

OPINIONS

OF THE

Attorney General

OF

NEW JERSEY

FOR THE

Period from January 1, 1951,
to December 31, 1953

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STATE OF NEW JERSEY

Department of Law and Public Safety

Division of Law

JANUARY 1, 1951—DECEMBER 31, 1953

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JANUARY 3, 1951.

HON. CHARLES R. ERDMAN, *Commissioner*,
Dept. of Conservation and Economic Development,
Trenton, New Jersey.

FORMAL OPINION—1951. No. 1.

DEAR COMMISSIONER:

Your letter concerning application for permit to dredge a lagoon and approach channel to deep water of Barnegat Bay, of Francis E. Fanning, is at hand.

You first inquire whether the board has the right to require this applicant or any future owner of said lagoon to make application to the State for a permit for any dredging or construction work contemplated within the lagoon and whether the State has the right to establish an exterior line for piers within the lagoon. Then you inquire whether the lagoon as described inshore of the mean high-water line is strictly private property.

Under R. S. 12:3-21 no person shall dredge or remove any deposit of sand from lands of the State lying under water without a license first obtained as provided in R. S. 12:3-22. At the end of this section there is a proviso that nothing in the section contained shall prevent the owner of any grant or lease from digging, removing or taking sand within the lines of or in front of such grant for the purpose of improving lands granted or leased to them, nor prevent such owner from digging or dredging a channel to the main channels and removing and taking the material therefrom.

My answer to this question is that if the applicant digs, dredges or removes any material from the land of the State lying under tidal water, he must have a permit from your board before commencing said work. But if he digs a lagoon on his property inshore of the mean high-water line that is strictly private property and requires no permit.

You next inquire—In a case where a small tidal stream tributary of some bay or river, for which an applicant has acquired the riparian rights, covering the bed of same, and by widening or deepening said stream so as to form a boat basin within the applicant's upland, has the State, acting through Title 12:5-3 jurisdiction over such a basin?

My answer to that question is yes.

Under R. S. 12:5-3 all plans for the development of any water front upon any navigable water or stream of this State or bounding thereon, which is contemplated by any person or municipality, in the nature of individual improvement or development or as a part of a general plan which involves the construction or alteration of a dock, wharf, pier, bulkhead, etc., shall be first submitted to your board and no such development or improvement shall be commenced or executed without the approval of your board first had and received.

The map submitted to me upon which this inquiry is established shows a river or bay in front of applicant's property and there was an original stream from the river or bay running through the property, which was widened and improved, which gives your board jurisdiction because the land on each side of the stream itself was originally riparian land. Under previous decisions, the State owns the bed of a stream where it is flowed by tide. *McCarter vs. Hudson Co. Water Company*, 70 N. J. L. 720.

(1)

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In your third inquiry you ask—Where an applicant acquires riparian rights along a portion of water front, then dredges through the mean high-water line into applicant's property so as to form a public or private boat basin, has the State, acting through Title 12:5-3 jurisdiction over that portion of the basin located on applicant's upland as set forth in sketch "B."

Sketch "B" shows the river or bay in front of applicant's land and dredged basin is on the private property of the applicant and is not a navigable stream. So that my answer to the third inquiry is no.

The public has no right to use a stream which is not navigable in its natural condition; and, in case the riparian owner makes it navigable for his own purpose, he may exclude the public from the use of it in its improved condition. This is cited in Farnham on "Waters and Water Rights," p. 1491.

The mere fact that the applicant permitted the public to enjoy the increased facilities does not deprive him of any of his rights when he chooses to exercise them. Farnham on "Waters &c." p. 1496.

Our earliest courts from the grant of King James down have ruled that every navigable river so high as the sea flows the bed of the stream belongs to the State to high-water mark, but in every waterway not navigable the owners have an interest of common right, which is not a public right. Farnham on "Waters &c." p. 238.

The fact that a grantee has improved the waterway of the stream which was made navigable by public improvements does not disturb the rights of the adjoining owners. Farnham on "Waters &c." p. 240.

All of the courts agree that the title to streams which are not navigable is in the upland owner and public policy requires the titles of the beds of such streams to be in private owners and the fact that the stream is navigable or being made navigable does not affect the rule stated above. Farnham on "Waters &c." p. 262-3. Woolrych, Waters, p. 147 with numerous cases throughout the United States cited thereunder.

The right of using the water of a private pond is generally regarded as a property right of which a riparian owner cannot be deprived for the private use of another without receiving compensation. Farnham on "Waters &c." p. 282; citing thereunder *Keyport vs. Farmers Trans. Co.* 18 N. J. Eq. 12; aff. 18 N. J. Eq. 511.

Therefore the statutory provisions, in order to improve navigation, do not authorize the improvement of non-navigable streams nor do they contemplate the creation of a navigable stream out of a non-navigable stream and mere private improvements which make a non-navigable stream navigable do not increase the rights of the public therein. Farnham on "Waters &c." p. 366, citing Hale, chap. 3, and *DeCamp vs. Thompson*, 44 N. Y. 1014.

So that the State has no jurisdiction over that portion of the basin located on applicant's upland as it is private property.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: ROBERT PEACOCK,
Deputy Attorney General.

RP:N

JANUARY 8, 1951.

HON. GEORGE M. BORDEN, *Secretary,*
State Employees' Retirement System,
1 West State Street, Trenton, N. J.

FORMAL OPINION—1951. No. 2

DEAR MR. BORDEN:

Receipt of your letter of December 22nd is hereby acknowledged. As we understand it, an employee of the State Highway Department has applied for retirement effective January 1, 1951. This employee had joined the retirement system for the second time on January 1, 1934 and some time in September of 1949, it is stated, he deposited in full the amount required to reinstate 7 years 1 month of membership credit under his previous or first enrollment. You inquire whether in as much as this highway employee has served considerably more than five years since the beginning of the second enrollment on Jan. 1, 1934 and has completed a redeposit as aforesaid, can credit be given to him on the retirement date for 7 years 1 month under his previous enrollment.

The answer is no.

R. S. 43:14-55 provides as follows:

"Should an employee * * * be eligible to renew his membership, and has been or shall hereafter be re-enrolled as a member, and has paid or shall hereafter pay into the annuity savings fund the amount which he previously withdrew, there shall be restored his annuity credit, and in addition, upon the completion of five years thereafter, his pension shall be restored as it was at the time of his withdrawal."

In the instant case, the highway employee having reinstated his membership credit for a period of 7 years 1 month on or about September of 1949 entitled that employee to restoration of his annuity credit, but as he has failed to complete the term of five years after said payment as an employee of the highway department, his pension credit has not been restored.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: JOHN W. GRIGGS,
Deputy Attorney General.

JWG:N

JANUARY 8, 1951.

MR. GEORGE M. BORDEN, *Secretary,*
State Employees' Retirement System,
 1 West State Street, Trenton, N. J.

FORMAL OPINION—1951, No. 3.

DEAR MR. BORDEN:

Receipt of your letter of December 13, 1950, is hereby acknowledged. As we understand, you inquire whether J. Albert Blackburn, professor of education at Rutgers University, with 17 years of service at that institution prior to July 1, 1946, can pay sufficient moneys into your retirement system to warrant payment to him of an overall allowance of half pay at the age of 62 years.

We believe that your retirement commission cannot accept this contribution.

R. S. 43:14-2 clearly gives your commission the right to elect to membership in the retirement commission a person not within the classified service, but credit for that service can only be given for a period of time in which the employee was actually employed by the State of New Jersey. In this particular case, Mr. Blackburn for the first 17 years of his employment was in the employ of Rutgers University and not the State of New Jersey.

R. S. 43:14-17 does not appear to give your commission authority because, again, under its provisions, you may only receive payments made to you based upon employment in State service.

By authority of chapter 49, P. L. 1945, the State of New Jersey took over Rutgers University and employees of the University, who were then members of the State Employees' Retirement System were allowed to continue their membership. Other employees became eligible to membership in the State Employees' Retirement System by serving the State after the effective date of this act. Mr. Blackburn, having not been a member of the State Employees' Retirement System prior to the adoption of this act, can only date his service from the effective date of the act in question.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By : JOHN W. GRIGGS,
Deputy Attorney General.

JWG:N

JANUARY 26, 1951.

THE HONORABLE ALFRED E. DRISCOLL,
Governor of New Jersey,
 Trenton, New Jersey.

FORMAL OPINION—1951, No. 4

DEAR GOVERNOR:

Some weeks ago, anticipating that the One Hundred and Seventy-fifth Legislature (to which we shall refer as the 1951 Legislature) would have the duty to apportion the members of the General Assembly among the several counties, you directed us to examine into the problem from the standpoint of the method that would effectuate the command of the Constitution of 1947 that the apportionment be made "as nearly as may be according to the number of inhabitants, but each county shall at all times be entitled to one member and the whole number of members shall never exceed sixty." However, in view of the fact that the federal census of 1950, showing county population totals, had not been promulgated when the 1951 legislative year began, the immediate question is whether the 1951 Legislature has the power to make the apportionment.

We have given this question thorough consideration. Our conclusion, which we now express as our opinion, is that the power to apportion the members of the General Assembly inheres in the Legislature in session during the legislative year next succeeding the promulgation of a federal census; and that, inasmuch as the federal census of 1950 showing county totals had not been promulgated when the 1951 legislative year began, the 1951 Legislature has no power to make the apportionment.

Article IV, Section III, Paragraph 1, of the Constitution of 1947 commands that

... Apportionment of the members of the General Assembly shall be made by the Legislature at the first session after the next and every subsequent census . . .

This is essentially the same language contained in the Constitution of 1844, *viz.*:

... an apportionment of members of the General Assembly shall be made by the Legislature at its first session after the next and every subsequent enumeration or census . . . (Art. IV, Sec. III, Par. 1.)

In *Botti vs. McGovern*, 97 N. J. L. 353 (Sup. Ct. 1922), which was heard by Mr. Chief Justice Gummere and Justices Trenchard, Bergen, Minturn and Katzenbach (a majority of the court), the Chief Justice said:

By article 4, the legislative power is vested in two separate bodies, the Senate and General Assembly. The members of each of these bodies are to be selected, not from the people of the State at large, but from the inhabitants of the several counties into which the State is divided and are to be elected by the legal voters of the county; each county is entitled to one senator, without regard to the number of inhabitants thereof; but membership in the General Assembly is variable, the representation of each county therein being dependent upon the number of the inhabitants thereof as nearly as may be. The framers of the constitution realized that in the growth of the population of the State there would naturally be a change from time to time in the proportion of the number of inhabitants of the various counties

inter sese, and, in order that the governmental scheme, based upon representation in the lower house in proportion to population, might be made effective in the future, provided that there should be an apportionment of membership among the various counties at stated times, *the period fixed being the year succeeding the promulgation of the federal census*, the apportionment to be made without regard to whether or not, by it, any change in the number of representatives should occur in any county. (Italics ours.)

In the above-recited portion of the court's deliverance the significant language is: ". . . the period fixed being the year succeeding the promulgation of the federal census . . ." And, as will presently be borne out by a further excerpt from the same opinion, there can be no doubt that the court had in mind, not the succeeding calendar year but the succeeding legislative year as interpretive of the clause of the Constitution of 1844 reading: "first session after the . . . census."

When does the session of the Legislature begin? In the Constitution of 1947 the answer is to be found in Article IV, Section I, Paragraph 3:

The Senate and General Assembly shall meet and organize separately at noon on the second Tuesday in January of each year, at which time the legislative year shall commence.

And this provision is essentially the same as that contained in Article IV, Section 1, Paragraph 3, of the Constitution of 1844:

Members of the Senate and General Assembly shall be elected yearly and every year, on the first Tuesday after the first Monday in November; and *the two Houses shall meet separately on the second Tuesday in January next after the said day of election, at which time of meeting, the legislative year shall commence*; but the time of holding such election may be altered by the Legislature. (Italics ours.)

Thus, if the federal census showing the population of the several counties (the promulgation of a State total obviously does not subserve the constitutional requirements of New Jersey) had been promulgated by the federal authorities before noon of the second Tuesday in January 1951 (the ninth day of that month), the power to apportion the members of the General Assembly would have been conferred—and the constitutional duty to make such appointment would have been consequently imposed—upon the Legislature directed by the Constitution to meet at that hour, such being the time fixed for the beginning of the legislative year. Only in such circumstances would the legislative year beginning at noon of the second Tuesday in January 1951 be "the year succeeding the promulgation of the federal census."

In *Botti vs. McGovern* the relator (Botti) had sought the allowance of a *mandamus* to compel the respondents (McGovern, as Clerk of Hudson County, and the Hudson County Board of Election), in taking the statutory steps preliminary to the holding of the annual election in Hudson County of members of the Assembly to disregard the apportionment made by the 1922 Legislature and to observe that made by the 1911 Legislature. The court said:

The federal census is taken and promulgated every ten years, the last one being in the year 1920 . . . The last federal census having been promulgated in 1920, under the constitutional mandate, the duty rested upon the

Legislature of the year 1921 to make a new apportionment of members among the counties of the State . . .

This (apportionment of Assembly representation according to population) being the governmental scheme provided by the framers of the constitution and adopted by the people, the question presented for decision is whether *the Legislature sitting in the year next succeeding the promulgation of a federal census* can defeat that scheme, so far as it deals with the matter of the distribution of members of the General Assembly among the several counties of the State, by refusing or neglecting to make the apportionment required by article 4, section 3. In our opinion, the right of the inhabitants of the several counties of the State to be accorded the representation in the lower house, provided by the constitution, cannot be defeated by such non-action of the Legislature. It is true that the clause requiring *the Legislature sitting next after the promulgation of the federal census* to make the apportionment is mandatory; but disobedience of that mandate cannot produce the result claimed by the relator. The failure to perform the duty cannot cancel the legislative obligation. In other words, as was stated by Peckham, J., in the case of *People, ex rel. Carter vs. Rice*, 135 N. Y. 473, similar in its legal aspect to that now before us, the duty is a continuous one, and is cast in turn upon each Legislature succeeding that which has defaulted in the performance of the obligation, until the obligation is fulfilled. That is to say, if the apportionment is not made in the first session after the return of the enumeration, the duty to make it devolves upon the Legislature then next sitting, and upon each following Legislature until that duty is performed. To quote from the opinion just cited, "It cannot be tolerated that a Legislature, by mere omission to perform its constitutional duty at a particular session, can thereby prevent, for another ten years, the apportionment provided for by the constitution." (Italics ours.)

The portions we have italicized in the above excerpt from the court's opinion in *Botti vs. McGovern*, serve to confirm what we have already set forth as our understanding of what the court meant by saying ". . . the period fixed being the year succeeding the promulgation of the federal census . . ." By the expressions "the Legislature sitting in the year next succeeding the promulgation of a federal census" and "the Legislature sitting next after the promulgation of the federal census" the court made it crystal clear that the power to make the apportionment is *not* available to the Legislature which sits during the legislative year in which the federal census is promulgated. At the same time, the court made it equally clear that this power, once it inheres in the Legislature sitting in the year next succeeding the promulgation of the census, continues as a legislative power until exhausted by the making of the apportionment according to the constitutional prescription and purpose.

Now, from the standpoint that the various counties of the State are fundamentally entitled to representation in the General Assembly according to the number of their inhabitants as enumerated in decennial federal censuses, it can hardly be said that, in a given census, population counts which lack the stamp of finality are acceptable as the basis of apportionment. While the Bureau of the Census, United States Department of Commerce, promulgated during the year 1950 a *State* population total of 4,835,329 for New Jersey, there has been no promulgation of final *county*

population totals. All releases of county figures have been publicized as preliminary counts, subject to revision.

In reply to a telegram sent by us during the afternoon of January 9, 1951, to the Bureau of the Census, inquiring whether there had been "a promulgation of final 1950 census figures showing county totals in New Jersey," the Director of the Bureau stated (by letter dated January 10, 1951):

While the final 1950 population of each State has been reported as required by law, similar figures are not yet available for counties or other subdivisions. The returns for persons enumerated away from their usual residence are first reallocated on a State basis only in order to obtain the final State totals as quickly as possible and are not assigned to individual areas within States until later. The final 1950 population of New Jersey counties will be issued in a press release in the late spring or early summer . . .

Federal laws providing for decennial censuses of population have never made any provision regarding the date when the results become effective or official in a given area, and we do not know of any federal court decision concerning the same. It is believed that this is a matter for State determination through legislation, as has been done in a few States; but if no such action has taken place, or if the matter has not been decided by the State courts, the question will usually require the attention of the Attorney General of the State: . . .

The director then cites several cases decided in State courts, which, he suggests, "may be helpful." But the cases thus cited deal, not with a question so vital as the availability of tentative or preliminary census figures where (as in New Jersey) representation in a legislative body must be in proportion to the population of integral political subdivisions, but with the availability of such figures for other governmental purposes. In fact, the cases cited by the director generally involve the type of question which in New Jersey would now be governed by R. S. 52:4-1, as complemented by the definition of the word "census" in R. S. 1:1-2, fixing, "unless it be otherwise expressly provided or there is something in the subject or context repugnant to such construction," the effective date of a federal census for the purpose of the Revised Statutes and any other statute. But any such "determination through legislation" obviously cannot—and just as obviously was not intended—to govern the making of an apportionment of members of the General Assembly.

Be that as it may, in *Botti vs. McGovern* the court, in speaking of "the promulgation of the federal census," manifestly had in mind the federal census as officially and finally promulgated. Moreover, in the 1891 Supreme Court case of *In re Assessment for Passaic*, 54 N. J. L. 156, the decision was that Passaic did not become a second-class city until ninety days after April 17, 1891 (the date on which, according to the court, the official bulletin of the census of 1890 was issued), the act of April 2, 1891 (P. L. p. 306, supplementing the cities classification act) providing, in the words of the court, "that a census taken under national or State authority shall be applicable to the cities in question ninety days after the official promulgation thereof." Accordingly, this case has significance here insofar as it lays down the rule that a federal census is not officially promulgated unless it is complete. The court, after declaring that the supplementing act of April 2, 1891, "set at rest" the question, "At what period will 'population,' as used in the original Classification act, be fixed and determined?," said:

The contention is that, when the bureau or officers charged with the duty of enumerating state the result, the population of the district is estab-

lished and proven. But this is . . . inadmissible. Such statements may be varied and altered, and manifestly the enumeration intended is not complete until it is officially promulgated. (Italics ours.)

The federal census law (13 U. S. C. A. sec. 202), provides, as intimated by the Director of the Bureau of the Census in his letter, that "the tabulation of total population by States as required for the apportionment of representatives shall be completed within eight months from the beginning of the enumeration and reported by the Director of the Census to the Secretary of Commerce and by him to the President of the United States." Does not the reason that requires completed (final) figures for a congressional apportionment, in effectuation of the command of the federal Constitution ("Representatives . . . shall be apportioned among the several States . . . according to their respective numbers . . .") likewise require completed (final) figures for Assembly apportionment, in effectuation of the mandate of the New Jersey Constitution ("The members of the General Assembly shall be apportioned among the several counties . . . according to the number of their inhabitants . . .")? It must be manifest that final census figures are as essential to the integrity of the scheme of representation in the New Jersey General Assembly as they are to the integrity of the scheme of representation in the National House of Representatives.

In view of the opinion of the court in *Botti vs. McGovern*, it is unnecessary to ascertain whether any apportionment, either before or after that deliverance, was made on the basis of preliminary census counts. Nor would it serve any purpose to do so. As above indicated, the court stated, unequivocally: "The last federal census having been promulgated in 1920, under the constitutional mandate, the duty rested upon the Legislature of the year 1921 to make a new apportionment. . . ." And even if the court was in error as to the time of promulgation (of the final figures) of the 1920 census, its exposition of the sense and meaning of the constitutional language is so clear as to leave no room for doubt regarding the principle involved.

The construction thus placed by the court upon the pertinent provision of the Constitution of 1844 is applicable to the derivative provision of the Constitution of 1947. When a later instrument adopts a provision of an earlier one that has received a certain construction, the provision is deemed to be adopted as thus construed. *State vs. De Lorenzo*, 81 N. J. L. 613, 623 (E. & A. 1911).

We are not unmindful that under the Constitution of 1947 the terms of members of the General Assembly are fixed at two years (instead of one year as under the Constitution of 1844); that, because the members elected at the 1951 general election will have constitutional protection as to tenure accordingly, the next apportionment cannot effectuate county representation thereunder earlier than the legislative year beginning the second Tuesday of January 1952; and, therefore, that, even though the 1952 Legislature (provided the federal census will have been seasonably promulgated) performs its constitutional duty and makes the apportionment, the members then apportioned will not be elective until 1953. But that eventuality is rooted in the instrument of government adopted by the people.

Respectfully yours,

THEODORE D. PARSONS,
Attorney General.

By: DOMINIC A. CAVICCHIA,
Deputy Attorney General.

JANUARY 16, 1951.

MAJOR WILLIAM O. NICOL,
New Jersey State Police,
Trenton, N. J.

FORMAL OPINION—1951. No. 5.

DEAR MAJOR NICOL:

I have your letter regarding expense accounts for members of the board of tenement house supervision.

This board was originally created under R. S. 55:1-4 and subsequent sections and then in 1948, under chapter 439, it was placed under the jurisdiction of the Department of Law and Public Safety. Under that act it is provided that the board shall continue to have all the powers and exercise all the functions vested in or imposed upon it by law.

Your special inquiry is as to whether this board shall be allowed \$15.00 per meeting and whether the vouchers are signed by the board president as provided in 55:9-2, or by you as secretary of the commission.

Under 55:9-2 the members are allowed expenses actually incurred in and about the work of the board, upon warrant drawn by the board, signed by its president and attested by its secretary.

The above section has not been changed and there is no authority for the board members to receive \$15.00 a day for attending meetings. All they are allowed is their expense actually incurred in and about the work of the board, and these expenses should be itemized on vouchers signed by the board's president and attested by its secretary.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By : ROBERT PEACOCK,
Deputy Attorney General.

RP:N

JANUARY 17, 1951.

HON. WALTER T. MARGETTS, JR.,
State Treasurer,
State House, Trenton, New Jersey.

FORMAL OPINION—1951. No. 6.

DEAR MR. MARGETTS:

You have requested my opinion concerning the effect of section 11, chapter 270, P. L. 1950, on various statutes, previously enacted, prescribing, limiting or conditioning the kind or nature of investments in which various funds of the State of New Jersey may be invested.

Chapter 270, P. L. 1950, establishes within the Department of the Treasury, a Division of Investment. The act further requires the appointment of a Director of the Division, responsible for its immediate supervision and direction, and a State Investment Council of nine members.

Section 11 of this act provides:

Limitations, conditions and restrictions contained in any law concerning the kind or nature of investment of any of the moneys of any of the funds or accounts referred to herein shall continue in full force and effect; *provided, however,* that subject to any acceptance required, or limitation or restriction contained herein: the Director of the Division of Investment shall at all times have authority to invest and reinvest any such moneys in, and to acquire for or on behalf of any such funds or accounts, United States Treasury bills, notes and certificates of indebtedness, and such obligations and securities, which may be authorized by regulation of the State Investment Council, in which savings banks in this State may legally invest, and, for or on behalf of any such fund or account, to sell or exchange any investments or securities thereof.

Section 16 of the act provides:

To the extent that the provisions of this act are inconsistent with the provisions of any other law, the provisions of this act shall be controlling.

Reference to chapter 270, P. L. 1950, will indicate the large number of separate funds, and agencies controlling and managing separate funds, existing within our State Government. Among the former are the 1837 Surplus Revenue Fund, the Veterans Loan Guaranty and Insurance Fund, and certain funds held by the State Treasurer. Some of the agencies managing separate funds are the Board of Trustees of the State Employees' Retirement System, the Board of Trustees of the Police and Firemen's Retirement System, and the Prison Officer's Pension Commission. The basic statutes dealing with each of these separate funds, or agencies controlling and managing separate funds, prescribes the type or nature of investment in which the funds may be placed. These limitations are not uniform. Superimposed on these various lists of authorized investments are the additional authorized securities set forth in chapter 197, P. L. 1948, and chapter 94, P. L. 1948; R. S. 52:14-31 and R. S. 52:14-32, respectively.

Chapter 270, P. L. 1950, vested in the Director of the Division of Investment, the functions, powers and duties "of, or relating to, investment or reinvestment of moneys of, and purchase, sale or exchange of any investments or securities of or for" any of the specific funds or accounts listed in the act. Section 11 of that act, continued the various limitations, conditions and restrictions contained in other acts, relating to the kind or nature of investment in which these various funds or accounts could be placed; but specifically authorized the Director of the Division of Investment, under certain conditions and procedures prescribed by the act, to invest and reinvest such funds in United States Government securities and evidence of indebtedness and in "obligations and securities, which may be authorized by regulation of the State Investment Council, in which savings banks in this State may legally invest."

The desirable and beneficent objectives, in the public interest, of centralizing investment responsibilities and functions in one agency, is readily apparent.

In view of the pre-existing statutory limitations and restrictions contained in the several acts relating to these various funds, and to the agencies administering separate funds, what is the effect of section 11, chapter 270, P. L. 1950?

It is my opinion, and I so advise, that the effect of section 11, chapter 270, P. L. 1950 is to define a list of securities in which the specific State funds mentioned in chapter 270 may be invested, thereby permitting their investment in the securities specified in section 11, in addition to the securities specified in other acts. This clear intent, gleaned from the precise wording of the section under discussion, is emphasized by the provisions of section 16, quoted above. To this extent, therefore, previous lists of authorized securities are not superseded, but rather are expanded.

Your memorandum makes specific reference to two statutes, namely chapter 148, P. L. 1944, and chapter 158, P. L. 1947. These statutes refer to certain moneys held by the State Treasurer, namely moneys being held for a particular time or for a particular use, deposits by railroad companies for the construction of railroads and unclaimed for more than twenty years, and moneys held for unpresented and unpaid State bonds and coupons which were not presented for payment for at least two years from the due date. The statutes aforementioned, limit or prescribe the type of securities in which these funds may be invested by the State Treasurer. Chapter 270, P. L. 1950, however, by direct reference to these two statutes, transfers from the State Treasurer, to the Director of the Division of Investment, the function, power and duty to invest or reinvest these moneys in the securities listed in section 11 aforementioned, including savings bank legals. Accordingly, the opinion expressed in the preceding paragraph likewise is applicable to these two statutes.

It is to be noted that the authority vested in the Director of the Division of Investment, permitting him to invest the specified funds and accounts in securities, in addition to those authorized by the basic acts, is not an uncontrolled one. Section 11 provides that any savings bank legal obligations and securities, first must be authorized by the State Investment Council, before the director may invest in them. This provision must be followed, even in the case where statutes, heretofore enacted, already permit the investment of any of the funds or accounts mentioned in chapter 270, in savings bank legals. Thus provision is made, for the enactment of controls or limits by the State Investment Council, under which and within which the director must act.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By : DANIEL DEBRIER,
Deputy Attorney General.

ddb:d

FEBRUARY 5, 1951.

HUDSON COUNTY BOARD OF TAXATION,
2857 Hudson Boulevard
Jersey City 6, N. J.

Attention: CARL A. RUHLMANN, *President.*

FORMAL OPINION—1951. No. 7

GENTLEMEN :

We herewith reply to your request for an opinion on the following question :

"* * * has the assessor any right to levy an assessment on a structure that is not 100% complete on October 1st."

The answer is that the assessor has a right to levy an assessment on a structure that is not 100% complete on the assessing date.

R. S. 54:4-1 provides that "All property, real and personal, within the jurisdiction of this State, not expressly exempt from taxation or expressly excluded from the operation of this chapter, shall be subject to taxation annually under this chapter at its true value, and shall be valued by the assessors of the respective taxing districts * * *." The section further provides that all property shall be assessed to the owner thereof with reference to the amount owned on October 1st of each year.

Although we find no specific legislative provision for the assessing of a building in the course of construction, we find precedent for same in case law. In the matter of *City of Jersey City vs. Bergen Square Realty Company*, the assessor assessed a building in the course of construction, as of the assessing date, and the Tax Board of Appeals, in an opinion handed down and reported in the 1941 Supplement of New Jersey Tax Reports, at page 109, affirmed the assessment placed upon the building in the course of construction on the assessing date (October 1st).

The same procedure was followed by the assessor in the Boro of Princeton when he valued the building owned by the Princeton University, which was in the course of construction on the assessing date. See *Princeton University vs. Boro of Princeton, State Tax Board*, February, 1914, 37 N. J. L. J. 178; New Jersey Tax Reports, 1912-1934, page 82. See also *Roman Catholic Diocese vs. City of Newark, State Tax Board*, April, 1913, 36 N. J. L. J. page 126; New Jersey Tax Reports, 1912-1934, page 54.

We are, therefore, of the opinion that the assessor has a duty to value all property even though in the course of construction, on the assessing date, in accordance with the law.

Respectfully submitted,

THEODORE D. PARSONS,
Attorney General.

By : BENJAMIN M. TAUB,
Deputy Attorney General.

JANUARY 29, 1951.

THE HONORABLE ALFRED E. DRISCOLL,
Governor of New Jersey,
Trenton, New Jersey.

FORMAL OPINION—1951. No. 8.

DEAR GOVERNOR:

Under date of June 8, 1950, we submitted to you a memorandum in which we advised you as to the state of the law respecting the filling of the office of Keeper of the State Prison in the event of a vacancy therein. Recently, you communicated to us your desire that, because of the importance of the question involved, we re-examine the statutes and render a formal opinion in the matter. Our re-examination has developed nothing conducive to a conclusion substantially different from that advised in our aforesaid memorandum.

It is our opinion that when the present Keeper of the State Prison (George W. Page) shall have vacated his office, the board of managers in charge of the State Prison will have both the authority and the duty to appoint, with the approval of the State board (Department of Institutions and Agencies), a chief executive officer of the State Prison who will have all the powers, functions and duties of the Keeper of the State Prison (also referred to in our statutes as the Principal Keeper of the State Prison); but that, in view of pertinent provisions of existing law, it is imperative that such chief executive officer be appointed with the title "Principal Keeper of the State Prison."

Section 30:4-3 of the Revised Statutes provides as follows:

Unless and until otherwise provided by the State board by rule, regulation or order formally adopted, each board of managers may determine the number, qualifications, powers and duties of the officers and employees of the institutions or agencies committed to its charge, and their compensation except as the same is fixed by statute or otherwise determinable by law. Each board, with the approval of the State board, shall appoint the chief executive officer of each institution or agency in its charge, and determine his official title. The chief executive officer shall appoint, with the approval of the board of managers, all officers and employees of the institution or agency. Nothing herein shall apply to the appointment of the Principal Keeper of the State Prison.

This section (30:4-3) had its source in section 114 of P. L. 1918, c. 147, which act is generally the source of Title 30 (Institutions and Agencies) of the Revised Statutes. The exception contained in R. S. 30:4-3 that nothing therein "shall apply to the appointment of the Principal Keeper of the State Prison" was contained in said source section and obviously was intended to correlate with the constitutional provisions then in effect (1844 Constitution, as amended; Art. VII, Sec. II, par. 3) prescribing that the Keeper of the State Prison (among others) "shall be nominated by the Governor and appointed by him with the advice and consent of the Senate" to hold office for five years. That such was the intent of that exception is borne out by section 302 of said 1918 act which provided that

Unless and until the provisions of the Constitution of this State in this particular shall be changed, the Principal Keeper shall be appointed by the

Governor, as heretofore, and shall hold his office for the term of five years. (Italics ours.)

This section (302 of the 1918 act) was omitted from the Revised Statutes by the revisers (who nonetheless noted, under section 30:4-3, that Art. VII, Sec. II, par. 3 of the 1844 Constitution should be referred to for appointment and term of the Principal Keeper, and set forth, under section 30:4-138, which we shall presently recite in part, the provision of that Constitution relating to the appointment of the Keeper of the State Prison by the Governor with the advice and consent of the Senate). However, this section, while omitted from the Revised Statutes, supports the view that the exception contained in R. S. 30:4-3, above recited, was necessitated by the then controlling constitutional provisions relating to the Keeper of the State Prison and that it was intended to prevail only so long as such constitutional provisions should remain in force. "The propriety of resorting to the legislative history of legislation to discover the meaning of ambiguous statutes is well recognized." *Murphy vs. Zink*, 136 N. J. L. 235, 239 (Sup. Ct. 1947); affirmed 136 Id. 635 (E. & A. 1947). The failure of the revisers to include in the Revised Statutes, section 302 of the 1918 act did not change the sense and meaning of the exception contained in section 114 of the same act, since that exception, as we have already pointed out, was, in the revealing light of its legislative history, intended to correlate with said section 302. "There is a presumption against a legislative intent to effect a change in substance by a revision of the general laws. . . . The intention to effect a change in substance must be expressed in language excluding a reasonable doubt." *Murphy vs. Zink, supra*.

Under the Constitution of 1844, as evidenced by the provision of that instrument above recited, the Keeper of the State Prison was a constitutional officer. But the Constitution of 1947, which by its own terms (Art. XI, Sec. I, par. 1) superseded the Constitution of 1844 as amended, makes no specific mention of that officer in any respect. Therefore, as regards the "particular" (sec. 302, 1918 act) concerning his appointment, the Constitution of this State has unquestionably been changed. Accordingly, the conclusion is inescapable that the effect of the exception contained in section 114 of the 1918 act and incorporated in R. S. 30:4-3 has expired, and that the injunction of the same section that "Each board, with the approval of the State board, shall appoint the chief executive officer of each institution or agency in its charge . . ." comprehends the appointment of the chief executive officer of the State Prison (as well as the chief executive officer of each of the other institutions or agencies).

At the outset we stated our opinion to be, in part, that "in view of pertinent provisions of existing law, it is imperative that such chief executive officer be appointed with the title 'Principal Keeper of the State Prison'." While R. S. 30:4-3 provides that each board shall determine the official title of the executive officer of each institution or agency in its charge, R. S. 30:4-138 provides that

The Principal keeper shall be the chief executive and administrative officer of the board of managers in charge of the State Prison. . . .

This and other provisions of law, in which reference is made to the Keeper (or Principal Keeper) of the State Prison, modify *pro tanto*, we think, that portion of R. S. 30:4-3 dealing with the determination of the titles of chief executive officers. Manifestly the 1918 Legislature, in including the State Prison in the statutory scheme governing various institutions and agencies of the State, was compelled to utilize the

then constitutional officer known as the Keeper of the State Prison. And whether referred to in the statutes as the "Keeper of the State Prison" or as the "Principal Keeper of the State Prison," he is one and the same officer.

In our deliberation of this matter we have not overlooked the provision of the Constitution of 1947 (Art. V, Sec. I, par. 12) which prescribes that the Governor "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." This provision is traceable to the Constitution of 1844 (Art. VII, Sec. II, par. 8). Mr. Justice Collins of our Supreme Court (1903) discussing, in *Ross vs. Freeholders of Essex*, 69 N. J. L. 143, affirmed 69 Id. 291 (E. & A. 1903), the similar provision of the Constitution of 1844, said: ". . . Had the Park Commission act been silent as to how the commissioners authorized should be appointed, I entertain no doubt that their appointment would have lain with the Governor, on the Senate's advice and consent." We think we have made it clear that the sections of the Revised Statutes above indicated as controlling in the matter here under review, coupled with the legislative history thereof as above set forth, evince an unmistakable legislative intent to make due provision by statute law for filling a vacancy in the office here in question.

Respectfully yours,

THEODORE D. PARSONS,
Attorney General.

By : DOMINIC A. CAVICCHIA,
Deputy Attorney General.

FEBRUARY 9, 1951.

HON. W. T. VANDERLIPP, *Director,*
Division of Planning and Development,
Trenton, New Jersey.

FORMAL OPINION—1951. No. 9.

DEAR MR. VANDERLIPP:

Further consideration has been given to your request for opinion as to whether Frank Holmes has authority to put up 30 or more pilings in the sand below high-water mark in front of his property without a permit from your board.

The answer to this is that he has no authority to make any erection or permanent obstruction of any kind without a permit from your board.

Under the Act of 1864, on the right to occupy lands under water in this State, the riparian commission was instructed to make a survey to ascertain the rights of the State in lands under water and to fix and establish exterior lines beyond which no pier, wharf, bulkhead, erection or permanent obstruction of any kind should be permitted to be made.

Under the second section of that act it was provided that until a report was made no grant or lease of any lands was to be made and permission was granted the commission to stay all proceedings, erections and obstructions until further direction of the Legislature.

In 1869 a supplement to the 1864 act mentioned exterior lines for piers, and the act further stated that no "erection or structure of any kind shall hereafter be erected, allowed or maintained beyond or exterior to the aforesaid bulkhead line * * * and which shall in no case extend beyond the line indicated for piers * * * nor shall any such pier be constructed in any other manner than on piles or on blocks and bridges* * *."

Sec. 15 of the supplementary act of 1869 prescribes the procedure when a person desires a grant for land under water, and states that the grantee may reclaim, improve and appropriate to his own use, the lands contained and described in the certificate subject to the regulations and provisions of the first and second sections of the act.

Under Sec. 19 of the 1869 act the commissioners were given permission to bring suit for ejectment against persons trespassing on or occupying lands of the State.

In 1891 there was passed an act which amended the original act of 1864. The amendatory act (p. 216) refers to the wharf act of 1851 and repeals it as to tides-waters of this State. It provided, however, that the *said repeal shall not be construed* to restore any supposed rights, usage or local common law, founded upon the tacit consent of the State or otherwise to fill in any land under water below mean high tide; and without the grant or permission of said commissioners, *no person shall fill in, build upon or make any erection on or reclaim any of the lands under the tideswaters of this State.* Any person so offending shall be guilty of a purpresture.

This act was construed by our courts in *American Dock vs. Trustees for the Support of Public Schools*, which gives a description of the rights of the State of New Jersey and shows its ownership in said lands, and refers to the law that I have cited above. The court said that public grants whether they be of lands or franchises are strictly construed. Public grants differ from grants between private persons. Grants between individuals are construed favorably for the grantee. Public grants are construed most favorably for the public and against the grantee. The grantee takes nothing not clearly given. (*American Dock vs. Trustees for the Support of Public Schools*, 39 N. J. Eq. 425.)

And in a similar case, Chief Justice Beasley, speaking on this subject said that "the State is never presumed to have parted with any of its property in the absence of conclusive proof of an intention to do so; such proof must exist either in express terms or in necessary implications." *Stevens vs. P. & N. R. R. Co.*, 5 Vr. 532, 553.

The acts above referred to bring us down to R. S. 12:5-3 which reads as follows:

"All plans for the development of any water front upon any navigable water or stream of this State or bounding thereon, which is contemplated by any person or municipality, in the nature of individual improvement or development or as a part of a general plan which involves the construction or alteration of a dock, wharf, pier, bulkhead, bridge, pipe line, cable, or any other similar or dissimilar water-front development shall be first submitted to the board. No such development or improvement shall be commenced or executed without the approval of the board first had and received, or as hereinafter in this chapter provided."

Under R. S. 12:5-2 it is provided that the board may, by appropriate action in any court, prevent the encroachment or trespass upon the water front of any of the navigable waters of this State or bounding thereon or upon the riparian lands

of the State and compel the removal of any such encroachment or trespass and restrain, prevent and remove any construction, erection or accretion injurious to the flow of any such waters.

In R. S. 12:3-4, on the repeal of the wharf act of 1851, it is specifically set forth:

"As to the future each revocable license, if the said lands covered by the license have not been wholly or in part lawfully reclaimed or built upon, is hereby revoked, and no occupation or reclamation of land under water without such legislative act or revocable license shall divest the title of the State, or confer any rights upon the party who has reclaimed or who is in possession of the same."

That is construed in the case of *In re Camden*, 1 N. J. Misc. 623.

R. S. 12:5-6 provides that any development or improvement as outlined in 12:5-3 which is commenced or executed without first obtaining the approval of your board shall be deemed to be a purpresture and public nuisance and shall be abated in the name of the State in such action as shall be appropriate.

It is my opinion that no person has a right to dredge in front of any waters of this State or build any structure in front of said riparian lands for the development of any water front upon any navigable water or stream of this State or bounding thereon without first obtaining the permission of your board.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By :/s/ ROBERT PEACOCK,
Deputy Attorney General.

RP: N

FEBRUARY 16, 1951.

HON. J. LINDSAY DE VALLIERE,
Division of Budget and Accounting,
Department of the Treasury,
Trenton, New Jersey.

FORMAL OPINION—1951. No. 10.

DEAR DIRECTOR:

In your communication of February fifteenth you request, on behalf of the Joint Legislative Committee on Appropriations, an opinion as to whether, under the provisions of the Tri-State Compact (R. S. 32:18-1 et seq.) creating the Interstate Sanitation Commission, the sum of \$15,000.00 is the minimum or maximum amount which the State of New Jersey is obligated to appropriate to said commission yearly.

It is our opinion that the sum of \$15,000.00 specified in R. S. 32:18-15 is neither the minimum nor the maximum amount which the State of New Jersey is obligated to appropriate to the Interstate Sanitation Commission yearly, but is the maximum amount which the State of New Jersey is obligated to appropriate only for the year, if any, in which the Governor does not approve a recommendation by the commission for a total appropriation which, by the percentages fixed in said section, calls for an appropriation by the State of New Jersey of an amount in excess of \$15,000.00.

The compact (R. S. 32:18-15) provides as follows:

ARTICLE XIV

1. The signatory States agree to appropriate annually for the salaries, office and other administrative expenses such sum or sums as shall be recommended by the commission and approved by the Governors of the signatory States, the State of New York and the State of New Jersey agreeing each to appropriate forty-five per cent (45%) thereof, and the State of Connecticut agreeing to appropriate ten per cent (10%) thereof. The State of New York and the State of New Jersey obligate themselves hereunder, however, only to the extent of fifteen thousand dollars (\$15,000.00) each in any one year, and the State of Connecticut obligates itself hereunder only to the extent of three thousand, three hundred thirty-three dollars and thirty-four cents (\$3,333.34) in any one year.

It will be noted that the sum specified as the yearly obligation for each signatory State reflects the percentage first fixed. The total of the specified sums is \$33,333.34. This reflects forty-five per cent (45%) each for New Jersey and New York, and ten per cent (10%) for Connecticut. But the significant feature is that the percentage appropriation first fixed is conditioned upon both the recommendation of the commission and the approval of the Governor. In other words, if the commission's recommendation does not have the Governor's approval, the State has no obligation to appropriate more than \$15,000.00 to the commission for the applicable year. Manifestly, the requirement of such approval is a protection to any signatory State whenever the amount recommended might not, in the judgment of the Governor, be grounded in necessity.

It follows, therefore, that the Governor's approval of the sum recommended by the commission places upon the Legislature the obligation to make the appropriation. Failure on the part of the Legislature to make the appropriation will result in a failure on the part of the State to comply with the terms of the compact.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: DOMINIC A. CAVICCHIA,
Deputy Attorney General.

dac;d

MARCH 9, 1951.

HON. ALFRED E. DRISCOLL,
Governor of New Jersey,
Trenton, New Jersey.

FORMAL OPINION—1951. No. 11.

DEAR GOVERNOR:

You have requested a formal opinion as to which of the two lists of nominations for Democratic appointees to county election boards, submitted by Congressman Hart and Senator O'Mara, respectively, should be recognized pursuant to R. S. 19:6-18, which provides, *inter alia*:

"The chairman of the State committee of each of such two political parties shall during the month of February in each year, in writing, nominate one person residing in each county, duly qualified, for member of the county board in and for such county."

In your request for this opinion, it is stated that Senator Edward J. O'Mara has been, by letter, certified by Charles Quinn, Secretary of the Democratic State Committee, to have been duly elected Chairman of the Democratic State Committee and that Congressman Edward J. Hart, by telegram, has advised that he is the Chairman of the Democratic State Committee. Briefs have been received from Congressman Hart and Senator O'Mara and an open hearing has been held, at which oral argument was made and additional facts presented.

R. S. 19:5-4 states: "The annual meeting of the State Committee shall be held on the first Tuesday after such primary election . . . at which annual meeting the members of the committee in the year in which a Governor is to be elected, shall elect some suitable person as chairman to hold office for four years, or until his successor is elected."

After the primary election of 1949, Edward J. Hart was elected for the four-year statutory term, which will not expire until 1953. His election to the office of Chairman of the Democratic State Committee has been heretofore recognized by you by the acceptance of his nomination of persons for appointment to the membership of the county election boards.

The Constitution of the State Committee of the Democratic Party, adopted January 9, 1950, by Article IV. "MEETINGS" provides:

"The State Committee shall meet annually immediately prior to the State Convention defined in Revised Statutes, section 19:5-6, and it shall be the policy that from time to time special meetings shall be had at the call of the chairman or at the call of eleven or more of the members on petition in writing. Meetings shall be held only on notice given in writing seven or more days from the date of sending of notice unless the chairman shall declare, in writing, an emergency to exist and summons the State Committee by written notice delivered not less than 48 hours before such call."

On February 1, 1951, the following telegram was sent to the members of the State Committee:

"An important dinner and business meeting of the State Committee will be held at Hotel Hildebrecht, Trenton, on Monday, February fifth, at six-thirty P. M. to discuss the party situation and any other business that may come before the meeting.

(Signed) CHARLES QUINN,
Secretary."

The minutes of this meeting recite that Chairman Hart was absent. The discussion at the meeting is set forth in the minutes. After the discussion, a motion was carried "that Edward J. Hart be removed as State Chairman because of his persistent failure to perform the duties required by law and the Constitution and By-Laws of the State Committee, and because he has wilfully and wantonly refused and neglected to discuss with the State Committee, at any time, campaign strategy, party policy, patronage, conditions of the party, or anything for the good of the Democratic Party."

After the passage of this motion, the minutes read as follows:

"Mrs. Hawkins then nominated, seconded by Mr. Ewart, Edward J. O'Mara for the office of Chairman of the State Committee of the Democratic Party in New Jersey. No other nominations were made. Mr. O'Mara was then elected Chairman."

The purpose of the meeting on February 5th was not set forth in the notice. The minutes do not disclose that Congressman Hart was apprised of the charges to be made against him or that he was afforded the opportunity of a hearing. To determine the issue raised in your request for this opinion it is not necessary to decide the legal questions pertaining to the form of the petition calling the meeting, the sufficiency of the notice of the meeting, and the propriety of the action on the charges against Congressman Hart, in his absence and without notice to him.

The former New Jersey Supreme Court, in *Driscoll vs. Sakin*, 121 N. J. L. 225, affirmed 122 N. J. L. 414 said:

"The act creating the office (member of county election board) provides for the nomination by the State Chairman of the two most powerful political parties of two of the members of the board. To insure a democratic form of government, it is necessary that there be at least two strong political parties holding different views upon political questions. Only as a result of public discussion can a wise policy be adopted. To insure honest elections it is essential that the county board be made up at least by the choice of both powerful political parties."

In the same case, which was followed by *Haines vs. Appleton*, 123 N. J. L. 492, the delegation to the State Chairman of the nomination of the members of the county boards was held to be constitutional. The respective State Chairmen of the two major political parties are vested with authority, in the words of the Court in *Driscoll vs. Sakin, supra*, to "act in matters of high public interest, and . . . are subject to constitutional restraint. . . ."

As was said in *Nixon vs. Condon*, 286 U. S. 73:

" . . . when those agencies (State political organizations) are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the State itself, the repositories of official power."

The nomination of the members of the county election boards and the election of the State Chairman are controlled by statute. The determination whether you should accept the nominations submitted by Congressman Hart or Senator O'Mara depends upon the construction of the statute. R. S. 19:5-4 reads as follows:

"At the primary for the general election of the year in which a Governor is to be elected, one male and one female member of the State committee of each of the political parties shall be elected in each county. The male receiving the highest number of votes among the male candidates and the female receiving the highest number of votes among the female candidates shall be declared elected.

"The members of the State committee of each of the political parties shall take office on the first Tuesday following their election, on which day the terms of all members of such committees theretofore elected shall terminate. The annual meeting of the State committee shall be held on the first Tuesday after such primary election at the hour and place to be designated in a notice in writing to be mailed by the chairman of the outgoing State committee to each member-elect, at which annual meeting the members of the committee in the year in which a Governor is to be elected, shall elect some suitable person as chairman to hold office for four years, or until his successor is elected. The committee shall have power to adopt a constitution and by-laws for its proper government. The chairman shall preside at all meetings of the committee and shall perform all duties required of him by law and the constitution and by-laws of such committee.

"A member of a State committee of any political party may resign his office to the committee of which he is a member, and upon acceptance thereof by the committee a vacancy shall exist. A vacancy in the office of a member of the State committee of any political party, howsoever caused, shall be filled for the unexpired term by the members of the county committee of such political party in the county in which the vacancy occurs.

"Members of the State committee shall serve for four years or until their successors are elected. The State committee shall choose its chairman and the member or members of the national committee of its political party."

The statute clearly provides that the term of the chairman shall be "for four years or until his successor is elected." The statute has as its source chapter 187, of the Laws of 1930. It is significant that R. S. 19:6-5 which has its source in the same act provides that members of district election boards "may be summarily removed from office, with or without cause."

R. S. 19:6-8 provides:

"The terms of office of the members of the district boards shall be for one year or until their successors are appointed . . ."

When the identical words were used by the Legislature in fixing the term of members of the district boards, the words "or until their successors are appointed" evidently were not considered to empower a summary removal since the Legislature deemed it necessary to specifically provide by statute that a member might summarily be removed from office with or without cause.

The Supreme Court of this State in *Ringle vs. Republican State Committee*, 122 N. J. L. 435, in construing the same words of the act relating to the term of members of the State committee, as it was before the amendment of 1948, said:

"The statute, R. S. 19:5-4, provides for a term of office of three years 'or until a successor is elected,' and in case of vacancy, howsoever caused, to be filled by members of the county committee in the county where the vacancy occurs.

"We conclude that the voiding of the election of the successor of relator caused a vacancy in the office, R. S. 19:3-25; and that relator was thus continued in office until the election of his successor."

Thus the Legislature has indicated that the words "or until their successors are appointed" did not carry the power of summary removal with or without cause and the Supreme Court has construed "or until a successor is elected" to authorize the incumbent to "hold-over" until the election of his successor.

It is not necessary to discuss the effect of the sentence "the committee shall have power to adopt a constitution and by-laws for its proper government" since the constitution and by-laws could not prevail against the provisions of the statute which are so definite and clear. Moreover there is nothing in the constitution of the Democratic State Committee to authorize what was done in this instance.

There has been no decision submitted to me in either of the briefs, and research has disclosed no decision of the courts of this State which construes the statute to give to the State committee power to remove the chairman for cause. Until a court of competent jurisdiction construes the statute otherwise, its certain words must control.

Since the statute fixes the specific term of four years and does not provide for the removal of the State Chairman, I advise you that you should accept and appoint the nominations for members of the county boards of elections submitted by Edward J. Hart who was duly elected as State Chairman, who has been recognized as such in the acceptance of nominations heretofore made by him, and who is now exercising the statutory authority vested in that office.

Respectfully yours,

THEODORE D. PARSONS,
Attorney General.

APRIL 3, 1951.

HON. JOHN H. BOSSHART,
Commissioner of Education,
 175 West State Street,
 Trenton 8, New Jersey.

FORMAL OPINION—1951. No. 12.

DEAR COMMISSIONER:

You have requested the opinion of this office concerning the right of colleges in this State to confer what may be termed "degrees in course" and "honorary degrees," respectively. It is believed that your specific inquiries may be fairly stated and answered as follows:

1. Does a college which conferred degrees in course prior to March 17, 1891, have authority generally, without prior approval from the State Board of Education, to award other degrees in course not given by said college prior to the aforesaid date? For example, if a college conferred only a bachelor of arts degree before 1891, may it now confer a master of arts or bachelor of science degree without State Board approval? The answer is "Yes."

2. May any college confer honorary degrees without first securing approval of the State Board of Education? Answer—"Yes."

The sections of the Revised Statutes which govern these questions read as follows:

18:20-2. Right of colleges to give diplomas and confer degrees. Subject to the provisions of sections 18:20-5 to 18:20-17 of this title, any college in this State founded or hereafter to be founded under and by virtue of the provisions of a general act of the Legislature, may, from time to time, give diplomas and confer degrees upon those who shall successfully complete prescribed courses of study, and confer honorary degrees upon such others as shall be recommended therefor by its board of trustees. Nothing in this section shall be construed to authorize a college to confer any degree or diploma authorizing the practice of medicine, dentistry, or law.

18:20-8. Submission and approval as prerequisite to conferring of degrees. No school, corporation, association or institution of learning conducted within this State, nor any officer or member thereof, in recognition of the attainment or proficiency of any person in pursuing or graduating from any course or courses of study, arts, or learning conducted by it or another such school, corporation, association or institution, shall admit any such person to the grade of a degree by conferring, or participating in conferring, any degree upon any person without first submitting the basis or conditions thereof to the State Board of Education, and obtaining its approval thereof, and of the practice of conferring and bestowing such degrees.

Nothing contained in this section shall apply to any school, corporation, association or institution of learning, or officer or member thereof, which was established and conducted within this State on March seventeenth, one thousand eight hundred and ninety-one, and was then in the course of admitting persons to the grade of a degree by conferring the same upon them in recognition of their attainments or proficiencies, nor to any school conducted under the public school system.

Under section 18:20-2, the colleges clearly possess the right to confer in general both degrees in course and honorary degrees without approval from the State board, except as such approval may be required by anything contained in sections 18:20-5 to 18:20-17. Of the latter, only section 18:20-8 appears material to the present discussion, and the questions raised are thus narrowed to the effect, if any, of that section upon the general grant of authority contained in 18:20-2.

Section 18:20-8 is manifestly concerned only with degrees awarded for attainment or proficiency "in pursuing or graduating from any course or courses of study, arts or learning," and thus it does not affect the general power of any college to bestow honorary degrees. The same section provides, furthermore, that "nothing in this section shall apply to" any institution of learning which in 1891 was conferring degrees in recognition of attainment or proficiency. That proviso, in my opinion, renders the entire section inapplicable to any college which was bestowing any degree in course in 1891, thereby leaving such college free generally to establish and award new degrees in its own discretion.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: THOMAS P. COOK,
Deputy Attorney General.

APRIL 16, 1951.

CIVIL SERVICE COMMISSION,
 State House, Trenton, N. J.

FORMAL OPINION—1951. No. 13.

GENTLEMEN:

You request to be advised whether a State employee whose services were terminated because of absence occasioned by acute alcoholism is entitled to the vacation leave, which he claims, with pay.

The answer is no.

Such employee has by his conduct forfeited any and all vacation rights.

In *Walters vs. Pension Commission, Trenton*, 120 N. J. L. 39, it was held that a police officer forfeits his right to pension if he is convicted of malfeasance in office even though he had become eligible for pension by reason of having served 20 years and having attained the age of 51 years.

In *McFeeley vs. Pension Commission of New Jersey*, 8 N. J. Super. 575, the court has gone further. It was held that a policeman who was discharged was not entitled to recover amounts which he had contributed to the pension fund.

In *Pendlebury vs. Passaic Valley Sewage Commission*, 122 N. J. L. 344 it was further held that a discharged employee was not entitled to a bonus.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: JOHN W. GRIGGS,
Deputy Attorney General.

jwg:n

MARCH 22, 1951.

THE HONORABLE SANFORD BATES, *Commissioner*,
Department of Institutions and Agencies,
 State Office Building,
 Trenton, New Jersey.

FORMAL OPINION—1951. No. 14.

DEAR COMMISSIONER:

You desire to be advised regarding a situation at the State Prison which concerns a prisoner under sentence of death. It seems that he was convicted in a county court of murder in the first degree, without recommendation, and the death sentence was imposed. Thereafter, as a result of an appeal filed by him, the Supreme Court of New Jersey affirmed the conviction. The prisoner's application to the United States Supreme Court for certiorari was denied.

Thereupon the prisoner sought issuance of a writ of habeas corpus in a Federal District Court and the writ was denied. The prisoner now appeals to the United States Court of Appeals for the Third Circuit and has served upon the Warden of the State Prison a notice of his said appeal.

You desire to be advised whether the service by the prisoner, or his counsel, upon the Warden of the State Prison, of such notice of appeal to the United States Court of Appeals, shall operate, without more, as a stay of execution.

It is our opinion and we advise you that such notice of appeal, as described herein, when served upon the Warden of the State Prison, will not, per se, operate as a stay of execution, for the reasons set forth below.

With respect to this general situation, Title 28, section 2251, U. S. C. A., controls, and an examination thereof reveals the following provisions:

"A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

"After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending." (June 25, 1948, c. 646, 62 Stat. 966.)

It will be observed from the foregoing provision of the federal statute that the appellant in habeas corpus proceedings in the federal jurisdiction must make application for a stay of any proceedings against such person detained in any State court or detained by or under the authority of any State. It will further appear that if no such stay is granted, any such proceedings against any such prisoner so detained shall be as valid as if no habeas corpus proceeding or appeal were pending.

Accordingly, we advise you that in the situation you describe, the mere filing of a notice of appeal to the United States Court of Appeals by the prisoner involved is not sufficient to stay the execution, which we understand in the instant matter, with respect to this prisoner, has been scheduled by order of the court for the week of April 15th.

In view of the actual pendency of execution proceedings and because prisoner's counsel, when submitting a notice of appeal, observed that in his opinion it would

act as a stay, it would seem advisable for you to notify counsel for the prisoner that a notice of appeal filed by him is not considered as a stay of execution.

Very truly yours,
 THEODORE D. PARSONS,
Attorney General of New Jersey.

By: EUGENE T. URBANIAK,
Deputy Attorney General.

ETU:HH

JULY 2, 1951.

HON. CHARLES R. ERDMAN, JR., *Commissioner*,
Department of Conservation,
 520 East State Street,
 Trenton, N. J.

FORMAL OPINION—1951. No. 15.

DEAR COMMISSIONER ERDMAN:

I have your letter of June 8th on the question presented as to whether or not the Riverton Yacht Club has a right to fill in, build upon or make any erection of or reclaim any of the lands under the tidewaters of this State without the grant or permission of the Department of Conservation and Economic Development.

It is my opinion that the Riverton Yacht Club has no right to fill in, build upon or make any erection on or reclaim any land under the tidewaters of this State in front of its yacht club without the grant or permission of the Department of Conservation and Economic Development.

The Legislature of New Jersey passed an act (P. L. 1852, p. 208) to incorporate the Riverton Improvement Company, under which act permission was granted to lay out streets and erect thereon the Town of Riverton; to construct wharves on the river for landing steamboats and other vessels. Under this act, Daniel L. Miller retained a lot on which to erect a dwelling. In section 6 the act provided that the company was authorized to improve that portion of the land to be held by erecting buildings, laying out lots and streets and building a wharf for commercial and shipping purposes, and not to injure the navigation of said river.

The Riverton Improvement Company sold the property to R. Biddle in 1868, and Biddle conveyed to Riverton Iron Pier Company in 1886. That company sold to Riverton Yacht Club in 1918.

Under 12:3-4 (P. L. 1891, p. 216) no person or corporation shall fill in, build upon or make any erection on or reclaim any of the lands under the tidewaters of this State without the grant or permission of the Department of Conservation and Economic Development, and any person or corporation so offending shall be guilty of a purpresture. By the reorganization Act of 1948, p. 1783 the powers and duties formerly exercised by the Board of Commerce and Navigation were transferred to the Department of Conservation and Economic Development.

A legislative grant is to be strictly construed and its general terms should not be extended to include specific rights not clearly included within its language. *Morris Canal vs. Central R. R.* 16 N. J. Eq. 419; *Townsend vs. Brown*, 24 N. J. L. 80; *New Jersey Zink vs. Morris Canal*, 44 N. J. Eq. 398; *Katzenbach vs. Armstrong Cork Co.*, 99 N. J. Eq. 32.

Under the cases cited above, it was held that so far as such reclamation took place within the proper limits, said right is a mere license and subject to withdrawal by the State if not previously acted upon by actual reclamation or improvements. and as there has been a specific appropriation by the Legislature of such portions of the land in question as have not been actually reclaimed or otherwise improved or built upon at the time of the passage of P. L. 1891, p. 216, the defendant will be restrained from proceeding with the reclamation and improvement of such lands. The Department of Conservation and Economic Development has a right under R. S. 12:3-8 to begin ejectment proceedings. This has been carried down from section 12 of the original supplement of 1869, authorizing the old commission to bring ejectment proceedings for trespass on lands under water. *Seacoast &c. vs. American Timber Co.*, 92 Eq. 221.

The alleged right claimed by the Riverton Yacht Club to reclaim riparian land or to erect any building adjacent to its upland is a mere license or privilege since said club has not built or reclaimed any of the land prior to the 1891 act cited above. The Riverton Improvement Company under the legislative grant of 1852 could only build a wharf for commercial and shipping purposes and not to injure the navigation of said river. The Riverton Yacht Club is not engaged in commercial pursuits and for reasons stated has no right to erect buildings on the land under water without the grant or permission of the Department of Conservation and Economic Development.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By : ROBERT PEACOCK,
Deputy Attorney General.

APRIL 16, 1951.

HONORABLE SANFORD BATES,
Commissioner of Institutions and Agencies,
Trenton, New Jersey.

FORMAL OPINION—1951. No. 16.

DEAR COMMISSIONER:

Reference is made to your letter of March twentieth, in which you ask whether persons employed in connection with the operation of commissaries in State institutions are State employees.

The answer is "Yes."

In your letter you point out that the persons so employed have no civil service status and that their wages are paid from profits derived from the operation of the respective commissaries. These circumstances are of no consequence in the determination of this question.

Commissaries in State institutions are maintained by warrant of law. Section 30:4-15 of the Revised Statutes provides, in part, that

The board of managers of a charitable, hospital, relief or training institution or noninstitutional agency may maintain a commissary or store for the sale of commodities to patients or inmates under rules adopted by the board. The cost of establishing the commissary or store may be defrayed out of any funds appropriated for current maintenance. . . .

We therefore experience no difficulty in concluding that persons employed in connection with the maintenance or operation (by the respective State institutions) of commissaries or stores established by authority of the provisions of law above cited (source P. L. 1931, c. 13) are State employees.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: DOMINIC A. CAVICCHIA,
Deputy Attorney General.

dac:d

APRIL 27, 1951.

THE HONORABLE SANFORD BATES, *Commissioner,*
Department of Institutions and Agencies,
State Office Building,
Trenton, New Jersey.

FORMAL OPINION—1951. No. 17.

