.A. 39:4-50.1 et seq., and specifically, N.J.S.A. 39:4-50.4. By virtue of that law, any person who operates a motor vehicle on the roads of this state is deemed to have given his consent to the taking of a breath test in order to determine the content of alcohol in his blood. Should the operator refuse to consent to the taking of the test under proper circumstances, he may forfeit his driver's license or right to operate a motor vehicle within this state for six months.

A person charged with refusing to submit to a test is entitled to a hearing before the Director of the Division of Motor Vehicles at which the following issues must be considered: (1) whether the arresting officer had reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle on the public roads of this state while under the influence of intoxicating liquor; (2) whether the person was placed under arrest; (3) whether he refused to submit to the test upon request of the officer. N.J.S.A. 39:4-50.4.

Further, N.J.S.A. 39:4-50.4 provides, in pertinent part, as follows:

"If an operator of a motor vehicle, *after being arrested for a violation of section 39:4-50* of the Revised Statutes, shall refuse to submit to the chemical test provided for in section 2 of this act when requested to do so, the arresting officer shall cause to be delivered to the Director of Motor Vehicles his sworn report of such refusal in which report he shall specify the circumstances surrounding the arrest and the grounds upon which his belief was based that the person was driving or operating a motor vehicle in violation of the provisions of section 39:4-50 of the Revised Statutes." (Emphasis supplied.)

The issue confronting police officers apprehending motorists for drunk driving violations is when, and how, does an arrest take place within the routine enforcement procedures of these laws. The following discussion then is focused on the question of arrest as it applies to a routine drunk driving violation within the context of the Implied Consent Law.

An arrest is generally defined as "the taking into custody in order that [the suspect] may be forthcoming to answer for the commission of an offense." *American Law Institute, Code of Criminal Procedure*. Such an abstract definition is not serviceable unless considered in the context of precise factual situations.

"There is no absolute test as to when an arrest occurs. The action of the police officer must be evaluated in the context of the circumstances in which it takes place . . . indeed even the use of formal language of arrest is not conclusive on this issue." *State v. Bell*, 89 N.J. Super. 437 at 443 (App. Div. 1965); cf. *State v. Romeo*, 43 N.J. 188 (1964).

For this reason, we have chosen to answer this question with reference to the two most typical factual situations confronting a police officer in making an arrest for a violation of N.J.S.A. 39:4-50, *i.e.*: (1) where the offense is committed in the officer's presence, and (2) where he arrives at the scene after the fact.

#### I.

In the first situation, where the offense is committed in the officer's presence, the typical factual composite may be described as follows. An officer on patrol sees a vehicle driving in an erratic manner. He stops the car for the purpose of eliciting certain information from the driver and making general observations. If the driver has been drinking intoxicating liquor, the officer will note the driver's physical appearance and behavior pattern. Ordinarily, he may smell alcohol on the offender's breath and he may note such items as bloodshot eyes, disheveled clothes, slurred

speech, and difficulty of coordination. The police officer, after witnessing the erratic driving and making the essential observations of the person of the driver, may at that point determine that he has reasonable grounds to believe that this particular driver has been operating his vehicle in violation of N.J.S.A. 39:4-50. He will then inform the operator that he is bringing him down to the police station for further observations and tests.

In the above factual situation, it is our opinion that for purposes of N.J.S.A. 39:4-50.4, the arrest took place at the moment the police officer made his judgment, and informed the driver, that he would not be permitted to continue on his journey but that he was being taken to the police station for further tests.

While a police officer is permitted to make an arrest without a warrant for a motor vehicle offense committed in his presence, N.J.S.A. 39:5-25, the courts of New Jersey have recognized that every stopping of a person by a policeman does not necessarily amount to an arrest. Under certain conditions, the police are authorized to detain a person when confronted with a suspicious situation in order to ascertain whether or not a violation of the law has taken place, without effecting an arrest.

"A law enforcement officer has the right to stop and question a person found in circumstances suggestive of the possibility of violation of criminal law. . . . Such investigatory detention is not an arrest, 'and the evidence needed to make the inquiry is not of the same degree or conclusiveness as that required for an arrest.'" *State v. Hope*, 85 N.J. Super. 551, 554 (App. Div. 1964); *State v. Bell*, *supra*; *People v. Mickleson*, 50 Cal. 2d 448, 380 P. 2d 658 (Sup. Ct. Calif. 1963); *People v. Rivera*, 14 N.Y. 2d 441, 201 N.E. 2d 32 (Ct. App. 1964); see also, *State v. Taylor*, 81 N.J. Super. 296 (App. Div. 1963).

In the fact situation here posited, when the policeman noted the erratic driving, he had the right to stop the vehicle and detain the driver for a brief period in order to ascertain whether or not a motor vehicle offense was being committed. While making his observations of the physical condition of the driver as well as his behavior, the policeman is conducting an investigatory detention. If, during the course of this investigation, it is learned that the driver had not been drinking and that the erratic driving was attributable to some cause which was not the fault of the driver and did not amount to a violation, the policeman would ordinarily release that person to continue on his way or render necessary assistance to him. In such circumstances there would be no arrest, in a legal sense, but merely an investigative detention. On the other hand, if after this brief period of detention the policeman makes observations which give him reasonable grounds to believe that a violation of N.J.S.A. 39:4-50 has occurred in his presence, he will not permit the driver to continue but will take him back to the police station for the purposes of conducting further tests, for the driver's own security as well as the safety of all others sharing that highway, and for the issuance of a summons. See R.R. 8:3-2(a) (2). As noted heretofore, at the point in time that the policeman has made this determination and orders the driver to accompany him to the police station, thereby interrupting his journey, the arrest has been made.<sup>1</sup>

## II.

The second most typical fact situation regarding arrest for drunk driving vio-

lations involves the factual pattern wherein the police arrive at the scene of an accident. In such a case, the policeman will ordinarily request the drivers of the vehicles to wait for him in his car while he secures the area or cares for the injured, if any. When he questions the respective drivers, he may observe that one of them will exhibit the recognizable indicia of the consumption of alcoholic beverages, e.g., blood-shot eyes, slurred speech, the odor of alcohol, etc. He may also receive information from witnesses as to the subject's erratic driving or other behavior which would indicate that the driver had been drinking. After making these observations, the policeman will have reasonable grounds to believe that the person has been driving in violation of N.J.S.A. 39:4-50. Upon making this determination, the policeman will order the driver to accompany him to the station for further investigation. As in the former situation, at the point that the policeman makes this determination and informs the subject that he must accompany him, the arrest is executed.<sup>2</sup>

The above rules are submitted not as a precise statement as to when an arrest occurs but as a general guide in those situations which most typically confront police officers. The law of arrest cannot be articulated with specificity in the abstract and must be related to the particular case at hand with all of its individual ramifications. Further, the above opinion relates only to the narrow area of the law dealing with the subject of drinking driving offenses as they relate to the implied consent statutes. N.J.S.A. 39:4-50.1 through 50.7.

Very truly yours,

JOSEPH A. HOFFMAN  
Assistant Attorney General

1. The policeman should then inform the driver that he has reasonable grounds to believe that he has been driving in violation of N.J.S.A. 39:4-50 and that he is therefore being placed under arrest. On the other hand, formal language of arrest is not conclusive of this issue and it is sufficient if the driver is made aware that he is in police custody and that he has no legal option but to accompany the officer. *Cf. State v. Romeo*, *supra*.
2. In New Jersey the common law of arrest prevails except as modified by statute. Therefore, a policeman may arrest without a warrant where he has probable cause to believe that either a misdemeanor or a high misdemeanor has been committed and that the person he is arresting is committing or has committed the offense. *State v. Doyle*, 42 N.J. 334 (1964); *State v. Smith*, 37 N.J. 481 (1962). As noted heretofore, a policeman may arrest without a warrant when a motor vehicle offense is committed in his presence. N.J.S.A. 39:5-25. It is our opinion that a policeman may arrest a person without a warrant if there is reasonable cause to believe that a violation of N.J.S.A. 39:4-50 has been committed and that the person being arrested has committed that offense. N.J.S.A. 39:4-50.2 provides that a person who operates a motor vehicle on any of the roads in New Jersey has given his consent to the taking of a breath test provided the test is made after he has been arrested and "at the request of a police officer who has reasonable grounds to believe that such person has been operating a motor vehicle in violation of . . . 39:4-50 . . ." As noted heretofore, N.J.S.A. 39:4-50.4 directs that one of the elements which must be proven in an implied consent hearing before the director of motor vehicles is "whether the arresting officer had reasonable grounds to believe the person had been driving . . . while under the influence of intoxicating liquor. . ." The clear implication of these provisions is that the Legislature has authorized the police in this state to make an arrest without a warrant, upon probable cause, for a violation of N.J.S.A. 39:4-50.

