OPINIONS

OF THE

Attorney General

OF

NEW JERSEY

FOR THE

Period from February 23, 1949, to December 31, 1950

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STATE OF NEW JERSEY

Department of Law and Public Safety

Division of Law

FEBRUARY 4, 1949—DECEMBER 31, 1950

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PREFACE

When I assumed office as Attorney General, early in 1949, Governor Alfred E. Driscoll suggested that I give thought to the formalization of my official opinions and to the periodic publication of them in volume form. Accordingly, I early instituted a system under which there were to be two types of opinions, formal opinions and memorandum opinions. Experience has dictated the enlargement of this system by the addition of an informal opinion, so that there are now three types of opinions, formal, informal and memorandum opinions. This volume, the first to be published in compliance with Governor Driscoll's suggestion, contains all the formal opinions rendered in my name as Attorney General between February 23, 1949, and December 31, 1950.

In inaugurating a new system governing opinions, I made provision for an Opinion Board consisting of three members of my legal staff, one of whom, by designation of the Attorney General, serves as Chairman. The other two members may vary from time to time. Every formal opinion is submitted to the Chairman, and no such opinion may issue unless it has been approved by at least two members of the board. This means that every formal opinion issued has been agreed to by at least three members of the legal staff, the writer of the opinion and two others.

Ordinarily, when an opinion that is to be written involves the payment of money, the construction of a statute, or a constitutional or other question of broad public concern, the formal opinion is used. While any one of the three types of opinions has efficacy for its own purpose, an informal opinion or a memorandum opinion usually applies to a particular set of facts and they have no continuing effect as precedent, and the opinion itself should so state. The choice of either of these two types of opinions depends upon the situation and the writer's judgment. The informal opinion is used where the writer considers that the subject matter may be of interest to other Departments, and for that reason it is also submitted to the Opinion Board. Oftentimes the writer of an opinion, whether it be formal, informal or memorandum will consult with the Opinion Board beforehand.

All formal opinions, as well as all informal and memorandum opinions in the writing of which the Board's assistance is sought, are examined by the Opinion Board for accuracy as to conclusion and reasoning. When an opinion is particularly troublesome, its

writer meets with the Board and argues the accuracy of the opinion as submitted by him. If a majority of the Board does not agree and the writer adheres to his views, the opinion is then re-written by a member of the Board. In such an instance, however, there must still be a concurrence by two others. When a member of the Board writes the opinion, either in the event just recited or because it is his to write by assignment in the first instance, there is a substitution for him on the Board for the purpose of the opinion.

When requests for opinions are received, they are passed on to the Chairman of the Opinion Board, who assigns them to the various members of the legal staff. So far as practicable, the respective assignments are made to the members of the staff most familiar with the subject matter. As a rule, opinions are rendered only to departments, agencies and officers of the State Government. This includes, but is not limited to, the executive branch, the Administrative Director of the Courts, and the members of the Legislature.

To date, there have been three chairmen of the Opinion Board. The first one to be designated was Deputy Attorney General Theodore Backes, who, when I took command early in 1949, had served in the Attorney General's office for more than half a century. His passing, late in December of 1950, left a great void. I cannot repeat too often what I have elsewhere said, that it is with a deepening sense of respect that one reflects upon the extraordinary career of Mr. Backes. Coming into the office of the Attorney General as a mere youth, his stature kept pace with the legal complexities of a fast-growing State. In time he became the master. The respective Attorneys General under whom he served soon learned that their confidence in him was merited. The advancing years, in broadening his knowledge and enriching his experience, rendered greater his service. It was inevitable that his mind should become a veritable storehouse of legal lore. Indeed, from it came often the ready answer to problems otherwise answerable only by tedious and time-consuming research.

When Mr. Backes passed away, I designated Deputy Attorney General Dominic A. Cavicchia to succeed him as Chairman of the Opinion Board. Mr. Cavicchia had worked closely with Mr. Backes. He had come to the Attorney General's office after several years of service as a member of the Legislature. He had been Speaker of the General Assembly in 1944 and, while Deputy Attorney General, had been a member of the Constitutional Convention of 1947, which drafted the present Constitution of New Jersey. Mr. Cavicchia's experience served him in good stead, first as a colleague of Mr. Backes on the Opinion Board and then as Chairman succeeding Mr. Backes. Mr. Cavicchia was recently appointed by Governor Driscoll and confirmed by the Senate as Director of the Division of Alcoholic

Beverage Control. To succeed him as Chairman of the Opinion Board I appointed Deputy Attorney General Oliver T. Somerville. Mr. Somerville had already been serving as a valuable member of the board.

I wish to acknowledge my appreciation for the generous and valuable service rendered by the West Publishing Company in the preparation of the index to this volume.

It is a pleasure to acknowledge a particular debt of gratitude to Governor Driscoll for his understanding of the value of published opinions and the encouragement given by him to the compiling and printing of this volume.

THEODORE D. PARSONS,
Attorney General.

Trenton, N. J., August 1, 1952.

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1949 - 1950

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FEBRUARY 23, 1949.

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

FORMAL OPINION—1949. No. 1.

DEAR COMMISSIONER:

Your letter of February 16th, requesting an opinion as to whether Section 52:25–2 of the Revised Statutes is still in effect or whether it has been repealed by P. L. 1944, Chapter 112 (erroneously referred to in your letter as Chapter 122) or by P. L. 1948, Chapter 92, received.

Said section, which is part of Chapter 25 (State Purchasing Department) of Title 52 of the Revised Statutes, reads as follows:

> 52:25–2. Nothing in this chapter contained shall apply to the erection or construction or original equipment of any building or addition thereto or alteration or repair thereof as distinguished from the furnishing or maintenance thereof, nor to the construction or repair of any road or bridge, nor to the performance of any like work.

Our opinion is, and we advise you, that this section is still in full force and effect.

An examination of P. L. 1944, Chapter 112, discloses no provision which specifically or impliedly repeals, or supersedes, R. S. 52:25–2; and an examination of P. L. 1948, Chapter 92, discloses no provision specifically repealing R. S. 52:25–2, although section 47 of said act of 1948 does provide that "all acts and parts of acts inconsistent with any of the provisions of this act are, to the extent of such inconsistency, hereby repealed." To what extent, if any, this general repealer affects R. S. 52:25–2 is a question for consideration.

In section 16 of Chapter 92, P. L. 1948, the Division of Purchase and Property of the existing State Department of Taxation and Finance (P. L. 1944, c. 112), together with all its functions, powers and duties, is transferred into the Department of the Treasury. But there is nothing in the 1948 act which conceivably could be said to conflict with R. S. 52:25–2 and effect a repeal thereof.

Very truly yours,
THEODORE D. PARSONS,
Attorney General,

By: DOMINIC A. CAVICCHIA,
Deputy Attorney General.

FEBRUARY 25, 1949.

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

FORMAL OPINION—1949. No. 2.

MY DEAR COMMISSIONER:

I have your letter of the 16th instant, with enclosures.

The matter referred to in your letter of June 28, 1948, was presented to the writer hereof by Mr. Urbaniak, of your Department.

The matter referred to in your letter of September 7, 1948, has never come to the writer.

Your first letter states that in the course of your investigations it has been brought out that in one instance, at least, a hospital which is incorporated as a nonprofit institution appears to be operating as a proprietary hospital with all of the profits benefiting certain individuals connected with the operation of the institution.

If I understand your question correctly it is whether you, as Commissioner, your Institutions Board, or the Hospital Licensing Board authorized to be appointed under Section 7 of Chapter 340 of the Laws of 1947, may inquire into the corporate status of a hospital to be licensed.

I find nothing in the act of 1947, which is amendatory of all of the sections of Chapter 11, of Title 30 of the Revised Statutes, save Section 2, with added new sections, which grants such power, and I know of no other statute which covers the same or similar subject matter. May I, however, respectfully suggest that if in the course of an investigation by your inspectors it is ascertained with certainty that an organization incorporated not for pecuniary profit is in fact conducting an establishment for profit, that the facts be forwarded to this department.

As you know, under the common law it is the duty of the Attorney General to see that corporations keep within their corporate powers, and that power still exists, although the prerogative writ of Quo Warranto no longer exists, but a complaint takes its place.

I believe your specific inquiry in respect to the above is whether your Department is authorized to question the corporate status of a hospital to be licensed. As indicated, I specifically advise you that no such power exists under the act of 1947.

I have only one other suggestion to make in respect to the nonprofit organizations which in fact conduct their institutions for profit; the question of exemption from taxation may arise, and where the facts obtained by your Department indicate that there may be fraud or deceit, at least with respect to taxation of property used for hospital purposes, that the facts be communicated to the local assessor and to the State Treasurer, who as such under the 1948 statutes succeeds to the powers heretofore conferred upon the Commissioner of Taxation.

Your last inquiry in your communication of June 28th apparently raises the question whether a nonprofit hospital may also be regarded as a charitable institution. Not necessar ly. I cannot view "nonprofit" and "charitable" as truly synonymous, and it may well be that a nonprofit institution may not be able to meet all the tests ordinarily applicable to charitable institutions, in that the nonprofit institution may be limited in its purpose, so far as the public is concerned.

Now, as to your letter of September 7, 1948, you call my attention to the Surf Hospital, located at Sea Isle City, where apparently a group known as the Friends of that Hospital, are soliciting funds in the community to purchase equipment for the same, and that the doctor in charge has advised that he has no connection with the group raising the funds, and states that they are public spirited citizens who from time to time raise funds for that hospital. Your inquiry is whether the Hospital Licensing Board, under the act of 1947, has any jurisdiction in the matter.

In my opinion, it has not. If, however, you or the Licensing Board are satisfied from facts obtained that fraud or deceit is practiced in the matter named, or in fact in any similar matter, the facts should be submitted to the Prosecutor of the Pleas of the county where the hospital is located for his consideration and action, if warranted.

Very truly yours,
THEODORE D. PARSONS,
Attorney General,

By: THEODORE BACKES,
Deputy Attorney General.

TB:S

MARCH 8, 1949.

MR. THOMAS E. HEATHCOTE, *Secretary-Director.*
State Board of Professional Engineers and Land Surveyors,
921 Bergen Avenue, Room 710,
Jersey City 6, New Jersey.

FORMAL OPINION—1949. No. 3.

DEAR SIRS:

I have your letter of the 2d instant requesting to be advised whether the Secretary-Director of your board may, subject to the approval of the Attorney General, employ such assistants as may be required to perform the work of your office without receiving approval from the Civil Service Commission. The authority to make appointments is conferred by R. S. 45:8-29, subject, however, to the provisions of Section 33 of Chapter 439 of the Laws of 1948, creating the Department of Law and Public Safety, which require that future appointments shall be subject to the approval of the Attorney General.

All your employees, I believe, have temporary status and have never been covered by civil service. This may happen in the future either by direct legislation or by a competitive examination ordered by the Civil Service Commission.

Very truly yours,
THEODORE D. PARSONS,
Attorney General,

By: THEODORE BACKES,
Deputy Attorney General.

TB:B

MARCH 8, 1949.

DR. WILLIAM S. CARPENTER, *President,*
Department of Civil Service,
State House,
Trenton, New Jersey.

FORMAL OPINION—1949. No. 4.

MY DEAR COMMISSIONER:

I have your memorandum of the 28th ult. stating that the Sheriff of Passaic County has requested your department to reclassify Process Servers as Deputy Sheriffs.

I know of no law for your so doing. The Sheriff may appoint Under Sheriffs and, among others, he may appoint Deputies, but the Process Servers, who have been classified as such under civil service, cannot, in my opinion, be designated as Deputy Sheriffs.

Very truly yours,
THEODORE D. PARSONS,
Attorney General,

By: THEODORE BACKES,
Deputy Attorney General.

TB:B

MARCH 9, 1949.

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

FORMAL OPINION—1949. No. 5.

MY DEAR COMMISSIONER:

I duly received your letter of the 24th ult. with enclosure of letter addressed to me by Mr. Smith, County Superintendent of Schools of Somerset County. It appears from Mr. Smith's letter that the County Superintendent under the school law was called upon to divide the assets of the Bernards Township Board of Education with the new school district of the Borough of Bernardsville, and that included in the assets was $1600.00 which had been voted in the February, 1947, school election to purchase land in what is now Bernardsville, but which land was in the combined school districts, and when the separation of the school districts became effective on July 1, 1948, the land had not been purchased. Mr. Smith submits for my consideration three questions, to wit:

1. Must the land be purchased as voted in February, 1947, even though it is in the new district which came into existence on July 1, 1948?

2. Should the $1600.00 be divided as an asset and according to ratables?
3. Should the $1600.00 be given to the new district as an asset and not be divided according to ratables?

The answer to the first question is in the negative. The direction of the legal voters was merely a naked authority which the board never exercised.

The answer to your second question is in the affirmative. The $1600.00 must be divided as an asset according to the ratables of the two municipalities.

I understand that the $1600.00 was not raised by a bond issue but was raised by taxation in the year 1948 and must therefore be considered as an asset.

As to question No. 3, the money is not to be given to the new district as an asset but, as I have already indicated, is to be divided according to the ratables of the two municipalities.

Very truly yours,
THEODORE D. PARSONS,
Attorney General,

By: THEODORE BACKES,
Deputy Attorney General.

TB:B

MARCH 15, 1949.

CHARLES J. SHEEHAN, *Secretary,*
New Jersey Racing Commission,
1 West State Street,
Trenton 8, N. J.

FORMAL OPINION—1949. No. 6.

DEAR MR. SHEEHAN:

I acknowledge receipt of your recent inquiry in which you request my interpretation of Chapter 33, P. L. 1948, appertaining to pari-mutuel breakage based on the following facts:

You inform me that a situation sometimes arises whereby an amount payable to a winning patron, calculated on the basis of one dollar ($1.00), is less than ten cents ($0.10) and that under such circumstances your commission has heretofore determined that all of the balance remaining in this particular pool constitutes breakage payable to the State. I am further informed that in such cases the track contributes a sufficient amount of money to the pool to the extent necessary in order to arrive at a ten-cent ($0.10) distribution on the dollar. You have called my attention to the following specific example:

> "After deducting commission and the amount payable in the show pool to the first and second horse, there remains in the show pool account the sum of $2,000. $21,000 has been bet on the particular horse to show. By arithmetic processes the track determines the amount payable by merely dividing the amount bet into the sum available for distribution to the public. By so doing * * * the moneys to be distributed over and above the amount bet amounts to

$.09 calculated on the basis of a dollar. Applying, therefore, the ruling hereinabove referred to, the entire $2,000 in this pool is declared to be breakage and the track is then obliged to place $2,100 into the show pool in order to distribute the results of the race at the rate of $1.10."

Your letter concludes as follows:

"Your legal opinion is therefore requested with particular reference to the interpretation of breakage as defined in the statute in such instances where the amount to be distributed, calculated on the basis of a dollar, is less than ten cents."

It is my opinion that the moneys in the pool, as set forth in the example quoted, constitutes breakage and is payable in its entirety to the State.

Breakage is defined in our statute (Chapter 33, P. L. 1948):

"* * * as the odd cents over any multiple of ten cents ($0.10) calculated on the basis of one dollar ($1.00) otherwise payable to a patron."

I understand that the argument has been advanced that since the nine cents ($0.09), as indicated above, is not over a multiple of ten cents ($0.10) the same does not constitute breakage and the track should, under such circumstances be obliged to replenish the fund only to the extent of one cent ($0.01)) calculated on the basis of a dollar, for the purpose of making a distribution of one dollar and ten cents ($1.10) or two dollars and twenty cents ($2.20) on a two-dollar ($2.00) ticket.

The interpretive key rests on the words "otherwise payable to a patron." The amount payable to a patron is not nine cents ($0.09) as in the example cited, but rather is one dollar and nine cents ($1.09). Under such circumstances, interpreting the statute as written, the nine cents ($0.09) constitutes the odd cents over a multiple of ten cents ($0.10) calculated on the basis of one dollar ($1.00) "otherwise payable to a patron."