DEAR COMMISSIONER:

You advise that certain of the private hospitals coming under jurisdiction of your department, and being subject to license under the provisions of R. S. 30:11-1 et seq., as amended, contemplate the establishment of a practice which would require patients of said hospitals to remain in the custody of the institutions after their treatment was concluded, such custody to operate as a guarantee for payment of the costs of furnishing medical care and hospitalization.

You desire to be advised whether there is any warrant in law for such practice and whether any such institution can legally hold a debtor patient in this type of custody pending payment of such hospital bill for medical care and treatment.

It is our opinion and we advise you that such a practice would be completely without warrant in law and, in addition, is suggestive of false imprisonment. A careful examination of the pertinent statutes and the provisions of our Constitution fails to disclose any grounds upon which such a practice might be justified, and none exists. It is a fundamental concept of both the Constitution of New Jersey and that of the United States that persons shall not be imprisoned for debt. (N. J. Const. Art. 1, par. 13.) Nor shall any person be deprived of his liberty without due process of law. (U. S. Const. Amend. XIV.) The deprivation of liberty of an individual within the four walls of a charitable hospital institution is just as much imprisonment as if that individual were confined in a State or county penal institution.

For the reasons set forth above, we advise you that the suggested procedure of holding debtor patients in custodial detention in a hospital facility, to guarantee payment of the costs of medical care and treatment, is illegal and cannot be permitted to exist under the law in this State.

Very truly yours,

THEODORE D. PARSONS,
Attorney General of New Jersey.

By: EUGENE T. URBANIAK,
Deputy Attorney General.

ETU: HH

JULY 3, 1951.

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

FORMAL OPINION—1951. No. 18.

DEAR MR. BORDEN:

You have requested my opinion with reference to the following facts:

An employee of the State, holding a position in the unclassified service for some years prior to World War II, secured a military leave of absence from the State in order to enter military service. On his return from military duty during World War II he rejoined the State service, again in an unclassified position. The employee now seeks to enroll in the State Employees' Retirement System and to purchase credit for his previous State service. You now inquire whether the State, rather than the employee, is obligated to pay to the retirement system the contributions that would have been paid by the State, during the period of the employee's war service, had the employee been a member of the State system during that time.

Our statutes protecting the pension rights and benefits of public employees entering military service, and requiring the employing governmental agency or department to pay the required pension contributions for such persons, namely, chapter 326, P. L. 1942 as amended (R. S. 38:23-5 and 38:23-6) refer or relate to employees, who, at the time of entry on military service, was or is a member in good standing of a pension fund or system.

In my opinion the employee, whose application is now before you, not having been a member of the State retirement system when he entered on active military service, cannot now receive the benefits of the statutes cited in the preceding paragraph.

The question presented is not one of first impression with this office. Under date of April 14, 1944, inquiry was made by the State Employees' Retirement System, whether if applications for employees in the unclassified service, absent on military service, are not filed by the employing department, and such employees "return to their positions after the close of the war and then make application for membership, would the department be required to pay their contributions for the period of military service?"

Under date of April 18, 1944, and again under date of May 24, 1946, this office answered the above question in the negative. It has been suggested that perhaps chapter 118, P. L. 1943 (R. S. 43:14-2.8) was not considered when the aforementioned opinions were written. This statute provides as follows:

"Any State employee who was or shall hereafter be inducted into the military or naval service of the United States before making application for enrollment in the retirement system shall be accepted as a member upon his filing application, and his regular salary deductions as determined by the board of trustees shall be paid to the retirement system by the employing department as provided by chapter two hundred fifty-two, pamphlet laws of one thousand nine hundred and forty-two, as amended by chapter three hundred twenty-six, pamphlet laws of one thousand nine hundred and forty-two. This provision shall not apply to any employee whose appointment is temporary or seasonal."

Although this statute is not specifically mentioned in the April 18, 1944 and May 24, 1946 opinions of the Attorney General hereinbefore referred to, it is to be assumed that consideration was given thereto. In any event, the conclusion hereinabove expressed by me has not been reached without due consideration of said act.

Chapter 118, P. L. 1943, was enacted to enable State employees, who were, or who might be, inducted into military service, prior to enrolling in the State system, to join such system, and to have the State make the required contributions for them for the period of military service, provided the benefits of the act were claimed by the employee, *while in the service.*

In order to reach a contrary conclusion, I would have to hold that chapter 118, P. L. 1943, in fact repeals chapter 326, P. L. 1942, by wiping out for all purposes, the requirement in the latter act, that employees affected, be members in good standing of a pension fund, at the time of entry into military service. A general repealer is not to be presumed, in the absence of specific words, or evidence of specific intention, to that end. I find no such intention or evidence in chapter 118, P. L. 1943. What the latter means to me, is that it attempted to prevent the loss of pension rights on the part of employees, who were inducted, before they made application to enroll in the State system. It was not intended to assist State employees, in the unclassified service, who did not join the State system prior to going into the military service, or who did not endeavor to join while in the service. In short, the two statutes must be read together.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: DANIEL DE BRIER,
Deputy Attorney General.

MAY 4, 1951.

HON. R. J. ABBOTT,
State Highway Commissioner,
Trenton, New Jersey.

FORMAL OPINION—1951. No. 19.

DEAR COMMISSIONER:

You have requested our opinion as to whether you have the authority, provided the consent of the State House Commission is obtained, to award a contract for repair work on a State highway bridge on the basis of the cost of material, labor and equipment, plus a fixed fee to cover overhead and profit, where it is practically impossible to estimate the amount of the work to be done. You have called our attention to the fact that while an extensive job of removing and replacing the concrete on the bridge in question will probably be required, you cannot properly estimate the extent of the repairs needed until the asphalt block pavement has been removed and the underlying concrete deck has been probed. With these uncertainties, it is difficult to prepare plans and specifications for competitive bidding on the regular contract basis without inviting extraordinarily high quotations from bidders. You have indicated, however, that you would advertise for bids on the fee to be paid for overhead and profit.

In my opinion, you have the authority to proceed as above outlined, subject to the qualification that bids should be invited on labor, material and equipment to whatever extent is practicable, and that the contractor's cost in respect to any item should be a basis of the contract only when competitive bidding on that item is not practicable.

The pertinent provisions of the State Highway Law (R. S. 27:7-25 et seq.) require advertisement for bids, competitive bidding, and award of the contract to the lowest responsible bidder on a fixed price basis. However, section 52:34-5 of the Revised Statutes provides in its second paragraph as follows:

"Nothing in this chapter shall be construed to prohibit the State House Commission, by unanimous vote of all of the members thereof in open public meeting from awarding any contract or authorizing the award of any contract for the doing of any work or the furnishing of any goods, chattels, supplies or materials, without first advertising as herein required, in case of public exigency, or for the purchase of perishable food supplies, or where property has been destroyed by fire or by the elements, and the determination of the State House Commission that a public exigency exists shall not be questioned."

This language is sufficiently broad to cover contracts made by all departments and commissions of the State Government, including the Highway Department. That it should be so interpreted is manifest when the quoted section is read, as it should be, in conjunction with section 52:34-1, which precedes it in the same chapter. Section 52:34-1 requires public advertising for bids on all contracts over \$1,000 made by "any State department or commission" and payable with State funds. Section 52:34-5 evidently pertains to at least as broad a category of contracts as is covered by 52:34-1, and therefore it appears clearly applicable to State highway contracts.

It would seem, furthermore, that one of the purposes of section 52:34-5 is to protect the interest of the State by authorizing a waiver of the usual bidding procedure where, as here, the latter would probably result in excessive quotations from bidders because of the uncertainties involved in the work.

For the foregoing reasons, the State House Commission may grant the authority here sought so far as a public exigency justifies such action. In the circumstances presented, however, the exigency would appear to exist only to the extent that the use of competitive bidding would not operate to the benefit of the State. In respect to items on which competitive bids can appropriately be secured, the regular procedure in the Highway Law should be followed.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: THOMAS P. COOK,
Deputy Attorney General.

MAY 31, 1951.

HON. FRANK DURAND,
State Auditor,
State House,
Trenton, New Jersey.

FORMAL OPINION—1951. No. 20.

DEAR SIR:

You have requested an opinion as to whether the State Auditor has the power to conduct post-audits of the transactions and accounts kept by or for the New Jersey Turnpike Authority.

It is our opinion that the State Auditor has not only the *power* but also the *duty* to conduct post-audits of all transactions and accounts kept by or for the New Jersey Turnpike Authority.

Article VII, Section I, paragraph 6, of the Constitution of 1947, provides:

The State Auditor shall be appointed by the Senate and General Assembly in joint meeting for a term of five years and until his successor shall be appointed and qualified. *It shall be his duty to conduct post-audits of all transactions and accounts kept by or for all departments, offices and agencies of the State Government, to report to the Legislature or to any committee thereof as shall be required by law, and to perform such other similar or related duties as shall, from time to time, be required of him by law.* (Italics ours.)

An agency of the State is not essentially an agency of the State Government. In common speech and common apprehension the government of the State and the State itself are usually regarded as identical; the one is often confounded with the other, and often the former is meant when the latter is mentioned. *Poindexter vs.*

Greenhow, 114 U. S. 290. Counties and municipalities are agencies of the State but not of the State Government; so, too, with other entities created by law, as, for example, the Passaic Valley Sewerage Commissioners. See *Brickett vs. Lagay*, 134 N. J. L. 1 (E. & A., 1945). But the duty which the Constitution itself lays down for the State Auditor relates precisely to departments, offices and agencies of the State Government. If, then, the Turnpike Authority is an agency of the State Government, the State Auditor has the constitutional duty to conduct post-audits of transactions and accounts kept by or for it.

In *New Jersey Turnpike Authority vs. Parsons*, 3 N. J. 235, our Supreme Court (1949), taking up the point that the Turnpike Authority was constituted a body corporate and politic in the State Highway Department (N. J. S. A. 27:23-3), said:

This statutory provision is manifestly intended to be a compliance with the constitutional provision requiring that "all executive and administrative offices, departments, and instrumentalities of the State Government, including the offices of Secretary of State and Attorney General, and their respective functions, powers and duties, shall be allocated by law among and within not more than twenty principal departments," *Article V, Section IV, paragraph 1*. But the State Highway Commissioner is given no authority whatsoever over the Turnpike Authority. The Turnpike Authority is in but not of the State Highway Department and that fact does not make it any the less an independent entity, as the language of the entire act clearly demonstrates.

Whatever the significance of the distinction, as marked by the Supreme Court, between "in" and "of," that distinction nevertheless judicially confirms the fact that the Turnpike Authority is in the State Highway Department in compliance with Article V, Section IV, paragraph 1, of the Constitution. No reason suggests itself to us for recognizing the Turnpike Authority to be an agency of the State Government for the purpose of Article V, Section IV, paragraph 1, but not for the purpose of Article VII, Section I, paragraph 6.

Nor do we think it material that the Turnpike Authority is not dependent upon the State Treasury for its operations. While it may be true that the primary function of the State Auditor, the only officer authorized by the Constitution to be appointed by the Senate and General Assembly, is to examine into expenditures of money provided by the Legislature, it is equally true that the same paragraph of the Constitution which assigns to him the duty "to conduct post-audits of all transactions and accounts kept by or for all departments, offices and agencies of the State Government" also lays upon him the duty (besides that of reporting as required) "to perform such other similar or related duties as shall, from time to time, be required of him by law." Thus the Constitution does not confine the State Auditor's jurisdiction to such departments, offices and agencies of the State Government as shall receive appropriations from the State Treasury.

Will it be seriously questioned that the State Auditor would have the duty to conduct post-audits of the transactions and accounts kept by or for the Turnpike Authority, if the act creating that body had not provided (N. J. S. A. 27:23-14) that the Turnpike Authority "shall cause an audit of its books and accounts to be made at least once in each year by certified public accountants"? However that may be, this statutory provision does not oust the State Auditor of post-audit jurisdiction over the Turnpike Authority. From the standpoint that the Constitution is not a

grant but a limitation of legislative power (*State vs. Murzda*, 116 N. J. L. 219), the constitutional prescription of duty for the State Auditor is, we think, *pro tanto* a constitutional restriction upon the Legislature. We are not to be understood as saying that it was the intention of the Legislature to relieve the State Auditor of post-audit jurisdiction over the Turnpike Authority. We are only to be understood as making the point that the Legislature could not, even if it so desired, make effective provision to transfer to another person or other persons the duty assigned to the State Auditor by the Constitution in clear and imperative language.

In this connection, it is to be observed that neither the Constitution nor the implementing statute relating to the State Auditor (R. S. 52:24-1 *et seq.*) requires the State Auditor to conduct an *annual* post-audit of all departments, offices and agencies of the State Government. Therefore, the requirement, in the Turnpike Authority Act, of an audit to be made "at least once in each year by certified public accountants" evinces an unmistakable legislative intent that the annual report, which the same section of the act (N. J. S. A. 27:23-14) requires the Turnpike Authority to make to the Governor and the Legislature, shall truly, in the words of the Legislature, "set forth a complete operating and financial statement covering its operation during the year."

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: DOMINIC A. CAVICCHIA,
Deputy Attorney General.

JUNE 4, 1951.

COL. CHARLES H. SCHOEFFEL, *Superintendent,*
New Jersey State Police,
Trenton, New Jersey.

FORMAL OPINION—1951. No. 21.

DEAR COLONEL SCHOEFFEL:

This will acknowledge receipt of your letter regarding summons issued to Arthur G. Nelson, Annandale, New Jersey, for overloading a truck which bore farmer's registration license, with your request as to whether or not a farmer can be arrested and convicted for overloading a truck, where he is carting farm products.

The term "commercial motor vehicle" includes every type of motor-driven vehicle used for commercial purposes on the highways, such as the transportation of goods, wares and merchandise, excepting such vehicles as are run only upon rails or tracks and vehicles of the passenger car type used for touring purposes or the carrying of farm products and milk, as the case may be. Under this section the exemption would apply only to vehicles that are run on rails or tracks and the passenger car type used for touring purposes. These words must be read in connection with the words "or the carrying of farm products and milk, as the case may be." (39:1-1.)

Chapter 142 of the Laws of 1950 states that an applicant for registration for automobile commercial vehicles, trailers, semitrailers and tractors shall pay a fee based on the gross weight of the vehicle and load, and then proceeds to give the respective loads. Section 1 of the act reads in part:

"It shall be unlawful for any vehicle having gross weight of load and vehicle in excess of the gross weight provided on the registration certificate to be operated on the highways of this State."

This act refers to any vehicle having excess of gross weight provided on the registration certificate, and the registration certificate provides for the gross weight.

The act further states that the gross weight imposed on the highway by the wheels of any one axle of a vehicle shall not exceed 22,400 pounds.

We then come to the question concerning license plates for farmers.

Under 39:3-25 license plates are issued for trucks marked "farmer" upon evidence satisfactory to the commissioner that the applicant is a farmer who is actually engaged in the growing, raising and producing of farm products as an occupation. License plates issued under authority of this section are to be placed upon motor vehicles engaged exclusively in the carrying or transportation of applicant's farm products, raised or produced on his farm, and farm supplies, and not engaged in hauling for hire.

The last paragraph of this section states that the term "farmer" means any person engaged in growing, raising and producing farm products on a farm not less than three acres in area, and who does not engage in the business of buying farm products for re-sale. The term "farm products" means any food crop, cattle, hogs, poultry, dairy products and other agricultural products designed and to be used for food purposes.

The law in question does not exempt farmers from overloading. It only confers a special privilege on farmers for reduction of fees for the purposes of farmer, license plates. In every other place the act refers to "vehicle" and the intent of the Legislature was that the owner of every vehicle that violates the act concerning overloading should be prosecuted and a farmer should not be exempt from the same offense. It only confers on him special privileges for the price that he has to pay for a license, because the motor vehicle and traffic regulations set forth that a vehicle means every device in, upon and by which a person or property is or may be transported upon a highway, excepting devices moved by human power or used exclusively upon stationary rails or tracks. (39:1-1.)

It is my opinion, from the facts and law stated above, that any person driving a vehicle with a farmer's license, who violates the overloading act, can be successfully prosecuted and convicted.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: ROBERT PEACOCK,
Deputy Attorney General.

JUNE 8, 1951.

DR. E. C. NUROCK, *Secretary,*
New Jersey State Board of Optometrists,
162 West State Street,
Trenton, New Jersey.

FORMAL OPINION—1951. No. 22.

DEAR DOCTOR NUROCK:

Receipt is acknowledged of your letter relative to the terms of office of members of the New Jersey Board of Optometrists. Specifically, you request an opinion as to whether the term of Dr. Arthur R. Neale, Jr., who was last appointed a member of the Board in February of 1949, will expire on July 1, 1951, or in February of 1952.

It is my opinion that the term of Dr. Arthur R. Neale, Jr., as a member of the New Jersey Board of Optometrists, will expire on July 1, 1951.

The statute (R. S. 45:12-2) provides that upon the expiration of the term of office of a member, his successor shall be appointed by the Governor, subject to the provisions of R. S. 45:1-2 (not here relevant), "for a term of three years from July first of the year of appointment." A careful reading of this section leads to the conclusion that the Legislature, in employing the phrase "for a term of three years from July first of the year of appointment," meant for a term of three years from July first of the year in which the appointment should be made, in regular course, under the scheme of continuity of terms obviously intended by P. L. 1914, c. 222 (the source law) and preserved by force of the language R. S. 45:12-2.

At the time of his appointment in 1949, Dr. Neale was in office as a hold-over under the provision of R. S. 45:12-2 prescribing that "each member shall hold his office until his successor has qualified." However, the term for which he was appointed in 1949 (to succeed himself) had begun to run on July 1, 1948. Accordingly, Dr. Neale's current term will expire on July 1, 1951.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: HENRY SCHENK,
Deputy Attorney General

JULY 11, 1951.

MR. J. L. BROWN, *Deputy Commissioner,*
Department of Labor and Industry,
 State House,
 Trenton 7, New Jersey.

FORMAL OPINION—1951. No. 23.

DEAR MR. BROWN:

Re Minimum Fair Wage Standards Order No. 6 Governing Employment of Women and Minors in Restaurant Occupations.

Receipt is acknowledged of your request for a formal opinion relative to the collection of moneys paid to the Wage and Hour Bureau of the Department of Labor and Industry, by employers pursuant to direction by the aforesaid bureau.

Under date of March 1, 1951, we sent the following letter to Labor Commissioner Miller:

"Our attention has recently been directed to a situation involving the administration of Minimum Wage Order No. 6 by the Minimum Wage Division of your Department. The problem relates to the classification of so-called car hops or curb service employees as *non-service employees*.

As you know, there is a differential of about 12½ cents in the hourly rate between the service employee who receives 26½ cents an hour, and the non-service employee who receives 39 cents an hour. The differential presumably is based upon the contingency of gratuities.

Minimum Wage Order No. 6 defines *Service Employees* and *Non-Service Employees* as follows:

Service Employee. The term *Service Employee* as used in this Order shall mean any employee whose duties relate solely to the serving of food to patrons seated at tables, or to the serving of food to patrons seated both at tables and counters in establishments where all food served is prepared in a kitchen separate from the room in which food is served and to the performance of duties incidental thereto and who customarily receive gratuities from such patrons. (Italics ours.)

Non-Service Employee. The term *Non-Service Employee* as used in this Order shall mean any employee, except service employees.

The duties of car hops are to receive the food prepared within the restaurant building and serve it to patrons seated in their cars. The food is served on portable trays attached to the car doors. The incidence of gratuities is, if anything, greater than that attendant table waitresses.

Attached hereto is a copy of our file indicating that the precise question now under discussion was considered in 1947 when, pursuant to inquiry from White Castle System, Inc., the Minimum Wage Bureau was advised by this office that curb service employees should be classified as *Service Employees*.

After careful reconsideration of the duties of car hops and curb service employees we fail to discern any distinction and it is, therefore, our opinion that they must be classified as service employees.

This letter is being directed to you in an effort to rectify a misconception of the intent of the law, and to assist you in the administration of it."

Answering your questions as set forth in your inquiry:

1. What action should be taken with respect to the moneys that heretofore have been collected and dispersed by our Wage and Hour Bureau by reason of the differences in interpretation as to the definition of *service* and *non-service* employees?

As to the moneys that have heretofore been collected and dispensed by the administrator, it would seem to be virtually impossible for him to reacquire the funds because of the transient proclivities of those engaged in the type of work here involved.

2. What action should be taken with respect to the funds already collected as partial payment on pending claims? Should these funds be dispersed on a partial basis to the claimants or should they be returned to the employer?

The funds already collected as partial payment on pending claims should not be dispersed by the administrator, but should be returned to the employers, together with an explanation of the reason therefor.

3. If the funds referred to in question No. 2 are dispersed on a partial basis to the claimants, what action should be taken with respect to the uncollected portion of these same claims?

Every attempt must be made by the Wage and Hour Bureau to reacquire the funds partially dispersed, such moneys to be returned to the employers. (In such instances the Bureau has knowledge of the whereabouts of, and a modicum of control over the claimants.) As to the uncollected portion, the employers as well as the claimants must be advised of their correct and legal status.

4. What action should be taken with respect to the claims that have already been filed, or may hereafter be filed, by attorneys or individuals with respect to the differences in classification of *service* and *non-service* employees under this Order?

Each claim must be decided on its merits by the administrator, the latter keeping in mind the distinction between *service employee* and *non-service employee* as delineated by the Attorney General.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: GRACE J. FORD,
Assistant Deputy Attorney General.

JULY 17, 1951.

CAPTAIN JAMES A. COX, *President,*
Board of Commissioners of Pilotage,
 16 Elmwood Place,
 Elizabeth, New Jersey.

FORMAL OPINION—1951. No. 24.

DEAR CAPTAIN COX:

Receipt is acknowledged of your inquiry of July 5th in which you ask, what percentage of pilotage fees may members of your commission receive as compensation for services.

Such fees are now fixed at 1½ per cent by the Revised Statutes (R. S. 12:8-4) reading:

"The commissioners, as compensation for their services under this chapter, shall be entitled to receive one and one-half per cent on the fees received by the pilots for pilotage, to be divided among the commissioners according to the days they may have, respectively, attended at any meeting. They shall not be entitled to receive said commissions on extra pilotage for boarding offshore, or for fees received for what is called transportation or harbor pilotage."

You direct my attention to sections 24 and 24A appearing in the Compiled Statutes of 1910 (Vol. 3, page 3954). Section 24 fixed said fees at 1½ per cent. Section 24A increased said fees to 3 per cent.

The section numbered 24 was originally enacted in 1846 and under it the commissioners received 5 per cent. By the Act of 1850 (Section 24A) this percentage was reduced to 3 per cent.

Section 24 was amended by P. L. 1889, chapter 139, and the percentage was reduced to 1½ per cent. Section 24 was further amended by P. L. 1894, chapter 290, and the percentage remained 1½ per cent, and this act of 1894 had a section numbered 5, which repealed all acts or parts of acts inconsistent therewith, and thereby the section numbered 24A was superseded. It was included in 1910 although it had been superseded because the Compiled Statutes of New Jersey, published in 1910, was a compilation and not a revision.

Verly truly yours,

THEODORE D. PARSONS,
Attorney General.

By: JOSEPH LANIGAN,
Deputy Attorney General.

JL:rk

AUGUST 10, 1951.

HON. RANSFORD J. ABBOTT,
State Highway Commissioner,
 Parkway Avenue, Fernwood,
 Trenton, New Jersey.

FORMAL OPINION—1951. No. 25.

MY DEAR COMMISSIONER ABBOTT:

Your memorandum to Attorney General Parsons of May 24, 1951, requesting a formal opinion on the matter of drainage rights at locations described in Mr. Alex. W. Muir's memorandum to me of March 19, 1951, was referred by the Attorney General to me for such opinion.

Around the time of that reference, and on the evening of July 9, 1951, Mr. Muir, Mr. William A. Pfister, drainage engineer of the State Highway Department, and I met with members of the Planning Commission of Burlington Township, property owners and others involved at the Stevens School on Route 25, visited the locus in quo and held a general discussion of the matter.

This opinion is based upon information furnished me, supplemented by my observation referred to above.

I understand the history of the matter to be as follows: The section of highway involved is in Burlington Township, Burlington County, and was originally constructed as State Highway Route No. 2, Burlington-Roebling section. Subsequently this highway was renumbered Route 25. The station references given hereafter are in accordance with map entitled "New Jersey State Highway Department Plan, Profile of Route 25 (1927) Section 24, Burlington to Crystal Lake." Prior to the deed hereafter mentioned there were existing cross drains at stations 873/60 and 881/16.

On July 15th, 1936 Henry J. Bosshard, the then owner of land adjoining the highway on the north side between stations 871 and 882, executed a deed to the State of New Jersey for certain parts or parcels of his said land described therein, including land adjoining and on each side of the two cross drains referred to, by which acquisition, with others, Route 25 was widened. The deed was recorded in the Clerk's Office of Burlington County on July 17, 1936, in Book 558 of Deeds, page 53. This deed also conveyed, among other things, the following:

"And also such drainage rights, if any, as may be necessary or desirable adequately to drain and protect the aforesaid State Highway as constructed the full ultimate width thereof;"

In the year 1936, in connection with the widening of the said highway, the cross drain at station 873/60 was replaced by one at station 876/20 for the full width of said highway, and the one at station 881/16 was reconstructed at its exact former location to conform to the widening of the highway. The original drains, I am informed, had existed since about 1919.

The mere lengthening of the pipes under the highway as widened for these cross drains does not appear to have caused any more water to flow through them than before.

Thereafter part of the remaining property of the said Bosshart was improved by the then owner by the erection of houses and the construction of some sidewalk and curbing. Water now ponds in certain places on this remaining property and particularly at the foot of the embankment of the Pennsylvania Railroad which runs about parallel with the highway but some distance to the north, about the existence of which water the owners of the said houses complain and because of which they claim damage to their properties.

It would appear from observation of the ground that none of the water complained of comes from the cross drain at station 881/16, and that it would be practically impossible to determine exactly how much of it comes through the cross drain at station 876/20 as compared with that which comes off the highway itself or from the portion of the remaining land between the highway and the houses. While this does not affect the basis of this opinion, it should be noted in passing.

I have been further informed that the cross drains referred to were and are necessary and desirable to the adequate drainage and protection of the said highway and are no more than what is reasonably necessary and desirable for those purposes.

Under these circumstances it is my opinion that any one who purchased or acquired rights in said remaining property of the said Bosshart subsequent to said deed had (a) notice by record subsequent to the recording thereof of the rights of the State thereunder, and (b) actual notice, sufficient to put him upon inquiry, of the drainage rights of the State, or its claim thereto, by said deed, prescription or otherwise, by the open and visible existence and use of the said two cross drains, and hence purchased or acquired his rights in said remaining property subject to the rights of the State granted by said deed or otherwise acquired in, to or over said remaining property.

It is further my opinion that under the broad definition of "drain" under many authorities, the conditions existing at the time the deed referred to was given, as well as prior and subsequent thereto, the fact that the closing of an existing cross drain at one location and opening one at the other imposed no burden upon the remaining land aforesaid additional to that it had borne since 1919, and particularly the wording of the quoted clause of the deed, which includes not only the right to drain the highway itself, but also "drainage rights" "necessary and desirable" "adequately" to "protect" the said highway, the State of New Jersey has a right to maintain the two cross drains aforesaid as heretofore so far as the said remaining land of said Bosshart is concerned against the said Bosshart and against any and all purchasers thereof or claimants to rights therein from him, as set forth in the preceding paragraph.

And it is further my opinion that the said State, or the State Highway Commissioner or State Highway Department thereof, has in no way wrongfully or unlawfully caused the water conditions complained of, or any part thereof, as set forth above, and that neither it, nor its commissioner or department aforesaid, is liable for the damage complained of which may be caused thereby.

Very truly yours,

FRANK A. MATHEWS, JR.,
Deputy Attorney General.

August 22, 1951.

HON. ALFRED C. CLAPP,
Senator, Essex County,
744 Broad Street,
Newark 2, New Jersey.

FORMAL OPINION—1951. No. 26.

DEAR SENATOR CLAPP:

In the absence of Attorney General Parsons from the State, your letter of August 7, 1951, as Chairman of the Advisory Committee on Revision of the Statutes, has been referred to me for answer.

Your letter requests an opinion on the "constitutionality of the proposal to downgrade various offenses in our Crimes Act, which are now classified as misdemeanors, to the rank of disorderly persons offenses."

In view of the fact that your question does not confine itself to any particular offense, but is general in nature, I will attempt to answer it in an over-all manner.

Basically, the question is controlled by paragraphs 8 and 9 of Article I of the Constitution of 1947. Paragraph 8 provides that "No person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury * * *." Paragraph 9 provides that "The right of trial by jury shall remain inviolate * * *."

The Legislature has, from time to time, defined certain offenses against the State as misdemeanors and others as disorderly conduct and it has provided the method and manner for their punishment. Generally speaking, a person accused of a misdemeanor has the right to a trial by jury after a presentment or indictment by a grand jury and a person accused of disorderly conduct can be tried in a summary manner.

A reclassification of certain offenses presently defined in the Crimes Act as misdemeanors to that of disorderly conduct will change the method of punishment for those offenses from that of a trial by jury after a presentment or indictment by a grand jury to that of a summary proceeding.

Whether or not a person accused of an offense can be punished in a summary manner as a disorderly person will depend on the nature of the offense.

It has been said that all offenses which were triable by a jury after indictment at the time of the adoption of the Constitution of 1947 were clothed with the guarantees contained in paragraphs 8 and 9 of Article I.

Fortunately, the effect of these two paragraphs of the 1947 Constitution were discussed at length by Mr. Justice Case in the recent case of *Montclair vs. Stanczyevich* reported in 6 N. J. 479. This case held that only those offenses which were indictable at common law or those offenses for which an accused would have a right to a trial by jury at common law were included in the aforementioned guarantees.

I am therefore of the opinion that offenses classified as misdemeanors in the Crimes Act, which were not indictable at common law or those for which an accused would have a right to a trial by jury at common law, can be changed by the Legislature to disorderly persons offenses.

Very truly yours,

OLIVER T. SOMERVILLE,
Deputy Attorney General.

OTS:meh

SEPTEMBER 4, 1951.

HONORABLE WALTER T. MARGETTS, JR.,
State Treasurer,
 State House,
 Trenton 7, New Jersey.

FORMAL OPINION—1951. No. 27.

DEAR TREASURER MARGETTS:

I have before me your request for an opinion concerning the legality of certain provisions contained in a pamphlet entitled "Contract Work" promulgated by the Division of Purchases and Property in the Department of the Treasury.

The questioned provisions are paragraphs (a) and (b) of "Instructions to Bidders" and paragraph 3 of "General Conditions," as amended by "Addendum to General Conditions for Contract Work."

Paragraphs (a) and (b) of "Instructions to Bidders" read as follows:

"(a) The State of New Jersey agrees to include the interest of the successful bidder in a standard fire and extended coverage insurance policy and will furnish contractors with a certificate of said policy. The State of New Jersey, through the Director of the Division of Purchase and Property, will purchase and pay for this insurance.

(b) Within ten days after the contract is awarded, the successful bidder will be required to execute a performance and completion bond in the full amount of the contract price, which will be furnished and paid for by the State of New Jersey through the Director of the Division of Purchase and Property in the Department of the Treasury * * *"

Paragraph 3 of the "General Conditions" reads as follows:

"3. Bond.

The cost of the required contractor's performance bond shall not be included in the bid. The State of New Jersey, through the Director of Purchase and Property, will purchase and pay the premium on said bond, but the contractor agrees to furnish all information, financial statements, etc., and to execute such agreements and indemnities as are required by the bonding company in connection with the furnishing of said performance bond."

The "Addendum to General Conditions for Contract Work" reads as follows:

"Paragraph 3 is hereby amended by adding the following:

In accordance with section 17:31-1 of the New Jersey Statutes it is immaterial from what surety company the contractor procures the performance bond so long as the surety company is authorized under the laws of New Jersey to carry on a bonding business in the State of New Jersey and provided the surety is satisfactory. The contractor may deal with any agent or broker of his choice.

The premium charge which will be paid direct by the State of New Jersey to the surety is not to exceed the rate of 75 cents per \$100.00 of contract price. The remaining portion of the premium, if any, is to be paid by the contractor."

We will first dispose of the question concerning paragraph (a) of "Instructions to Bidders." This paragraph has reference to the matter contained in section (a) of paragraph 8 of the "General Conditions," which reads as follows:

"8. Insurance.

(a) Fire. Fire Insurance: The cost of fire insurance shall not be included in the bid. The State of New Jersey, through the Director of Purchase and Property, will purchase and pay for said insurance. The contractor agrees to furnish information as to the progress of the work on a monthly reporting basis. The State of New Jersey agrees to furnish the successful bidder with evidence of fire and extended coverage insurance in the form of a fire insurance certificate."

A reading of the "Instructions to Bidders" indicates that their purpose is to assist bidders in complying with the terms of the "General Conditions." It therefore follows that the propriety of paragraph (a) of the "Instructions" will depend upon the legality of section (a) of paragraph 3 of the "General Conditions."

We will therefore consider them as one.

As we view the situation, there is nothing improper in this condition. R. S. 52:27B-62 is sufficient authorization for the Director of Purchase and Property to procure such fire insurance as he considers necessary for safeguarding the interest of the State. Undoubtedly, the State's interest in any of its projects will increase as the work progresses and the Director is charged with the responsibility of purchasing insurance to protect that interest from loss by fire. Of course, the purchase of the insurance must be made in accordance with the law.

Your question concerning paragraph (b) of the "Instructions" and paragraph 3 of the "Conditions," as amended, presents a more serious problem.

For the reasons pointed out in our answer to your first question, these items will also be considered as one.

The broad question presented is whether the State can legally purchase contractor's performance bonds and pay the premiums therefor.

We are of the opinion that such a procedure cannot be justified under the law.

To understand the basis for this opinion, it is necessary to review the powers and duties of the Director of Purchase and Property. This task is simplified by the opinion in *Gann Law Books vs. Ferber, et al.*, 3 N. J. Super. 236, wherein those powers and duties are traced from the creation of the Office of State Purchasing Agent by chapter 68, P. L. 1916 to their incorporation in the Department of the Treasury by chapter 92, P. L. 1948 (N. J. S. A. 52:18A-1, et seq.).

The director, or his predecessors, had no duties with respect to insurance until the enactment of chapter 112, P. L. 1944 (N. J. S. A. 52:27B-1, et seq.) where, in section 62, in addition to being authorized to effect fire insurance upon the State House and the contents thereof, he was authorized "to purchase and secure all necessary casualty insurance, marine insurance, fire insurance, fidelity bonds, and other insurance necessary for the safeguarding of the interest of the State."

In view of the fact that the pamphlet, containing the questioned provisions and entitled "Contract Work," refers to construction projects as distinguished from the general activity of purchasing materials and supplies, it is pertinent to point out at this time that the director, or his predecessors, did not have jurisdiction over these matters until the enactment of chapter 112, P. L. 1944 (N. J. S. A. 52:27B-1 et seq.) and chapter 227, P. L. 1950 (N. J. S. A. 52:18A-19.2). The 1944 Act, section 64, transferred the authority over the construction and alteration of certain buildings from the State House Commission to the director. The 1950 Act made a similar transfer of authority concerning institutional buildings.

It is therefore apparent that the director's authority to purchase and pay for insurance rests upon section 62 of the 1944 Act and the risks contemplated at that time. If those risks include contractor's performance bonds, it must be found in the powers and duties transferred to him by the aforesaid acts.

An examination of the statutes governing the State House Commission (N. J. S. A. 52:20-1 et seq.) and the Department of Institutions and Agencies (N. J. S. A. 30:1-1, et seq.) fails to reveal that authority, nor are there any cases supporting that point of view.

In fact, there would be no such legal authority, because from time immemorial it has been the custom for one to support his obligation by his own undertaking or collateral. That this was the understanding of the Legislature on the subject is indicated by the mandate contained in N. J. S. A. 52:34-3, wherein it is provided that on contracts in excess of \$1,000 a bond for the faithful performance of the contract or agreement shall be furnished by the successful bidder. The same philosophy is apparent in N. J. S. A. 2:60-207 which requires a bond for additional labor and material. It is interesting to observe at this point that the only statute we can find authorizing payment by the State of premiums on surety bonds is N. J. S. A. 17:31-1 concerning the bonds of public officials.

Possibly the director considers the provision in section 62 of the 1944 Act to purchase "any other insurance necessary for the safeguarding of the interest of the State," and the provision in the 1951 budget for "premiums for insurance not otherwise provided" to be sufficient authority for the general condition. We do not think that this position is tenable. A surety bond is defined in N. J. S. A. 17:31-1 as "any bond, undertaking, recognizance, guaranty or other obligation required or permitted to guarantee the performance of any act, duty or obligation, * * *." In other words, the surety binds himself for the performance of an act by another who is already bound to perform the same. Insurance, on the other hand, is an undertaking to compensate the insured for loss on a specified thing from specified causes. (Words and Phrases 4, First Series 3674.) Two different objects are contemplated. The surety says he will perform if the obligor fails to do so. The insurer says he will pay a loss sustained by his insured. An understanding of this difference between the obligations of a surety and that of an insurer clearly indicates that the director does not propose to purchase insurance. It should not be assumed that suretyship and insurance are one and the same because both are regulated under laws generally designated as "insurance laws."

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: OLIVER T. SOMERVILLE,
Deputy Attorney General.

SEPTEMBER 26, 1951.

HON. PERCY A. MILLER, JR.,
Commissioner of Labor,
State House,
Trenton, New Jersey.

FORMAL OPINION—1951. No. 28.

DEAR COMMISSIONER:

Your letter of July 31, 1951, requesting an opinion as to the construction of the laws of 1940, chapter 153, section 17 relating to minors working as apprentices in construction projects received. The specific question presented is whether a minor under 18 years of age may be permitted to work as an apprentice in construction work of any kind.

It is my opinion that the clear intent of Public Laws of 1940, chapter 153, section 17 (as amended) is that no minor under 18 years of age shall be employed, permitted or suffered to work as an apprentice in or about or in connection with construction work of any kind.

A careful examination of the laws of 1940, chapter 153, section 17 (N. J. S. A. 34:2-21.17) discloses that it provides, among other things, that:

"No minor under eighteen years of age shall be employed, permitted or suffered to work in, about or in connection with the following:

* * *

construction work of any kind; * * *"

An apprentice is defined in Black's Law Dictionary (3rd Edition), p. 129, as "a person, usually a minor, bound in due form of law to a master to learn from him his art, trade or business and to serve him during the time of his apprenticeship." See also *Lyon vs. Whitmore*, 3 N. J. L. 413 (2 Penn. 845); *Heget vs. Christ Hospital*, 26 N. J. Misc. 189. An apprentice, however, is not necessarily a minor. The term "apprentice" includes all persons irrespective of age who by contract place themselves in a position to learn a trade and undertake to do so in good faith; so that a man over 21 may become an apprentice. *City of St. Louis vs. Bender*, 154 S. W. 88, 89. But the question presented relates to a minor under 18 years of age, and the statute must be further examined to determine whether it contains an exception from the general provision that no minor under 18 years of age shall be employed or permitted to work as an apprentice in construction work. Elsewhere in the same section (Sec. 17), after it provides that minors under the age of 18 years may not be permitted to operate or help in the operation of power-driven woodwork machinery, an exception is made for apprentices to operate same under conditions of bona fide apprenticeship under competent instruction and supervision. The same section, likewise provides that minors under 18 years of age may not be permitted to work in connection with grinding, abrasive, polishing or buffing machines, but makes an exception for the grinding of their own tools by apprentices operating under conditions of bona fide apprenticeship.

Manifestly, it was the intention of the Legislature to make provision for apprentices under 18 years of age to be employed only in specific instances. No exception, however, has been made for apprentices under 18 years of age to be employed

in construction work of any kind. It must be concluded that the intent was not to permit their employment as such.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By : LOUIS S. COHEN,
Deputy Attorney General.

LSC:rk

OCTOBER 1, 1951.

HON. J. LINDSAY DEVALLIERE, *Director,*
Division of Budget and Accounting,
State House,
Trenton, New Jersey.

FORMAL OPINION—1951. No. 29.

DEAR DIRECTOR :

Receipt is acknowledged of your letter of September thirteenth, in which you present to us for opinion the question whether contracts made by the Department of Conservation and Economic Development, "in connection with the appropriation of \$50,000.00 for the State Advertising Council," are subject to the provisions of law requiring State agencies to advertise for bids when the payment of State funds in excess of one thousand dollars is involved. We take it that you refer to the \$50,000.00 item in the current appropriation act labelled "Promotional Expenses (New Jersey Council)" and, as well, to the provisions of R. S. 52:34-1.

It is our opinion, and we advise you, that the provisions of R. S. 52:34-1 do not apply to expenditures from the appropriation labelled "Promotional Expenses (New Jersey Council)"; and that the Department of Conservation and Economic Development may enter into any contract or contracts in effectuation of the purpose of the appropriation, without advertising for bids.

The provisions of R. S. 52:34-1 are as follows:

No contract or agreement for the construction of any building, for the making of any alterations, extensions or repairs thereto, for the doing of any work or labor, or for the furnishing of any goods, chattels, supplies or materials of any kind, the cost or contract price whereof is to be paid with State funds and shall exceed the sum of one thousand dollars, shall be awarded, made or entered into by the board of managers or board of trustees of any State institution, or by any State department or commission, or by any person acting for or on behalf of the State, without first having publicly advertised for bids for the same, according to the specifications

to be furnished to or for the inspection of prospective bidders by the board of managers or board of trustees of any State institution, or by the State department or commission, or by the person acting for or on behalf of the State, authorized to procure the same.

It has been represented to us that from the very beginning the practice has been to contract with a private advertising agency for the preparation and servicing of the larger annual advertising venture, at a cost in excess of one thousand dollars. The conclusion hereinabove expressed, however, does not rest upon the consideration that a contract of this nature does not involve work or labor within the meaning of R. S. 52:34-1; for such a contract is itself one resulting from the exercise of discretion, and is not one of necessity. Indeed, the conclusion we have expressed rests upon the very construction that contracts authorized by P. L. 1937, c. 154 (R. S. 52:9c-1 to 52:9c-4, since repealed) were not intended to be subject to provisions of law which were then in existence and which were incorporated into the Revised Statutes as R. S. 52:34-1 *et seq.*

In section 1 of P. L. 1937, c. 154 (R. S. 52:9c-1), it was provided that the council thereby created was to be a commission "to advertise the agricultural, educational, industrial, recreational and residential advantages" of the State, in section 3 (R. S. 52:9c-3) it was provided that the council "shall formulate plans for effectuating this act, and in its discretion, enter into a contract or contracts from time to time for the purpose hereof from any appropriation" made to it by the Legislature; and in section 4 (R. S. 52:9c-4) it was provided that appropriations were to be made to the State Board of Commerce and Navigation and were to be administered and expended by that board "under the direct authority of the council herein created." The provision concerning appropriation to the Board of Commerce and Navigation is of no moment, since by subsequent—and therefore superseding—law, each annual appropriation for the purpose in question has been made to the agency succeeding to the functions, powers and duties of the New Jersey Council. It is the other provisions that are significant, in that they evince a legislative intent that the council was to have free rein in effectuating the purpose of the act under which it (the council) was created.

By the provisions of P. L. 1944, c. 85, R. S. 52:9c-1 to R. S. 52:9c-4 were repealed; and the New Jersey Council was abolished and its "functions, powers and duties" were transferred to the Department of Economic Development (created by the same act). It must follow, then, that the Legislature of 1944, which abolished the council and enjoined that its functions, powers and duties should devolve upon the Department of Economic Development, intended that the successor agency was not only to replace the council for the purpose of advertising the agricultural, educational, industrial, recreational and residential advantages of the State, but also that in effectuating that purpose the new agency was to enter into contracts from time to time "in its discretion" and have "direct authority" over the administration and expenditure of appropriations.

By P. L. 1948, c. 448, the Legislature provided that "all the functions, powers and duties of the existing Department of Economic Development and of each of the divisions therein," etc., were transferred to and vested in the Department of Conservation and Economic Development established by the same act. And by this provision the Department of Conservation and Economic Development succeeded to those functions, powers and duties of the New Jersey Council which, by P. L. 1944, c. 85, had earlier devolved upon the Department of Economic Development.

Accordingly, the Department of Conservation and Economic Development may by contract, and without advertising for bids, commit expenditures in any amount from the appropriation labelled "Promotional Expenses (New Jersey Council)."

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By : DOMINIC A. CAVICCHIA,
Deputy Attorney General.

DAC:mb

OCTOBER 8, 1951.

DR. LESTER H. CLEE,
President, Civil Service Commission,
State House,
Trenton, New Jersey.

FORMAL OPINION—1951. No. 30.

MY DEAR DR. CLEE:

You are desirous of knowing whether under the terms of R. S. 38:23-1 an officer or employee of this State is entitled to leave of absence with pay while engaged in field training. The answer is "Yes" and to that extent Civil Service Circular No. 18, dated June 13, 1943, as revised April 11, 1951, should be amended accordingly.

You also inquire whether pursuant to R. S. 38:12-4 as amended by P. L. 1941, chapter 109, section 23, which statute contains approximately the same wording as R. S. 38:23-1, but which affects members of the National Guard, the Naval Militia, or New Jersey Guard, an officer or employee of the State is entitled to leave of absence with pay while engaged in field training. The answer is "Yes" and to that extent Circular No. 18 aforesaid must be amended.

You inquire whether in conformity with a certain opinion rendered by the Superior Court of New Jersey, Appellate Division, entitled *Sylvester J. Lynch, Plaintiff-Appellant, vs. Borough of Edgewater, Defendant-Respondent*, 14 N. J. Super. 329, that portion of Circular 18 above which limits payment of salary in full to a period of two weeks or less should be amended, and whether one being called into military service to attend a training course is entitled to full pay during the entire time of such training procedure contrary to the circular aforesaid.

The pertinent section of the statute R. S. 38:23-1 provides:

"An officer or employee of the State or a county or municipality, who is a member of the organized reserve of the Army of the United States, United States Naval Reserve Force and United States Marine Corps Reserve, or other organization affiliated therewith, shall be entitled to leave of absence from his respective duty without loss of pay or time on all days on which he shall be engaged in field training. Such leave of absence shall be in addition to the regular vacation allowed such employee."

In *Lynch vs. Edgewater, supra*, wherein the plaintiff recovered from defendant his full salary for a period of ninety days covered by his absence to attend a field training period of that duration, it was contended by the defendant that the term "field training" as used in the aforementioned statute meant the fifteen days maximum period for which a reserve officer can be compelled to serve in any one year during peacetime and not a greater period for which any officer might volunteer. The court held that the words "field training" as used in the aforementioned statute were defined as a period of time in which the Legislature intended to offer incentive to an individual member of the reserve system for the purpose of keeping his interest and skill in military affairs at a high degree of efficiency, and contemplated among other things service in mobilization, concentration, instruction, or maneuver camps.

The Superior Court quoted the following language from *Parks vs. The Union County Park Commission*, 7 N. J. Super. 5 (App. Div. 1950):

"We believe that the comparison of the aforementioned statutes indicates that the legislative intentment of R. S. 38:23-1 was to engender on the part of trained military personnel an incentive to retain their interest and skills in military affairs at a high degree of efficiency through the reserve organization training program, with a minimum of sacrifice to them and to provide additional compensation for their service. Under the provisions of this statute, members of reserve organizations of the United States Armed Forces are entitled to a leave of absence from their duties as employees of the State, county or municipality 'without loss of pay or time' while engaged in field training."

It would therefore appear that a member of the organized reserve who performs temporary active duty to engage in field training as above defined will so serve without loss of pay or time on all days during which he shall be engaged in field training as defined above and may not be limited to a two weeks' period. To that extent Circular 18 must be amended.

R. S. 38:12-4 as amended by P. L. 1941 contains approximately the same wording as R. S. 38:23-1, but affects members of the National Guard, the Naval Militia, or New Jersey Guard. Therefore any officer or employee of the State is entitled to be paid in full during the field training period, whether in excess of two weeks or not, for the reasons above set forth, and to that extent Circular 18 must likewise be amended.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By : JOHN W. GRIGGS,
Deputy Attorney General.

jwg:d

OCTOBER 3, 1951.

HONORABLE WALTER T. MARGETTS, JR.,
State Treasurer,
 State House,
 Trenton, New Jersey.

FORMAL OPINION—1951. No. 31.

DEAR MR. MARGETTS:

We acknowledge receipt of your communication of September 6, last past, in which you advise that there are some officers of the Army, Navy, Air Corps, Marine Corps, etc., who have continuous service in the Armed Forces of our country and have never been released from active duty. These are termed as career men in the armed services. You desire to know whether these officers qualify for an exemption under Article VIII, section 1, paragraph 3 of the New Jersey State Constitution.

Our answer to your inquiry is that they do not qualify for exemption, in accordance with Article VIII, section 1, paragraph 3.

Prior to the adoption of the new Constitution of 1947, the matter of veterans' exemptions was governed and controlled by the provisions of R. S. 54:4-3.12, the benefits of which were extended by R. S. 54:4-3.12 (d) to (h), inclusive.

Article VIII, section 1, paragraph 3 of the New Jersey State Constitution provides as follows:

"3. Any citizen and resident of this State now or hereafter honorably discharged or released under honorable circumstances from active service in time of war in any branch of the Armed Forces of the United States, shall be exempt from taxation on real and personal property to an aggregate assessed valuation not exceeding five hundred dollars, which exemption shall not be altered or repealed. Any person hereinabove described who has been or shall be declared by the United States Veterans Administration, or its successor, to have a service-connected disability, shall be entitled to such further exemption from taxation as from time to time may be provided by law. The widow of any citizen and resident of this State who has met or shall meet his death on active duty in time of war in any such service shall be entitled, during her widowhood, to the exemption in this paragraph provided for honorably discharged veterans and to such further exemption as from time to time may be provided by law." (Italics supplied.)

Our Legislature in 1951 has defined what is meant by "honorably discharged or released under honorable circumstances from active service in time of war." Your attention is called to chapter 184, P. L. 1951, page 679, wherein under paragraph "d" the Legislature has used the following language in defining "honorably discharged, etc."

"(d) 'Honorably discharged or released under honorable circumstances from active service in time of war,' means and includes every form of separation from active, full-time duty with military or naval pay and allowances in some branch of the Armed Forces of the United States in time of war, other than those marked 'dishonorable,' 'undesirable,' 'bad conduct,'

'by sentence of general court martial,' 'by sentence of summary court martial' or similar expression indicating that the discharge or release was not under honorable circumstances. A disenrollment certificate or other form of release terminating temporary service in a military or naval branch of the Armed Forces rendered on a voluntary and part-time basis without pay, or a release from or deferment of induction into the active military or naval service shall not be deemed to be included in the aforementioned phrase."

From all of the foregoing, the answer to the question is simple. Unless the officer connected with service in the Army, Navy, Air Corps, Marine Corps or in any of the other services of the Armed Forces can show that he or she was separated from active full-time duty, in accordance with the definition hereinbefore given, advantage may not be taken of the constitutional provision granting exemptions to citizens and residents of this State who have served in the Armed Forces in time of war.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: BENJAMIN M. TAUB,
Deputy Attorney General.

OCTOBER 2, 1951.

THE HONORABLE SANFORD BATES, *Commissioner,*
Department of Institutions and Agencies,
 State Office Building,
 Trenton, New Jersey.

FORMAL OPINION—1951. No. 32.

MY DEAR COMMISSIONER:

This acknowledges your request of recent date for an interpretation of the provisions of chapter 139, P. L. 1951 which presents three queries.

In your first question you desire to be advised regarding the liability of the several counties to appropriate moneys and make provision for the payment of the county's share of the cost of providing financial assistance to needy persons of the age of 18 years or over who are permanently and totally disabled.

We are of the opinion, and we so advise you, that the provisions of chapter 139, P. L. 1951, do impose a clear responsibility and liability upon the several counties to provide the necessary funds and make same available to the county welfare boards thereof to make payment of the county's share of the cost of providing financial assistance to needy persons above the age of 18 years who are permanently and totally disabled, for the reasons set forth herein.

In the title of chapter 139, P. L. 1951, it is declared to be a supplement to chapter 7, Title 44, Revised Statutes, which deals generally with grants of Old Age Assistance.

In section 1 of the law we are now considering it is provided that:

"Any needy person residing in New Jersey who has attained the age of 18, who is permanently and totally disabled by reason of any physical or mental impairment, other than blindness, shall be entitled to receive assistance from the county welfare board of the county in which he resides."

And thereafter certain limitations are placed upon these payments with which we need not now concern ourselves for they have no application to the question to be resolved.

It is clearly stated in section 2 of the new law that the assistance to be extended thereunder shall be governed by the requirements, conditions, limitations and procedures established by the act to which chapter 139 is a supplement (Title 44, chapter 7, R. S.) except that the recipient shall not be required to pledge his property as a condition precedent to the granting of this aid and further that the cost sharing provisions of R. S. 44:7-25 shall not apply.

The law establishes the basis upon which the cost of this assistance program shall be shared by the State, county and Federal Government, and requires the State to pay to the several counties any moneys received from the Federal Government by way of contribution to this category of assistance, plus an additional sum equal to one-half of the cost remaining after deduction the amount of federal participation.

The statute imposes upon the several counties an obligation to provide the necessary funds for the payment of one-half of the cost of rendering this type of financial aid to eligible needy persons qualifying under chapter 139, a portion of which will be reimbursed to each of the counties when Federal moneys are made available for payment of the federal share of the cost of this program.

The provisions of R. S. 44:7-24, a portion of the act to which chapter 139 is a supplement, clearly defines the manner in which the county welfare board shall annually fix and determine the amount required to pay the estimated amounts of the county's share of this category of assistance and imposes upon the board an obligation to request the board of freeholders of the county to make such sum available. Therein it is further required that the board of freeholders shall appropriate such sum of money and make it available to the county welfare board to permit payment of the county's share of the cost of this category of assistance together with the necessary costs for the administration of the program.

It is further stated in this applicable section of Title 44 that the board of chosen freeholders shall be required to make such sums available even if it becomes necessary to secure temporary loans, certificates of indebtedness or loan bonds.

The clear legislative intent of chapter 139, P. L. 1951, is to establish within Title 44, Revised Statutes, a completely new category of assistance to persons who have attained the age of 18 years and who are permanently and totally disabled. The same obligation, which is imposed upon the several counties to provide funds for the payment of Old Age Assistance, within Title 44, R. S., is established with respect to this new type of financial aid.

In your second question, you advise that each county budget carries an appropriation for payment of the county share of the cost of Old Age Assistance under chapter 7, Title 44, Revised Statutes. You desire to be advised whether the provisions of chapter 139, P. L. 1951, would permit the several counties to utilize this appropriation for Old Age Assistance for the payment of aid for needy persons as defined as eligible therefor in chapter 139, P. L. 1951.

With respect to this question, we are required to inform you that this is a matter which should be made the subject of a ruling by the respective county counsel since it deals solely with the administration of the internal affairs of the county and with county funds.

Your third and concluding question is whether the State has legal authority to advance to the several counties that portion of the cost of this assistance program which ultimately will be borne by the Federal Government, the transmittal of which appears subject to some delay at this time.

We find no warrant of authority in law to permit such advance payment by the State and are required to advise that the counties must make available the moneys necessary to defray their portion of the cost of this program, subject to later reimbursement to them when funds are available from the Federal Government.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: EUGENE T. URBANIAK,
Deputy Attorney General.

ETU:HH

OCTOBER 9, 1951.

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

FORMAL OPINION—1951. No. 33.

DEAR COMMISSIONER ERDMAN:

This will acknowledge receipt of your recent letter wherein you request an opinion in connection with the following:

"Whether the benefits of chapter 263, P. L. 1947, as amended by chapter 138, P. L. 1948, and chapter 331, P. L. 1951, extend to a case of paraplegia, osteochondritis or hemiplegia where such condition has resulted from a disease contracted while in active military or naval service."

The answer to this is in the affirmative for the reasons hereinafter set forth. The applicable parts of the present law (L. 1947, c. 263, as amended by L. 1949, c. 192; L. 1950, c. 196 and L. 1951, c. 331) read as follows:

"A veteran who served in the active military or naval forces of the United States and who is suffering from paraplegia and has permanent paralysis of both legs and lower parts of the body, or who is suffering from osteochondritis and has permanent loss of the use of both legs, or who is suffering from hemiplegia and has permanent paralysis of one leg and one arm, or either side of the body, resulting from *injury* to the spinal cord, skeletal structure, or brain . . ."
(Italics mine.)

The law prior to its being amended referred to "traumatic injury." In order to determine the construction to be placed on this statute, particularly as to what

meaning the Legislature intended the word "injury" to have and what it meant by deleting the word "traumatic," it is necessary to take into consideration existing law at the time this statute was passed. *West Shore Railroad Company vs. Board of Taxes*; 92 N. J. L. (Sup. Ct. 1918) 332.

In the recent case of *Allgaier vs. Township of Woodbridge*; 5 N. J. (Super. Ct. 1949) 21, Judge Waesche stated at page 25:

"The legislative mind is presumed to be consistent. * * * In seeking to ascertain the legislative intent, the courts will take into consideration the state of the existing law at the time the statute was passed."

The law prior to its being amended read as follows:

"A veteran who served in the active military or naval forces of the United States and who is suffering from paraplegia and has permanent paralysis of both legs and lower parts of the body, or who is suffering from hemiplegia and has permanent paralysis of one leg and one arm, or either side of the body, resulting from *traumatic injury* to the spinal cord or brain, . . ."
(Italics mine.)

It is to be noted that the Legislature in amending this law deleted the word "traumatic" as limiting the type of injury involved. In view of the legislative history, it is clear that the Legislature desired to broaden the meaning of the word "injury" by deleting the word "traumatic." This conclusion is inescapable in view of the meaning of the words "traumatic injury," "trauma" and "injury."

"Traumatic injury" has been defined to mean any injury produced by any sudden violent attack upon the tissues and organs of the human body producing a wound, tear or abnormal condition thereon or therein. *Malone vs. Industrial Commission of Ohio*; 43 N. E. 2d, 266. "Trauma" has been defined to mean a wound or any injury to the body caused by external force. *Harlen Collieries Company vs. Johnson* (Ky.) 212 S. W. 2d, 540; *Higgins vs. Department of Labor* (Wash.) 180 P. 2d, 559.

In the case of *Davis vs. Onyx Oil and Resin Company*, 130 N. J. L. (E. & A. 1943) 381, the court held that damage to respiratory areas diagnosed as sub-acute chemical bronchitis, induced by inhalation of chemical fumes, was an injury within the meaning of the Workmen's Compensation Act of this State.

The word "injury" is defined in Webster's Standard Dictionary as any damage or hurt done to or suffered by a person or thing; and in Darland's Medical Dictionary, as a harm or hurt, a wound or maim.

I am therefore of the opinion that a qualified veteran within the meaning of the act, who is suffering from paraplegia, osteochondritis or hemiplegia as a result of a disease contracted while in active military or naval service, is entitled to the benefits provided by the law; and that "disease" is included within the meaning of the word "injury" as used in the statute.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: CHESTER K. LIGHAM,
Deputy Attorney General.

DECEMBER 28, 1951.

HON. J. LINDSAY DE VALLIERE,
Director, Division of Budget & Accounting,
Department of the Treasury,
State House,
Trenton, New Jersey.

FORMAL OPINION—1951. No. 34.

DEAR SIR:

Your recent communication with reference to the application for a widow's pension of Helen G. Tuesday, widow of William H. Tuesday, a former State Trooper, who died as a result of suicide, is acknowledged. You inquire whether a pension legally may be paid to the widow when the death of her husband resulted from suicide.

It is my opinion, and I so advise, that, the fact that Trooper Tuesday died as a result of a self-inflicted wound, does not preclude or bar his widow's right to a pension, if his service was efficient and honorable.

The pertinent section of the statute, establishing the State Police Retirement and Benevolent Fund, namely, R. S. 53:5-5, is quoted herewith:

"The widow or children under the age of sixteen years, or dependent parent or parents of any member of the Department of State Police who shall have heretofore lost or shall hereafter lose his life in the performance of his duty, or where death results from injury received in the performance of duty, or having served not less than ten years in the Department of State Police shall die from causes other than injuries received in the performance of duty, shall receive a pension equal to one-half of the salary, including maintenance allowance, of such member at the time of his death. If there are a widow and children such pension shall be for the widow and the children and shall be paid to the widow. If there are three or more children under the age of sixteen years and no widow, the children shall receive the pension in equal shares until they attain the age of sixteen years. If there are two children under the age of sixteen years and no widow, they shall be paid twenty-five dollars per month each until they attain the age of sixteen years. If there is only one child and no widow, he or she shall be paid the sum of thirty dollars monthly until he or she attains the age of sixteen years. If there is no widow and no children under the age of sixteen years then such pension shall be paid to the parent or parents dependent upon the deceased member. If any widow or parent entitled to a pension aforesaid remarries, then such pension shall cease and shall not be paid to such widow or children."

It will be observed from the foregoing, that a pension is provided for the widow of a State trooper, when the latter (1) loses his life in the performance of duty; or (2) loses his life as the result of injury received in the performance of duty; or (3) having served not less than ten years in the department, dies from causes other than injuries received in the performance of duty.

The statute evinces, as I view it, a clear legislative intent to protect the aforementioned beneficiaries, not only when the trooper dies from service-connected causes, but, as the statute reads, also in those cases where the trooper has served not less than ten years, and dies from causes other than service-connected ones. The words "causes other than injuries received in the performance of duty" are all-inclusive in their scope, and in the absence of language requiring a deprivation of benefits because of the suicide of the trooper, must be construed to include even those cases where the cause of death is a self-inflicted wound. "Primarily, the intent of the Legislature is to be harvested from the language of the statute." *Leeds vs. Atlantic City*, 13 N. J. Misc. 858. If the Legislature had desired to rule out those cases where death results in suicide, it could have done so by appropriate language.

In any event, our courts have already considered the position of the widow, seeking a pension, when her spouse died as a result of suicide, in *Angersbach vs. South River Police Commission*, 122 N. J. L. 1, which decision, I am of the opinion, is controlling in the matter before us.

In the cited case, the Supreme Court had before it the application of the widow of a policeman for a pension, based on the death of her husband, whom it was alleged, died by his own hand. The court held:

"It is urged by respondent that all of the circumstances point to self-destruction. No one saw the act that produced death. The proofs are circumstantial. Presumptions favor innocent as against criminal conduct.

But, whether the death be accidental or suicidal, we conclude that the relator is entitled to judgment upon the proofs in this case.