September 1, 1967

HONORABLE CARL L. MARBURGER  
 Commissioner, Department of Education  
 225 West State Street  
 Trenton, New Jersey

FORMAL OPINION 1967—NO. 3

Dear Commissioner:

You have requested our opinion as to the constitutionality of the oath of office to which teaching and supervisory employees in the public schools must subscribe pursuant to N.J.S.A. 18:13-9.1 and as set forth in N.J.S.A. 41:1-3.

It is our opinion for the reasons expressed herein that the second paragraph of the statutory oath is unconstitutional, but that the first paragraph of the statute is constitutional and enforceable. You are therefore advised that each and every teaching and supervisory employee in the public schools must conform to the provisions of N.J.S.A. 18:13-9.1 by taking the first paragraph of the oath which appears in N.J.S.A. 41:1-3.

I.

N.J.S.A. 41:1-3 provides as follows:

"In addition to any official oath that may be specially prescribed, every person who shall be elected, appointed or employed to, or in, any public office, position or employment, legislative, executive or judicial, of, or in, any county, municipality or special district other than a municipality therein, or of, or in, any department, board, commission, agency or instrumentality thereof shall, before he enters upon the execution of his said office, position, employment or duty take and subscribe the oath of allegiance and office as follows:

"I, ..... do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of New Jersey, and that I will faithfully discharge the duties of ..... according to the best of my ability.

"I do further solemnly swear (or affirm) that I do not believe in, advocate or advise the use of force, or violence, or other unlawful or unconstitutional means, to overthrow or make any change in the government established in the United States or in this State; and that I am not a member of or affiliated with any organization, association, party, group or combination of persons, which so approves, advocates or advises the use of such means. So help me God."

In addition to the persons expressly enumerated in the above statute, the prescribed oath is also required to be taken by every person who applies for a license or a renewal thereof to teach or to supervise in any of the public schools of this state. N.J.S.A. 18:13-9.1<sup>1</sup>

The first paragraph of the oath requires demonstration of support for the State and Federal Constitutions and exacts a promise from the affiant that the duties of the respective office will be faithfully discharged by him in accordance with the best

of his abilities. This paragraph of the oath is similar in both form and substance to the oath required by the Federal Constitution of the President of the United States, and also to the oaths required by the State Constitution for the Governor and Members of the Legislature.<sup>2</sup>

In the case of *Imbrie v. Marsh*, 3 N.J. 578 (1950) the State Supreme Court ruled that the oath prescribed in N.J.S.A. 41:1-3 could not constitutionally be applied to the Governor, members of the Legislature, nor to candidates for these offices since the New Jersey Constitution directly and exclusively prescribed the requisite oath to be administered to these officials. N.J. Const. 1947, Art. IV, § 8, par. 1; Art. VII, § 1, par. 1. However, as the State Constitution did not provide specific oaths of office for other public officials, the Legislature was deemed competent to provide such oaths of office for other state officials or employees, as it might require, limited only by pertinent provisions of the New Jersey and the United States Constitutions as might be applicable.

The first paragraph of the statutory oath requires the taker to support the Constitutions of the United States and New Jersey and to discharge the duties of his office faithfully and to the best of his ability. Recently, in *Knight v. Board of Regents of University of New York*, 269 F. Supp. 339 (D.C.S.D.N.Y. 1967) a statute requiring that the subscriber affirm that he will support the constitutions of the United States and the State of New York and that he will be a dedicated teacher was upheld against constitutional challenge. The ruling was rationalized in the following manner:

"The statutory language of support of the constitutional governments can be substantially equated to that allegiance which, by the common law, every citizen was understood to owe his sovereign . . .

"As for the statutory requirement of professional dedication . . . [I]n our view, a state can reasonably ask teachers in public or tax exempted institutions to subscribe to professional competence and dedication. . . .

"[W]e interpret the statute to impose no restrictions upon political or philosophical expressions by teachers in the State of New York. A state does not interfere with its teachers by requiring them to support the governmental systems which shelter and nourish the institutions in which they teach, nor does it restrict its teachers by encouraging them to uphold the highest standards of their chosen profession. Indeed, it is plain that a state has a clear interest in assuring . . . careful and discriminating selection of teachers by its publicly supported educational institutions." *Ibid.* 35 U.S. Law Week, p. 2744, Cf. *Imbrie v. Marsh, supra*.

Earlier, the United States Supreme Court saw no constitutional defect in the simple oath to support the Federal Constitution, stating:

"For the President, a specific oath was set forth in the Constitution itself. Art. II, § I. And Congress has detailed an oath for other federal officers. Obviously the Framers of the Constitution thought that the exacting of an affirmation of minimal loyalty to the Government was worth the price of whatever deprivation of individual freedom of conscience was involved." *Communications Ass'n v. Douds*, 339 U.S. 382, 415, 70 S. Ct. 674, 692 (1950).

In *Imbrie v. Marsh, supra*, our Supreme Court noted:

"Not only does the [common law] duty of allegiance continue [even in the absence of an oath] but it would seem, moreover, to be difficult, if not impossible, to state the distinction between the scope of our traditional oath of allegiance before 1949 [the date at which the statute in its present form was enacted] and the scope of an oath to support the Constitution." *Id.*, 3 N.J. at 592-593.

It is clear, therefore, that the portion of the state statutory oath which provides that the affiant will support the Constitutions of the United States and New Jersey and will discharge the duties of his office faithfully and to the best of his ability, as set forth in the first paragraph of N.J.S.A. 41:1-3, is constitutional.

## II.

The second paragraph of the oath prescribed in N.J.S.A. 41:1-3 requires two additional avowals which are substantially different in content. Firstly, the affiant must swear that he does "not believe in, advocate, or advise the use of force or violence or other unlawful or unconstitutional means to overthrow the government." Secondly he must swear that he is neither a member of, nor affiliated with subversive organizations.

The United States Supreme Court has consistently required utmost precision in the construction of statutes which attempt to regulate constitutionally guaranteed freedom. While recognizing that governmental interests in this area are both legitimate and substantial, the Court has cautioned that "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S. Ct. 240, 252, 5 L. Ed. 2d 231 (1960). See also *Cantwell v. Connecticut*, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940). The Court has also emphasized that there is a critical relationship between individual freedom and the state's interest in self-preservation, noting that:

"The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press, and free assembly in order to maintain the opportunity for free political discussion, to the end that... change, if desired, may be obtained by peaceful means." *De Jonge v. Oregon*, 299 U.S. 353, 365, 57 S. Ct. 255, 260.

The United States Supreme Court in a series of decisions has concerned itself with state statutory oaths proscribing such activities as the belief in, advocacy, advice or teaching of certain political doctrines or membership in or affiliation with certain types or organizations. The most recent inquiry by the United States Supreme Court into the validity of state loyalty oaths was in *Keyishian v. Board of Regents*, 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967). In that case the Court invalidated an intricate New York statutory and administrative scheme which required newly appointed teachers to answer the following question:

"Have you ever advised or taught or were you ever a member of any society or group of people which taught or advocated the doctrine that the Government of the United States or of any political subdivisions thereof should be overthrown or overturned by force, violence, or any unlawful means?"

The Court, in invalidating the New York procedure, emphasized that academic freedom was a special concern of the First Amendment and that the classroom, which is both the source of peaceful social change as well as the market place of ideas, cannot be shadowed by a "pall of orthodoxy." It concluded that the particular requirements of the statutory oath proscribing advice and teaching were not sufficiently precise and entrenched upon the freedoms constitutionally protected by the First Amendment. See also *N.A.A.C.P. v. Button*, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963); *Baggit v. Bullitt*, 377 U.S. 360, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 82 S. Ct. 275, 7 L. Ed. 2d 275 (1961).

That portion of the second paragraph of the oath dealing with membership or affiliation with subversive organizations also offends the Federal Constitution. In *Elfbrandt v. Russell*, 384 U.S. 11, 86 S. Ct. 1238, 16 L. Ed. 2d 321 (1966), an Arizona oath was invalidated essentially on the ground that it denied freedom of association as guaranteed by the First Amendment because it failed to confine its scope to persons who joined organizations with the "specific intent" to further their illegal aims. Rather, the Arizona Legislature was found to have put a "gloss" on the oath by subjecting to prosecution for perjury and to discharge from public office anyone who took the oath and who knowingly became a member of any organization having for one of its purposes the overthrow of the government of Arizona. The Court stated:

"... Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees. Laws such as these which are not restricted in scope to those who join with the 'specific intent' to further illegal action impose, in effect, a conclusive presumption that the members share the unlawful aims of the organization." *Ibid.*, 384 U.S. at 17, 86 S. Ct. 1241 (1966).