It is not the function of our courts, nor is it mine, to interpret a statute on the basis of what the Legislature intended to say. What did the legislature intend by what it did say is the controlling factor. The intention of the Legislature as expressed in a statute should be ascertained and given effect. *Norton* vs. *State Board of Tax Appeals,* 134 N. J. L. 57, 62. In my opinion, the intention of the Legislature as expressed in this statute is clear and any application for relief therefrom in its present form should be addressed to the Legislature.

There is no provision in our statute for, what is called in racing parlance, a "minus pool." The breakage payable to the State is in the nature of a supplemental license fee for permission to engage in the business of horse racing and pari-mutuel wagering. *State* vs. *Garden State Racing Association,* 136 N. J. L. 173. The adoption of the racing act in 1940 and its several amendments and supplements thereto was not intended for the primary purpose of aiding the track promoters. The benefits accruing to the racing association as a result of such operation are incidental and necessarily subordinate to the paramount welfare of the State.

I know of no provision in the law which requires the racing association to pay to a winning patron a sum in excess of the amount wagered in such instances where there is no surplus in the pool after the deduction of the statutory commission and the breaks as defined in the statute. As a matter of fact, I find that the commission has stricken from its rules and regulations (1948) the provision which heretofore

required the association to distribute to a winning patron not less than the face of the winning ticket plus a certain amount on each dollar wagered. Since there is no statutory requirement (nor even a commission regulation) requiring the track to distribute the ten cents ($0.10) on the dollar as hereinabove stated, I assume that such distribution is voluntarily made by the track for the purpose, among other reasons, of creating good will and inviting greater patronage. In other words, although there is no legal obligation on the part of the track so to do, it is apparently a sound business policy ultimately enuring to the economic advantage of the association. With such policy the State is not legally concerned.

Based on the facts hereinbefore referred to, and the law applicable thereto, it is my conclusion that the odd cents over a multiple of ten cents ($0.10), calculated on the basis of a dollar, constitute breaks payable to the State, even though the amount otherwise payable to the patron may be one dollar and nine cents ($1.09) as herein referred to.

Respectfully yours,

THEODORE D. PARSONS,
Attorney General,

By: MAX EISENSTEIN,
Deputy Attorney General.

MARCH 14, 1949.

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

FORMAL OPINION—1949. No. 7.

MY DEAR COMMISSIONER BATES:

It appears that there are certain prisoners in the New Jersey State Prison at Trenton who have been committed by the courts to serve a sentence of life and that such prisoners have on one or more prior occasions been convicted of crime.

You desire to be advised as to whether Section 11 or Section 12 of Chapter 84, P. L. 1948, shall be utilized in determining the date upon which such prisoners shall be eligible for consideration for release on parole.

I am of the opinion that section 11 will govern the eligibility date. It provides that any prisoner serving a sentence of life shall be eligible for consideration for release on parole after having served 25 years of his sentence, less commutation time for good behavior and time credits earned and allowed by reason of diligent application to work assignments.

Section 12 can have no application to the matter under consideration for thereunder it will appear that it is impossible for the Parole Board to compute an eligibility date. Section 12 provides that a second offender shall not be eligible for parole until he has served one-half his maximum sentence, a third offender shall not be paroled until he has served three-fourths of his maximum sentence and a fourth offender shall be required to serve his maximum sentence.

In view of the uncertainty of the span of life of a prisoner sentenced to confinement for the duration of his natural life, it is obviously impossible to compute one-half, or any other percentage thereof, in determining the eligibility date.

The Legislature, having this in mind, intended that all prisoners serving a sentence of life be given an eligibility date as provided for in section 11.

Very truly yours,
THEODORE D. PARSONS,
Attorney General,

By: EUGENE T. URBANIAK,
Deputy Attorney General.

MARCH 14, 1949.

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

FORMAL OPINION—1949. No. 8.

MY DEAR COMMISSIONER BATES:

First, you desire to be advised whether the chief executive officer of a State correctional or charitable institution is permitted to censor incoming mail intended for your patients and outgoing mail written by them and intended for other persons.

It is my opinion that the chief executive officers are permitted to censor both incoming mail intended for your patients and prisoners and outgoing mail written by them and intended for other persons.

I reach this conclusion because in June 1947, it was necessary to take up this general question with the Postal Authorities and on June 24, 1947, Frank Delany, Esquire, Solicitor for the Post Office Department, submitted Form 287 from the Office of the Solicitor of the Post Office Department, dated July 24, 1922, setting out portions of various opinions of the United States Attorney General's Office on the right of prison officials to open the letters of prisoners.

Mr. Delaney in his communication advised that the principle of law that applies to inmates of penal institutions applies with equal force to patients in mental institutions under court commitment who have been declared incompetent. The general rule to be applied in a situation of this kind is that when the Post Office Department has delivered to the institution superintendent the mail intended for a prisoner or patient under his supervision that their jurisdiction and control over such mail is terminated. Conversely, the Post Office Department has no jurisdiction over mail written by a patient or prisoner until it is actually placed within the control of the Post Office Department. Mr. Delany said specifically:

> "The Post Office Department recognizes the right on the part of the institution to exercise its discretion concerning mail matter addressed to or written by the inmate."

Such censorship is obviously necessary to prevent the bringing in of contraband and the planning of an escape involving the inmate or patient.

Second, you further desire to be advised whether the chief executive officer of a State correctional or charitable institution has the legal right to exclude undesirable persons from the grounds of the institution.

The Board of Managers of your institution has the right to exclude undesirable persons from the institution grounds where it appears that such persons endeavor to excite and arouse your patients and to create distrust and lack of confidence in the institution staff.

The Legislature, in R. S. 30:4–4, charged the Board of Managers with management, direction and control of the institution and stated that it would be responsible to the State Board of Control of Institutions and Agencies for the efficient, economical and scientific operation of the institution. It is, therefore, within the legal authority of your Board to promulgate rules and regulations designed to exclude undesirable persons from the institution grounds.

Very truly yours,
THEODORE D. PARSONS,
Attorney General,

By: EUGENE T. URBANIAK,
Deputy Attorney General.

MARCH 16, 1949.

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

FORMAL OPINION—1949. No. 9.

DEAR COMMISSIONER BATES:

You advise that a prisoner was committed to the New Jersey State Prison at Trenton on January 7, 1949, for the offense of carnal abuse, to serve a term of from two to three years. It seems further that there was a notation on the order of commitment that "Immigration authorities may take him at any time for deportation."

You further advise that the United States Immigration Officer was in your institution the other day and appears agreeable to arrange for the deportation of this subject.

You now desire to be advised whether the court in committing this prisoner can include a condition in the commitment that he may be turned over to the Immigration Authorities at any time for deportation. This, of course, would have the effect of terminating the sentence when the Immigration Authorities decided that they would accept him for deportation.

I am of the opinion that the condition attached to the commitment has no validity in the law, is, therefore, inoperative, and the prisoner is required to serve the sentence imposed upon him less any commutation time that he may be entitled to receive for good behavior or work performed. I find nothing in the statutes of this

State relating to sentences and imprisonment which empowers the court to sentence conditionally, the effect of which is to terminate the sentence upon the happening of a contingency.

R. S. 2:192–4 provides that all sentences to the State Prison shall be for a maximum and minimum term except sentences for life. R. S. 2:190–15 permits the court, within 30 days after imposition of sentence, to open and vacate the judgment and resentence as right and justice may require. R. S. 2:190–16 permits the court on its own motion, within six months from date of conviction, to open and vacate the conviction, discharge the defendant from custody and grant him a new trial.

The law provides for no other controls by the court upon its sentence after same is imposed upon the prisoner.

There appears to be no warrant in the law for the inclusion of the condition in the commitment you speak of and you should, therefore, disregard it and consider the prisoner as having been sentenced for a minimum of two years and a maximum of three years.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: EUGENE T. URBANIAK,
Deputy Attorney General.

MARCH 17, 1949.

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

FORMAL OPINION—1949. No. 10.

MY DEAR COMMISSIONER:

You advise that in connection with the administration of the work of the State Board of Child Welfare, an agency under the jurisdiction of your department, attention must be given to the matter of requiring legally responsible and financially able persons to support their children. In connection with this matter you have had several situations wherein you are required to proceed against a stepfather to require support of him for one or more stepchildren.

You desire to be advised whether, under our law, a stepfather can be required to contribute to the support of a stepchild.

In my opinion, there is no provision in the law of this State which will permit a court to require a stepfather to contribute financially or otherwise to the support of a stepchild.

Advisory Master Van Winkle in the case of *Schneider* vs. *Schneider,* 25 N. J. Misc. 180, dealt with this matter rather thoroughly in a matrimonial case wherein this question was not directly in issue but where it had a significant bearing on the eventual decision of the court.

In that case, the Advisory Master, speaking for the former Court of Chancery, said:

> "A stepfather, as such, is under no obligation by the English common law, to maintain a child of his wife by a former marriage (*Cooper* vs. *Martin,* 4 East 76; 102 Reprint 759; *Stone* vs. *Carr,* 3 Esp. 1; 170 Reprint 517; *Tuff* vs. *Harrison,* 4 T. R. 118; 100 Reprint 926).
>
> "Other state decisions on the subject, a number of which are collected in the foot-note in Corp. Jur. title 'Parent and Child' par. 182, show that the American common law is to the same effect. The law allows a stepfather to refuse to provide for a stepchild or to take it into his family. (*Chicago M. School* vs. *Scott,* 157 Ill. App. 350.) If a stepfather voluntarily accepts into his family a child of his wife by a former husband and assumes the obligation of a parent for maintenance, the obligation continues only as long as he permits the child to be in the home. (*Copek* vs. *Kropick,* 21 N. E. Rep. 836; 129 Ill. 509.)"

The foregoing enunciation of the state of the law is clear and unambiguous. The court went on further to discuss the definition of a person in loco parentis and, referring to *Brinkerhoff* vs. *Merselis,* 24 N. J. L. 680, said:

> "The proper definition of a person in loco parentis of a child is, a person who means to put himself in the situation of a lawful father of the child, with reference to the father's office and duty of making provision for the child."

It was further disclosed that this definition was adopted in our courts in the case of *Mott* vs. *Iossa,* 119 N. J. Eq. 185.

It is to be concluded from the language of the *Schneider* case that, while a stepfather may voluntarily assume the responsibilities of providing for his stepchild, it cannot be thrust upon him nor can he be forced into the relationship against his will, and such relationship, under the cited cases, will only exist so long as the person means or intends that he be in such situation. In fact, the court at page 184 said:

> "Assuming that the relationship once existed * * *, it has not continued to exist and it may not again exist without the husband *meaning* that it shall exist. Loco parentis has to do with custody, liability to support, and the like, and is temporary in character and is not to be likened to that of adoption. The one is temporary in character, the other permanent and abiding. (*In re McCardles Estate,* 35 Pac. Rep. 2nd 850.)"

The rule has been uniformly adopted both in England and on the Continent that when a woman remarries, although she acquires the domicile of her second husband, into whose family she passes, this domicile of her second husband will not be that of her infant children, who do not pass, as she does, into the family of their stepfather (Keenan; "Residence and Domicile," p. 313).

Keenan further discloses that this rule has been followed in a majority of the states in the early leading cases in this country and states that, while it leaves the minor in a somewhat anomalous position, there is nevertheless logical basis for the rule.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: EUGENE T. URBANIAK,
Deputy Attorney General.

MARCH 17, 1949.

HONORABLE JOHN J. DICKERSON, State Treasurer,
State House,
Trenton, New Jersey.

FORMAL OPINION—1949. No. 11.

DEAR MR. DICKERSON:

I am in receipt of your request for my opinion as to who shall draw and issue checks against the funds of the Unemployment Compensation Commission and the State Disability Benefits Fund, and who shall maintain the book records and accounts therefor.

The State Disability Benefits Fund is established pursuant to the provisions of Section 22 of Chapter 110 of the Laws of 1948 and, among other things, provides:

> "The Treasurer shall maintain books, records and accounts for the fund, appoint personnel and fix their compensation within the limits of available appropriations * * *. The fund shall remain in the custody of the State Treasurer, and to the extent of its cash requirements shall be deposited in authorized public depositories in the State of New Jersey * * *. All moneys withdrawn from the fund shall be upon warrant signed by the State Treasurer and countersigned by the director of the commission or by such trustee of the fund as may be designated by the commission * * *. The fund shall be held in trust for the payment of disability benefits pursuant to this act, for the payment of benefits pursuant to subsection (f) of section 43:21-4 of the Revised Statutes, and for the payment of any authorized refunds of contributions."

It will be seen, therefore, that the State Treasurer is the custodian of the fund and is one of the signers of every warrant and draft withdrawing moneys from the fund. The Treasurer is also the proper official to maintain books, records and accounts reflecting at all times the condition of the fund.

The documentation and recording of the activities of the 6% administration account erected under Section 22 of the same statute are the sole responsibility of the State Treasurer. The authentication of the administration cost of the Division chargeable against that account under Article V of the act, Section 21, rests with the Division. The administration cost incurred by the Treasurer and chargeable against this 6% administration account is expressly provided for in Section 22.

I wish at this point to direct your attention to Section 18 of said Chapter 110, P. L. 1948, which provides that the same laws, regulations and practices applicable under the Unemployment Compensation Law shall apply to the administration of disability benefits to the extent that such laws, regulations and practices are not inconsistent with the Temporary Disability Benefits Law. This means that, to the extent that there is no conflict between the mandates of the two acts, the administration of the new act shall be assimilated to the administration of the old act, and the rules, regulations and practices made coincidental.

Coming now to the various unemployment compensation funds, the Unemployment Compensation Law specifically states that the Treasurer of the State of New Jersey acts simply in an *ex officio* capacity and is designated as the treasurer and

custodian of those funds to be administered in accordance with the directions of the Commission or the Commissioner of Labor and Industry as the Commission's successor. The State Treasurer, as treasurer and custodian *ex officio,* issues his warrants in accordance with such regulations as the Commission or the Commissioner of Labor and Industry shall prescribe. He also deposits moneys under the direction of the Commission or the Commissioner of Labor and Industry. All warrants issued by the treasurer for the payment of benefits and refunds must bear the signature of the treasurer and the countersignature of the Executive Director, now the Director of the Division of Employment Security. All benefits and refund checks should be prepared and drawn by the administrative agency, sent to the treasurer for completion and, thereafter, mailed out and issued by the agency.

The unemployment compensation auxiliary fund, erected under Chapter 79, P. L. 1948, is administered in the same manner with the exception that moneys withdrawn from the fund for administrative purposes are subject to legislative appropriation.

From a reading of the act creating the State Disability Benefits Fund (P. L. 1948, Chap. 110) and the various statutes to be harmonized therewith, notably the Unemployment Compensation Commission Act (Revised Statutes Title 43, Chap. 21), I am of the opinion that the State Treasurer is the custodian of the funds and is one of the signers of every warrant and draft withdrawing moneys from the fund. The State Treasurer is also the person who must maintain books, records and accounts reflecting at all times the condition of the fund, but all other financial records covering the various accounts of the administrative agency shall be kept and maintained by the agency.

Very truly yours,
THEODORE D. PARSONS,
Attorney General,

By: JOSEPH LANIGAN,
Deputy Attorney General.

JL:MB

MARCH 24, 1949.

HONORABLE JOHN J. DICKERSON,
State Treasurer,
State House,
Trenton, New Jersey.

FORMAL OPINION—1949. No. 12.

DEAR MR. DICKERSON:

Receipt is acknowledged of your letter of March 17th in which you submit for my opinion the following inquiry:

> "Would you be good enough to furnish me with a legal opinion as to whether or not the State Treasurer may, with the advice and consent of the State Auditor, hire an outside auditor to certify as to the financial condition of his department on assuming office."

The Constitution by Article VII, Section I, Paragraph 6, 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."