The act, R. S. 43:16-4, provides:

"The widow or children or sole dependent parent of any member of the police or fire department, who shall have paid into the fund the full amount of his annual assessment or contributions and shall have lost his life in the performance of his duty or died from causes other than injuries received in the performance of duty, shall receive a pension equal to one-half of the salary of the member at the time of his death, but not exceeding one thousand dollars. If there are a widow and children, pension shall be paid to the widow for the use of herself and the children, * * *

In the instant case, the right of relator is based upon a reasonable interpretation of the statute. Nothing is contained in the statute barring recovery in the event of self-destruction, not contemplated when the contractual obligation was created."

The statute before the court in the *Angersbach* case, namely R. S. 43:16-4, and the statute under which Mrs. Tuesday makes her claim, namely, R. S. 53:5-5, are similar to each other, in their provisions relating to the widow's right to a pension, and, in my opinion, the views of the court in the *Angersbach* decision, relative to the former statute, apply with equal force and effect to R. S. 53:5-5.

The right of a widow to a pension, under the circumstances stated, is subject, however, to the additional requirement that the service of the deceased spouse must have been efficient and honorable. This requirement of efficient and honorable service was well summarized by the old Supreme Court in *Kelly vs. Kearins, et al.*,

132 N. J. L. 308, in which the Court referring to the statute under which certain veterans may retire after twenty years of public service (R. S. 43:4-1 et seq.) and which statute contains no specific requirement of honorable service, stated:

"Many are the statutory classes and conditions for the retirement of public servants on pension and for the establishment and upkeep of pension funds. See R. S. 1937, Title 43. And yet a reading of each discloses a clear legislative pattern determinative of the policy of the State for the retirement on pension of public servants for honest and efficient services. Cf, *Walter vs. Police and Fire Department, &c.*, Trenton, 120 N. J. L. 39, 42; 198 Atl. Rep. 383."

Although the foregoing case related specifically to retirement rights under the Veterans' Act, nevertheless, I think the statement of policy enunciated is applicable to all claims arising under our various pension laws, including claims for widows' pensions.

In the case before us, the fact that Trooper Tuesday died as a result of a self-inflicted wound does not of itself infer or impute dishonorable or inefficient service.

In short, if, in the instant case, the record shows honorable and efficient service on the part of the trooper up to the time of the suicide, and the conditions set forth in R. S. 53:5-5 are met, then, in my opinion, the trooper's widow is entitled to her pension.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By : DANIEL DE BRIER,
Deputy Attorney General.

OCTOBER 29, 1951.

HON. CHARLES R. ERDMAN, JR., *Commissioner,*
Department of Conservation and Economic Development,
Trenton, New Jersey.

FORMAL OPINION—1951. No. 35.

DEAR COMMISSIONER:

In your letter of October eighteenth you request an opinion as to the beginning date of the four-year term of the three members of the Fish and Game Council, Department of Conservation and Economic Development, who were originally appointed for a two-year term beginning April 1, 1949, and whose reappointment this year was not confirmed by the Senate until June 26th. The question essentially raised by your letter is whether under P. L. 1948, chapter 448 ("Department of Conservation and Economic Development Act"), there is a continuity of terms of office for members of the Fish and Game Council, with April first as the beginning date for each term.

It is our opinion that the intentment of the pertinent provisions of P. L. 1948, chapter 448, is that there is to be continuity in the terms of office of members of the Fish and Game Council; and that the beginning date of each such term is April first, the year being dependent upon the length of the original term prescribed by the act for the line of succession embracing the particular office.

The statute (P. L. 1948, Chapter 448), specifies April first as the date for the commencement of the term of the first appointees to the council thereunder created. But the problem is essentially one of statutory construction, and we must determine whether the April first date is also applicable to the terms of all subsequent appointees.

Section 26 of the act (P. L. 1948, Chapter 448), provides that there shall be eleven members of the council, and that each member

shall be appointed for a term of four years and shall serve until his successor has been appointed and has qualified; except that of the first appointments hereunder, two shall be for a term of one year, three for two years, three for three years, and three for four years, each commencing on April first following the date of appointment. The term of each of the respective first appointees to the council shall be designated by the Governor.

These provisions, coupled with the provision (in the same section) that the persons in office as members of the Fish and Game Council in the then existing Department of Conservation were to constitute the newly established Fish and Game Council until April 1, 1949, and that their respective terms of office were to expire at that time, evince a legislative intent to institute for the new council a scheme of uninterrupted terms, in such manner as eventually to effect the occurrence of three simultaneous vacancies on April first in each of three successive years and of two simultaneous vacancies on April first in every fourth year.

Moreover, section 28 of the act provides that "vacancies in the membership of said council occurring other than by expiration of term shall be filled . . . for the unexpired term only." The effect of this provision, viewed in the light of related provisions, is to preserve the integrity of the legislative scheme of term continuity. Nor can the hold-over provision of section 26, *supra*, operate to destroy that scheme; for if at any time an incumbent's tenure were to be prolonged beyond his term, the successor appointee would serve for the unexpired portion of the term then current.

Since there are eleven members of the council, there are eleven offices. An official term begins to run from the date of the appointment only when no time is fixed by law for the commencement thereof. See *Haight vs. Love*, 39 N. J. L. 476 (E. & A., 1877). However, as we have already indicated, P. L. 1948, Chapter 448, fixes by intentment, if not by specification, the time from which the term of a member of the Fish and Game Council begins to run.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: DOMINIC A. CAVICCHIA,
Deputy Attorney General.

dac;d

NOVEMBER 20, 1951.

HON. PERCY A. MILLER, JR.,
Commissioner of Labor,
State House,
Trenton, New Jersey.

FORMAL OPINION—1951. No. 36.

DEAR COMMISSIONER:

I am in receipt of your letter requesting an opinion as to the effect of R. S. 34:6-1 and 34:2-24 upon an establishment that receives and completes the preparation of laundered goods for customers after sending them out to another place for washing.

Your communication presents two questions. The first question is whether an establishment that receives soiled wearing apparel and bedclothes and has same laundered by another concern and receives the wet wash for ironing, pressing and preparation of the finished product for delivery to the customer is a laundry as is contemplated under R. S. 34:2-24. The second question is whether the establishment which accepts the soiled wearing apparel and bedclothes and has same laundered by another concern and receives the wet wash for ironing, pressing and preparation of the finished product for delivery to customers is a workshop as is referred to in R. S. 34:6-1.

As to the first question: An establishment which receives soiled apparel and bedclothes and has same laundered by another concern and receives the wet wash for ironing, pressing and preparation for delivery to customers is a laundry as referred to in R. S. 34:2-24.

Section 34:2-24 of the New Jersey Revised Statutes reads as follows:

"No female shall be employed or permitted to work in any manufacturing or mercantile establishment, bakery, laundry or restaurant more than ten hours in any one day or more than six days, or fifty-four hours in any one week."

It must therefore be determined what was meant to be a laundry. "Laundry" as defined in R. S. 34:2-1 means any place where laundry work is carried on regularly. We must therefore determine what is laundry work and whether the performance of part of the entire process of the laundering of clothing is to be considered a laundry. I can find no case in the State of New Jersey defining the word. The dictionaries define "laundry" as an establishment or place where laundering is done, and an establishment or room for washing and ironing of clothes (Standard Dictionary, Funk and Wagnalls, Websters New International Dictionary).

In examining the cases of other states, I find one that is somewhat parallel to the situation before us and in my opinion is dispositive of this question. The Supreme Court of Rhode Island, in the case of *State vs. Wah Lee*, 144 Atlantic, page 159, 49 R. I. 491, decided that an establishment for starching, ironing and preparing for delivery to customers, clothes washed by a wet wash laundry was a "public laundry" within the act. Chief Justice Sweetland, speaking for the court, said,

"Whatever may be the etymological derivation of the word, in the social and domestic life of to-day the popular and ordinary meaning of the term 'laundry,' used in connection with the word 'public,' is that of a place to which the public are invited to deliver soiled clothes to be washed, dried, starched, ironed, and subjected to the processes ordinarily employed to render soiled

clothes suitable for further use. An establishment which performs all or any considerable portion of those services for the public is in common acceptation 'a public laundry.' We know of no general term other than that of a 'public laundry' which would properly designate a place where all of such services are rendered save that of washing the clothes."

As to the second question: An establishment that receives soiled wearing apparel and bedclothes and sends same out for wet wash and upon their return starches, irons and prepares them for delivery to the customers is not a workshop as is referred to in R. S. 34:6-1.

Section 34:6-1 of the Revised Statutes provides in part that for certain purposes,

"Every factory, workshop, mill or place where the manufacture of goods of any kind is carried on shall under the supervision and direction of the commissioner be provided * * *"

The problem presented is, what is a workshop? Reference to dictionaries, lexicons and cases in other states discloses a wide range of definitions of the word "workshop." Our New Jersey Supreme Court, in the case of *Griffith vs. Mountain Ice Co.*, 74 N. J. L., page 272 defines "factories and workshops" to be a place where machinery is employed in the work of fabrication. In this case Justice Garrison, speaking for our New Jersey Supreme Court, construed Section 3 of the General Statutes, page 2345 (General Act approved 1885) as it applied to an establishment employing outdoor conveyors, and said,

"We think that the defendant's plant does not come within the statutory language 'factories and workshops,' not only because those words import a building in which the machinery is so placed as to be dangerous to operatives, but also, and chiefly, because such words in their statutory context imply that the places to which they refer are those where machinery is employed in the work of fabrication, i. e., of making or manufacturing something. Such is the common meaning of a factory or workshop."

Moreover, R. S. 34:2-1 defines "manufacturing establishment" as any place where articles for use or consumption are regularly made; and the same section defines bakeries, laundries, mercantile establishments and restaurants, thus distinguishing them from manufacturing establishments. Furthermore, the Legislature, in providing for registration of industries, enacted R. S. 34:6-141, which reads in part as follows:

"persons engaged in any productive industry within the supervision of the Department as a factory, workshop, mill, newspaper plant, printery or commercial laundry to register same with the commissioner before the commencement of business * * *."

By specifying laundry as a separate industry coming under the supervision of the Department of Labor, the Legislature obviously intended to distinguish between a workshop and a laundry.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: LOUIS S. COHEN,
Deputy Attorney General.

NOVEMBER 26, 1951.

HONORABLE JOHN H. BOSSHART,
Commissioner of Education,
175 West State Street,
Trenton 8, New Jersey.

FORMAL OPINION—1951. No. 37.

DEAR COMMISSIONER:

You have requested the opinion of this office as to whether the children who will reside in a certain housing development on the Fort Dix military reservation, known as Sheridanville, will be domiciled in the New Hanover School District so as to make the board of education of that district responsible for their education pursuant to N. J. S. A. 18:14-1.

In my opinion, the answer must be in the negative.

The housing development in question is being constructed by Sheridanville, Inc., a private corporation, which has leased the site of the project from the United States Government. The lease is for a period of 75 years, and among other things it provides in substance that:

(1) The lessee shall lease all units of the housing project to such military and civilian personnel of the armed forces, including government contractors' employees, assigned to duty in the area of the Fort Dix military reservation, as are designated by the commanding officer thereof; provided, however, that in the event that the available accommodations are not leased to the aforesaid personnel, the lessee may lease the available unit or units to "persons other than military or civilian personnel"; and

(2) That the lessee shall pay to the proper authority all taxes, assessments and similar charges which at any time during the term of this lease may be imposed upon the Government or upon the lessee with respect to the leased property, and that "in the event any taxes, assessments or similar charges are imposed through the consent of Congress of the United States upon the property owned by the Government and included in the lease (as opposed to the leasehold interest of the lessee therein)" there shall be an appropriate reduction in the rental provided for in the lease.

The site of the project is part of the land which was ceded to the United States by the State of New Jersey by chapter 354 of the laws of 1938, which transferred jurisdiction over so much of the territory within this State as had theretofore been acquired by the United States for use by the Army, and known as Camp Dix. The act of cession provided that "the jurisdiction hereby ceded shall continue no longer than the United States of America shall own said land or lands and occupy and use the same for military purposes."

According to my understanding, all parties interested in this matter agree that until the execution of the lease in question, children residing on the Fort Dix military reservation after the cession of 1938 have not been residents of a New Jersey school district so as to be entitled to free education therein. Indeed, an examination of the authorities will not permit of any other conclusion.

Since the Fort Dix reservation was not purchased originally by the consent of the New Jersey Legislature, the acquisition did not fall within Article I, Section VIII, Clause 17 of the United States Constitution giving Congress the power "to exercise exclusive legislation" over all military installations acquired by such consent. Consequently, the terms of the grant by New Jersey to the United States control the extent of the jurisdiction transferred by the statute. *James vs. Dravo Contracting Co.*, 302 U. S. 134, 142; *Bowen vs. Johnston*, 306 U. S. 19, 23; *Surplus Trading Co. vs. Cook*, 281 U. S. 647, 651, 652. The act of cession here coincides with numerous others which, according to judicial construction, granted to the United States the entire jurisdiction of this State over the reservation, except in the matter of executing process. See *U. S. vs. Unzeuta*, 281 U. S. 138; *Rogers vs. Squier*, 157 Fed. 2d 948, cert. denied 330 U. S. 840. In this situation, persons residing on the reservation are not liable to local taxation, have no local elective franchise, and are not entitled to free education for their children in the local public schools. *Opinion of the Justices*. 42 Mass. 580; *State vs. Board of Education*, 57 N. E. 2d 118 (Ohio Court of Appeals, 1944); *Fort Leavenworth R. Co. vs. Lowe*, 114 U. S. 541; *James vs. Dravo Contracting Co.*, *supra*.

The crux of your inquiry therefore is whether the United States Government, by leasing the land in question to Sheridanville, Inc., retroceded to New Jersey the jurisdiction over this territory which it had previously granted to the United States.

After territory has been ceded by a State to the Federal Government, the State can apparently resume jurisdiction over such territory, but only (1) by express retrocession by the United States, (2) by the automatic operation of the reverter clause in the act of cession, or (3) if there is no reverter clause, by retrocession implied from such acts as abandonment by the United States of the property ceded. See *Arlington Hotel Co. vs. Fant*, 278 U. S. 439, 455; 65 Corpus Juris 1359. In the present situation, there has been no Federal legislation specifically receding jurisdiction to the State. The question arises, however, as to whether the lease in question has resulted in a cessation of the use of the leased property for military purposes, so that the reverter clause in chapter 354 of the laws of 1938 has become operative.

According to my information, the Army will continue to furnish water, sewage, fire and police service to the housing project. As the lease itself recites, the military and civilian personnel of the armed forces will have priority on all accommodations to be rented in the development. The lease was executed pursuant to subchapter 8 of Chapter 13 of Title 12, U. S. C. A., the very purpose of which, as stated in section 1748(b), is to "assist in relieving the acute shortage of housing which now exists at or in areas adjacent to military installations because of uncertainty as to the permanency of such installations and to increase the supply of rental housing accommodations available to military and civilian personnel at such installations." In view of these facts, it seems clear that the military use of the land in question has not ceased within the meaning of chapter 354 of the laws of 1938.

In a number of cases bearing on this point, the Supreme Court has held that exclusive Federal jurisdiction continued, because essential to enjoyment of the premises as a military reservation, even though in a narrow sense the premises were not being used for military purposes. See *United States vs. Unzeuta*, *supra* (railroad right of way through the reservation); *Benson vs. United States*, 146 U. S. 325 (portion of reservation used for farming purposes); *Arlington Hotel Co. vs. Fant*, *supra* (portion of reservation leased for use as a hotel). Even more clearly military is the purpose of the Fort Dix housing project now under discussion.

I am informed that the Army authorities at Fort Dix have taken the view that the lease in question does not terminate the general military use of the property leased. The Federal courts have frequently indicated that the view of the military authorities on the subject will at least be entitled to great weight. See *Bowen vs. Johnston*, *supra*, 306 U. S. at pp. 29-30; *Benson vs. United States*, *supra*, 146 U. S. at p. 331; *Rogers vs. Squier*, *supra*, 157 Fed. 2d at p. 950.

It has been suggested that the local authorities have the power to tax property in the housing development under the paragraph of the lease pertaining to payment of taxes by the lessee. An examination of that clause, however, reveals no support for such a contention. The clause merely provides for payment of such taxes and assessments as may be properly imposed with respect to the leased property, and for an adjustment in the rent "in the event" that any taxes are imposed with the consent of Congress. That event has not occurred, according to my examination of the law, and it follows that no taxes on that property (other than the leasehold interest of the lessee therein) may legally be assessed by the local governmental bodies.

The foregoing reasons lead to the conclusion that children residing in the proposed housing development at Fort Dix do not reside in a local school district within the meaning of N. J. S. A. 18:14-1.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: THOMAS P. COOK,
Deputy Attorney General.

tpc;b

NOVEMBER 28, 1951.

HON. PERCY A. MILLER, JR.,
Commissioner of Labor and Industry,
State House,
Trenton 7, N. J.

RE FORMAL OPINION—1951. No. 38.

Regulation of Private Employment Agencies and the Application of Fee Schedule Under Title 34, Chapter 8, of the New Jersey Revised Statutes.

DEAR COMMISSIONER:

Your letter of October 4, 1951, requesting an opinion as to the manner of the charging of fees by a nurses registry under certain circumstances is acknowledged, and opinion rendered as follows:

STATEMENT OF FACTS.

An individual trading as a nurses registry, operating in Ridgewood, Bergen County, New Jersey, is duly licensed under New Jersey Revised Statutes 34:8-1 to 34:8-23, inclusive, to operate as a private employment agency, and has filed with the Commissioner of Labor and Industry a schedule of fees proposed to be charged by the agency. Under the proposed schedule practical nurses must pay \$60.00 for

an annual registration fee, payable in one sum, or in semi-annual or quarterly installments. For part time services, applicants for employment must pay 5% of each case until the \$60.00 fee has been paid (payable weekly).

The applicant registered with the agency, paid fees in the amount of \$45.00 to cover a nine-month period. Under the alternate provisions of the fee schedule providing for part time services the number of placements of this applicant for the period of January 1, 1951, to July 31, 1951, when computed on a 5% basis, would entitle the agency to \$52.50 instead of the \$45.00 which had been paid on account of the annual registration fee.

It also appears that the agency was closed for summer vacation between July 15 and July 30, 1951, and that during that two-week period the applicant secured employment from a previous employer originally obtained through the subject agency. The agency in computing its fee on the 5% basis includes a charge for this placement.

QUESTIONS PRESENTED.

The questions propounded in your letter of October 4, 1951, are:

No. 1. Is it permissible under the provisions of the New Jersey Revised Statutes 34:8-1 to 34:8-23 for an employment agency or nurses registry to charge "registration" fee payable either on an annual basis or on the basis of quarterly or semi-annual payments?

No. 2. Is it permissible under the provisions of the New Jersey Revised Statutes above referred to for an employment agency or nurses registry to charge "registration" fee payable either on an annual basis or on the basis of quarterly or semi-annual payments, and at the same time include in its schedule of fees, a percentage basis of 5% of the salary for each placement until the annual fee is reached?

ANSWER.

The answer is yes. (Questions 1 and 2 are grouped together as they may be answered for the same reason.) Under the New Jersey Revised Statutes 34:8-1 to 34:8-23, inclusive, the New Jersey State Legislature enacted a statute providing for the licensing of private employment agencies, including therein statutory requirements to be performed by the applicant. Under the New Jersey Revised Statutes 34:8-10 every employment agency shall file with the commissioner a schedule of fees proposed to be charged for any services rendered to employers seeking employees, and persons seeking employment, and all charges must conform thereto. Such schedule of fees, on blanks provided by the commissioner, shall be posted in a conspicuous manner in the office of the agency.

The above section is the only statutory requirement pertaining to fees that appears in the employment agency act.

Under the New Jersey Revised Statutes 34:8-15 the Commissioner of Labor and Industry may enforce this chapter and he may refuse to issue and may revoke any license for any good cause shown within the meaning and purpose of this chapter, and when it is shown to his satisfaction that any licensed person is guilty of any immoral or illegal conduct in connection with the conduct of said business, it shall be his duty to revoke the license of such person, but notice of the charge shall be presented and reasonable opportunity shall be given the licensed person to defend himself.

The right of the State to enact this legislation has been sustained by the State's highest courts, and the United States Supreme Court.

Ribnik vs. McBride, 48 Sup. Ct. Rep. 543, 137 Atl. 437, 133 at 870.

Brazee vs. Michigan, 36 Sup. Ct. Rep. 561.

McBride vs. Clark, 101 N. J. L. 213.

In *Ribnik vs. McBride*, *supra*, the New Jersey Supreme Court opinion citing the United States Supreme Court opinion in *Brazee vs. Michigan*, *supra*, said:

"It seems clearly that without violating the Federal Constitution, a State exercising its police powers may require licenses for employment agencies and prescribe reasonable regulations in respect of them to be enforced according to the legal discretion of a commissioner."

Under New Jersey Revised Statutes 34:8-15, and in the reported cases, the commissioner may refuse to issue a license, or may likewise revoke any license for any good cause shown (1) *within the meaning and purpose of the act* and the power of the Legislature to limit such right for the safety of the public morals and public health under the police power must rest (2) *on some reasonable basis and cannot be arbitrarily exercised*.

Likewise under Revised Statutes 34:8-15 the commissioner may revoke a license when it is shown to his satisfaction that any licensed person is guilty of any immoral or illegal conduct in connection with the conduct of said business. There is nothing within the meaning of this act, New Jersey Revised Statutes 34:8-1 to 34:8-23, inclusive, which would vest the Commissioner of Labor and Industry with the right to revoke a license for the charging of a registration fee either on an annual basis or on the basis of quarterly or semi-annual payments, or for the issuance and charge of a registration fee payable on a quarterly or annual basis, and at the same time include in the schedule of fees a percentage basis based upon placement until the annual fee is reached. Unless such a method discloses that it is illegal to make such a charge the commissioner cannot revoke a license of an agency that conducts the business in such a manner.

The Legislature in the enactment of New Jersey Revised Statutes referring to employment agencies has limited the commissioner in the exercise of his discretion as to the reasons for which a license may be revoked. The commissioner hence cannot read into the statute something which does not exist, and by doing so he would be usurping legislative functions. The statute is purely regulatory under our police powers and must be applied as it appears.

The laws of 1918, chapter 227, creating the Employment Agency Act contained a provision requiring the filing of a schedule of fees proposed to be charged with the commissioner *for his approval*. The statute permitting the Commissioner of Labor and Industry to regulate fees was held valid by our New Jersey Supreme Court and the Court of Errors and Appeals in the case of *Ribnik vs. McBride*, 4 N. J. Misc. 623, affirmed 103 N. J. L. 708. However, the United States Supreme Court reversed the State court decision in 48 Supreme Court 545 in an opinion which held powers regulating prices and fees were unconstitutional.

Evidently following the impact of the United States Supreme Court decision the Legislature amended the act in 1928, chapter 283, and omitted the phrase *for his approval*, thereby removing the right to regulate fees from the commissioner's powers, laws of 1928, chapter 283, is still in effect.

Since this statute is penal in nature it must be strictly construed.

Saks Theatrical Agency vs. Mentine, 48 Atl. 2nd 644, 24 N. J. Misc. 332.

An agreement to pay a fee and to charge a fee is created between the agency and the applicant, and unless the contract is illegal the commissioner cannot, under the statute, be permitted to intervene. Any right of action arising under said contract is purely a civil one and either party has a remedy in the civil courts for the enforcement of same. Therefore, an agency may permit an annual fee to be collected on a quarterly or semi-annual basis, and may likewise agree with an applicant for part time position to pay on a 5% basis until such annual fee is paid.

QUESTION.

No. 3. May a licensee of an employment agency or nurses registry charge a fee for work which is secured directly from the employer when the agency is inactive?

ANSWER.

The answer is no. Unless specifically agreed upon between the applicant and the agency, the latter is not entitled to charge a fee for part time services unless it recommends said service to the employee. Each contract for part time services is separate and apart from the other. The New Jersey Employment Agency Act, R. S. 34:8-10, among other things says that no agency is to send out an applicant for employment without having obtained either orally or in writing a bona fide order therefor and if it shall appear that no employment of the kind applied for exists at the place to which the applicant was directed the agency shall refund to the applicant within three days of demand all fees paid by the applicant.

It is my opinion that the employee was not directed to the employer in this instance, and was not informed by the agency of the existence of the part time work. In order to comply with the legislative intent it is necessary that the agency refer the applicant to the position. If the obtaining of a position at some subsequent time was through an independent agreement between the applicant and the former employee the agency would not be entitled to be paid. This situation, of course, can be changed by a separate and independent agreement between the parties, but under the circumstances presented, there existed no such agreement.

I believe the foregoing opinion adequately answers the three questions proposed by you.

THEODORE D. PARSONS,
Attorney General of N. J.

By: LOUIS S. COHEN,
Deputy Attorney General.

FEBRUARY 18, 1952.

AARON K. NEELD, *Deputy Director,*
Division of Taxation,
State House.

FORMAL OPINION—1952. No. 1.

DEAR SIR:

You have asked this office to advise you on the following questions:

1. Is an elected assessor amenable to supervision and the rules and regulations of the Director of Taxation of the State of New Jersey?
2. May the director bring charges against such official for his removal for failure to discharge the duties of his office by not complying with published rules and regulations?
3. Is such elected assessor answerable to the governing body of the taxing district for failure to discharge his duties as assessor?

The answer to questions 1 and 2 is in the affirmative. The answer to question 3 is in the negative.

It is the opinion of this office that the Director of the Division of Taxation has the statutory right to prescribe basic rules for taxation. (See R. S. 54:4-26.)

The Legislature has provided two methods to remove an assessor whether he be elected or appointed. One method may be found in R. S. 54:1-36, which provides that where an assessor or other person, charged with reviewing assessments in a taxing district, shall wilfully or intentionally fail, neglect or refuse to comply with the constitution and laws relating to the assessment and collection of taxes, the county board of taxation shall thereupon make complaint to the commissioner (now the Director of the Division of Taxation) who may, upon a proper hearing, after due notice, dismiss him and declare his office vacant. Thereafter, the director shall cause a certified copy of his judgment to be transmitted to the county board of taxation which shall cause notice thereof to be given to the governing body of the taxing district or officer having power to elect or appoint such successor or other person. The governing body or officer referred to shall then appoint a successor who shall hold office for the then fiscal year.

The other method provided by the Legislature for the removal of an assessor who does not comply with the laws or constitution of the State may be found in R. S. 54:1-37, 38 and 39.

Where the Supreme Court is mentioned in the sections referred to hereinbefore, the said jurisdiction is now vested in the Superior Court of New Jersey, and all complaints for the removal of an assessor are now filed with the Superior Court.

Thus, by the express terms of the statute, the Director of the Division of Taxation, or the Superior Court, may after hearing remove an assessor, whether he be appointed or elected, for failing to obey the constitution and laws of the State of New Jersey.

We find no statutory provision for the removal of an elected assessor by the governing body, and it is our opinion that R. S. 54:1-36 and 54:1-37, et seq., are exclusive methods to be pursued in the removal of an assessor. As a general rule, statutory provisions are enacted by the Legislature for the removal of elected officials. There is no power to remove except that which is given by statute. The grant of power of removal from office, generally speaking, is to be strictly construed and whatever is not given in unequivocal terms is regarded as withheld; usually such power is not implied.

In creating an elective municipal office with a fixed term, the Legislature may condition the incumbent's tenure on good behavior in office and clothe the local governing body with the power of removal upon the ascertainment of facts demonstrating a breach of the condition. See *Finnegan vs. Miller*, 132 N. J. L., page 192, at page 195 (New Jersey Supreme Court, 1944). We find no legislative pronouncement relating to the removal of an assessor where he is elected.

It is, therefore, our opinion that the governing body of a taxing district cannot remove an elected assessor where he fails to obey the constitution and laws of this State.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: BENJAMIN M. TAUB,
Deputy Attorney General.

MARCH 3, 1952.

DANIEL BERGSMA, M.D., M.P.H.,
State Commissioner of Health,
State House,
Trenton, New Jersey.

FORMAL OPINION—1952. No. 2.

DEAR DR. BERGSMA:

Your letter of January 24, 1952, requesting an opinion as to whether the Board of Beauty Culture Control may require the public vocational schools which operate courses in beauty culture under curricula established by the State or local Boards of Education to submit to it reports of the time spent by beauty culture students has been received. The answer is No.

Licensed schools of beauty culture are required by R. S. 45:4A-10 to keep, among other things, a daily record of the attendance of each student and the Board of Beauty Culture Control requires that the licensed schools of beauty culture submit to it, each week, a report as to the number of hours each of its students spent in school the preceding week. The number of hours required under R. S. 45:4A-10 to complete a course in a licensed school of beauty culture is 1,000 and the Board of Beauty Culture Control checks on this requirement by means of the above-mentioned weekly reports.

Revised Statutes 45:4A-35 provides:

"Nothing in this chapter shall limit in anyway the right of the State Board of Education or any local board of education to establish and operate courses in beauty culture, to employ teachers, to determine the standards for teaching and the qualifications of teachers, to determine courses of study, to determine the standards for the admission, progress, certification and graduation of students, to determine any and all standards and rules as to quarters, supplies, equipment and anything whatsoever pertaining to the

establishment, operation and maintenance of a course in beauty culture operated by a public school. Nothing in this chapter shall be interpreted to give any person or agency other than the State Board of Education and the local boards of education the right to prescribe any requirement of any kind whatsoever for courses of beauty culture in public schools or for teachers or pupils in such courses.

"Any person having graduated from a vocational course in beauty culture approved by the State Board of Education and given by a public vocational school of this State shall have all the rights and privileges granted under this chapter to graduates of beauty schools, duly registered by the department, but nevertheless shall be required to be examined and licensed by this department in accordance with the provisions of this chapter."

By the provisions of R. S. 45:4A-35 which authorizes the State and local Boards of Education to conduct courses in beauty culture as part of the vocational training of high school students, it is clear that except for the examination for license the Board of Beauty Culture Control is to have no jurisdiction over any student taking a beauty culture course in a public vocational school.

Under such clear language as is contained in R. S. 45:4A-35, it was the obvious intent of the Legislature that the public vocational school should not be required to submit time reports to the Board of Beauty Culture Control. Not until after the students have graduated and have applied for a license do the students come within the jurisdiction of the Board of Beauty Culture Control. The graduates of the public vocational schools have all the rights and privileges granted to graduates of any licensed school of beauty culture. The Board of Beauty Culture Control has no right to challenge their eligibility to take the examination.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: HERMAN M. BELL, JR.,
Deputy Attorney General.

HMB:rk

APRIL 21, 1952.

HON. RANSFORD J. ABBOTT,
State Highway Commissioner,
Trenton, New Jersey.

FORMAL OPINION—1952. No. 3.

DEAR COMMISSIONER:

By your memorandum of April 17 you request to be advised whether Assembly Bill No. 10 (now Chap. 16, Laws of 1952) in any way prohibits the State Highway Commissioner from proceeding with the construction of any portion of the Garden State Parkway that may be authorized by the Governor within the limits of appropriations provided.

Section 20 of the bill authorizes the Authority to construct "The Garden State Parkway" on the same location as the present-designated State Highway Route 4 Parkway.

Section 21 in part provides that all public departments, agencies and commissions of the State of New Jersey are hereby authorized and empowered to lease, lend, grant or convey to the Authority at its request upon such terms and conditions as the proper authorities of such departments, agencies, or commissions of the State may deem reasonable and fair any real property which may be necessary or convenient to the effectuation of the authorized purposes of the Authority, including public highways and other real property already devoted to public use and including any portion of the State Highway Route 4 Parkway established by the act. At such time as the Authority shall undertake to construct any part of the project described in section 20 of the bill or shall acquire any portion of said State highway route as part of such project, the jurisdiction and authority of the department over such part shall cease and section 2 of chapter 17, laws of 1946 as amended, shall be inapplicable to such part.

Section 23 provides that the foregoing sections of the bill shall be deemed to provide an additional and alternative method for the doing of the things authorized thereby, and shall be regarded as supplemental and additional to powers conferred by other laws, and shall not be regarded as in derogation of any powers now existing.

It is, therefore, my opinion that until the Authority shall be organized and shall undertake to construct any part of the project authorized by the bill, you are not prohibited from proceeding with the construction of any portion of the Garden State Parkway that may be authorized by the Governor within the limitation of your appropriation.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: SACKETT M. DICKINSON,
Deputy Attorney General.

smd/n

APRIL 8, 1952.

THE HONORABLE ALFRED E. DRISCOLL,
Governor,
State House,
Trenton, New Jersey.

FORMAL OPINION—1952. No. 4.

DEAR GOVERNOR DRISCOLL:

It appears that the Collector of Internal Revenue for the Northern District of New Jersey by letter dated March 24, 1952, copy of which has been forwarded to us, desires the fiscal authorities of the State of New Jersey to honor three "Warrants for Distrain" against the salary of an employee of one of our State hospitals. These warrants aggregate approximately \$250.00 and represent delinquent income taxes of the said taxpayer. In order to effect collection of the said warrants, a levy was served upon a parole district supervisor of the Department of Institutions and Agencies, said department having jurisdiction of the State hospital at which the taxpayer was employed, as provided in Title 30, Revised Statutes. It does not appear that any action was taken by the Federal Government against the taxpayer in our State courts.

The question to be resolved is whether service of the levy, by an agent of the Federal Government upon a parole district supervisor, pursuant to said warrants, is sufficient to permit the fiscal authorities of the State of New Jersey to garnishee the salary of this delinquent taxpayer, who is employed in State service, and forward the proceeds to the Collector of Internal Revenue.

For the reasons stated herein, it is our opinion and we so advise that there is no warrant in law for the action and procedure proposed by the Federal Government.

We are not unmindful of the importance of the question involved as pointed out in the Collector's letter of March 24, nor should it be suggested that New Jersey fails to accord to the United States Government rightful comity consistent with the friendly relationships existing between the Federal Government and this jurisdiction.

Of no less importance is the issue which here confronts the State of New Jersey in the proper discharge of its functions of government. The manner in which the collector seeks to levy upon the whole salary of a State employee, rather than upon a percentage proportion thereof, as limited in our statutes, poses a real threat to the "instrumentalities, means and operations whereby the States exert the governmental powers belonging to them." (See *Ohio vs. Helvering*, 292 U. S. 360.)

The taxpayer involved in this controversy is an employee of one of our mental hospitals. We are not informed concerning the nature or extent of his duties or the responsibility of his position as it affects the health and welfare of citizens of the State who are hospitalized therein.

Nonetheless, we are permitted to assume that such a levy might be made on any State employee's salary, including that of the medical director and other executive officials of such a hospital. If such levy operated to attach the whole salary of such a State officer, as is proposed hereunder, what incentive would exist for the taxpayer to continue to faithfully discharge his responsibility to the State and to the unfortunate patients under his care? The question permits of but one answer. The taxpayer would be obliged to abandon his post and tour of duty from sheer economic necessity.

Thus the State most effectively would be denied the instrumentality and means of carrying forward this important function of government in caring for its mentally ill. Like examples can be found in other agencies of the State, the net result of which would seriously impair, if not circumvent, the orderly process of State Government. Such interference by an agency of the Federal Government in the affairs of a State is violative of ordinary concepts of the right of a State to govern itself and its citizens. So much for the factual side of the issue.

We now examine the law, for irrespective of the impairment of the discharge by the State of its essential functions of government, as illustrated above, this issue can only be resolved by an application of controlling legal principles to the facts here presented.

Preliminarily, it should be noted that we have carefully examined the decisions in the Federal courts offered by the Collector of Internal Revenue as authority for the proposition that "There are many decisions by the Federal courts which have held that the United States Government has the right to levy upon salaries of State and municipal employees."

The first such decision is *United States vs. City of New York*, 82 F. 2d 243. We are obliged to state that the case is completely dissimilar. The New York police arrested a delinquent taxpayer who had in his possession a sizable sum of money which was confiscated and deposited with the clerk of the police court. Thereafter,

a lien was placed thereon by the Federal authorities and a demand made on the property clerk of the police department and the police commissioner for said funds. The clerk ignored the demand and delivered the moneys to a third party, presumably the taxpayer, but, in any event, did not honor the levy. The Federal District Court gave judgment to the Government against the city but the Circuit Court of Appeals reversed on the theory that the moneys were never in the hands of the appropriate fiscal authorities of the city. The case is authority only for the proposition that local law governs with respect to the responsibility of the police clerk to the city and to the Federal authorities with respect to the levy on said funds.

The collector relies on *Ohio vs. Helvering*, 292 U. S. 360, which likewise is inapplicable to the instant matter. In that case, it was determined that the State of Ohio, which engaged in the sale of alcoholic beverages, was conducting a nongovernmental proprietary function and was required to pay Federal liquor taxes on such an operation. No income tax was involved nor is there the slightest suggestion that a levy was made on the salary of a State employee.

The court said that the conduct of a liquor business by a sovereignty is an exception from the general rule that "The instrumentalities, means and operations whereby the States exert the governmental powers belonging to them are * * * exempt from taxation by the United States." (Citing *Indian Motorcycle Co. vs. U. S.*, 283 U. S. 570; *McCulloch vs. Maryland*, 4 L. Ed. 578; *Collector vs. Day*, 20 L. Ed. 122; and other cases in *Trinityfarm Const. Co. vs. Grosjean*, 291 U. S. 466.)

In *Georgia vs. Evans*, 316 U. S. 159, proposed by the collector in support of his request, it was determined that a "State" is a "person" within contemplation of the Sherman Anti-Trust Act (Sec. 7, 26 Stat. at L. 209, 15 U. S. C., par. 15). Georgia annually purchases large amounts of asphalt for the reconditioning of its highways and complained that respondents violated the Federal anti-trust statutes to the injury of the sovereign State of Georgia. The decision of the court was to the effect that Georgia could maintain an action for treble damages under the language of the law that "Any person who shall be injured in his business or property" by reason of anything made unlawful by the act may bring such suit.

Additionally, we have made a careful search of all cases annotated under sections 3690 and 3692 of the Internal Revenue Code which the collector claims extends authority for collection of delinquent income tax through the distraint action that he proposes. We have found no decision which squarely holds, or even suggests, that the proposition of the collector is meritorious.

However, in *U. S. vs. Long Island Drug Co.*, 115 F. 2d. 983, C. C. A. 2d. Cir., 1940, it was stated by the court: "We find nothing in 3690 or 3710 which varies the general rule that a garnishee process is not to be extended to future earnings, but will only reach an indebtedness which has accrued * * *. Rights which do not exist at the time of the demand upon the taxpayer are not subject to any lien. *U. S. Pacific R. R.*, C. C. Mo. 1 F. 97."

So that, if the levy were properly made, as it was not, and if the law recognized the validity of such a distraint action, which it does not, such levy could only attach to the sum of money earned by the State employee and due to him on the date of the levy. No rights would accrue to the Federal Government in the future earnings of such employee.

Since there is no authority in the Federal decisions to support the request of the collector, we turn to a review of the law of this jurisdiction.

Executions against wages, earnings and salary are authorized and provided for in section 2A:17-50, et seq., New Jersey Statutes. It is provided therein that when a judgment has been recovered in a court of competent jurisdiction, that wages due and owing the judgment debtor, in excess of \$18.00 per week, are subject to an order of the court directing execution thereon. Only one execution may obtain at the same time and succeeding executions are satisfied in the order of priority in which presented. A salary less than \$2,500.00 per annum is only subject to a levy of 10% and, in the case of larger salaries, the court may order a larger percentage.

The collector proposes to levy upon the full salary due the taxpayer thereby seeking an advantage denied resident judgment creditors who are limited by our law to 10% of any wages of the debtor.

In this jurisdiction we have afforded immunity against an execution on wages of a Federal employee in *Cahn vs. Allen*, 124 N. J. L. 159 (Supreme Court, 1940), and the court said: "The salary of a Federal employee * * * was not subject to execution, as a matter of public policy. Neither by legislation nor by judicial ruling has this been changed. The Executions Act expressly deals with the class of State, county and municipal employees. No intention can be inferred, if indeed the power existed, to change the public policy with respect to Federal employees."

There has been a minor change in our legislation since that decision by the provisions of chapter 57, P. L. 1942, which now appears as section 2A:17-64, New Jersey Statutes.

Therein it is provided that if a judgment debtor is entitled to income for services rendered as a Federal employee that he may be required, by order of the court, to make payment therefrom at stated periods in installments, and upon such terms and conditions as the court may direct, on account of the unsatisfied judgment. In such case, however, the employee is entitled to receive notice of the proposed entry of such order and is afforded an opportunity, at any time, to apply for modification thereof, a process which is denied the State employee in these proceedings.

The courts of this State are always available to the Federal Government for the collection of delinquent income taxes due from public employees by garnishment of their wages, but only in the manner provided for in section 2A:17-50 et seq., *supra*. Thus the taxpayer cannot complain that the collector is afforded an advantage denied the taxpayer in the courts of his own State.

We are not called upon to determine the propriety of service of the levy on a district parole supervisor rather than upon the State Treasurer, or his duly accredited representative, for such is not essential to a disposition of the prime question.

Because of the importance of the issue, involving as it does both the Federal and State Government, we have dealt at length with the problem so that it may clearly appear that the decision rests squarely on legal principles rather than upon an absence of desire on the part of New Jersey to co-operate with the Federal agencies in the important task of collecting revenues so essential to the proper discharge of the functions of government.

Sincerely yours,

THEODORE D. PARSONS,
Attorney General.

MAY 2, 1952.

HON. J. LINDSAY DEVALLIERE, *Director,*
Division of Budget and Accounting,
 State House, Trenton, N. J.

FORMAL OPINION—1952. No. 5.

MY DEAR DIRECTOR:

This will acknowledge receipt of your letter of April 25, 1952, wherein you request an opinion concerning refund of funds which have escheated to the State of New Jersey. The question presented in your letter is:

Does the amendment to the escheat act (Chap. 304, Laws of 1951, now N. J. S. 2A:37-43) which permits payment of escheat funds less than \$50.00 upon presentation of satisfactory proof, without the necessity of a court order reopening the judgment theretofore entered, allow the Treasurer of New Jersey to deduct the pro rata expenses of the State in collecting the escheated funds?

My answer is that the treasurer must deduct the pro rata expenses incurred before making refunds.

In the original escheat act, L. 1946, c. 155 (now 2A:37-28), the procedure was outlined to reopen a judgment of escheat by one whose property had escheated to the State of New Jersey. It contained the following: "provided, however, there shall be first deducted all expenses and charges that may have accrued or been paid out by reason of the entry of the original judgment." A great many judgments of escheat were entered in 1949, 1950 and 1951 and many people began to make claims to the treasurer for payment of moneys due them. The treasurer advised these claimants that it would be necessary to reopen the judgment theretofore entered, in accordance with the statute. In most of these instances, the amount sought to be refunded was small and people, therefore, abandoned their claims for refund, rather than incur the expense of counsel to have the judgment of escheat reopened.

In order to assist claimants in obtaining moneys due them, and obviate the need of employing counsel to reopen judgments of escheat where amounts were small, the 1951 amendment was passed. This permitted the treasurer, upon presentation of satisfactory proof, to refund sums less than \$50.00 without reopening the judgment. This amendment may now be found in N. J. S. 2A:37-43. It is as follows:

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

This provision does not modify N. J. S. 2A:37-28 which directs the treasurer to deduct a pro rata share of the expenses incurred in entering the judgment of escheat. It never was intended to modify or change that provision. The provisions of N. J. S. 2A:37-28 and N. J. S. 2A:37-43 must be read together. The amendment

was passed as a convenience to claimants to obtain refunds, speedily and inexpensively.

It is my opinion that the State Treasurer must deduct a pro rata share of the expense incurred on refunds made by him in sums less than \$50.00 where said moneys have escheated to the State of New Jersey.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: OSIE M. SILBER,
Deputy Attorney General.

oms/n

OCTOBER 1, 1952.

HONORABLE FREDERICK M. RAUBINGER,
Commissioner of Education,
 175 West State Street,
 Trenton 8, New Jersey.

FORMAL OPINION—1952. No. 6.

DEAR COMMISSIONER:

You have requested our opinion as to whether an employee of a school for industrial education, constituted pursuant to Title 18, chapter 15, article 4 of the Revised Statutes, is eligible for a veteran's pension under the provisions of R. S. 43:4-1 et seq.

In my opinion the answer is "Yes."

Section 43:4-2 of the Revised Statutes provides for a pension to veterans who for twenty years have been "in office, position or employment of this State or of a county, municipality or school district or board of education." While the governing body of a school for industrial education is denominated as a "board of trustees," the statute gives to such board virtually the same status, powers and duties as are vested in the boards of education which govern other publicly-operated schools and are known as "boards of education." (See R. S. 18:15-19 to 18:15-23.) It seems clear that in making the veterans' pension law apply to employment of a "school district or board of education," the Legislature intended to include not only the governing bodies of local school districts, but all other governing bodies of publicly-supported and operated schools. Thus, when the statute mentions "boards of education" in addition to "school districts," the former term must be held to include boards such as the board of trustees of a school for industrial education established pursuant to R. S. 18:15-17 et seq.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: THOMAS P. COOK,
Deputy Attorney General.

tpc;b

MAY 13, 1952.

HON. PERCY A. MILLER, JR.,
Commissioner of Labor and Industry,
 State House,
 Trenton 7, N. J.

FORMAL OPINION—1952. No. 7.

MY DEAR COMMISSIONER MILLER:

Receipt is acknowledged of your letter of April 4, 1952, in which you request a clarification and legal interpretation of section 17, chapter 153, P. L. 1940 (Child Labor Law) as amended by chapter 139, P. L. 1941, with respect to certain questions propounded by you and hereinafter set forth.

Your first question is:

Would the employment of minors under eighteen years of age be excluded from only that portion of the premises licensed by the Alcoholic Beverage Control Law?

The answer is yes. Said section provides "no minor under 18 years of age shall be employed, permitted, or suffered to work in, about, or in connection with any establishment where alcoholic liquors are distilled, rectified, compounded, brewed, manufactured, bottled, or are sold for consumption on the premises, or in a public bowling alley, or in a pool or billiard room; *provided, however,* this section shall not apply to minors 16 years of age and over employed as pin-setters only in public bowling alleys."

The question in controversy concerns itself with the meaning of the phrase "on the premises." The term "premises" has in legal parlance a meaning so broad and varied that its interpretation in a given case must be ascertained from and governed by the context.

The New Jersey Alcoholic Beverage Control Law defines "premises" as "The physical place at which a licensee is or may be licensed to conduct and carry on the manufacture, distribution or sale of alcoholic beverages . . ."

Accordingly, the operation and effect of every license is confined to the licensed premises. Therefore, we are of the opinion that the employment of minors under 18 years of age is excluded, or prohibited, from only that portion of the building licensed under the Alcoholic Beverage Control Law to conduct and carry on the manufacture, distribution or sale of alcoholic beverages.

Your second question is:

Would the employment of minors under eighteen years be permitted in barber shops, dress shops, drug stores, beauty parlors or other trades occupying leased space, but which have no relation to the operation of that portion of the building where liquor is sold such as in hotels and similar establishments?

The answer is yes. In the case of *Dowman vs. State*, 14 Ala. 242, it was held that the word "premises" relating to illegal sale of spirituous liquors to be drunk on

the premises meant some place over which the shopkeeper had the legal right to exercise authority and control.

In cases where space is leased in a hotel structure to individuals for barber shops, dress shops, drug stores, beauty parlors or other trades in no manner appurtenant to the operation of the business of the hotel, and not under the control and authority of the hotel management, the term "on the premises" as used in the Child Labor Law has no application. Therefore, the employment of minors under 18 years is permitted in other trades occupying leased space in hotels or similar establishments but which have no relation to the operation of that portion of the building where liquor is served; *provided, however,* that such employment is not otherwise prohibited by the Child Labor Law.

Your third question is:

Would the employment of minors under 18 years of age be permitted in the executive offices and maintenance departments of hotels and similar establishments where liquor is served?

This question must be answered in the negative. Since the question sub judice deals with the employment of minors in hotels or similar establishments it becomes necessary to distinguish between the use of the word hotel in its application to the actual, physical structure of the building and the operation of the business of a hotel, namely to furnish food and lodging to transients. Thus since the lawful sale and delivery of alcoholic beverages to guests of a hotel in those portions of the structure over which the owner or occupant has the right and does exercise authority and control, is an integral part of the regular hotel business, and since the owner or occupant has the right and does exercise control and authority over the executive offices and maintenance departments in the management of hotels or similar establishments where liquor is served, the employment of minors under 18 years of age is not permitted.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: GRACE J. FORD,
Assistant Deputy Attorney General.

MAY 20, 1952.

HON. PERCY A. MILLER, JR., *Commissioner,*
Department of Labor and Industry,
 State House,
 Trenton, New Jersey.

FORMAL OPINION—1952. No. 8.

DEAR SIR:

I am in receipt of your recent communication requesting an opinion on the following questions:

Is a plant which prints daily, weekly, semi-weekly and other newspapers subject to the supervision of the Department of Labor and Industry under R. S. 34:6-1; 34:6-14; 34:6-20; 34:6-62 and 34:6-63?

If such a plant is within the meaning of the sections referred to, does the Department of Labor and Industry have the power to enforce the provisions thereof if the violations are found to exist? Obviously, this question requires no answer if the first question is answered in the negative.

As to the first question, it is my opinion that an establishment or plant which prints *only* daily, weekly, semi-weekly and other newspapers is not subject to the supervision of the Department of Labor and Industry as to maintaining fire escapes and fire protection, supervision of fire alarms and sprinkling systems, prohibiting smoking, machine guards on machinery and meal-time for employees, as more particularly set forth in R. S. 34:6-1; 34:6-14; 34:6-20; 34:6-62 and 34:6-63.

The several sections of the Revised Statutes referred to repose in the Department of Labor and Industry supervision of every factory, workshop, mill or place where the manufacture of goods of any kind is carried on. The point to be considered is whether or not a newspaper plant which prints newspapers only is a factory, workshop, mill or place where the manufacture of goods of any kind is carried on.

A newspaper plant is not a place where the manufacture of goods of any kind is carried on. In the case of *Evening Journal Association vs. State Board of Assessors*, 47 N. J. L., page 38, Justice Depue, speaking for the Supreme Court, held that,

"Neither in the nature of things nor in the ordinary signification of language, would a newspaper be called a manufactured article or its publisher a manufacturer."

and he said that insofar as it referred to the question of taxation and the exemption from said taxation, newspaper plants were not manufacturers. On the other hand, however, if this same newspaper were to conduct and prosecute the business of book printing and job printing, engraving, electrotyping and lithographing, then in that case it would be engaged in the manufacturing business. The ruling in this case has been sustained in the subsequent decision in *Press Printing Company vs. State Board of Assessors*, 51 N. J. L., page 75.

A newspaper plant is not a factory or a workshop. Our New Jersey Supreme Court, in the case of *Griffin vs. Mountain Ice Co.*, 74 N. J. L., page 272, defines factories and workshops to be places where machinery is employed in the work of fabrication. In this case the court held that machinery must be employed in the making or manufacturing of something.

We have already observed in the case of *Evening Journal Association vs. State Board of Assessors*, *supra*, that a newspaper plant was not considered such a place that made or created something. Justice Depue, in speaking for our court in that case said:

"A newspaper has intrinsically no value above that of the unprinted sheet. * * * Its value to its subscribers arises from the information it contains, and its profit to the publisher is derived, in a great measure, from the advertising patronage it obtains by reason of the circulation of the paper induced by the enterprise and ability with which it is conducted. Neither in the nature of things nor in the ordinary signification of language, would a newspaper be called a manufactured article or its publisher a manufacturer."

See *Capital Publishing Co.*, 18 Nat. Bank. Reg. 319, and *Somers Lumber Co. vs. State Board of Taxes and Assessment*, 9 Misc., page 248.

Although the foregoing cases concern exemption from taxation, nevertheless they express a clear and definite view of the courts that newspaper plants are not manufacturing plants and are not productive so far as they apply to the printing of newspapers.

In R. S. 34:6-141 our Legislature has distinguished between a factory, workshop or manufacturing plant and a newspaper plant or printery. Under the original act, laws of 1904, chapter 64, it was provided that every corporation, firm or person, after it began to occupy a factory, workshop, mill or place where the manufacture of goods of any kind is carried on, was to notify the department of such occupancy. This law was amended by chapter 117 of the laws of 1925 so as to include not only factory, workshop, and mill, but also newspaper plants, printeries and commercial laundries. This amendment would not have been necessary if a newspaper plant or printery was considered to be a factory, workshop, mill or manufacturing plant.

It becomes unnecessary to answer the second question in as much as the first one has been answered in the negative.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: LOUIS S. COHEN,
Deputy Attorney General.

LSC/LL

MAY 21, 1952.

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

RE FORMAL OPINION—1952. No. 9.

DEAR COMMISSIONER ERDMAN:

This is to answer your recent memorandum wherein you request an opinion as to the legality of giving to veteran tenant occupants of units in Veterans' Emergency Housing Projects the first option to purchase such units.

Pursuant to the Veterans' Emergency Housing Law (c. 323, P. L. 1946, as amended and supplemented, R. S. 55:14G-1, et seq.) you, as Administrator of the Public Housing and Development Authority constructed or caused to be constructed throughout the State various Veterans' Emergency Housing Projects. There are three general types of projects—temporary, semi-permanent and permanent. Such projects are made up of detached dwellings; semi-detached (duplex units); and multi-family consisting of 3, 4, or 6-family houses or apartment buildings, both conventional and garden. All of these projects, with the exception of private conversions with which we are not here concerned, were constructed and are now being managed, operated and maintained pursuant to contracts between you as Administrator and the municipality within which same were erected. These contracts generally provide for (a) a lease to the Administrator for a term of five years (commencing from initial occupancy after completion of construction); (b) that the site be supplied by the municipality (in all cases except for a few instances involving temporary projects the fee simple title to the site is owned by the municipality—where it is not, the municipality has obtained a lease from the owner and pays the rental—the one exception is the Weequahic Park Project in Newark (a temporary project), where the lease is to the Administrator); (c) that the Administrator provide a certain sum of money for the construction of the project; (d) that the municipality undertake the necessary site preparation and in some instances in connection with temporary projects, and almost all instances involving permanent projects, it supply additional funds necessary for construction. Such sums have been obtained by the municipality through (1) bond issue; (2) mortgage, and (3) appropriated funds; (e) that the Administrator appoint the municipality as agent to manage, operate and maintain the project pursuant to the rules and regulations of the Administrator; (f) that the managing agent collect the rents and after paying out costs of management and operation pay (1) a service charge to the municipality in lieu of taxes, (2) distribute the net rents to the State and the municipality in proportion to the investment of each—the municipality's investment includes moneys expended by it for site preparation and construction, if any—however, generally in permanent projects its contribution toward construction is not included since if it was raised by bond issue or mortgage, payments required thereon are included within the expense of management and operation if the rental income is sufficient to cover such charges—if not, the municipality pays the deficit remaining with the understanding it will be reimbursed as a priority payment out of the gross proceeds of sale of the project; and (g) that on termination of the lease the Administrator will (1) as to temporary projects remove the units from the site, level the foundation and rough-grade the site and dispose of

the units—the municipality not having any interest therein since such units under the contract are deemed personalty and the property of the Administrator—if the municipality requests that the unit and site be sold together, the Administrator will proceed with such sale and the proceeds of sale will be divided between the State and the municipality pursuant to an agreement between them, (2) as to permanent projects, sell the project in accordance with arrangements mutually agreed upon between the Administrator and the municipality to the end that the best interests of each will be protected; the gross proceeds of such sale shall be applied (I) to expenses of sale, (II) to retire any mortgage or bond issue of the municipality in connection with its contribution to construction of the project and to reimburse the municipality for any moneys it has paid on such bond issue or mortgage because there were not sufficient rents to do so, and (III) the net balance shall be divided between the State and the municipality in accordance with the investment of each in the project under the same formula as in distribution of net rents except that the municipality's investment shall include the appraised value of the site.

Some few contracts contain an option to the municipality enabling it to purchase the State's interest for a specific sum. We are not concerned with this here. In all cases the elements of the State's and municipality's investment have been agreed upon after certification by the municipality and review by the State.

Many of these leases are about to expire and all will expire during the period 1952-1956 despite the fact that some have and will be extended under the authority of chapter 20, P. L. 1951 (R. S. 55:14G-12); however, as a matter of policy, permanent housing projects will not be extended by the Administrator.

The temporary projects in the main consist of converted army barracks and prefabricated units, some with and some without cellars. Some of the permanent units are duplex, either one- or two-story buildings. All of these units are, under the rules and regulations of the Administrator, now occupied by World War II veterans and their families having a minimum monthly income indicating financial ability to pay the rent and utility charges—there are no maximum income limitations. Throughout the State there are 4,016 temporary units and 3,217 municipally-owned permanent units, including municipally-owned conversions.

The policy of the State as set by you as Administrator and approved by the Veterans' Services Council in sales of the projects and buildings thereon is (1) to obtain an independent appraisal of market value; (2) to offer it for sale in the first instance to the veteran occupant at the appraised figure; and if the veteran desires to buy at such a figure, to sell the building or building and site to him at a private sale; and (3) if the veteran occupant does not desire to purchase the building, to sell it at public sale. No definite policy has as yet been set regarding sales to limited-dividend housing corporations, co-operatives or public agencies, including municipalities.

Under the law these projects are now tax exempt; however, on sale of such projects, such tax exemption terminates.

There are two questions involved:

(1) Has the Administrator the right under existing law to sell buildings in a Veterans' Emergency Housing Project to the veteran tenant occupant at private sale?

(2) If such a sale involves the necessity of a conveyance of real property by the municipality owning the site, does such municipality have the power under existing law to make such a conveyance to a veteran tenant occupant where it involves a private sale and preference to such veteran?

The answer to both questions is in the affirmative providing such sales are approved in the first instance by the Director of the Division of Purchase and Property in the Department of the Treasury. Such sales are permissible under the contract and existing law. They will, of course, be made pursuant to arrangements mutually agreed upon between you as Administrator and the municipality involved.

Section 12 of the Veterans' Emergency Housing Act (c. 323, P. L. 1946, as amended, sec. 1, c. 186, P. L. 1949, sec. 1, c. 20, P. L. 1951; R. S. 55:14G-12) provides that whenever any emergency housing project is available for occupancy in whole or in part, the Administrator shall, subject to regulations approved by the Veterans' Services Council, have certain powers during the duration of the emergency. This section defines the emergency to be for a period of five years from the date the housing is available for occupancy and that such emergency shall be deemed to continue for an additional two-year period in any municipality where the governing body of such municipality shall, prior to the expiration of the five-year period, by resolution find that the need for such housing continues to exist in such municipality and files a certified copy of the resolution with the Administrator.

Subsections (d) and (e) of section 12 sets forth the powers of the Administrator in connection with sale. Subsection (d) provides that the Administrator may transfer, set over, grant and convey such property to any public corporation, municipality or other public agency or private person, firm or corporation including the person, persons, firm or corporation from whom or which such property was acquired, by public or private sale or by lease, at such rentals and with such preferences as to occupancy and upon such terms and conditions as shall be for the best interests of the public. This subsection authorizes a municipality, public corporation or other public agency to purchase such property from the Administrator, subject to the approval of the State House Commission. Subsection (e) authorizes the Administrator to provide in any agreement or agreements heretofore or hereafter made that any emergency housing be disposed of by sale at any time, subject to the approval of the Director of the Division of Purchase and Property and that such sale may be public or private and may be conducted by him, subject to the approval of said director, on a lump sum or negotiated contract basis. It also provides that, if any sale is made during the period of the emergency, the housing shall, during the period of said emergency, continue to be operated under the act and the regulations.

Under these provisions you, as Administrator, have the right to sell projects or any units therein to private persons by public or private sale, subject to the approval of the Director of Purchase and Property, and in connection with such sale you have the right to convey and sell such property with preferences as to occupancy and under such terms and conditions as may be for the best interest of the public. Any sale to a public agency, however, would be subject to the approval of the State House Commission.

Section 17 of the Veterans' Emergency Housing Act (c. 323, P. L. 1946, as amended, sec. 2, c. 52, P. L. 1947; R. S. 55:14G-17) states, among other things, that any municipality, by resolution of its governing body, is hereby authorized and empowered to enter into any contract which the Administrator is authorized by the act to execute, and any such municipality is given all powers necessary, convenient or desirable in order to carry out and perform any and all provisions of any such contract.

Section 25 of the Veterans' Emergency Housing Act (c. 323, P. L. 1946; R. S. 55:14G-25) states that the powers enumerated in the act shall be interpreted broadly to effectuate the purposes thereof and shall not be construed as a limitation of powers.

From the above it would appear that a municipality would have the power to enter into a contract with you as Administrator in connection with the sale of these projects or units therein and to make conveyance of any property necessary to effectuate the sale; however, in view of the fact that such a conveyance involves real property, it may be well to proceed under the law covering sale of municipally owned real property. Under this law (sec. 1, c. 160, P. L. 1944, as amended sec. 1, c. 106, P. L. 1946, sec. 1, c. 417, P. L. 1947, sec. 1, c. 245, P. L. 1948; R. S. 40:60-26) the governing body of any municipality may sell any lands or buildings or any right or interest therein not needed for public use. Subsection (d) thereof provides that the governing body may sell any such properties at public or private sale upon such terms and conditions as may be authorized by resolution of said governing body with the approval in writing of the Director of the Division of Local Government in the State Department of Taxation and Finance, except that in the case of a sale to a veteran of World War II the approval of said director shall not be required.

Under subsection (d) of this act a municipality may be authorized to convey the real property involved on the sale of any unit of a Veterans' Emergency Housing Project to a veteran tenant occupant under the policy set by you as Administrator. Such a sale would have to be authorized by a resolution of its governing body and comply with the other requirements of that act; however, these requirements would not prohibit a private sale to such veteran.

Subsection (d) of that act was reviewed by our Supreme Court in the recent case of *Jamouneau vs. Local Govt. Bd., et al.*, 6 N. J. (Sup. Ct., 1951) 281. That case involved the private sale of the interest of the City of Newark in certain property and did not involve World War II veterans. The sale was not to a veteran. The court held that the provision requiring the approval of the Director of the Division of Local Government was unconstitutional in that it was an unlawful delegation of legislative authority since no standards were set by which said director was to exercise his power.

The fact that this provision was held unconstitutional does not invalidate the other parts of that subsection relating to sales to World War II veterans. It is a fundamental principle that a statute may be constitutional in one part and unconstitutional in another and that if the invalid part is severable from the rest, the portion which is constitutional may stand while that which is unconstitutional is stricken out and rejected. *Hudspeth vs. Swayze*, 85 N. J. L. 592; *Riccio vs. Hoboken*, 69 N. J. L. 649; 11 Am. Jur-Const. Law, sec. 152, p. 834.