The New Jersey oath similarly imputes guilt by mere association, thereby unconstitutionally restricting the affiant's guaranteed right to freedom of association. See also *Aptheker v. Secretary of State*, 378 U.S. 500, 84 S. Ct. 1659, 12 L. Ed. 2d 992 (1964); *Scales v. U.S.*, 367 U.S. 203, 81 S. Ct. 1469, 6 L. Ed. 2d 782 (1961). These decisions combine to indicate that only active membership with the specific intent of promoting the unlawful ends of the organizations involved may be made the basis of governmental sanctions. In *Keyishian v. Board of Regents, supra*, the Court again affirmed this test:

"[L]egislation which sanctions membership unaccompanied by specific intent to further the unlawful goals of the organization or which is not active membership violates constitutional limitations." *Id.*, 385 U.S. at 608, 87 S. Ct. 686.

The membership and affiliation language of the New Jersey oath is plainly infected with the same constitutional infirmity which the Supreme Court found to be present in the *Elfbrandt, Scates, Aptheker* and *Keyishian* cases, *supra*.

It is not often that the Attorney General is constrained to rule that a state statute, expressive of public policy, is contrary to either the Federal or State Constitution and, therefore, invalid. *Wilentz v. Hendrickson*, 133 N.J. Eq. 447 (Chan. 1943), *aff'd* 135 N.J. Eq. 244 (E. & A. 1944). The Attorney General is constitutional officer and by his oath of office is bound to support both the Constitution of this State and of the United States. *N.J. Const. 1947, Art. V, § 4, paras. 1, 3; Art. VII, § 1, para. 1*. In that capacity he must also respect and abide by the decisions of the United States Supreme Court which equally represent the supreme law of the land where federal law controls. *Cf. Jackman V. Bodine*, 43 N.J. 453 (1964); *Sills v. Hawthorne Bd. of Ed.*, 84 N.J. Super. 63 (Chan. Div. 1963), *aff'd per curiam* 42 N.J. 351 (1964). As suggested, the Attorney General is bound to uphold and apply the United States Constitution as the supreme law of the land. See *Cooper v. Aaron*, 358 U.S. 1, 16-20, 78 S. Ct. 1401, 3 L. Ed. 2d 3 (1958). See also, Opinion of the Attorney General F.O. 1964, No. 1.

It is clear that the second paragraph of the oath as provided in N.J.S.A. 41:1-3 could not survive constitutional challenge and therefore must be considered invalid.

III.

Under existing United States Supreme Court decisions, we conclude that the first paragraph of the oath set forth in N.J.S.A. 41:1-3, and required to be subscribed under N.J.S.A. 18:13-9.1 is constitutional, the second paragraph, however, is invalid. Accordingly, the remaining issue is whether the first paragraph of the oath is severable from the second paragraph thereby permitting it to retain its vitality as a legal requisite in accordance with N.J.S.A. 18:13-9.1

We are of the opinion, for the reasons following, that the first paragraph of the statutory oath, N.J.S.A. 41:1-3 is severable from the second paragraph and that it is capable of separate application and enforcement.

N.J.S.A. 1:1-10 provides:

"If any title, subtitle, chapter, article or section of the Revised Statutes . . . shall be declared to be unconstitutional . . . in whole or in part . . . such title, subtitle, chapter, [etc.] . . . shall to the extent that it is not unconstitutional . . . be enforced and effectuated. . . ."

This statute has recently been interpreted to mean that if one part of a statute is deemed unconstitutional, the remainder may nonetheless stand independently so long as it does not conflict with the overall legislative purpose. *Cf. N.J. Chapter, American Institute of Planners v. N.J. State Bd. of Professional Planners*, 48 N.J. 581 (1967). The courts, in their consideration of the issue of severability, seek to ascertain conceptually what the Legislature would have done if the invalid section had not been included in the initial bill. *Carter v. Carter Coal Co.*, 298 U.S. 238, 56 S. Ct. 855, 80 L. Ed. 1160 (1936); *Ahto v. Weaver*, 39 N.J. 418 (1963); *State v. Lanza*, 27 N.J. 516 (1958).

"In statutes not containing a separability clause, the independence of the

valid portion of the statute will be a principal indicia of the legislative intent that the statute be separately enforced." 2 Sutherland, *Statutory Construction* § 2404 (3rd. ed. 1943).

In order to implement these tests, it is necessary to examine the legislative history of N.J.S.A. 41:1-3. An official oath of office was first provided in 1799 (*Paterson*, p. 377):

"I, . . . . ., do solemnly promise and swear, that I will faithfully, impartially and justly perform all the duties of the office of . . . . . according to the best of my abilities and understanding. So help me God."

This statute was carried to R.S. 41:1-3 in 1937, and was amended by P.L. 1949, c. 22 to read much as it does now. A revision in 1962 made the statute more concise but did not change its import.

The history of the oath of office demonstrates that the first paragraph of the oath as it presently appears in N.J.S.A. 41:1-3 has existed in the same or substantially similar form since 1799. It was not until 1949 that the Legislature saw fit to add the second paragraph of the oath. Clearly, had the Legislature then been aware that the second paragraph was invalid, it would not reasonably have been willing to repeal the first paragraph of the oath which has been utilized in our State for close to two centuries. Throughout the history of New Jersey, we, as a people, have required our public servants before embarking upon their trusteeship to declare allegiance to our organic system of law, namely the State and Federal Constitutions, and to elicit a promise that the duties of office will be discharged faithfully and well. There is absolutely no evidence in either history or logic which would indicate that the Legislature would be willing to sacrifice this form of oath which is already an integral part of our State and Federal Constitutions merely because the newly developed language which was added in 1949 would subsequently be held invalid.

For the foregoing reasons, it is our opinion that the first paragraph of the statutory oath, as prescribed in N.J.S.A. 41:1-3 is constitutional; the second paragraph thereof is unconstitutional and severable from the remaining portions of the statute. Consequently every person who is required to take an oath pursuant to N.J.S.A. 18:13-9.1 must subscribe to the first paragraph of the oath which appears in N.J.S.A. 41:1-3 as follows:

"I, . . . . ., do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of New Jersey, and that I will faithfully discharge the duties of . . . . . according to the best of my ability."

Since the second paragraph of the oath is unconstitutional, no one can be compelled to subscribe to that portion thereof.

Very truly yours,  
ARTHUR J. SILLS  
Attorney General

1. The same oath must also be taken by every professor, instructor, teacher or other person employed in any teaching capacity in any State college. *N.J.S.A.* 18:13-9.2.

2. *Art. II, §1, par. 8* of the United States Constitution provides as follows:

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—

"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

*Art. IV, §8, par. 1* of the New Jersey Constitution provides as follows:

Members of the Legislature shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation: "I do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of New Jersey, and that I will faithfully discharge the duties of Senator (or member of the General Assembly) according to the best of my ability." Members-elect of the Senate or General Assembly are empowered to administer said oath or affirmation to each other.

*Art. IV, §8, para. 2* of the New Jersey Constitution provides as follows:

Every officer of the Legislature shall, before he enters upon his duties, take and subscribe the following oath or affirmation: "I do solemnly promise and swear (or affirm) that I will faithfully, impartially and justly perform all the duties of the office of . . . . . to the best of my ability and understanding; that I will carefully preserve all records, papers, writings, or property entrusted to me for safe-keeping by virtue of my office, and make such disposition of the same as may be required by law."

*Art. VII, §1, para. 1* of the New Jersey Constitution provides as follows:

Every State officer, before entering upon the duties of his office, shall take and subscribe an oath or affirmation to support the Constitution of this State and of the United States and to perform the duties of his office faithfully, impartially and justly to the best of his ability.

February 19, 1969

HONORABLE CHARLES R. HOWELL  
*Commissioner of Banking and Insurance*  
 State House Annex  
 Trenton, New Jersey 08625

FORMAL OPINION 1969—NO. 1

Dear Commissioner Howell:

You have requested our opinion as to whether an insurance company, as a subrogee, is a "party in interest" within the meaning of *N.J.S.A.* 39:6-100, in order that it may file for payment from the Motor Vehicle Liability Security Fund. For the reasons to follow, it is our conclusion that a subrogee in the position of the claimants hereinafter referred to should be permitted to file with the Fund.