Supplementing the constitutional provision, the Legislature, in 1948, enacted Chapter 29 (P. L. 1948, Chap. 29, p. 90), the pertinent parts of which follow:

> "It shall be the duty of the State Auditor 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 and to the Governor, as provided by this chapter and 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.
>
> "The State Auditor shall personally or by any of his duly authorized assistants, examine and post-audit all the accounts, reports and statements and make independent verifications of all assets, liabilities, revenues and expenditures of the State, its departments, institutions, boards, commissions, officers, and any and all other State agencies, now in existence or hereafter created, hereinafter in this article called 'accounting agencies.' The officers and employees of each accounting agency shall assist the State Auditor, when and as required by him, for the purpose of carrying out the provisions of this article."

I have considered the terms of the old statute—(R. S. 52:24-9)—which, in substance, enacted that a State department might, with the permission in writing from both the Governor and the State Auditor, employ outside auditors, but I am of the opinion that the constitutional provision above recited and the Statute of 1948 passed in pursuance thereof, place the conduct of all examinations and post-audits under the exclusive supervision and control of the State Auditor.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: JOSEPH LANIGAN,
Deputy Attorney General.

JL:MB

MARCH 24, 1949.

DR. WILLIAM S. CARPENTER, *President,*
Att: DR. CHARLES P. MESSICK, *Secretary,*
Civil Service Commission,
State House, Trenton, N. J.

FORMAL OPINION—1949. No. 13.

DEAR SIR:

Your letter of March 16, 1949, requesting an opinion has been received.

The facts as related to this office indicate that on December 7, 1948, 18 patrolmen of the City of Hoboken were voted and paid bonuses for the calendar year 1944, pursuant to P. L. 1941, Chapter 404, as amended by P. L. 1943, Chapter 31. The City of Hoboken justifies its position by recognizing said bonuses as a lawful debt of the municipality, incurred in the year 1944 when the then City Commission deprived the 18 patrolmen in question of city Christmas bonuses, which were paid to all other city employees who had waived their right to commence legal proceedings against the city for overtime pay, and further by requiring these 18 patrolmen to render 1,400 extra hours punishment detail.

You propound the following questions:

1. Whether or not the Board of Commissioners of the City of Hoboken could, under the statutes, direct on December 7, 1948, the payment of a bonus to selected members or any members of the uniformed police department of the City of Hoboken for the fiscal year 1944, and make payment thereof.

The answer is yes.

The 1941 statute as originally passed allowed municipalities, etc., to discriminate in respect to bonus payments. At the time that the City of Hoboken granted its 1944 bonus, its action was a proper one. On April 29, 1946, P. L. 1946, Chapter 193, a supplement to Chapter 404, P. L. 1941, became effective. This latter statute provides that when and if bonuses are granted under the 1941 act, as amended by the '43 statute, that

> "where such bonus payments have been heretofore or shall hereafter be granted and paid in any department under the jurisdiction of the * * * governing body * * * by whatsoever name, of any * * * municipality * * * such bonus shall apply and be paid generally to all persons holding office, position or employment in such department without discrimination among such persons."

In an endeavor to give effect to the 1946 act, and recognizing the discriminatory practice in 1944, the municipality properly elected to vote a 1944 bonus to those persons who had previously been excluded. You will please note the use of the words "heretofore or shall hereafter" which contemplated uniform payment to all employees within the several departments, irrespective of the year in which the discrimination might be found.

2. Whether or not payrolls, bills or warrants for such payment should have been submitted to the Civil Service Commission or its duly authorized representative for certification before such payments were made.

The answer is yes.

Undoubtedly the payroll and warrants for payment should have been submitted to the Civil Service Commission pursuant to the 1946 supplement. But the question then arises, what duty now devolves upon the Civil Service Commission to rectify this error of procedure. The funds allocated to the payment of these bonuses have been appropriated and payments have been made to the individuals concerned. I do not see how the Civil Service Commission can now assume any jurisdiction, the statute being silent as to any penalty or action which the Commission may now institute.

3. Whether or not an appeal properly lies before this Commission as per complaint of certain members of the department against the granting of the bonuses under the action of the Board of City Commissioners on December 7, 1948, to certain selected members of the department.

The answer is no, for the reasons set forth in the answers to one and two above.

4. What action, if any, the Civil Service Commission should take under the statutes in consideration of all the facts and circumstances disclosed by the file herewith submitted.

It is our view that the Civil Service Commission should take no action in this matter and should inform the persons allegedly aggrieved that their individual problems should be presented to private counsel.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: JOHN W. GRIGGS,
Deputy Attorney General.

MARCH 24, 1949.

HON. HOMER C. ZINK,
Att: MR. AARON NEELD,
Division of Taxation,
State House.

FORMAL OPINION—1949. No. 14.

DEAR SIR:

Your letter of March 2, 1949, requesting an opinion has been received.

As we understand the problem, the Outdoor Advertising Tax Bureau has received two applications for permit to erect and maintain advertising structures, one on either side of an overhead bridge or trestle owned by the Jersey Central Railroad Company and spanning a street in Newark. These applications were accompanied by a city permit issued by the Department of Public Safety, Division of Buildings, City of Newark, New Jersey, and signed by the Superintendent of Buildings.

You quote Section 3 (5), Chapter 168, P. L. 1942, as amended by Chapter 169, P. L. 1947 (R. S. 54:40–22) which provides as follows:

> "If the site of the proposed outdoor advertising structure is within the confines of any public highway, park or other public property the applicant shall file with the application a true copy of the written consent of the public authority controlling such public highway, park or other public property."

You present two questions:

1. Whether a building permit or billboard license issued by a municipality for the erection of such overhead structure constitutes sufficient compliance with section 3 (5) above quoted.

The answer to this first question is yes.

Generally, the control of railroad structures, overhead bridges and trestles lies within the power of the municipality. Assuming that the applicant has satisfied all of the requirements as set forth by the municipality, and a permit has issued, the aforementioned statute clearly contemplates the issuance of a permit without the necessity of action on behalf of your department.

Of course you must be satisfied in accordance with Section 12, P. L. 1942, Chapter 168, as amended, that the contemplated structures, in your judgment, will not interfere with any existing sign boards, etc., heretofore licensed, nor will the same create a hazardous condition.

2. You ask for an interpretation of the definition of "confines of any public highway, park or otherwise."

The answer to this question depends on ownership of the fee and will include all property over which the municipality, etc., has legal title. In the case, however, of the State Highway Department, which in many instances has but an easement allowing it and the users of its highway to traverse a piece of property owned by others, it is believed that "confines" may be interpreted as measured horizontally by the width of the property held under the terms of the easement and vertically from the roadbed to the ceiling of the usable area.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: JOHN W. GRIGGS,
Deputy Attorney General.

MARCH 25, 1949.

HON. A. W. MAGEE, *Director,*
Att: HON. WILLIAM J. DEARDEN, *Deputy,*
Division of Motor Vehicles,
State House.

FORMAL OPINION—1949. No. 15.

DEAR SIR:

This will acknowledge receipt of letter from your division dated March 7th.

You have asked the opinion of this department as to what constitutes a "humane society" so that you may determine whether or not applicants may be entitled to "no fee" registration plates for motor vehicles.

I have checked authorities and find as follows:

Words & Phrases, 5th Series.

> The word "humane" necessarily carries an implication of compassion for men or animals in their sentient needs and feelings. 200 At. 815, *Seymour* vs. *Attorney General of Conn.*

Words & Phrases, 2nd Series.

> The foundation of the humanitarian doctrine is the principle that no person has the right knowingly or negligently to injure another, when he knows, or should know if he is reasonably careful, that his fellow is in danger of injury at his hands, and he possesses the means of removing that danger. *Ross* vs. *Metropolitan St. Ry. Co.*, 112 S. W. 9, 12, 132.

Webster's International Dictionary

> Pertaining to man, human; having the feelings and inclinations creditable to man; having, showing or evidencing, a disposition to treat other human beings or animals with kindness or compassion. "Humane" was at first but a variant spelling of human but during the 16th and 17th centuries became more and more restricted to the senses involving moral qualities.

I have been unable to locate any reported cases in which the courts of New Jersey have defined "humane society."

It is the opinion of this department that a "humane society" is an organization which provides for the care and comfort of humans or animals who, by one reason or another, cannot provide such for themselves.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: JOHN J. KITCHEN,
Deputy Attorney General.

MARCH 22, 1949.

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

FORMAL OPINION—1949. No.16.

MY DEAR COMMISSIONER:

It appears that on several occasions patients of the feebleminded or mental hospitals, while on visit or on escape, have contracted marriages with other persons.

You desire to be advised whether these marriages are valid. There are three aspects to this question.

First, I assume that the contracting parties had first secured a license to marry as required by law, and that the marriage was solemnized by an official authorized so to do by statute. If the contrary were the fact, the marriage would be absolutely void by the provisions of R. S. 37:1–10, as amended by Chapter 227, P. L. 1939, which requires both prerequisites for a valid marriage.

Second, it must also be assumed that your patient had sufficient mental capacity to consent to the marriage, otherwise it is void ab initio, as distinguished from voidable.

Third, I must advise you that a marriage will not be rendered invalid by the mere fact that a license was secured as the result of misrepresentation.

In R. S. 37:1–2, it is provided that before a marriage can be legally performed in this State the persons intending to be married shall obtain a marriage license from the licensing official and deliver it to the person who is to officiate in the marriage ceremony.

In R. S. 37:1–9, it is provided that no such marriage license shall be issued to a person who is or has been an inmate of an insane asylum or institution for indigent persons unless it appears that such person has been satisfactorily discharged therefrom. In the situation which you describe, it appears that these persons have not been satisfactorily discharged from your institutions and, therefore, come within the prohibition clause of the cited section of the law. In R. S. 37:1–8, it is provided that any person furnishing false information to secure a license shall be guilty of perjury and punished accordingly.

R. S. 37:1–15, provides that any person who solemnizes a marriage without the presentation of the license provided for under the law shall be guilty of a misdemeanor and punished accordingly.

It is significant to observe in the reading of all of these sections of the law that it is nowhere provided that the securing of a marriage license under false representations shall invalidate the marriage contract. On the contrary, in the case of *Buechler* vs. *Simon*, 104 N. J. Eq. 572, it was specifically decided that the provision of the law prohibiting the issuance of a marriage license to an inmate of an insane institution would not affect the legality of the marriage.

The contracting parties who secure the license by fraud are subject to the penalties provided by the act, but, assuming capacity to consent and compliance with R. S. 37:1–10, as amended, the marriage is valid.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: EUGENE T. URBANIAK,
Deputy Attorney General.

MARCH 28, 1949.

MR. JOSEPH L. BUSTARD, *Assistant Commissioner,*
Department of Education,
Division Against Discrimination,
1060 Broad Street,
Newark 2, New Jersey.

FORMAL OPINION—1949. No. 17.

DEAR MR. BUSTARD:

Receipt is acknowledged of your letter of March 18th, in which you inform us that a question has arisen as to the meaning of the word "creed" in the 1945 Law Against Discrimination and in "the proposed civil rights law" (by which we assume that you refer to Assembly Bill No. 65, which would amend said 1945 law), and request our opinion as to whether "use of the word 'creed' in the law applies only to religious beliefs or religious principles, and not political beliefs or political principles."

It is our opinion, and we advise you, that, as used in the Law Against Discrimination (P. L. 1945, c. 169), the word "creed" comprehends religious principles only; and that if Assembly Bill No. 65 becomes law in its present form (second official copy reprint), no provision thereof will alter such meaning.

The broad object of the Law Against Discrimination is to prevent and eliminate practices of discrimination against persons "because of race, creed, color, national origin or ancestry".

In your letter you pass on to us the suggestion that in some dictionaries the word "creed" is defined to comprehend political, as well as religious, principles. Let this be conceded. Our task, however, is not to find and apply various authoritative definitions of the word, but to ascertain the meaning thereof as used in the Law Against Discrimination. It would be futile, therefore, to resort to dictionaries. Nor would reported judicial constructions of the word be helpful. Rather, we approach the issue, first, from the viewpoint of the meaning intended for the word "creed" by the Legislature which enacted the law, and, secondly, from the viewpoint of pertinent provisions of the 1947 Constitution.

It is a matter of common knowledge that our Law Against Discrimination was patterned generally after a similar law which had been then recently enacted in New

York State. The New York law had been recommended for enactment by the State Temporary Commission Against Discrimination in its report to the Governor and the Legislature (January 29, 1945). On page 39 of its report the Commission said:

> "The various anti-discrimination statutes of this state vary in their phrasing of the grounds of discrimination. Some refer only to 'race or color.' Some mention 'creed,' while others mention 'religion'; and some mention both.
>
> *"Obviously, the underlying intent is the same;* and that intent should be expressed in uniform phraseology." (Italics ours.)

Section 2 of the New Jersey Law Against Discrimination declares:

> "The enactment hereof shall be deemed an exercise of the police power of the State . . . and in fulfillment of the provisions of the Constitution of this State guaranteeing civil rights."

The law became effective April 16, 1945, when the New Jersey Constitution of 1844 (as amended) was in force. In Article I (Rights and Privileges) of that Constitution, the words (or term) "race", "color", "national origin", "ancestry" were not specifically mentioned, nor were they represented by specific synonyms. As to the word "creed", however, while there was no specific mention thereof as such, the article did contain several clauses relating to religion; and paragraph 4 thereof specifically provides that

> ". . . no person shall be denied the enjoyment of any civil right merely on account of his religious principles."

It was this clause that was generally regarded as *the* "civil rights clause" of the 1844 Constitution; and this is borne out by the fact that, as will appear later herein, the framers of the 1947 Constitution concentrated their efforts upon a broadening thereof.

It is not our purpose here to reconcile with the 1844 Constitution the declaration in Section 2 of our Law Against Discrimination to the effect that the enactment thereof shall be deemed to be in fulfillment of the provisions of the Constitution of this State guaranteeing civil rights. The history hereinabove recited has been set forth merely for the purpose of establishing that when our Law Against Discrimination was enacted, in 1945, the word "creed" was intended to be synonymous with the term "religious principles" as used in our 1844 Constitution.

In the New Jersey Constitution of 1947, Article I (Rights and Privileges), Paragraph 5, it is provided:

> "No person shall be denied the enjoyment of any civil . . . right, nor be discriminated against in the exercise of any civil . . . right . . . because of religious principles, race, color, ancestry or national origin.

Upon adoption of the 1947 Constitution by the people, the declaration in section 2 of our Law Against Discrimination became clarified by reason of the embodiment in our new fundamental law of the prohibited reasons for discrimination contained in the statute. (The Law Against Discrimination prohibits discrimination based on race, *creed,* color, national origin or ancestry, while the civil rights paragraph of the 1947 Constitution prohibits discrimination based on *religious principles,* race, color, ancestry or national origin.)

It is of moment in our consideration of this issue that the 1945 Legislature also enacted laws amending R. S. 10:1-3 and 10:1-6 (prohibiting discrimination in places of public accommodation), 10:1-8 (prohibiting disqualification of citizens for jury service), 10:2-1 (prohibiting discrimination in employment on public works), 18:14-2 (prohibiting exclusion of children from any public school), 30:9-17 (prohibiting preference in the admission of patients to certain municipal institutions), and P. L. 1942, c. 114 (prohibiting discrimination in defense industries), so that in each instance the range of prohibited reasons for discrimination was made the same as that which it (the Legislature) was writing into the Law Against Discrimination. Aside from the significance of these amendatory acts as establishing law *pari materia* (on the same subject), there is import in the circumstance that the one Legislature purposely inserted in our then existing statutes a uniform range of prohibited reasons for discrimination (race, creed, color, national origin or ancestry). By its comprehensive action in this regard, the 1945 Legislature fashioned a policy for this State; and it becomes apparent that the framers of the 1947 Constitution sought to perpetuate that policy when they integrated the substance thereof in the new fundamental law they were framing.