There are several tests as to whether such portions of an act are severable; one is, if the invalid parts are eliminated, whether the remaining provisions are operative and sufficient to accomplish their purpose; another is the intention of the Legislature and whether one part of the act would have been passed without the other. With these tests in mind and from a reading of subsection (d) of the act, there would appear to be no question that the part which has been held unconstitutional by the Supreme Court is severable from the part relating to private sales to World War II veterans.

It is, therefore, my opinion that under subsection (d) of that act, the governing body of the municipality may sell properties at a private sale to a veteran of World War II and that such sale may be authorized by resolution of the governing body. It is my opinion that the policy set by you as Administrator as approved by the Veterans' Services Council providing the option of first refusal in the sale of units in Veterans' Emergency Housing Projects to veterans of World War II, who are tenant occupants of these units, is authorized under existing law and that both you

and the municipality would be authorized to consummate such sale under the provisions of the acts referred to herein.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: CHESTER K. LIGHAM,
Deputy Attorney General.

JUNE 16, 1952.

HONORABLE SANFORD BATES, *Commissioner,*
Department Institutions and Agencies,
State Office Building,
Trenton, New Jersey.

FORMAL OPINION—1952. No. 10.

DEAR SIR:

I have your letter of June 3, 1952, wherein you ask this office to render a legal opinion on the question as to whether or not cigarettes sold at the State Prison and purchased by the prisoners are subject to the three-cent stamp tax.

The answer to your inquiry is that all sales at the prison of cigarettes are subject to the three-cent stamp tax.

Section 303 of the Cigarette Tax Act (R. S. 54:40A-10) gives an exemption only on cigarettes which New Jersey is prohibited from taxing under the Federal Constitution or the statutes of the United States. This would encompass sales of unstamped cigarettes to the United States Government or the sale of cigarettes in interstate commerce.

There is nothing in the present law which provides for an exemption of the three-cent per package tax on sales to State institutions.

Your attention is further directed to section 302 of the Cigarette Tax Act (R. S. 54:40A-9), which provides:

"The taxes imposed by this act are hereby levied upon any sales of cigarettes made to the State Government or any department, institution or agency thereof, and to the political subdivisions of this State, and their departments, institutions, and agencies."

When the State of New Jersey purchases cigarettes and distributes them to its institutions, departments or agencies the three-cent stamp tax must be paid before a resale of the cigarettes is permitted to be made.

The tax in question is levied specifically upon the sale of cigarettes. Therefore, these cigarettes being sold by the State Government are not exempt from the tax even though sales are made within the confines of the State Prison.

We are, therefore, of the opinion that all sales of cigarettes in the State Prison must be subject to the cigarette stamp tax.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: BENJAMIN M. TAUB,
Deputy Attorney General.

JUNE 26, 1952.

HONORABLE PERCY A. MILLER, JR., *Commissioner,*
Department of Labor,
State House,
Trenton, New Jersey.

FORMAL OPINION—1952. No. 11.

DEAR COMMISSIONER MILLER:

I am in receipt of your recent letter requesting an opinion on the following question:

What position should the New Jersey State Board of Mediation take in response to requests for service in cases where labor disputes arise between political subdivisions of government and employees in the State of New Jersey?

We are of the opinion that the board does not have the authority to entertain such requests.

The statutory authority of the board (N. J. S. A. 34:13A-6) to effect the adjustment and settlement of labor disputes must necessarily be limited to those disputes which can legally be made the subject of negotiations between the employer and employee.

It has been recognized for many years that there is a legal difference between the rights of persons in private employment and of those engaged in public employment.

That difference was discussed at length in an opinion given by former Attorney General David T. Wilentz to the New Jersey State Board of Mediation under date of January 12, 1944.

In that opinion the Attorney General said:

"The departments of the State Government derive their sole power from the statutes. Counties, municipalities and school districts are creatures of the Legislature and possess only such rights and powers as have been granted in express terms, or as arise by necessary or fair implication, or are incident to, powers expressly conferred and as are essential and indispensable to declared objects and purposes of municipalities."

He further states:

"It is not a question whether the law prohibits a bargaining agreement of the kind we are considering. The real question is, is there any law on our statute books which authorizes, either by express words or by necessary implication, such a bargaining agreement? If there is no such warrant, then certainly the governing bodies of counties and municipalities have not the power to engage in any such undertaking."

Subsequent to the writing of this opinion, the underlying philosophy of the law discussed therein was incorporated into the New Jersey Constitution of 1947. Paragraph 19 of Article I thereof, provides as follows:

"Persons in private employment shall have the right to organize and bargain collectively. Persons in public employment shall have the right to

organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing."

Thus, we observe, the basic law of the State now recognizes the difference and distinguishes between the rights of persons engaged in private employment and the rights of those engaged in public employment. In the first instance, persons engaged in private employment are given the right of collective bargaining. In the second instance, the rights of persons engaged in public employment are limited to organizing and presenting their grievances to the proper bodies politic.

The rights of public employees were deliberately limited in this respect for valid and substantial reasons.

Government, in the final analysis, is the people. Employees of government are of the people and, as such, they are a part of the government which they serve. The people, through their duly chosen representatives, have, from time to time, provided regulations for the operation of their government. Among these, there are regulations concerning the raising and expenditure of public funds. A strict observance of these regulations is essential for the sound administration of government. The administrative officer in charge of a segment of government is required to confine his expenditures within the limits of the budget assigned to him. To permit him to bargain with the employees serving under him for purposes which would exceed his budget appropriation would extend to other segments of government and employees, to the end that the equilibrium of established government would become disturbed.

In the absence of legal authority for that purpose, within the pattern of government established in this State, public employees do not have the right of collective bargaining in the sense that it applies to persons employed in private enterprise.

In view of this posture of the law, labor disputes involving public employees are not legally the subject of negotiation between employer and employee, and they are, therefore, not within the powers of mediation vested in the Board of Mediation.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

JUNE 19, 1952.

HON. THOMAS S. DIGNAN,
Deputy Director of Civil Defense,
State House,
Trenton, New Jersey.

FORMAL OPINION—1952. No. 12.

DEAR MR. DIGNAN:

Receipt is acknowledged of your inquiry of June 12th as to the operation and effect of chapter 12 of the laws of 1952, providing for disability, death, medical and hospital benefits for civil defense volunteers. This act became effective on April 10, 1952, and is a supplement to the Civilian Defense Act of 1942 as amended.

Specifically, you request to be advised whether claims arising after the effective date of the act, but before July 1, 1952, when the new appropriation act becomes effective,

may be paid and satisfied from the fund specifically appropriated for civil defense and set up in the new appropriation bill.

The answer is in the affirmative.

Section 15 of the Civil Defense Act in part provides:

"15. There is hereby created a fund which shall be known as the special fund for civil defense volunteers to provide for the payment of weekly benefits for total disability, expenses of medical and hospital care and death benefits under this act and the expenses of administration. Such fund shall consist of any moneys appropriated therefor or credited thereto including any financial contributions received from the United States Government for such purposes. * * *"

A reading of the entire statute indicates a legislative purpose and intent to make it immediately effective and to thereafter promptly compensate all persons who may be entitled to benefits for disabilities incurred after the passage of the act.

The legislative appropriation of \$200,000 was made contingent upon the Civil Defense Act being enacted into law, and upon it being so enacted the appropriation merely implements the disability provisions of the act.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: JOSEPH LANIGAN,
Deputy Attorney General.

JL:rk

JULY 2, 1952

DR. LESTER H. CLEE, *President,*
Civil Service Commission,
State House.

FORMAL OPINION—1952. No. 13.

DEAR DOCTOR CLEE:

In your memorandum of June 16, 1952, you inquire:

"Shall State employees be allowed to keep jury pay, in addition to their State pay when serving as jurors?"

It is the opinion of this department that you have no right to take from a juror his jury pay, but as to whether or not you should allow an employee, who is serving on a jury, to receive his salary or compensation, would appear to be a matter of sound administrative policy for you to decide.

Jury service is a civic duty and there is no right to compensation for such service in the absence of a statute. See *31 Am. Jur., Jury, 595*. However, in New Jersey, R. S. 22:1-1 provides:

"Every person summoned as a petit juror in the Superior Court and the County Courts shall receive, for each day's attendance at such courts, to be paid by the sheriff of the county in which the juror shall serve, at the expiration of each term of service or at such other time or times within such terms as the board of chosen freeholders of the county shall direct the sum of five dollars (\$5.00)."

The above-mentioned statute is self-explanatory. Any person, be he State employee or otherwise, is entitled to the fund so paid and it would be beyond the power of your department to say that any employee is not entitled to the allowance which the Legislature has granted.

It might be further noted that there is no statute of this State which disqualifies a public employee merely because he is paid a salary by the State, municipality or county.

We feel that it is sound policy to pay State employees their regular salaries while on jury service and we believe there is ample authority for these payments, pursuant to R. S. 11:14-11 which provides as follows:

"The chief examiner and secretary shall, after consultation with the heads of departments and their principal assistants, prepare, and, after approval by the commission, administer regulations regarding . . . *special leaves of absence* with or without pay. . . ."

Your attention is respectfully called to the fact that the Federal Government follows the procedure above outlined, as do the vast majority of private industries.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: JOHN W. GRIGGS,
Deputy Attorney General.

JUNE 23, 1952.

HON. J. LINDSAY DE VALLIERE,
Director, Division of Budget and Accounting,
Department of the Treasury,
State House,
Trenton, New Jersey.

FORMAL OPINION—1952. No. 14.

DEAR MR. DE VALLIERE:

I acknowledge your request for an opinion, relative to the pension rights of Mr. Christopher Sipler, 331 Moreau Street, Morrisville, Pa., a bridge officer employed by the Delaware River Joint Toll Bridge Commission. Mr. Sipler has made application

to the State of New Jersey for a pension under the provisions of chapter 134, P. L. 1921 (R. S. 43:5-1 to 43:5-4, inclusive). This act is commonly referred to as the "Heath Act."

The Heath Act authorizes a State pension to "all persons in the State service qualifying hereunder as of January 1, 1921," who do not draw a pension or who are not specifically entitled to do so under any other law enacted prior to March 31, 1921, who do not have a fixed term of office, who have been continuously in the employ of the State for a period of twenty-five years, and who have reached the age of sixty years. Such persons may retire or be retired by reason of physical disability or incapacity developed during their "service to the State." The pension is equal to one-half of the average annual salary or wage received by "an employee" for the two years prior to the time of filing the application.

Mr. Sipler's pension application discloses that he is employed by the Delaware River Joint Toll Commission as a bridge policeman, and has been so employed by the present commission, and its predecessor commission, for nearly 34 years. I am informed by the commission, that the applicant's original appointment in 1918 was made by the commission of our State created by an act entitled "An act authorizing the acquisition and maintaining by the State of New Jersey, in conjunction with the State of Pennsylvania, of toll bridges across the Delaware river, and providing for free travel across the same," approved April 1, 1912 (Chapter 297, P. L. 1912), as amended and supplemented, the New Jersey Commission acting as a joint commission in conjunction with a similar commission created by Pennsylvania.

In 1934, by compact or agreement between the State of New Jersey and the Commonwealth of Pennsylvania, the present Delaware River Joint Toll Bridge Commission was created, consisting of the two former commissions. The New Jersey statute is chapter 215, P. L. 1934 (R. S. 32:8-1 to 32:8-15, inclusive). This compact was consented to by the Congress on August 30, 1935. The original compact was amended by a supplemental agreement set forth in chapter 283, P. L. 1947 (R. S. 32:8-10) and by a second supplemental agreement contained in chapter 284, P. L. 1951 (R. S. 32:8-11, 32:8-11.1, 32:8-11.2, 32:8-11.3, 32:8-11.4, 32:8-11.5, 32:8-11.6 and 32:8-16).

The original compact provides that no action of the Joint Commission shall be binding "unless a majority of the members of the commission from New Jersey, and a majority of the members of the commission from Pennsylvania shall vote in favor thereof" (R. S. 38:8-2); and that each of the States must pass bridge legislation similar to that enacted by the other, and must make like appropriations. (R. S. 32:8-14). Thus duality of control is established and maintained.

Insofar as its free bridges are concerned, the Joint Toll Bridge Commission operates upon an appropriation made by the State of New Jersey; and New Jersey is reimbursed in turn by the Commonwealth of Pennsylvania, in an amount equal to one-half of the New Jersey appropriation. Through administrative procedures adopted by the Joint Toll Bridge Commission and the State of New Jersey, persons performing duties in connection with the free bridges, are paid by check or warrant of the State of New Jersey, drawn against the New Jersey appropriation. Mr. Sipler's duties being in connection with the free bridges, his salary has been so paid, and to the extent that New Jersey is reimbursed by Pennsylvania for one-half of the New Jersey appropriation, Mr. Sipler may be said to draw his pay in the final analysis from both States involved.

It will be recalled that the Heath Act, in describing those entitled to its benefits, uses several different phrases as, "all persons in the State service," "in the employ of the State," "the employee," and those retiring "from the service of the State."

The real question before us, therefore, is whether Mr. Sipler, an employee of the Delaware River Joint Toll Bridge Commission, may be considered under the Heath Act, to be an employee of the State of New Jersey.

It is my opinion, and I so advise you, that Mr. Sipler is not an employee of the State of New Jersey, and accordingly he is not entitled to a pension under the Heath Act cited above.

In the first place, it is clear that the applicant was not hired by the State of New Jersey, and that the State of New Jersey does not determine the character or nature of his employment, his working conditions, or amount of compensation. Nor may the State of New Jersey direct him nor discharge him. Thus, the very attributes and incidents of the employer-employee relationship, are determined in the present case, not by the State of New Jersey, but by the Joint Commission, the latter being a bi-state agency, existing by virtue of the laws of two States, as consented to by the Congress. In other words, the essence of the employer-employee relationship—namely, control, is missing from the present situation, insofar as the State of New Jersey is concerned.

In view of our inability to point out any control by the State of New Jersey over employees of the Delaware River Joint Toll Bridge Commission, as Mr. Sipler, we are unable to classify Mr. Sipler as an employee of our State.

The fact that the element of control is the necessary ingredient to the employer-employee relationship has been stated by our Courts in a number of decisions. In *Outdoor Sports Corp. vs. American Federation of Labor*, 6 N. J. 217 (1951), the Supreme Court held:

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

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

“Our courts have recognized that ‘control by the master over the servant is of the essence of that relationship.’”

The words “in the service of a county or municipality” as used in an earlier version of the Veterans' Pension Act, were construed by the Supreme Court in *Reilly vs. Board of Education*, 127 N. J. L. 490 (1941), as not including employees of a municipal board of education.

The status of employees of bi-state agencies has been discussed by our Courts and by the Federal Courts in a number of cases. Bearing on our present discussion, are the decisions dealing with the Port of New York Authority, which as the Delaware River Joint Toll Bridge Commission, is a bi-state agency, existing by virtue of a compact between two States, consented to by Acts of the Congress, and composed of representatives of both States.

In the unreported decision of *Green vs. Firemen's and Policemen's Pension Fund of the City of Jersey City*, dated April 6, 1937, Judge Frank L. Cleary, sitting in the Union County Circuit Court, had before him a suit instituted by the plaintiff, a retired member of the Jersey City Fire Department, against the Pension Fund of the City of Jersey City. The plaintiff following his retirement, had accepted employment with the Port of New York Authority. Thereafter, the Pension Fund

directed plaintiff's attention to the provisions of chapter 259, P. L. 1932, which statute, in its then form, prohibited any State, county or municipal pensioner, from holding “any public position or employment in the State or in any county, city, town, township, borough, village or other municipality, unless the pensioner waived his pension, for the duration of the public position or employment. The Pension Fund stopped payment of plaintiff's pension. Plaintiff then brought the present suit. Defendant's answer set up chapter 259, P. L. 1932, as its defense. Plaintiff thereupon moved to strike out the answer on a number of grounds, one of which was:

“That the answer filed by the defendant in this cause sets forth no legal defense to the cause of action set forth by the plaintiff in the complaint, in that the same is frivolous, as chapter 259 of the Pamphlet Laws of 1932 of the State of New Jersey does not affect the plaintiff's cause of action in that employment of the plaintiff by the Port of New York Authority is not employment in the ‘State or in any County, City, Town, Township, Borough, Village or other municipality or school district’ within the meaning of the said act.”

The court dismissed the answer on this ground, namely, that employment by the Port Authority was not employment by the State, and therefore the statute referred to did not affect the petitioner's employment with the Port Authority. In this regard, the court held:

“The only question argued on the return day of this motion was whether or not the plaintiff is entitled to receive his pension from the defendant during the period he has been employed by his present employer, the Port of New York Authority.

“The issue in this case is limited to such a narrow sphere, that it does not seem to me to require any lengthy discussion upon the subject. As set forth in the memorandum filed on behalf of the defendant, and also in a memorandum filed by Russell E. Watson, Esq., attorney for the Port of New York Authority, amicus curiae, the sole question to be determined is, whether or not the provisions of the 1932 act apply to employment such as the plaintiff has been engaged in since the time of his retirement. In other words, is the Port of New York Authority such an agency as to come within the classification set forth in the act of 1932, so as to give the pensioning body the right under the statute to suspend the payment of such pension while the employment continues?”

“I have reached the conclusion that the 1932 act has no application to the Port of New York Authority, the plaintiff's present employer . . .

“Having reached the conclusion that the 1932 statute does not apply to this case I am of the opinion that there is no defense raised in the answer to the plaintiff's complaint and that the motion to strike said answer should be granted.”

Another decision bearing on the present matter, is *Rubright vs. Civil Service Commission*, 137 N. J. L. 369 (1948), 58 Atl. 2nd 772. In this case, our Supreme Court had before it a certiorari proceeding instituted by the prosecutor against the Civil Service Commission of the State of New Jersey, seeking to review a determination by the commission as to the prosecutor's permanent State Civil Service status. The prosecutor had been employed in the State Employment Service Division, the records, facilities and personnel of which were subsequently transferred

to the Federal Government. Thereafter, the Federal service was terminated and the records, facilities and personnel on temporary leave, including the prosecutor, were returned to the State service. The prosecutor, in order to uphold his civil service status contended that he continued to be an employee of the State while on "temporary loan" to the Federal Government. The court held that workers temporarily on loan to the Federal government, being compensated for their labors by the Federal Government, were not, while in Federal service "also employees of the State" as they were not subject to State control, while thus assigned.

The fact that the applicant before us is paid by the check or warrant of the State of New Jersey, has, in my opinion, no effect whatsoever on the situation. This is simply an administrative procedure adopted by the Commission and the State of New Jersey to facilitate transaction of the joint commission's fiscal affairs, and to provide administrative controls over the disbursement of the appropriation.

In performing the administrative or ministerial act of making payments and disbursements for the joint commission, the State of New Jersey is performing merely a fiscal service for the joint commission, without affecting, in any manner, Mr. Sipler's status.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: DANIEL DE BRIER,
Deputy Attorney General.

ddb:b

JULY 2, 1952.

HONORABLE WALTER T. MARGETTS, JR.,
State Treasurer,
Trenton 7, New Jersey.

FORMAL OPINION—1952. No. 15.

DEAR MR. MARGETTS:

Receipt is acknowledged of your request, transmitted through Mr. de Valliere, for an opinion as to whether the issuing officials (comprised of the Governor, the State Treasurer and the Comptroller) named in P. L. 1951, c. 340, "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 fifteen million dollars (\$15,000,000.00) for State teachers' college buildings," etc., may issue bonds under said act prior to an actual legislative appropriation.

The answer is "No."

Section two of the act under consideration (P. L. 1951, c. 340), provides that bonds in the sum of \$15,000,000.00 are authorized "for State teachers' college buildings, their construction, reconstruction, development, extension, improvement, equipment and facilities for the education of teachers as follows: for the construction, reconstruction, development, extension, improvement and equipment of State teachers' college buildings, and for the appurtenances thereto, and for acquisition of land for said purposes, if necessary." However, the same section prescribes that such con-

struction, reconstruction, development, extension and improvement, and such acquisition of equipment and facilities, "shall proceed pursuant to appropriations thereof in the manner provided in section thirteen" of the act. And section thirteen, specifically dedicates the moneys in the State Teachers' College Buildings Construction Fund (to be comprised of proceeds from the sale of bonds, etc., as directed in section twelve) to the purpose for which the bonds are authorized, and prescribes that no moneys from said fund "shall be expended except in accordance with appropriations, from said fund, made by law."

The obvious intentment of these provisions is that the various projects contemplated by the act and for which money is to be raised by the sale of bonds are to be undertaken only after allotments, by way of appropriations, are made by law. Moreover, section four of the act provides that the bonds "shall be issued from time to time as money is required for the purpose aforesaid, as the issuing officials * * * shall determine." Obviously, no money will be required unless and until the Legislature has acted in the matter.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: OLIVER T. SOMERVILLE,
Deputy Attorney General.

OTS:mcb

JUNE 26, 1952.

THE HONORABLE SANFORD BATES, *Commissioner,*
Department of Institutions and Agencies,
State Office Building,
Trenton, New Jersey.

FORMAL OPINION—1952. No. 16.

DEAR COMMISSIONER BATES:

You have inquired concerning the possibility of utilizing certain moneys from the Inmates' Welfare Fund at the State Prison to retain the services of an attorney to act for and on behalf of the prisoners in the matter of presenting writs of habeas corpus to the courts and with respect to furnishing legal advices on their problems.

It is our opinion and we are obliged to inform you that the statutes as they now exist do not permit this type of expenditures from the two such funds established by law.

One of the laws relating to the subject matter is found in R. S. 30:4-15, wherein it is provided that the board of managers of any institution may maintain a commissary or store for the sale of commodities, and it is stated therein that "Any profit accruing may be used by the board for recreational entertainment or other like purposes." It is too obvious to require comment that these moneys cannot be so expended, for the retention of the professional services of an attorney are certainly not in the category of "recreational entertainment or other like purposes."

The second statute dealing with the question is R. S. 30:4-67.1, which permits the chief executive officer of any institution to deposit and maintain the funds of all inmates in a general account and any interest paid thereon by a bank or trust company may be utilized by the board of managers "for the use, benefit and general welfare of the inmate population as a whole."

We cannot find as a fact that the use of these funds to pay for the services of an attorney would come within the quoted limitation placed upon the fund by the Legislature. There are countless inmates in confinement, and there will be many more in the future, who have no need to consult counsel either because the legal points involved in their cases have been settled by the decisions of our courts or because no legal problem is presented by the form of their sentence. While it is true that a decision favorable to one prisoner would operate beneficially to all prisoners sentenced under similar circumstances, we believe that such decisions touch but a minority number of all prisoners in confinement and that it is not the type of expenditure which the Legislature intended should be made from these funds.

For the above reasons, we are obliged to inform you that the moneys in either of these funds cannot be utilized as requested by the committee of inmates.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: EUGENE T. URBANIAK,
Deputy Attorney General.

ETU:HH

AUGUST 13, 1952.

THE HONORABLE SANFORD BATES, *Commissioner,*
Department of Institutions and Agencies,
State Office Building,
Trenton, New Jersey.

FORMAL OPINION—1952. No. 17.

MY DEAR COMMISSIONER BATES:

You have inquired concerning the interpretation to be made of R. S. 44:7-5d.(2) as amended by chapter 24, P. L. 1952.

Specifically, you desire to be advised whether grants of financial assistance, contemplated by chapter 24, P. L. 1952, can be made to persons who are patients in general hospitals owned by the several municipalities.

It is our opinion and we advise you that such payments can be made to individuals otherwise qualified and eligible to receive Old Age or Disability Assistance even though they may be patients in municipally-owned general hospitals.

An examination of chapter 24, P. L. 1952, discloses that certain limitations are contained therein upon payments of this type of assistance to persons otherwise qualified who are hospitalized in certain types of medical institutions. The act clearly precludes such payments to persons who are patients in tuberculous sanatoria or hospitals for treatment of mental diseases. There is a further prohibition in the section of the law under construction against making such payments to persons hospitalized in medical institutions eligible to receive funds from any one of the several counties or municipalities as provided in chapter 5, Title 44, Revised Statutes.

To determine the character of the institutions defined in R. S. 44:7-5d.(2) et seq., examination must be made of R. S. 44:5-2 et seq. Provision is made in that portion of our law whereby the several counties or municipalities may assist certain charitable hospitals to meet their operating deficit by paying to such hospitals sums of money to be used for current maintenance expense and operation thereof or for the direct cost of maintaining patients resident in the several municipalities and counties.

It was the obvious intent of the Legislature that such hospitals eligible to receive these moneys should not also receive, directly or indirectly, additional moneys representing the cost of maintaining persons eligible for the type of assistance provided for in chapter 24, P. L. 1952, and who are hospitalized in such medical institutions.

It becomes apparent from a reading of R. S. 44:5-2 et seq. that a hospital owned, maintained and operated by a municipality is not such a charitable hospital as is defined as eligible to receive financial grants in aid from counties or municipalities. This for the reason that throughout R. S. 44:5-2 et seq. it is provided that in any county or municipality which has no hospital located therein and maintained by the county or municipality that such county or municipality may contribute to the support of existing general charitable hospitals within the county or municipality and which are supported by private charity.

Municipal general hospitals owned, maintained and operated at the sole expense of the community are not in the category of general charitable hospitals supported by private charity. They are agencies of the municipal government and patients hospitalized therein, otherwise eligible for assistance under chapter 24, P. L. 1952, are not prohibited by R. S. 44:7-5d.(2) from receiving assistance payments.

Very truly yours,

THEODORE D. PARSONS,
Attorney General of New Jersey.

By: EUGENE T. URBANIAK,
Deputy Attorney General.

ETU:HH

JUNE 25, 1952.

THE HONORABLE SANFORD BATES, *Commissioner,*
Department of Institutions and Agencies,
State Office Building,
Trenton, New Jersey.

FORMAL OPINION—1952. No. 18.

DEAR COMMISSIONER BATES:

You have requested an interpretation of section 12 (c), chapter 84, P. L. 1948, the present law which establishes the State Parole Board and defines its duties and places certain limitations upon its authority.

You state that a prisoner in confinement at State Prison was convicted in 1939 for an offense which occurred in 1925 and with respect to which he surrendered himself to the authorities and confessed the commission of the offense. In the intervening period between 1925 and 1939 he committed three separate offenses and upon

which he was convicted and sentenced to institutions of State Prison character in other States.

You desire to be advised whether he is a fourth offender in contemplation of the Parole Law to the end that he should be denied parole until he has served the maximum of the sentence imposed upon him.

It is our opinion and we advise you that the prisoner in question, for purposes of parole consideration, shall be deemed to be a first offender rather than a fourth offender, for the reasons stated herein.

The pertinent and applicable statute provides that "Any person sentenced to any penal institution of this State who has previously served all or part of three terms of imprisonment in any penal institution" of this State, other States, the United States or a combination thereof "shall be deemed to be a fourth offender and upon his incarceration for such fourth or later offense shall be ineligible for parole consideration by the board until he shall have served the maximum sentence imposed upon him * * *."

At first blush, predicated upon the strict application of the words used in the law, it would seem that the prisoner is a fourth offender since he has served all or a part of three prior sentences in penal institutions. However, we believe this does violence to what appears to be the clear legislative intent in the enactment of this law. Mr. Justice Heher, in his opinion of *In re Huyler*, 133 N. J. L. 171, at page 176, said:

"Comparing the related sections of the Revision, there is a conspicuous policy to provide an incentive for reformation by imposing penalties for recidivism. The first offender and the unregenerate criminal are placed on different levels. There are readily understandable grounds for this policy."

In the enactment of section 12 (c), chapter 84, P. L. 1948, the Legislature intended to provide this type of incentive for reformation by withholding parole consideration to habitual offenders. The prisoner whose case we review was not such an habitual offender or unregenerate criminal at the time of the commission of the crime in 1925 for which he was convicted in 1939. True that he later became such an offender but it is axiomatic in the interpretation of penal statutes that they shall be liberally construed most favorably to the prisoner and against the authorities. In the classic deliverance upon this subject in *U. S. vs. Wiltberger*, 18 U. S. 76, 5 L. Ed. 37, approved and followed in *State vs. Woodruff*, 68 N. J. L. 89 (Supreme Court, 1902), Chief Justice Marshall said:

"The rule that penal laws are to be construed strictly is perhaps not less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not the judicial, department. * * * The intention of the Legislature is to be collected from the words they employ. Where there is no ambiguity in the words there is no room for construction."

The ambiguity in the statute under construction becomes apparent when it is observed that the withholding of parole consideration in this case is contrary to public policy enunciated in the *Huyler* decision, *supra*.

"A penal statute cannot be extended, by implication, beyond the legitimate import of the words used, to include persons or objects not clearly described

in the statute, and the offense charged must come within both the letter and the spirit of the statute. As the Legislature adopts criminal statutes for the purpose of preventing or punishing definite mischiefs, and as statutes often embrace all conduct likely to result in such mischiefs and often contain no statement of exceptions thereto, one who is charged with violation of a criminal statute must be permitted to show, if he can, that he is not within the spirit of the statute even though his conduct is apparently within the letter of the law. This principle is of great importance in cases of mere technical violation of law, where the statutory language is all embrative but where the accused person never committed the mischief the statute was enacted to prevent, for it is contrary to the spirit of justice and of the common law to apply criminal sanctions in cases where the conduct of the accused fails to violate the spirit of the law." See *O'Regan and Schlosser*, "Criminal Laws of New Jersey," Vol. 1, page 84, &c.

The mischief sought to be controlled and discouraged by the Legislature in section 12 of the Parole Law was recidivism. It is the plain fact that the prisoner whose case we discuss here was not a recidivist in 1925 when he committed the crime for which he was incarcerated in 1939. His voluntary surrender to the authorities and his confession to the crime is laudable, and it is inconceivable that the language of this law can be construed in such fashion as to penalize the prisoner as an habitual offender when the record clearly demonstrates that he was not.

The Parole Board should be informed that the prisoner should be considered as eligible for release on parole without the application of the limitations imposed by section 12 of the Parole Law.

Very truly yours,

THEODORE D. PARSONS,
Attorney General of New Jersey.

By: EUGENE T. URBANIAK,
Deputy Attorney General.

ETU:HH

JULY 7, 1952.

HON. J. LINDSAY DE VALLIERE,
Director, Division of Budget & Accounting,
Department of the Treasury,
State House,
Trenton, New Jersey.

FORMAL OPINION—1952. No. 19.

DEAR MR. DE VALLIERE:

I have your recent request for the opinion of this office, with reference to the effect of chapter 271, P. L. 1952, upon Item T 22 of the Appropriations Act for the current fiscal year ending June 30, 1953. (Chapter 43, P. L. 1952.)

Chapter 271, P. L. 1952, aforementioned, repealed as of July 1, 1952, the Apportionment Fund Act, namely, chapter 254, P. L. 1944. This latter statute

made an annual appropriation of \$1,000,000.00 to be apportioned among the municipalities of our State employing full time policemen and firemen, or both. The statute directs that these moneys be used for the maintenance of police and firemen's pension funds in those municipalities wherein such funds are established, and where not so established, for the support of police and fire departments.

Item T 22 of the current appropriations act is as follows:

"T 22. *Police and Firemen's Apportionment Fund*

Apportionment Fund as provided in chapter 254, P. L. 1944 . . . \$1,000,000.00

The issue before us, is whether Item T 22 is to be administered as an effective and valid appropriation during the current fiscal year, or whether on the other hand, it is to be regarded as repealed, due to the repeal of the Apportionment Fund Act, by chapter 271, P. L. 1952.

It is my opinion, and I so advise you, that Item T 22 of the current appropriations act remains fully effective and valid for its stated purpose, and is to be administered as such.

As has been observed heretofore, the basic authorization for the \$1,000,000 annual appropriation is the Apportionment Fund Act, namely chapter 254, P. L. 1944. This act, constituted, in itself, a valid and proper appropriation measure. The Legislature, however, pursuant to the requirements of section 3 of chapter 33, P. L. 1945 annually enacts an appropriations act, the purpose of which is to include in one document, in so far as is possible, a complete picture of the fiscal needs of the State Government. Section 3 of the statute referred to is as follows:

"So far as known or can be reasonably foreseen, all needs for the support of the State Government and for all other State purposes shall be provided for in one general appropriation law covering one and the same fiscal year except that, if change in fiscal year is made, necessary provision may be made to effect the transition."

In accordance with this statute, Item T 22 was included as a specific appropriation in the current appropriations act. When enacted, Item T 22 was, in itself, a full and complete authorization for the appropriation in question, until repealed as is hereinafter discussed, irrespective of what subsequent disposition was made of the enabling Apportionment Fund Act, namely, chapter 254, P. L. 1944.

The foregoing leads to the real question before us—was Item T 22 repealed or rendered invalid by the repeal of the Apportionment Fund Act?

In order to conclude that Item T 22 was rendered invalid, a specific or implied repeal thereof must be found. The facts are clear that no specific repeal occurred. The Legislature could have enacted a specific repealing act if this was desired. In the absence of a specific repealer, are we to presume that chapter 271, P. L. 1952 worked an implied repeal of Item T 22? I think not.

Repeals by implication are not to be lightly adopted. As was stated by our court in *Bednarik vs. Bednarik*, 18 N. J. Misc. at 649 (1940):

"It is an established rule of statutory construction that repeals by implication are not favored and that where it is possible to reconcile two statutes the court should make every effort to sustain both. *Winne vs. Casale*, 99 N. J. L. 345; affirmed, 100 N. J. Law 291."

In the same vein, in section 2014 of Sutherland on "Statutory Construction," which states:

"The bent of the rules of interpretation and construction is to give harmonious operation and effect to all of the acts upon a subject, where such a construction is reasonably possible. . . . Where the repealing effect of a statute is doubtful, the statute is to be strictly construed to effectuate its consistent operation with previous legislation."

The foregoing citations in support of the rule that statutes are to be construed to effectuate the "consistent operation" of all statutes on a given subject, make necessary a reference to certain other legislation, affected by the several statutes with what we have heretofore been concerned in this discussion.

The repealing statute, namely, chapter 271, P. L. 1952, was one of several acts enacted by the 1952 Legislature, in connection with the establishment of the Consolidated Police and Firemen's Pension Fund Commission. This commission, established by chapter 358, P. L. 1952, consolidates under its control and management all local police and firemen's pension funds established under the provisions of chapter 160, P. L. 1920, as amended. The legislative plan set forth in the 1952 statute, is to fund existing deficits in local police and firemen's pension funds through a thirty year program to which the State, commencing July 1, 1953, is to make annual appropriations. This statute makes no mention of the plan of contribution established by the Apportionment Fund Act. Accordingly, we must inquire as to whether the Legislature intended that the \$1,000,000 annual appropriation continue until July 1, 1953, when the new plan of contribution commences.

I think the Legislature did so intend. In the first place, it is to be presumed that the Legislature in enacting the current appropriations act, including Item T 22, effective July 1, 1952, the Consolidated Police and Firemen's Pension Fund Commission Act, and another companion act, namely, chapter 272, P. L. 1952, likewise effective July 1, 1952, was cognizant that it had repealed, as of July 1, 1952, the Apportionment Fund Act. Had the Legislature intended to repeal Item T 22 it could have done so by express words. *Oakland vs. Board of Conservation and Development*, 98 N. J. L. at 102 (1922).

Secondly, in order to give meaning and consistency of operation to the plan of consolidating the local police and firemen's pension funds, to give equal force and effect to the various statutes to which I have referred, all effective on the same date, and to provide for the funding of existing deficits over thirty years, partially thereof the medium of contributions to be made annually by the State, commencing July 1, 1953, it is necessary that we assume the Legislature intended that the previous plan of contribution continue during the current fiscal year, and until the new plan of contribution becomes effective next July. By this type of interpretation, we reach, as our courts direct we do, that construction that gives consistent and harmonious operation and effect to the various statutes discussed herein.

What other assistance do we have, in arriving at the legislative intent? Chapter 271, P. L. 1952, prior to enactment, was designated as Senate Bill 278, 1952. The statement attached to this bill, when introduced, read as follows:

"STATEMENT"

Senate Bill No. 129, entitled 'An act to consolidate and place under the control of a State commission all pension funds heretofore created pursuant to chapter 160 of the laws of 1920, as amended and supplemented, for policemen and firemen; creating a State commission for the control and administration of such consolidated fund; providing for the achievement and maintenance of the actuarial solvency of such fund; amending sections 43:16-1, 43:16-2, 43:16-5, 43:16-6 and 43:16-7, and supplementing chapter sixteen of Title 43 of the Revised Statutes' would consolidate local municipal and county police and firemen's pension funds and place such consolidated fund under the control and management of a State commission created thereby for that purpose. Said bill provides, among other things, for annual contributions by the State of New Jersey to the consolidated fund over a period of years with the object of ultimately bringing such fund to a state of actuarial solvency and maintaining it in such a condition. The provision for these State contributions, therefore, renders unnecessary the annual State appropriation of \$1,000,000.00 apportionable among the municipalities of the State employing full time policemen and firemen for local pension fund purposes as provided by chapter 254, P. L. 1944. In view of the absence of further necessity for the last mentioned enabling act, the foregoing bill provides for its repealer, effective July 1, 1952, *after the appropriation for the year 1952 has been made.*" (Italics supplied.)

The last sentence of the statement is indicative of the intention on the part of at least the author of the bill, that the \$1,000,000 appropriation, as contained in Item T 22 of the current appropriations act, was to remain valid during the current fiscal year, to be disbursed for the purposes stated.

The significance, if any, to be given to a statement attached to a legislative bill, as an aid in arriving at legislative intent, has been discussed from time to time by our courts, the most recent discussion being that of Mr. Justice Jacobs, in his concurring opinion in the Supreme Court decision of *Board of National Missions vs. Neeld*, 9 N. J. at 358 (1952). Mr. Justice Jacobs stated:

"However, in *Hoffman vs. Hock*, 8 N. J. 397, 408 (1952) this court recently indicated that such statement may not in anywise be used as an extrinsic aid in the ascertainment of the legislative purpose, meaning or intent . . ."

"In *Flagg vs. Johansen*, 124 N. J. L. 456, 459 (Sup. Ct. 1940) the court described the introducer's statement as a 'frail and unreliable' source of legislative intent which should not be considered. It seems to me that this fails to distinguish between legal admissibility and weight. The introducer's statement clearly constitutes relevant evidence on any proper issue as to the legislative purpose, meaning or intent; it sets forth the interpretation of the draftsman or sponsor of the legislation, is circulated amongst his fellow members of the Senate or Assembly, as the case may be, and becomes a matter of record available for inspection by all, then and thereafter. It may be very complete and embody a fully documented narrative of purpose entitled to substantial consideration. See e. g., Assembly No. 15 introduced on March 21, 1952, and bearing a statement which is in form

comparable to a detailed committee report. On the other hand it may be inadequate and perhaps misleading and entitled to little consideration. But before this court can tell what kind of statement it is it must have the privilege of looking at it, and that is what *Flagg vs. Johansen* denied. I, for one, am for removing the blinkers. See *Winne vs. Casale*, 100 N. J. L. 291, 295 (E. & A. 1924) where Chief Justice Gummere found significance in the introducer's statement and *Schwegmann Bros. vs. Calvert Distiller's Corp.*, *supra*, where Justice Douglas remarked that 'It is the sponsors that we look to when the meaning of the statutory words is in doubt.' In construing particular statutory phraseology such as that embodied in L. 1948, c. 268 we must, unless we are to usurp functions of the other branches of government, seek to ascertain and effectuate the legislative meaning rather than our own. To that task we should bring minds unafraid to explore."

Cognizant as I am of the limitation placed upon the statement appended to a legislative bill, as a means of ascertaining the legislative intent, nevertheless, in the spirit of Justice Jacobs' opinion, the statement attached to the statute with which we are presently concerned, namely, chapter 271, P. L. 1952, is presented for whatever weight it may have, in connection with the facts and law herein discussed, in support of the conclusion reached by this opinion that the Legislature intended that Item T 22 remain valid until July 1, 1953.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: DANIEL DE BRIER,
Deputy Attorney General.

ddb:b

JULY 30, 1952.

HON. WILLIAM J. DEARDEN, *Acting Director,*
Division of Motor Vehicles,
State House.

FORMAL OPINION—1952. No. 20.

DEAR MR. DEARDEN:

I have your letter of July 22, 1952, in which you request an opinion as to whether or not the organization known as the "New Jersey Timing Association" in operating motor vehicle races against time over a marked track, comes within the purview of chapter 299, P. L. 1952.

The answer to this question is, "Yes."

Chapter 299, P. L. 1952 provided, in part, as follows:

"No person, partnership, association or corporation shall manage, operate or conduct a motor vehicle race or exhibition of motor vehicle driving skill except by virtue of a license to manage, operate or conduct the same first had and obtained from the Department of Law and Public Safety * * *"

Since the members of the New Jersey Timing Association are operating their cars over a measured course and are racing against time or time previously established by another driver, there can be no question in my mind but that the association is conducting both a motor vehicle race and an exhibition of motor vehicle driving skill and, therefore, comes within the provisions of chapter 299, P. L. 1952.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: JOHN J. KITCHEN,
Deputy Attorney General.

jjk:n

JULY 10, 1952.

HONORABLE FRED V. FERBER,
Director, Division of Purchase and Property,
Department of the Treasury,
State House,
Trenton, New Jersey.

FORMAL OPINION—1952. No. 21.

DEAR MR. FERBER:

This will acknowledge receipt of your letter of July 10, 1952, wherein you request an opinion concerning workmen's compensation insurance coverage for salaried employees and the board members of the State Board of Pharmacy. The question presented in your letter is:

"Kindly advise whether or not the Board of Pharmacy may carry workmen's compensation insurance to cover not only its salaried employees but also those board members who are paid on a per diem basis."

In my opinion, the Board of Pharmacy may carry workmen's compensation insurance for its salaried employees and for those of its board members who perform services and are paid therefor upon a per diem basis.

R. S. 34:15-43 provides: "Every employee of the State * * * or any board or commission * * * who may be injured in line of duty shall be compensated under and by virtue of the provisions of this article and article two of this chapter * * * but no person holding an elective office shall be entitled to compensation." It clearly appears to be the intention of this section to provide broad coverage for all persons except elective officials, and a special provision, R. S. 34:15-43.1, was required to eliminate from coverage casual employees for whom employment was provided under a relief plan. (By chapter 317 of the Laws of 1952, approved June 19, 1952, the restriction excluding even elective officials from workmen's compensation coverage has been eliminated.)

An employee under the Workmen's Compensation Act (R. S. 34:15-36) is defined as follows: "'employee' is synonymous with servant, and includes all natural persons who perform service for another for financial consideration, exclusive of casual employments."

The State Board of Pharmacy consists of five members, each of whom is appointed by the Governor for a term of five years. The board is required to examine into applications for registration and the granting of certificates to duly qualified persons, and other like duties. The members of the board are entitled to receive "traveling and other necessary expenses" and, in addition, each member "shall receive * * * the sum of ten dollars for each and every day upon which he is engaged upon the duties of the board." R. S. 45:14-1 et seq.

R. S. 34:15-37 provides that "In any case the weekly wage shall be found by multiplying the daily wage by five" and "Five days shall constitute a minimum week." Therefore, in the event of an accidental injury sustained by a board member, arising out of and in the course of the performance of his duties, compensation would have to be based upon the statutory rate of two-thirds of the product of \$10.00 per day times 5 days, the weekly pay rate, subject to the statutory maximum limitation of \$30.00 per week for temporary or permanent disability.

In view of the present practice under which the Board of Pharmacy and other like boards are required to be self-sustaining bodies subsisting and meeting their expenses from the dues, contributions, and fines collected by these boards, it is not only proper but it would appear highly advisable that these boards carry workmen's compensation coverage for their salaried employees and those board members who may come within the definition of the word "employee." It is readily conceivable that serious injury sustained by an employee or a board member might result in an award so high that the board might find it difficult or impossible to pay from its own funds.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: CHARLES I. LEVINE,
Deputy Attorney General.

TDP:L:ld

SEPTEMBER 3, 1952.

DOMINIC A. CAVICCHIA, *Director,*
Division of Alcoholic Beverage Control,
1060 Broad Street,
Newark 2, N. J.

FORMAL OPINION—1952. No. 22.

MY DEAR DIRECTOR:

Your letter of July 30, 1952, poses the question of whether the provisions of the so-called State Limitation Law, P. L. 1947, c. 94, found in R. S. 33:1-12.13, *et seq.*, prohibit the issuance of a new plenary retail consumption license in the Borough of Princeton.

The answer to this question is "Yes."

According to your advices, the borough, with a population of 12,230, has issued 11 plenary retail consumption licenses. If that were all, it would appear

obvious that the borough could properly issue one additional consumption license, since R. S. 33:1-12.14 provides, so far as here pertinent:

“. . . no new plenary retail consumption . . . license shall be issued in a municipality unless and until the . . . number of such licenses existing in the municipality is fewer than one for each one thousand of its population . . .”

The complicating feature, however, lies in the fact the Princeton Inn, which is located on the boundary line separating the Borough and the Township of Princeton, operates its business under a plenary retail consumption license. Although your letter is not clear as to whether each municipality actually issues a license certificate to the Princeton Inn, it does appear that only one license fee is paid and that the fee is divided between the municipalities pursuant to the provisions of R. S. 33:1-16, which provides:

“Whenever it shall appear that a building or premises to be licensed is located in more than one municipality, it shall not be necessary to secure more than one license of the same class for the building or premises. Application may be made in each of the municipalities having jurisdiction over any part of the building or premises and said municipalities shall agree upon a satisfactory division of the fee. If the municipalities cannot agree upon a satisfactory division of the fee it shall then be the duty of the commissioner to determine the proportionate amount of the fee to be paid to each of the municipalities; but in no case shall the total fee to be paid exceed the higher license fee as fixed in any of the municipalities in which part of the building or premises is located.”

The issue, succinctly stated, therefore, is whether the Princeton Inn, a portion of whose licensed business is located in the borough, should be considered as holding a license “existing in the municipality” within the purpose and intent of the statutory language, quoted above, appearing in R. S. 33:1-12.14.

The issue must be resolved in the affirmative. Irrespective of whether the borough actually issues a license certificate authorizing the alcoholic beverage operation of the Princeton Inn in its municipality, the inn is undoubtedly conducting its licensed business in the borough pursuant to some official action taken by the borough’s issuing authority. Otherwise, of course, the inn would be guilty of illegal sales of alcoholic beverages without a license, so far as the conduct of its business in the borough was concerned. It is too obvious to require comment that the inn, even though holding a license certificate issued to it by the township, could not lawfully operate thereunder in the borough. It follows, therefore, that the Princeton Inn, which exercises the privileges of a plenary retail consumption license in the borough, must be considered as holding a license (as distinguished from a license certificate) “existing in the municipality,” thus exhausting the borough’s quota of 12 consumption licenses based upon its population of 12,230.

This construction of the law accords with the legislative policy of restricting the number of licenses that may be issued by a municipality. The provisions of R. S. 33:1-16, quoted above, are not inconsistent with such policy. This section was designed merely to eliminate the unjust requirement, theretofore existing, of an applicant paying separate license fees to two municipalities for a single place of business located on the dividing line of those municipalities. It did not, however, eliminate the necessity for the submission of separate applications to each municipality and separate action thereon by them.

The problem may be seen in clearer focus if we were to assume that the borough had already issued 12 consumption license certificates and a new application were now to be made by the Princeton Inn for a consumption license. In that case, it would be crystal clear that the borough, having reached its maximum limit of 12 consumption licenses, could not authorize the operation of a licensed business on that portion of the premises of the Princeton Inn located in its municipality. The fact that we are here concerned with the reverse situation does not, of course, change the result.

You are advised that the answer to your inquiry is that, in the indicated circumstances, the Borough of Princeton is precluded from issuing a new plenary retail consumption license.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: SAMUEL B. HELFAND,
Deputy Attorney General.

SBH: MF

JULY 24, 1952.

HONORABLE WALTER R. DARBY,
Director of Local Government,
Commonwealth Building,
Trenton 8, New Jersey.

FORMAL OPINION—1952. No. 23.

DEAR MR. DARBY:

Your letter of July 10, 1952 has requested our opinion as to the manner in which the governing body of a municipality shall make an emergency appropriation for a Chapter 6 School District after the amount thereof has been certified to the governing body by the Board of School Estimate under R. S. 18:6-56.

We are of the opinion that such appropriation must be made in the manner prescribed by R. S. 40:2-31.

The question arises from the necessity of construing R. S. 18:6-57, which provides:

“Upon receipt of the certificate of the board of school estimate delivered as required by section 18:6-56 of this Title, the governing body of the municipality shall immediately appropriate the sum or sums for the purpose or purposes and shall raise such sum or sums in the manner provided by law for the raising of such funds by the municipality in emergencies and the raising of the funds required by such certificate, in such a case, shall be considered an emergency.”

The manner of raising of funds by a municipality in emergencies is provided for in R. S. 40:2-31, which sets forth two steps in the process: (1) making an appropriation, and (2) obtaining the money. The statute first authorizes the

governing body to make emergency appropriations only "by resolution adopted by two-thirds vote of all the members," declaring that an emergency exists requiring a supplementary appropriation. The resolution must be in the form and content prescribed by the Local Government Board, must set out the nature of the emergency in full, and a copy thereof must be filed with the Director of Local Government. The section further provides:

"Any county or municipality may borrow money and issue its negotiable notes to meet any such emergency appropriation. Each such note shall be authorized by resolution of the governing body, shall be designated an 'emergency note,' and may be renewed from time to time, but all such notes and any renewals thereof shall mature not later than the last day of the fiscal year next succeeding the fiscal year in which the emergency appropriation was made to meet which such notes were issued. The provisions of sections 40:2-40 and 40:2-41 and 40:2-43 to 40:2-46 of this Title shall apply to such notes as fully as though such notes were mentioned therein."

The sections cited in the quoted provisions refer to the interest rate, form, registration, execution, and other matters pertaining to the issuance of emergency notes.

It is plain that the emergency status of the appropriation for the board of education is determined by the Board of School Estimate, and that once such determination has been made, it is binding upon the governing body. Thus the finding of an emergency which the governing body must make in connection with emergency appropriations for municipal purposes is determined in advance, in the case of emergency appropriations for school purposes, by virtue of sections 18:6-56 and 18:6-57.

The narrow question for decision here is therefore reduced to one of procedure only.

Must the governing body, in making an emergency appropriation for school purposes, go through the procedure prescribed by section 40:2-31 for declaring an emergency and making an appropriation, including the passage of a resolution for this purpose by two-thirds vote of all its members? Or do the words "in the manner provided by law for the raising of such funds by the municipality in emergencies" as used in section 18:6-57 refer only to the issuance of emergency notes and similar steps necessary to obtaining the funds after they have been appropriated?

In my opinion, the sections above quoted imposed upon the governing body of the municipality the duty to make the emergency appropriation for school purposes in accordance with the procedure laid down in section 40:2-31 for emergency appropriations generally. The latter section, being the only specific law on this subject, is obviously the one intended by the phrase "in the manner provided by law," etc., as used in section 18:6-57. That quoted phrase in its context refers, in my opinion, both to the "appropriation" and the "raising" of the sums in question. Section 18:6-57 does not itself specify the manner in which such appropriation shall be made; but this omission is supplied if section 40:2-31 is deemed to apply as above suggested. Furthermore, there is nothing in section 18:6-57 which permits the governing body to dispense with the appropriation procedure set forth in R. S. 40:2-31 when the appropriation is for school purposes. Even though the governing body has no discretion in the matter, the procedure set up by the statute

must be complied with. This means that a mere majority vote of the members of a governing body in favor of the appropriation is not sufficient, and that such appropriation must be passed by at least two-thirds vote of all its members.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: THOMAS P. COOK,
Deputy Attorney General.

tpc:b

AUGUST 27, 1952.

DR. LESTER H. CLEE, *President,*
Civil Service Commission,
State House, Trenton, N. J.

FORMAL OPINION—1952. No. 24.

DEAR DOCTOR CLEE:

You have asked whether a State employee who has accepted a commission in the Regular Army Services should be considered on leave of absence without pension rights, or whether the acceptance of such commission is tantamount to a resignation from his civil position.

We feel that the answer to the above is "Yes," and that the acceptance of the commission was voluntary and was considered a waiver of all rights under the pension statute, and a waiver of the requirements of leave of absence.

Where, on the other hand, an individual goes into a component of the Reserve of the Army, the result would be otherwise, as being a leave of temporary expediency.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: JOHN W. GRIGGS,
Deputy Attorney General.

SEPTEMBER 8, 1952.

HON. J. LINDSAY DE VALLIERE,
Director, Division of Budget and Accounting,
Department of the Treasury,
State House,
Trenton, New Jersey.

FORMAL OPINION—1952. No. 25.

DEAR SIR:

You have requested our opinion as to whether funds in Account M 50 in the 1952 Appropriation Bill, which provides \$156,500 for the Rehabilitation Commission, may be used to defray general administration expenses of the commission. Account

M 50 has provided the aforesaid sum for tuition, vocational purposes, artificial appliances, hospitalization, medical examinations and medical treatments, and has further provided as follows:

"In addition there is appropriated to the Rehabilitation Commission, the balance on June 30, 1952, of all Federal funds, together with all Federal receipts during 1952-53. All such funds applicable to programs of prior fiscal years shall be available for both administration and case services."

You have informed me that the Federal Government has failed to provide sufficient funds for the necessary administrative costs of the Rehabilitation Commission, and that if that commission is to continue its beneficial program for the handicapped, it will be necessary for the State to provide the funds for paying administrative costs.

In my opinion, the needed money may be taken, if the State Treasurer so permits, from other items in the appropriation for the Rehabilitation Commission, under the "flexibility" provision in section four of the Appropriation Act (chapter 43, P. L. 1952), which reads as follows:

"4. In order that there be a flexibility in the handling of appropriations, any department or other State agency receiving an appropriation by any act of the Legislature may apply to the State Treasurer for permission to transfer a part of any item granted to such department or agency to any other item in such appropriation. Such application shall only be made during the current year for which the appropriation was made, and if the State Treasurer shall consent thereto, he shall subject to the approval of the State Auditor, place the amount so transferred to the credit of the item so designated; provided, however, that no sum appropriated for any permanent improvement shall be used for maintenance or for any temporary purpose; and provided further, that any item for capital improvement may be transferred to any other item of capital improvement on the approval of the State Treasurer."

The situation here presented would appear to be the very sort contemplated by the Legislature when it enacted the above quoted provision. The lawmakers could not have intended that the rehabilitation program be allowed to lapse for want of Federal funds to defray administration expenses. The provision in Account M 50 appropriating Federal receipts for both administration and case services must be deemed an item in the appropriation, within the meaning of the flexibility clause of the Appropriation Act.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: THOMAS P. COOK,
Deputy Attorney General.

tpc:b

SEPTEMBER 2, 1952.

ABE J. GREENE, *Commissioner,*
State Athletic Commission,
State House, Trenton, N. J.

FORMAL OPINION—1952. No. 26.

DEAR COMMISSIONER:

Receipt is acknowledged of your inquiry of August 18th, in which you ask to be advised as to the legality of taxing admissions to television pictures exhibited in New Jersey theatres over controlled television circuits, the actual exhibition or performance being held without the State.

Pursuant to the provisions of the Revised Statutes (R. S. 5:2-12) you may impose a tax on licensees who hold boxing, sparring or wrestling exhibitions within this State but the tax may be collected only from such statutory licensees. Under the situation existing as outlined in your letter, theatre owners would not be subject to the license tax fixed by the statute. It would be necessary to affirmatively amend the present statute should it be desired to extend the tax to these theatrical activities.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: JOSEPH LANIGAN,
Deputy Attorney General.

JL:rk

AUGUST 29, 1952.

MR. BENJAMIN B. JOHNSON, *Deputy Commissioner,*
Department of Banking and Insurance,
State House Annex,
Trenton 7, New Jersey.

FORMAL OPINION—1952. No. 27.

DEAR MR. JOHNSON:

We have before us your letter of August 11, 1952 requesting an opinion with respect to the contributions to be made to the Motor Vehicle Liability Security Fund, pursuant to chapter 175, P. L. 1952, by insurance companies authorized to transact the business of motor vehicle liability insurance of motor vehicles principally garaged in this State.

It appears that it is common practice with most companies writing automobile liability insurance to include in the policy, for an additional premium, a provision for payment on behalf of the injured party or for reimbursement of the insured for payment of medical, hospital, surgical and funeral expenses incurred as a result of an accident involving the automobile with respect to which the liability

of the insured is covered by the policy. This type of coverage is commonly known as "medical payments."

Contributions to the security fund are determined from a formula contained in sections 4 and 5 of the aforesaid act calculated upon the net direct written premiums received for policies of motor vehicle liability insurance.

You inquire: "In your opinion, does the act require the insurers to make payments into the Motor Liability Security Fund on the premiums written on auto medical payments coverage, which insurance is made a definite part of a policy of motor vehicle liability insurance by the insurer, yet of itself is not a form of liability coverage and in fact is not furnished by any carrier except as a part of such a policy."

We are of the opinion that the act does not require payments into the fund on those premiums.

Paragraph (g) of section 1 of said act defines "net direct written premiums" to mean "direct gross premiums written on policies of motor vehicle liability insurance * * * * *"

Paragraph (f) of said section defines "motor vehicle liability insurance" to mean "insurance against the legal liability of the insured for injury to persons or damage to property of another arising out of the ownership, operation or maintenance of motor vehicles which are principally garaged in this State."

It, therefore, is apparent that the act contemplates payments into the fund to be made only on net direct premiums for policies written on motor vehicle liability insurance as therein defined.

R. S. 17:28-1 authorizes the inclusion of the additional risk of medical payments in a motor vehicle liability insurance policy. This situation is no different from the inclusion in such policies of fire and theft insurance and collision insurance, also permitted by this section of the Revised Statutes, which are risks separate and distinct from the primary liability risk, and for which an additional premium is charged for each of such risks.

The dissimilarity between the liability risk and the "medical payments" risk is found in the fact that payments will be made under the latter without regard to the occurrence of liability on the part of the insured.

The fact that, under present business practices, "medical payments" coverage is not furnished by any company, other than as a part of a liability policy, does not alter the situation.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: OLIVER T. SOMERVILLE,
Deputy Attorney General.

OTS:meh

SEPTEMBER 15, 1952.

HONORABLE R. J. ABBOTT,
Chairman, New Jersey Highway Authority,
1035 Parkway Avenue,
Trenton, New Jersey.

FORMAL OPINION—1952. No. 28.

DEAR COMMISSIONER ABBOTT:

On behalf of the New Jersey Highway Authority, you have requested an opinion on three certain questions concerning the interpretation and application of the New Jersey Highway Authority Act (P. L. 1952, ch. 16) and the related act which provides for the guarantee of bonds of the New Jersey Highway Authority by the State of New Jersey in a principal amount not exceeding \$285,000,000 (P. L. 1952, ch. 17). In substance, the questions relate to the powers of the New Jersey Highway Authority. The questions, together with my answers thereto, are set forth herewith:

1. Q. Whether the northernmost limit of the Garden State Parkway must be at Paramus or Ridgewood or whether the New Jersey Highway Authority is authorized to include, as a part of the Garden State Parkway project, construction made northerly of such designated points in order to connect with other through arteries?

A. P. L. 1952, ch. 16, section 20 authorizes the construction of a project to be known as "The Garden State Parkway," beginning at State Highway Route No. 17 in Paramus or Ridgewood. Whether any construction can be undertaken northwardly of such designated points depends upon whether, in the opinion of the New Jersey Highway Authority, such construction will create or facilitate access to the Parkway and increase the use thereof.

It is provided by P. L. 1952, ch. 16, section 5(n) that the Authority shall have the power:

"To construct, maintain, repair and operate any feeder road * * * which in the opinion of the Authority will increase the use of a project * * *"

A feeder road is defined in section 3(g) of ch. 16 as follows:

"'Feeder road' means any road which in the opinion of the Authority is necessary to create or facilitate access to a project."

That a "feeder road" is itself a part of a project is shown by section 15 of ch. 16 which provides in part as follows:

"Each feeder road or section thereof acquired, constructed or taken over in connection with a project by the Authority shall for all purposes of this act be deemed to constitute part of the project, * * *"

In my opinion, if the New Jersey Highway Authority determines that a "feeder road" northwardly of Paramus or Ridgewood will create or facilitate access to the Garden State Parkway and will increase the use thereof, the Authority is presently empowered to construct, maintain, operate and repair such "feeder road"

as a part of the project to be known as the "Garden State Parkway," authorized by P. L. 1952, ch. 16, section 20.

2. Q. Whether the cost of such construction may be financed from the proceeds of the State guaranteed bonds, pursuant to P. L. 1952, ch. 17?

A. Since the "feeder road" so constructed would be a part of the Garden State Parkway project, in my opinion, the cost of such construction may be financed from the proceeds of Authority bonds guaranteed by the State under the provisions of P. L. 1952, ch. 17. As already stated, chapter 16 gives approval to a project to be known as "The Garden State Parkway" and chapter 17 likewise speaks of "The Garden State Parkway."

Sutherland on Statutory Construction, 3rd edition, section 5202, states in part:

"* * * However, application of the rule that statutes *in pari materia* should be construed together is most justified in the case of statutes relating to the same subject matter that were passed at the same session of the Legislature, especially if they were passed or approved or take effect on the same day, and in the case where the later of two or more statutes relating to the same subject matter refers to the earlier." (See also *State vs. Freulli*, 98 N. J. L. 395 (N. J. Sup. Ct. 1923).)

The statutes in question were passed the same day, were approved by the Governor on the same day, both became effective immediately (except that chapter 17 is subject to the result of a referendum), and the said chapter 17 refers specifically in section 1 thereof to chapter 16 by its title and further provides that the money to be raised by the issuance of bonds guaranteed by the State shall be used "to finance the Garden State Parkway in accordance with the Authority act." In addition, chapter 17 does not in the said section 1 limit the guarantee to bonds issued for the construction of the Garden State Parkway but provides broadly for the guarantee of any bonds issued "in connection with" such construction, again evincing a legislative intent to include everything that may be included in the project authorized by chapter 16.

The two statutes properly construed authorize the construction of the "feeder road" in question with the proceeds of bonds guaranteed under P. L. 1952, ch. 17.