You have advised us that the Chesapeake Insurance Company, a Maryland corporation authorized to do business in New Jersey, (hereinafter referred to as "Chesapeake") was declared insolvent by a Maryland court. Due to its insolvency, various claims arising out of automobile accidents allegedly caused by its insureds remain unpaid. In each instance, the injured party was compensated pursuant to his

own automobile collision insurance policy. The collision insurers, as subrogees of non-negligent parties, now seek recovery out of the Security Fund, contending that they are "parties in interest" within the meaning of *N.J.S.A.* 39:6-100.

The Motor Vehicle Liability Security Fund Act (hereinafter referred to as the "Security Fund Act") was enacted in 1952, together with the Unsatisfied Claim and Judgment Fund Law, *N.J.S.A.* 39:6-60 to 91, and the Motor Vehicle Security Responsibility Law, *N.J.S.A.* 39:6-23 to 60. These Laws establish a comprehensive plan to provide, *inter alia*, financial protection for innocent victims of automobile accidents. See *Selected Risks Insurance Co. v. Zullo*, 48 *N.J.* 362, 371 (1966); *Mattios v. Nationwide Mutual Auto. Insurance Co. v. Wall*, 87 *N.J. Super.* 543, 559 (*Law Div.* 1965). The Unsatisfied Claim and Judgment Fund Law, *supra*, provides a fund for the payment of claims against uninsured, financially irresponsible tortfeasors, arising as a result of injuries sustained in automobile accidents. The Motor Vehicle Security Responsibility Law, *supra*, is designed to induce motorists to carry liability insurance, to facilitate the compensation of persons injured by uninsured and financially irresponsible motorists, and to remove such financially irresponsible motorists from the highways by providing for license suspension under specified circumstances.<sup>1</sup>

The Security Fund Act completes this legislative scheme by establishing an insolvency fund (hereinafter referred to as the "Security Fund") to pay automobile accident claims which remain unpaid because of the insolvency of the tortfeasor's motor vehicle liability insurance carrier. *N.J.S.A.* 39:6-95. The Fund stands in the shoes of the insolvent insurance company and, through the Commissioner of Banking and Insurance, is vested with whatever rights and remedies the insolvent insurer would have. *N.J.S.A.* 39:6-101. A claim may be settled or compromised by the Commissioner. *N.J.S.A.* 39:6-100. If a claim has been reduced to final judgment, the appropriate amount is paid out of the Fund. *N.J.S.A.* 39:6-100. If an action is instituted after the date of insolvency, the Commissioner must be joined as a party. *N.J.S.A.* 39:6-100.

*N.J.S.A.* 39:6-100 expressly defines those persons who are entitled to file a claim against the Security Fund. That section provides, in its relevant part, that: "any party in interest may file with the commissioner an application for payment from the fund. . . ." [Emphasis added] Research discloses no judicial or statutory definition of "party in interest" as contained in *N.J.S.A.* 39:6-100, nor has there been any definitive determination bearing upon the problem presented. Therefore, we must look to the pertinent legislative history of the act, including whatever related materials are available as an aid in determining what the Legislature intended when it used the cited phrase. See *N.J. Pharmaceutical Ass'n v. Furman*, 33 *N.J.* 121, 130 (1960); see also, *Dumont Lowden, Inc. v. Hansen*, 38 *N.J.* 49, 56 (1962). The language in question must be construed in light of the purpose of the statute and the problem which it was meant to correct. See *Seatrains Lines, Inc. v. Medina*, 39 *N.J.* 222, 226 (1963).

A statement of the Legislature's purpose in creating the Security Fund is expressly incorporated in *N.J.S.A.* 39:6-94. That section provides, in its relevant part, as follows:

"There is hereby created a fund to be known as the 'Motor Vehicle Liability Security Fund' for the purpose of securing the benefits under policies of motor vehicle liability insurance on account of claims from accidents. . . ." *N.J.S.A.* 39:6-94 (Emphasis added).

This statement of legislative purpose, being non-restrictive as to the kinds of benefits to be secured, is indicative of the Legislature's intent to secure all benefits derived from a motor vehicle liability insurance policy. Naturally, the insured tortfeasor derives the primary benefit from such a policy. He purchases liability insurance for the very purpose of self-protection and insulation from the claims of injured persons. Therefore, when the Legislature utilized the broad phrase "securing the benefits", it must have intended to protect the insured tortfeasor if his insurance company became insolvent.

The existence of such a legislative intent is supported by two authoritative articles, cited with approval by the New Jersey Supreme Court.<sup>2</sup> In Gaffney, *The Motorist, His Victims and the State*, 25 State Gov't 266 (1952), Mr. Gaffney, then Commissioner of Banking and Insurance of the State of New Jersey stated, with reference to the Security Fund Act, that "*this law protects policyholders if their insurance company becomes insolvent*". Gaffney, *supra*, p. 267. [Emphasis added] Mr. Gaffney went on to explain that the then recent failure of an insurance company doing business in New Jersey had:

"... dire consequences to its New Jersey policyholders and their claimants. The Legislature apparently recognized that it would be inconsistent to require motorists to procure insurance policies unless *they* [the insureds] were protected against the consequences of the insurers' insolvency. Therefore, the Motor Vehicle Liability Security Fund Act was enacted." Gaffney, *supra*, pp. 269-283. [Emphasis added].

In a more recent article, Paul J. Molnar, then Special Assistant Deputy to the New Jersey Department of Banking and Insurance, also concluded that the Legislature had established the Security Fund to protect insured tortfeasors. See Molnar, *New Jersey's Answer to Financially Irresponsible Motorists*, Nov. Ins. L.J. 729 (1955).

Thus, both writers conclude unequivocally that the Legislature, in establishing the Security Fund, was primarily concerned with protecting the insured tortfeasor against the effects of his insurer's insolvency.<sup>3</sup>

We are, therefore, of the opinion that in creating the Motor Vehicle Liability Security Fund the Legislature intended, *inter alia*, to secure to the insured tortfeasor the benefits normally derived from his motor vehicle liability insurance policy. That being so, the technical legal status of the person making a claim against the Fund is irrelevant, the pertinent question being whether the insured tortfeasor is afforded protection by the Fund, as he would have been protected by his insurer had the company not become insolvent. If a subrogee is not permitted to file with the Fund, then the Fund would fail to achieve the very purpose for which it was created. The insured tortfeasor will lose the benefits derived by his purchase of a policy of insurance since the subrogee, not having access to the Fund, will simply institute suit directly against him. The act should not be construed so as to reach this absurd result. See *Robson v. Rodriguez*, 26 N.J. 517, 528 (1958); *State v. Gill*, 47 N.J. 441, 444 (1966).

Moreover, the use of the phrase "party in interest" is itself indicative of a legislative recognition that, under certain circumstances, it is necessary to permit a subrogee to file with the Fund. Since the subrogees in the matter *sub judice* have a substantial pecuniary interest to protect, they should fall within this broad phrase. Cf. *Black's Law Dictionary*, 4th Ed. (1947) at p. 1276; *In re Syde*, 16 N.J. Misc.

23 (*Essex Cty. Orphan's Court* 1937) and cases cited therein. This becomes more apparent when the "party in interest" requirement is contrasted with its counterpart under the Unsatisfied Claim and Judgment Fund Law. That Law strictly limits the right to file a claim to "any qualified person. . . who suffers damages resulting from bodily injury or death or damage to property. . . ." N.J.S.A. 39:6-65. The distinction between these two provisions is rendered more significant because the Unsatisfied Claim and Judgment Fund expressly prohibits subrogation by an insurance carrier which has paid its own insured. N.J.S.A. 39:6-71. There is a conspicuous and, therefore, meaningful absence of a similar prohibition in the Security Fund Act. Since both Acts were passed at the same time and are *in pari materia*, it must be concluded that the Legislature, being familiar with its own enactments, intended to permit subrogation under the Security Fund Act.

Based upon all of the foregoing, we conclude that the insurance companies in the matter *sub judice*, as subrogees, are legally entitled to file for payment from the Motor Vehicle Liability Security Fund.

Very truly yours,  
ARTHUR J. SILLS  
*Attorney General of New Jersey*  
By: E. ROBERT LEVY  
*Deputy Attorney General*

1. See *Selected Risks Insurance Company v. Zullo*, *supra*, p. 368; Budget Message of Richard J. Hughes, Governor of New Jersey, for the fiscal year ending June 30, 1968, page 61; Gaffney, *The Motorist, His Victims and the State*, 25 State Gov't 266 (1952).