True, we are not here called upon to construe the provision of our 1947 Constitution concerning civil rights (Art. I, Par. 5). Parenthetically, our comment is that the framers' retention of the term "religious principles" rather than their use of the word "creed", in the civil rights paragraph, would seem to have obviated the necessity, at any time, of a constitutional construction involving an issue similar to the one under consideration here but arising from statute law. Accordingly, since our concern is one of statutory, and not constitutional construction, it might be said that recourse to the proceedings of the Constitutional Convention is not in order. In view of the fact, however, that (as we have hereinabove shown) the framers carried over into our new fundamental law the then existing statutory pattern of prohibited reasons for discrimination, we conceive the Convention's proceedings to be available toward ascertaining the meaning commonly attributed to the word "creed" as contained in our laws, inasmuch as the delegates were pointedly dealing with the problem of broadening the then controlling constitutional clause relating to civil rights, and also toward ascertaining the effect, if any, the Constitution of 1947 had upon such meaning.

The record of the discussions among, and of presentations by public representatives at hearings before, the Constitutional Convention's Committee on Rights, Privileges, etc., indicates that the word "creed" was generally accepted as connoting religious principles only, or in the sense thereof as used in the Law Against Discrimination—to which law (incidentally but significantly) reference was made several times before the Committee.

The Committee's proposal to the Convention (see printed Report and Proposal, dated July 31, 1947) included, under Rights and Privileges, the following:

> "No person shall be denied the enjoyment of any civil right, nor be discriminated against in any civil right on account of religious principles, race, color, ancestry or national origin."

And in its accompanying report to the Convention, the Committee's comment upon its own proposal was:

> ". . . This section is an all-inclusive statement of principle on the enjoyment of civil rights and on the question of no discrimination in civil rights, and is self-explanatory."

The mimeographed transcript of the Convention proceedings reveals that when this subject was being debated by that body, Mr. Schenk, Chairman of the Committee, in defending his Committee's proposal against projected amendments, said in part (page 17-30A):

> ". . . We struck the ambiguous word "creed" out of that recommendation, which can mean communism, or . . . can mean just an off-shoot of a particular religion. We added the words "ancestry or national origin", and we broadened the word "religion" to "religious principles" to include agnostics and nonbelievers. . . ."

Mr. Schenk was referring to a proposal which had been made to his Committee and which, as quoted by him immediately before he spoke the comments above reproduced, was substantially the same as the provision contained in the New York Constitution.

Our examination of the proceedings of the 1947 Constitutional Convention has served to satisfy us that, in relation to civil rights, the word "creed" was commonly recognized as comprehending religious principles only; and that the delegates, in integrating into the proposed fundamental law they were drafting the prevailing statutory range of prohibited reasons for discrimination, saw fit to preserve therein the term "religious principles", as contained in the 1844 constitutional clause anent civil rights, rather than to use in place thereof the word "creed" which, although recognized as commonly signifying religious principles only, might sometime be construed more broadly than intended.

Having shown to what extent considerations cognate to the Law Against Discrimination influenced the language written into the civil rights paragraph of the 1947 Constitution, reference to the "saving clause" of that instrument might be thought superfluous. Yet, our reasoning would not be complete unless we directed attention to Article XI (Schedule), Section I, Paragraph 3, in which it is decreed that

> "All law, statutory and otherwise . . ., in force at the time this Constitution . . . takes effect shall remain in full force until . . . suprseded, altered or repealed by this Constitution or otherwise."

We conclude by saying that we have examined the provisions of Assembly Bill No. 65 (second official copy reprint), and that there is nothing therein that specifically or impliedly would change the meaning of the word "creed" as used in the original law (P. L. 1945, c. 169).

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: DOMINIC A. CAVICCHIA,
Deputy Attorney General.

MARCH 31, 1949.

HONORABLE LLOYD B. MARSH,
Secretary of State,
State House,
Trenton, New Jersey.

FORMAL OPINION—1949. No. 18.

DEAR MR. MARSH:

I have your letter of the 28th ult., requesting an opinion as to whether William Dewey was legally holding the office of Jury Commissioner in and for the County of Passaic.

Your letter discloses that Mr. Dewey was Sheriff of Passaic County when he was appointed a jury commissioner and that his term of office as Sheriff of Passaic County terminated on November 10, 1948. He also held the office of jury commissioner which expires on June 30, 1948.

R. S. 2:87–1 provides as follows:

> "In each county of the State there shall be appointed by the Governor, by and with the advice and consent of the Senate, two citizens, resident therein who shall not be members of the same political party, who shall constitute and be designated as 'commissioners of juries,' hereinafter designated jury commissioners, of the county. No person holding any other public office other than that of sheriff and no person licensed to practice law in this State shall be appointed as a commissioner of juries. The certificate of appointment of each person appointed as a jury commissioner, together with the oath which he is required to take and subscribe by section 2:87–3 of this Title, shall be filed in the office of the clerk of the county in and for which he is appointed."

This section provides for the appointment of two jury commissioners by the Governor with the advice and consent of the Senate, and it further provides that they shall not be members of the same political party.

It further provides that no person holding any public office other than that of Sheriff, and no person licensed to practice law in this State shall be appointed as a commissioner of juries.

R. S. 2:87–2 provides for the term of commissioners and reads as follows:

> "Each jury commissioner appointed pursuant to section 2:87–1 of this Title shall hold office for one year."

R. S. 2:87–5 provides as follows:

> "The office of a jury commissioner appointed pursuant to section 2:87–1 of this Title shall become vacant, immediately upon his assuming the duties of any other public office, *or if he holds the office of sheriff, immediately upon the expiration of his term of office as sheriff.*" (Italics ours.)

From a reading of this section it is very clear that where a sheriff of the county also holds the office of jury commissioner, then immediately upon the expiration of his term of office as sheriff his office as jury commissioner becomes vacant.

Therefore, it is apparent that Sheriff Dewey's office as a jury commissioner became vacant on November 10, 1948, when his term as sheriff in and for the County of Passaic had terminated.

Answering your specific question posed in paragraph two of your letter as to whether or not Mr. Dewey should be appointed for an unexpired term, it is the opinion of this office that Sheriff Dewey should receive an appointment for an unexpired term as jury commissioner in and for the County of Passaic as provided for by R. S. 2:87–6 which reads as follows:

> "If the office of a jury commissioner appointed pursuant to section 2:87–1 of this Title becomes vacant by reason of his removal pursuant to section 2:87–4 of this Title, or his death, resignation or removal from the county, or his disqualification by assuming the duties of another public office, or for any other reason, the Governor shall appoint his successor for the balance of the term. A certificate of the appointment to fill a vacancy shall be filed in the office of the clerk of the county in which the vacancy existed."

Respectfully submitted,

THEODORE D. PARSONS,
Attorney General,

By: BENJAMIN M. TAUB,
Deputy Attorney General.

bmt;d

MARCH 29, 1949.

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

FORMAL OPINION—1949. No. 19.

MY DEAR COMMISSIONER:

You indicated that there is some misunderstanding regarding the power of a sentencing court to open and vacate the sentence of a prisoner committed to and confined in the penal and correctional institutions under the jurisdiction of your department.

You desire to be advised concerning the procedure to be followed when your institutions receive an order of the court remanding the prisoner for resentence.

The Supreme Court has established a procedure governing the courts under its jurisdiction relative to correction of sentences and imposition of new sentences under Rule 2:7–13 of the Rules, which reads as follows:

> "The court may correct an illegal sentence at any time. The court may reduce or change a sentence within 60 days from the date of the judgment of conviction."

Accordingly, when you receive an order from the committing court directing that a prisoner be produced before it at a specific time and place, you are required to comply with the provisions thereof, assuming of course, that you receive a copy of said order certified under the hand and seal of the clerk of the court as being a true copy of the original.

In the event that it appears that such order has been entered more than 60 days after date of judgment of conviction, it is my opinion, and I advise you that you should, nevertheless, comply with the order.

This for the reason that your department and the several institutions under your jurisdiction are part of the Executive Branch of the Government and your function in respect to prisoners committed to your care is administrative and in no sense judicial.

If the court is in error in bringing a prisoner before it or in subsequently ordering his release, the responsibility is solely that of the court and it is the better practice in all such cases to advise your institutional officials to comply with court orders as above set out.

Very truly yours,
THEODORE D. PARSONS,
Attorney General,

By: EUGENE T. URBANIAK,
Deputy Attorney General.

ETU:hp

MARCH 29, 1949.

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

FORMAL OPINION—1949. No. 20.

DEAR MR. BATES:

The Warden of the State Prison has inquired concerning the recent opinion of this office to the effect that he may censor incoming and outgoing mail of the inmates in his institution.

He asks whether the opinion negatives the provisions of Section 17, Chapter 84, P. L. 1948 of the new Parole Law, which specifically provides by legislative mandate that prisoners may send uncensored mail to the Parole Board.

Second, he asks to be advised, if the answer to the first question is in the affirmative, whether this also means that mail from the Parole Board to the prisoner shall be uncensored.

It is my opinion, and I advise you that the Legislature was clearly within its right in providing in Section 17, Chapter 84, P. L. 1948, that a prisoner could be privileged to send uncensored mail to the Parole Board. Our previous opinion had no application to this situation and, therefore, does not negative the statutory enactment above cited.

This provision is found in the laws of many states and is included to insure that each prisoner shall secure substantial justice under the law by calling to the attention of the Parole Board any specific situation requiring attention which the Prison officials or the Parole Board may have overlooked.

Secondly, it is my opinion, and I advise you that the privilege does not extend to mail received from the Parole Board to the prisoner, for this is not within the contemplation of the language of the Law.

This for the reason that there is no necessity for the requirement that the prisoner receive an uncensored reply, for the action of the Parole Board becomes a matter of record in the file of the prisoner. There is the further possibility that some ingenious person might come into possession of Parole Board stationery, or even duplicate same, and thereafter direct improper communications within Parole Board envelopes indiscriminately to inmates of penal and correctional institutions.

Very truly yours,
THEODORE D. PARSONS,
Attorney General,

By: EUGENE T. URBANIAK,
Deputy Attorney General.

ETU:hp

MARCH 29, 1949.

MR. JOSEPH GIULIANO, *State Superintendent,*
Division of Weights and Measures,
Department of Law and Public Safety,
187 West Hanover Street,
Trenton 7, New Jersey.

FORMAL OPINION—1949. No. 21.

DEAR SIR:

Receipt is acknowledged of your interdepartmental communication of March 17, 1949, requesting the opinion of this office respecting the application of R. S. 51:1–93 to non-commercial scales. There is attached to such communication a letter from Arthur Sanders, Esq., counsel for the National Association of Scale Manufacturers, Inc.

It has been the policy and procedure for the Division of Weights and Measures to require all scales to be approved by your division as to type, construction and operation. This requirement has been applied to scales used in the purchase or sale of commodities or service known as commercial or trade scales and also scales which are not designed or used for the determination of quantities in buying and selling or in computing charges for services rendered, known as non-commercial or non-trade scales.

The question has now arisen whether non-commercial or non-trade scales are subject to R. S. 51:1–93 and require approval of your division as to type, construction and operation.

In my opinion, they are not subject to R. S. 51:1–93.

R. S. 51:1–93 provides as follows:

"51:1–93. Every weight or measure sold, leased or delivered after sale to any person within the state for use in the purchase or sale of commodities or service shall be of the legal standard as provided in this chapter.

"Every person selling, leasing or delivering, or buying, renting or receiving any such weight or measure shall furnish to the local superintendent of the county or municipality in which such weights or measures are installed, a statement in writing, showing the sale or lease and location of such weights and measures.

"Any person who shall sell or lease a false weight or measure or a weight or measure that has not been approved as to type, construction and operation by the state superintendent, or who otherwise violates this section shall be liable to a penalty of fifty dollars."

A reading of this section discloses that it was intended to require only those scales used in the purchase or sale of commodities or service, that is, commercial or trade scales, to be approved as to type, construction and operation.

Rules of statutory construction require all provisions of the same section to be read and construed together. Paragraph one requires every such scale to be of the legal standard provided by the statute. The reports required by paragraph two apply to such scales only. Paragraph three, although not referring specifically to such scales must be read and construed in the light of the others and compels me to the conclusion that the approval required applies only to such scales. Although it may be desirable that the purchasing public be protected in all respects and for this reason non-commercial or non-trade scales should be approved by your division, still the wording of this section of the statute is not sufficient to require this approval.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: JOSEPH A. MURPHY,
Assistant Deputy Attorney General.

JAM:MB

APRIL 1, 1949.

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

FORMAL OPINION—1949. No. 22.

DEAR SIR:

I have your letter of March 29th, requesting to be advised whether Chapter 307 of the Laws of 1948, authorizing the Commissioner of the Department of Conservation to certify to the Civil Service Commission the names of certain persons employed by said department, has been affected by the provisions of Chapter 448 of the Laws of 1948, establishing the Department of Conservation and Economic Development.

The first act, in my opinion, has not been affected by the second act in the slightest degree. Where two acts of the Legislature are passed at one and the same session they must be reconciled so that both acts may stand. See *State Board of Health* vs. *Ihnken,* 72 N. J. Law, 865.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: THEODORE BACKES,
Deputy Attorney General.

TB:S

APRIL 4, 1949.

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

FORMAL OPINION—1949. No. 23.

MY DEAR COMMISSIONER:

Receipt is acknowledged of letter of March 30, 1949, requesting the opinion of this office respecting the application of R. S. 23:5–24.4. (use of nets on Saturday afternoons and Sunday.) R. S. 23:5–24.4 provides as follows:

"23:5–24.4. No net of whatever description shall be fixed, set, hauled, drifted or staked or lifted between the hours of twelve noon on any Saturday and twelve midnight on the following Sunday, but this section shall not apply to the Atlantic Ocean or fyke nets and to nets commonly used for the purpose of taking crabs or bait fish."

The question has now arisen whether it be a violation of the above provision to leave a net set in the water during the period of twelve noon on Saturday to twelve midnight on Sunday.

It is my opinion that all nets (excepting fyke nets and nets commonly used for the purpose of taking crabs or bait fish) must be removed from waters in this State other than the Atlantic Ocean between the hours of twelve noon on Saturday and twelve midnight on Sunday.

These lift or rest periods are conservation measures designed to assure that sufficient breeders may ascend to spawning grounds to perpetuate the species. I have been informed that there are various types of nets, such as set or stake nets which are in a fixed position, haul seines which are hauled through the water by manpower and drift nets which drift with the tide. The leaving of these nets in the water during the period of twelve noon on Saturday and midnight on Sunday would constitute a violation of R. S. 23:5–24.4.

Respectfully yours,

THEODORE D. PARSONS,
Attorney General,

By: BENJAMIN M. TAUB,
Deputy Attorney General.

bmt:d

APRIL 4, 1949.

HON. JOHN T. CONNOLLY, *Deputy Commissioner,*
Department of Banking and Insurance,
State House Annex,
Trenton, New Jersey.

FORMAL OPINION—1949. No. 24.

DEAR MR. CONNOLLY:

I have before me your request for an opinion relative to the effect of the limitations on mortgage loans contained in Section 69 "A" of The Banking Act of 1948 upon the amounts guaranteed by the Administrator of Veterans' Affairs in those mortgage loans made to veterans commonly known as "G. I. Mortgages".

The facts contained in the question are relatively simple. Chapter 257, P. L. 1945, authorizes banks to exclude the amount of such guarantees from any statutory limitation affecting investments. The Banking Act of 1948 containing the aforesaid limitations became effective on September 16, 1948.

The specific question is, did the enactment of The Banking Act of 1948 repeal Chapter 257, P. L. 1945?

The answer to the question lies in ascertaining the intention of the Legislature as expressed in the applicable statutes. After reading them and the many cases on this subject, we are of the opinion that the 1945 act is in full force and effect and that it was not repealed by the later enactment of The Banking Act of 1948.