3. Q. Whether a toll may be charged for the use of such portion of the project?

A. Section 15 of chapter 16 provides that no toll shall be charged for transit between points on a feeder road constructed under that act. The Authority would therefore not presently be authorized to charge toll for transit between points on the feeder road discussed above. Since, however, the restriction regarding the charging of a toll for transit between points on a feeder road is a matter of legislative enactment, the Legislature could at some future date change the law so as to permit the charging of a toll for transit between points on the feeder road in question.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: BENJAMIN C. VAN TINE,
Deputy Attorney General.

SEPTEMBER 29, 1952.

HON. WILLIAM J. DEARDEN,
Director of Motor Vehicles,
State House, Trenton, N. J.

FORMAL OPINION—1952. No. 29.

DEAR MR. DEARDEN:

I have your request for a formal opinion in which you ask to be advised whether under section 3 of chapter 174, P. L. 1952, known as the "unsatisfied claim and judgment fund law," a dealer can be considered a person registering a motor vehicle and should, therefore, be required to pay \$1.00 for each set of plates issued, if the dealer is insured and \$3.00 for each set of plates issued if the dealer is uninsured.

The answer to this question is, Yes.

R. S. 39:3-18, as amended, provides in part:

"A bona fide dealer in motor vehicles, motor-drawn vehicles or motorcycles doing business in this State and having a license to do business as such issued by the director may, with regard to motor or motor-drawn vehicles or cycles owned by him, obtain general registration and registration plates therefor * * *"

Section 3, of chapter 174, P. L. 1952 provides in part as follows:

"a. Every person registering an uninsured motor vehicle in this State for the yearly period commencing April 1, 1954, shall pay at the time of registering the same, in addition to any other fee prescribed by any other law, a fee of \$3.00;

"b. Every other person registering a motor vehicle in this State for the yearly period commencing April 1, 1954, shall pay at the time of registering the same, in addition to any other fees prescribed by any other law, a fee of \$1.00;"

There being no exception in chapter 174, P. L. 1952 with respect to the persons to whom this law applies, it, therefore, follows that a dealer must make the payments required in the same manner as any other person registering a motor vehicle.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: JOHN J. KITCHEN,
Deputy Attorney General.

jjk:n

DECEMBER 1, 1952

HON. PERCY A. MILLER, JR.,
Commissioner of Labor and Industry,
 State House,
 Trenton 7, New Jersey.

FORMAL OPINION—1952. No. 30.

Receipt is acknowledged of your communication regarding the application of certain labor laws concerning females employed in a cafeteria or restaurant connected with manufacturing establishments.

The two specific questions that you put to this office are:

1. Do the provisions of R. S. 34:2-24 apply to females employed in cafeterias or restaurants connected with manufacturing establishments whether operated by the manufacturer or a concessionaire?
2. Do the provisions of R. S. 34:2-28 apply to females employed in an industrial cafeteria or restaurant in the following specific situations:
 - a. where the eating facility is located in a manufacturing area;
 - b. where it adjoins but is physically separated from a manufacturing area;
 - c. where it is not adjacent to such an area but is located within premises which include such an area?

This office is of the opinion the answer to question number 1 is, yes. With regard to question number 2, the answer is, yes, if the eating facility is operated by the manufacturer as an incidental part of his business. However, if the eating facility is not operated by the manufacturer and is a separate enterprise, in our opinion, the statute does not apply.

Both section 24 and section 28 of chapter 2 of Title 34 relate to the same matter, namely, the working hours of female labor, and are therefore to be read together in order to ascertain the intent of the Legislature.

A scrutiny of the terms of these two sections indicates that R. S. 34:2-24 relates to the number of working hours per day and per week and number of days per week, of females in certain establishments and that R. S. 34:2-28 relates to the hours in the morning and the hours in the evening between which females in certain establishments shall be employed.

The pertinent part of R. S. 34:2-24 provides that:

"No female shall be employed or permitted to work in any manufacturing or mercantile establishment, bakery, laundry or restaurant more than ten hours in any one day or more than six days, or fifty-four hours in any one week."

The pertinent part of R. S. 34:2-28 provides that:

"... no female shall be employed or permitted to work in any manufacturing establishment, bakery, or laundry in this State before seven o'clock in the morning or after twelve o'clock in the evening of any day . . ."

The case of *Toohey vs. Abromowitz Department Store, Inc.*, 124 N. J. L. 209, 11 A. 2d 297, holds that R. S. 34:2-24 expressly forbids the employment of females in the enumerated occupations for more than ten hours in any one day or more than six days in any one week or more than fifty-four hours in any one week. It seems clear that R. S. 34:2-28 expressly prohibits the employment of females in the enumerated occupations before seven o'clock in the morning or after twelve o'clock in the evening.

Accordingly, where a female is employed in any of the enumerated establishments or occupations, the provisions of the statute must apply.

Of the enumerated establishments or occupations we are only concerned here with "manufacturing establishments" and "restaurants." These terms, incidentally, are defined in R. S. 34:2-1 as follows:

"'Manufacturing establishment' means any place where articles for use or consumption are regularly made, and 'restaurant' means any place where meals or refreshments, both food and drink, are served to the public."

The problem is, however, whether the female is employed in a "restaurant" or "manufacturing establishment" within the meaning of the statute.

The legislative intention must be regarded as reasonable, for a beneficial purpose, to promote the welfare of a certain class of labor, embracing and including all females. The object of R. S. 34:2-24 is to limit their number of working hours and days in, among other establishments, manufacturing establishments and restaurants. The object of R. S. 34:2-28 is to prohibit them from working between certain hours in, among other establishments, manufacturing establishments. It is noted that R. S. 34:2-28 does not enumerate restaurants. Therefore, females employed in restaurants are exempted from the prohibition contained in R. S. 34:2-28.

It seems, therefore, that if females are employed in a restaurant, and nowhere else, R. S. 34:2-24 is applicable and R. S. 34:2-28 is not applicable. Basically, their kind of work is the same by whomsoever the restaurant is operated, whether by the manufacturer or a concessionaire, wheresoever the restaurant is located, either in a manufacturing establishment, a store, a bus station, or in a separate room to itself, or elsewhere for the service of meals. See *State vs. Seithel*, 201 S. C. 1, 21 S. E. 2d 195. It is primarily the welfare of female labor that we are here concerned with—not the welfare of the operator of the restaurant. Ordinarily, of course, a restaurant is thought of as a place where food and drink are served to the public generally, but is not an operator who serves to selected portions of the public, such as the workers and employees of a manufacturing establishment, and not to the public generally, none the less, in the restaurant business. A restaurant is a place where refreshments can be had to be consumed on the premises. It is an establishment for the sale of refreshments, both food and drink, or a place where meals are served. See in re *Bowers*, D. C., Cal., 33 F. Supp. 965, 966. We do not feel that a restaurant operator, by serving only selected portions of the public, can by so doing, immunize himself from the regulatory provisions of the labor laws. As stated by Mr. Justice Bodine in the *Toohey vs. Abromowitz* case (supra):

"Public policy requires that there should be control over the hours of work in certain occupations. The public interest is not served by the physical injury resulting from labor too long continued."

However, we must take into consideration that when the statutes under examination were enacted, restaurants and manufacturing establishments were undoubtedly thought of as being separate and distinct enterprises, independent from one another. With the advent of modern industrial practices in manufacturing establishments, there has come into being the anomalous situation of restaurants and cafeterias connected with the manufacturing establishments. If these eating facilities are operated by the manufacturer and are not conducted as enterprises separate and independent of the other activities of the manufacturer, but are conducted as incidental but necessary undertakings of the business, then are not the female employees working in these eating facilities just as much employees of the manufacturer as female employees of the manufacturer working in the stockroom and elsewhere in the manufacturing establishment? If so, both R. S. 34:2-24 and R. S. 34:2-28 would be applicable, by virtue of the fact that both statutes cover female employees of manufacturing establishments.

In our opinion, the answer to this question is, yes. On the other hand, if these eating facilities are not operated by the manufacturer, or are operated as enterprises separate and independent of the activities of the manufacturer, the female employees would not be employees of the manufacturing establishment, and hence R. S. 34:2-28 would not be applicable.

The foregoing indicates that legislation has not kept pace with industrial practices and leads us to the conclusion that the matter should be clarified by amendatory legislation.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: FREDERIC G. WEBER,
Deputy Attorney General.

SEPTEMBER 30, 1952.

DR. LESTER H. CLEE, *President,*
Civil Service Commission,
State House, Trenton, N. J.

FORMAL OPINION—1952. No. 31.

DEAR DOCTOR CLEE:

You have asked whether or not R. S. 2A:11-11 changes the law as contained in R. S. 2:16-24.1 relative to removal of a stenographic reporter by the appointing justice.

As we understand the amendment the law now provides that the Supreme Court may remove any reporter so appointed at any time for cause and appoint another in his place.

The fact that the words "for cause" have been introduced into this new provision would not appear to change the character or type of service provided by the position in question. We believe that the individual so concerned will remain in the unclassified service.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: JOHN W. GRIGGS,
Deputy Attorney General.

SEPTEMBER 11, 1952.

THE HONORABLE J. LINDSAY DE VALLIERE,
Comptroller and Director of the Budget,
State House,
Trenton, New Jersey.

FORMAL OPINION—1952. No. 32.

DEAR MR. DE VALLIERE:

You have asked whether the Director of the Division of Fish and Game, Department of Conservation and Economic Development, can legally award to a specified party a State contract to print and publish a periodical devoted to conservation, fishing and hunting, without requiring the preparation of specifications, the submission of bids and the award of the contract to the highest bidder. It is presumed that the expenditure involved exceeds \$1,000.00.

It is my opinion that the Director of Fish and Game may not lawfully so contract. Where the cost of the project exceeds \$1,000.00, public advertisement for bids is required, according to specifications to be furnished by the Division of Fish and Game. The statute in this respect is Title 52:34-1 and reads as follows:

"No contract or agreement for the construction of any building, for the making of any alterations, extensions or repairs thereto, for the doing of any work or labor, or for the furnishing of any goods, chattels, supplies or materials of any kind the cost or contract price whereof is to be paid with State funds and shall exceed the sum of one thousand dollars, shall be awarded, made or entered into by the board of managers or board of trustees of any State institution, or by any State department or commission, or by any person acting for or on behalf of the State, without first having publicly advertised for bids for the same, according to the specifications to be furnished to or for the inspection of prospective bidders by the board of managers or board of trustees of any State institution, or by the State department or commission, or by the person acting for or on behalf of the State, authorized to procure the same."

These statutory provisions have applied to general contracts for printing since 1907. The precise statute was considered by the Appellate Division of the Superior Court in a case decided May 7, 1949 (*Gann Law Books vs. Ferber and Soney and Sage*), 3 N. J. S. 236. In that case, the court distinguished between the awarding

of a general State contract for printing and the awarding by a court reporter, of a contract to print the reported decisions of our higher courts. Limited and specific legislation controls the latter type of printing contract and is not applicable to the situation to which this inquiry relates. I know of no changes in the statutory provisions and no changes in present practice which would warrant deviation from strict adherence to the requirements of the statute.

In addition to Title 52:34-1, attention is invited to Title 52:18A-19 in which the procedure employed by the Director of the Division of Purchase and Property for the handling of the State contracts is set forth in detail. That section reads as follows:

"Each using agency shall, at all times, in the form and for the periods prescribed by the director of the Division of Purchase and Property, present to him detailed applications and schedules for all articles to be purchased. The director shall then arrange such schedules or parts thereof for purchase and contract, in the manner best calculated to attract competition and advantageous prices. He shall award contracts or orders for purchase to the lowest responsible bidder meeting all specifications and conditions. He shall have authority to reject any and all bids or to award in whole or in part if deemed to the best interest of the State to do so. In case of tie bids, he shall have authority to award orders or contracts to the vendor or vendors best meeting all specifications and conditions. Public bids shall not be waived except with the written approval of the State Treasurer and except after notice in writing to the State Auditor. The director shall prescribe the terms and conditions for delivery, inspection, payment and all other detail whatsoever.

"Upon the award of contracts or orders for purchase, the director of the Division of Purchase and Property shall thereupon make an encumbrance request to the director of the Division of Budget and Accounting in the Department of the Treasury for the amount necessary to defray the cost thereof, indicating the appropriations or authorizations to spend funds against which the contract or purchase order will be charged.

"The bills for such purchases shall be apportioned by the director of the Division of Purchase and Property among the using agencies in proportion to the purchases made therefor, and certified as apportioned to the director of the Division of Budget and Accounting, to be charged against the respective appropriations or authorizations to spend as indicated by the certificate of the director of the Division of Purchase and Property. The bills therefor shall be paid by warrant check of the director of the Division of Budget and Accounting and State Treasurer.

"Nothing in this section shall be construed to repeal or otherwise affect any law of this State relating to the purchase or use of the products of the labor of the inmates of a charitable, reformatory or penal institution of this State."

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: ROBERT CAREY, JR.,
Deputy Attorney General.

OCTOBER 8, 1952.

HON. WALTER R. DARBY,
Director of Local Government,
Commonwealth Building,
Trenton, New Jersey.

FORMAL OPINION—1952. No. 33.

DEAR DIRECTOR:

You have requested our advice as to certain legal questions flowing from the impending acquisition by the State of New Jersey of all land lying within the present boundaries of the Borough of Island Beach, Ocean County. Your inquiry presents essentially two problems arising from this event:

- (a) What will become of the corporate entity of the Borough, and
- (b) How are its finances to be handled from then on?

In answer to your first question, the municipal corporation of Island Beach will not ipso facto cease to exist. No borough can be dissolved except by special act of the Legislature (R. S. 40:86-1; see also McQuillin, *Municipal Corporations* (1949 ed.), Secs. 8.04, 8.10). It may, however, be consolidated with any other municipality in the same county and comprising contiguous territory, in accordance with the procedure set forth in the Local Units Permissive Consolidation Act (R. S. 40:43-66.1 et seq.). Since there is no statute providing for the extinction of the corporation in the situation here presented, it seems clear that the corporate entity of the borough will remain in existence until the passage of a special act providing for its dissolution, or unless the borough is consolidated with a neighboring municipality pursuant to the consolidation act above cited.

Answering the second set of questions posed by you, I advise that until the corporate entity has been extinguished as above outlined, the municipal officials should continue to exercise their functions insofar as possible. Specifically, taxes which have already been levied for borough, school and county purposes should be collected except as they may abate upon the passage of title to the State. The obligations of the municipality should be taken care of in the usual manner. This would include payment for the tuition of Island Beach pupils attending school in another school district.

Your inquiry as to what should be done with any balance remaining in the treasury when the affairs of the borough have been wound up, will not arise until extinction of the corporate entity has been provided for. If the municipality is to be dissolved by a special act, such legislation should contain the answer to this and many other problems involved in the winding up process.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: THOMAS P. COOK,
Deputy Attorney General.

OCTOBER 8, 1952.

HON. WALTER T. MARGETTS, JR.,
State Treasurer,
 State House, Trenton, N. J.

FORMAL OPINION—1952. No. 34.

DEAR MR. MARGETTS:

I have your memorandum in which you request to be advised whether or not properties acquired by the State Building Authority for motor vehicle inspection stations are in the tax exempt category which is applicable to State-owned property.

The answer to this question is, Yes.

Chapter 255, P. L. 1950, as amended by chapter 224, P. L. 1952 (N. J. S. A. 52:18A-50 to 78) created the "State Building Authority" and set forth its powers, duties and privileges.

Section 21 of chapter 255, P. L. 1950 (N. J. S. A. 52:18A-70) provides:

"The exercise of the powers granted by this act will be in all respects for the benefit of the people of the State, and as the operation and maintenance of projects by the Authority will constitute the performance of a governmental function, the Authority shall not be required to pay any taxes or assessments upon any project acquired or used by the Authority under the provisions of this act or upon the income therefrom, and any project and any property acquired or used by the Authority under the provisions of this act and the income therefrom, and the bonds issued under the provisions of this act, their transfer and the income therefrom (including any profit made on the sale thereof) shall be exempt from taxation."

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: JOHN J. KITCHEN,
Deputy Attorney General.

jjk/n

OCTOBER 17, 1952.

HON. WALTER T. MARGETTS, JR.,
State Treasurer,
 State House,
 Trenton, N. J.

FORMAL OPINIONS—1952. No. 35.

DEAR SIR:

Receipt is acknowledged of your letter, dated September 30, 1952, wherein you advise that a question has arisen as to whether a veteran is entitled to an exemption under chapter 184, P. L. 1951, N. J. S. A. 54:4-3.12 i to u, on property in which he is in possession under a long-term lease. The two specific questions that you put to this office are:

1. Can the lessee, a veteran, claim exemption under the circumstances where no property is assessed against him?
2. Would the veteran-lessee be entitled to claim exemption in the event the assessor elects to levy the assessment for both land and improvements to him?

The aforementioned questions must be related to the facts submitted to me in your letter, and briefly they are: The owner of the legal title (fee) to unimproved property leases the same for a period of ninety-nine years, apparently without the right of renewal, but with the provision that the lessee shall have an exclusive option to purchase the property at a mutually agreed price. Under the terms of the lease, the lessee is to pay an annual rental in advance, as fixed in said lease, and, in addition thereto, the lessee assumes to pay the taxes and all other assessments which may be levied against the premises, this all being in addition to the rent as fixed by the terms of the lease. You further advise that it has been the practice of the assessor in the particular district wherein the property is located to assess the land and the improvements to the lessor.

We will now treat question No. 1. This office is of the opinion and we so advise you that, pursuant to chapter 184, P. L. 1951, unless the veteran "is owner of the legal title" to property on which exemption is claimed, he cannot maintain his status for said exemption. In the case of *Brown vs. Havens*, reported in 17 N. J. Super. 235, at page 238 (1952), the court used the following language relating to long-term estates:

"The pivotal point is the second step in plaintiff's argument, that the interest in the lands here involved is merely personalty within the purview of the foregoing cases. *An estate for years is a chattel real.* It is an estate in lands *but is less than freehold* and ordinarily falls in the category of personal property despite its relation to real property, and this is so for purposes of succession upon death. * * *" (Italics ours.)

In the case just referred to, the defendant urged, with considerable force, that the leasehold interest was tantamount to a fee. In answer to that, the court said on page 239:

"* * * In the first place, the instrument is a lease and nothing more * * *"

If we take the requirement of the statute which states that the owner of the property, when claiming exemption, must have "legal title", then, in law, we can assume that title means full, independent and fee ownership. The word "title" must denote, and it does denote, complete ownership in fee. See *In re Polis Estate*, 271 N. Y. Supp. 731, (1934), and see also *Smith vs. Bank of America National Trust and Savings Association*, 57 P. 2d 1363 (1936).

In the case of *United States vs. Hunter*, 21 Fed. 615, at page 617 (1884) the court said:

"* * * Sometimes the word 'title' is used in a general sense, so as to include any title or interest; but 'title' in common acceptance means the full and absolute title. We can speak of a man as having title to certain lands, the ordinary understanding is that he is the owner of the fee, and not that he is a mere lessee." (Italics ours.)

Century Dictionary defines the word "title" as "ownership; absolute ownership; the unincumbered fee."

The Constitution of the State of New Jersey, Article VIII, section 1, paragraph 3, provides that:

"Any citizen and resident of this State now or hereafter honorably discharged or released under honorable circumstances from active service in time of war in any branch of the armed forces of the United States, shall be exempt from taxation on real and personal property to an aggregate assessed valuation not exceeding five hundred dollars * * *."

In 1951 the Legislature implemented the constitutional provision referred to hereinabove. Chapter 184, P. L. 1951 (N. J. S. A. 54:4-3.12 i to u) provides that a veteran making application for his exemption shall establish that

"* * * he is the owner of the legal title to the property on which exemption is claimed." (Italics ours.)

In the case at hand, you advise us that the veteran does not own the property in fee, but is in possession by virtue of a ninety-nine year lease, and since our courts have held that a lease is an estate in lands less than a freehold, it falls in the category of personal property despite its relation to real property. Therefore, it is the opinion of this office that the veteran did not have legal title to the property by virtue of mere possession, and is not entitled to the benefits given to him by the New Jersey Constitution nor chapter 184, P. L. 1951.

Having answered question number 1 in the negative, I think we have disposed of the answer to question number 2, because it is our opinion that the right to exemption is not predicated upon the payment of taxes by the veteran, but upon the proposition in law that the veteran is owner of legal title to property on the critical taxing date.

Respectfully submitted,

THEODORE D. PARSONS,
Attorney General.

By: BENJAMIN M. TAUB,
Deputy Attorney General.

OCTOBER 20, 1952.

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

FORMAL OPINION—1952. No. 36.

DEAR COMMISSIONER:

You have requested our opinion as to whether your department is authorized by the Appropriation Act of 1952 (Chapter 43, P. L. 1952) to grant State aid from coast protection moneys for certain repairs to the bulkheads and concrete wall around Deal Lake at Ocean Township and Asbury Park, New Jersey. The pertinent section of the Appropriation Act provides money for "beach protection along the Atlantic coast, Delaware bay, Sandy Hook and the Raritan bay, including construction of beach protection measures, bulkheads, back fills, groins, jetties, pumping of sand, advertising and inspection costs."

It appears from information and maps furnished to me that Deal Lake, although separated from the Atlantic Ocean by only a 700-foot strip of beach and highway, is a body of fresh water, ordinarily not affected by the ebb and flow of the tide; and that its shores have not been washed by the sea for many years except in unusually severe storms. The waters of what is now Deal Lake, formerly flowed into the ocean and the present site of the lake was an ocean inlet, but its character was changed when access from the inlet to the ocean was closed off by the construction of the artificial 700-foot strip above mentioned. It further appears that while the damage now sought to be repaired was partly caused by the hurricane of 1950, the main cause thereof has been natural deterioration not connected with the action of the sea.

In my opinion, the repairs in question to the shores of Deal Lake would not be a "beach protection" measure along the "Atlantic coast," within the meaning of the Appropriation Act.

The "coast" ordinarily means that land which is washed by the sea. *Mahar vs. Gartland S. S. Co.*, 154 Fed. 2d 621, 622 (C. C. A. 2d); *U. S. vs. Bain*, 40 Fed. 455, 456. Likewise, the word "beach" ordinarily means the land between ordinary high water mark and low water mark, or the area over which the tide ebbs and flows. *Anderson vs. De Vries*, 93 N. E. 2d 251, 255, 326 Mass. 127; *Town of Easthampton vs. Kirk*, 68 N. Y. 459, 463; see also *State vs. Wright*, 54 N. J. L. 130, 23 Atl. 116. Although in certain contexts the words "beach" and "coast" have been construed to have broader meanings (see for example *Anderson vs. De Vries, supra*, and *Pacific Milling and Elevator Co. vs. City of Portland*, 133 P. 72, 76, 64 Ore. 349), I find no basis for construing the above quoted provision of the Appropriation Act as including the shore of a fresh water lake separated from the ocean by 700 feet or more of land. On the contrary, the context suggests that what the Legislature intended to aid in the Appropriation Act was the effort of local seashore communities to prevent erosion, by the action of the waves and the tides, of beaches bordering the Atlantic Ocean (plus Delaware Bay, Sandy Hook and Raritan Bay).

It is also observed that chapter 258 of the laws of 1946 (N. J. S. A. 12:6A-1 et seq.) authorized the State Department of Conservation to repair or construct

bulkheads and other beach protection devices along the Atlantic Ocean, including "any inlet along the coast of the State of New Jersey" in order to "repair damage caused by erosion and storms, or to prevent erosion of the beaches and to stabilize the inlet." Here again, it seems clear that an inlet, within the purview of that law, was a body of water whose shores might be eroded by the action of the sea and its tides and might therefore need to be stabilized. In the case of Deal Lake, erosion by the sea has already been prevented and the shores of the lake stabilized by the construction of the beach and highway separating it from the ocean.

These reasons lead to the conclusion that the aforesaid request for State aid from coast protection moneys cannot legally be granted.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: THOMAS P. COOK,
Deputy Attorney General.

tpc;b

DECEMBER 3, 1952.

*Major William O. Nicol, Supervisor,
Hotel Fire Safety,
1060 Broad Street,
Newark, New Jersey.*

FORMAL OPINION—1952. No. 37.

DEAR MAJOR NICOL:

Your letter of August 27, 1952, requesting an opinion interpreting N. J. S. A. 29:1-11 (L. 1948, c. 340, p. 1330, sec. 4, as amended L. 1950, c. 245, p. 827, sec. 1), received.

N. J. S. A. 29:1-11 reads in part as follows: "'Hotel' means every building kept, used, maintained, advertised as or held out to be a place where sleeping accommodations are supplied for pay to transient or permanent guests, in which fifteen or more rooms are rented, furnished or unfurnished, including any room found to be arranged for or used for sleeping purposes, with or without meals, for the accommodation of such guests, or every building, or part thereof, which is rented for hire to thirty or more persons for sleeping accommodations."

The specific questions presented are whether a building used as a residence for retired Salvation Army officers, and buildings used as nurses' homes and operated in connection with hospitals, are subject to said law, and if so, must a hotel registration fee be paid.

It is my opinion that the building to be used as a residence for retired Salvation Army officers is subject to said law, so long as the occupants pay rent, though nominal, and a registration fee must be paid.

The statute is explicit in its definition of a hotel. If the conditions are met, the law applies. This being a statute in derogation of common law principles and public freedom, it must be strictly construed, and we are not at liberty to read into it an interpretation other than that expressly set forth by the legislators, who undoubtedly would have provided exemptions had such been their intent.

I am further of the opinion that nurses' homes such as confront you are not subject to this law, and no registration fee is necessary. The nurses' homes are in effect part of the hospital plan, and the accommodations offered are part of the nurses' salaries. As such, it appears that no rent is paid, which the statute holds to be an essential factor to designate such a building a hotel.

I trust that the foregoing answers the questions raised.

Very truly yours,

HENRY W. ECKEL, JR.,
Deputy Attorney General.

HWE/LL

OCTOBER 30, 1952.

HON. THOMAS S. DIGNAN,
*Deputy Director of Civil Defense,
State House Annex,
Trenton, New Jersey.*

FORMAL OPINION—1952. No. 38.

DEAR MR. DIGNAN:

Receipt is acknowledged of your letter in which you request my opinion as to the operation and effect of chapter 12 of the laws of 1952 entitled "An act to provide disability, death and medical and hospital benefits for civil defense volunteers who may suffer injury as a result of participation in authorized civil defense service."

You submit for my consideration and opinion three specific queries. Your queries and the answers thereto follow:

"Question Number 1. Can actual duties by Civil Defense volunteers with the regular police or fire departments constitute practice or training sessions and as same will the Civil Defense volunteers be covered by insurance under this bill?"

If the Civil Defense volunteers are expected to work with the local police and fire departments, in order to obtain practical training for meeting emergencies which might occur in connection with defense problems, then any injury arising out of and in the course of the performance of duty sustained by any of these volunteers would be compensable under the chapter. The practice or training should be bona fide practice or training sessions, and the local municipalities should not be permitted to take advantage of the services of the Civil Defense volunteers by utilizing

them for purely normal local police and fire department activities, in order to economize and save paying for regular employees to perform these services.

"Question Number 2. As to minors in Civil Defense, in the event of accident, etc., do they receive compensation the same as persons deemed unemployed inasmuch as they are students and therefore, not earning a salary per 'C. App. A 9-57-3, payt. of \$15.00 per week'."

The provisions of chapter 12 do not distinguish between minors and those legally competent as to the payment of benefits. If the minor, whether student or not, can produce proof of earnings entitling him to greater than the \$15.00 per week minimum benefits, he should be paid such greater benefits, otherwise, he is entitled to the \$15.00.

"Question Number 3. If in the event the volunteers carry private insurance covering hospital, medical or accidental, etc., as many do, or in the cases where industry carries this coverage for employees, will the Civil Defense volunteers benefits be reduced by the amounts of the private benefits or will they receive no aid due to the private coverage. Kindly clarify this section for us."

The question relating to whether or not benefits under chapter 12 would be affected by outside hospital, medical and accident insurance coverage is a difficult one to answer categorically, because in so many cases the answer depends upon the provisions of the insurance contract. Under the Blue Cross plan, hospital and medical benefits are not payable in cases covered by Workmen's Compensation liability. This is because of the express provisions in the Blue Cross contract. There is nothing in the Workmen's Compensation Act itself, or in chapter 12, which would bar the payment of benefits or require allowance for benefits paid under the outside insurance. Of course, where the Blue Cross or other hospital plan pays the hospital bills direct it does not seem that the plan is necessarily entitled to reimbursement, contra, if the State Department of Defense paid for the hospital and medical care, I find no provision in chapter 12 entitling the State to look to the Blue Cross or other insurance plan for reimbursement. In the absence of any provision in chapter 12 from which it can be deduced that an allowance must be granted for outside insurance coverage, whether expressly or by implication, such allowance is not required. Premiums for the insurance are privately paid and the employee is entitled to the benefits thereof.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: JOSEPH LANIGAN,
Deputy Attorney General.

JL:rk

NOVEMBER 10, 1952.

HON. J. LINDSAY DEVALIERE,
Division of Budget and Accounting,
State House, Trenton, N. J.

FORMAL OPINION—1952. No. 39.

DEAR MR. DEVALIERE:

I have your memorandum directed to the Attorney General under date of October 14, 1952 in which you ask the following question:

"Is it your opinion that any portion of the \$339,420 allocated by the State Legislature in the 1952-53 budget for new positions in the Division of Motor Vehicles may be used for purposes other than the employment of new employees?"

The answer to this question is, "No."

This appropriation is a line item and is self-explanatory. It is made for the single and specific purpose of adding new employees in the Division regardless of where they may be assigned for work.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: JOHN J. KITCHEN,
Deputy Attorney General.

jjk:n

DECEMBER 1, 1952.

DR. LESTER H. CLEE, *President,*
Civil Service Commission,
State House, Trenton, N. J.

FORMAL OPINION—1952. No. 40.

DEAR DR. CLEE:

You have requested an opinion as to whether or not you have authority to approve appointments in the unclassified service of persons appointed by the heads of each institution coming under the jurisdiction of the Department of Institutions and Agencies, and similar appointments made in the other 13 major departments by persons other than the 13 principal department heads.

As we understand it, the Chairman of the State Parole Board takes the position that he is entitled to one clerk or secretary and one confidential employee or agent in the unclassified service, pursuant to the provisions of R. S. 11:4-4(m).

The discussion of R. S. 11:4-4(m) is restricted to the question of its applicability to the State Parole Board and its right to appoint one clerk or secretary

and one confidential employee or agent in the unclassified service. What follows concerning the State Parole Board may or may not apply to the various other boards and commissions depending upon a study of the establishment, history and functions of such boards and commissions.

R. S. 11:4-4(m) provides:

"One clerk or secretary and one confidential employee or agent (in the unclassified service) to each Justice of the Supreme Court, the Chancellor, each Vice Chancellor, judge, principal executive officer and each State department, *board* or commission, when such Justice, Chancellor, Vice Chancellor, judge, principal executive officer, department head, *board* or commission certifies to the commission that such clerk or secretary and such additional confidential employee or agent is essential to the work of the court, department, *board* or commission."

Under R. S. 30:1-2 (P. L. 1948, chap. 87) the Legislature continued the Department of Institutions and Agencies and constituted it a principal department in the executive branch of the State Government. Such department consists of the State board of control of institutions and agencies, which shall be the head of the department, the Commissioner of Institutions and Agencies, who shall be the principal executive officer of the department, with such divisions, bureaus, branches, committees, officers and employees specifically referred to in the act.

By R. S. 30:4-123.1 (P. L. 1948, chap. 84) the provision conferring power upon the board of managers to grant paroles was repealed. By this act there was created and established within the Department of Institutions and Agencies a State Parole Board of three members: a chairman, and two associate members.

Because of R. S. 30:1-2 (P. L. 1948, chap. 87) a "principal executive officer" under R. S. 11:4-4(m) cannot mean the parole board because P. L. 1948, chap. 87 says the "Commissioner of Institutions and Agencies (who) shall be the principal executive officer of the department."

The State Parole Board may come under the word "board" defined in R. S. 11:4-4(m) *supra*, even though the parole board was created and established *within* the Department of Institutions and Agencies on the theory that although it took the place of the various boards of managers in regard to parole matters (by the repeal of R. S. 30:4-106.1, 2, 3) it nevertheless established a distinct "board." If the Legislature had intended that the parole board be merely an arm of the board of managers in matters relating to parole it could have done this by amendment of P. L. 1918, chap. 147, transferring matters relating to parole from the board of managers to the parole board. However, the Legislature did not do this. It chose rather to establish a parole board defining its composition, powers and duties and expressly repealed the sections by which the board of managers had power over parole. The fact that the Legislature established the parole board *within* the Department of Institutions and Agencies may be merely indicative of the Legislature's intention of keeping the various departments limited to 14 under the reorganization, but does not necessarily mean that a "board" established within one of the 14 principal departments should not constitute a "board" within R. S. 11:4-4(m).

It would seem further that if the Legislature intended to exclude a board, whether within or without one of the 14 departments, from the provisions of R. S. 11:4-4(m), it would have done so, especially in view of the fact that R. S. 11:4-4(m)

was amended twice, once on June 12, 1948 and again on May 23, 1952 both occasions being subsequent to the amendment of R. S. 30:1-2 (P. L. 1948, chap. 87) without deleting, defining or explaining the word "board."

May it not be assumed that the Legislature left the word "board" in R. S. 11:4-4(m) because it intended that it should remain in? This assumption becomes more forceful when it is realized that the word "board" was left in with the complete knowledge of the Legislature that it had reduced the various departments and agencies to 14 principal departments and no one of the 14 departments constitutes a "board." Therefore, it may be reasoned that the Legislature, anticipating the obscurity which would result by the reorganization, would have excluded "boards" but for the fact that it meant intentionally to leave it in.

R. S. 11:4-4(m) applies to the State Parole Board simply because the statute includes "boards" as a class of agencies that may appoint in the unclassified service, strict construction notwithstanding.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: JOHN W. GRIGGS,
Deputy Attorney General.

jwg:m

DECEMBER 22, 1952.

THE HONORABLE SANFORD BATES, *Commissioner,*
Department of Institutions and Agencies,
State Office Building,
Trenton, New Jersey.

FORMAL OPINION—1952. No. 41.

DEAR COMMISSIONER BATES:

You have requested an interpretation of the provisions of chapter 56, P. L. 1950, which permits a prisoner in confinement in default of fine to discharge the fine at the rate of \$3 per day for each day of imprisonment.

In the case under consideration it appears that the prisoner was given a sentence having a minimum and a maximum term and, in addition, a fine was imposed upon him. In default of payment thereof he stands committed. You indicate that the parole board has granted him a parole, effective immediately, with regard to the minimum-maximum sentence imposed upon him, and his present incarceration relates solely to failure to pay the fine.

You desire to be advised whether the sentence upon which he was paroled will continue to run to its maximum expiration date at the same time that he is working out the fine.

It is our opinion and we advise you that such a prisoner is deemed to have the dual status of a prisoner paroled on his minimum-maximum sentence and a convict in confinement serving time in default of payment of the fine imposed upon him.

We find no authority in chapter 84, P. L. 1948, the Parole Law, which would permit or authorize the State Parole Board to hold a sentence in suspension and

defer the effective date of parole to accommodate an intervening period of imprisonment such as that represented by the case here under review. Accordingly, a parole granted by the State Parole Board, becomes effective upon the date specified therein and the sentence of the prisoner continues to run until the maximum thereof unless said parole is revoked for cause, as provided by law.

In the situation you speak of, the confinement of the prisoner in default of payment of the fine is analogous to a consecutive sentence following a prior sentence upon which parole had been granted by the board.

The manner in which consecutive sentences shall be dealt with is set out in the case of *In re Fitzpatrick* 9 N. J. Super. 511 (County Court, 1950); affirmed 14 N. J. Super. 213 (App. Div. 1951). Therein it is stated that when parole is granted on one of a series of consecutive sentences, such parole shall become effective upon the date specified therein and thereupon while under such parole, the prisoner shall enter into and upon service of the next succeeding sentence. At that time, as the court observed, he has the dual status of a prisoner on parole on a prior sentence and a prisoner in confinement on the next succeeding sentence.

Accordingly, with respect to the case under discussion, the same result obtains and the prisoner is deemed to be serving his sentence of incarceration, upon which he has been paroled, and at the same time he is disposing of the fine for which he is now in confinement under default of payment thereof at the rate of \$3 per each day of imprisonment as provided in chapter 56, P. L. 1950.

Very truly yours,

THEODORE D. PARSONS,
Attorney General of New Jersey.

By: EUGENE T. URBANIAK,
Deputy Attorney General.

ETU:HH

DECEMBER 17, 1952.

HON. WALTER T. MARGETTS, JR.,
State Treasurer,
State House,
Trenton, New Jersey.

FORMAL OPINION—1952. No. 42.

DEAR MR. MARGETTS:

You ask whether the benefits of Social Security coverage under section 218 of the Federal Social Security Act are available to employees of specified political subdivisions of the State of New Jersey in view of the enactment of chapter 253 of P. L. 1951.

Section 218(b) and (d) of the Social Security Act limits coverage to those individuals who are not already covered under an existing retirement system of the State or of any of its political subdivisions.

Specifically, section 218 (b) (4) provides:

"The term 'retirement system' means a pension, annuity, retirement, or similar fund or system established by a State or by a political subdivision thereof."

and (d) states:

"No agreement with any State may be made applicable (either in the original agreement or by any modification thereof) to any service performed by employees as members of any coverage group in positions covered by a retirement system on the date such agreement is made applicable to such coverage group."

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

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

The pertinent statutory provisions:

R. S. 43:12-63. Persons holding office, position or employment; retirement

Whenever any person holding office, position or employment, in any borough, has or shall have been continuously in office, position or employment in such borough, whether elective or appointive or both elective and appointive, for a period of twenty-five years, and has or shall have attained the age of sixty-five years, the governing body of such borough may allow the retirement of such person from service, upon his application. L. 1949, c. 262, p. 829, § 1.

R. S. 43:12-64. Amount of Pension.

Upon any such retirement, the person so retired shall be entitled, for and during the remainder of his natural life, to receive an annual pension equal to one-half of his salary or compensation at the time of his retirement or at the time of his completion of twenty-five years of continuous service, whichever is greater, and the governing body of the borough shall provide for the payment of such pension. L. 1949, c. 262, p. 829, § 2.

R. S. 18:5-50.9. Terminating employment of employees 65 years old, resolution.

The board of education of any school district, by resolution duly adopted by a majority of the members of the board, may terminate the employment of any employee of the district who has or shall have attained the age of sixty-five years, as of the date or time specified in the resolution, * * * notwithstanding the fact that such employee has or shall have acquired tenure of office or employment by virtue of the provisions of any other law. * * *

R. S. 43:9-1. Conditions for retirement; amount of pension.

A person who has been continuously in the employ of any county for a period of forty years and has reached the age of sixty-five years, may retire or be retired at any time thereafter.

On and after his retirement such employee may be paid by the county one-half of the amount he was receiving as salary from the county at the time of his retirement.

R. S. 43:12-1. Retirement for service and age.

A person who has been continuously in the employ of any city for a period of twenty-five years and has reached the age of seventy years or who has been continuously in the employ of any city for a period of forty years and has reached the age of sixty years or who has been continuously or otherwise in the employ of any city for a period of twenty-five years and has reached the age of seventy-five years, may retire or be retired at any time thereafter. * * *

R. S. 43:12-56. Assessors of taxes; amount of pension.

Any person, who shall have held the office of assessor of taxes in any township continuously for a period of twenty-five years and who shall have reached the age of eighty years while holding such office, may be retired upon pension by the township committee on his application or on motion of the township committee. * * *

R. S. 43:12-57. Retirement of tax collectors.

The governing body of any township may retire any person, who has served as collector of taxes in the township for twenty-five years and who has attained the age of seventy years, on pension in such amount as shall be determined by said governing body. L. 1944, c. 154, p. 585, § 1.

R. S. 43:12-57.1. Health officers, retirement of

The local board of health of any township is authorized and empowered, in its discretion, to order the retirement from the service (on a pension as hereinafter provided) * * *.

R. S. 43:12-57.4. Treasurer; retirement

The governing body of any township may retire any person, who has served as treasurer of the township continuously for twenty years * * *.

R. S. 43:12-57.5. Clerk of township

The governing body of any township may retire on pension any person who has served continuously as clerk of the township for twenty-five years. * * *.

The above specified statutory provisions do not, of themselves, constitute a retirement system which would bar the employees working in such positions from coverage under section 218 of the Social Security Act.

The statutes are not self-operative but merely authorize a governing body, if and when proper legal action is invoked by it, to formulate a retirement plan or

system for its employees. These unilateral acts of the Legislature do not, of themselves, erect the necessary scheme so that it may be considered that a retirement plan or system is legally effective. They do not create any entitlement to benefit on the part of employees occupying the positions denominated therein. In order to effectuate the purpose of the statute, further action is required, either by ordinance or resolution. In the absence of any such implementation, a "naked" contingent right exists which does not materialize until the political subdivision acts. If a political subdivision "stands by" and does nothing then, without question, an employee has only an inchoate right, which vests only if and when a plan or system is created by a legislative act of his employer. Until such affirmative legal action, on the part of the particular political subdivision, to carry out the purpose of the statute, is completed, a retirement system is not constituted, within the meaning of section 218. Given their broadest interpretation, the statutes merely authorize a governing body, if and when it deems it necessary, to create rights to a pension or retirement benefit, by legislative action on its part, for employees who occupy certain offices or who are engaged in certain employment. This is insufficient to establish a plan or system for the retirement of the employees.

If a political subdivision has, by ordinance or resolution, pursuant to a statute, adopted an ordinance or resolution for the benefit of employees holding certain positions or offices, some question of discrimination may arise, if the municipality does not invoke the provisions of the statute for the benefit of other employees who have served meritoriously for the required period of time. However, it has been held that a pension granted by public authorities is not a contractual obligation but a gratuitous allowance and that the pensioner has no vested right. *Moran vs. Firemen's and Policemen's Pension* (November 1942) Hudson C. C., 28 Atl. (2nd) 885. It may be necessary, therefore, if an application for coverage under the Social Security Act is made on behalf of employees who might be entitled to the benefit of the aforesaid statutes, that inquiry be directed to the proper municipal officials as to whether other employees have been granted the benefit permitted under those statutes. If such has been the case, the question of discrimination will, at such time, have to be carefully examined and determined.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: WILLIAM C. NOWELS,
Deputy Attorney General.

TDP:wnr

DECEMBER 19, 1952.

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

FORMAL OPINION—1952. No. 43.

DEAR SIR:

I have your memorandum of December 10, 1952 in which you refer to the law requiring commercial vehicles exceeding a gross weight of 6,000 pounds to be equipped with mud flaps for operation on the highways in New Jersey on or after January 1, 1953. In addition, you mention R. S. 39:3-15 N. J. S. A. concerning reciprocity granted non-residents. Your question was whether or not you should impose the law requiring mud flaps upon non-resident commercial vehicles of the class designated in the law.

The answer to this question is, Yes.

Chapter 343, Laws of 1952, in section 1 provides:

"No person shall operate or cause to be operated any bus, truck, full trailer or semitrailer of registered gross weight exceeding three tons on any public highway unless the same is equipped with suitable metal protectors or substantial flexible flaps on the rearmost wheels, and, in case the rear wheels are not covered at the top by fender, body or other parts of the vehicle, the rear wheels shall be covered at the top by protective means, of such standard type or design and installed in such manner as shall be approved by the Director of the Division of Motor Vehicles in the Department of Law and Public Safety and as shall conform substantially to any requirements of the Interstate Commerce Commission governing similar subject matter, in order to prevent, as far as practicable, such wheels from throwing dirt, water or other materials on the windshields of the following vehicles, except in cases in which the motor vehicle is so designed and constructed that the above requirements are accomplished by reason of fender or body construction or other means of enclosure; *provided, however,* this act shall not apply to pole trailers, dump trucks, tanks, or other vehicles where the construction thereof is such that complete freedom around the wheel area is necessary to secure the designed use of the vehicle."

You will note that this section makes no distinction between persons operating a New Jersey-registered vehicle and persons operating vehicles registered in a State other than New Jersey.

R. S. 39:3-15 N. J. S. A. cited in your memorandum applies only with respect to registration and is quoted as follows:

"Any passenger type motor car, omnibus, motor vehicle used for transportation of goods, wares and merchandise, motor cycle, or motor-drawn vehicle belonging to a non-resident, and which has been registered in accordance with the laws respecting the registration of motor vehicles of the State, Territory, Federal district of the United States or province of the

Dominion of Canada, or foreign country, in which the non-resident resides, and which has conspicuously displayed thereon the registration number thereof, may, without complying with the provisions of this subtitle with respect to registration, be operated in this State during such portion of the entire year as the free operation of a similar type of vehicle belonging to a resident of this State and registered in compliance with the laws of this State, and whose registration number is conspicuously displayed thereon, is permitted in the State, Territory, Federal district or province of the Dominion of Canada, or foreign country, of the non-resident."

In view of the fact that the commonly-referred-to reciprocity section of Title 39 (R. S. 39:3-15 N. J. S. A.) by its wording applies only "with respect to registration" it does not affect the enforcement of chapter 343, laws of 1952 as above quoted.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: JOHN J. KITCHEN,
Deputy Attorney General

jjk:n

FEBRUARY 17, 1953.

DANIEL BERGSMAN, M.D., M.P.H.,
State Commissioner of Health,
State House,
Trenton, New Jersey.

FORMAL OPINION—1953. No. 1.

DEAR DR. BERGSMAN:

Under date of December 10, 1952, you requested an opinion of our office determining the exact responsibilities of the Board of Beauty Culture Control under R. S. 45:4A-10 (P. L. 1943, Chapter 9, Section 10) in promulgating rules and regulations relating to courses in beauty culture to be administered in private schools as contrasted to public or vocational training schools which are under the jurisdiction of the State Board of Education.

The answer is that R. S. 45:4A-10 places the responsibility upon the State Board of Education for the promulgation of rules and regulations relating to courses of beauty culture as they are given in public, private and vocational training schools of this State.

R. S. 45:4A-10 states that,

"No school of beauty culture of this State shall be granted a certificate of registration or license, and no school of beauty culture of another State, territory, or the District of Columbia shall be approved by the department, unless it shall comply in all respects with the rules and regulations of the State board of beauty culture control and State Board of Education relating to courses in beauty culture as they are given in the public schools or vocational training schools of this State, * * *."

A reading of the aforementioned paragraph of Section 10 of the Act clearly provides that private schools of beauty culture shall be granted a certificate of registration or license or approval only when they meet two requirements. First, they must comply in all respects with the rules and regulations of the State Board of Beauty Culture Control and, second, they must comply in all respects with the rules and regulations of the State Board of Education relating to courses in beauty culture as they are given in the public schools or vocational training schools.

It is clear that the Act intends that the courses of study for beauty culture be the same in all schools, whether public, private or vocational.

Turning to R. S. 45:4A-35 (P. L. 1938, Chapter 120, Section 5), which states,

"Nothing in this chapter shall limit in anyway the right of the State Board of Education or any local board of education to establish and operate courses in beauty culture, to employ teachers, to determine the standards for teaching and the qualifications of teachers, to determine courses of study, to determine the standards for the admission, progress, certification and graduation of students, to determine any and all standards and rules as to quarters, supplies, equipment and anything whatsoever pertaining to the establishment, operation and maintenance of a course in beauty culture operated by a public school. *Nothing in this chapter shall be interpreted to give any person or agency other than the State Board of Education and the local boards of*

education the right to prescribe any requirement of any kind whatsoever for courses of beauty culture in public schools or for teachers or pupils in such courses." (underscoring supplied.)

Logically, it follows that since R. S. 45:4A-35 clearly forbids the State Board of Beauty Culture Control to prescribe any requirement whatsoever for courses of beauty culture in public schools and since R. S. 45:4A-10 clearly states that private schools must comply in all respects with the rules and regulations of the State Board of Beauty Culture Control and State Board of Education relating to courses in beauty culture as they are given in public or vocational training schools, the rules and regulations mentioned therein refer to the powers of the State Board of Beauty Culture Control under R. S. 45:4A-13 and 16 (P. L. 1935, Chapter 307, Sections 12 and 15) to make rules and regulations, and the courses in beauty culture as prescribed for public schools refer to the power of the State Board of Education under R. S. 45:4A-35.

Accordingly we advise you that the State Board of Beauty Culture Control has no responsibility and no authority to promulgate rules and regulations pertaining to courses of study of beauty culture in private beauty schools.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: HERMAN M. BELL, JR.,
Deputy Attorney General.

TDP/HMB/LL

FEBRUARY 20, 1953.

THE HONORABLE SANFORD BATES, *Commissioner,*
Department of Institutions and Agencies,
State Office Building,
Trenton, New Jersey.

FORMAL OPINION—1953. No. 2.

DEAR COMMISSIONER BATES:

You desire to be advised whether an individual convicted as a disorderly person is deemed to have been convicted of a crime within contemplation of Chapter 84, P. L. 1948, Section 24. It is our opinion and we advise you that the answer to this proposition is in the negative.

Section 24 reads as follows:

"A prisoner, whose parole has been revoked because of conviction of a crime committed while on parole, shall be required, unless sooner reparaoled by the board, to serve the balance of time due on his sentence to be computed from the date of his original release on parole. If parole is revoked for reasons other than subsequent conviction for crime while on parole then the parolee, unless sooner reparaoled by the board, shall be required to serve the

balance of time due on his sentence to be computed as of the date that he was declared delinquent on parole."

Since the sanction imposed in the cited section upon one convicted of crime while on parole serves to require him to remain in confinement for an additional period of time, the law must be strictly construed, as is the case in penal statutes, and the interpretation most favorable to the accused will apply. See Sutherland's Statutory Construction, 3rd Edition, Vol. 3, Sec. 5604.

Additionally, the subject matter received the attention of our courts in *State vs. Block*, 119 N. J. L. 282 (Supreme Court, 1938), where it said:

"Conviction as a disorderly person is not a conviction of crime."

Of similar effect is *State vs. Lavato*, 7 N. J. 137 (1951).

Accordingly, in view of the above decisions, you are advised that an individual on parole adjudged a disorderly person as now provided in N. J. S. Title 2A, Subtitle 12, is not deemed to have been convicted of crime within the meaning of Section 24 of the Parole Law, *supra*, and is not subject to the sanctions contained therein.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: EUGENE T. URBANIAK,
Deputy Attorney General.

ETU:HH

FEBRUARY 20, 1953.

THE HONORABLE SANFORD BATES, *Commissioner,*
Department of Institutions and Agencies,
State Office Building,
Trenton, New Jersey.

FORMAL OPINION—1953. No. 3.

DEAR COMMISSIONER BATES:

You desire to be advised of the legal authority of the State Board of Child Welfare to consent to the performance of surgery upon certain infant children in situations wherein the said board is not acting as legal guardian but is administering some form of welfare services to said children as provided in Chapter 138, P. L. 1951.

It is our opinion and we advise you that in the absence of legal guardianship in the said board, pursuant to an order of a court of competent jurisdiction, we perceive no statutory warrant of authority to give consent to perform surgery on minor children for whom the board merely provides "welfare services" under Chapter 138, P. L. 1951.

"Under the law, the least manual touching of the body of another against his will, constitutes an assault and battery." See *Central R. R. Co. of N. J. vs. Simandl*, 124 N. J. Eq. 207 (Chanc. Ct., 1938).

Wrongful abuse of authority is an assault and battery even when involving the medical services of a physician. See Whartons Criminal Law, Vol. I, p. 1105, Sec. 810.

A proper exercise of authority or duty conferred upon one by law is always justification and a defense to an action for assault and battery, as in the case of a parent who moderately chastises a child (See Wharton, *supra*, Vol I, p. 1117, Sec. 830); but who does not exceed the bounds of propriety and reasonableness in the infliction of punishment.

Thus, if we were to answer your query in the affirmative we must find in the statute under consideration some authority conferred upon the board to consent to the performance of surgery upon children not legal wards of the board. We find none, but rather observe a legislative intent to reserve certain rights and duties unto the parents of these children. Of interest is Section 5 of the law:

"Nothing in this act shall authorize the State Board of Child Welfare to accept the care or custody of any child, nor to provide welfare services for any child, except with the voluntary approval and consent of the parent, parents, legal custodian, guardian or other person with whom the child may be living."

Even though the necessary consent be secured from the parents or guardian as required by law, only those "welfare services" defined in the statute may be provided. See Sec. 2(g):

"The term 'welfare services' means consultation, counselling, and referral to or utilization of available resources, for the purpose of determining and correcting or adjusting matters and circumstances which are endangering the welfare of a child, and for the purpose of promoting his proper development and adjustment in the family and the community."

The most liberal construction of the words utilized in accordance with the commonly accepted meaning thereof will not accommodate the proposition that the board may consent to the performance of surgery on a child receiving the benefits of the act. It seems most significant to us that no mention is made anywhere in the above definition of "welfare services" of "medical or surgical services." It may be urged by some that the term "welfare" is sufficiently broad in its meaning to encompass surgical services. If any such decision exists in this jurisdiction it has escaped our attention.

It is within the clear power of the Legislature to enact statutes for the protection of the health of the infant wards of the State. 31 C. J. p. 994. In New Jersey, we have done this with respect to children committed to the guardianship of this same board. See Sec. 22, Chapter 138, P. L. 1951. Not so as to those children receiving aid under Article I of the same statute. Nor does the declaration of public policy in Section I of the act include the authority here sought. If such responsibility is to be vested in the board then the medium is by legislation designed for that purpose.

The board may wish to consider including a general consent for such surgery in the form of consent and approval secured from the parents or guardian as required in Section 5, *supra*.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: EUGENE T. URBANIAK,
Deputy Attorney General.

ETU:HH

FEBRUARY 20, 1953.

THE HONORABLE SANFORD BATES, *Commissioner,*
Department of Institutions and Agencies,
 State Office Building,
 Trenton, New Jersey.

FORMAL OPINION—1953. No. 4.

DEAR SIR:

You desire to be advised concerning the proper interpretation to be placed upon Section 4, Chapter 207, P. L. 1950, an act providing for the disposition of persons convicted of certain enumerated sex crimes.

You wish to be informed whether a person placed on probation under Section 4(a), with a condition that he receive psychiatric treatment, may thereafter be subject to revocation of such probation for failure to comply with such condition and subsequently be committed to an institution to be designated by the Commissioner of Institutions and Agencies as set forth in Section 4(b).

An examination of the pertinent sections of the law leads us to the conclusion that the answer to the query is in the affirmative.

The Legislature in the enactment of Chapter 207, P. L. 1950, recognized that certain repetitive sex offenders commit these crimes because of mental disorders. Provision is made for the examination of the defendant, after conviction of certain enumerated sex crimes, at the Diagnostic Center. If it appears from the report submitted by the Diagnostic Center that the offender's conduct was characterized by a pattern of repetitive compulsive behavior and, either violence or age disparity, it shall be the duty of the court to recognize that such offender requires specialized treatment for his mental and physical aberrations.

In Section 4, here under construction, it is provided that the court shall dispose of the case by *one or more* of the following methods: (a) Place the individual on probation with a condition that he receive psychiatric treatment; (b) Commit such individual to an institution to be designated by the Commissioner of Institutions and Agencies.

The legislative intent seems clear that either one or both of these measures may be adopted and the commitment of the defendant to an institution following probation and revocation thereof presupposes that the condition has been violated.

There is no suggestion that the court is limited in its treatment of the defendant to but one of the two suggested procedures but it will appear that either or both may be utilized for the welfare of society and the person so convicted. To adopt the contrary view would be to discourage the use of probation and would result in an unusually large number of institutional commitments without the many benefits available in modern day probation methods.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: EUGENE T. URBANIAK,
Deputy Attorney General.

ETU:HH

FEBRUARY 26, 1953.

RE: A-4302773 IB

MR. A. C. DEVANEY, *Assistant Commissioner,*
Inspections and Examinations Division,
Immigration and Naturalization Service,
 United States Department of Justice,
 Washington 25, D. C.

FORMAL OPINION—1953. No. 5.

DEAR SIR:

By your inquiry of January 19, 1953, you raised four questions relating to the effect of an order expunging record of conviction secured under the provisions of R. S. 2:192-15 (now N. J. S. 2A:164-28). We believe that the issues raised can be resolved by the single question, "Is such an order expunging record of conviction secured in accordance with the cited statutes equivalent to a pardon granted by the Governor and would an individual who had secured such an expunging order be exempt from additional punishment available to habitual offenders?"

It is our opinion and we advise you that such an order expunging record of conviction does not have the attributes of a full pardon granted either by the former Court of Pardons under the Constitution of 1844 or by the Governor under the Constitution of 1947.

It becomes necessary to make reference to the provisions of our former Constitution because it appears that the order in question was secured in the appropriate court of Middlesex County on January 2, 1948. The present Constitution of this State became effective January 1, 1948. Since the proceedings were instituted under the former Constitution, it might be urged that the individual involved had available to him the safeguards of the former Constitution. Even if this be the case, we will demonstrate that the result obtained from a review of the law is the same under either Constitution.

By the Constitution of 1844, Art. V, Par. 10, it was provided as follows:

"The governor, or person administering the government, the chancellor, and the six judges of the Court of Errors and Appeals, or a major part of them, of whom the governor, or person administering the government, shall be one, may remit fines and forfeitures, and grant pardons, after conviction, in all cases except impeachment."

This provision of our former Constitution received judicial interpretation in an advisory opinion of Chancellor Walker in a matter entitled *In re N. J. Court of Pardons*, 97 N. J. Eq. 555 (Chancery Court, 1925). Therein it was stated that the former Court of Pardons could not grant a pardon by a majority vote of the members of the court unless the Governor or person administering the government, concurred. It was further said:

"Our Court of Pardons represents, not the parliament but the king and his privy counsel, *Cook vs. Freeholders* * * *, 26 N. J. L. 340. Ergo, it is a kingly, and not a parliamentary power—that is, one vested in the executive and not in the legislature."

Elsewhere in the opinion, Chancellor Walker said (page 558):

"In this state and country, the pardoning power is, and always has been, a prerogative of the executive department. In this state it is expressly bestowed in Art. V of the Constitution relating to the executive department. And Art. III, Par. 1, declares that no person or persons belonging to or constituting that department shall exercise any of the powers belonging to either of the others. * * * And it also provides that no person or persons belonging to or constituting either of the other departments shall exercise any of the powers properly belonging to it."

Further discussion in the decision leads to the inescapable conclusion that the pardoning power in New Jersey under the former Constitution reposes solely in the executive and could not be fettered by any legislative restrictions and it was said that the Legislature shall define the crimes and fix the degree and method of punishment but it is within the executive authority to relieve from the punishment.

If the order expunging record of conviction is controlled by the 1947 Constitution, which was in effect at the time that the order was entered, then the result is the same for in Art. V, Par. 1, 1947 Constitution, this is found:

"The governor may grant pardons and reprieves in all cases other than impeachment and treason, and may suspend and remit fines and forfeitures."

In *State vs. Mangino*, 17 N. J. Super. 587 (App. Div., 1952), wherein this portion of the Constitution received judicial attention, the court said:

"The exercise of executive clemency is exclusively the governor's province."

Thus, we observe that whatever the effect of an order expunging record of conviction may be, it has not the effect of an executive pardon nor does it partake of the attributes or consequences of such a pardon. So, it can be said that the statute is not supplemental to or in addition to the pardoning power of the governor as herein discussed.

Your remaining inquiry deals with any exemptions that might be granted the holder of such an order with respect to additional penalties that may be imposed under our Habitual Offender Law (N. J. S. 2A:85-8, et seq.).

We do not believe that a discussion of this phase of the matter is necessary to a disposition of the prime question. Suffice it to say, that in this jurisdiction additional punishments are imposed upon persons holding former convictions for crimes denominated as high misdemeanors. An examination of the expungement statute reveals that it does not apply to a series of crimes specifically enumerated therein, the bulk of which are high misdemeanors. In these specific instances no escape would be permitted the holder of such an order of expungement from the operation of our Habitual Offender Law. We make no further reference thereto for the reasons stated.

Accordingly, we hold the view that an order expunging record of conviction has not the force and effect of a full pardon in this jurisdiction.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: EUGENE T. URBANIAK,
Deputy Attorney General.

ETU:HH

FEBRUARY 16, 1953.

MAJOR WILLIAM O. NICOL, *Secretary and Executive Officer,*
Bureau of Tenement House Supervision,
1060 Broad Street,
Newark, New Jersey.

FORMAL OPINION—1953. No. 6.

DEAR MAJOR NICOL:

This will acknowledge receipt of your communication of January 30, 1953, and supplement of February 11, 1953, wherein you request an opinion concerning R. S. 45:3-10 as amended by Chapter 249 of the Laws of 1950. The question presented in your communication is:

Shall the Tenement House Bureau accept plans from one, other than a licensed architect or a licensed professional engineer, if such person files an affidavit setting forth only that he is the designer of the plans?

Your further question is:

Whether your present procedure—accepting an affidavit from a person who certifies that he drew the plans—should be changed.

My answer is that the procedure presently adopted and being followed by you should be changed.

A study of the 1950 amendment reveals that no radical change was made to the existing law. It does, however, show an enlargement of the principles theretofore existing. The 1950 amendment is set forth with italics, which italics shows the words which were added to the existing law.

"45:3-10. Any person who shall pursue the practice of architecture in this State, or shall engage in this State in the business of preparing plans, specifications and preliminary data for the erection or alteration of any building, except buildings designed by licensed professional engineers incidental or supplemental to engineering projects, or use the title architect or registered architect, or shall advertise or use any title, sign, card or device to indicate that such person is an architect, without a certificate thereof *or while his certificate is suspended*, in accordance with the provisions of this chapter, or any person aiding or assisting such person not having a certificate to practice architecture *or while his certificate to practice architecture is suspended*, shall be liable to a penalty of not less than fifty dollars (\$50.00), nor more than two hundred dollars (\$200.00) for the first offense, and a penalty of not less than two hundred dollars (\$200.00) nor more than five hundred dollars (\$500.00) for a second or each subsequent offense, which penalty shall be sued for, and recovered by and in the name of the board. *The payment to the board of an amount at least equal to the minimum penalty prescribed in this act, prior or subsequent to the commencement of proceedings for the recovery of a penalty shall be deemed and construed to be a conviction, and any subsequent violation shall be considered an additional offense.*

Any single act or transaction shall constitute engaging in business or the practice of architecture within the meaning of this chapter.

Nothing herein contained shall prohibit students or employees of licensed architects from acting upon the authority of such licensed architects, *whose certificates have not been suspended*, where said students or employees are under the immediate supervision of such licensed architect, or to prohibit any person in this State from acting as designer of any building that is to be constructed by himself for his own *occupancy or occupancy by a member or members of his immediate family*, but no licensed architect shall permit his name to be used in connection with the name of any other person not licensed to practice architecture in this State in any advertisement, sign, card or device in such a manner as to indicate that such other person is a licensed architect."