2. Both articles were cited by the Court as setting forth the genesis, operation and purpose of the Act. See *Indemnity Ins. Co., etc. v. Metropolitan Casualty Ins. Co., N.Y.*, 33 N.J. 507, 513 (1960).

3. The authoritative quality of their conclusion is further supported by the fact that the bill was recommended by the Department of Banking and Insurance. See statement accompanying L. 1952, c. 175, Assembly, No. 346, 1952.

February 17, 1969

HONORABLE RICHARD J. HUGHES  
*Governor*  
State House  
Trenton, New Jersey 08625

FORMAL OPINION 1969—NO. 2

Dear Governor:

You have requested our opinion as to whether the current 193rd New Jersey Legislature may rescind a concurrent resolution proposing a constitutional amendment which had been agreed to by more than three-fifths of the members of both Houses of the preceding 192nd Legislature. The resolution has been ministerially



filed with the Secretary of State, but has not yet been delivered by the Secretary of State to the appropriate County officials for submission to the people at the next general election pursuant to the provisions of N.J.S.A. 19:12-1, *et seq.* If the answer to the inquiry is affirmative, you then request advice concerning the vote required to rescind such resolution.

You have informed us that on April 29, 1968, by a vote of 34 to 0, the Senate of the 192nd New Jersey Legislature adopted Senate Concurrent Resolution No. 41, which proposed a constitutional amendment releasing the State's claim of title to certain meadowlands. On November 18, 1968, by a vote of 55 to 13, the General Assembly of the 192nd Legislature also adopted Senate Concurrent Resolution No. 41. Records indicate that the notice and public hearing requirements of N.J. Const., Art. IX, Sec. I were satisfied prior to these votes. The resolution was filed with the Secretary of State on November 23, 1968 and is scheduled to be placed on the ballot at the next general election in November, 1969. On January 14, 1969, the 193rd New Jersey Legislature assumed office.

Our review of the New Jersey Constitution and applicable case law indicates that a subsequent legislature may rescind a resolution proposing a constitutional amendment if a three-fifths vote of all the members of each of the respective houses is obtained.

#### I

The applicable constitutional provision, N.J. Const., Art. IX, Sec. I, states as follows:

"Any specific amendment or amendments to this Constitution may be proposed in the Senate or General Assembly. At least twenty calendar days prior to the first vote thereon in the house in which such amendment or amendments are first introduced, the same shall be printed and placed on the desks of the members of each house. Thereafter and prior to such vote a public hearing shall be held thereon. If the proposed amendment or amendments or any of them shall be agreed to by three-fifths of all the members of each of the respective houses, the same shall be submitted to the people. If the same or any of them shall be agreed to by less than three-fifths but nevertheless by a majority of all the members of each of the respective houses, such proposed amendment or amendments shall be referred to the Legislature in the next legislative year; and if in that year the same or any of them shall be agreed to by a majority of all the members of each of the respective houses, then such amendment or amendments shall be submitted to the people."

The aforesaid constitutional provision does not establish any specific procedure for the rescission of resolutions proposing constitutional amendments. However, a survey of the constitutions of our sister states indicates that none contain a specific procedure for rescission.

Whether the New Jersey Legislature has the implied power to rescind a resolution providing for a constitutional amendment has never previously been raised in the courts of this state or presented to the Attorney General. A review of the minutes of the Constitutional Convention Record, Vol. III, Committee on Rights, Privileges, Amendments and Miscellaneous Provisions, indicated that the question was not discussed by the framers.

In Michigan, however, the Attorney General rendered an opinion in which he concluded that the legislature has the power to rescind a resolution directing the submission of a constitutional amendment at a subsequent legislative session prior to the submission of the question to the public. Opinion No. 652, Attorney General of Michigan (1948). He reasoned that the legislature may ordinarily reconsider its actions and there was no specific reason for differentiating a resolution of this type from other legislative actions. He cited *Crawford v. Gilchrist*, 64 Fla. 41, 59 So. 969 (1912) wherein the court stated: "A right to reconsider action taken is an attribute of all deliberative bodies and is not forbidden to the legislature by the commission." He then went on to indicate that since a legislature may pass an act at one session and repeal it at the next, there would appear to be no reason to hold joint resolutions immune from the exercise of the same power. Thus, he determined:

"... In the absence of authority directly to the contrary, no good reason appears to exist why at any time before the administrative officers charged with that duty have taken the necessary steps to submit the amendment to an election, the legislative action which forms the authority for such submission cannot be rescinded." Opinion No. 652, Attorney General of Michigan (1948).

See also *In re Senate Concurrent Resolution No. 10 of the Forty-First General Assembly*, 137 Colo. 491, 328 P. 2d 103 (1958); *Crawford v. Gilchrist*, *supra*; *In re Opinion of the Justices*, 252 Ala. 89, 39 So. 2d 665, 668 (1949). These three decisions found no impropriety in the legislature rescinding a prior resolution proposing a constitutional amendment.

An opinion contrary to the foregoing was rendered by the Attorney General of California, who concluded that a subsequent legislature did not have the power to reconsider a resolution proposing a constitutional amendment. Opinion No. 173, Attorney General of California (1955). Citing the constitutional language, "... and it shall be the duty of the legislature to submit such proposed amendment ... to the people ...", Calif. Const. Art. XVIII, Sec. I, he concluded that such language placed a mandatory duty on the legislature to submit the resolution to the people. He relied upon prior California decisions holding that the California Legislature in proposing a constitutional amendment is limited to an exercise of powers expressly granted by Art. XVIII, Sec. I and must strictly observe the mandatory requirements of that section.

The reasoning of the California Attorney General's opinion is not persuasive in light of the decisional law of this State. It is a general rule of law in the State of New Jersey that restraints on legislative power must be expressly stated or arise by necessary and fair implication. The New Jersey courts have held that the state constitution, unlike the federal constitution, is not a grant but a limitation of legislative power. *Behnke v. N.J. Highway Authority*, 13 N.J. 14 (1953); *Gangemi v. Berry*, 25 N.J. 1 (1957); *State v. Murzda* 116 N.J.L. 219 (E.&A. 1935). Since the New Jersey Constitution does not expressly limit the power of the legislature to rescind or revoke earlier resolutions proposing constitutional amendments, it is reasonable to conclude that the legislature has the implied authority to take such action under New Jersey decisional law.

Additionally, it should be noted that the New Jersey Constitution of 1844, Art. IX, Sec. I contained the exact language as California Const., Art. XVIII, Sec. I: "...

and it shall be the duty of the legislature to submit such proposed amendment . . . to the people . . ." However, when the New Jersey Constitution was revised in 1947 the language was changed to read: ". . . the same shall be submitted to the people . . .", N.J. Const., Art. IX, Sec. I, ". . . in the manner and form provided by the legislature", N.J. Const. Art. IX, Sec. IV. The procedural mechanism for submission to the people appears in N.J.S.A. 19:12-1, *et seq.* These statutory provisions require the Secretary of State, not later than the sixtieth day preceding the primary election for the general election, to cause to be delivered to the Clerk of the County and the County Board wherein any such election is to be held, a notice stating the public questions which are to be submitted to the voters of the State at the ensuing general election. Thus, under present New Jersey constitutional law, the filing of a resolution proposing a constitutional amendment is a ministerial act which is revocable up until such time as the Secretary of State executes the obligation imposed upon him under N.J.S.A. 19:12-1.

The aforesaid reasoning does not, in our opinion, become altered when the resolution sought to be revoked or rescinded has been passed by a previous legislature. Compare Opinion 652, Attorney General of Michigan (1948). Therefore, the 193rd Legislature has the authority to rescind Senate Concurrent Resolution No. 41.

## II.

With respect to the vote required for a subsequent New Jersey Legislature to rescind a prior resolution proposing a constitutional amendment, Art. IV, § IV, par. 3 of the New Jersey Constitution provides that each house of the legislature shall determine the rules of its own proceedings. Neither the standing rules of the New Jersey Senate and the New Jersey Assembly, *Cushing's Law and Practice of the Legislative Assembly* nor the rules of practice followed by the New Jersey Legislature in the absence of standing rules touch upon this question. New Jersey case law and opinions of the Attorney General are also silent on this issue.