The parts of the statutes applicable to the question, are as follows:

Chapter 257, P. L. 1945:

> TITLE: "AN ACT to provide that certain loans to veterans guaranteed by the Administrator of Veterans' Affairs shall be legal investments for any savings bank, banking institution or trust company of this State, and that any amount so guaranteed may be excluded in applying legal limitations affecting investments or loans in certain cases.
>
> "1. Any savings bank, banking institution or trust company organized under the laws of this State, notwithstanding any law of this State prescribing the nature, amount or form of security or requiring security for its loans or investments, may legally invest its funds in bonds or notes evidencing loans to veterans if the full amount of any such loan is guaranteed by the Administrator of Veterans' Affairs, pursuant to the servicemen's readjustment act of one thousand nine hundred and forty-four, approved June twenty-second, one thousand nine hundred and forty-four; and in the case of loans guaranteed for less than the full amount thereof by the Administrator of Veterans' Affairs, the maximum amount which may be loaned or invested by it pursuant to the provisions of any law of this State shall be increased by the amount so guaranteed."

Section 69 "A", of Chapter 67, P. L. 1948 (The Banking Act of 1948):

> "'A'. No bank shall make a mortgage loan when the total cost of acquisition by the bank of all real property owned by it, other than real property held for the purposes specified in subparagraph (a) of paragraph (5) of section 24, and the total of all principal balances owing to the bank on mortgage loans, less all write-offs and reserves with respect to such real property and mortgage loans, together exceed, or by the making of such loan will exceed, fifty per centum of the time deposits of the bank or one hundred per centum of the aggregate of its unimpaired capital stock and its surplus, whichever is the greater. For the purposes of this subsection, principal balances owing on mortgage loans subject to the provisions of subsection A of section 68 shall, only to the extent of seventy-five per centum of such balances, be included in the total of all principal balances owing to the bank on mortgage loans. This subsection shall not, however, prevent the renewal or extension of the time for payment of a mortgage loan for the amount due thereon at the time of such renewal or extension."

Section 336 "C" of Chapter 67, P. L. 1948:

> "'C'. All other acts and parts of acts inconsistent with this act are hereby repealed."

Section 336 "A" and "B" of the said Banking Act of 1948 expressly repeals certain sections of the Revised Statutes and certain statutes by chapter number and year, but they do not include the above mentioned 1945 act.

The Title of Chapter 67, P. L. 1948 reads as follows:

> "AN ACT concerning banking and banking institutions (Revision of 1948)."

The 1945 act clearly indicates an intention by the Legislature to expedite housing for veterans and The Banking Act of 1948 clearly indicates from its title an intention to revise the existing laws affecting the banking business and the operation of banking institutions. It is apparent that the Legislature had two distinct and separate thoughts in mind at the time of the enactment of these statutes.

The mere fact that both statutes touch on the same subject matter is not controlling. There is ample authority to the effect that if the Legislature intended to repeal the 1945 act upon the enactment of the 1948 act it would have done so in definite language. Repeal by implication is not favored and when the later is not necessarily repugnant, the intent to repeal is not implied. *Bugbee* vs. *Mills,* 116 E. 59; *Terrone* vs. *Harrison,* 87 N. J. L. 541; *Winne* vs. *Castle,* 99 N. J. L. 345, affirmed 100 N. J. L. 291; *First National Bank* vs. *Bianchi,* 106 N. J. E. 333; *Adams* vs. *Plainfield,* 161 N. J. L. 282. *Ruckman* vs. *Ransom,* 35 N. J. L. 565, and *In re Kellner,* 11 N. J. M. 201. It should be noted at this point, that of the many statutes expressly repealed in the 1948 act, no mention is made of the 1945 act.

It has been held that nothing short of an irreconcilable conflict between two statutes works a repeal by implication. *Title Guarantee Land Co.* vs. *Paterson,* 76 N. J. E. 539; *State* vs. *Garris,* 98 N. J. L. 608; and *Ruckman* vs. *Ransom, supra.*

It has also been held that when both acts can, by reasonable construction, be upheld, the later act will not operate as a repeal of the former. *Britton* vs. *Blake,* 35 N. J. L. 208, affirmed 36 N. J. L. 442; *Trustees, &c.* vs. *Trenton,* 30 N. J. E. 618, affirmed 30 N. J. E. 667; *Winne* vs. *Castle, supra.* Our examination of the two statutes fails to reveal any repugnance or irreconcilable conflict to the degree required to work a repeal of the 1945 act by implication, nor do we find anything that would indicate that both statutes cannot be upheld. As a matter of fact, the history of the 1945 act leads us to the contrary view. There has been no fact or circumstance

directed to our attention that would lead us to the view that there was any difficulty in the operation of the 1945 act with the loan limitations in effect prior to the enactment of the 1948 act.

In view of the 1948 act being a complete revision of the banking laws of this State, we feel that it is proper to comment briefly upon the rule found in *O'Neill* vs. *Johnson,* 99 N. J. L. 317. The Supreme Court in that case held that a statute of complete revision is decisive evidence of intent to repeal or supersede whatever of prior law on the subject matter is not included in the new act. However, in considering that rule, the Court in *Bugbee* vs. *Mills, supra,* held that this rule must be limited and controlled in accordance with the decisions above set forth.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: OLIVER T. SOMERVILLE,
Deputy Attorney General.

OTS/b

APRIL 11, 1949.

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

FORMAL OPINION—1949. No. 25.

DEAR GOVERNOR:

You have requested my opinion as to the status of the present Highway Commissioner. Mr. Miller was appointed April 29, 1942, for a six-year term; thus his term expired on April 29, 1948. On July 1, 1948, Chapter 91, P. L. 1948, "constituting" the Highway Department a principal department, became effective. On July 2, 1948, the Highway Commissioner was given an ad interim appointment. The Legislature was then only in temporary adjournment. The Legislature adjourned sine die September 8, 1948. In 1949, the nomination of Mr. Miller, for appointment as Highway Commissioner, was submitted to the Senate. It has not been acted on; it has neither been rejected nor confirmed.

In determining the status of the present Highway Commissioner, the Statutes in force at the time of the original appointment, the Constitution of 1947, and the 1948 Act must, in turn, be considered.

I. WHAT IS THE EFFECT OF THE APPOINTMENT UNDER THE STATUTES IN FORCE PRIOR TO THE 1948 ACT?

Mr. Miller was appointed in 1942 pursuant to the provisions of Revised Statutes 27:1-3:

> "The state highway commissioner, hereinafter in this title referred to as the 'commissioner', shall be a citizen and resident of this state, and shall be nominated and appointed by the governor, by and with the advice and consent of the senate, to serve for the term of six years and until his successor shall be appointed and qualified, unless sooner removed by the governor. The governor shall have the power to remove the commissioner for cause."

Under this act, therefore, the Commissioner was appointed to serve a term of six years ". . . and until his successor shall be appointed and qualified . . .".

On April 29, 1948, the statutory term of the Commissioner therefore ended. His tenure of office, however, continued. He, by virtue of his appointment, held the office not only for the term of six years, but also until his successor shall have been appointed and qualified. Thus, his term ended on that date, but his tenure did not.

In *Mount* vs. *Howell,* 85 N. J. L. 487, the Supreme Court held that under a statute providing that appointees serve for a specified term ". . . and until their successors are appointed and qualify . . .", no vacancy is created if no appointment is made at the end of the specified term, since the incumbents hold over by the express terms of the statute ". . . . until their successors are appointed and qualify . . .". In *Kimberlin* vs. *State,* 29 N. E. 773, it is said:

> ". . . a term of office fixed by statute runs not only for the period fixed but for an additional period between the date fixed for its termination and the date at which a successor shall be qualified to take the office. The period between the expiration of the term fixed by statute and the time at which a successor shall be qualified to take the office is as much a part of the incumbent's term as the fixed statutory period."

The Highway Commissioner has tenure of his office, since no successor has been appointed and qualified, subject to any change that may have been caused by the Act of 1948.

II. DID THE ACT OF 1948 CREATE A NEW OFFICE OR ABOLISH THE OFFICE TO WHICH THE HIGHWAY COMMISSIONER WAS APPOINTED OR AFFECT THE STATUS THEREOF?

In 1948, the Legislature enacted Chapter 91. This Act is entitled:

> "An Act relating to the reorganization of the executive and administrative offices, departments, and instrumentalities of the State Government; constituting and concerning the State Highway Department as a principal department in the executive branch of the State Government; amending sections 27:1-1, 27:1-3, 27:1-4, 27:1-7, 21:1-14, 27:1-15 and 27:1-16 of the Revised Statutes; and supplementing subtitle one of Title 27 of the Revised Statutes."

Section 27:1-3 was amended to read as follows:

> "The State Highway Commissioner, hereinafter in this Title referred to as the 'commissioner,' shall be the head of the State Highway Department. He shall be a citizen and resident of this State, and shall be nominated and appointed by the Governor, with the advice and consent of the Senate, and shall serve at the pleasure of the Governor during the Governor's term of office and until the appointment and qualification of the commissioner's successor."

The context of both the title and the body of Chapter 91, P. L. 1948, clearly indicates that the enactment was pursuant to the intendments and directions of Article V, Section IV, Paragraph 1 of the Constitution of 1947:

> "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, in such manner as to group the same according to major purposes so far as practicable."

The Act of 1948 did not create a new department. It continued the State Highway Department and "constituted" it a principal department. The Act did not change the title "State Highway Commissioner." It inserted in section 27:1–3 of the Revised Statutes, the provision that the Commissioner ". . . shall be the head of the State Highway Department . . .". Prior to the 1948 Act, Revised Statutes 27:1–7 provided that the Commissioner shall be ". . . the administrative and executive head of the department." The 1948 Act retains the exact language in the amended section. Revised Statutes 27:1–3 was amended to change the term so as to provide that the Commissioner ". . . shall serve at the pleasure of the Governor during the Governor's term of office . . .". This was done in conformance with the constitutional mandate contained in Article V, Section IV, Paragraph 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."

The 1948 Act took effect July 1. On that date, Mr. Miller's term had expired but he was vested with hold-over tenure of the office. The Act must be construed in the light of the provisions of Article V, Section IV, Paragraph 1, supra, and Article XI, Section III, Paragraph 2 of the Constitution. The provision of Paragraph 2 which is applicable to the tenure and status of the Highway Commissioner reads as follows:

> "The taking effect of this Constitution or any provision thereof shall not of itself affect the tenure, term, status or compensation of any person then holding any public office, position or employment in this State, except as provided in this Constitution."

"Tenure, term, status." No language can be more explicit and comprehensive. Thus, at the time the 1947 Constitution became effective, the tenure and status of Mr. Miller was protected subject to legislative enactment.

Did the 1948 Act create a new office? The answer to this question must be in the negative. It is the general rule of statutory construction that unless the statute explicitly provides for the abolition of an existing office and the creation of a new office, the office will not be considered changed. *Bird* vs. *Johnson,* 59 N. J. L. 59; *Birdsey* vs. *Baldwin,* 45 Conn. 134. In *Farrell* vs. *Pingree,* 16 P. 843, which was

approved by the Supreme Court of this State in *Bird* vs. *Johnson,* supra, the Court said:

> "There was no repeal of the act creating the office. The amendment dealt only with the length of the term of office. It left all the residue of the statute intact, and in full force. If the legislature intended to vacate the office, that intention must clearly appear before a court is warranted in saying it exists."

The 1948 Act effected no repeal of the law creating the office. The office of Highway Commissioner was continued. No new office was created. The abolition of an office may only be accomplished by precise and definite language in the statute. Cf. *46 Corpus Juris,* page 935, section 30:

> ". . . to abolish the office, the intention of the competent authority to abolish such office must be clear."

In *Campbell* vs. *Schmidt,* 219 N. Y. S. 25, the Court stated:

> "It has been said that, to abolish an office, the intention of the competent authority to abolish such office must be clear."

42 American Jurisprudence, p. 906, par. 35; *Quigg* vs. *Evans,* 53 P. 1093.

It is, therefore, concluded that the Act of 1948 did not create a new office and did not abolish the then existing office of State Highway Commissioner; and that Mr. Miller has tenure which, under the existing law, continues at the pleasure of the Governor and until the appointment and qualification of the Commissioner's successor.

III. What is the Effect of the ad interim Appointment?

Mr. Miller received a commission appointing him ad interim as State Highway Commissioner on July 2, 1948. Article V, Section 1, Paragraph 13 of the 1947 Constitution provides:

> "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; and after the end of the session no ad interim appointment to the same office shall be made unless the Governor shall have submitted to the Senate a nomination to the office during the session and the Senate shall have adjourned without confirming or rejecting it. No person nominated for any office shall be eligible for an ad interim appointment to such office if the nomination shall have failed of confirmation by the Senate."

Under this constitutional provision, before the Governor can make an ad interim appointment, there must first exist a vacancy in an office and the appointment must be made during a recess of the Legislature.

The present State Highway Commissioner had, on July 2, 1948, hold-over tenure at the pleasure of the Governor until his successor was appointed and qualified. There was no vacancy. This precise question of vacancy was passed upon by Chief Justice Beasley, with whom sat Justices Van Syckel, Depue and Knapp, in the case of *Stilsing* vs. *Davis,* 45 N. J. L. 390. A police justice held office under a statute which per-

mitted the Governor to fill a vacancy, and under a subsequent statute, had the right to hold office for the determined period and ". . . until his successor has been appointed and qualified . . .". The prescribed term had expired. Another was appointed ad interim. The first appointee challenged the existence of a vacancy. Chief Justice Beasley said:

> "The contention of the relator is, that by force of this law his own official life was prolonged and that as no vacancy existed, the respondent's appointment was and is a nullity.
>
> "In my opinion, this contention must prevail."

See also *McCarthy* vs. *Watson* (Conn.), 47 Atl. (2) 716, 164 A. L. R. 1238 and extensive annotation following; *Mount* vs. *Howell,* 85 N. J. L. 487. It, therefore, must be concluded that no vacancy existed in the office of Highway Commissioner to which ad interim appointment could be properly made.

An ad interim appointment can be made only ". . . during a recess of the Legislature . . .". It is noteworthy that in the immediately following section of the Constitution (Article IV, Section I, Paragraph 14) reference is made to a "temporary" adjournment in the course of a regular or special "session" and to "adjournment sine die." Which of these terms is meant by the term "recess" as used in paragraph 13? Under Article II, Section II, Clause III, of the United States Constitution, the President was given the right to fill vacancies ". . . that may happen during the recess of the Senate . . .". In the opinions of Attorneys General, Volume 23, page 599, the President was advised by Attorney General Philander C. Knox that recess meant final adjournment.

> "The recess means the period after the final adjournment of Congress for the session, and before the next session begins."

The Supreme Court of this State in *Fritts* vs. *Kuhl,* 51 N. J. L. 191, discussed the meaning of the word "recess." Justice Van Syckel reviewed the opinions of various Attorneys General of the United States, quoting from many, and basing his decision, in part, upon the statements contained in these opinions, thereby approving the authoritative effects of these precedents.

It has also been the established practice in this State to construe the word "recess" as meaning the adjournment sine die of the Legislature. Attorney General Katzenbach advised Governor Moore in 1926:

> "The recess spoken of in the Constitution is obviously the absence sine die of the legislature, by consent of both houses. The present legislature is not absent sine die.
>
> "Under the constitutional provisions, Your Excellency would have the right to make ad interim appointments after the occurrence of such event, but not before, . . ."

See Opinion Book 18, page 212.

It is significant that the delegates to the Convention which drafted the 1947 Constitution, carried over into the new document the word "recess" from the old Constitution. The long standing construction of the word "recess" was further confirmed when, in connection with a further limitation upon the Governor's ad interim appointing power, the delegates employed language which definitely revealed their understanding of the word "recess" to be the period ". . . after the end of the session . . ."