The changes may be summarized as follows:

1. Prohibition of the pursuit of the practice of architecture while certificate is suspended.
2. Prohibition of person aiding or assisting a person in the practice of architecture while certificate is suspended.
3. Payment of minimum fine, whether before or after commencement of proceedings, shall be construed as a conviction.
4. Allows any person to act as designer of any building that is to be constructed for himself for his own occupancy or occupancy by a member or members of his immediate family.

We are concerned principally with this last category, and it seems to me that the Legislature specifically granted an exemption to persons acting in their own behalf as it did in permitting an individual, non-licensed to practice law, the right to plead his own case or defend himself in a pending action.

R. S. 45:3-10 presents limitations to the pursuit of the practice of architecture. This section specifically permits one non-licensed, to design a building to be constructed for his own occupancy, etc.

In this connection, it is significant to refer to N. J. S. A. 52:32-3 (L. 1948, Ch. 293) and N. J. S. A. 40:55-52 (L. 1948, Ch. 294) which sections are to be read together with R. S. 45:3-10. These sections above referred to pertain to the *filing* of plans in a State department or a municipality. These laws set forth a prohibition against filing plans and specifications for buildings, in a department in the State or the municipality unless same have the seal of a licensed professional engineer or a licensed architect of the State, or in lieu thereof, an affidavit sworn to by the person who drew or prepared the same. These two laws included "licensed professional engineer" in the category of licensed architects. As previously stated, R. S. 45:3-10 is the section of the law pertaining to the practice of architecture, whereas the 1948 laws hereinabove mentioned made reference to the filing of plans.

The procedure presently adopted by you does not strictly follow the provisions of the 1950 statute hereinbefore referred to.

It is, therefore, recommended that the Tenement House Bureau accept the affidavit of the designer of a building *only* if the affidavit states that the building is to be constructed by himself for his own occupancy or occupancy by a member or members of his immediate family.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: OSIE M. SILBER,
Deputy Attorney General.

oms;d

THE HONORABLE SANFORD BATES, *Commissioner,*
Department of Institutions and Agencies,
State Office Building,
Trenton, New Jersey.

FORMAL OPINION—1953. No. 7.

DEAR COMMISSIONER BATES:

You have requested an interpretation of Section 12, Chapter 84, P. L. 1948, which relates to the date upon which certain prisoners may be considered eligible for release on parole. You desire to be advised whether a prisoner sentenced to a reformatory type institution and who is subsequently transferred, through administrative action by someone in authority in the executive branch of the government, to an institution of penal character, is deemed to have served all or part of a term of imprisonment in a penal institution as defined in Section 12 aforesaid and thus subject to the sanctions contained therein.

It is our opinion that the inquiry must be answered in the negative and we so advise for the reasons outlined herein.

There is a conspicuous policy in this jurisdiction to provide an incentive for reformation by imposing penalties for recidivism. (See *In re Huxler*, 133 N. J. L. 171 (Supreme Court, 1945).) This is accomplished either by imposing a longer term of sentence upon conviction as an habitual offender (See N. J. S. 2A:85-8 et seq.), or by withholding eligibility for consideration for release on parole as provided for in Section 12 aforesaid. The requirement in Section 12, that a prisoner who has previously served all or part of a term of imprisonment in any penal institution and who is again sentenced to a penal institution of this State, which is defined in the law to mean the New Jersey State Prison, must serve one-half of his maximum sentence before being eligible for release on parole, is in the nature of a forfeiture. This must be so for he is denied the opportunity afforded a first offender in Section 10 of the same law to be released at an earlier date, i.e. one-third of his maximum or his minimum less credits for good behavior and work performed, whichever occurs sooner.

Thus, we must be guided by the principles of statutory construction which apply to penal statutes or those creating forfeitures. Traditionally, penal statutes have been strictly construed in favor of the defendant. (Sutherland, *Statutory Construction*, Third Edition, Horack, Vol. III, Sec. 5603 et seq.) The same applies to forfeiture statutes.

Let us examine the exact language of the law.

"The granting of parole, as provided for herein, shall be limited as follows:

- (a) Any offender sentenced to any penal institution of this State who has previously served all or part of a term of imprisonment in any penal institution
 - (1) Of this State, or
 - (2) Of the United States, or
 - (3) Of any State other than this State,

shall be deemed to be a second offender and upon his incarceration for such second offense shall be ineligible for parole consideration by the board until he shall have served at least one-half of the maximum sentence imposed upon him for such second offense * * *"

In the case under discussion, the prisoner was not originally "sentenced" to a penal institution of this or any other State but rather was confined in such penal institution as a result of the administrative action of some official in the executive branch of the government, such as may be done in this jurisdiction under R. S. 30:4-85, the validity and effect of which is discussed in *Ex parte Hodge*, 17 N. J. Super. 198; *Ex parte Zienowicz*, 12 N. J. Super. 563 and *Ex parte White*, 10 N. J. Super. 600.

While the statute under review does not clearly indicate whether the prior term of imprisonment must have resulted from a sentence to a penal institution, nonetheless, we are constrained to the view that a liberal construction of the law most favorable to the defendant requires us to find that such must be the case. Our courts have adopted a liberal construction of the Parole Law to afford the prisoner parole consideration upon the earliest date consistent with the text of the Parole Statute and the legislative intent to be derived therefrom.

To illustrate, although the Parole Law is silent as to whether the Parole Board is empowered to grant a retroactive parole, the court found such authority to be vested in the board to deal with inequitable situations, such as were presented in the case of *DeSanto vs. Parole Board*, 17 N. J. Super. 44 (App. Div., 1951). Again, in *White vs. Parole Board*, 17 N. J. Super. 580 (App. Div., 1952), it was stated that, although the Parole Statute makes no provision for a hearing by the board to give a prisoner an opportunity to challenge the accuracy of the information utilized to classify him as an habitual offender under Section 12 aforesaid, and even though such was not deemed essential to due process, nevertheless, considerations of simple fairness suggest that the board should pursue procedures reasonably adequate to give the inmate notice of such classification and appropriate consideration upon a claim of error if the facts of prior conviction, imprisonment or identity are denied by him.

For these reasons, we believe that the habitual offender status, alluded to in Section 12 aforesaid, must result from the judicial action of the sentencing court in imposing a sentence to a penal institution rather than from administrative action transferring such a prisoner from an institution of reformatory character to a penal institution of State prison status. It must be remembered that this only imposes an obligation upon the Parole Board to consider the prisoner for release on parole and does not require the grant of parole, for this always is a matter for the exercise of discretion by the Parole Board.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: /s/ EUGENE T. URBANIAK,
Deputy Attorney General.

ETU:HH

MARCH 13, 1953.

HON. WALTER T. MARGETTS, JR.,
State Treasurer,
Trenton, New Jersey.

FORMAL OPINION—1953. No. 8.

DEAR SIR:

This will acknowledge receipt of your letter of March 2, 1953, wherein you request an opinion concerning exemptions to the statute requiring a permit for the erection, use and maintenance of a certain sign. The sign mentioned in your inquiry is approximately 4' x 6' and is located on the north side of Red Bank Avenue at the northwest corner of Third Avenue, National Park Borough, Gloucester County. The sign contains the following words:

"The Texas Company
Marine Department
Warehouse and Office"

A directional arrow has painted on it:

"Dock Area"

The question presented in your communication is:

"Is a permit required and payment of fee necessary for the above mentioned sign?"

My answer to the question is "Yes."

The answer to your question may be found in N. J. S. A. 54:40-35(3) and (6). This reads as follows:

"54:40-35. Permit not required for certain signs.

No permit shall be required for the erection, use or maintenance of any sign, billboard, structure, object or other device which is to be used solely for any of the following purposes:

(3) For any cautionary, informative or directory sign, signal or device erected on any public highway exclusively in the interest of public safety, convenience or health when permission has been given therefor by the public authority having jurisdiction of such public highway.

(6) For any private directional sign not exceeding two square feet in area."

It is true the sign in question is cautionary, informative and directory, but it is not used and maintained exclusively in the interest of public safety, convenience or health as it serves both the public and The Texas Company. The Legislature in creating a class of exempt signs was careful to use the word "exclusive" to limit this benefit. The Texas Company does not come within the class organization devoted exclusively to the public interest.

It seems to me that (6) above mentioned is the more important paragraph which answers your query. The exemption placed in (6) was for any private directional

sign not exceeding two square feet in area. The sign in question is somewhat greater than twenty-four square feet in area, and therefore the exemption does not obtain. The need for a permit and payment of fees is, therefore, required for the erection, use and maintenance of the sign in accordance with the statute.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: OSIE M. SILBER,
Deputy Attorney General.

oms;d

MARCH 19, 1953.

HON. RUTH A. PILGER,
Chairman of the Committee on Elections,
Assembly Chamber,
State House, Trenton, N. J.

FORMAL OPINION—1953. No. 9.

DEAR MRS. PILGER:

Receipt is acknowledged of your request for my opinion as to the right of citizens of this State, in certain cases, to vote by absentee ballot.

Your inquiry states:

"As Chairman of the Elections Committee in the House of Assembly several bills have been sent to my committee providing for the voting by citizens who are confined to their homes or who are out of the State, through the use of an absentee ballot.

"I have been contacted by several lawyers concerning this legislation and several of them have advised me that voting through the use of absentee ballots is a proper subject of legislation and that all that is necessary is to amend Title 19 of the Revised Statutes to accomplish this purpose.

"Several other lawyers, in whom I have equal confidence, have advised me that any bill amending Title 19 of the Revised Statutes would be unconstitutional because before legislation can be passed to permit voting by absentee ballot the Constitution will have to be amended. The advocates of this theory point out that Article II of the Constitution provides that no elector in actual military service of the State or the United States shall be deprived of his vote by reason of his absence from his election district, and the Legislature shall have the power to provide the manner in which such absent electors may vote, and because it mentions the fact that the Legislature shall have power to provide for ballots for people in military service, it thereby prohibits legislation to be passed enabling anyone else to vote by absentee ballot.

"I am holding all of these bills in my committee until I receive your advice as to which legal theory is correct; * * *"

The State Constitution by Article II, paragraph 3 provides:

"3. Every citizen of the United States, of the age of twenty-one years, who shall have been a resident of this State one year, and of the county in which he claims his vote five months, next before the election, shall be entitled to vote for all officers that now are or hereafter may be elective by the people, and upon all questions which may be submitted to a vote of the people."

I am of the opinion that it is within the power of the Legislature, to provide by appropriate amendments to the Election Law for the casting of absentee ballots.

In the early case of *Ransom vs. Black*, 54 N. J. L. 446, 449 (Supreme Court, 1892) in discussing the right of suffrage and the conditions surrounding the exercise thereof, the Court held:

"The right conferred is the right to vote for all elective offices. As to when, where and how the voting is to take place, is left to the Legislature. Without the intervention of the Legislature the privilege conferred by the Constitution would be fruitless. A wide field, therefore, is left open for the exercise of legislative discretion. The days upon which elections are to be held, the hours of the day or night during which, or between which, votes shall be received, must be determined by the Legislature. So, too, the places where each election is to be held, and the size of the voting precinct, and whether the size shall be measured by territory or population, must also be settled by direct or delegated legislative authority. The widest field for the exercise of legislative wisdom and discussion is in adjusting the method by which the sentiments of the voter shall be obtained and canvassed. The Constitution does not even prescribe that the voting shall be done by ballot, and, in fact, long after the adoption of the present Constitution, township elections were conducted otherwise."

This case was affirmed by the Court of Errors and Appeals in 65 N. J. L. 688 (E. & A., 1902) and while the affirmance is on the opinion of Mr. Justice Dixon he nevertheless concurred in the reasoning of the Supreme Court, that legislation is necessary to determine who are legal voters, to provide for them the means of voting, to prevent all others from voting and to ascertain the result of the vote, holding that "all legislation conducive to these ends is, therefore, permissible."

In the case of *In re City Clerk of Paterson*, 88 Atl. 694 (Supreme Court, 1913) Chief Justice Gummere, in discussing the case of *Ransom vs. Black*, and approving the right of the Legislature to protect and regulate the manner of voting, held:

"The case of *Ransom vs. Black* was a case of note which was decided by the Supreme Court in 1892. It went to the Court of Errors and was affirmed in the same year; but there was no note in our reports of decision until about ten years later, except a mere statement that the judgment was affirmed. Judge Reed read the prevailing opinion of the Supreme Court. Judge Dixon concurred in the result, but differed vitally upon the vital question in the case. In the Court of Errors the judgment was affirmed on the dissenting opinion of Judge Dixon. This is what Judge Dixon says in his opinion in 54 N. J. Law, 446, 24 Atl. 489, 1021, 16 L. R. A. 769, on the right of suffrage: 'It must be conceded that legislation is necessary to determine

who are legal voters, to provide for them the means of voting, to prevent all others from voting, and to ascertain the result of the vote. All legislation conducive to these ends is therefore permissible."

In the matter of *In re Ray*, 26 N. J. Misc. 56, 60, 61, the cases are collated and reviewed by Judge Proctor. In quoting from the opinion of Mr. Justice Kalisch in the case of *In re Freeholders of Hudson County*, 105 N. J. L. 57, he said:

"It is quite clear from the decisions of the courts of this State that though an individual falls within the class of those entitled to vote by virtue of the constitutional declaration, nevertheless, the manner in which and how he shall become entitled to exercise the right extended to him or her, is left to the sound discretion and wisdom of the lawmaking power of this State. * * *

"Cooley, in his authoritative treatise on Constitutional Limitations, volume 2, page 1368 (eighth edition), has set forth the rule which appears to be the philosophy of our courts (*In re Freeholders of Hudson County, supra*) as follows:

"While it is true that the Legislature cannot add to the constitutional qualifications of electors, it must, nevertheless, devolve upon that body to establish such regulations as will enable all persons entitled to the privilege to exercise it freely and securely, and exclude all who are not entitled from improper participation therein."

For many years our Election Law provided for absentee voting. The Election Law of 1920 (P. L. 1920, Chapter 349, p. 791) among other things provided:

"23. An absentee elector shall be deemed to be a qualified registered elector who by reason of inability through illness or absence from the county in which he resides is unable to cast his ballot on the day of the general election at the polling place in the election district in which he is registered."

"24. Any absentee elector desiring to vote at a general election shall make application for an official ballot to the municipal clerk in any municipality other than county seats in counties of the first class and in all municipalities in counties other than counties of the first class, or the county board of election of the county in which he resides. If said application is based upon illness it shall have attached to it a physician's certificate setting forth that such absentee elector's illness is such that he is or will be unable to go to the polling place or room to cast his ballot on election day. All applications shall be filed with said municipal clerk in any municipality other than county seats in counties of the first class and in all municipalities in counties other than counties of the first class or the county board of elections not later than the second Tuesday preceding the day of the general election. Said municipal clerk shall on the day following the receipt of said application file same with the county board of elections. The county board of elections shall, immediately upon receipt of said application and certificate, forward to said elector with a return stamped envelope enclosed, a formal application."

The statute further detailed a form of application, a form of affidavit and the procedure by which applications should be forwarded to the county board of elections; the form of the absentee elector's official ballot, for the mailing of the ballot, the method of distribution of ballots by the county board of elections and how

the absentee elector's official ballot should be cast. (P. L. 1920, Chapter 349, pp. 792, 793, 794, 795, 796.) This statute was later repealed.

The claim that an amendment to the Constitution is necessary in order to provide for a civilian absentee ballot is without merit.

The Constitution, by Article II, paragraph 3 prescribes the suffrage qualifications. Paragraph 4 of the same Article gives to the Legislature the right to provide for absentee voting by members of the Armed Forces.

These two paragraphs of Article II deal with distinct and severable propositions.

A consideration of the cited cases and of the legislative precedent and practice heretofore prevailing, with respect to the voting of absentee ballots, leads me to the conclusion that it is competent for the Legislature to provide for the participation of electors in elections, by the use of absentee ballots.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: JOSEPH LANIGAN,
Deputy Attorney General.

JL:rk

MARCH 16, 1953.

STATE INVESTMENT COUNCIL,
State House,
Trenton, New Jersey.

FORMAL OPINION—1953. No. 10.

DEAR SIRS:

The State Investment Council has requested my opinion as to the investment jurisdiction of the Director of Investment, and the attendant supervisory responsibilities of the State Investment Council over the following items:

(a) One thousand eight hundred and eighty-seven shares of stock of the United New Jersey Railroad and Canal Company, held in the account of the General Treasury Fund;

(b) Certain riparian leases held in the account of the Trustees for the Support of Public Schools;

(c) Certain real estate and personal property held in certain Escheat Funds.

(a) *As to the shares of stock of the United New Jersey Railroad and Canal Company:*

Chapter 270, P. L. 1950, which established the State Investment Council and the Division of Investment, committed certain designated funds to the investment jurisdiction of the Director of Investment. The General Treasury Fund is not specifically mentioned. Chapter 270, P. L. 1950, however, does transfer to the Director of Investment, certain investment powers formerly vested in the State Treasurer by Chapter 148, P. L. 1944.

This latter statute provides:

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

Likewise, of course, Chapter 270, P. L. 1950, broadens the list of securities in which funds so held by the treasurer may be invested.

I am informed by the Division of Budget and Accounting, Department of the Treasury, that the securities of the United New Jersey Railroad and Canal Company mentioned above, have been held by the State for many years, apparently having been acquired at the time the railroad tracks were built between Jersey City, New Jersey, and Philadelphia, Pa.

The State Treasurer is under no legal compulsion to sell the stock in question. This is a matter entirely within his good judgment and discretion. Even if the stock is sold, and cash realized, the State Treasurer would then be under no legal compulsion to invest the proceeds. It would only be at such time that the State Treasurer should decide to sell the securities, and to invest the cash thereby realized, that the investment jurisdiction of the Director of Investment would attach to the given situation.

It is therefore my opinion that inasmuch as the stock is being held in that form, that neither the Director of Investment nor the State Investment Council has any investment responsibility in the matter.

(b) *Riparian leases held in the account of the Trustees for the Support of Public Schools:*

Chapter 1, P. L. 1903 (R. S. 18:10-5) provides that all lands belonging to the State now or formerly lying under water are appropriated for the support of public schools. The same statute (R. S. 18:10-6) also provides that "All leases of lands appropriated for the support of public schools by section 18:10-5 of this title shall be held by the board of trustees as a part of the principal of the school fund, and the income arising from such leases shall be a part of the income of the school fund."

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

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

The 1903 act aforementioned (R. S. 18:10-8) limited the investment of moneys in this fund to school district bonds, bonds of the United States, of New Jersey or of any county or municipality of this State. The enactment, however, of Chapter 270, P. L. 1950, and particularly Section 2 thereof, resulted in the investment jurisdiction over this fund being transferred from the Trustees for the Support of Public Schools to the Division of Investment, and accordingly permitted the investment of these funds in those types of investments authorized by Chapter 270, P. L. 1950.

It follows, therefore, I believe, that the investment of moneys belonging to this fund is a responsibility of the Director of Investment. As long as the leases themselves, which are the subject matter of our present inquiry, remain in this form, they are not committed to the investment jurisdiction of the Director of Investment, but remain the property of the Trustees of the Fund, and are to be held by the Trustees as a part of the principal of the school fund, under the provisions of R. S. 18:10-6 cited above. (See *The American Dock and Improvement Company, et al. vs. The Trustees for the Support of Public Schools, et al.*, 35 N. J. Eq. 181, and *State vs. Owen*, 23 N. J. Misc. 123.) Income arising from these leases is treated as part of the income of the school fund to be disbursed annually as directed by R. S. 18:10-16.

(c) *Real estate and personal property held in certain escheat funds.*

I assume that this inquiry relates to property other than cash or negotiable securities, as the disposition by the State Treasurer of these items is specifically regulated by the provisions of Chapter 155, P. L. 1946 (R. S. 2A:37-21). Should the State Treasurer decide to convert personal property to cash, such cash could be regarded as constituting moneys being held for a particular time or a particular use. Accordingly, should the State Treasurer decide to invest this cash, investment jurisdiction relating thereto, would be exercised by the Director of Investment pursuant to the provisions of Chapter 270, P. L. 1950. On the other hand, should the State Treasurer retain such property as such, neither the Director of Investment nor the Investment Council would have any responsibility in the matter.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: DANIEL DE BRIER,
Deputy Attorney General.

ddb;b

APRIL 27, 1953.

HONORABLE J. LINDSAY DEVALIERE, *Director,*
Division of Budget and Accounting,
 State House,
 Trenton, New Jersey.

FORMAL OPINION—1953. No. 11.

DEAR MR. DEVALIERE:

You have before you the application of Frank A. Mathews, Jr., for a pension under the provisions of R. S. 43:4-1 to 43:4-5, inclusive.

The cited act is commonly referred to as the Veterans' Pension Act. It authorizes a pension to certain veterans who have attained the age of sixty-two years, and additionally have served for twenty years continuously or in the aggregate "in office, position or employment of this State or of a county, municipality or school district or board of education."

Mr. Mathews' pension application, which has been verified, discloses the following record of service:

<i>From</i>	<i>To</i>	<i>State agency</i>
5-28-29	6-30-33	Judge of District Court—First Jud. Dist. of Burlington County
2-13-34		Unclassified Appt. Counsel—State Highway
7-1-37		Salary change
7-1-38		Salary reduction
9-16-40		Leave without pay—Military
10-16-40		Returned from leave
	2-4-44	Services terminated
2-21-44		Unclass. Appt.—Asst. Atty. Gen.— Highway Dept.
3-16-44	Transfer 11-30-45	Dept. Atty. Gen.—Dept. of Law Resigned
2- 1-49	4-15-53	Unclassified appt.—Dept. Atty. Gen. Div. of Law

Mr. Mathews also served in World War I from September 21, 1917, to May 15, 1919.

You inquire whether the service rendered by Mr. Mathews, set forth above, "implies the type of service covered by the Veterans' Pension Act."

I assume that your inquiry is prompted by the fact that Mr. Mathews' public services have been on a part-time basis, during which time Mr. Mathews also engaged in the private practice of his profession as a lawyer.

It is my opinion that the services rendered by Mr. Mathews satisfy the requirements of the Veterans' Pension Act, and make Mr. Mathews eligible for the pension sought.

Our old Supreme Court in the case of *Kelly vs. Kearins*, 132 N. J. L. at 312 (1944), having before it a set of facts arising under the Veterans' Pension Act, referred to what it termed the "clear legislative pattern determinative of the policy of the State for the retirement on pension of public servants. . .," and stated:

"Many are the statutory classes and conditions for the retirement of public servants on pension and for the establishment and upkeep of pension funds. See R. S. 1937, Title 43. And yet a reading of each discloses a clear legislative pattern determinative of the policy of the State for the retirement on pension of public servants for honest and efficient services. *Cf. Walter vs. Police and Fire Department, &c.*, Trenton, 120 N. J. L. 39, 42; 198 Atl. Rep. 383. That pattern, save for incapacity, is that the public servant shall have attained a fixed age and additionally shall have served a fixed number of years, but not upon having only attained a fixed age (R. S. 43:4-1) nor upon only having served for a fixed number of years (R. S. 43:4-2). Both concomitants must be satisfied."

The requirement of public service on the part of the veteran, is defined by R. S. 43:4-2 as service "for twenty years continuously or in the aggregate in office, position or employment of this State or of a county . . ."

The Legislature, in my opinion, in employing the three terms, namely, public "office," "position," and "employment" intended to cover the entire range of public service, in its widest and broadest sense.

The words "office," "position" and "employment" were discussed by our Court of Errors and Appeals in the case of *Wilentz vs. Stanger*, 129 N. J. L. 606 (1943) at p. 614, in which case the Court held:

"We may discover the fundamentals of the term "office" from the definitions given in opinions by two of our eminent jurists. Mr. Justice Dixon, in *Stewart vs. Freeholders of Hudson*, 61 N. J. L. 117, defined and distinguished the terms "office" and "position" thus: "'An office' is a place created, or at least recognized, by the law of the State, and to which certain permanent public duties are assigned either by the law itself or by regulations adopted under authority of law. * * * 'A position,' within the purview of this act (viz., Gen. Stat., p. 3702), is defined to be a place, the duties of which are continuous and permanent, analogous to those of an office, and which pertain to the position as such."

Mr. Justice Garrison, in *Fredericks vs. Board of Health*, 82 N. J. L. 200, said: "An office is a place in a governmental system created or recognized by the law of the State which, either directly or by delegated authority, assigns to the incumbent thereof the continuous performance of certain permanent public duties. * * * A position is analogous to an office, in that the duties that pertain to it are permanent and certain, but it differs from an office, in that its duties may be non-governmental and not assigned to it by any public law of the State. * * * An employment differs from both an office and a position, in that its duties, which are non-governmental, are neither certain nor permanent."

To like effect, *McGrath vs. Bayonne*, 85 N. J. L. 188.

A textbook definition, taken from *Mechams' Public Off.*, p. 1, § 1, and incorporated with approval by Mr. Justice Van Syckel in his opinion in *Oliver vs. Jersey City*, 63 N. J. L. 96, is:

"A public office is the right, authority and duty created and conferred by law, by which, for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer."

We observe, that neither the Veterans' Pension Act, nor the judicial definitions and interpretations of the terms "office," "position" or "employment," require that the public services to be rendered must be full-time services. As was stated by our Court of Errors and Appeals in *State vs. Murzda*, 116 N. J. L. 219, "the purpose of judicial interpretation is the discovery of 'the true sense of the form of words which are used . . .'"

Mr. Mathews held an "office" while serving as Judge of the District Court of Burlington County, and, in my opinion, likewise held public office, while serving as an Assistant Attorney-General and subsequently as a Deputy Attorney-General. "The place of legal adviser to a public body may, by suitable statutory provision and endowment with sovereign duties and other appropriate indicia of rank in the public service, be constituted as an office." *Wilentz vs. Stanger*, *supra*. See also *Gallaher vs. Camden County*, 129 N. J. L. 290 (1942). As counsel to the State Highway Commission, Mr. Mathews held, if not an office, at least public position or public employment.

The point must also be made that there was no statutory requirement that in holding any of the various public offices, positions or employments, held by Mr. Mathews, that he abstain from the private practice of law. The Legislature could have imposed such restriction, had it so desired, just as it saw fit to do so in the case of assistant deputy attorneys-general, who, by the provisions of R. S. 52:17A-8 are required to devote their entire time to the performance of their duties. The act cited further states that the assistant deputy attorneys-general "shall not engage in the private practice of law." Likewise, the Legislature in establishing the former position of general solicitor of the State Highway Department prohibited the incumbent from engaging in the private practice of law. (Chapter 75, P. L. 1939.)

In view of the absence of any language, of which I am aware, either in the statute before us, or in the applicable decisions, that requires full-time public service on the part of Mr. Mathews, the conclusion is inescapable to me, that in the specific case before us, and under the specific facts presented by the pension application you are considering, Mr. Mathews has satisfied the requirements of the Veterans' Pension Act.

Although your inquiry does not make the point, it is clear that Mr. Mathews' services were not continuous over a period of twenty years. Service in the aggregate, however, totalling twenty years, as Mr. Mathews' service does, is sufficient to satisfy this specific requirement of the statute. *Murphy vs. Zink*, 136 N. J. L. 235 (1947) *aff.* 136 N. J. L. 635.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: DANIEL DE BRIER,
Deputy Attorney General.

ddb;b

APRIL 27, 1953.

MR. ELMER G. BAGGALEY, *Secretary*,
Consolidated Police & Firemen's Pension Fund Commission,
State House Annex,
P. O. Box 1266
Trenton, New Jersey.

FORMAL OPINION—1953. No. 12.

DEAR MR. BAGGALEY:

I have your letter of April 8, 1953 requesting my opinion in connection with executions directed against pension allowances made by local police and firemen's pension commissions in causes where the defendant is a retired pensioner. You also inquire what action should be taken by the Consolidated Police and Firemen's Pension Fund Commission after July 1, 1953 in connection with these executions, in view of the fact that as of that date all funds of local police and firemen's pension systems are to be in the hands of the new Consolidated Police and Firemen's Pension Fund Commission pursuant to the terms of Chapter 358, P. L. 1952 (R. S. 43:16-7.1).

I understand that your question was suggested by a judgment entered in the New Jersey Superior Court, Chancery Division, Union County, under date of September 15, 1950, wherein a portion of certain pension payments being paid to the defendant by a local police and firemen's pension fund, were ordered paid to the plaintiff in the cause.

In the first place, the judgment in that matter, you will observe, is by its very terms based upon the consent of the defendant. This judgment, therefore, is not to be regarded as a precedent as to what may or may not be done under the circumstances, in the absence of the consent of the defendant.

The consent by the judgment debtor to the terms of a judgment, authorizing the payment by the pension authorities of a portion of his salary to the plaintiff, may be regarded as tantamount to an assignment. Chapter 253, P. L. 1944 does not prohibit an assignment, as was pointed out by our courts in *Sganga vs. Police and Firemen's Pension Fund Commission*, 2 N. J. Super. at 578 (1949).

The rule is well stated by our courts in *Passaic National Bank vs. Eelman*, 116 N. J. L. at 286 (1936): "The exemption of public pensions, as such, from liability to execution and garnishment is ordinarily derived from statute." Section 8 of Chapter 253, P. L. 1944 provides that all pensions granted by local police and firemen's pension fund commissions shall be exempt from execution, garnishment, attachment, sequestration or other legal process.

If your information is correct that local police and firemen's pension commissions have been permitting the attachment of pension moneys subsequent to the enactment of Chapter 253, P. L. 1944, I am unable to state under what authority this is being done, unless, of course, it was being done with the consent of the pensioner. If done otherwise, I am of the opinion that it was contrary to the statute cited above.

As to what action should be taken by the Consolidated Police and Firemen's Pension Fund Commission on executions against its funds, may I point out that section 3 of Chapter 358, P. L. 1952 (R. S. 43:16-5) in referring to the Consolidated Police and Firemen's Pension Fund Commission, states that all rights and privileges heretofore granted and extended to members of a municipal police or fire department "are hereby expressly reserved, continued and transferred from the local pension funds

to the Consolidated Police and Firemen's Pension Fund. Further, Section 7 of the same statute (R. S. 43:16-7) states that "all pensions granted under this chapter shall be exempt from execution, garnishment, attachment, sequestration or other legal process."

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: DANIEL DE BRIER,
Deputy Attorney General.

ddb;b

Authorities

Statutes:

Chapter 253, P. L. 1944
Chapter 358, P. L. 1952

Cases:

Passaic Bank vs. Eelman, 116 L. 279
Newark vs. American Realty Co., 26 Misc. 240
Mechanics Finance Co. vs. Austin, 8 N. J. Misc. 582
Finnegan vs. State Board of Tax Appeals, 131 L. 276
Sganga vs. Police & Firemen's Pension Fund Commission, 2 N. J. Super. 575

APRIL 29, 1953.

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

FORMAL OPINION—1953. No. 13

DEAR MR. DEARDEN:

Reference is made to your request for a formal opinion concerning the application of the provisions of Chap. 343, Laws of 1952 (R. S. 39:3-79.1).

This law provides generally for the use of mud flaps on any bus, truck, full trailer or semi-trailer of a registered gross weight exceeding three tons. The law contains the following proviso:

"This act shall not apply to pole trailers, dump trucks, tanks, or other vehicles where the construction thereof is such that complete freedom around the wheel area is necessary to secure the designed use of the vehicle."

You desire to know whether or not all the enumerated vehicles are required to have mud flaps unless they come within the provisions of the above-quoted exception.

The answer to your question is, "Yes."

It is my opinion that pole trailers, dump trucks and tanks are joined in a general classification with such other vehicles to be determined by you, the construction of

which require complete freedom around the wheel area. Pole trailers, dump trucks and tanks must also be of the type which necessitates such complete freedom as specified in the act; otherwise, they are required to be equipped with mud flaps on the rearmost wheels.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: JOHN J. KITCHEN,
Deputy Attorney General.

MAY 4, 1953.

HON. J. LINDSAY DEVALLIERE,
Director, Division of Budget and Accounting,
Department of the Treasury,
State House, Trenton, N. J.

FORMAL OPINION—1953. No. 14.

DEAR MR. DEVALLIERE:

Receipt is acknowledged of your request for my opinion concerning the claim submitted to you by Messrs. James M. Davis, Jr., John A. Mathews and Milton M. Conford, in the sum of \$22,500, for services rendered in connection with litigation instituted by the State of New Jersey, resulting in the voiding of the sale of the Burlington-Bristol bridge and the Tacony-Palmyra bridge.

This claim was the subject of litigation in the case of *Haines vs. Burlington County Bridge Commission*, 8 N. J. 539 (Supreme Court, 1952). There an action was instituted by Henry S. Haines and others against the Burlington County Bridge Commission and others for injunctive relief. The Superior Court, Chancery Division, allowed counsel fees to these attorneys in the sum of \$22,500 and directed payment out of the general bridge fund, and defendants appealed. The Superior Court, Appellate Division, affirmed the decree, and certification was thereupon had to the Supreme Court. The Supreme Court, Vanderbilt, C. J., held that there was no "fund in court" within the meaning of the court rule permitting allowance of fee for legal services from such fund, notwithstanding fact that property which was subject to litigation was under control of court through issuance of temporary restraints.

The claim was next discussed in the case of *Driscoll vs. Burlington-Bristol Bridge Co.*, 8 N. J. 433, 494 (Supreme Court, 1952) wherein the court held that special counsel in this litigation could not be compensated from the "bridge fund" and indicated that compensation of such a nature could be paid only by legislative appropriation.

In summarizing its conclusions on this point the Court held:

"It is apparent from the foregoing that the Legislature contemplated that special counsel for the State, its agencies or officers should be compensated out of funds appropriated by it and not by the court in a particular proceeding in which special counsel might be appearing." (page 494.)

Thereafter, the matter was presented to the Legislature and in the Supplemental Appropriations bill of this year (Senate No. 249—Chapter 101) the following item was inserted:

“DEPARTMENT OF LAW AND PUBLIC SAFETY,
DIVISION OF LAW

“Amount to cover fees of former Senator James Davis, of Burlington, John A. Mathews, of Essex County, and Milton B. Conford, of Union County, representing costs in the litigation of the recent Burlington Bridge matter \$22,500.00

The Supplemental Appropriations bill is an adequate and comprehensive piece of legislation in itself. It makes appropriations not only for the support of the State government, but for several public purposes, of which in the judgment of the Legislature the recited item is one. No additional legislation is necessary to authorize payment of the appropriated item, and I am of the opinion that the amount should be paid to the named individuals in accordance with the mandate of the appropriation law.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: JOSEPH LANIGAN,
Deputy Attorney General.

JL:rk
Encl: Voucher

MAY 5, 1953.

HON. J. LINDSAY DEVALIERE, *Director,*
Division of Budget and Accounting,
Department of the Treasury
State House, Trenton, N. J.

FORMAL OPINION—1953. No. 15.

DEAR MR. DEVALIERE:

Receipt is acknowledged of your request for my opinion relative to certain claims for contingent and incidental expenses, presented to you by the Honorable G. Clifford Thomas, Chairman of the House Committee on Incidental Expenses. You ask to be advised as to the power of the House of Assembly, the committees and members thereof, to incur these expenses and is there legislative authority therefor.

By Chapter 43 of the Laws of 1952 (the General Appropriations Bill) it is provided:

“GENERAL STATE PURPOSES

A 10. LEGISLATURE

* * *

“Services Other Than Personal:

Indexing Journal and Minutes and other incidental and contingent expenses \$100,000.00”

By Chapter 7 of the Laws of 1952 (the Incidental Appropriations Bill) at page 34 thereof it is provided:

A 10. LEGISLATURE

* * *

“Services Other Than Personal:

Indexing journal and minutes and other incidental expenses \$148,000.00”

Incidental and contingent expenses are those charges, which in the judgment of the respective Houses of the Legislature, are incurred in the performance of duties and in the functioning of the legislative machinery. So long as they are within the limits of authorized appropriations they are controlled by the judgment of each House, pursuant to the constitutional power to conduct its own proceedings.

“The adjective ‘incidental,’ as used in appropriation bills to qualify the word ‘expenses,’ has a technical and well-understood meaning. It is usual for Congress to enumerate the principal classes of expenditure which they authorize, such as clerk hire, fuel, light, postage, telegrams, etc., and then to make a small appropriation for the minor disbursements incidental to any great business, which cannot well be foreseen, and which it would be useless to specify more accurately. For such disbursements a round sum is appropriated under the head of ‘incidental expenses.’” *Dunwoody vs. United States*, 22 Ct. Cl. 269, 280.

The State Constitution by Article IV, Section IV, paragraph 3, among other things, provides: Each House shall choose its own officers and determine the rules of its proceedings. Pursuant to this constitutional provision the House of Assembly by Rule 34 has created a number of standing committees, one of which is a Committee on Incidental Expenses. The Legislature functions through its various committees and the accepted practice for a period of more than 60 years has been to refer all incidental claims of the officers and members of the House of Assembly to this Incidental Committee. The committee, and the committee alone, is vested with the power to approve or disapprove these incidental claims subject only to the overriding vote of a majority of the members of the House.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: JOSEPH LANIGAN,
Deputy Attorney General.

JL:rk
Encl: Voucher

MAY 5, 1953.

THE HONORABLE HOMER C. ZINK, *Chairman,*
State Parole Board,
 State Office Building,
 Trenton, New Jersey.

FORMAL OPINION—1953. No. 16.

MY DEAR MR. ZINK:

You have inquired, under date of May 5, 1953, as to the extent of the authority of the State Parole Board to consider for release on parole a prisoner undergoing life imprisonment at the State Prison and upon whom sentence of death had been imposed and which said sentence of death was commuted by the former Court of Pardons to life imprisonment.

In *State vs. Hildebrand*, 25 N. J. Super. 82 (App. Div., 1953) this very question was considered. You will recall that in the case of *George Hildebrand*, a prisoner in confinement at State Prison having the status alluded to above, that he made application to your board for consideration for release on parole under section 11, Chapter 84, P. L. 1948, relating to life sentence prisoners. On July 3, 1952, your board ruled that it had no authority to consider him for release on parole because (1) he was not serving a sentence of life imprisonment imposed by a trial criminal court and (2) that Section 4, Chapter 83, P. L. 1948, provided that when a sentence of death was commuted to one of life imprisonment that "such term of imprisonment shall not be remitted or commuted except by the Governor."

The Court in the *Hildebrand* decision, *supra*, considered both grounds and rejected them and the Court said:

"This defendant qualifies under section 11 as a 'prisoner serving a sentence of life.' We conclude that the ruling of the State Parole Board is invalid and that the defendant is not ineligible for consideration for parole by the State Parole Board for any of the reasons set forth in the letter of said parole board dated July 3, 1952."

It seems clear from a reading of this decision that *Hildebrand* can now be considered as eligible for consideration for release on parole under section 11 of the Parole Act, *supra*, assuming, of course, that he qualifies as to length of time served in confinement.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: EUGENE T. URBANIAK,
Deputy Attorney General.

ETU:HH

MAY 5, 1953.

THE HONORABLE SANFORD BATES, *Commissioner,*
Department of Institutions and Agencies,
 State Office Building,
 Trenton 7, New Jersey.

FORMAL OPINION—1953. No. 17

MY DEAR COMMISSIONER BATES:

It appears that you desire to be advised concerning the type of information that may be furnished the State Selective Bureau respecting the adjudication made against a juvenile offender. Your inquiry flows from the fact that the various branches of the Armed Services of the United States require information of such a fact since it is a condition that prior to entry of such person into the Armed Forces that he shall have adjusted satisfactorily on probation or parole for a period of at least six months. The Selective Service Bureau wishes to be informed when a juvenile registrant for military service has offender status, and you desire to be advised whether this can be accomplished without contravention of the statutes relating to the disposition of juvenile offenders.

It is our opinion and we advise you that you may inform the Selective Service Bureau of the fact that a juvenile registrant has offender status so that compliance may be had with the federal regulations for entry into the various branches of the Armed Forces of the United States.

It is true that there are certain safeguards erected by our statutes to protect juvenile offenders. In N. J. S. 2A:85-4, it is said that "a person under the age of sixteen years is deemed incapable of committing a crime."

The public policy of this State is clearly enunciated in N. J. S. 2A:4-2, where it is provided, "it is hereby declared to be a principle governing the laws of this State that children under the jurisdiction of said (Juvenile and Domestic Relations) Court are wards of the State, subject to the discipline and entitled to the protection of the State, which may intervene to safeguard them from neglect or injury and to enforce the legal obligations due to them and from them."

In N. J. S. 2A:4-21, provision is made for fingerprinting of offenders between the ages of seventeen and eighteen years, "but if in case such person is found not to be guilty of such offense or such charge is dismissed, the State Bureau of Identification or any police department having possession of the same shall deliver such fingerprints to the Juvenile and Domestic Relations Court having jurisdiction of said proceedings, upon demand, and they thereupon shall be destroyed."

Perhaps the most important safeguard for the juvenile offender is found in N. J. S. 2A:4-39, as follows:

"No adjudication upon the status of a child under eighteen years of age shall operate to impose any of the civil disabilities ordinarily imposed by conviction, nor shall such a child be deemed a criminal by reason of such adjudication, nor shall such adjudication be deemed a conviction. The disposition of a child under eighteen years of age or any evidence given in the Juvenile and Domestic Relations Court shall not be admissible as evidence against the child in any case or proceeding in any other court, nor shall such disposition or evidence be held against the child's record in any future Civil Service examination, appointment or application."

The records of the Juvenile Court concerning disposition made of juvenile cases are not always available for public inspection such as those of other courts. The Court had its origin in Chapter 157, P. L. 1929, and in Section 27 thereof it was provided that the records shall be withheld from indiscriminate public inspection but shall be open to inspection by the parent or other authorized representative of the person concerned and, in the discretion of the court, by other persons having a legitimate interest. This same language was carried forward into R. S. 9:18-35 when the statutes of this State were codified in 1937. However, the same section of the law was not re-enacted at the time of the Title 2A Revision, N. J. Statutes.

The matter received the attention of the Supreme Court in the draft of its rules and specifically in Rule 6:2-7 wherein it is stated that the records of the Juvenile Court shall be classified as (a) procedural and (b) social. With regard to procedural records which shall include docket, petitions, complaints, orders, etc., they shall be available for public inspection, except in juvenile causes, and then only in the discretion of the court. Social records are defined as those relating to psychological and psychiatric examinations and other reports concerning family life. These records are to be strictly safeguarded from indiscriminate public inspection. Here again, however, the court may, in its discretion, permit inspection of any of these documents when the best interest and welfare of the child is to be served.

It becomes obvious from a reading of the various statutes alluded to hereinabove and the Rule of Court that the primary purpose of keeping these records confidential is to make certain that the juvenile offender shall not be subject to any civil disabilities or other injury by a disclosure of his record. We understand that the rules and regulations of the Federal Government pertaining to the admission of persons into the Armed Forces provide that no one who has been adjudicated a juvenile offender shall be accepted for military service until he shall have been on probation or parole under satisfactory conduct for a period of at least six months. Thus the juvenile offender will not be subject to any disabilities or injury by furnishing information of the fact of his juvenile offender status to the various branches of the Armed Services for, at most, his entry into the Armed Forces will be delayed but six months.

For the reasons stated, we do not believe that the furnishing of this information to appropriate and accredited officials of the Federal Government is prohibited by the law of this jurisdiction.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: EUGENE T. URBANIAK,
Deputy Attorney General.

MAY 13, 1953.

MR. RUSSELL E. WATSON, JR., *Executive Assistant,*
Office of the Governor,
State House,
Trenton, New Jersey.

FORMAL OPINION—1953. No. 18.

DEAR SIR:

This will acknowledge receipt of your communication of April 30, 1953, wherein you request an opinion relative to the date on which the terms of office of the members of the State Board of Veterinary-Medical Examiners, appointed November 20, 1950, expire.

We are of the opinion that the terms of office of the members of the State Board of Veterinary-Medical Examiners appointed November 20, 1950, expired May 1, 1953.

Section 45:16-1 of the Revised Statutes provides that upon the expiration of the term of office of a member, his successor shall be appointed by the Governor, subject to the provisions of section 45:1-2 (not here relevant), "for a term of three years from the first Monday of May of the year of appointment."

The general rule is that the term of office, when not otherwise provided by statute, begins in the case of appointive offices on the date of appointment, except where under the statute the appointee has a certain time within which to qualify, in which case the term begins at the time of qualification. Section 45:16-1 of the Revised Statutes under consideration so otherwise provides!

The clear and unambiguous language of this statute leads to the conclusion that the term of office is for a period of three years and that said term begins to run as of the date of the first Monday in the month of May of the year during which the appointment is made, irrespective of the day and month in that year when the appointment is in fact made and the member qualifies.

By virtue of the fact that the appointments were made in the year 1950, the terms thereof began to run as of the first Monday of May of the same year, or May 1, 1950. By virtue of the fact that the terms were for periods of three years, the terms of those appointed expired three years thereafter, on May 1, 1953.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: FREDERIC G. WEBER,
Deputy Attorney General.

MAY 15, 1953.

MR. RUSSELL E. WATSON, JR.,
Executive Assistant,
Office of the Governor,
State House,
Trenton, New Jersey.

FORMAL OPINION—1953. No. 19.

DEAR SIR:

This will acknowledge receipt of your communication of May 5, 1953, wherein you request an opinion as to the status of Arthur L. Robinson, of Hackensack, whose term on the State Board of Shorthand Reporting expired April 21, 1953.

We are of the opinion that on April 21, 1953, a vacancy resulted which may be filled by the Governor, by and with the consent of the Senate, and that Mr. Robinson, in holding over is a de facto and not a de jure officer.

Section 45:15A-1 of the Revised Statutes provides that the members of the State Board of Shorthand Reporting are to be appointed by the Governor, by and with the consent of the Senate, and that "the members shall hold office for a term of three years. . . ."

It is noted that the term of the appointment is for a specified number of years. It is further noted that this statute does not make the usual provision for an appointment for a specified term "and until his successor is appointed." No provision is made for holding over.

If, by statute, a definite term is established for an office without provision that the incumbent shall continue in office after its expiration, he will, in holding over, be a de facto and not a de jure officer, and a vacancy will result which may be filled by the appointment, under proper authority, of a successor. *State Ex Rel. McCarthy vs. Watson*, 132 Conn. 518, 164 ALR 1238, 45 A2d 716 (Conn. Supreme Ct., 1946); see also *Mount vs. Howell*, 85 N. J. L. 487, 89 A. 977 (N. J. Supreme Ct., 1914).

Your official records show that the term of Mr. Robinson expired April 21, 1953. We are constrained to advise, as above, that on that day a vacancy resulted and that, in holding over, Mr. Robinson is no more than but a de facto officer.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: FREDERIC G. WEBER,
Deputy Attorney General.

MAY 12, 1953.

HONORABLE DANIEL BERGSMAN,
Commissioner, Department of Health,
State House,
Trenton, New Jersey.

FORMAL OPINION—1953. No. 20.

DEAR COMMISSIONER:

Your department has raised the question whether it has the power to issue an "order of necessity" under N. J. S. A. 40:1-16(g) for the purpose of authorizing a municipal bond ordinance for sewer purposes without the usual down payment provided for in section 40:1-12, when the bond issue will not cause the municipality to exceed its debt limitation.

In my opinion, your department does have the power to make such an order, even though the municipality's debt limitation will not be exceeded, provided that your department makes the findings required by section 40:1-16(g), i.e. "that the expenditure and every part thereof, is necessary to protect the public health and to prevent or suppress a present menace to the public health of sufficient gravity to justify the incurrence of debt in excess of statutory limitations, and that no less expensive method of preventing or suppressing such menace exists."

Section 40:1-12 requires a down payment of five per cent of the amount of the bonds to be authorized by a municipal bond ordinance, but subsection (c) thereof declares that the provisions of this section shall not apply to a municipal bond ordinance "which authorizes obligations solely for purposes described in subsection 'a,' 'b,' 'c,' 'f,' 'g,' or 'h' of section 40:1-16 of this Title * * *."

Even though section 40:1-16, of which the aforesaid section (g) is a part, deals with exceeding the debt limitation, it is believed that said subsection (g) is referred to in subsection (c) of 40:1-12 in order solely to describe the purpose of the bond issue to be exempted from the down payment, i.e., construction of a sewage disposal system, the need for which is sufficiently urgent from a health standpoint, and which constitutes the least expensive method of preventing or suppressing the health menace. In my opinion, the reference to the incurrence of debt in excess of statutory limitations, as contained in subsection (g), is intended merely to show the degree of gravity which must prevail in order to justify the order of necessity. It is not intended to indicate that such an order may be granted only when the debt limitation is to be exceeded. The contrary construction of section 40:1-12(c), read together with section 40:1-16(g), would lead to the absurd result that a municipality which is already heavily in debt should be ordered by the department to incur more debt for a sewage disposal system, while a municipality in good financial shape should not be ordered to do so, even though the menace to the public health were the same in both cases.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: THOMAS P. COOK,
Deputy Attorney General.

MAY 12, 1953.

HON. CHARLES R. ERDMAN, JR., *Commissioner,*
Dept. of Conservation and Economic Development,
 520 E. State Street,
 Trenton, New Jersey.

FORMAL OPINION—1953. No. 21.

DEAR COMMISSIONER:

You have requested our opinion as to whether sections 114 and 116 of chapter 448, P. L. 1948, constitute sufficient authority for the acceptance by your department of funds from the Stony Brook-Millstone Watersheds Association or its members, and from the Federal Government, for the construction of a stream gaging station to be established on Stony Brook in Princeton Township.

It appears from information furnished by you that such a gaging station is a prerequisite to the planning of water conservation and flood control measures in the watershed; that the U. S. Geological Survey has indicated its willingness to construct the station and to pay one-half of the cost, provided the State will sponsor the project and will provide for paying the other half of the cost; and that the aforesaid Watersheds Association has proposed to contribute the funds with which to pay that half of the cost for which the State is responsible.

In my opinion, your department is authorized, under the above cited provisions of the law, to accept these gifts from the Federal Government and from the Watersheds Association, respectively.

Section 114 above cited specifically authorizes the department to accept for and in the name of the State, subject to the approval of the Governor and of yourself as Commissioner, "bequests and donations of money or other personal property to be used for the maintenance and use of any service or activity of the department * * * if such * * * bequests or donations are unconditional or are subject to such conditions as the commissioner finds are reasonable and not inconsistent with the use of such property for such service or activity * * *."

Section 116 likewise authorizes the department, subject to the approval of the Governor and the Commissioner, to "apply for and accept grants from the Federal Government or any agency thereof" and to "comply with the terms, conditions and limitations thereof, for any of the purposes of the department * * *."

The foregoing provisions are plainly broad enough to cover your acceptance of the proposed gifts and grants as above outlined.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: THOMAS P. COOK,
Deputy Attorney General.

tpc/n

MAY 18, 1953.

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

FORMAL OPINION—1953. No. 22.

DEAR DIRECTOR:

You have asked this office to give you a formal opinion as to whether you could reasonably require a constable serving a levy on a motor vehicle to either take actual possession of the vehicle itself or merely take possession of the certificate of ownership.

The answer to your inquiry is "no."

The manner of seizure of a motor vehicle is provided in R. S. 39:10-15, as amended by chapter 136, P. L. 1946, p. 630, section 11 and is quoted as follows:

"If a motor vehicle is seized, levied upon or attached and taken into possession, actually or constructively, by virtue of judicial process issued by a court of competent jurisdiction in this State, or by virtue of a statute, State, Federal or otherwise, the person from whose possession the motor vehicle was taken, and without prejudice to his rights in the premises, shall surrender the title papers to the commissioner upon written notice or demand from the commissioner. * * *"

The above quoted law provides that the seizure, levy or attachment may be "actually or constructively." No provision is made for the constable to secure possession of the certificate of ownership and, on the contrary, the law provides that the owner shall surrender the title papers to the commissioner upon written notice or demand.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: JOHN J. KITCHEN,
Deputy Attorney General.

jjk/n

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

JUNE 1, 1953.

FORMAL OPINION—1953. No. 23

DEAR MR. DEARDEN:

By your memorandum of May 29th you request a formal opinion as to whether a dealer, licensed with a designated place of business may, under the same license, operate branch agencies with a designated place of business at different addresses.

The answer to your question is "No".

R. S. 39:10-2, as amended, defines the word "dealer" as meaning the agent, distributor or authorized dealer of the manufacturer of the new motor vehicle, and who has an established place of business.

The same section defines "used motor vehicle dealer" as meaning a person engaged in the business of selling, buying or dealing in used motor vehicles, and who has an established place of business.

R. S. 39:10-19 provides, among other things:

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

* * *

The license fee provided in this latter section is \$100.00.

No provision is made in this law authorizing the director of the Division of Motor Vehicles to permit or recognize the operation of branch agencies at an address other than the dealer's address as designated by such dealer in his application for a license.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: JOHN J. KITCHEN,
Deputy Attorney General.

jjk:m

JUNE 9, 1953.

COLONEL RUSSELL A. SNOOK,
Superintendent of State Police,
Trenton, New Jersey.

FORMAL OPINION—1953. No. 24

DEAR COLONEL SNOOK:

You have requested our opinion as to whether the Division of State Police must hold a hearing before adopting amendments to the regulations governing liquefied petroleum gases pursuant to Chapter 139 of the Laws of 1950. Section 2 of the aforesaid statute authorizes the division to promulgate regulations governing the storage, handling, transportation and utilization of liquefied petroleum gases, and further provides that "such regulations shall be adopted by the Division of State Police only after a hearing thereon".

In my opinion, the requirement of a hearing applies to all amendments as well as to the original regulations. The purpose of the hearing is to allow all interested parties to express themselves as to the merits of the proposed regulation, both in order to give such parties the opportunity to protect their interests and in order that

the Division of State Police may have the benefit of the knowledge and opinions of such parties before promulgating the regulation. These considerations apply to all the regulations, regardless of whether they are the original or constitute amendments or supplements thereto.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: THOMAS P. COOK,
Deputy Attorney General.

tpc;b

JUNE 9, 1953.

HON. RUSSELL E. WATSON, JR.,
Secretary to the Governor,
State House,
Trenton, New Jersey.

FORMAL OPINION—1953. No. 25.

DEAR MR. WATSON:

Receipt is acknowledged of your inquiry of June 5th in which you state: "The Governor has requested an opinion as to his power of appointment from now to the end of his term of office. Among other conditions, he is concerned about his power of appointment of an individual whose present term expires after that of the Governor's."

The State Constitution, by Article V, Section IV; paragraphs 2 and 3, provides:

"2. Each principal department shall be under the supervision of the Governor. The head of each principal department shall be a single executive unless otherwise provided by law. Such single executives shall be nominated and appointed by the Governor, with the advice and consent of the Senate, to serve at the pleasure of the Governor during his term of office and until the appointment and qualification of their successors, except as herein otherwise provided with respect to the Secretary of State and the Attorney General.

"3. The Secretary of State and the Attorney General shall be nominated and appointed by the Governor with the advice and consent of the Senate to serve during the term of office of the Governor."

Pursuant to said paragraph two, the head of each principal department, who is a single executive, shall serve at the pleasure of the Governor during his term of office, and thereafter until the appointment and qualification of his successor. By virtue of said paragraph three, the Secretary of State and the Attorney General shall serve only during the term of office of the Governor.

The Constitution, by Article V, Section IV, paragraph 4, provides:

"4. Whenever a board, commission or other body shall be the head of a principal department, the members thereof shall be nominated and appointed by the Governor with the advice and consent of the Senate, and may be removed in the manner provided by law. Such a board, commission or other body may appoint a principal executive officer when authorized by law, but the appointment shall be subject to the approval of the Governor. Any principal executive officer so appointed shall be removable by the Governor, upon notice and an opportunity to be heard."

The members of any such board, commission or other body, who have been appointed by the Governor with the advice and consent of the Senate, shall serve for the respective terms of office for which they have been severally commissioned, even though such terms extend beyond the term of the present Governor. There is no limitation upon these terms of office such as is contained in paragraphs 2 and 3 of Article V, Section IV of the Constitution above cited.

A vacancy occurring in any office by reason of the expiration of term, appointment to which may be made by the Governor with the advice and consent of the Senate, may be filled by the Governor, during his present incumbency, and the appointee shall be commissioned and serve for the term prescribed by law.

The Constitution, by Article V, Section I, paragraph 13, provides:

"13. The Governor may fill any vacancy occurring in any office during a recess of the Legislature, appointment to which may be made by the Governor with the advice and consent of the Senate, or by the Legislature in joint meeting. An ad interim appointment so made shall expire at the end of the next regular session of the Senate, unless a successor shall be sooner appointed and qualify;
* * *"

The second part of your query reads: "Among other conditions, he is concerned about his power of appointment of an individual whose present term expires after that of the Governor's."

Substantially stated, your query is: Has the Governor the lawful authority and right to appoint, to fill an anticipated vacancy in a public office, the term of which could not begin until after his own term of office has expired.

I can find no case, text or general rule of law which would support such a power of appointment. The cases are to the contrary.

In the leading case of *State of Ohio ex rel James C. Morris vs. John Sullivan* (Ohio Supreme Court—81 Ohio St. 79; 90 N. E. 146—1909), the Ohio Supreme Court, in considering and passing upon the identical question, held:

"On January 4, 1909, the relator, James C. Morris, was appointed by Andrew L. Harris, then Governor of the State of Ohio, to be a member of the railroad commission of this state for the term of six years; said term to commence on the first Monday in February, 1909, and to terminate on the first Monday of February, 1915. On the same day the senate of Ohio, being then in session, assented to and confirmed said appointment. On the following day, January 5th, Gov. Harris issued to said James C. Morris a commission to serve as a member of said railroad commission for said term of six years commencing on the first

Monday in February, 1909. By operation of law the term of office of Andrew L. Harris as Governor of Ohio expired at noon on January 11, 1909, and Judson Harmon then became Governor. On January 21, 1909, Gov. Harmon appointed the defendant, John Sullivan, to be a member of said railroad commission for and during the same term for which Gov. Harris had theretofore named and appointed the relator, Morris. Said appointment so made by Gov. Harmon was on the 3d day of March, 1909, assented to and confirmed by the Senate, and on March 8, 1909, the defendant, Sullivan, having received his commission, qualified and entered upon said office of railroad commissioner and has ever since continued to hold the same and to discharge the duties thereof, under and by virtue of said appointment. These facts being admitted, the question here presented is: Had Andrew L. Harris, as Governor of Ohio, the lawful authority and right to appoint the relator Morris to fill an anticipated vacancy in a public office the term of which could not begin until after his own term of office had expired? It admittedly is the well-established general rule of law that an officer clothed with authority to appoint to a public office cannot, in the absence of express statutory authority, make a valid appointment thereto for a term which is not to begin until after the expiration of the term of such appointing officer.

"Meehem, in his work on Public Offices and Officers, at section 133, states the general rule as follows: 'The appointing power cannot forestall the rights and prerogatives of their own successors by appointing successors to office expiring after their power to appoint has itself expired.'"

This case is considered and reviewed in 26 L. R. A. p. 514 (New Series 1910) as follows:

"Note:—May officer make a prospective appointment the term of which cannot begin until after his own term has expired.

"The statement in the foregoing case of the common-law rule on this point is fully borne out by the authorities.

"An appointment to office in anticipation of a vacancy therein is good only in case the officer making the appointment is still in office when the vacancy occurs. *People vs. Fitzgerald*, 180 N. Y. 269, 73 N. E. 55; *Toume vs. Porter*, 128 App. Div. 717, 113 N. Y. Supp. 758.

"A board of officers has no power to make a prospective appointment to an office that will not become vacant during the term of the board's official life. *People ex rel Sweet vs. Ward*, 107 Cal. 236, 40 Pac. 538."

In *Bowmes vs. Meehan*, 45 N. J. L. 189, 191 (Sup. Ct., 1883) the Court held that an outgoing board of chosen freeholders cannot fill an office that will not become vacant during the term of its own official life.

In *Dickinson vs. Jersey City*, 68 N. J. L. 99, 102 (Sup. Ct., 1902) the Court held:

"It is a well-recognized principle, under the decisions in this State, that an existing municipal board or body cannot appoint to an office which is to come into existence or become vacant in the life of the same board or body at a time when it will be differently constituted. The official board or body of a municipality which is or will be in office at the time an appointee is to take his office can alone make an appointment to such office, unless there be express legislative authority otherwise. This rule is founded in sound public policy."

In *Pashman vs. Friedbauer*, 1 N. J. Super. 616, 620 (Superior Court, 1949) the Court said:

"The vacancy and the power of appointment must coincide. As was held in *Dickinson vs. Mayor, &c., of Jersey City*, 68 N. J. L. 99, 102:

"The official board or body of a municipality which is or will be in office at the time an appointee is to take his office can alone make an appointment to such office, unless there be express legislative authority otherwise. This rule is founded in sound public policy. Any other rule would work for confusion and disorganization in municipal affairs. If an existing board can appoint to an office falling within the term of the next incoming board, why not for one falling in the term of the same board two or five years hence?"

"The same is true of an individual appointing power."

In 43 Am. Jur., Section 160, pp. 18-19, the rule is summarized: "At common law, an officer clothed with authority to make appointments to a public office may not forestall the rights and prerogatives of his successor by making a prospective appointment to fill an anticipated vacancy in an office the term of which cannot begin until after his own term and power to appoint have expired."

Upon a consideration of the Constitution and the cited cases, it would seem that the power of appointment to fill an anticipated vacancy does not extend beyond the constitutional term of the Governor.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: JOSEPH LANIGAN,
Deputy Attorney General.

JL:rk

JUNE 12, 1953.

HON. RUSSELL E. WATSON, JR.,
Secretary to the Governor,
State House,
Trenton, New Jersey.

FORMAL OPINION—1953. No. 26.

DEAR MR. WATSON:

Your inter-communication of June 5th, requests an opinion as to the legality of the loyalty oath, which it is assumed each State employee takes, pursuant to R. S. 41:1-3 (P. L. 1949, chapter 22, page 68).

In considering said chapter 22, together with statutes of a similar nature (chapters 21, 24 and 25 of the Laws of 1949) in the case of *Imbrie vs. Marsh*, 5 N. J. Super. 239, 247 (1949) the Appellate Division of the Superior Court held, that these statutes are invalid insofar as they relate to the Governor, Senators and members of the General Assembly, and candidates for these offices (p. 247). While this judgment was affirmed in the Supreme Court, 3 N. J. 578, 593, the opinion was broadened so as to include State officials.