However, Opinion No. 745, Attorney General of Michigan (1948), answered this inquiry by concluding that where there is no express contrary rule on the subject a vote of rescission required the same number of votes required to take the initial action. In Michigan, a two-thirds vote is required to pass a proposed constitutional amendment. Thus, with respect to the Michigan House of Representatives where the rules of practice were silent, the Attorney General stated that a two-thirds vote was required to rescind such motion. With respect to the Michigan Senate, the Attorney General stated that a two-thirds vote was also required, but such requirement came from the express provisions of Section 705 of the Hughes' *American Parliamentary Guide*, which was incorporated into the Michigan Senate rules at that time.

The opinion of the Michigan Attorney General replied upon *Whitney v. Village of Hudson*, 69 Mich. 189, 37 N.W. 184, 190 (1888), which stated:

"It is claimed, also, by the defendants' counsel, that the vote to reconsider was not carried; that where, by statute, a vote of two-thirds is required to pass a resolution, it cannot be reconsidered or rescinded except by a two-thirds vote. This was declared to be the law in the case of *Stockdale v. School-dist.*, 47 Mich. 226 (10 N.W. Rep. 349), where the motion was to rescind. And, where the body has adopted no rule regulating the practice upon motions for reconsideration, it is not perceived why the same ruling should not apply.

"The law requires a vote of two-thirds of the members of the body to pass the act in the shape it is in when the vote is taken. Two-thirds are

satisfied with it as it then reads, and no reason exists why a majority less than two-thirds can bring the resolution again before the body for the purpose of changing its features, or postponing action. There should be some stability in legislative action which is passed under the requirements of a law calling for a vote of two-thirds of its members, and it should remain as the two-thirds have passed it, unless the same number desire a further consideration of the measure."

Citing the *Whitney* case, the Michigan Attorney General concluded that:

" . . . as to the House of Representatives, there being no express rule on the subject, its action is governed by the general rule announced by the Supreme Court of this state in *Whitney v. Village of Hudson* and that as to the House of Representatives a vote of two-thirds of the members of that body will be required to rescind the resolution in question." Opinion No. 745, Attorney General of Michigan (1948).

In the instant circumstances, since the New Jersey Constitution has no provision for rescission and the legislative rules are silent on the subject, it would appear reasonable and proper to follow the procedure adopted by Michigan, that a rescission must be accomplished by the same number of votes required for passage. Therefore, the 193rd Legislature may rescind Senate Concurrent Resolution No. 41 only by a three-fifths vote of both houses of the legislature.

For the foregoing reasons, it is our opinion that the 193rd Legislature has the implied power to rescind Senate Concurrent Resolution No. 41 prior to its submission to the electorate in the next general election in November 1969. A three-fifths vote of both houses is required to rescind such resolutions.

Respectfully,

ARTHUR J. SILLS  
*Attorney General*

By: RACHEL LEFF  
*Deputy Attorney General*

November 24, 1969

HONORABLE CARL L. MARBURGER  
 Commissioner, Department of Education  
 225 West State Street  
 Trenton, New Jersey 08625

## FORMAL OPINION 1969—NO. 3

Dear Commissioner Marburger:

You have asked whether a resolution of a local board of education providing for a period of "free exercise of religion" on school premises prior to the formal opening of each school day violates the First Amendment to the Constitution of the United States.

In responding to your inquiry in accordance with the duty imposed upon the Attorney General by N.J.S.A. 52:17A-4(e), we are mindful of our responsibility to respect and abide by the Constitution of this state and of the United States as interpreted by the courts. See *N.J. Const.*, 1947, Art. VII, Sec. I, para. 1; *Jackman v. Bodine*, 43 N.J. 453 (1964); *Sills v. Hawthorne Bd. of Ed.*, 84 N.J. Super. 63 (Ch. Div. 1963), *aff'd* 42 N.J. 351 (1964); see *Cooper v. Aaron*, 358 U.S. 1, 16-20 (1958); see also, Opinion of the Attorney General F.O. 1964, No. 1.

The attendant facts and circumstances giving rise to your inquiry are as follows: At a regular meeting of the Netcong Board of Education on September 2, 1969, the following resolution was passed:

"That the Superintendent be instructed by the Board of Education to institute prayers in the Netcong Schools, forcing no student to pray if unwilling but denying no student the right to pray, details to be worked out by the Board of Education."

It was further resolved that:

"Members of the clergy from the communities of Netcong and Stanhope be invited to meet with representatives of the Board of Education and compose a suitable prayer for the Board's consideration. In the interim, the Superintendent is instructed to institute 30 seconds of silent meditation until the Board takes further action."

On September 10, 1969, the Board rescinded its resolution of September 2, 1969 and enacted the following:

"On each school day before class instruction begins, a period of not more than five minutes shall be available to those teachers and students who may wish to participate voluntarily in the free exercise of religion as guaranteed by the United States Constitution. This freedom of religion shall not be expressed in any way which will interfere with another's rights. Participation may be total or partial, regular or occasional, or not at all. Non-participation shall not be considered evidence of non-religion, nor shall participation be considered evidence of or recognizing an establishment of religion. The

purpose of this motion is not to favor one religion over another nor to favor religion over non-religion but rather to promote love of neighbor, brotherhood, respect for the dignity of the individual, moral consciousness and civic responsibility, to contribute to the general welfare of the community and to preserve the values that constitute our American heritage."

At a special meeting on September 16, 1969, the Board adopted the following supplementary resolution:

"BE IT RESOLVED that the Superintendent of Schools be authorized, empowered and directed to implement the resolution creating a period for the free exercise of religion in whatever manner, in the exercise of his discretion, he considers best under the circumstances."

The Superintendent of School has implemented the resolution only at Netcong High School. The requirements of the resolution have been met in the following manner:

Normally all high school students must be in their homerooms at 8:05 a.m. with classes to begin at 8:10 a.m. (Most students walk to school except those from Stanhope, whose buses arrive at approximately 7:30 a.m.) Pupils may enter the school building whenever they arrive although in practice, weather permitting, most stay out of doors until either 7:55 or 8:05 a.m.

The religious exercise period is conducted on a voluntary basis at 7:55 a.m. in the high school gymnasium. The students who wish to join either sit or stand in the bleachers. A student volunteer reader then comes forward and reads from the Congressional Record, giving the date, volume, number and body (Senate or House of Representatives) whose proceedings are being read.<sup>1</sup> The reading contains the "remarks" of the Chaplain of the House or Senate.<sup>2</sup> The selection of the material to be read is made by the volunteer reader with the approval of the high school principal. Readers are assigned by the principal in the order in which they volunteer to participate. At the conclusion of the reading, the students are asked to meditate for a short period of time on the material that has been read.

Students who do not wish to participate in the program are free to enter the building and to go to their lockers or their homeroom during the exercise. They may also remain outdoors or off school grounds, or they may simply arrive at school after the program is concluded, which is generally around 8:00 a.m. No records are kept regarding participation in the program.

It is the opinion of this office that the resolutions of the Netcong School Board, and the implementation thereof, constitute an infringement of the First Amendment to the United States Constitution as made applicable to the states through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Everson v. Board of Education of Ewing Twp.*, 330 U.S. 1 (1947); *Sills v. Hawthorne Board of Education, supra*.

The First Amendment to the United States Constitution provides in relevant part:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

The freedom of religion provision consists of two distinct but interrelated por-

tions, the Establishment Clause and the Free Exercise Clause. The interrelationship of these clauses was discussed by the Supreme Court in the decisions in *School District of Abington Twp. v. Schempp* (*Murray v. Curlett*), 374 U.S. 203 (1963) and *Engel v. Vitale*, 370 U.S. 421 (1962):

"Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not." *Engel v. Vitale*, 370 U.S. at 430.

On the other hand, the Free Exercise Clause:

"... withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *Abington v. Schempp*, 374 U.S. at 223, 224.

In other words, the distinction between the two clauses is predicated upon the fact that the Free Exercise Clause necessarily involves coercion while the Establishment Clause need not.

In *Abington*, the Court struck down the statutory provisions of Maryland and Pennsylvania providing for Bible reading and the recitation of the Lord's Prayer. In so doing the Court held that the Establishment Clause clearly prohibits the states from instituting any form of prayer or worship for its citizens to follow, whether sectarian or nonsectarian, and whether participation therein is voluntary or required. Patently, what is proscribed by the Establishment Clause is not the use of any particular form of prayer, but rather any establishment by the state of a religious or devotional exercise in connection with the operation of the public school system. It was further recognized that the actual and potential compulsion upon those students who might not wish to participate but who might do so out of fear or embarrassment would contravene the Free Exercise Clause notwithstanding that they could be excused therefrom upon request.

In *Engel v. Vitale*, *supra*, the interaction between the clauses was more subtle. There, the State of New York adopted a voluntary daily program of denominational neutral prayer in the public school classrooms. The Court invalidated the program on Establishment Clause grounds.