It is therefore concluded that no recess existed which permitted an ad interim appointment of Mr. Miller. If there was no vacancy, and if the Legislature was not in recess, then what effect has the ad interim appointment? The answer to this must be that such appointment was without force or effect.

I therefore conclude that Mr. Miller occupies the office of State Highway Commissioner by reason of his hold-over tenure at the pleasure of the Governor and until his successor is appointed.

Respectfully,

THEODORE D. PARSONS,
Attorney General.

tdp:ap

APRIL 8, 1949.

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

FORMAL OPINION—1949. No. 26.

DEAR SIR:

By your letter of March 17th you advise that in connection with an audit of the accounts of the office of the Secretary of State, a test circularization was made to verify whether collection agencies operating within the State had filed a yearly bond and paid the annual fee for filing such bond as required by R. S. 45:18–1 to 45:18–6; and that in selecting the collection agencies to be circularized, reference was made to the current classified telephone directories, under the section headed "Collection Agencies", published in 1948. You request to be advised whether a listing in the classified section of the telephone directory constitutes advertising or soliciting in print the right to collect or receive payment for another of any bill or indebtedness.

We have been advised by the New Jersey Bell Telephone Company that throughout New Jersey only the persons whose names are printed in the classified section of the directory in heavy type pay for such insertions, and that the names in the lighter type are classified by the telephone company itself. The several independent telephone companies in New Jersey may not adhere to this system of classification, but I doubt whether the directories of these companies were examined by you. You are therefore advised that the persons whose names appear in heavy type in the New Jersey Bell Telephone Company books should be classified as advertisers.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: SACKETT M. DICKINSON,
Assistant Deputy Attorney General.

APRIL 8, 1949.

DR. WILLIAM S. CARPENTER, *President,*
Department of Civil Service,
State House,
Trenton 7, New Jersey.

FORMAL OPINION—1949. No. 27.

DEAR DR. CARPENTER:

I have your letter of the 23d ult. requesting to be advised whether the State employees of the Veterans' Emergency Housing Program, in the State Department of Conservation and Economic Development, are subject to civil service. In my opinion, they are not. The original act is Chapter 323 of the Laws of 1946. By Section 26 of that act except as to certain sections not pertinent to your inquiry, the act was to continue only until July 1, 1948, unless extended by legislative act. It was so extended in 1948 by Chapter 12 of the laws of that year, and I note that by Assembly Bill No. 3 of the current session, now pending, there will be a further extension, if the same becomes a law, to July 1, 1950.

From the foregoing, it will be seen that Chapter 323 of the Laws of 1946 is to expire by its own limitation and, in my opinion, the employees of that department not now under civil service or under tenure by Chapter 435 of the Laws of 1948, are temporary employees and in nowise subject to the jurisdiction of the Civil Service Commission.

Very truly yours,
THEODORE D. PARSONS,
Attorney General,

By: THEODORE BACKES,
Deputy Attorney General.

TB:B

APRIL 8, 1949.

DR. WILLIAM S. CARPENTER, *President,*
Department of Civil Service,
State House,
Trenton, New Jersey.

FORMAL OPINION—1949. No. 28.

DEAR DR. CARPENTER:

I have your memorandum of the 24th ult. calling my attention to the provisions of Section 8 of Chapter 245 of the Laws of 1946 relative to the employees of the Society for Establishing Useful Manufacturers now under the control of a commission of the City of Paterson. That section provides that the commission may employ a general manager, engineers, a secretary, counsel, and such other engineering, clerical, legal, accounting and other assistants as it may deem necessary to carry out

the provisions of this act, and that the provisions of Title 11 (Civil Service) shall be construed to extend to all the officers and employees of the commission with the exception of the members of the commission, the general manager, secretary, counsel and engineers. I have also noted the provision in the second paragraph of Section 8 that in any employments, the commission shall give preference, wherever possible, but in its absolute discretion, to the persons employed by the owner of the property so acquired by the municipality, having in mind the fitness of such employees for the performance of the duties to be assigned to them, etc.

There is nothing in this section which indicates that the Civil Service Commission shall blanket into the civil service the employees of the former Society, but as the provisions of Title 11 by the express language of the statute shall be construed to extend to all the employees other than those specifically excluded, I conclude that they are in the classified service subject to the jurisdiction of your commission.

I am also of opinion that all employees appointed after May 2, 1946, the effective date of the act in question, are subject to the jurisdiction of your commission.

Very truly yours,
THEODORE D. PARSONS,
Attorney General,

By: THEODORE BACKES,
Deputy Attorney General.

TB:B

APRIL 11, 1949.

HONORABLE JOHN J. DICKERSON,
State Treasurer,
State House,
Trenton, N. J.

FORMAL OPINION—1949. No. 29.

DEAR TREASURER:

I acknowledge receipt of your inquiry in which you inform me that B, a licensed cigarette distributor in this State, has requested a ruling from the Cigarette Tax Bureau as to the following proposal:

B intends to enter into a contract with N, a corporation operating on a co-operative plan, whereby the N corporation, through its employees, would solicit the cigarette business of its member drug stores and transmit the orders for same to B who would deliver directly to the retail stores and assume the credit risk thereon. N has never previously engaged in the business of selling or arranging for the sale of cigarettes to its member stores.

The plan contemplates the payment of a commission in the sum of 2½% to the N corporation on all purchases made by the member stores. I am further informed that N distributes, in the usual course of its business practice, 65% of its net profits to its co-operative members, which distribution is predicated on a formula which takes into consideration the proportionate purchases made by each store. However, in this

particular instance, as I understand it, no direct distribution would be made on the basis of cigarette purchases. Your letter of inquiry aforementioned states that:

> "This 2½% would not be available to member drug stores for patronage dividends, but would be devoted exclusively to operational costs, thereby accruing indirectly to the member drug stores."

The foregoing resolves itself into a query as to whether or not the proposed plan is in violation of the Unfair Cigarette Sales Act, Chapter 188, P. L. 1948. Based on the facts herein contained, it is my opinion that the said plan is in violation of the said Act.

Section 3 of the Act aforementioned provides that:

> "It shall be unlawful for any retailer or wholesaler, * * * to sell, * * * cigarettes at less than cost to such retailer or wholesaler, as the case may be. * * *"

Section 5a provides:

> "The term 'cost to the wholesaler' shall mean the 'basic cost of cigarettes' to the wholesaler plus the 'cost of doing business by the wholesaler' as evidenced by the standards and methods of accounting regularly employed by him in his allocation of overhead costs and expenses, paid or incurred * * *."

In the absence of proof of a lesser or higher cost of doing business by the wholesaler making the sale, it is provided in Section 5b, that the "cost of doing business by the wholesaler" shall be 3½% of the "basic cost of cigarettes" plus ¾ of 1% for cartage. No proof of "cost to the wholesaler," as provided in Section 5a, has been presented to the department.

Had the plan contemplated the allowance of a rebate directly to the retail dealer by the wholesaler, there would, of course, be no question concerning the invalidity of the transaction. That practice strikes at the very foundation of the Act. In the instant case, it would appear that the identical result is being accomplished by the circuitous route of paying the rebate to a third party intermediary for the ultimate benefit of the retailer. That which is directly prohibited by statute may not be accomplished lawfully by indirection. The fact that the N corporation would use the commission monies for general operational costs, and would not distribute the same to its member stores based on purchases made, is not of prime importance, because it must be obvious that the use of such monies by the N corporation for its intended purposes must necessarily release for ultimate distribution to its member stores a corresponding sum which they otherwise would not have received. Under the proposal, retailers would be purchasing cigarettes at below the established wholesale cost, or conversely stated, the plan results in a sale by the wholesaler at below the cost set forth in the Act.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: MAX EISENSTEIN,
Deputy Attorney General.

APRIL 11, 1949.

DR. WILLIAM S. CARPENTER, *President,*
Department of Civil Service,
State House.

FORMAL OPINION—1949. No. 30.

DEAR SIR:

I have your letter of the 5th instant, stating that Sussex County adopted Civil Service on November 4, 1947, and that the Board of Freeholders of that county now contend that prior to the date of such adoption all employees in the county were temporary, and that the Board has declared that sick leave for county employees will commence only from the date of such adoption.

In my view, that is not the law. Both as to vacation leave and sick leave the years in service of such employees "prior and subsequent to the adoption of this act shall be used." The statute is clear and explicit and must be obeyed. See Chap. 232, P. L. 1939.

In reaching the conclusion I have I am not unmindful of the fact that there may have been in the employ of the county certain true temporary employees who should not be certified to your Commission, but as to all employees regularly employed the provisions of the statute to which I have called attention must be adhered to.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

APRIL 11, 1949.

DR. WILLIAM S. CARPENTER, *President,*
Department of Civil Service,
State House.

FORMAL OPINION—1949. No. 31.

DEAR SIR:

I have your memorandum of the 1st instant, inquiring whether the employees of the Beverly Sewerage Authority come within the jurisdiction of the Civil Service Law.

I understand the City of Beverly adopted the Civil Service Law in 1947, and in the same year created The Beverly Sewerage Authority, pursuant to the provisions of Chapter 138 of the Laws of 1946. By Section 5 (e) of that act The Sewerage Authority is authorized to appoint necessary officers and employ the required help; and by Section 4 (b) of said act such Sewerage Authority when constituted is an agency and instrumentality of the municipality creating it.

The Sewerage Authority of the City of Beverly necessarily must confine its operations to land lying within the corporate limits of that municipality, and, in my opinion, it is immaterial how the employees of the Sewerage Authority are compen-

sated, whether from appropriations by the municipality, or from revenue derived by The Sewerage Authority from the operation of its system. The Legislature could have provided either method of compensation.

I am, therefore, of opinion that employees of The Beverly Sewerage Authority are subject to the jurisdiction of your Commission.

Very truly yours,
THEODORE D. PARSONS,
Attorney General

APRIL 11, 1949.

DR. WILLIAM S. CARPENTER, *President,*
Department of Civil Service,
State House.

FORMAL OPINION—1949. No. 32.

DEAR SIR:

I have your memorandum of the 6th instant, with respect to the proper interpretation of the statute respecting vacation leave and sick leave, both of which are provided for by R. S. 11:14–1 and R. S. 11:14–2, as said sections were amended by Chapter 233 of the Laws of 1939.

The question submitted by you, if I understand it correctly, is whether vacation time accrues during the period when a State employee is away on accumulated sick leave.

It is my view that vacation leave continues to accumulate while a State employee is on sick leave, and it is my understanding that this matter was fully considered and passed upon by this department, without formal opinion, some years ago. The sick leave may be accumulated over a period of years, and the duration of such sick leave depends upon length of service. Not so, however, with vacation leave, because it does not accumulate except in those instances where the vacation leave was not granted by reason of pressure of State business, in which event the leave accumulates and shall be granted during the next succeeding calendar year.

To state the matter succinctly, in my opinion, vacation leave may not be offset as against sick leave.

Very truly yours,
THEODORE D. PARSONS,
Attorney General.

APRIL 11, 1949.

DR. WILLIAM S. CARPENTER, *President,*
Department of Civil Service,
State House.

FORMAL OPINION—1949. No. 33.

DEAR SIR:

I have your memorandum of the 1st instant, stating that request has been received by your Commission for approval of an appointment to a position in the office of the State Athletic Commissioner, a position formerly in the unclassified service.

The question is whether the new employee remains in such unclassified service.

In my opinion, he does. The office of the State Athletic Commissioner was created by Chapter 143 of the Laws of 1931, and was continued by Chapter 2 of Title 5 of the Revised Statutes (R. S. 5:2–1, et seq.); and by R. S. 5:2–4 the appointments authorized by that section, including inspectors, referees and other officials and clerical help, were not subject to the provisions of your Civil Service Law.

By Chapter 445 of the Laws of 1948 a Department of State was created as one of the principal departments in the Executive Branch of the State Government; and by Section 4 of that act the office of the State Athletic Commissioner, together with all his functions, powers and duties, was continued, but such office was transferred to the Department of State established under said act; and by Section 7 of said act the functions, powers, duties, records and property of the existing State Athletic Commissioner were transferred to and vested in the State Athletic Commissioner designated as the head of the office of State Athletic Commissioner in the Department of State, to be exercised and used by him pursuant to the provisions of said act, and as otherwise provided by law.

By Section 8 of said act the Athletic Commissioner has no authority to appoint, employ or remove any clerical personnel in his office, and the authority to employ or remove, fix the compensation of such clerical employees was vested in the Secretary of State, and such employees as were retained (Section 9) were transferred to the Department of State, to be assigned by the Secretary of State for the performance of duties. Nowhere in the act of 1948 is there the slightest indication of legislative intention to place new employees of the Athletic Commissioner in the classified service. Had the Legislature such a thought in mind it would have directed the classification of such employees. It is my judgment that employees appointed by the Secretary of State for work in the office of the State Athletic Commissioner still remain in the unclassified service, notwithstanding they may have been transferred under the new Department of State law to the latter department.

Very truly yours,
THEODORE D. PARSONS,
Attorney General.

APRIL 18, 1949.

DANIEL BERGSMA, M.D., M.P.H.,
State Commissioner of Health,
State House, Trenton, N. J.

FORMAL OPINION—1949. No. 34.

DEAR SIR:

This is in response to your letter dated March 30, 1949, concerning your authority to fix the compensation of a director of a bureau in your department who, of necessity, must be a licensed physician.

By Chapter 177, P. L. 1947, the Legislature established the State Department of Health. This statute was amended in 1948 by Chapter 444, P. L. 1948. Section 13, Chapter 177, P. L. 1947 confers certain powers and duties upon the Commissioner with respect to the organization of the department and the appointment of personnel. The question now arises whether you, as Commissioner of Health, may, subject to approval by the Public Health Council, fix the compensation of a physician director of a bureau in your department.

In my opinion, Section 13, Chapter 177, P. L. 1947 (R. S. 26:1A-130), appears to confer this authority provided such compensation is within the limits of available appropriations.

Section 13, Chapter 177, P. L. 1947 (R. S. 26:1A-13) provides as follows:

"The commissioner shall, subject to approval by the Public Health Council, prescribe the organization of the department. He shall, subject to the provisions of Title 11 of the Revised Statutes relating to Civil Service, appoint the directors of the bureaus and such other personnel as he may consider necessary for the efficient performance of the work of the department.

"He shall prescribe the duties of all such persons thus appointed and shall, subject to approval by the Public Health Council, fix their compensation within the limits of available appropriations. All such persons thus appointed shall be in the classified service of the Civil Service of the State, unless otherwise provided by law."

The Civil Service Law, R. S. 11:4-4 (q) provides:

"The positions held by the following officers and employees shall not be within the classified service:

(q) All superintendents, directors, or other employees in the State government, who, of necessity, must be licensed physicians, surgeons, or dentists;"

Section 13, Chapter 177, P. L. 1947, above quoted authorizes you to appoint, subject to approval by the Council, the directors of the bureaus and fix their compensation, and prescribes that they shall be in the classified service unless otherwise provided by law. The Civil Service Act (R. S. 11:4-4 (q)), above set forth, otherwise so provides by expressly exempting from the classified service directors who, of necessity, must be physicians. In view of these provisions, therefore, you, as Commissioner, subject to approval by the Public Health Council, have the authority to fix the compensation of such physician director of a bureau but it must be within the limits of available appropriations.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: JOSEPH A. MURPHY,
Assistant Deputy Attorney General.

JAM:MB

APRIL 20, 1949.

SANFORD BATES, *Commissioner,*
Department of Institutions and Agencies,
State Office Building,
Trenton 7, New Jersey.

FORMAL OPINION—1949. No. 35.

MY DEAR COMMISSIONER BATES:

This acknowledges your inquiry of April 13th, requesting my advices as to the present validity and legal force and effect of an Opinion rendered by this office on November 27, 1922, in a matter pertaining to the discipline of guards and uniformed officers at the New Jersey State Prison and allied institutions.