At page 592 the Court said:

"Thus, there is nothing in the history of either the Constitutional Convention of 1844 or of the Constitutional Convention of 1947 that lends countenance to the idea that the Legislature was authorized to impose oaths in addition to those set forth in the Constitution on the classes of public officials covered hereby. * * *

"This decision in nowise affects the duty of allegiance owed by a legislator or State officers generally to the State. Even though it is beyond the power of the Legislature to prescribe an oath of allegiance for members of the Legislature and other State officers, they are nevertheless bound, along with every other citizen, in their allegiance to the State even in the absence of an oath;"

What are these oaths set forth in the Constitution and who are the classes of public officers covered thereby? The Constitution by Article IV, Section VIII, paragraphs 1 and 2, provides:

"1. 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.

"2. 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.'"

The Constitution by Article VII, Section I, paragraph 1, provides:

"1. 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."

Commenting on these sections of the Constitution and the required oaths thereunder, the Appellate Division said (5 N. J. Super. p. 246):

"The Constitution sets out the exact words of the oath to be taken by Senators and Assemblymen. The legislators are not permitted to frame their own oaths; here nothing is left to their discretion. The Legislature cannot authorize the omission of the oath or any part of it, or the addition of other clauses or of another oath.

"The clause in our Constitution respecting the oath of other State officers is differently framed; it sets forth the ground to be covered by the oath, but probably leaves some scope to legislative action. We may surmise, for in-

stance, that the duties of the office may be set forth with some particularity in the oath. But no oath can be required that does not come within what the Constitution prescribes."

That the invalidity and infirmity of said chapter 22 does not extend to persons holding positions and employments is best shown by the language of the dissenting opinion of Justice Oliphant (3 N. J. p. 621) reading in part as follows:

"The constitutionality of chapter 23 of these laws was not argued before this Court and as I understand the majority opinion, while it states that chapters 21, 22, 24 and 25 are unconstitutional, it affirms the judgment of the Appellate Division and holds that these statutes are unconstitutional as they relate to the Governor, Senators and Members of the General Assembly and candidates for those offices, and they are unconstitutional as to all State officers who fall within the provisions of Article VII, Section 1, Constitution of 1947."

The persons required to take the oath of allegiance set forth in R. S. 41:1-3, are detailed in the first part of this statute. Among them are:

"* * * every person who shall be elected, appointed or employed to, or in, any public office, position or employment, legislative, executive or judicial, or to any office of the militia, of, or in, this State or of, or in, any department, board, commission, agency or instrumentality of this State, * * *"

State officers who come within the provisions of Article VII, Section I of the Constitution are excepted from the statute by the *Imbrie vs. Marsh* case, *supra*.

The statute speaks of "public office, position or employment." There is a clear distinction in this State between an office on the one hand and a position or employment on the other. *Fredericks vs. Board of Health*, 82 N. J. L. 200 (Sup. Ct., 1912).

"An office is a place in a governmental system 'created or recognized by the law of the State which, either directly or by delegated authority, assigns to the incumbent thereof the continuous performance of certain permanent public duties'; a position is analogous to an office 'in that the duties that pertain to it are permanent and certain, but it differs from an office, in that its duties may be non-governmental and not assigned to it by any public law of the State'; and an employment differs from both an office and a position 'in that its duties, which are nongovernmental, are neither certain nor permanent.' *Fredericks vs. Board of Health*, 82 N. J. L. 200 (Sup. Ct., 1912). The test of a public office is whether the incumbent is 'invested with any portion of political power partaking in any degree in the administration of civil government, and performing duties which flow from the sovereign authority.' *City of Hoboken vs. Gear*, 27 N. J. L. 265 (Sup. Ct., 1859). An office partakes in some degree of political power or governmental authority; a position is an employment 'not calling for the exercise of governmental authority.' *Dolan vs. Orange*, 70 N. J. L. 106 (Sup. Ct., 1903). See also, *Uffert vs. Vogt*, 65 N. J. L. 377 (Sup. Ct., 1900); *Duncan vs. Board of Fire and Police Commissioners of Paterson*, 131 N. J. L. 443 (Sup. Ct., 1944)." *Thorp vs. Bd. of Trustees of Schools for Industrial Ed.*, 6 N. J. 506, 507 (Sup. Ct., 1951).

The distinction between an office, and a position and employment, having been judicially recognized and defined, the statute is operative and effective with respect to positions and employments, and the occupants thereof must comply with the law by taking and subscribing the required oath of allegiance.

The result is, therefore, that the condemned portions of the statute, being severable, have been excised and rejected, thus leaving the remainder of the statute intact.

"The settled rule regarding severability as laid down in the cases is that while a statute may be in part constitutional and in part unconstitutional, if the Legislature would have passed the constitutional parts independently of those deemed unconstitutional and the different parts of the statute are not so intimately connected with and dependent upon each other so as to make the statute one composite whole, unconstitutional parts may be rejected and the constitutional parts may stand. *Johnson vs. State*, 59 N. J. L. 535 (E. & A., 1896); *Riccio vs. Hoboken*, 69 N. J. L. 649 (E. & A., 1903); *McCran vs. Ocean Grove*, 96 N. J. L. 158 (E. & A., 1921); *Wilentz vs. Galvin*, 125 N. J. L. 455 (Sup. Ct., 1940)." *Lane Distributors, Inc. vs. Tilton*, 7 N. J. 349, 370 (Sup. Ct., 1951).

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: JOSEPH LANIGAN,
Deputy Attorney General.

JL:rk

JULY 1, 1953.

COLONEL RUSSELL A. SNOOK,
Superintendent, Division of State Police,
Trenton, New Jersey.

FORMAL OPINION—1953. No. 27.

DEAR COLONEL SNOOK:

You have requested our opinion as to whether a municipality of this State may enact or enforce an ordinance which (a) compels a dealer in liquefied petroleum gas, required to obtain a State license, to also secure from the municipality a permit to transport, use or store such commodity, and (b) limits domestic installations to 100 gallons water capacity and industrial installations to 500 gallons water capacity.

In my opinion, neither of such provisions is valid, because each is in conflict with Chapter 139, Laws of 1950, and with the rules and regulations of the Division of State Police issued pursuant thereto.

The statute authorizes the State Police to promulgate and enforce regulations setting forth minimum general standards covering the design, construction, location, installation and operation of equipment for storing, handling and transporting by motor vehicle and utilizing liquefied petroleum gas. The statute further provides that said regulations shall be such as are reasonably necessary for the protection of the health, welfare and safety of the public and persons using such materials, and shall be in substantial conformity with the generally accepted standards of safety con-

cerning the same subject matter. It is then declared that the published standards of the National Board of Fire Underwriters shall be deemed the generally accepted standards.

Section seven of the act provides:

"No municipality or other political subdivision shall adopt or enforce any ordinance or regulation in conflict with the provisions of this act or with the regulations promulgated under section two of this act."

The regulations of the State Police provide for the issuance of permits by State officials for the bulk transportation, handling, utilization and storage of liquefied petroleum gas, and prohibit such operations without the securing of such permits. Furthermore, said regulations do not limit the capacity of domestic or industrial installations, but they do require approval of installations in excess of 2,000 gallons, as well as certain fire protection measures where the installation exceeds 150,000 gallons.

In determining whether the ordinance conflicts with the State law or regulations so as to be invalid, it is important to decide whether the Legislature intended such law and regulations to prohibit any municipal action more restrictive than that taken by the State. The answer depends upon the nature, scope and purpose of the State law, as well as its relation to other legislation.

In our opinion, the purpose of Chapter 139 was to establish a uniform scheme of regulation of the liquefied petroleum gas industry throughout this State. Moreover, the reference to the published standards of the National Board of Fire Underwriters indicates an intent to make such regulations conform with safety standards and practices generally recognized throughout the United States. The Legislature appears to have contemplated that the interests of the public in both safety and commerce would best be protected by a uniform set of regulations for all areas of this State, particularly on such matters as permits for transportation, utilization and storage, and the capacity of installations used by the industry. When, therefore, a State regulation covering one of these matters has been promulgated, more stringent municipal regulation of the same matter is precluded.

As a general rule, an ordinance is deemed to be in conflict with a State law or regulation when it prohibits acts permitted by the State. *McQuillan, Municipal Corporations* (3rd Ed.) Sec. 15.20; 43 *Corp. Jur.* 217-218; *Hudson and Manhattan Railroad Co. vs. Hoboken*, 75 N. J. L. 302; *Pennsylvania Railroad Co. vs. Jersey City*, 84 N. J. L. 716.

Thus, in *Strauss vs. Bradley Beach*, 117 N. J. L. 45 affirmed on opinion below, 118 N. J. L. 561, our courts held invalid an ordinance prohibiting all peddling within the borough, in so far as such ordinance was applied to a veteran holding a license to peddle under a State law. The opinion of Mr. Justice Lloyd in the Supreme Court said (117 N. J. L. at p. 46):

"There is no doubt we think of the purpose of the statutes. It was to class veterans of the various wars as a body and to entitle them to a privilege of peddling throughout the State regardless of the action of municipalities, whether such action took a prohibitive form or a regulative form. The statute is applicable to the State generally, making no exceptions, and if in conflict with a municipal ordinance the latter must cease to be effective."

The foregoing decision was also cited and approved in 1947 in the similar case of *Higgins vs. Krogman*, 140 N. J. Eq. 518, where the ordinance restricted the city's licensees from peddling on boardwalks and on the beach.

Also pertinent here is the case of *Bussone vs. Blatchford*, 164 Pa. Super. 545, 67 Atl. 2d 587, which invalidated an ordinance prohibiting the sale of liquor on certain premises for which the owner had been granted a license by the Pennsylvania Liquor Control Board. The court succinctly stated the applicable rule as follows (67 Atl. 2d at p. 589):

"A municipality cannot lawfully forbid what the Legislature has expressly licensed, authorized or required, or authorize what the Legislature has expressly forbidden."

This opinion has not overlooked Section 40:48-1 of the Revised Statutes, which authorizes the governing body of every municipality to make and enforce ordinances to "regulate the use, storage, sale and disposal of inflammable or combustible materials, and to provide for the protection of life and property from fire, explosions and other dangers." For the reasons already given, it is our view that this statute should not be construed as authorizing the enactment of ordinances more restrictive than the State regulations above mentioned. A contrary determination would, in our opinion, result in a conflict with Chapter 139 of the Laws of 1950 in so far as R. S. 40:48-1 applies to liquefied petroleum gas. In that event, Chapter 139 and the regulations thereunder would prevail. Where there are two conflicting statutes applying to a particular subject, one being general and the other specific, the statute specifically pertaining to that subject controls. *Allgaier vs. Township of Woodbridge*, 5 N. J. Super. 21, 25; *Ackley vs. Norcross*, 122 N. J. L. 569, aff'd. 124 N. J. L. 133.

For the foregoing reasons, we conclude that a municipality in this State may not require a permit for the transportation, utilization, or storage of liquefied petroleum gas from a dealer holding a State license for these purposes, nor may any ordinance limit the size of liquefied petroleum gas installations. Such provisions of any existing ordinance would attempt to prohibit what the State has expressly licensed or authorized, and thus would be in conflict with the controlling provisions of Chapter 139 of the Laws of 1950 and the regulations issued pursuant thereto.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: THOMAS P. COOK,
Deputy Attorney General.

tpc:n

JULY 1, 1953.

MR. ERNEST H. FOUIGNER, *Secretary-Director*,
New Jersey State Board of Architects,
 1060 Broad Street,
 Newark 2, New Jersey.

FORMAL OPINION—1953. No. 28.

DEAR DIRECTOR:

This will acknowledge receipt of your communication of June 15, 1953 wherein you request an opinion as to when the terms of members of the State Board of Architects commence.

We are of the opinion that the intendment of the pertinent provisions of Section 45:3-1 of the Revised Statutes (as amended by L. 1950, Chap. 323, p. 1081, Sec. 1) is that there is to be continuity in the terms of office of the members of the State Board of Architects, that all terms commence as of the same day and month of the respective year in which the appointment falls due, and that an appointment for a new term is called for annually.

Chapter 323 of the Laws of 1950 provides that the New Jersey State Board of Architects, created and established by P. L. 1902, Chapter 29, as amended and supplemented, is to be continued and that said Board shall consist of five members.

Section 1 of Chapter 323 of the Laws of 1950 specifically provides that:

"On the effective date of this act the terms of office of the members of the board shall cease and terminate, and they shall thereafter continue in office as holdover members until such time as the Governor shall designate and appoint them to serve for new terms of office as hereinafter provided."

Section 1 of Chapter 323 of the Laws of 1950 further provides:

"Within a period of thirty days after the effective date of this act, or as soon thereafter as circumstances shall permit, the Governor shall designate and appoint said members to serve and hold office for the following terms: One member for a term of one year from the date of such designation and appointment, one member for a term of two years from said date, one member for a term of three years from said date, one member for a term of four years from said date, and one member for a term of five years from said date."

Section 1 of Chapter 323 of the Laws of 1950 further provides:

"Thereafter, upon the expiration of the term of office of any member, his successor shall be appointed by the Governor, subject to the provisions of section 45:1-2 of this Title, for a term of five years."

This law fixes a time as of when the terms of the five appointees thereunder commence. The problem, however, is whether said date is also applicable to the terms of all subsequent appointees and is one of statutory construction.

The foregoing provisions clearly indicate that the persons in office on the effective date of the act were to constitute the continued New Jersey State Board of Architects, but that their respective terms of office were to cease and terminate at

that time, subject to their holding over until their new appointments by the Governor. They evince a legislative intent to institute a new scheme of uninterrupted terms, in such manner as eventually to affect the occurrence of a vacancy at the same time and date in every successive year.

Moreover, Section 1 aforesaid also provides that "any vacancy in the membership of the Board shall be filled for the unexpired term in the manner provided for an original appointment". The effect of this provision, viewed in the light of the related provisions heretofore recited, is to preserve the integrity of the legislative scheme of term continuity.

The general rule is that the term of office, when not otherwise provided by statute, begins in the case of appointive offices on the date of appointment. However, as we have already indicated, Chapter 323 of the Laws of 1950 fixes by intendment, if not by specification, the time from which the term of a member of the State Board of Architects begins to run.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: FREDERIC G. WEBER,
Deputy Attorney General.

JULY 6, 1953.

HON. ALFRED E. DRISCOLL, *Governor*,
 HON. WALTER T. MARGETTS, JR., *State Treasurer*,
 HON. J. LINDSAY DEVALLIERE, *State Comptroller*.

FORMAL OPINION—1953. No. 29.

DEAR SIRs:

This is to acknowledge your letter of June 30, 1953, referring to the proposed sale of \$150,000,000 of New Jersey Highway Authority bonds, to be submitted for guaranty by the State, as described in an official statement of the Authority. You request my opinion as to the legality of the State guaranty under the terms of the Guaranty Act (P. L. 1952, c. 17), approved by the voters at the 1952 general referendum, and the legality of consenting to a reservation in the Authority of the right and power to issue additional bonds equally secured by the revenues of the Garden State Parkway.

I have reviewed the pertinent provisions of our State Constitution, the New Jersey Highway Authority Act (P. L. 1952, c. 16) as well as the Guaranty Act.

The New Jersey Highway Authority, and its enabling statute, was patterned upon the New Jersey Turnpike Act which our Supreme Court reviewed and sustained in *New Jersey Turnpike Authority vs. Parsons*, 3 N. J. 235, 69A. (2d) 875 (1949). The validity of the Guaranty Act was considered and approved by the same court in *Behnke vs. New Jersey Highway Authority, et al.* May 25, 1953.

In outline and in detail the Legislature conferred upon the New Jersey Highway Authority the corporate and financial powers successfully employed by the New Jersey Turnpike Authority. Thus, negotiable bonds may be issued for any corporate

purpose, without limit as to kind or amount, provided that the interest rate does not exceed 6% per annum. Moreover the Authority is empowered to covenant as to the source and methods of debt service and as to the rank or priority of bonds.

The Guaranty Act created a liability on the part of the State of New Jersey for the guaranty of Authority bonds subject to an aggregate limit of \$285,000,000 of bonds bearing interest of not more than 3% per annum, maturing within 35 years of their respective dates, issued in connection with the construction, maintenance, repair or operation of all or any part of the Garden State Parkway. The endorsement of the guaranty upon Authority's bonds depends upon a certificate, consenting to the issuance of such bonds signed by the Governor, the State Treasurer and State Comptroller or any two of such officials.

In proposing to offer \$150,000,000 of its bonds for guaranty by the State, I note that the Authority has reserved the power, which it possesses by law, to issue its own bonds in excess of the State-guaranteed \$285,000,000 to be equally secured, together with guaranteed bonds, from the revenues of the Garden State Parkway. It is noted also that while the law does not express this limitation, the Authority has covenanted that the additional bonds will be issued only with the consent of the Governor and either the State Treasurer or State Comptroller. Moreover, these additional bonds can be utilized only if necessary to complete the Garden State Parkway from Paterson-Paramus to Cape May, or to pay for a feeder road from Paramus to the New York State boundary, or to buy from the State any of the existing four sections of the Garden State Parkway completed with State funds. Moreover, the Authority has covenanted that it will charge tolls which will never be less than 100% of debt service on all such bonds and beginning with 1956, will be not less than 120% of that amount.

It is my opinion, and you are so advised, that:

1. The \$150,000,000 of Series A guaranteed bonds, or any part thereof, as set forth in the official statement of the Authority to which your letter refers, are authorized and in conformity with both the New Jersey Highway Authority Act, the Guaranty Act and the referendum of November 1952 which permitted a State guaranty of not more than \$285,000,000 of New Jersey Highway Authority bonds issued for the construction, maintenance, repair and operation of the Garden State Parkway;

2. The Governor, State Treasurer and State Comptroller or any two of such officials may lawfully sign a certificate consenting to the issuance of such bonds;

3. The Governor, State Treasurer and State Comptroller or any two of such State officials including the Governor have power to assent to the resolution authorizing such bonds;

4. Upon presentation by the Authority to the State Treasurer of said bonds, together with the certificate consenting to the issuance thereof signed by the Governor, State Treasurer and State Comptroller or any two of such officials, the State Treasurer may lawfully and properly file such certificate in the office of the Secretary of State together with the record of the amounts and other description of the terms of such bonds and upon such filing of said certificate and record, the punctual payment of principal of and interest on such bonds will be unconditionally guaranteed by the State of New Jersey;

5. Such guaranty may lawfully be expressed or endorsed upon such bonds by the signature of the State Treasurer or any person in the Department of the Treasury appointed by him for that purpose; and

6. The reservation by the Authority of the power to issue its bonds in excess of \$285,000,000 to be equally secured with State guaranteed bonds, by the revenues of the Garden State Parkway, is permitted both by the New Jersey Highway Authority Act and the Guaranty Act.

The State's vital interest in the timely and successful completion of the Garden State Parkway is matched by the people's concern that State revenues will not be required to contribute to the payment of obligations incurred by the Authority. The restrictions accepted by the Authority and the covenants which it has given are capable of achieving both objectives. In my opinion, the Authority, in issuing further securities at a later date, and the Governor, State Treasurer, and Comptroller, in consenting to such action at that time will be obligated at such time to satisfy themselves that Garden State Parkway revenues always will be adequate to discharge all Highway Authority debts.

Respectfully,

THEODORE D. PARSONS,
Attorney General.

JULY 6, 1953.

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

FORMAL OPINION—1953. No. 30.

DEAR SIR:

Your request for a formal opinion concerning your authority under Title 39 has been received. Your question is whether or not where a fine has erroneously been assessed may you refund the amount to the defendant.

The answer to this question is, No.

Title 39 specifically provides the manner in which you must dispose of all fines forwarded to your office. This generally is covered by R. S. 39:5-40 and provides:

"Except as otherwise provided by this subtitle all moneys received in accordance with the provisions of this Title, whether from fines, penalties, forfeitures, registration fees, license fees, or otherwise, shall be accounted for and forwarded to the commissioner, who shall pay the same over to the state treasurer to be credited to the state highway fund and used for the purposes of such fund as provided by section 52:22-20 of the Title "State government, departments and officers".

No provision is made in Title 39 for you to refund any moneys paid to you by way of fine or as otherwise provided in the above quotation.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: JOHN J. KITCHEN,
Deputy Attorney General.

jjk/n

JULY 27, 1953.

AARON K. NEELD, Deputy Director,
Division of Taxation,
 State House,
 Trenton, N. J.

FORMAL OPINION—1953. No. 31.

DEAR MR. NEELD:

I am in receipt of your request for my opinion on the following:

"A question has arisen as to whether the salary of the secretaries of the various boards shall be equal to the salary of the president of each board or merely equal to the salary paid to each member."

R. S. 54:3-8 provides that the board of chosen freeholders shall fix the annual salary to be paid to the secretary of a county board of taxation. "The salary of the secretary shall not be less than the salary of any member of the board of that county."

Chapter 197, Laws of 1953 (R. S. 54:3-6) specifically sets forth the salaries of the members of the several county boards of taxation. Said law further provides that "The president of each county board shall, in addition to the above, receive the further sum of \$500 per annum."

It would appear that since 1906 the salaries of the members of the several county boards of taxation have been fixed by the legislature. The president of the board received the same salary as other members of the board. The secretary's salary, therefore, was never questioned in view of the statutory provision that such secretary receive the same salary "as any member of the board".

The question presented is whether the board of chosen freeholders must fix the salary of the secretary of a county board of taxation in an amount not less than the president of the board.

Considering the historical background of this legislation and the 1953 amendment, it is clear that the Legislature intended to give additional recognition to the "position or office of the president" of the county tax board by providing for additional compensation for such office and not as a "member of the board".

It is my opinion that the salary of a secretary of a county board of taxation "shall not be less than the salary of any member of the board" of that county, but that such salary does not have to equal the salary of the president of the board.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: JAMES ROSEN,
Deputy Attorney General.

AUGUST 4, 1953.

HON. PERCY A. MILLER, JR.,
Commissioner of Labor and Industry,
 State House,
 Trenton 7, N. J.

FORMAL OPINION—1953. No. 32.

MY DEAR COMMISSIONER:

We have for attention your request for re-consideration of Formal Opinion No. 48, 1949, heretofore rendered. You will recall that Formal Opinion No. 48, 1949, was rendered pursuant to a situation which arose in Kresge-Newark, Inc. In that instance the company was advised that "minors under 18 years of age are not permitted to load, operate, or transport merchandise in a passenger or freight elevator which includes any power driven hoisting or lowering mechanism (Letter dated December 3, 1948 to Kresge-Newark, Inc.). Thereafter, this office was called upon to render its interpretation of R. S. 34:2-21.17. Since the opinion is short we include it herewith:

"While Section 17 of R. S. 34:2-21 prohibits minors under 16 years of age from being employed, permitted or suffered to work in, about, or in connection with power driven machinery, it further delineates specific occupations at which minors under 18 years of age may not be employed. Among these is the following, 'Operation or repair of elevators or other hoisting apparatus'. Thus the Legislative intent is patently indicated to exclude from the general provision of the statute any reference to elevators by its specific inclusion of them in the enumerated prohibited occupations.

"The language employed in the statute clearly circumscribes the prohibition contained therein to 'operation and repair of elevators'. Hence it is my opinion that minors under 18 years of age, who otherwise conform to the requirements of the Child Labor Law, may be employed in work which requires riding on a freight elevator when said elevator is manned or operated by a competent adult".

The immediate problem posed by you deals with the meaning of the term "in, about or in connection with" used by the Legislature in the prohibition contained in R. S. 34:2-21.17. Our first resort is to the literal meaning of the words employed; we find all lexicographers in unison in defining the words "in", "about" and "in connection with" as "in the immediate neighborhood", "in contiguity or proximity of", "near, as to place", etc.

However, we then ask, "in, about or in connection" with what? Indubitably the answer is found in the statute ". . . in, about or in connection with . . . *the operation or repair of elevators or other hoisting apparatus*" (Italics ours).

The following examples set forth in your communication as the actual hazards are extrinsic to the prohibition contained in the statute:

1. Loading or unloading goods on elevators, dumb-waiters and various types of hoists so long as the actual operation is done elsewhere. Some of these are carefully closed-in elevators but there are many crude open ones and many swinging hoists. We have had numerous persons injured while standing under or bending over, under down-coming elevators and dumb-waiters which they were waiting to load and which someone else was operating.

2. Minors as young as 12 employed in tree work being permitted to work directly in areas where sawed off limbs or tree tops are being lowered by a hand hoist; 14-year-old boys permitted to ride and work up on swinging scaffolds so long as they do not raise or lower it; 16-year-old farm boys working at the very hazardous task of hooking bales of hay which are being carried to the storage areas of the barn by hoists and dumped there.

3. Stevedores and laborers in the areas of cranes loading and unloading freight boats as well as working in the vicinity of all types of cranes, derricks or rigs.

4. Work on high dump truck so long as the dump is not operated by the minor, although he may be working on the dump itself or in the area where the materials are being unloaded.

It is axiomatic that where, as in the instant case, the law is plain, unambiguous and within the legislative power, it is self-declaratory and nothing is left for interpretation. The remedy for a law that does not encompass the exigencies or meet specific situations is not to be found in a strained interpretation but rather in amendment.

We must conclude therefore that the interpretation contained in Formal Opinion No. 48, 1949, is, upon review, reiterated.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: GRACE J. FORD,
Ass't Deputy Attorney General.

GJF:mh

AUGUST 13, 1953.

HUDSON COUNTY BOARD OF TAXATION,
2857 Hudson Boulevard,
Jersey City 6, New Jersey.
Attention: Michael Donovan, *Secretary.*

FORMAL OPINION—1953. No. 33.

GENTLEMEN:

I am in receipt of your request for my opinion on the following:

"Under the provisions of 54:3-21 appeals by taxpayers and taxing districts, etc., must be filed on or before August 15th with the County Board of Taxation.

August 15th, 1953 is a Saturday and all county offices have been closed during the months of July and August by statutory enactment, I believe. Subsequent day, August 16th is a Sunday, and therefore, the offices will not be open for business.

Would you kindly advise this Board when is the last day it should accept petitions of appeal."

Chapter 129, Laws of 1946, p. 609, provides as follows:

"Each Saturday in the month of July and August in each year shall, for all purposes whatsoever, as regards the transaction of business in the public offices of this State, and the counties and municipalities in this State, be considered as the first day of the week, commonly called Sunday, and as public holidays."

It is well settled law in this State that where, by statute, an act is due arithmetically on a day which turns out to be a Sunday or legal holiday, it may be lawfully performed on the following day, and if that day be also a *dies non* on which the public offices are closed to the transaction of business, according to the "holiday acts," *supra*, a similar rule applies.

In *Union City vs. Capitol-Theatre Amusement Co.*, 26 N. J. Misc. 102, 57 A. 2d, 226 (1948), the Division of Tax Appeals held that where the last day for service of petition for appeal from action of County Board of Taxation occurred on first of two consecutive days generally observed as legal holidays, service on next following secular day was sufficient. See also, *Etrick vs. State Board of Tax Appeals*, 12 N. J. Misc. 432, 172 A. 365 (Sup. Ct., 1934).

Pursuant to the provisions of Chapter 129, Laws of 1946, and R. S. 36:1-1, public offices are closed to the transaction of business on Sundays and legal holidays and on Saturdays during the months of July and August.

It is, therefore, my opinion that the last day for filing petitions of appeal to the County Board of Taxation is Monday, August 17th, 1953. *Poetz vs. Mix*, 7 N. J. 436, pp. 445, 446 (1951).

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: JAMES ROSEN,
Deputy Attorney General.

jr/c

AUGUST 19, 1953.

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

FORMAL OPINION—1953. No. 34.

DEAR MR. BORDEN:

I acknowledge your recent letter inquiring whether a member of the Board of Education Employees' Pension Fund of Essex County, who has recently changed her position, making it necessary that she withdraw from that Fund, may transfer her membership to the State Employees' Retirement System, pursuant to the provisions of R. S. 43:2-1.

It is my opinion that the proposed transfer is not authorized by the statute cited.

The right of any officer or employee to transfer his or her membership from certain retirement systems or pension funds, to another system or fund is governed by the provisions of Chapter 313, P. L. 1926 (R. S. 43:2-1 to 43:2-3 incl.).

Section 1 (R. S. 43:2-1 of the act aforementioned reads as follows:

"Any officer or employee who is a member of and entitled to benefits in any retirement system or pension fund operated wholly or partly by the state, and in which system or fund the member contributes thereto, including employees of municipalities and counties who have or shall become members of any such system or fund, may transfer his membership to another retirement system upon accepting an office or position in another branch of service and thereby make it possible for him to participate in the other system, when such transfer of office or employment would make it impossible for him to continue in the retirement system or pension fund of which he has been a member."

The significant words of the quoted statute, for our purposes, are "retirement system or pension fund operated wholly or partly by the state, * * *". In other words, the system or fund from which a transfer is authorized, must be one which the State operates wholly or partially.

Is the Board of Education Employees' Pension Fund of Essex County operated wholly or partly by the State? I think not.

This fund is established under the provisions of Chapter 112, P. L. 1929, as amended (R. S. 18:5-68 to 18:5-82 inc.). A reading of this statute makes evident the fact that the Board of Education Employees' Pension Fund of Essex County is controlled, operated and managed by a designated number of its members, who are elected as trustees, and is sustained by deductions from the salaries of its members and annual contributions by the board of education. These funds are supplemented, if necessary, by appropriations from the board of education.

The status and character of the Essex County Fund was considered by our court in the case of *Board of Education of Montclair vs. Board of Education Employees' Pension Fund of Essex County*, 125 N. J. L. 164, affirmed 126 N. J. L. 66. In that case, the plaintiff challenged the constitutionality of the statute under which defendant had been established and incorporated, namely, Chapter 112, P. L. 1929. In passing on this point, the Supreme Court observed that the duties of the trustees "are defined and circumscribed by the statute," and that the trustees are "the administrative and ministerial instrumentalities for the purpose of carrying into effect the legislative will." That legislative will was declared in Section 3 of the act cited, which states that the pension fund created by the act "shall be under the control and management of the board of five trustees" elected by the members from the membership. To this extent, the pension fund under discussion differs from pension funds operated wholly or partly by the State, wherein their boards of trustees include public members appointed by the Governor, or certain designated State officials as members ex officio. Among retirement systems or pension funds in this class are the State Employees' Retirement System, the Consolidated Police and Firemen's Pension Fund, and the Teachers' Pension and Annuity Fund, to name several.

Under the circumstances above set forth, it is my opinion that this fund cannot be regarded as a "retirement system or pension fund operated wholly or partly by the State" as such words are employed in R. S. 43:2-1, but is operated by its members, through their elected trustees. For this reason the benefits of the statute authorizing

a transfer of membership from one pension fund, as defined, to another, are not available to the employee in the matter before us.

You inform me that the contention has been made that inasmuch as the State of New Jersey contributes certain sums in the form of State aid for education, part of which reach the Board of Education of Essex County, that this brings the pension fund in question, into the category of those operated wholly or partly by the State.

A similar contention received the judicial disapproval of the Appellate Division of our Superior Court in the case of *Abrams vs. Hogan*, 4 N. J. Super. 463 (1949). In the decision cited, the court was concerned with the claim made by a member of the Maywood Police Department who requested that moneys to his credit in the Police Pension Fund of Maywood be transferred to the Police and Firemen's Retirement System of New Jersey, on his changing employment from Maywood to the Bergen County Police Department. The plaintiff based his claim on the provisions of R. S. 43:2-1, which has been cited above, arguing that inasmuch as the State of New Jersey directly appropriated \$1,000,000 annually to be apportioned among municipal firemen's and police pension funds, including Maywood, that this fact constituted the Maywood Police Department Pension Fund as one operated partly by the State. In connection with this contention, the Appellate Division held as follows:

"R. S. 43:2-1 provides that 'any officer or employee who is a member of and entitled to benefits in any retirement system or pension fund operated wholly or partly by the State * * * may transfer his membership to another retirement system upon accepting an office or position in another branch of service * * *.' It is argued that since the State of New Jersey appropriates \$1,000,000 annually to be apportioned among the municipal firemen's and police pension funds that this puts the municipal fund in the category of being 'operated wholly or partly by the State.' This is not so. R. S. 43:16-7 places the management and control of this fund in a commission appointed for that purpose under authority of R. S. 43:16-6."

I am of the opinion that the above decision is controlling in the matter before us.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: DANIEL DE BRIER,
Deputy Attorney General.

ddb;b

SEPTEMBER 14, 1953.

MR. ELMER G. BAGGALEY, *Secretary,*
Consolidated Police and Firemen's Pension Fund Commission,
 State House Annex,
 Trenton, New Jersey.

FORMAL OPINION—1953. No. 35.

DEAR MR. BAGGALEY:

You will recall that under date of April 27, 1953, this office furnished you with its Formal Opinion No. 12, 1953. That opinion was rendered in reply to your inquiry of April 8, 1953, requesting advice as to what action should be taken by the Consolidated Police and Firemen's Pension Fund Commission in connection with executions directed against pension allowances made by local police and firemen's pension commissions, in causes wherein the defendant was a retired pensioner.

You were advised in that opinion that pension allowances made by local police and firemen's pension commissions were exempt from liability to execution, in view of the authorities cited in the opinion, and more particularly so, in view of the provisions of Section 7 of Chapter 358, P. L. 1952 (R. S. 43:16-7) stating, "that all pensions granted under this chapter shall be exempt from execution, garnishment, attachment, sequestration or other legal process".

Since the rendering of our opinion, of April 27, 1953, aforementioned, there has been a new development in the law on the subject of executions against pension payments, which I desire to discuss with you in this present opinion, in order that you may be guided accordingly in the administration of the Fund, which you serve as secretary.

Very recently, our Supreme Court, in the case of *Fischer vs. Fischer*, 13 N. J. 162 (1953), had before it the specific question as to whether the pension provided by the statute administered by your commission (R. S. 43:16-1 to R. S. 43:16-7.2) "is wholly immune from judicial appropriation, before the individual installments reach the hands of the pensioner, to the satisfaction of alimony established by judgment".

The facts in the *Fischer* case disclosed that the Police and Firemen's Pension Fund Commission of Irvington, had been directed by order of the Chancery Division to deduct a stated amount monthly from respondent's pension check, to be applied to alimony and counsel fees, under a divorce decree. Subsequently, the Chancery Division vacated the order, under the authority of *Hoffman vs. Hoffman*, 8 N. J. 157 (1951). The wife then appealed to the Appellate Division. That court (*Fischer vs. Fischer*, 24 N. J. Super. 180) affirmed the vacating of the order directed to the Pension Commission, stating: (Pages 184 and 189):

"We are faced with the question as to whether the pension moneys of the defendant may be attached or sequestrated, at least to the extent of the monthly payments required under the alimony decree, while in the hands of the pension commission. The defendant contends that so far as New Jersey is concerned, this question has been settled adversely to the plaintiff's contention in the case of *Hoffman vs. Hoffman*, *supra*, wherein Mr. Justice Burling, speaking for the Supreme Court, stated, *inter alia*:

"That the policy of this State is in favor of exemptions from civil process in cases of public pension funds appears from an analysis of legislative treatment thereof," citing the several New Jersey statutes dealing with such exemptions.

"In view of the language employed by Mr. Justice Burling in the *Hoffman* case, we feel that its holding is controlling here. In that case the court did not distinguish between a general creditor's rights against the defendant's retirement payments and those under an alimony judgment. In the *Hoffman* case, although the question of a wife's right under an alimony judgment to sequester her husband's pension moneys under a statutory governmental pension plan, exempting the same from 'execution, garnishment, attachment, sequestration or other legal process' was not the factual issue involved, it seems to us that in view of the language employed by the court we must conclude that the Supreme Court regarded the alimony claim in the same category as any other creditor's rights."

When the *Fischer* case reached our Supreme Court, a majority of the Court, speaking through Mr. Justice Heher, reversed the Appellate Division, holding that the pension in question was not immune from judicial appropriation to satisfy a court order based on an award for alimony. I quote from Mr. Justice Heher's decision:

"The exemptive clause of the statute is in these words: 'All pensions granted under this chapter shall be exempt from execution, garnishment, attachment, sequestration, or other legal process.' R. S. 43:16-7, as amended by L. 1944, c. 253, p. 829. The amendment introduced this provision into the statute. . . .

"A pension such as this is a stated allowance or stipend to one retired from service, in consideration of past services. The pensioning of civil servants, as well as those in private employment, is designed primarily to attain suitable standards of service at a relatively low wage cost, by a guarantee against want when the servant's years of productivity have ended, thus heightening the morale of the workers and enhancing the quality of the service. *Plunkett vs. Board of Pension Commissioners of Hoboken*, 113 N. J. L. 230 (Sup. Ct., 1934), affirmed 114 N. J. L. 273 (E. & A., 1935). Considered in context, the immunity clause constitutes a protection against improvidence and creditors in the broad general sense of persons whose claims are grounded in contract or tort, or a penalty or forfeiture, to insure sustenance and a measure of economic security for the pensioner and his dependent family in the evening of life when earning power has diminished or ceased altogether. It is akin to the policy of the law that limits execution upon the worker's wages for the satisfaction of the claims of creditors. . . .

" . . . it is abundantly clear that the policy of the immunity provision is to shield the pensioner against the coercive remedial and executorial processes available to creditors, and thus to secure the pensioner and his family against improvidence and want. 'Legal' process undoubtedly has this generic sense, *i. e.*, legal and equitable remedies in favor of those having a right of action grounded in contract or tort, a penalty or a forfeiture. The word 'alimony', presumably derived from the Latin 'alere,' meaning to nourish or sustain, signifies the sustenance or support which a husband may be required to supply to his wife when she is living separate and apart from him, or has been divorced. It was the method by which the ecclesiastical courts of England conferred the duty of support owed by the husband to the wife during such time as they were legally separated pending the marriage relation. *Lynde vs. Lynde*, 64 N. J. Eq. 736, 751 (E. & A., 1902). It is a periodic allowance determined by the wife's needs and the husband's means, and varies from time to time according to changing circumstances. In its very nature, it is not comprehended in the terms of the exemptive clause of the statute under review, designed as it is to secure the pension against the claims of third persons as a means of support for the pensioner and his family.

"Such is the outstanding policy of the statute. There is provision for a pension to the dependents of the retired member, his widow and children under the age of 18 years, and his dependent parents if he dies without leaving a widow or children. Amended R. S. 43:16-3; 43:16-1. But no pension shall be payable to a child or children of a female member unless it is established that "such child or children would otherwise become a public charge." R. S. 43:16-4.1.

"A holding barring recourse to the statutory pension to absolve the public from the burden of supporting the pensioner's wife or children would be perverse of the true intent and meaning of the act. And a decree of divorce in favor of the innocent wife does not relieve the guilty husband from the obligation of support; this is the significance of a provision for alimony. *Lynde vs. Lynde*, cited *supra*. . . .

"The interpretive principle in general application elsewhere is that the essential purpose of such immunity from process is the protection not only of the pensioner, but of his family as well, from destitution and the need for public relief, and, absent a clear and definite expression *contra*, the provision will not be read to enable the husband to claim the full benefit of the pension as against his dependent wife and children; and thus to subvert the laws enjoining upon the husband the performance of this basic obligation of the marriage state. This was the ruling in *Schlaefter vs. Schlaefter*, 112 Fed. (2d) 177, 130 A. L. R. 1014 (Ct. App. D. C., 1940). *Vide, Holmes vs. Tallada*, 125 Pa. St. 133, 17 Atl. 238 (S. Ct., 1889); also 11 A. L. R. 123 and 106 A. L. R. 669.

"The Hoffman case cited *supra* is plainly not to the contrary. There, the subject matter was a group insurance contract which made the retirement annuity and death payments 'nonassignable, whether by voluntary act or by operation of law;' and the holding was that if the annuity benefits were made available for the satisfaction of the foreign decree for alimony 'that contractual undertaking' would be violated. There, the contract of the parties was enforced *inter partes*; here, the determinative is the policy of the statute.

"The judgment is accordingly reversed; and the cause is remanded for further proceedings in conformity with this opinion."

A vigorous dissent was filed in this matter by Mr. Justice Burling, concurred in by Mr. Justice Wachenfeld, stating in part:

"It is difficult to conceive language more comprehensive than that used in R. S. 43:16-7 as amended, *supra*. Patently it includes any order, writ or other formal writing required or permitted by law to be issued by a court of this State. The premise of the majority opinion writes words into the statute which do not expressly exist therein. This is foreign to the method whereby the Legislature has treated the subject of exemption of pensions, namely to specifically designate the exception from the exemption.

"For the reasons herein expressed I would affirm the judgment of the Superior Court, Appellate Division."

I have quoted at length from the decisions of the Appellate Division and those of the Supreme Court, so that the honorable members of your commission and you, may see some of the problems, social, philosophical and legal, that are involved.

As a result of the recent holding of the majority of our Supreme Court in the *Fischer* case (*supra*) the views of this office on the question of executions directed

against pension allowances paid by your commission, are stated as follows: pension payments made by your fund, are exempt from executions, garnishments, attachments, sequestration or other legal process, prior to the time such payments reach the hands of the pensioner; except, however, that such payments are "not immune from judicial appropriation, before the individual installments reach the hands of the pensioner" to satisfy the alimony portion of alimony judgments. Alimony judgments, in other words, by judicial determination, are to be considered as the exception to the general exemption of such payments from appropriation to satisfy judgments or court orders.

It is observed that some court orders for alimony before you, have been directed against local pension funds, rather than against the Consolidated Pension Fund Commission. I would suggest that in the case of such orders, so directed, that you notify the plaintiff to obtain and serve on you a new court order directing the payment to be made to the plaintiff by the Consolidated Fund Commission. In the interim, until the new court order is delivered to you, I suggest the deductions be made by you, and withheld in your account.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: DANIEL DE BRIER,
Deputy Attorney General.

ddb;b

SEPTEMBER 18, 1953.

MR. ERNEST R. KERR, *Chief Clerk*,
Department of State,
State House,
Trenton, New Jersey.

FORMAL OPINION—1953. No. 36.

MY DEAR MR. KERR:

Receipt is acknowledged of your letter of September 16, 1953, enclosing letter addressed to you under date of September 15, 1953 by Edward C. Gardner, Secretary, Camden County Board of Elections, requesting an opinion "as to whether or not it is legal to register voters in industrial plants in Camden county without first advertising in our local newspapers".

Section 19:31-6 of the Revised Statutes, as amended by Chapter 60 of the Laws of 1952, provides that "the commissioner, in counties having a superintendent of elections and the members of the county board in all other counties, or a duly authorized clerk or clerks acting for him or it, as the case may be, shall receive the application for registration of all eligible voters who shall personally appear for registration during office hours at the office of the commissioner or the county board, as the case may be, or at such other place or places as may from time to time be designated by him or it for registration."

The said Section 19:31-6 further provides:

"When the commissioner or county board has designated a place or places other than his office or its office for receiving registrations, he or it, as the case may be, shall cause to be published a notice in a newspaper circulated in the municipality wherein such place or places of registration shall be located. Such notice shall be published within at least ten days before the time that such place or places shall be open for registration and shall contain the address or addresses of such place or places and the dates and hours upon which they shall remain open."

In my opinion, it is necessary to publish a notice in a local newspaper before any place, other than the office of the county board of elections, may be designated as a place for the registration of voters. Also in my opinion, it would be unlawful to accept registrations at any place so designated until at least ten days after the publication of such notice.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

SEPTEMBER 18, 1953.

THE HONORABLE SANFORD BATES, *Commissioner,*
Department of Institutions and Agencies,
State Office Building,
Trenton, New Jersey.

FORMAL OPINION—1953. No. 37.

MY DEAR COMMISSIONER:

You have inquired concerning the authority of the Board of Managers of the State Prison to grant to prisoners in confinement commutation time for good behavior covering the period of time spent by such prisoners in a county jail either awaiting trial or imposition of sentence.

It is our opinion and we advise you that the Board of Managers of the State Prison have no such authority under the law as it now exists. It is provided in Rule 3:7-10(g), Rules of Court, that:

"In all custodial sentences the prisoner shall receive credit on the term imposed for any time he may have served in custody between his arrest and the imposition of sentence."

The authority of the Board of Managers to reduce the minimum and maximum of a sentence imposed by the Court for good behavior of an inmate while in confinement derives from R. S. 30:4-140 wherein it is stated:

"For every month of faithful performance of assigned labor by any convict committed to the State Prison there shall be remitted to him from

the maximum and minimum term of his sentence two days, and in addition, for every month of continuous orderly deportment two days, and for every month of manifest effort of self-improvement and control, two days."

Provision is made for the forfeiture of these credits as follows:

"In any month in which a convict shall have merited and received punishment no remission of sentence shall be made, and in case of any flagrant misconduct the Board of Managers may declare a forfeiture of the time previously remitted, either in whole or in part, as to them shall seem just."

Additional and accelerated credits may be allowed in the following manner:

"On the recommendation of the Principal Keeper and moral instructor, there shall be remitted two additional days per month to every convict who for 12 months preceding shall have merited the same by continuous good conduct, and for each succeeding year of uninterrupted good conduct the remittance shall be progressively increased at the rate of one day per month for that year."

When a prisoner is received at the State Prison accompanied by an order of commitment designating a specific minimum and maximum period of confinement, the Board of Managers is authorized to detain such individual until the expiration of his maximum less credits allowed for work performed and for good behavior unless he is sooner paroled or pardoned. When such an order of commitment contains a directive from the Court that the prisoner shall be given credit for a specified number of days spent in jail awaiting trial or sentence, the effect of such a directive is to reduce the stated minimum and maximum period of detention by the number of such days. The time to be served by the prisoner is that remaining on the minimum and the maximum after due allowance is given for jail time credits.

The Board of Managers has jurisdiction over the prisoner only for that period of time remaining to be served on the originally stated sentence less the period of time allowed by the Court in reduction thereof. This being so, the Board of Managers can only allow the commutation time for good behavior, provided for in R. S. 30:4-140 *supra*, on such remaining portion of the sentence.

Very truly yours,
THEODORE D. PARSONS,
Attorney General,

JJK:JC

By: EUGENE T. URBANIAK,
Deputy Attorney General.

ETU:HH

OCTOBER 5, 1953.

WILLIAM J. DEARDEN, *Director,*
Division of Motor Vehicles,
 State Office Building,
 Trenton, New Jersey.

FORMAL OPINION—1953. No. 38.

DEAR MR. DEARDEN:

You have made a request to be advised whether vehicles owned by either State, county or city authorities are to be considered government-owned vehicles and registered without fee in accordance with the provisions of 39:3-27.

The word "authorities" is taken as used in Title 39 and the answer to your question is "no."

R. S. 39:3-27, as amended by the Public Laws of 1951, chapter 217, and the Public Laws of 1952, chapter 226, provides in part:

"No fee shall be charged for the registration of motor vehicles not used for pleasure or hire, owned by the United States, the State of New Jersey, a municipality, county, Passaic Valley Sewerage Commissioners, North Jersey District Water Supply Commission, duly authorized volunteer fire department, hospital, humane society, an anti-cruelty society in this State, New Jersey wing of the Civil Air Patrol incorporated by the Act of July 1, 1946 (Public Law 476-79th Congress), or the American Red Cross. * * *"

This law specifically designates that ownership of the vehicle must be in the organization or government to receive free plates. R. S. 55:14A-4 specifically states "* * * Such authority shall constitute an agency and instrumentality of the municipality or county creating it."

In view of the facts furnished this department indicating that these vehicles are titled in the name of the Housing Authority and not in the name of the governmental branch, they should not receive no free plates.

Very truly yours,
 THEODORE D. PARSONS,
Attorney General,

By: JOHN J. KITCHEN,
Deputy Attorney General.

OCTOBER 19, 1953.

HON. CHARLES R. ERDMAN, JR., *Commissioner,*
Department of Conservation and Economic Development,
 Trenton, New Jersey.

FORMAL OPINION—1953. No. 39.

DEAR COMMISSIONER ERDMAN:

You have requested our opinion as to whether the State, acting through the Division of Planning and Development in your Department, has the right to issue riparian grants (including irrevocable leases) for restricted purposes, such as a public park, place, or street, for a consideration less than the usual price charged for unrestricted grants in the same vicinity.

In my opinion, the Division does have this right, provided that the consideration represents the fair value of what has been granted.

Article VIII, Section IV, paragraph 2 of the Constitution of 1947 provides, as did also the Constitution of 1844, that all money, stock and other property appropriated for the fund for the support of free public schools shall be securely invested and remain a perpetual fund. By the Act of 1894 (P. L. 1894, p. 123) all riparian lands of the State were irrevocably appropriated to the school fund, and all moneys received from the sale and rental of such lands were directed to be invested by the trustees of the fund. In view of these respective constitutional and statutory provisions, it was held in *Henderson vs. Atlantic City*, 64 N. J. Eq. 583, that the Board of Riparian Commissioners had no power to make a grant of riparian lands to the city for park or street purposes for a nominal consideration only. The Court observed, however (64 N. J. Eq. at page 587) that perhaps a privilege could be granted to a municipality to use the riparian land as a park until such time as the State thought it to the benefit of the school fund to transmute the land into money by sale or lease.

This last dictum by the Court supports the constitutionality of section 12:3-36 of the Revised Statutes, which authorizes the Board of Commerce and Navigation (whose functions are now exercised through the Division of Planning and Development) to grant to a municipality a revocable lease of or a permit to use riparian lands for public park or street purposes for a nominal consideration until such time as the board shall decide to make a grant in fee of the land for adequate compensation. I have found no decision indicating that this section violates the above mentioned constitutional provision, and accordingly it is my opinion that said statute is valid.

Authority to convey riparian lands for the purposes of a public park, place or street is vested in the Division of Planning and Development by virtue of section 12:3-33 of the Revised Statutes, which however is silent as to the consideration to be charged for such grant. It seems clear, nevertheless, that the duty of the Division is to obtain the "fair value" of the lands conveyed. See *In re Camden*, 1 N. J. Misc. 623, 640. What is fair value in any particular case is to be determined by the Division in the exercise of the "reasonable discretion" lodged in that body by virtue of the various statutes governing riparian grants. See *Seaside Realty Co. vs. Atlantic City*, 74 N. J. L. 178, 181; *Attorney General vs. Goetchius*, 142 N. J. Eq. 636, 641.

I conclude that while a conveyance or irrevocable lease of riparian lands by the State must be for more than a nominal consideration, the sum demanded for a grant restricted to public use for a park or street need not be as great as for an unrestricted grant, because the value of the former is plainly less than the value of the latter.

Very truly yours,

Deputy Attorney General.
Attorney General,

By: THOMAS P. COOK,
Deputy Attorney General.

tpc;d

OCTOBER 26, 1953.

DR. LESTER H. CLEE, *President,*
Civil Service Commission,
State House,
Trenton, New Jersey.

FORMAL OPINION—1953. No. 40.

MY DEAR DR. CLEE:

As we understand it, you raise the question whether R. S. 11:27-11.1 allows holders of the Congressional Medal of Honor, Distinguished Service Cross, or Navy Cross to one appointment or one promotion, or whether this statute entitles the holder thereof to both an appointment and any number of subsequent promotions.

It is our conclusion that the holder of such an award is entitled to but one appointment, or in lieu thereof, one promotion.

R. S. 11:27-11.1 provides as follows:

"* * * The head or person in charge of any department or subdivision of this State and the various counties and municipalities thereof, to whom such soldier, sailor, marine or nurse as above provided shall apply for employment or promotion, shall within his discretion employ or promote such person, as in his judgment shall deem proper and necessary for the good of his department. Upon said promotion, appointment or employment, the said person shall then become subject to and under the direct supervision, rules and regulations governing such employment by the Civil Service Commission."

It would appear to us that the statute clearly gives to the head of the department the right to employ or promote such holder as in the judgment of the appointing authority shall be proper for the good of his department. This statement is clearly a limitation upon both the department head and the recipient and allows to the latter either the appointment or promotion as a reward for his distinguished service.

This becomes more clear when one notes the use of the singular terms in the second sentence of the above quoted statute which states, "upon said promotion, appointment, or employment."

This phraseology can mean but one thing, and that is that individual concern is limited to one appointment, or in lieu thereof, one promotion.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: JOHN W. GRIGGS,
Deputy Attorney General.

jwg;d

NOVEMBER 17, 1953.

DR. LESTER H. CLEE, *President,*
Civil Service Commission,
State House,
Trenton, New Jersey.

FORMAL OPINION—1953. No. 41.

MY DEAR DR. CLEE:

As we understand it, you seek advice in regard to the computation of annual vacation and accumulated sick leave for employees in the State and local services, and you specifically ask whether in computing the allowable vacation and sick leave the employee's service prior to his resignation, dismissal, or lay-off must be taken into consideration or should such computation be based only on that period of continuous service following his re-employment.

It is our conclusion that, prior to the passage of N. J. S. A. 11:14-1.1, allowable annual vacation and sick leave should be based upon the aggregate service of the individual within the classified service, but after the enactment of the aforementioned statute, only continuous service can be allowed as the basis of computation of vacation time but that the computation of sick leave remains as heretofore.

R. S. 11:14-1 provides in pertinent part:

"The chief examiner and secretary shall, * * *, prepare, and after approval by the commission, administer regulations regarding holidays, hours of work, attendance and annual sick and special leaves of absence with or without pay or with reduced pay for permanent employees in the classified service; provided, however, that every permanent employee in the classified service shall be granted at least the following annual leave for vacation purposes with pay * * *. In determining all vacation leave, the years of service of such employees prior and subsequent to the adoption of this act shall be used * * *."

R. S. 11:14-2 provides in pertinent part:

"In the preparation and administration of regulations regarding sick leaves of absence with pay as provided in section 11:14-1 of this Title, every employee in the classified service shall, in addition to his annual vacation leave with pay, be granted sick leave, as hereinafter defined, with pay of not less than * * *. In computing the accumulation of sick leave, the years of service of such employee prior and subsequent to the adoption of this act shall be used. * * *"

R. S. 11:24A-1 and R. S. 11:24A-3 deal with employees in the classified service of counties, municipalities and school districts and are similar to the above statutes in that the section dealing with vacations by its terms refers to permanent employees, and the section dealing with sick leave applies to every employee in the classified service. They are also similar in that the service of affected employees before and after adoption of the act both count. None of the above four sections of the statutes referred to indicate whether aggregate service or only the most recent continuous service should be considered in computing annual vacation time allowable and accumulated sick leave.

R. S. 11:14-1 and R. S. 11:14-2 are to be considered as in *pari materia*. The former provides that "every permanent employee" in the classified service shall be affected, and the latter provides that "every employee" in the classified service. All employees in the classified service means permanent employees, because only permanent employees are and can be in the classified service. Although no specific section of Title 11 so states, and no case holds that classified service embraces, per force, only permanent employees, such may be inferred generally from the scheme of subtitles R. S. 11:4 and R. S. 11:22 which clearly separate the classified and unclassified services into distinct divisions.

As all of the four sections of the statutes above referred to provide that the years of service of an employee prior and subsequent to the adoption of this act are to be used in computing annual vacation and sick leave, the action of the Civil Service Commission in following this mandate was the correct one as applied to all persons in the classified service.

However, the Legislature, by a recent amendment of R. S. 11:14-1.1 approved and effective June 11, 1953, provided:

"In determining the annual leave for *vacation purposes* to which any employee in the classified service of the State service shall be entitled pursuant to Section 11:14-1 of the Revised Statutes, credit shall be given for all continuous, full-time service which such employee shall have served, whether the same shall have been served under temporary or permanent appointment in an office position or employment in the classified or unclassified service of the State service."

By the passage of this act, in computing annual leave for vacation purposes, the employee is entitled to credit for service with the State whether this service was in a temporary or permanent capacity and whether or not the same was in the classified or unclassified State service.

This interpretation, borne out by the "statement" appended to the report of this amendment in the "Current Service—New Jersey Legislature (Gann Co.)", indicates the purpose of the statute was to equalize vacation leave for both temporary and permanent full-time State employees, R. S. 11:14-1 by its terms being only applicable

to permanent employees. This amendment appears to have upset prior Civil Service Department rulings that aggregate service should be considered in determining the annual vacation time earned, since it clearly states "credit shall be given for all continuous full-time service".

Assuming compliance with the procedural requirements in adopting rules and regulations to the effect that aggregate service shall count in determining vacation time allowable and accumulated sick leave under R. S. 11:14-1, R. S. 11:14-2, R. S. 11:24A-1 and R. S. 11:24A-3, such interpretation would appear to be valid before the enactment of R. S. 11:14-1.1. Subsequent to the enactment of R. S. 11:14-1.1, it would appear that only "continuous service" could be counted in the computation of vacation time pursuant to R. S. 11:14-1. To count periods of service prior to a break in service, under R. S. 11:14-1 would require an interpretation of "all continuous, full-time service" contrary to the plain meaning of the words; to discount all periods prior to a break in service may work obvious hardships in some cases; to have different rules applicable to parallel sections R. S. 11:14-1 and R. S. 11:24A-1 will result in a complete lack of uniformity.

It must be noted, however, that in computing accrued *sick leave* pursuant to R. S. 11:14-2 and R. S. 11:24A-3, aggregate service of employees in the classified service should be used rather than continuous service.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: JOHN W. GRIGGS,
Deputy Attorney General.

jwg;d

OCTOBER 20, 1953.

HONORABLE WALTER T. MARGETTS, JR.,
State Treasurer,
State House,
Trenton, N. J.

FORMAL OPINION—1953. No. 42.

DEAR SIR:

You have requested my opinion concerning two questions relating to the Corporation Business Tax Act (N. J. S. A. 54:10A-1, et seq.). You desire to be advised specifically on the following:

(1) Can the State of New Jersey institute legal proceedings against a company in New York to enforce the collection of delinquent franchise and corporation business taxes?

(2) Does the Director of the Division of Taxation have the authority to employ the agreement method provided under N. J. S. A. 54:10A-19.1(c) to make a settlement with the taxpayer for such sum less than the full amount due as to him seems expedient under the circumstances?

I shall endeavor to answer the questions in the same sequence in which they appear in your letter.

Taxes due by a taxpayer are in the nature of a personal debt to the State and the same may be recoverable in any court of competent jurisdiction in an action in debt in the name of the State (R. S. 54:49-1). The important point to be determined, relating to your question (1), is whether the State of New Jersey can enforce its revenue laws in another State or political subdivision thereof. Generally speaking, a tax is an impost levied for the support of the government or for some public purpose, or by some agency having a certain governmental function delegated to it, such as a municipal corporation. It is not based on a contract, neither express nor implied, as the consent of the taxpayer is not necessary for its collection. I find no cases wherein the revenue laws of one State would have equal force for the collection thereof in another State, the general rule of law being that one State will not enforce the revenue laws of another. However, I am of the opinion that if suit were instituted in our courts to recover the taxes due in an action-in-debt, the State would then be permitted to institute a suit in a foreign State on said judgment.

It is a well-known principle of law that full faith and credit extends to a judgment obtained in one State and sued upon in another State. The courts of one State cannot refuse to give full faith and credit to a judgment of a court of a sister State, pursuant to the Federal Constitution requirement. A judgment recovered in one State is constitutionally entitled to full faith and credit in the courts of every State. This principle was laid down by the United States Supreme Court in the case of *Texas vs. Florida*, 306 U. S. 398. In the case *supra*, 59 S. Ct., 563, at page 570, the Court said in part:

"* * * And a judgment thus obtained is binding on the parties to it and constitutionally entitled to full faith and credit in the courts of every other State. * * *"

In *Milwaukee County vs. M. E. White Co.*, 296 U. S. 268, 56 S. Ct., 229, at page 233, the Court said:

"* * * A cause of action on a judgment is different from that upon which the judgment was entered. In a suit upon a money judgment for a civil cause of action, the validity of the claim upon which it was founded is not open to inquiry, whatever its genesis. Regardless of the nature of the right which gave rise to it, the judgment is an obligation to pay money in the nature of a debt upon a specialty. * * *"

Therefore, be advised that our opinion, relating to question (1) of your inquiry, is that the State of New Jersey can institute legal proceedings against Pettit and Reed in the Courts of our State in an action-in-debt, and then subsequently institute an action in a sister State on the judgment.

Answering your question No. 2, I am of the opinion that the Director does not have the authority to make a settlement with the taxpayer for such sums less than the full amount due, unless the Director can spell out that the remission, cancellation and abatement of the tax debt is supported by a legal, equitable or moral consideration. From the facts submitted to me, I must answer this question in the negative for the Director.

The Constitution of the State of New Jersey (1947), Article VIII, Section 3, paragraph 3, 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." (Italics ours.)

An appropriation, directly or indirectly, by the State to a private corporation, founded upon a transaction wherein a sufficient quid pro quo is not easily discoverable and justly ascertainable, is forbidden. It is elementary that unless the obligation is unenforceable, the payment by a taxpayer of that part of his liability which he is willing to discharge confers no benefit upon the State beyond that which it was already entitled to receive. Therefore, if the Director were to accept less than the full amount of the taxes due it would benefit the taxpayer and not the State.

In the cases of *Guiteras' Estate*, 204 N. Y. S. 267, and *People vs. Westchester County, etc.*, 231 N. Y. 465, the principle was enunciated that:

"It is immaterial whether the funds are actually voted out of the State Treasury or are remitted by cancellation of a tax validly due but unpaid. The result is the same and the constitutional provision was intended to prohibit either form of diversion."

Our own New Jersey courts, in the case of *Wilentz vs. Hendrickson*, 133 N. J. E. 447, affd. 135 N. J. E. 244, laid down the principle:

"Courts should not gradually emasculate or whittle away the beneficent provisions of the supreme law (Constitution). They must always be alert to detect and suppress all evasions of constitutional interdictions." (Paren. ours.)

In the instant case the corporation is privately owned and operated exclusively for gain. I therefore am of the opinion that if the Director were to cancel or remit any part of the taxes due he would be violating Article VIII, Section 3, paragraph 3 of the State Constitution.

Very truly yours,

BENJAMIN M. TAUB,
Deputy Attorney General.

OCTOBER 28, 1953.

HON. HOMER C. ZINK, *Chairman*,
State Parole Board,
 State Office Building,
 Trenton, New Jersey.

FORMAL OPINION—1953. No. 43.

DEAR MR. ZINK:

You have inquired concerning the effect of a full pardon granted one convicted of crime with specific regard to whether such an individual must reply in the affirmative when asked whether he has ever been convicted of a crime. The second part of your question has direct bearing on the prime inquiry since you ask whether he must answer affirmatively with a qualifying observation that he received a full pardon.