"There can be no doubt that New York's state prayer program officially established the religious beliefs embodied in the Regents' prayer. The respondents' argument to the contrary, which is largely based upon the contention that the Regents' prayer is 'non-denominational' and the fact that the program, as modified and approved by the state courts, does not require all pupils to recite the prayer but permits those who wish to do so to remain

silent or to be excused from the room, ignores the essential nature of the program's constitutional defects. Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause, of the First Amendment, both of which are operative against the States by virtue of the Fourteenth Amendment." 370 U.S. at 431.

A basic principle which has emerged from the pertinent cases is that the guarantees of the First Amendment concerning religion are observed best by "wholesome neutrality" on the part of the state toward matters sectarian. *School District of Abington Twp. v. Schempp*, *supra*. This is not to say that the state must be hostile toward religion, but rather steer a careful course between the constitutional prohibition against establishment on the one hand and the constitutional guarantee of free exercise on the other. See *Everson v. Board of Education*, *supra*. Thus, the *Everson* rationale, reiterated in *Abington*, is viable today:

"The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. *Everson v. Board of Education*, 330 U.S. 1, 91 L. Ed. 711, 67 S. Ct. 504, 168 A.L.R. 1392, *supra*; *McGowan v. Maryland*, (366 U.S. at 442)." 374 U.S. at 224.

See also, *Board of Education v. Allen*, 392 U.S. 236 (1968); *Rhoades v. School Dist. of Abington Twp. (Worral v. Matters)*, 424 Pa. 202, 226 A. 2d 53 (1967) appeal dismissed 389 U.S. 11 (1967).

On the basis of the foregoing discussion of the First Amendment as it has been interpreted by the courts, there are three issues presented by the action of the Netcong Board and its subsequent implementation: (1) whether reading the daily opening invocation from the Congressional Record at Netcong High School constitutes a religious observance; (2) whether the alleged voluntary nature of the observance removes the activity from the constitutional prohibitions of the First Amendment; and (3) whether the Netcong resolution satisfies the "primary" purpose test of *Everson*.

First, the materials read by the student volunteers in this case, although characterized as "remarks" of the Chaplain from the Congressional Record, clearly constitute a religious exercise within the meaning of *Abington* and *Engel*. The Congressional Record generally begins: "The Chaplain, the Reverend . . . . . offered the following prayer" (emphasis added). During the month of October 1969, the Congressional Record indicates that the various Chaplains quoted from Romans, Deuteronomy, Ephesians, Isaiah and, on seven separate occasions, from Psalms (see Appendix A). With respect to reading from the Bible, the trial court found in *Abington* that the reading of verses, even without comment, constitutes a religious exercise. In the present case, the biblical quotations are followed as well by the prayers of the individual ministers (see Appendix A). In this regard the Supreme Court in *Abington* (374 U.S. at 224) approved the finding of the trial court that:

"The devotional and religious nature of the morning exercises is made all the more apparent by the fact that the Bible reading is followed immediately by a recital in unison by the pupils of the Lord's Prayer." 201 F. Supp. at 819.

Further, the Congressional Record reflects that when the Bible is not quoted by a Chaplain, the "remarks" consist exclusively of a prayer. During the month of October 1969, for instance, every Chaplain commenced his invocation with the words "O God", "Eternal God", "Eternal Father" or the like, and ended with the word "Amen" (Appendix A). A glance at the Congressional Record establishes clearly that the Chaplains' "remarks" are indeed "solemn avowals of divine faith and supplication for the blessings of the almighty". *Engel v. Vitale*, 370 U.S. at 425.

In many instances the prayers in the Congressional Record are not nondenominational since "Christ" and "Jesus" are referred to therein (Appendix A). However, even if certain of the prayers can be said to be nondenominational, they would still fall within the proscription of *Engel v. Vitale*, *supra*. See also, *School District of Abington v. Schempp*, 374 U.S. at 216. As one respected scholar has noted:

"Nor should it be of consequence, that the prayer was 'nonsectarian'. Even such a prayer can be productive of religious divisiveness, not only because it is objectionable to non-believers or non-theistic religionists, but also because theistic believers may find it an offense to conscience to engage in prayer except in accordance with the tenets of their own religion. Moreover, religionists can have little enthusiasm for an officially sanctioned nonsectarian expression of religious belief which at most reflects a vague and generalized religiosity. Any usefulness of a prayer practice in public schools as symbolic of the religious tradition in our national life, of the values of religion to our society, and of religious ideas shared in common, must be weighed against the peril that the official promotion of common-denominator religious practices, conspicuous by their vagueness and syncretistic character, will contribute to the furtherance and establishment of an official folk or culture religion which many competent observers regard as a serious threat to the vitality and distinctive witness of the historic faiths." Kauper, *Prayer, Public Schools and The Supreme Court*, 61 Mich. L. Rev. 1031, 1066 (1963).

The use of the Congressional Record as source material for religious readings cannot be employed to circumvent the Supreme Court's pronouncements banning school prayer. There is no rational distinction between prayer and Bible passages read from a prayerbook or Bible, and prayer and Bible passages read from the Congressional Record. It is the reading of the prayer and Bible passages that is proscribed, not the source books from which they are taken.

Second, the alleged voluntary nature of the observance is not a defense to a claim of unconstitutionality under the Establishment Clause. Both in *Abington* and *Engel* the religious observance was voluntary in the sense that every student had a right to be excused from participating with parental consent. In both cases the Supreme Court rejected this contention:

"Applying the Establishment Clause principles to the cases at bar we find that the States are requiring the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer by the students in unison. These exercises are prescribed as part of the curricular activities of students who are required by law to attend school. They are held in the school buildings under the supervision and with the participation of teachers employed in those schools.

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Nor are these required exercises mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause. See *Engel v. Vitale*, *supra* (370 U.S. at 430)." *School District of Abington Twp. v. Schempp*, 374 U.S. at 223, 225.

There can be no doubt that under *Abington*, the fact that Netcong holds its religious exercise ten minutes before the students must be in their homerooms does not avoid the constitutional impropriety. The real issue according to *Engel* and *Abington* is not whether the child is compelled to attend the service but whether the service exists with the official sanction of the school authorities. In Netcong, the service is held on school grounds and the principal approves the selection of the material and assigns the volunteer readers on a first come, first served basis. In other words, the school authorities participate in and place their imprimatur upon, this religious exercise, thereby contravening the provisions of the First Amendment. As the court noted in *Reed v. Van Hoven*, 237 F. Supp. 48 (E.D. Mich. 1965):

"An examination of the establishment clause in light of the *Schempp* and *Engel* cases, *supra*, reveals that there need be no coercion upon minorities in order for a violation of the establishment clause to exist. It is only necessary that the practice or enactment have the net effect of placing the official support of the local or national government behind a particular denomination or belief. *Abington School District v. Schempp*, *supra*, 374 U.S. at 222. See also *Engel v. Vitale*, *supra*, 370 U.S. at 430-436, 82 A. Ct. 1261." 237 F. Supp. at 53.

Third, there is no question but that the design of the Netcong School Board resolution was to circumvent the Supreme Court's school prayer decisions and to aid religion generally. As such, it fails to satisfy the primary purpose test of *Everson*, which withdraws certain state action from the proscription of the First Amendment where its primary purpose can be shown to be "child benefit" rather than a desire to aid religion. See also, *Board of Education v. Allen*, *supra*. It has been suggested that exercises such as those in question are primarily for the benefit of the children since they presumably instill nonreligious moral values. This suggestion was rejected by the court in *Abington* (374 U.S. at 224), which indicated that if the inculcation of nonreligious moral values was truly involved, the exercises would not be voluntary.

On the basis of the foregoing it is clear that the readings at Netcong High School constitute a religious exercise; that the "voluntary" nature of the observance cannot

affect the fact that such a religious exercise is repugnant to the First Amendment and that the primary purpose of the exercise is not "child benefit". Accordingly, we conclude that the Netcong resolution and the exercises implementing it are unconstitutional.

Very truly yours,  
 ARTHUR J. SILLS  
*Attorney General of New Jersey*  
 By: VIRGINIA LONG ANNICH  
*Deputy Attorney General*

1. We have so been informed by the Superintendent of Schools of Netcong.
2. See Appendix A which contains, chronologically, twenty-three opening "remarks" by Chaplains from the Congressional Record for the month of October 1969. Although we have not been able to ascertain which volumes of the Congressional Record have been read by the student volunteers thus far, this appendix was compiled as an example of the type of material from which the readings are taken.