It appears that the Attorney General at that time answered two questions in the affirmative and you desire to restate these questions at this time as follows:

1. Has the State Board of Control power to compel the suspension of an employee of the Prison when charges have been preferred against such employee and when the Principal Keeper refuses to take such action?

2. Has the Board of Managers of the State Prison power to compel the Principal Keeper to suspend a guard of the Prison or one of its allied institutions against which said employee charges have been filed either by the Board of Managers of the Prison or by the State Board of Control?

I am of the opinion, and I so advise you, that both questions are still answerable in the affirmative for the reasons so ably stated in the Opinion of the Honorable Thomas F. McCran, then Attorney General, which I shall briefly review, and for other reasons which I shall set forth.

Our former Supreme Court said: "The legislative policy (N. J. S. A. 30:4, et seq.) has been to give the State Board of Control of Institutions and Agencies a wide latitude in the matter of administration of the penal institutions * * *." (In re O'Connor, 130 N. J. L. 197.)

Specifically, in R. S. 30:1-12 the state board is empowered to "determine all matters of policy and shall have power to regulate the administration of the institutions * * * within its jurisdiction, correct and adjust the same so that each shall function as an integral part of a general system. The rules, regulations, orders and

directions issued by the state board or by the commissioner pursuant thereto, for this purpose shall be accepted and enforced by the board of managers having charge of any institution or group of institutions * * *."

Then, in R. S. 30:4–4, the Legislature said: "Subject to the supervision, control and ultimate authority of the state board, the management, direction and control of the several institutions * * * shall be vested in the several boards of managers who shall be responsible to the state board for their efficient, economical and scientific operation."

Further down in the chain of authority, in R. S. 30:4–5, "The chief executive officer of each institution or agency shall be its executive and administrative officer and *subject to the rules and regulations adopted by the board of managers* shall be responsible to the board for the proper conduct and management of the institution or agency, the physical condition of the property, the proper use of the plant and equipment, *the conduct of all employees* appointed by him and the *care and treatment of the inmates.*"

We see then that the chief executive officer, in this case the Principal Keeper of the Prison, is responsible to the board of managers and they in turn are responsible to the state board. Therefore, the Principal Keeper is required to carry out the rules, regulations and directions of his board and those of the state board given the local board.

The board of managers, with the approval of the state board, may discharge any employee in the unclassified civil service whose performance of duties is unsatisfactory (R. S. 30:4–130). Or the state board may act in the premises without the initiative or assent of the board of managers.

Further, the board of managers may determine the number, qualifications, powers and duties of the officers and employees in each institution (R. S. 30:4–3).

As a result of the foregoing, the Principal Keeper is required to carry out the rules, regulations and directives of his board and of the state board and if such directives contemplate the suspension or dismissal of an officer or employee of the institution, for cause, this must be done.

It only remains for the state board to direct the local board to accomplish the disciplinary action, or in the alternative, the local board may so direct the principal keeper.

The rule of the state board, which is alleged to have been violated, prohibits the striking of inmates, unless in self defense. The rule is sound and finds approval in Instructions to Grand Jury, 22 N. J. L. J. 376.

There is no merit to the contention that the Principal Keeper is not subject to the foregoing statutes because his appointment was placed in the hands of the Governor by Article 7, Section 2, Paragraph 2 of the N. J. Constitution of 1844, as amended in 1875.

The constitutional provision for appointment makes no mention of the Principal Keeper's powers or duties, and they are by necessary implication deemed to be left to the Legislature for determination. Our courts have so ruled in construing this very section of the former constitution. (*Board of Public Utility Commissioners* vs. *Lehigh Valley R. Co.,* 106 N. J. L. 411, citing *State* vs. *DeLorenzo,* 81 N. J. L. 613, re Sheriff; *O'Reardon* vs. *Wilson,* 4 N. J. Misc. R. 1008; affirmed 104 N. J. L. 181, re attorney general.)

There being no constitutional limitation upon the authority of the Legislature to fix and determine the duties and responsibilities of the Principal Keeper of the

Prison, it therefore follows that such authority resides in the legislative branch of government.

The Legislature, having enacted the above cited statute dealing with the subject matter, the Principal Keeper is required to carry into effect the purpose and intent thereof. At the moment this requires the Principal Keeper, on orders of his board, to discipline three employees who have, in the judgment of the board, violated a rule of the State Board of Control which is also a rule adopted by the local board.

Accordingly, the board of managers should notify the Principal Keeper of the type of discipline these men should receive as indicated by the particular circumstances of each case.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: EUGENE T. URBANIAK,
Deputy Attorney General.

APRIL 21, 1949.

HON. JOHN J. DICKERSON, *State Treasurer,*
Att: MR. JOHN S. WOOD, 3D,
State House, Trenton, N. J.

FORMAL OPINION—1949. No. 36.

DEAR SIR:

Your letter of April 13, 1949, requesting opinion, has been received.

The facts as related to this office indicate that Edward E. Pickard, Supervising Principal of Schools of Cape May City, Member No. 3112, was in the armed forces from April, 1943, to April, 1947. During that period, his employer, the Board of Education of Cape May City, paid from current funds, contributions which were credited to Mr. Pickard's account in the county savings fund of your retirement system.

On April 4, 1947, Mr. Pickard received an honorable discharge and was awarded service-connected disability pension on account of injuries. From the date of said discharge, no further contributions were paid by his employers. We understand further that Mr. Pickard recently applied for disability retirement (we assume under the provisions of R. S. 18:13–57) and on March 12, 1949, the necessary medical certificate issued.

You propound the following questions:

1. Whether you should request and demand that the Cape May City Board of Education, from its current budget, pay contributions for the term from April 4, 1947, to March 12, 1949.

2. Whether you should allow Mr. Pickard credit for service up to the date of disability retirement, March 12, 1949, or whether his service credit as a member of the fund ceased on the date that he last had a contribution credited to his account—the month of March, 1947.

Answering both of the above, you are advised that no demand should be made of the Cape May City Board of Education to pay contributions, as their obligation to pay the same ceased at the time of Mr. Pickard's discharge and his service credit as a member of the fund ceases on the date of the last contribution credited to his account; namely, March, 1947.

> "R. S. 38:23–6. Contribution to pension or retirement funds during military or naval service. During the period beginning with the time of entry of such person into such service and ending at the earliest of (a) three months after the time of such person's discharge from such service; or (b) the time such person resumes such office, position or employment; or (c) the time of such person's death or disability while in the service, the proper officer or the state, etc. shall contribute or cause to be contributed to such fund the amount required by the terms of the statute governing such fund, * * *."

You will note that the third classification above mentioned allows contributions for disability while in the military service.

On April 4, 1947, Mr. Pickard was awarded service-connected disability pension because of injuries. He thereupon was entitled to immediately make application, pursuant to R. S. 18:13–57, for retirement, in which instance the board of trustees would automatically order the necessary medical examination and we can assume that the findings of the physician or physicians designated by the board would be substantially the same as those of the military. To now rule that the City of Cape May should make contributions for approximately two years, the intervening period, during which Mr. Pickard awaited making his application for retirement for disability under your statute, would not appear to be warranted under present statutes.

Yours very truly,
THEODORE D. PARSONS,
Attorney General,

By: JOHN W. GRIGGS,
Deputy Attorney General.

APRIL 27, 1949.

DANIEL BERGSMA, M.D., M.P.H.,
State Commissioner of Health,
Department of Health,
State House, Trenton, N. J.

FORMAL OPINION—1949. No. 37.

DEAR SIR:

This is in response to your letter dated April 14, 1949, requesting the opinion of this office concerning change of name on an existing birth or marriage record in your department.

The person involved in this matter, at the time of his naturalization, requested in his petition application for naturalization to change his name from Joseph Hamburg to Joseph Robert Hamilton. The Immigration and Naturalization Service of the United States Department of Justice has advised your department by letter that the request was granted. A copy of this letter was forwarded by you to this office. The question presented is whether such a letter is sufficient to permit your department to change the marriage record to show the new name and the date and manner the change was obtained under the provisions of Chapter 283, P. L. 1945 (R. S. 2:67–8).

The answer to such question is in the negative.

Section 1, Chapter 283, P. L. 1945 (R. S. 2:67–8) provides as follows:

> "Upon the receipt of a certified copy of an order permitting a change of name, and a request for correction of an existing record of the birth or marriage of the individual, the State Registrar of Vital Statistics or local registrar of vital statistics shall adjust the record or records to show the new name and the date and manner by which obtained."

The above-quoted provision requires a certified copy of an order permitting a change of name and a request for correction be received before you have the authority to adjust the record. The letter, which was forwarded to you by the Immigration and Naturalization Service of the United States Department of Justice, is not a certified copy of an order as required by the statute and not a sufficient compliance therewith.

Yours very truly,
THEODORE D. PARSONS,
Attorney General,

By: JOSEPH A. MURPHY,
Assistant Deputy Attorney General.

JAM:MB

APRIL 21, 1949.

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

Re: FORMAL OPINION—1949. No. 38.

DEAR COMMISSIONER ERDMAN:

I have before me a request made through you by the Division of Veterans' Services for an opinion concerning veterans' loans made by the First National Iron Bank of Morristown to Sidney T. Pearson, your Application No. 5165 and Gordon S. Jolliffe, your Application No. 5166.

In the Jolliffe matter, a loan was made to the veteran by the bank under date of April 15, 1946, in the sum of $2,000, said loan having been effected pursuant to an application of the veteran, dated March 21, 1946, for a veteran's loan in that amount for the purpose of purchasing a stationery store in partnership with the other veteran,

Sidney T. Pearson, who also received a loan in the same amount on the same date, pursuant to an application also dated March 21, 1946, for the above purposes. Both of these loans were approved under date of April 17, 1946, by the Veterans' Loan Authority, on condition that the bank obtain from these veterans a chattel mortgage covering all fixtures and equipment purchased with the proceeds of the loan. Pursuant thereto a chattel mortgage was executed by both of the above-named veterans, individually and as partners, and by Kathleen Pearson Jolliffe, the wife of the veteran, Jolliffe, the other veteran being single. The bank was the mortgagee named in the chattel mortgage and it covered certain property to be used in the partnership business. This mortgage is dated April 29, 1946, and was not recorded until one week thereafter. In each case the loan was evidenced by a note on the approved Veterans Loan Authority form signed by the veterans and in the case of Jolliffe by his wife, Kathleen Pearson Jolliffe, as endorser. Both of these loans were made pursuant to Chapter 126, P. L. 1944, as amended and supplemented.

In September, 1948, both veterans filed petitions in bankruptcy and the bank pursuant to instructions of the Veterans Loan Authority filed a petition in the cause, requesting permission to take possession of the chattels covered by the mortgage and proceed with foreclosure. The trustee in bankruptcy contested the validity of the chattel mortgage on the ground that same was not recorded within time. A hearing was held and thereafter the bank decided to compromise its claim on the chattel mortgage and accepted $600.00 in settlement. The claim was compromised by the bank in that there was a serious question as to its validity by reason of the bank's failure to record the chattel mortgage within time. The chattels covered by the mortgage were sold at public auction in the bankruptcy proceedings for $1,000.00.

The bank has now requested payment of its guaranty from the Veterans Loan Authority and has submitted the notes in question for purchase. There has been credited against the notes monies received by the bank on its compromise. The Authority has directed the bank to deduct from the amount requested in each case an additionel amount representing the difference between the amount which would have been recovered by the bank had the chattel mortgage been a valid and effective first lien and monies actually received on its claim from the bankruptcy proceedings. This represents approximately $500.00 in each case. The bank is willing to reduce its demand accordingly but has raised the question as to whether it should receive from the Veterans Loan Authority an agreement which would enable it to proceed against the wife of the veteran, Jolliffe, for that part of the loan which the Authority decided was not covered by the guaranty. In the event the veterans do not receive a discharge in bankruptcy, the agreement requested would also include the right to proceed against them for that part of the loan.

There are two questions involved:

Firstly: In payment of a guaranty or insurance on a veteran's loan is it proper for the Veterans Loan Authority to deduct the value of any chattels or property which should have been covered by a mortgage if the bank did not obtain a mortgage or did not obtain a valid and effective lien on the property purchased with the proceeds of the loan, in violation of the Veterans Loan Act and the regulations issued thereunder?

We are of the opinion that guaranty or insurance of the veteran's loan does not attach to that part of the loan which should have been secured by a mortgage on chattels or property if such a mortgage has not been obtained or the mortgage obtained was not a valid and effective lien.

The second question is whether the bank on purchase of the notes by the Veterans Loan Authority is entitled to any recourse against the Authority or the debtors for that part of the loan to which the guaranty or insurance did not attach, because of failure to obtain a valid and effective mortgage as set forth above?

As to the second question we are of the opinion that the bank is not entitled to any recourse against the Veterans Loan Authority or the debtors for that part of the loan which was not covered by the guaranty or insurance, because of its failure to obtain a valid and effective mortgage.

The answers to these questions are contained in the Veterans Loan Act, Chapter 126, P. L. 1944 (R. S. 38:23B-1 et seq.) as amended and supplemented; and the Regulations of the Authority.

The parts of the statute applicable to these questions are as follows:

Section 3, Chapter 126, P. L. 1944:

> "The authority shall have power to contract, to sue and be sued, to make, amend and rescind such rules and regulations as may be necessary to carry out the provisions of this act; but the authority may not in any manner, directly or indirectly, pledge the credit of the State."

Section 11, Chapter 126, P. L. 1944:

> "Any bank making a veterans' loan shall co-operate with the commissioner in supervising the use of the credit in accordance with its purposes."

Section 12, Chapter 126, P. L. 1944 as Amended by L. 1945, C. 185, Section 5, L. 1946, C. 121, Section 9, and L. 1947, C. 190, Section 1:

> "Each business loan made under this act shall:
>
> a. Be evidenced by a note or other obligation approved by the commissioner.
>
> b. Bear interest at a rate not exceeding four per centum (4%) per annum upon the unpaid balance.
>
> c. Be payable as follows:
>
> (1) In monthly or quarterly installments of interest, the first of which shall be payable not less than six months after the making of the loan and the last of which shall be payable not exceeding six years from the date of the obligation; and
>
> (2) In monthly or quarterly installments of principal, the first of which shall be payable not less than twelve months after the making of the loan and the last of which shall be payable not exceeding six years from the date of the obligation; except, however, that any veteran at his option, may, on such form as the commissioner shall prescribe, waive the grace period, or any part thereof, herein provided him for the payment of the first installment of interest, or the grace period, or any part thereof, herein provided him for the payment of the first installment of principal, or both.
>
> d. Be secured only by the personal liability of the maker, and not by any endorsers, co-makers, collateral or other security; except that in accordance with such rules and regulations as prescribed by the commissioner, where the maker is married endorsement of the spouse may be required, and *where the loan, or any part thereof, is made to finance the purchase or improvement of any property a lien on such property may be required.*

Where the loan, or any part thereof, is made to finance the purchase or improvement of any property to be used by the veteran and any other person or persons in a business or profession to be conducted by them as partners, and a lien on such property is required pursuant to the rules and regulations of the commissioner, the instrument creating such lien may, pursuant to regulations prescribed by the commissioner, be required to be made and executed by such partners, individually and as co-partners doing business under their trade name. Notwithstanding the provisions of any other law to the contrary every such lien instrument, properly recorded, shall be valid and effective against all creditors of such partnership."