It is our opinion and we advise you that an individual convicted of crime who has received a full pardon must answer in the affirmative when inquiry is made of him as to whether he was convicted of crime. He also has the privilege of introducing the pardon at the same time.

This view finds support in Wharton's "Criminal Evidence", Vol. 3, 11th Ed., p. 2263, Sec. 1376, where it was stated:

"If the witness was pardoned after the conviction, both the conviction and the pardon must be shown, as a pardon does not preclude such conviction from being put in evidence." Citing *Commonwealth vs. Quaranta* 295 Pa. 264, 145 A. 89 and *U. S. vs. Jones*, 2 Wheeler, C. C. 451, Fed. Cas. No. 15, 493.

Of similar import is 70 C. J. 857, Sec. 1063, where it is said:

"The fact that a witness has been pardoned does not preclude his conviction of crime from being shown to affect his credibility." (See footnote cases cited therein.)

This general subject matter received the attention of our courts in *Cook vs. Freeholders of Middlesex County*, 26 N. J. L. 326 (Supreme Court, 1857), where it was said:

"The effect of a pardon subsequent to the conviction is to make the offender a new man, and to acquit him of all penalties and forfeitures annexed to the offense for which he obtains his pardon."

The court rejected the theory that pardon flows from proof or suggestion of innocence and said:

"No doubt a clear case of innocence presents the strongest ground for the immediate remission of the penalties of conviction, but that is not, in practice, the ground upon which pardons are or ought to be based, nor is it the ground upon which the pardoning power in a government is created and sustained. Pardon implies guilt. If there be no guilt, there is no ground for forgiveness. * * * The principle universally propounded is that pardon is an exercise of sovereign or executive clemency toward the guilty. If the party convicted be innocent, nothing short of an utter abrogation of the sentence, restitution of all that he has paid, and

compensation for all that he has suffered, can fill the measure of justice. Nothing of this sort is contemplated or effected by a pardon."

The late Chancellor Walker in an exhaustive opinion on the New Jersey Court of Pardons, 97 N. J. Eq. 555 (1925) observed:

"The effect of a pardon is to make the offender a new man, to acquit him of all forfeitures annexed to the offense for which he obtains his pardon, not so much to restore his former as to give him a new credit and capacity."

The doctrine of pardon is clearly explained in *U. S. vs. Swift*, 186 Fed. 1002, where the court said:

"Amnesty or pardon obliterates the offense, it is true, at least to such extent that for all legal purposes the one-time offender is to be relieved in the future from all its results; but it does not obliterate the acts themselves. It puts the offender in the same position as though what he had done never had been unlawful; but it does not close the judicial eye to the fact that once he had done the acts which constituted the offense."

It has been held that even though one convicted of crime has been pardoned, nevertheless he must submit this information on application to be admitted to citizenship. *In re Spenser*, 22 F. Cas. No. 13,234, 5 Sawy. 195.

It has been held that the pardon of an attorney for official misconduct, although it wipes out the offense against the public, does not annul the act, nor affect the right of the court wherein he practices to punish him under the rules of court for professional misconduct. (*In re—86 N. Y. 563.*)

Thus, for the reasons outlined above, we are of the opinion that a person convicted of crime, although pardoned, is obliged upon inquiry to disclose the fact of such conviction and be privileged, if he so desires, to indicate the pardon at the same time.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: EUGENE T. URBANIAK,
Deputy Attorney General.

ETU:HH

RE: A-4302773 IB

OCTOBER 28, 1953.

MR. A. C. DEVANEY, *Assistant Commissioner,
Inspections and Examinations Division,
Immigration and Naturalization Service,
United States Department of Justice,
Washington 25, D. C.*

FORMAL OPINION—1953. No. 44.

DEAR SIR:

Additional inquiry has been raised of this office with regard to Formal Opinion No. 5 issued under date of February 26, 1953 at your request. The sole question dealt with therein was whether an order expunging record of conviction under R. S. 2:192-15 (now N. J. S. 2A:164-28) is equivalent to a pardon granted by the Governor and whether such an order of expungement would exempt the holder thereof from the additional punishment meted out in this jurisdiction to habitual offenders. The prime question was answered in the negative that such an expungement order does not have the attributes of a full pardon, and we declined to determine the secondary question for, as stated in that formal opinion, it had no application to our habitual offender laws.

We are now confronted with the additional question which seems most pertinent to this issue as to whether a record of conviction once expunged by a court order in the manner provided for by our statute may subsequently be produced to prove the conviction.

It is our opinion and we advise that once a record of conviction is expunged, as provided by N. J. S. 2A:164-28, that it cannot later be introduced to prove the conviction for the reasons which we shall outline herein.

The statute under construction, N. J. S. 2A:164-28, makes provision for the expungement of a criminal record of any person whose sentence was suspended or where a fine of not more than \$1,000 was imposed and where no subsequent conviction had been entered against such individual for a period of 10 years. It is provided in the statute that:

"An order may be granted directing the clerk of such court to expunge from the records all evidence of such conviction and that the person against whom such conviction was entered shall be forthwith thereafter relieved from such disabilities as may have heretofore existed by reason thereof."

There is a limitation upon the scope of the statute in that certain more serious crimes are excluded therefrom and which the Legislature did not intend to come within the purview of the law.

The statute cannot be said to be void for uncertainty for the language is clear and unambiguous. It has no application to prisoners who have been required to serve all or a portion of a sentence in confinement and it applies only to offenses of lesser character because of the exclusion of the enumerated more serious offenses. It cannot be said that the statute usurps the pardoning power which is vested by our Constitution in the Governor, for, as stated in the previous formal opinion, it has not the attributes of a full pardon and the very language of the law will so disclose.

It is stated that:

"A statute is a solemn enactment of the State acting through its Legislature and it must be assumed that this process achieves an effective and operative result. It cannot be presumed that the Legislature would do a futile thing." Sutherland "Statutory Construction", Vol. 2, p. 327.

Thus, it must be assumed that the Legislature intended to accomplish the objective which clearly appears from a reading of the law, i.e., expungement of record of conviction in certain cases and under certain circumstances. Since the order of the court requires the clerk to expunge from the records all evidence of such conviction, it becomes apparent that there is no record in such case which might be produced to prove the conviction.

Inferentially at least, our Constitution of 1947, in Art. II, Sec. 7, recognizes the right of the Legislature to restore to convicted persons certain privileges which may have been lost as the result of such conviction, for it is provided therein that:

"The Legislature may pass laws to deprive persons of the right of suffrage who shall be convicted of such crimes as it may designate. Any person so deprived, when pardoned or otherwise restored by law to the right of suffrage, shall again enjoy that right."

We believe this contemplates that civil disabilities lost by conviction may be restored by legislative enactment and gives further support to the proposition here advanced.

For the reasons stated, it is our opinion that the record of conviction once expunged in accordance with law cannot be produced to prove conviction.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: EUGENE T. URBANIAK,
Deputy Attorney General.

ETU:HH

OCTOBER 28, 1953.

COL. RUSSELL A. SNOOK, *Supt.*,
Division of State Police,
Department of Law and Public Safety,
 Trenton, New Jersey.

FORMAL OPINION—1953. No. 45.

DEAR COL. SNOOK:

You make the following inquiry of this office: "What disposition shall the State Police make when it is necessary to confine juveniles between the ages of 16 and 18 years old when they are picked up on our highways?"

The law on the subject matter is clear and concise and so also are the Rules of Court.

It is provided in N. J. S. 2A:4-33 as follows:

"A child between the ages of 16 and 18 years coming within the provisions of this chapter shall not be placed in any prison, jail, lockup or police station unless there shall be no other safe and suitable place for his detention, and it is necessary for his protection or the protection of the public, and unless when so placed in a jail, lockup or police station it shall be in a segregated section of such premises where the said child cannot have contact with any adult convicted of crime or under arrest."

Rule 6:8-7 of Rules of Court is in almost identical language.

It is provided further in R. S. 30:8-7 that the sheriffs, jailers, wardens, keepers and other persons having charge and control of the jails, workhouses, penitentiaries and other places of confinement in this State shall keep all persons under the age of 18 years, who shall be detained in such jails, workhouses, penitentiaries and places of confinement for any purpose whatsoever, separate and apart from persons above such age so that no communication may take place between said juveniles and other persons lodged in such places of detention on a charge or conviction of crime.

In your request for opinion it is disclosed that these juveniles were apprehended in an area served by a county jail having no such facilities and thus having no place of detention for juveniles, but having a working arrangement with an adjoining county which maintains a children's shelter. Application for admission of the juveniles to this county shelter home was refused because the juveniles had reached their 16th birthday.

There appears to be a clear mandate in the law in R. S. 30:8-8 upon the Freeholders of the several counties to make adequate provision for detention of juveniles for therein this language is found:

"The Boards of Chosen Freeholders of the several counties shall so arrange the jails, workhouses, penitentiaries and places of confinement in their respective counties that all persons under the age of 18 years, who shall be detained in any such jails, workhouses, penitentiaries and places of confinement for any purpose whatever, shall be kept separate and apart from and so that no communication take place between them and other persons above such age confined therein on a charge or conviction of crime.

If it is impracticable to so arrange the buildings used for such purposes, such Boards of Chosen Freeholders shall provide such places as shall be necessary to accomplish the purposes of this section." It is of interest to observe that historically this section of the Revised Statutes had its origin in Chapter 237, P. L. 1898.

Our Legislature and the Supreme Court has erected adequate safeguards for the segregated detention of juveniles separate and apart from adult offenders. There is no deficiency in our law. The obligation imposed by statute to provide these proper places of detention for juvenile offenders is clear.

We do not conceive it to be the function of the Attorney General to seek compliance with these statutes for there is no such provision in law. In the alternative, we can only suggest that you make personal contact with the judge of the County Court or of the Juvenile and Domestic Relations Court of any county wherein it is found that inadequate provision has been made for the detention of juvenile offenders and request that the Court bring this matter forthwith to the attention of the Board of Freeholders so that compliance may be had with the law and with the Rules of Court above cited.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: EUGENE T. URBANIAK,
Deputy Attorney General.

ETU:HH

NOVEMBER 18, 1953.

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

FORMAL OPINION—1953. No. 46.

DEAR COMMISSIONER:

You have requested this office for our opinion on certain questions arising under the new municipal planning enabling act (Chapter 433, P. L. 1953).

You have raised essentially two questions:

1. Under the new act, which becomes effective on January 1, 1954, does a planning board which is in existence and legally constituted as of December 31, 1953, continue to exist?
2. If so, what powers does it possess without further action by the governing body of the municipality?

Under Chapter 433 of the Laws of 1953, planning boards will have basically two functions: to prepare and adopt a master plan for the development of the municipality, and to approve or disapprove subdivisions. Planning boards will also have the authority and duty of acting as the zoning commission under Article 3 of Chapter 55 of Title 40 of the Revised Statutes.

The answers to your questions turn upon the construction of Section 3, last paragraph; Section 27, and Section 28 of the act, which read as follows:

"Sec. 3 (last paragraph).

The governing body may by ordinance grant any of the powers exercisable by a planning board to a planning board continued by Section twenty-seven [40:55-1.27] of this act or to be created under Section four [40:55-1.4] of this act, but no particular power may be exercised until expressly granted by ordinance and until compliance is made with the conditions, standards, procedures and regulations enumerated in the sections describing such power."

"Sec. 27. Any municipal planning board created under the authority of law prior to the adoption of this act [40:55-1.1 et seq.] shall be continued by this act, and the members appointed to said board shall continue in office until the completion of their terms, unless sooner terminated, and any action previously taken by said planning board shall be deemed to continue in full force and effect except as hereinafter in this section provided.

All rules and regulations adopted by planning boards under the authority of law regulating subdivision of lands shall continue in effect until July first, one thousand nine hundred and fifty-four, unless prior thereto the governing body of the municipality shall have adopted an ordinance pursuant to this act for the regulation of subdivisions, in which event such rules and regulations shall cease to be in effect upon the date such ordinance becomes effective."

"Sec. 28. Repealer. Sections 40:55-1 to 40:55-21, both inclusive, of the Revised Statutes are repealed."

In my opinion, the answers to the several questions raised by you may be stated as follows:

1. Where a planning board is in existence and legally constituted as of December 31, 1953, that board will continue to exist under the new act, by virtue of Section 3, last paragraph, and Section 27, both quoted above. The repealer contained in Section 28 must be read in conjunction with the other two sections mentioned, and as so read, it does not abolish existing planning boards. Such boards are continued by virtue of the other pertinent provisions of the new act, even though the act under which they were originally created is repealed.

2. After January 1, 1954, existing planning boards will have no authority to adopt new rules or regulations concerning the subdivision of land unless or until the governing body of the municipality has adopted a valid ordinance pursuant to the new act for the regulation of subdivisions. However, by virtue of Section 27, subdivision rules and regulations adopted by planning boards prior to January 1, 1954, will continue in effect, and the board may continue to operate thereunder, until July 1, 1954, unless or until the governing body has adopted a subdivision ordinance pursuant to the new act; provided the board was given the power of subdivision control by ordinance validly adopted under the "old" law now in effect. The continued effectiveness of existing subdivision regulations after January 1, 1954, until their expiration as noted, plainly implies the application and enforcement thereof by the planning board. Although the last paragraph of Section 3 declares that "no particular power may be exercised until expressly granted by ordinance," Section 27 must be

deemed to make an exception to the rule of Section 3, under the settled doctrine that a general regulation contained in a statute yields to the particular and is modified *pro tanto*. "The special provision is deemed an exception engrafted upon the general rule." *State vs. Masnik*, 125 N. J. L. 34, 36 (E. & A., 1940).

3. Even though a governing body may be satisfied with its present planning board organization, an existing planning board will not be able after July 1, 1954, to exercise any power concerning subdivision of land until such power is expressly granted to it by ordinance under the new act, and until compliance is had with the conditions, standards, procedures and regulations enumerated in the sections of the ordinance describing such power. A principal purpose of the new act is the establishment of standards which must be met by planning boards in exercising their powers with respect to subdivisions.

4. An existing planning board will under the new act possess the power to prepare and adopt a master plan without any further action by the governing body of the municipality, since the power with respect to master plans will be vested in the planning board by the new statute itself. Thus, Section 10 of the new act provides that "The planning board may prepare, and after public hearing, adopt, and from time to time amend, a master plan for the physical development of the municipality. . . ." By contrast, Section 14 provides that "The governing body may by ordinance provide for the regulation of subdivisions within the municipality. . . ." The last paragraph of Section 3 of the act, in my opinion, was intended to apply exclusively to those powers of a planning board which can be exercised only by virtue of an ordinance, i.e., powers relating to subdivision.

5. A master plan validly adopted prior to January 1, 1954, and any other action validly taken by the board prior to that date, will remain in effect by virtue of the first paragraph of Section 27, except as hereinbefore noted.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: THOMAS P. COOK,
Deputy Attorney General.

tpc;b

NOVEMBER 5, 1953.

THE HONORABLE SANFORD BATES, *Commissioner,*
Department of Institutions and Agencies,
State Office Building,
Trenton, New Jersey.

FORMAL OPINION—1953. No. 47.

DEAR COMMISSIONER BATES:

You have inquired whether an individual convicted of "assault with intent to commit" rape, sodomy or carnal abuse is to be dealt with in the manner provided for in N. J. S. 2A:164-3, commonly referred to as the Sex Offender Law.

Upon examination of the pertinent statutes involved, we are of the opinion and we advise you that persons convicted of "assault with intent to commit" rape, sodomy or carnal abuse are not within the purview of the aforementioned statute.

That portion of the Sex Offender Statute which enumerates those crimes which bring the person convicted thereof within the law is N. J. S. 2A:164-3 and reads as follows:

"Whenever a person is convicted of the offense of rape, carnal abuse, sodomy, open lewdness, indecent exposure or impairing the morals of a minor, or of an attempt to commit any of the aforementioned offenses, the judge shall order the commitment of such person to the diagnostic center for a period not to exceed 60 days. While confined in the said diagnostic center, such person shall be given a complete physical and mental examination."

This is a penal statute which imposes specialized treatment on the offender and as Chief Justice Marshall said:

"The rule that penal laws are to be construed strictly is perhaps not less old than construction itself. To determine that a case is within the intention of a statute its language must authorize us to say so." *U. S. vs. Wiltberger* 18 U. S. 76, 5 L. Ed. 37, approved and followed in *State vs. Woodruff* 68 N. J. L. 89 (Supreme Court, 1902).

While it is provided that an "attempt to commit" any of the enumerated sex offenses will bring the individual within the operation of the law, there is no specific provision that conviction of "assault with intent to commit" certain sex offenses is contemplated.

The "attempt to commit" and "assault with intent to commit" are two different offenses in law in this jurisdiction. An "assault with intent" is denominated as a high misdemeanor in N. J. S. 2A:90-2, punishable by a fine of not more than \$3,000 or by imprisonment for not more than 12 years, or both.

It is provided in N. J. S. 2A:85-5 as follows:

"An attempt to commit an indictable offense is a misdemeanor, but the punishment shall not exceed that provided for the crime or offense attempted."

N. J. S. 2A:85-7 states that a misdemeanor shall be punishable by a fine of not more than \$1,000 or by imprisonment of not more than three years, or both.

It may be said that the crime of "assault with intent" encompasses some of the elements of an "attempt" but with that proposition we are not now concerned for we must clearly find within the language of N. J. S. 2A:164-3, quoted at length above, that the Legislature intended to include therein conviction of "assault with intent" as this crime is found in N. J. S. 2A:90-2 and such is not the case.

Additionally, those persons coming within the purview of N. J. S. 2A:164-3 et seq., are subject to special treatment which denies to them certain rights and privileges afforded individuals convicted of crimes not within the Sex Offender Law, specifically that they have no minimum term of sentence but rather an indeterminate term the maximum of which is that provided by law for the crime of which convicted. They are denied the opportunity to reduce the maximum term of sentence by remission of sentence for commutation time for good behavior and for work performed. (See N. J. S. 2A:164-10.) When they are to be paroled, it must appear that recommendation for parole shall be made by a special classification review board appointed by the State Board of Control of Institutions and Agencies and that thereafter the Parole Board shall act upon the individual case. They may be transferred in the discretion of

the Commissioner of Institutions and Agencies to and from any institution within the jurisdiction of the said State Board of Control regardless of whether the institution is penal, correctional or hospital in character. Such is not the case with persons sentenced to imprisonment on minimum-maximum sentences wherein the transfer is governed by R. S. 30:4-82 upon order of a court of competent jurisdiction.

Because of the denial to individuals coming within the Sex Offender Law of these certain rights and privileges, it becomes more imperative that the statute be strictly construed and since the crime of "assault with intent" is not clearly denominated in N. J. S. 2A:164-3, we are of the opinion that persons so convicted are not to be dealt with in the manner provided for therein and must be sentenced to State Prison with a minimum-maximum sentence or to a reformatory, in the discretion of the court, in the manner provided by law.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: EUGENE T. URBANIAK,
Deputy Attorney General.

ETU:HH

NOVEMBER 23, 1953.

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

FORMAL OPINION—1953. No. 48.

DEAR MR. KERR:

I acknowledge your letter of November 16, 1953 requesting my opinion as to the effect of Chapter 81, P. L. 1953 and Chapter 100, P. L. 1953 on the list of securities in which you, as Director of the Division of Investment, Department of the Treasury, may invest and re-invest.

Chapter 81, P. L. 1953 (R. S. 32:2-24.1) relates to certain obligations issued by the Port of New York Authority. The original law on this subject, namely, Chapter 83, P. L. 1937, made the general and refunding bonds of the Port of New York Authority, issued under that Authority's resolution of March 18, 1935, as amended on March 25, 1935, legal for investment by savings banks, among others.

The 1953 amendment made the Port Authority's consolidated bonds and notes, issued under the Authority's resolution of October 9, 1952, also legal for investment by savings banks.

We are informed that the consolidated bonds and notes will constitute the principal media of all future Port Authority financing.

Inasmuch as Chapter 81, P. L. 1953 makes the Authority's consolidated bonds and notes, issued under the Port Authority's resolution of October 9, 1952, legal for investment by savings banks, it follows, pursuant to the provisions of section 11 of Chapter 270, P. L. 1950, as amended (R. S. 52:18A-89) that you, as Director of the

Division of Investment, also may invest and reinvest in these same bonds and notes, provided you are so authorized by regulation of the State Investment Council. The latter statute, as you are aware, permits the Director of the Division of Investment, to invest and re-invest in such savings bank legals as the State Investment Council, by its regulation, may authorize or approve for investment purposes by the Director of the Division of Investment.

Your second question relates to the effect of Chapter 100, P. L. 1953 (R. S. 17:12A-151) on your investment powers. This act authorizes savings banks to invest in one or more accounts in any insured association or any Federal association whose principal office is located in New Jersey in any amount up to, but not exceeding the amounts for which such accounts are insured.

The original act, namely Chapter 56, P. L. 1946, prior to the 1953 amendment, did not specifically include savings banks among those persons and agencies who were authorized to invest in accounts of insured associations or accounts of Federal Savings and Loan Associations having their principal office in New Jersey.

Inasmuch as the act in question now authorizes this type of investment for savings banks, then it follows that you, as Director of the Division of Investment, likewise may invest and re-invest in accounts of insured associations, and accounts, as aforementioned, insured by the Federal Savings and Loan Corporation, provided you are so authorized, pursuant to the provisions of Chapter 270, P. L. 1950, as amended, by specific regulation of the State Investment Council.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: DANIEL DE BRIER,
Deputy Attorney General.

ddb;b

NOVEMBER 23, 1953.

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

FORMAL OPINION—1953. No. 49.

DEAR MR. BORDEN:

I acknowledge your recent letter on the subject of Chapter 28, P. L. 1949 (R. S. 43:14-43), which extends to veterans, who are employees of the State, and members of the State Employees' Retirement System, the right to withdraw from the system at any time during the continuance of their employment.

You first inquire whether the Board of Trustees may, by rule, define a veteran as one having the same detailed qualifications, particularly as to the length and type of military service, as are set forth in Chapter 19, P. L. 1951 (R. S. 11:27-1).

R. S. 43:14-43 reads as follows:

"Any employee of the State, who is a veteran of any war and a member of the retirement system, may, at any time, apply to withdraw from the system during the continuance of his employment. Upon his making application, of which ten days' notice shall be given, he shall receive, upon demand, the amount of his payment, with regular interest, without prejudice to his right as a veteran to any benefit to which he may be entitled under any other law."

R. S. 11:27-1 defines "veteran" as:

"'Veteran' means an honorably discharged soldier, sailor, marine or nurse who served in any army or navy of the allies of the United States in World War I, between July fourteenth, one thousand nine hundred and fourteen, and November eleventh, one thousand nine hundred and eighteen, or who served in any army or navy of the allies of the United States in World War II, between September first, one thousand nine hundred and thirty-nine, and September second, one thousand nine hundred and forty-five, and who was inducted into such service through voluntary enlistment, and was a citizen of the United States at the time of such enlistment, and who did not, during or by reason of such service, renounce or lose his United States citizenship, and any soldier, sailor, marine, airman, nurse or army field clerk, who has served in the active military or naval service of the United States and has or shall be discharged or released therefrom under conditions other than dishonorable, in any of the following wars, uprisings, insurrections, expeditions, or emergencies, and who has presented to the Civil Service Commission of New Jersey full and convincing evidence of such record of service on or before the announced closing date for filing applications for a particular examination: . . ."

and then goes on to list a series of hostilities, including:

"Emergency, at any time after June twenty-third, one thousand nine hundred and fifty, and prior to the date of termination, suspension or revocation of the proclamation of the existence of a national emergency issued by the President of the United States on December sixteenth, one thousand nine hundred and fifty, or date of termination of the existence of such national emergency by appropriate action of the President or the Congress of the United States, who shall have served at least ninety days in such active service, exclusive of any period he was assigned (1) for a course of education or training under the Army Specialized Training Program or the Navy College Training Program which course was a continuation of his civilian course and was pursued to completion, or (2) as a cadet or midshipman at one of the service academies, any part of which ninety days was served between said dates; provided, that any person receiving an actual service incurred injury or disability shall be classed as a veteran whether or not he has completed the ninety-day service as herein provided."

You will note, that the word "veteran" as defined in R. S. 11:27-1 quoted above, is so defined, "as used in this subtitle" (R. S. 11:27-1), namely, the statute extending to veterans certain preferences under our Civil Service Act.

On the other hand, the word "veteran" as used in the act you administer, namely R. S. 43:14-43, contains no defining or limiting words as to length or type of military service. All that is said is "a veteran of any war." It is to be assumed, therefore, that the Legislature meant the quoted words, as used in R. S. 43:14-43, to mean just what they mean in common acceptance, and without further qualification.

The rule you propose, namely to graft by rule, onto your statute, the detailed list of qualifications as to length and type of military service contained in R. S. 11:27-1 quoted above, in my opinion, would constitute the making of a law, rather than, as is properly the function of your Board of Trustees, the execution of a law. "Administrative implementation cannot deviate from the principle and policy of the Statute" *Abelson's Inc. vs. N. J. Board of Optometrists*, 5 N. J. 412, 424 (1950).

It is my opinion, therefore, that the rule proposed in your letter, although salutary, would be legislative in nature, and therefore surpasses the rule-making authority vested in the Board of Trustees by legislation. *Welsh Farms, Inc. vs. Bergsma*, 16 N. J. Super. 295; *Abelson's Inc. vs. New Jersey State Board of Optometrists*, 5 N. J. 412, and *Frigiola vs. State Board of Education and the Board of Trustees of the Teachers' Pension and Annuity Fund*, 25 N. J. Super. 75 (Appellate Division—September term, 1952).

Your second question is based on a letter addressed to you under date of November 9, 1953, by the Business Manager of the New Jersey State Hospital, Marlboro, inquiring whether State employees who served during the present Korean emergency are to be regarded as "veterans of any war," thereby having the right of withdrawal from the State Employees' Retirement Fund, pursuant to R. S. 43:14-43.

The historical background of the Korean emergency was well summarized, by Chief Justice Stern of the Supreme Court of Pennsylvania, in *Beley vs. Pennsylvania Mutual Life Insurance Co.*, 95 Atl. Rep. 2d Series, at 204 and 205, in which he stated:

"The facts concerning the Korean situation are, briefly, as follows: By the charter of the United Nations there was established the principle of mutual assistance, and certain provisions were embodied therein for insuring effective and prompt action for the maintenance of international peace. In pursuance of that object Congress, in the Mutual Defense Assistance Act of October 6, 1949, 63 Stat. 716, 22 U. S. C. A. Sec. 1571 et seq., authorized the President to furnish military assistance, as therein provided, to the Republic of Korea and the Republic of the Philippines. On June 25, 1950, a commission having reported that North Korean forces had made an unprovoked assault upon the Republic of Korea, the Security Council denounced the attack as a breach of international peace, called upon the authorities of North Korea to withdraw their armed forces forthwith, and asked all members of the United Nations to render every assistance in the execution of the resolution. On June 27, 1950, the President made a public statement in which he referred to this call by the Security Council and stated that under such circumstances he had ordered United States air and sea forces to give the Korean government troops cover and support. On that same day the Security Council by a second resolution recommended that the members of the United Nations furnish whatever assistance to the Republic of Korea as might be necessary in order to repel the armed attack and to restore international peace and security in the area. On July 7, 1950, still another resolution of the Security Council recommended that all members provide military forces and other assistance for a unified command under the United States, requested

the United States to designate the commander of such forces, and authorized the use of the United Nations' flag in the action against the North Korean invaders.

Although Congress has, in certain enactments, recognized that military forces of the United States are operating in Korea and has appropriated funds for the support of the armed forces there, it is obvious from the above recital of events that there was not, nor ever has been, any declaration of war by Congress against any other country, state or nation, but merely a dispatch to Korea by Presidential order of military, naval and air forces of the United States in accordance with the provisions of the Charter of the United Nations and the recommendations of the Security Council. Since, therefore, it is Congress that has the power under the Constitution to declare war, and since that power is exclusive, *Youngstown Sheet & Tube Co. vs. Sawyer*, 343 U. S. 579, 642, 72 S. Ct. 863, 96 L. Ed. 1153, it is clear that the action being waged in Korea is not a 'war' within what may be termed the 'constitutional' or 'legal' sense of that term."

In the decision, cited above, the question before the Pennsylvania Court was whether the struggle in Korea was to be regarded as a "war" within the meaning of that term as employed in a certain life insurance policy. The majority of the Court held that the Korean hostilities were not to be regarded as a "war" in the political sense, reasoning thusly:

"The existence or nonexistence of a state of war is a political, not a judicial, question, and it is only if and when a formal declaration of war has been made by the political department of the government that judicial cognizance may be taken thereof; when so made it becomes binding upon the judiciary. *Bishop vs. Jones & Petty*, 28 Tex. 294, 319, 320; *Perkins vs. Rogers*, 35 Ind. 124, 167; *Hamilton vs. McClaughry, C. C.*, 136 F. 445, 449; *Verano vs. De Angelis Coal Co.*, D. C. 41 F. Supp. 954. An exact question involving the application of this principle arose in connection with the Japanese surprise attack on Pearl Harbor on December 7, 1941, war with Japan not being officially declared by Congress until the day following, December 8. As we all know, an appalling number of lives were lost in that infamous attack, and yet, in a majority of the cases involving the interpretation of the word 'war' as employed in life insurance policies similar to the one here in question, it was held that war did not exist on December 7, and therefore the beneficiaries of such policies were entitled to recover. *West vs. Palmetto State Life Insurance Co.*, 202 S. C. 422, 25 S. E. 2d 475, 145 A. L. R. 1461; *Rosenau vs. Idaho Mutual Benefit Association*, 65 Idaho 408, 145 P 2d 227; *Savage vs. Sun Life Assurance Co. of Canada*, D. C., 57 F. Supp. 620; *Pang vs. Sun Life Assurance Co. of Canada*, 37 Haw. 208, 14 C. C. H. Life Cases 496."

Two of the six members of the Pennsylvania Court dissented from the views of the majority.

Justice Chidsey in his separate dissenting opinion in the *Beley* case, and speaking of the Korean hostilities, stated:

"The word 'war' used without limitation or restriction, in my opinion should be construed as the word would ordinarily be used and understood

and calls for no technical construction. Certainly a major conflict between the armed forces of two nations under authority of their respective governments would be commonly regarded as war."

Another dissenting opinion was filed by Justice Bell, which will be cited subsequently in this opinion.

A similar question was presented to our Courts in the case of *Stanbery vs. Aetna Life Insurance Co.*, 26 N. J. Super. 498 (1953). In this case the beneficiary of a life insurance policy issued by the defendant, sought to recover double indemnity benefits. The facts disclosed that the insured, a United States Army captain, had been killed while on active duty in Korea on March 27, 1952, from a mine explosion while he was on reconnaissance. The policy provided for double indemnity if accidental death "does not result from military or naval service in time of war."

Judge Leyden, in the opinion cited, held that the insured had met his death in Korea while engaged in military service in time of war within the intent of the parties, and therefore gave judgment in favor of the defendant insurance company.

In reaching this result, on the question as to whether the Korean conflict is to be regarded as a war, the Court stated:

"In determining the ordinary and usual meaning of the word 'war' there are a number of definitions which might be quoted. A few will suffice. The New Century Dictionary (1940 ed.), vol. 2, page 2172, defines 'war' as follows: 'Conflict carried on by force of arms, as between nations or states ("international war" or "public war") or between parties within a state ("civil war"); warfare (by land, by sea, or in the air); also, a contest carried on by force of arms, as in a series of battles or campaigns (see phrases below); hence in general, conflict, or active hostility or contention; a contest, a struggle, or contention. * * *' In the *Prize* cases (The Army Warwick) 2 Black 635, 67 U. S. 635, 17 L. Ed. 459 (Sup. Ct., 1862) the Court defined 'war' as follows:

"War has been well defined to be, 'that state in which a nation prosecuted its right by force.'"

In 56 Am. Jur., page 133, section 2, "war" is defined as follows:

"War is an armed struggle or contest by force carried on for any purpose between two or more nations or states exercising at least de facto authority over persons within a given territory and commanding an army prepared to observe the ordinary laws of war."

In *Dole vs. Merchants Mut. Marine Insurance Company*, 51 Me. 465 (Sup. Ct., 1863), the Court said at page 470:

"Every forcible contest between two governments de facto or de jure is war. War is an existing fact and not a legislative decree."

Some of the authorities on international law have defined the word "war" as follows:

"War is essentially a struggle between states, involving the application of force." Wheaton's International Law (6th Ed. A. Keith, 1929), 630.

"War is the contention between two or more states through their armed forces for the purposes of overpowering each other and imposing such conditions of peace as the victor please." Oppenheim's International Law (6th ed. Lauterpacht, 1944), sec. 54. "When differences between states reach a point at which both parties resort to force, or one of them does acts of violence which the other chooses to look upon as a breach of the peace, the regulation of war is set up, in which the combatants may use regulated violence against each other until one of the two has been brought to accept such terms as his enemy is willing to grant." Hall, A Treatise on International Law (6th ed., Atlay, 1909).

Funk & Wagnalls New Standard Dictionary (1946) defines "war" as follows:

"A contest, as between nations or states, or between different parties in the same state, carried on by force and with arms, commonly either for defense, for avenging insults and redressing wrongs, for the extension of commerce and acquisition of territory, or to obtain and establish the superiority and dominion of one of the belligerents over the other; also, the condition of things created by such a contest."

O'Neill vs. Central Leather Co., *supra* [87 N. J. L. 552, 94 A. 790] quoting Professor Beale, defines war as follows (9 Harv. L. Rev. 407):

"War, in law, is not a mere contest of physical force, on however large a scale. It must be an armed struggle, carried on between two political bodies, each of which exercises de facto authority over persons within a determinate territory, and commands an army which is prepared to observe the ordinary laws of war. . . .

The conflict still raging in Korea is a war in the ordinary and usual meaning of the word, and it was such on March 27, 1952, when the insured met his untimely death. See *Weissman vs. Metropolitan Life Insurance Co.*, 112 F. Supp. 420 (D. C. S. D. Cal. 1953). To hold otherwise and rule the Korean war is not a war seems to me inexplicable and absurd. Borrowing the language of Mr. Justice Bell in his dissenting opinion in the *Beley* case, *supra* [373 Pa. 231, 95 A. 2d 207] . . .

"Every man, woman and child in America is informed by the newspapers and radio and knows that there are many thousands of American soldiers, sailors, marines and airmen who are now and for several years have been engaged with soldiers of North Korea and of China in open actual warfare. Our Navy is constantly patrolling and bombarding the coasts of North Korea; Our Air Force is having daily dog fights with the enemy, and our soldiers are daily killing the enemy and being killed. We have for over two years been engaged in negotiations for a truce and are vainly trying to exchange prisoners of war. The United States casualties exceed 128,000. How is it humanly possible to say that the Korean War is not war? * * *

In this case the mere fact that President Truman has declared the

Korean War to be a 'police action' does not, irrespective of his motives, make it so in construing a private contract of insurance. Although for political or international reasons, or to save the 'position' of their leader, the majority in Congress have not formally declared war against the North Koreans or Red China, the Congress (as well as every person in the civilized world) knows that the United States is at war in Korea."

The decision of Judge Leyden in the *Stanbery* case involved, as has been indicated, the interpretation of the word "war," as it appears in a life insurance policy. In the matter before us, we are concerned with the interpretation of that word as it appears in a statute, namely, R. S. 43:14-43.

Should the guides of "realistic interpretation" and "ordinary, usual and realistic meaning" referred to by Judge Leyden in the *Stanbery* case, be abandoned by us, in the matter before us, simply because we are dealing with a statute? In the present matter, I think not.

It is my opinion that the statute before us, in the absence of a decision by our Courts to the contrary, should be construed in harmony with the following rule discussed by Mr. Justice Heher in *Fischer vs. Fischer*, 13 N. J. at 168:

"A statute is not to be given an arbitrary construction, according to the strict letter, but one that will advance the sense and meaning fairly deducible from the context. The reason of the statute prevails over the literal sense of terms; the obvious policy is an implied limitation on the sense of general terms, and a touchstone for the expansion of narrower terms. *Edgewater vs. Corn Products Refining Co.*, 136 N. J. L. 664 (E. & A., 1948); *Maritime Petroleum Corporation vs. City of Jersey City*, 1 N. J. 287 (1949). The spirit of a statute gives character and meaning to particular terms. The reason of the law, i.e., the motive which led to the making of it, is one of the most certain means of establishing the true sense. It is not the words of the law, but the internal sense of it that makes the law. The declared policy is the true key to open the understanding of the statute. *Valenti vs. Board of Review of the Unemployment Compensation Commission of New Jersey*, 4 N. J. 287 (1950). Words are but symbols of thought and expression which necessarily take color and significance from their associated surroundings and the evident policy and purpose of the whole statute."

The obvious intent of R. S. 43:14-43 is to permit those who may be entitled to the benefits of the Veterans' Pension Act (R. S. 43:4-1 to 43:4-5, inc.) to withdraw their payments, with interest, from the State Employees' Retirement System, should they desire to avail themselves of the non-contributory veterans' pension established by the Veterans' Pension Act. It will be recalled that the Veterans' Pension Act provides in R. S. 43:4-3, that no person may retire under both the Veterans' Pension Act, and any other pension act of our State, the act requiring the retiring veteran to either waive his pension under any other law, or his pension under the Veterans' Pension Act.

I find nothing in R. S. 43:14-43, that would lead me to believe that the Legislature meant to limit the word "war," as it appears in this statute to a legalistic or technical sense. I think that what was meant was the realistic or literal meaning of the word—namely, actual hostilities between the armed forces of two or more

nations—and this, precisely, is what we have had in Korea, at least up to the time of the present uneasy truce.

I therefore recommend that the Board of Trustees of the State Employees' Retirement System recognize veterans of the Korean situation, as having the right of withdrawal extended to "veterans of any war" by R. S. 43:14-43.

You and I have discussed this problem on several occasions. In view of the narrow question presented, and the differing views expressed by Courts of various States, I can only repeat what I have stated heretofore, namely, that the entire situation should be clarified, once and for all, by legislation, categorically defining the term "veteran," as it appears in both R. S. 43:14-43, and R. S. 43:4-1 (The Veterans' Pension Act). Such definition should incorporate the same wording that appears in R. S. 11:27-1, particularly that which recognizes the status as a veteran, of those who have served in the Korean hostilities, namely, "at any time after June twenty-third, one thousand nine hundred and fifty, and prior to the date of termination, suspension or revocation of the proclamation of the existence of a national emergency issued by the President of the United States on December sixteenth, one thousand nine hundred and fifty, or date of termination of the existence of such national emergency by appropriate action of the President or the Congress of the United States, who shall have served at least ninety days in such active service . . .," exclusive of certain training or educational phases of such service. To the same effect see Chapter 89, P. L. 1951 (R. S. 38:23B-7) and Chapter 231, P. L. 1952 (R. S. 54:4-3.12i) wherein our Legislature extended to those participating in the Korean conflict, the various veterans' preferences authorized by the acts cited.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: DANIEL DE BRIER,
Deputy Attorney General.

ddb;b

DECEMBER 11, 1953.

WILLIAM O. NICOL, *Secretary,*
Bureau of Tenement House Supervision,
1060 Broad Street,
Newark, New Jersey.

FORMAL OPINION—1953. No. 50.

DEAR MAJOR NICOL:

Your memorandum dated November 24, 1953, requesting a formal opinion, received.

The question presented is whether or not buildings formerly under the Tenement House Act but which have been arranged so that rooms are rented either to individuals or families, with kitchen privileges, are subject to the Tenement House Act. I assume that you refer to a central kitchen used by all rental units.

Unless each unit has kitchen facilities specifically assigned to same and unused by other occupants, my opinion is that the building is not subject to the Tenement House Act.

N. J. S. A. 55:1-24 defines a tenement house as any house or building or portion thereof which is rented, leased, let or hired out to be occupied or is occupied as the home or residence of three families or more living independently of each other and doing their cooking upon the premises. N. J. S. A. 55:1-17 interprets "is occupied" to mean "is occupied or is intended, arranged or designed to be occupied."

The crux of this definition, as relates to the question raised, is the phrase "living independently of each other and doing their cooking upon the premises." When the same kitchen facilities are used by more than one unit, they cannot be living independently of each other, and the kitchen facilities cannot be considered upon the rented premises. Therefore, a building so designed and occupied is without the scope of the Tenement House Act as it now exists.

Until additional legislation widens the scope of the Tenement House Act, you are powerless to enforce same upon these type premises.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: HENRY W. ECKEL, JR.,
Deputy Attorney General.

HWE:JC

DECEMBER 7, 1953.

MR. WM. J. DEARDEN, *Director,*
Division of Motor Vehicles,
State House,
Trenton, N. J.

FORMAL OPINION—1953. No. 51.

DEAR MR. DEARDEN:

This will acknowledge receipt of your memorandum in which you request a legal opinion concerning whether there is any provision in the statute for a magistrate to deduct costs of court when bail bond for an appearance has been forfeited. The answer is No.

R. S. 39:5-8 provides for the posting of bond for appearance in matters which are set for trial at a later date not to exceed an adjourned period of 30 days from the return day of the summons.

R. S. 39:5-9 provides:

"The bond referred to in section 39:5-8 of this Title, if forfeited, may be prosecuted by the commissioner in any court of competent jurisdiction, and the cash deposit, if forfeited, shall be paid to the commissioner by the magistrate with whom it was deposited; provided, that such forfeiture is the result of a complaint instituted by the commissioner, or a member of his staff, or of the State Police, or an inspector of the Public Utility Commission, or a law enforce-

ment officer of any other State agency. The commissioner shall dispose of the said forfeiture in the manner provided by section 39:5-40 of this Title. Forfeitures imposed and collected as a result of a complaint instituted by a local officer shall be by the magistrate forwarded to the proper financial officer of the county, wherein they were collected, to be used by the county as a fund for road repairs therein. As amended L. 1942, c. 339, p. 1179, § 2."

R. S. 39:5-40 and 39:5-41 provide for the use and disposition of the forfeitures above mentioned. There is no provision in Title 39 for the withholding of court costs from any forfeiture of bail.

It is my opinion that if costs of court were deducted from forfeitures it would amount to the taxing of court costs against the State, and there is no provision in Title 39 for the deduction of such costs.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: JOHN J. KITCHEN,
Deputy Attorney General.

JJK:MH

DECEMBER 3, 1953.

HON. J. L. BROWN, *Acting Commissioner,*
Department of Labor and Industry,
State House,
Trenton 7, New Jersey.

FORMAL OPINION—1953. No. 52.

DEAR ACTING COMMISSIONER:

This is to acknowledge receipt of your letter requesting an opinion concerning the Department of Labor and Industry's jurisdiction over electric power plants insofar as they may be affected by the provisions of N. J. S. A. 34:6-1. The problem revolves about the resolving of the following query: Is an electric power plant a factory where the manufacture of goods of any kind is carried on? If the answer is in the affirmative, then N. J. S. A. 34:6-1 and the other provisions of Chapters 4 and 6 of Title 34 of this statute will repose jurisdiction in the Department.

It is my opinion that an electric power plant is a factory where the manufacture of goods is carried on and, therefore, comes within the jurisdiction of N. J. S. A. 34:6-1. Our statutes prescribe the instances when the Department of Labor and Industry shall exercise jurisdiction. N. J. S. A. 34:6-1 provides, among other things, that:

"Every factory, workshop, mill, or place where the manufacture of goods of any kind is carried on shall, under the supervision and the direction of the Commissioner, be provided with * * *, etc."

In order for a factory to come under the Department's supervision it must fall within the limitations expressed in the statute. The highest courts of our State in interpreting the legislation in question have held that a factory to come within the jurisdiction of this legislation was one that manufactured goods. See *Griffith vs. Mountain Ice Co.*, 74 L. p. 274. An examination of the law in this State discloses that our Court of Errors and Appeals has considered the question of whether or not the production and control of electric power was for a manufacturing and productive purpose. In the case of *Bates Machine Co. vs. Trenton and New Brunswick Railroad Co.*, 70 N. J. L. p. 684, our highest Court in construing the application of the Mechanics Lien Law to the erection of machinery for manufacturing purposes held that an electric power plant was a factory where something was produced. The Court in this case said:

"We must conclude, therefore, that the words 'manufacturing purposes' have an accepted meaning that is broad enough to cover the production by mechanical means of electric power and that they should be read in that sense in the statute in question, provided the context is one that fairly indicates that such was the meaning in which the Legislature employed them."

Subsequently, thereafter in the case of *Scrymser vs. Seabright Electric Light Co.*, 74 N. J. Eq. 587 (1908), Vice-Chancellor Stevenson, speaking for the Court, discussed the problem of restraining an electric power plant as coming within the restrictive covenants, and from continuing as a common law nuisance. The test question was whether or not an electric power plant was a factory for the production of goods. The Court there said:

"In my judgment, it is useless to go into speculative questions as to the nature of electricity or the nature of the product, if there be a product, of the electric plant which the defendant operated at the time of the filing of the bill. At different periods in the history of electrical discovery very different views have been entertained on this subject. At one time this plant might have been regarded as a manufactory of a 'fluid.' More recently it might be deemed to be turning out electrons or ions. All speculation is stopped, I think, by the recent decision of the Court of Errors and Appeals in the case of *Bates Machine Co. vs. Trenton and New Brunswick Railroad Co.*, *supra*, and the cases cited in the opinion of the Court delivered by Mr. Justice Garrison. This recent decision seems to me to answer the question in regard to the character of the defendant's plant, which has been argued in this case in favor of the complainant. This electric light station with the necessary incidents attending its operation is, in my judgment, as clearly a manufactory within the meaning of this protective covenant as it is a manufactory within the meaning of the Mechanics Lien Law. If a distinction can be made in favor of the defendant in this case, I think that it would be left to the higher Court to draw such distinction."

From a reading of the two above cases it is evident that our Courts have construed the legislation to mean that an electric power plant is a factory where the manufacture of goods is carried on, particularly so far as it relates to the application of the Mechanics Lien Law and to the restrictive covenants. Relying upon the statement of Vice-Chancellor Stevenson in the *Scrymser vs. Seabright Electric Light Co.* case, *supra*, if a further distinction was to be made to the contrary, such distinction should be made by our highest Court.

In view of the opinions presented by our Courts, I am of the opinion that an electric power plant is a factory that produces goods and, therefore, comes within the jurisdiction of the Department of Labor and Industry as set forth in Title 34 of Chapters 4 and 6 of the New Jersey Statutes Annotated. Under these statutes it will be necessary for the subject power plant to submit to all the mandatory requirements of the law and appropriate rules and regulations wherever set out.

Respectfully submitted,

THEODORE D. PARSONS,
Attorney General,

By: LOUIS S. COHEN,
Deputy Attorney General.

TDP:LSC:kms

DECEMBER 21, 1953.

DR. E. S. HALLINGER, *Secretary,*
State Board of Medical Examiners,
28 West State Street,
Trenton, New Jersey.

FORMAL OPINION—1953. No. 53.

DEAR DR. HALLINGER:

This will acknowledge receipt of your communication wherein you request an opinion as follows:

"Will you kindly give me an opinion as to whether the candidates who were admitted to the October 1953 examination under Chapter 363, P. L. 1953 (A-120) and failed are permitted to be re-examined at the next regular examination which will be held in June, 1954."

It is our opinion that candidates who applied for admission to the examination under the provisions of Chapter 363 of the Laws of 1953 and were admitted to the October 1953 examination but failed, are permitted to be re-examined at the next regular examination.

Chapter 363 of the Laws of 1953 sets forth the requirements for certain residents of this State who apply for admission to the examination. It provides that any person who meets such requirements, upon proof thereof to the State Board of Medical Examiners, shall be admitted to the examination by said Board. It is silent as to what examination the applicant shall be admitted and is also silent as to re-examination. To the extent of such silence, Chapter 363 is apparently deemed by the Board to be somewhat ambiguous.

In seeking the meaning of an ambiguous statute, we should look to the pre-existing body of law. It is presumed that the Legislature, in enacting a statute, had knowledge and took cognizance of existing laws on the same subject or relating thereto (*Matter of Simmons*, 130 App. Div. 350, affirmed 195 N. Y. 573). In the construction of an ambiguous law, every effort should be made to arrive at a meaning in harmony with other laws relating to the same or kindred matters (*Smith vs. People*, 47 N. Y. 330).

In accordance with these canons of interpretation and construction of statutes, each legislative act is to be interpreted with reference to other acts relating to the same subject and the same person or class of persons. The persons or class of persons under consideration are applicants for admission to the examination for a license to practice medicine and surgery. The subject in question is that of examinations and re-examinations.

We look, therefore, to other sections of the Medical Practice Act relating to applicants for admission to the examination, examinations, and re-examinations. In so doing, we find that Section 45:9-12 of the Revised Statutes provides in part, as follows, viz.:

“ . . . Upon the approval of the application for examination, such applicant shall thereupon be entitled to admission to such examination. If said applicant fails to pass the examination, he may be re-examined at the next regular examination . . . ”

For the reasons above expressed, we construe Chapter 363 of the Laws of 1953 with reference to Section 45:9-12 of the Revised Statutes and by virtue of the provisions thereof advise that if the applicants under consideration failed to pass the October 1953 examination, they may be re-examined at the next regular examination.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: FREDERIC G. WEBER,
Deputy Attorney General.

DECEMBER 14, 1953.

HONORABLE GEORGE C. SKILLMAN,
Director of Local Government,
Commonwealth Building,
Trenton 8, New Jersey.

FORMAL OPINION—1953. No. 54.

DEAR DIRECTOR:

You have requested our opinion as to whether a municipality can legally make a budget appropriation for all of the cost of a so-called Blue Cross Hospital Service Plan, to which a group of employees of the municipality have evidenced their desire to belong.

In my opinion, a municipality is not authorized to make such an appropriation.

The relevant provisions of the pertinent statutes read as follows:

“R. S. 40:11-15. In any municipality or county where the employees of the municipality or county have or shall have formed themselves into groups for the purpose of obtaining the advantages of a group plan of life insurance, or a group plan of health and accident insurance, or both, the governing body of the municipality or county, when written petitions and authorizations signed by the

employees as individuals, are filed with the receiving and disbursing officer of the municipality or county, may authorize, by resolution, the deductions specified in the written petitions and authorizations, and the payment of them to the designated fiscal agent of the group.”

“N. J. S. A. 40:11-16.2. Whenever a group has or shall have been established in accordance with the provisions of section 40:11-15 of this Title, the governing body of the municipality in which the group or groups are formed may pay, as additional compensation to the individual members of the group or groups, a part or all of the premium on the group policy or policies.”

“N. J. S. A. 52:14-15.9a. Whenever any person holding public office, position or employment, whose compensation is paid by this State or any county, municipality, school district or other political subdivision of this State, or by any board, body, agency or commission thereof, shall indicate in writing to the proper disbursing officer his desire to have any deduction made from his compensation for the payment of insurance premiums written on the group plan of accident and sickness insurance, or for any hospital service plan and medical-surgical plan, such disbursing officer shall . . . make such deduction from the compensation of such person, and such disbursing officer shall transmit the sum so deducted to the company carrying such insurance.”

Title 17 of the Revised Statutes draws a clear distinction between health and accident insurance, which is regulated by Chapter 38 of that Title, and hospital service plans, which are regulated by Chapter 48. The risks insured against and the benefits received from the two types of insurance are entirely different, even though they may somewhat overlap.

The distinction between the two kinds of insurance is specifically carried over into the statutes above quoted. Thus in Section 52:14-15.9a, provision is made for payroll deductions from the compensation of municipal employees “for the payment of insurance premiums written on the group plan of accident and sickness insurance, or for any hospital service plan and medical-surgical plan.” By contrast, Section 40:11-15 applies only to “a group plan of life insurance, or a group plan of health and accident insurance, or both.” Since the only authority for payment of the premium on group policies as additional compensation to the individual members is found in Section 40:11-16.2, which in turn applies only to groups formed in accordance with Section 40:11-15, it seems clear that the Legislature has not as yet seen fit to extend the benefits of 40:11-16.2 to hospital service plans.

On the other hand, where hospital service benefits are written by a qualified insurer as a part of a group plan of health and accident insurance, it is my opinion that the premium may then be paid by the municipality as additional compensation, since the type of insurance provided would fall within R. S. 40:11-15. The mere inclusion of hospital benefits in a group policy of health and accident insurance does not, in my view, take such insurance out of the purview of R. S. 40:11-15.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: THOMAS P. COOK,
Deputy Attorney General.

tpc;b;dtc

DECEMBER 21, 1953.

DR. E. S. HALLINGER, *Secretary,*
State Board of Medical Examiners,
 28 West State Street,
 Trenton, New Jersey.

FORMAL OPINION—1953. No. 55.

DEAR DR. HALLINGER:

This will acknowledge your request for an opinion as to the powers of the State Board of Medical Examiners in regard to the internship requirements under Chapter 363 of the Laws of 1953 (Assembly Bill 120) allocated to Revised Statutes of New Jersey, as Section 45:9-8.2.

Specifically, the inquiry as contained in your request for opinion is as follows:

"Do the provisions of the Medical Practice Act relating to internship apply to Chapter 363, P. L. 1953 (A-120)?"

It is our opinion that the provisions of the Medical Practice Act relating to internship do not apply to Chapter 363 of the Laws of 1953.

Section 45:9-8 of the Revised Statutes of New Jersey which sets forth generally the requirements of internship of applicants for admission to the examination for a license to practice medicine and surgery, in the part pertinent to this opinion, provides as follows:

"And such applicant, if he has graduated from a professional school or college after July first, one thousand nine hundred and sixteen, shall further prove to the board that, after receiving such diploma or license, he has completed an internship acceptable to the board for at least one year in a hospital approved by the board, or *in lieu thereof* he has completed one year of post-graduate work acceptable to the board in a school or hospital approved by the board; *provided*, however, that the board may in its discretion, during the present war between the United States, Germany, Italy, and Japan and for a period of three months after the cessation of the same, admit an applicant to examination for a license to practice medicine and surgery who has completed not less than nine months of an internship acceptable to the board in a hospital approved by the board." (Italics provided.)

Chapter 363 of the Laws of 1953, allocated as Section 45:9-8.2 of the Revised Statutes as aforesaid, does not amend the existing section of the statute just recited but merely supplements the Medical Practice Act. It applies only to certain residents of New Jersey who make application for admission to the examination, and provides that any such resident who makes application shall prove to the State Board of Medical Examiners that he has, among other things, "completed an internship, acceptable to the board, of at least one year in a hospital approved by the board."

Examination of the respective sections of the statute, aforesaid, indicates that Section 45:9-8, which governs applicants generally, provides for an alternate manner in which the internship requirement can be satisfied, to wit, completion of one year

of post-graduate work. This section further contains the proviso that the board may in its discretion, admit an applicant to examination who has completed not less than nine months of internship. Section 45:9-8.2, however, contains no alternate manner in which the internship requirement can be satisfied, nor does it contain a proviso whereby the board can admit an applicant who has completed less than one year of internship.

While Section 45:9-8 contains the general requirements for applicants, Section 45:9-8.2 contains specific provisions for certain applicants only. As a matter of statutory construction where there is a conflict between specific provisions and the general language of a statute, the specific provisions will control (*United States vs. Jackson*, 143 Fed. 783, 75 C. C. A. 41).

In determining the meaning of statutes, it is presumed that the Legislature intended to enact a valid, sensible, and just law (*Lake Shore & M. S. Ry. Co. vs. Cincinnati, W. & M. Ry. Co.*, 116 Ind. 578, 19 N. E. 440). It is further presumed that the lawmakers, in enacting a statute, had knowledge and took cognizance of existing laws on the same subject or relating thereto. (Matter of Simmons, 130 App. Div. 350, affirmed 195 N. Y. 573.)

Nor must we overlook the Doctrine of Literalness which is fundamental in the interpretation of statutes. It is presumed that the intent of the makers of a law, is to be sought, first of all in the words of the act itself. Where the language employed by the Legislature to express its will is plain and unambiguous and expresses a meaning that is single and sensible, the presumption becomes conclusive and that meaning is the legislative intention (*People vs. Long Island RR.*, 194 N. Y., 130). In such a case, the statute must be given a literal interpretation, that is, it must be interpreted to mean exactly what it says.

The language employed in Section 45:9-8.2 which requires that the applicant "has completed an internship acceptable to the board of at least one year in a hospital approved by the board," is plain and unambiguous and must be interpreted to mean exactly what it says, and no more!

Under the circumstances, we are constrained to advise that any candidate who makes application pursuant to the provisions of Section 45:9-8.2 must have completed an internship of at least one year in an approved hospital and that the alternative provisions in lieu of internship as contained in Section 45:9-8 are not available to him. Section 45:9-8.2 covers the whole subject-matter with reference to internship as to applicants thereunder and was intended as a substitute for Section 45:9-8. A statute which is complete in itself should not be compared with other acts relating to the same subject for the purpose of construction. (*City of Brooklyn vs. Long Island Water Supply Co.*, 148 N. Y. 107.)

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: FREDERIC G. WEBER,
Deputy Attorney General.

DECEMBER 29, 1953.

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

FORMAL OPINION—1953. No. 56.

DEAR COMMISSIONER:

You have requested our opinion as to who has the prior right to a riparian grant under the following circumstances. A developer has filed a map of certain property fronting upon tidal waters, showing a dedicated street 100 feet in width running along and parallel to the shore line. The mean high-water line is located, both on the filed map and at the present time, approximately in the middle of the 100 foot right of way for its full length along the waterfront of the property in question. The land on the in-shore side of the street is subdivided into lots. Several of the lot owners, and the municipality to which the street was dedicated, have both applied for a grant of the riparian lands in front of said lots.

Thus the question has arisen as to whether the municipality or the owner of a lot which abuts the in-shore side of the street has the prior right to acquire the land under water lying seaward of the 100-foot right of way and within the lot lines as extended. We are assuming here that the dedicator did not reserve to himself, as against the lot owners, the fee title to the bed of the street, but that said title passed by the deeds from the dedicator to the lot owners. Whether this is so in any particular case will depend upon all the relevant facts there presented. See *Ocean City Hotel Co. vs. Sooy*, 77 N. J. L. 527, 531.

On the foregoing set of facts, it is my opinion that the prior right belongs to the lot owner, and that the city has no right to acquire the riparian lands in question without the former's consent.

The dedication of a piece of property as a street gives to the public merely an easement, that is, the right of passage, and the owner of the fee still has all the rights of ownership which are not inconsistent with the public right of passage. *Laurel Garden Corp. vs. N. J. Bell Telephone Co.*, 109 N. J. L. 171; *823 Broad Street vs. Marcus*, 17 N. J. Misc. 25. Since one of the property rights of an abutting owner is the right to a grant of the riparian lands adjoining his upland, he retains such riparian rights regardless of the dedication of the right of way to the municipality.

This conclusion not only rests upon the foregoing common law principles, but also appears necessitated by the express provisions of R. S. 12:3-18 (P. L. 1877, c. 77, page 113), which reads as follows:

"12:3-18. *Right of way separating riparian owner's lands from tidewater; effect on leases and grants.*

When lands have been or shall be taken or granted for a right of way and such right of way has been or shall be so located on land of a riparian owner as to occupy the same along or on the shore line, thereby separating the upland of the riparian owner adjoining that used for the right of way from tidewater, such owner of the land so subject to such right of way shall be held to be a riparian owner for the purpose of receiving any grant or lease heretofore or hereafter made of the lands of the State under water, or for the purpose of receiving any notice under sections 12:3-2 to 13:3-17 of this Title; provided, that nothing in this section shall affect the rights of the State to the lands lying under water."

The dedication by a developer seems plainly to be a grant within the meaning of the foregoing section. See *Trustees of M. E. Church vs. Council of Hoboken*, 33 N. J. L. 13, 18-19; *George Van Tassel's, Inc. vs. Town of Bloomfield*, 8 N. J. Super. 524, 528, 529. Our opinion need not rest upon the statute, however, because it was enacted merely to codify what was already a general principle of the common law, that the acquisition of a mere easement over the lands of a riparian owner did not deprive him of any rights in his property except as was necessary to the full and free enjoyment of the easement. *N. J. Zinc & Iron Co. vs. Morris Canal & Banking Co.*, 44 N. J. Eq. 398, affirmed on opinion below, 47 N. J. Eq. 598.

There remains to be considered the effect of R. S. 12:3-33 and 12:3-34, which respectively provide:

"12:3-33. *Grant of riparian lands for public park, place, street or highway.*

Whenever a public park, place, street or highway has been or shall hereafter be laid out or provided for, either by or on behalf of the state or any municipal or other subdivision thereof, along, over, including or fronting upon any of the lands of the State now or formerly under tidewater, or whenever a public park, place, street or highway shall extend to such lands, the board of commerce and navigation, upon application of the proper authority of the State, or the municipal or other subdivision thereof, may grant to such proper authority the lands of the State now or formerly under tidewater, within the limits of or in front of said public park, place, street or highway."

"12:3-34. *Conditions in grant.*

The grant shall contain a provision that any land so granted shall be maintained as a public park, place, street or highway, or dock for public use, resort and recreation, and that no structures shall be erected on the land so granted inconsistent with such public use."

These sections should be construed in the light of R. S. 12:3-18, above quoted, and of the general policy enunciated in the *N. J. Zinc* case, *supra*, where the court said (44 N. J. Eq. at page 407):

"Public sentiment, from the earliest times to this day, and the whole course of legislative action in this State, have recognized a natural equity, so to speak, in the riparian owner to preserve and improve the connection of his property with the navigable water, and the consequence is, that a strong presumption arises against an implication of an intention on the part of the Legislature to violate such equity. In my opinion, such a design should not be deduced from the words of any statute, either general or special, except when it contains language not susceptible of any other rational interpretation."

In view of the foregoing considerations, it is my opinion that R. S. 12:3-33 and 12:3-34 give to the municipality the right to a grant, for street purposes only, of all lands under tidewater within the limits of the street as laid out to a width of 100 feet. However, the municipality is not otherwise an upland owner, and therefore it has no further right to acquire the riparian lands lying in front of the street. Such a right, in my opinion, is granted by R. S. 12:3-33 to the municipality only where the high-water line marks the terminus of the street. In such a case, it is reasonable that the municipality should have the right to acquire the lands necessary for the construction of a bulkhead or wharf at the terminus. On the other hand,

where the street runs parallel to the shore line, there appears no good reason why R. S. 12:3-33 should be construed to authorize a grant to the municipality of riparian lands in front of the street, in derogation of the common law principles above outlined.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: THOMAS P. COOK,
Deputy Attorney General.

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