October 6, 1970

HONORABLE PAUL T. SHERWIN  
*Secretary of State*  
 State House  
 Trenton, New Jersey 08625

FORMAL OPINION 1970—NO. 1

Dear Secretary Sherwin:

You have requested our opinion as to when the terms of office of the various state officers appointed pursuant to the New Jersey Constitution begin to run. It is our conclusion that the terms of office of these officers begin as of the date of the commission issued by the Governor and that the issuance of a commission rests within the sole discretion of the Governor.

The New Jersey Constitution expressly states that terms of office commence as of the date of the commission:

"The term of office of all officers elected or appointed pursuant to the provisions of this Constitution, except as herein otherwise provided, shall commence on the day of the date of their respective commissions; but no commission for any office shall bear date prior to the expiration of the term of the incumbent to said office." Art. VII, § 1, par. 5.

While this paragraph provides that the date of a commission may not antedate the expiration of the term of the incumbent, it does not otherwise specify what date a commission shall bear. To answer this question, therefore, it is necessary to consider

the function of a commission within the framework of the New Jersey Constitution.

The procedure for the appointment of officers and issuance of commissions is provided by Art. V, § 1, par. 12 of the Constitution:

"... [The Governor] shall grant commissions to all officers elected or appointed pursuant to this Constitution. He shall nominate and 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."

The relationship between executive appointment and the issuance of commissions was set forth in the landmark case of *Marbury v. Madison*, 5 U.S. 137 (1803). Chief Justice Marshall, speaking for the Court, described the federal appointive process as consisting of three parts: nomination, confirmation and appointment. The actual power of appointment is in the hands of the President alone, who may, after his nominee has been confirmed by the Senate, act upon this advice and appoint the nominee. The issuance of the commission is conclusive evidence of the appointment. Therefore, an officer's term does not begin when he is confirmed by the Senate because at the moment of confirmation, the officer has not yet been appointed:

"Some point of time must be taken when the power of the executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act, required from the person possessing the power, has been performed. This last act is the signature of the commission." 5 U.S. at 157.

While there is a minor difference in phraseology between the pertinent provisions of the United States and New Jersey Constitutions, a long line of cases decided since *Marbury v. Madison* have established that, irrespective of particular constitutional phraseology, the appointment of an officer is an independent executive act, evidenced by the commission, which must be performed subsequent to legislative confirmation to complete the appointive process. *E.g. United States v. Le Baron*, 60 U.S. 525 (1856); *Draper v. State*, 175 Ala. 547, 57 So. 772 (1911); *State ex rel. Coogan v. Barbour*, 53 Conn. 76, 22 A. 686 (1885); *Johnson v. Sampson*, 232 Ky. 648, 24 S.W. 2d 306 (1930); *People ex rel. Babcock v. Murray*, 70 N.Y. 521 (Ct. App. 1877); *Conger v. Gilmer*, 32 Cal. 75 (Sup. Ct. 1867). In *People ex rel. Babcock v. Murray*, *supra*, where a mayor had the power of appointing certain officers, the court said:

"The act of signing the commission completes the appointment as well as perpetuates the evidence of it. . . . The appointment under this delegated authority is inchoate until the last act to be done by the appointing power is completed, and that is the signing of the writing or the commission. The appointment is then, and not before, 'evidenced by an unequivocal act.' " 70 N.Y. at 526-527.

And in *Conger v. Gilmer*, *supra*, the court said:

"Until the last act has been performed the whole matter is *in fieri*, and within the control of the person or persons by whom the appointment is to be made, and there is nothing to prevent them from changing their minds and appointing some other person other than the one first selected. Suppose the Governor should be called upon to fill a vacancy and should determine in his own mind to appoint a particular individual. Undoubtedly he may change his mind as often as he may please until he has finally signed a commission to some particular individual. Until then he has not acted." 32 Cal. at 79.

The case of *Harrington v. Pardee*, 1 Cal. App. 278, 82 P. 83 (1905) is particularly instructive concerning the nature of such an appointive process. The Governor of California nominated the plaintiff to an office and sent the nomination to the state senate, which confirmed it. The Governor failed to issue a commission before he left office and, when his successor refused to issue one, a mandamus proceeding was brought. It was urged that the statute under which the plaintiff's name had been submitted to the legislature drew no distinction between "nomination" and "appointment", merely stating that the officer be "appointed by the Governor with the advice and consent of the senate," and that the appointment was therefore completed when the name was submitted to the legislature. Nevertheless, the court found that a three-part appointive procedure had been intended:

"In all such appointments the first step to be taken is the suggestion by the Governor to the Senate of the name of a person for the office, and to ask the advice of the Senate, and for its consent for him to appoint such person; the second step is the advice and consent of the Senate, which is manifested by a resolution certified to the Governor and to the Secretary of State; and the third and last step is the issuing of the commission signed by the Governor, and this is the evidence of such appointment.

"Plaintiff contends that 'nominate' and 'appoint' are synonymous terms and mean the same thing, and that therefore, when the Governor has nominated, he has appointed. Doubtless there are some instances where these terms may be used to mean one and the same thing, but by no process of reasoning can it be true that in 'nominating' to the Senate the Governor is 'appointing' the person to the office, because he cannot appoint without the advice and consent of the Senate. The 'appointment' is not made until the 'commission' is issued, and issuing the same is the last act, and in issuing the commission the Governor is performing an executive, and not a ministerial, act, and is therefore acting under his discretionary powers, and may or may not issue the commission, although the Senate may have advised it and consented that he should make the appointment." *Harrington v. Pardee*, *supra*, at 279-280.

Compare *State v. Governor*, 25 N.J.L. 331 (Sup. Ct. 1856) which involved the issuance of a commission to an elected officer.

We have been advised that some commissions have been dated as of the day the officer takes his oath and it has been suggested that all commission should be automatically dated as of that date. It is well established, however, that the oath required by the New Jersey Constitution (Art. VII, § 1, par. 1) simply "qualifies" any state

officer appointed pursuant to the Constitution to enter upon the execution of his duties. In *Haight v. Love*, 39 N.J.L. 14 (Sup. Ct. 1876) *aff'd* 39 N.J.L. 476 (E.&A. 1877), the Court of Errors and Appeals, in determining that the term of office of an appointed municipal tax collector began on the date of appointment and not the date of taking the oath, stated as follows:

"It is apparent that if [the term in question] did not begin to run until he was qualified, he could, in the absence of any restraining legislation, have prolonged his prior term indefinitely by his own failure to qualify. Public policy would forbid the adoption of a rule under which such a result is possible. *It would make the beginning of an official term to depend upon the will of the appointee, instead of the will of the appointing power. . . .*" 39 N.J.L. at 478 (Emphasis added).

Although there is therefore no basis for automatically dating commissions as of the day on which an officer takes his oath, it should be emphasized that the Governor, in his discretion, may grant a commission at any time between confirmation and the administration of the oath, even on the same day as the oath itself.

We have also been advised that some commissions bear the date of confirmation of the officer and it has been suggested that commissions might automatically bear this date. It is our opinion that it is appropriate to grant a commission on the date of confirmation only if the Governor, in his discretion, decides to make the appointment on that date and thereupon grants the commission. Otherwise, if a commission were automatically issued immediately upon confirmation, this would place the final power of appointment in the senate, contrary to the provisions of the New Jersey Constitution which confer upon the Governor the power to make appointments and to grant commissions.

Therefore, it is our opinion that the term of office of state officers appointed pursuant to the constitution commence as of the date of the commission issued by the Governor, and that the commission may bear whatever date the Governor selects from the date of confirmation to the date on which the oath is taken, provided it is not prior to the expiration of the term of the incumbent to the office.

We further advise you that in determining the date of termination of any particular term of office, you should refer to the specific constitutional or statutory provisions which govern that office. Where the applicable constitutional or statutory language indicates that an appointment shall be made to fill an unexpired term or provides a specific date of termination of a term of office, the appointment shall be only for the period thus indicated. In all other situations, the date of termination of a term of office may be determined by the length of the term provided by law, commencing on the date of the commission issued by the Governor.

Very truly yours,  
GEORGE F. KUGLER, JR.  
*Attorney General*

## APPENDIX A

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34:13B-21	F.O. 1, 1964		F.O. 11, 1964
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39:4-50.2	F.O. 2, 1967	43:15A-50	F.O. 2, 1966
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39:6-63 (d)	F.O. 1, 1966		F.O. 2, 1966
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40:14A-7	F.O. 10, 1964	43:16A-7 (1)	F.O. 9, 1964
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