Section 9, Chapter 185, P. L. 1945 provides for the purchase of loans which are insured and as to same states:

"Whenever any approved veteran's note shall be in default to any such bank for thirty days after the date of maturity thereof, or whenever any installment thereon is more than three months in arrears, the authority shall, *upon the demand of such bank, purchase from said bank such note by paying to said bank out of the reserve fund set aside to the credit of said bank, as herein provided, the total amount of principal and interest then due and owing to said bank on said note, but in no event shall any payment be made by the authority in excess of the amount then remaining to the credit of said bank in the reserve fund set aside for said bank, as herein provided."*

Section 10, Chapter 185, P. L. 1945 provides for the purchase of loans which are guaranteed and as to same states:

"In the event that a bank shall elect, pursuant to the provisions of section eight hereof, to have its veterans' loans guaranteed by the authority, *then the authority shall purchase upon demand of such bank, to the extent of the resources of the veterans guaranty and insurance fund* in excess of the total of all balances then held in reserve funds in accordance with the provisions of section nine hereof, any approved veteran's note which remains unpaid for thirty days after the date of maturity thereof, or on which any installment is more than three months in arrears, *at a price equal to ninety per centum (90%) of the unpaid principal of such note."*

Pursuant to the above statutes, certain regulations have been made by the authority which are applicable and are as follows:

Section 1.015:

"Mortgages—Generally. *When a business loan, or any part thereof, is made to finance the purchase of any specific property to be used in the business or profession, a mortgage on such property securing the amount of the loan, is required.* In all such cases the appropriate Veterans Loan Authority form of chattel or real property mortgage shall be used. In any case where the veteran requires moneys in excess of a $3,000.00 veteran's loan in order to purchase specific personal property to be used in his venture, and the bank is willing to lend such excess without any guaranty or insurance thereon by the Veterans Loan Authority, then, if specific property is to be purchased with the proceeds of both loans, chattel mortgage form DED-VLA-10A shall be used. This form provides that out of the proceeds of any sale of such property the non-guaranteed or uninsured loan shall first be satisfied before any application of said proceeds to the guaranteed or insured loan.

Whenever any mortgage is required to be made pursuant to the provisions of this section, *the bank making the loan shall cause such mortgage to be duly recorded in the proper county office."*

Section 1.018:

"Lien of Mortgage. Every mortgage required to be made under these regulations shall be such as shall create a valid first lien on the property covered by such mortgage, unless the Veterans Loan Authority shall, in writing, permit otherwise."

Italics ours.

The statute clearly states that where a loan or any part thereof is used to purchase property a lien on such property may be required. The regulations referred to herein require that such a mortgage be obtained and that such mortgage be a valid first lien on the property covered by such mortgage unless the Veterans Loan Authority shall, in writing, permit otherwise. No such permission was granted in this transaction and the facts clearly show that the bank was requested to obtain a chattel mortgage. It is, therefore, clear that the guaranty or insurance of loans should not apply to that part thereof which should have been protected by a mortgage and if a loss is incurred by reason of failure to obtain such a mortgage it should be borne by the bank. It is arguable that the bank's failure to abide by the rules and regulations of the Authority and the statute could result in the guaranty or insurance being entirely ineffective. However such a finding would be contrary to the spirit and intent of the act which was to provide a liberal source of credit to World War II veterans to enable their going into business.

It is also clear from the sections of the statutes above referred to that the payment of the guaranty or insurance is effected by the purchase of the note evidencing the veteran's loan. The amount paid where the loan is guaranteed is ninety per centum (90%) of the unpaid balance. The amount paid in cases of insured loans is the amount available in the reserve fund which may be the entire amount due or substantially less.

The clear intent of the statute is that the note will be purchased without any further recourse by the bank against the makers or endorsers. It is therefore, clear that the statute did not intend that the bank have any recourse against the borrower or endorser for any part of the loan for which it has not been paid by way of guaranty or insurance.

The bank has the option either to request the Veterans Loan Authority to purchase the note pursuant to the statute or waive its insurance or guaranty and proceed for collection on its own.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: CHESTER K. LIGHAM,
Deputy Attorney General.

May 2, 1949.

HON. HARRY C. HARPER, *Commissioner,*
Department of Labor and Industry,
State House,
Trenton, N. J.

FORMAL OPINION—1949. No. 39

Re: Employment of Child Labor in Children's Summer Camps.

MY DEAR COMMISSIONER:

Receipt is acknowledged of your letter of recent date in which you request an opinion concerning the application of the Child Labor Law (R. S. 34:2-21) to certain activities of minors vacationing at Y. M. C. A. and other summer camps for children. Specifically your inquiry deals with situations wherein minors pay for their vacations at these camps by performing designated services such as waiting on tables, dish washing, bugle blowing, etc.

The Child Labor Law was enacted by the Legislature of New Jersey in 1940 for the stated purpose of protecting the health and welfare of the children of the State and to prevent their exploitation at the hands of unscrupulous employers.

The Act was never designed to prevent underprivileged children from obtaining the benefits of a vacation at a summer camp under the sponsorship of a non-profit organization, which organization in order to function effectively must have certain minor services performed gratuitiously by such children.

It must be understood that anything said in this Opinion is concerned only with instances where children attend non-profit summer camps such as those conducted by the Y. M. C. A., Y. W. C. A., Boy Scout, Girl Scout, and similar organizations and covers only those children who attend such camps for the purpose of recreational and vacational facilities. This Opinion does not cover any boys who attend such camps in the way of regular employment and who, except for the compensation paid, would not attend such camps.

The preamble of the Child Labor Law (L. 1940, c. 153, p. 331) clearly sets forth what we deem to be the entire scope of the legislative intent. It is clearly designed to prevent the employment of minors in occupations or pursuits wherein they are subject to exploitation or where such employment would interfere with their education or would prove a detriment to their health and for such reason would be contrary to public policy.

The Act also clearly indicates the exclusion from its coverage the employment of minors in occasional and nonrecurrent occupations during vacation periods. The Act was clearly framed around gainful employment and may not be properly applicable to cases where the object is not gainful occupation but rather to obtain the vacational or other recreational benefits which because of the financial status of the children would be unavailable to them.

For the above reasons, it is my opinion that the provisions of the Child Labor Law do not apply to the above situation.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

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

May 5, 1949.

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

FORMAL OPINION—1949. No. 40.

DEAR COLONEL SCHOEFFEL:

The letter of Lieutenant Campbell addressed to this office for Prosecutor Parker of Burlington County has been received.

You inquire as to what are the duties of law officers and State police, particularly in apprehending violators at late hours in the night, on holidays and weekends, when they are hesitant about disturbing Judge Rigg upon apprehension of such violators, and as to what the officer should do with such prisoners.

The officer arresting a person with process or arresting a person who has committed an offense in his view may take the prisoner before the judge of the county district court or before a municipal court in the municipality in which the offense was committed and if there is no municipal court existing in that county, to the next nearest court. Or, in the alternative, the sheriff and jailers of the county jail shall receive from the constable or other officer all persons apprehended by such officers for an offense against the State. A jailer or sheriff refusing to receive such offender shall be guilty of a misdemeanor and on conviction shall be fined at the discretion of the court. (R. S. 30:8-1.) This statute has been construed by our courts that this section requires a sheriff to receive in custody a person legally arrested whether with or without a warrant and the fact that the person arrested had not been committed was no defense to a prosecution of the sheriff for a misdemeanor under this section. *State* vs. *Kelly,* 84 N. J. L. 1; aff. 86 N. J. L. 704.

It is our opinion that an officer who arrests for an offense in his view or who arrests with bona fide warrant in a municipality in which there is no municipal court may take the prisoner to the next municipality having a court or deliver him to the county jail and the sheriff shall receive him and keep him as abose set forth.

I suggest further that where a man has been arrested with or without warrant and is delivered to the county jail, that you give due diligence to the hearing of the person arrested.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: ROBERT PEACOCK,
Deputy Attorney General.

May 5, 1949.

HON. CHARLES R. ERDMAN, JR., *Commissioner,*
Dept. of Conservation and Economic Development,
520 East State Street, Trenton 7, N. J.

FORMAL OPINION—1949. No. 41.

DEAR COMMISSIONER:

Your recent letter requesting opinion as to whether the Planning and Development Council has the same power as the previous commissioners of the old Board of Commerce and Navigation, and asking particularly to be advised whether under the present statute (Chap. 448, P. L. 1948) the functions of the old Board of Commerce and Navigation and the former Council of Navigation are carried over and could be exercised by the Commissioner or by the Planning and Development Council, is at hand.

In order to answer the six questions submitted by you, it will be necessary to give you a history of the Department of Commerce and Navigation.

The original riparian commission act was passed in 1864, Chapter 391. The Board of Commerce and Navigation was created by Chapter 242, P. L. 1915. That carried on until the Department of Commerce and Navigation was created by R. S. 12:2–1. Under R. S. 12:2–13 the board succeeded to and exercised all the powers and performed all the duties formerly exercised and performed by or conferred upon the Board of Riparian Commissioners, the Department of Inland Waterways, the inspectors of power vessels, and the New Jersey Harbor Commission, with which last-named commission the New Jersey Ship Canal Commission was consolidated.

Under R. S. 12:2–14 the board is given full power to control and direct all State projects and work relating to commerce and navigation in any way whatsoever.

R. S. 12:2–15 provides that the board shall make such rules and regulations governing the work of the department as shall become necessary.

R. S. 12:3–4 provides that no person shall fill in, build upon or make any erection on or reclaim any of the lands under the tidewaters of this State without permission of the board of commerce and navigation.

And R. S. 12:3–7 directs that any person desiring to obtain a grant for lands under water which have not been improved and are not authorized to be improved under any grant or license protected by the provisions of sections 12:3–2 to 12:3–9 shall apply to the board therefor, and the board, together with the governor and attorney general shall designate what lands under water for which a grant is desired lie within the exterior lines, and fix such price, reasonable compensation or annual rentals for so much of said lands as lie below high water mark as are to be included in the grant or lease for which application is made, and shall certify the boundaries, and the price, compensation or annual rentals to be paid for the same, under their hands, which shall be filed in the office of the Secretary of State.

Under R. S. 12:3–10 any riparian owner on tidewaters in this State who is desirous to obtain a lease, grant or conveyance from the State of any lands under water in front of his lands, may apply to the board, which may make such lease, grant or conveyance with due regard to the interests of navigation.

R. S. 12:3–12 provides that the board may insert such covenants, clauses and conditions in said grants or leases as they shall think proper to require from the grantee or lessee or ought to be made by the State.

Pursuant to R. S. 12:3–16 it shall be lawful for the board, together with the governor, to fix and determine within the limits prescribed by law, the price or purchase money or annual rental to be paid by any applicant for so much of lands below high water mark, or lands formerly under tidewater belonging to this State, as may be described in any application therefor duly made according to law, and the board, with the approval of the governor, shall, in the name and under the great seal of the State, grant or lease said lands to such applicant accordingly, and all such conveyances or leases shall be prepared by the board or its agents at the cost and expense of the grantee or lessee therein and shall be subscribed by the governor and the board and attested by the Secretary of State.

Chapter 22, P. L. 1945 is an act relating to conservation and provides for the establishment in the executive branch of the State government of a State Department of Conservation and defines its duties, etc. Under section 2 of that act there was established in the executive branch of the State government a State Department of Conservation consisting of a State Commissioner of Conservation and such divisions, councils, officers and employees as are specifically referred to in the act and as may be constituted or employed by virtue of the authority conferred by the act or any other law. The Division of Navigation was established under section 4 of the act.

Section 28 establishes a Navigation Council within the division, which consists of nine members. Section 29 provides as follows:

> "The functions, powers and duties, records and property of the department of commerce and navigation and of the board of commerce and navigation are hereby transferred to and vested in the division of navigation established under this act, to be exercised *by the council thereof,* in accordance with the provisions of this act. No action shall be taken by said council except upon the approval of the commissioner of conservation.
>
> "No riparian leases or grants shall hereafter be allowed by less than a majority of the council and no such leases or grants shall hereafter in any case be allowed by the council except when approved and signed by the governor and the commissioner of conservation."

Under section 30 the council was vested with power to formulate comprehensive policies for the prevention and control of beach erosion, with the approval of the commissioner. By section 41 of the 1945 act it is provided that the rules and regulations heretofore promulgated by any of the departments, boards, commissions, authorities or other agencies, the functions, powers and duties of which have been transferred to any of the divisions established by the act, *shall continue with full force and effect* until amended or repealed by the council of such division, subject to the approval of the Commissioner of Conservation.

Chapter 448, P. L. 1948 is "An act relating to the reorganization of the executive and administrative offices, departments and instrumentalities of the State government, establishing and concerning a department of conservation and economic development as a principal department in the executive branch of the State government * * *."

Under section 5 of said act there was established a Division of Planning and Development in the Department of Conservation and Economic Development, which was formerly the Board of Commerce and Navigation. By section 7 all functions of the former Department of Economic Development and the respective divisions therein, and of the co-ordinator and Commissioner of the Department of Economic Development, exclusive of those of, or relating to * * * the Division of Veterans' Services * * *; and all of the functions, powers and duties of the harbor masters

under Title 12 and of the port wardens under Title 12 were transferred to the Department of Conservation and Economic Development and assigned to be exercised and performed through the Division of Planning and Development in the department. Section 8 provides that the Division of planning and Development shall be under the immediate supervision of a director, etc. The director shall administer the work of such division under the direction and supervision of the commissioner. Pursuant to section 11, the Planning and Development Council shall, subject to the approval of the commissioner:

> "a. Formulate comprehensive economic policies for the development and use of the natural and economic resources of the state * * *
>
> "b. Formulate comprehensive policies for the preservation and conservation and use of all state forests * * *
>
> "c. Formulate comprehensive policies for the prevention and control of beach erosion."

Section 13 provides:

> "No riparian leases or grants shall hereafter be allowed except when approved by *at least a majority of the planning and development council; and* no such leases shall hereafter in any case be allowed except when approved and signed by the governor and the commissioner of Conservation and Economic Development."

Section 107 provides, in part:

> "All appropriations and other moneys available and to become available to any department, board, office or other agency, the functions, powers and duties of which have been herein assigned or transferred to the department of conservation and economic development or to any office or agency designated, continued or constituted therein, are hereby transferred to the department of conservation and economic development established hereunder, and shall be available for the objects and purposes for which appropriated, subject to any terms, restrictions, limitations or other requirements imposed by state or federal law."

Section 112 provides:

> "This act shall not affect the orders, rules and regulations heretofore made or promulgated by any department, commission, council, board, authority, officer or other agency, the functions, powers and duties of which have been herein assigned or transferred to the department of conservation and economic development or to any officer, authority or agency designated, continued or constituted hereunder; but such orders, rules and regulations shall continue with full force and effect until amended or repealed pursuant to law."

The above powers granted to the Board of Commerce and Navigation, Division of Navigation, and the planning board seem to have been continued from 1915 down to date with the additional powers or approval by the Commissioner of Conservation and Economic Development.

Answering your questions:

1. Whether they also function with respect to the acceptance of applications for construction permits where riparian rights have been granted.

The answer is yes.

2. Whether they pass on applications and set prices for easement.

The answer is yes.

3. Whether they pass on applications and set prices for licenses.

The answer is yes.

4. Whether they function in the matter of waterfronts and jetty improvements.

The answer is yes.

5. Do they have any right to pass on improvements to be made and the awarding of contracts.

The answer is yes.

6. Should the expenditures made by the commissioner in the operation of these various works be submitted to them for approval. The answer is no. The commissioner is in charge of expenditures and they are to be made under his jurisdiction and approval.

Regarding the answers to the five questions above, all of these matters are subject to the approval of the commissioner and the governor.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: ROBERT PEACOCK,
Deputy Attorney General.

May 16, 1949.

HON. HARRY C. HARPER,
Commissioner of Labor and Industry,
State House,
Trenton 7, N. J.

FORMAL OPINION—1949. No. 42.

DEAR COMMISSIONER:

Re: Employment of Minors in Agricultural Pursuits.

Receipt is acknowledged of your request for an interpretation of the term "Agricultural pursuits" as used in R. S. 34:2-21.2.

The situation, specifically, is one wherein a minor under 18 years of age was employed by a large nursery industry in the actual raising of horticultural products. During the Easter season he was transferred to a retail farm market owned and operated by the employer nurseryman. The agricultural permit for the minor had

expired in 1948 and in April, 1949, at which time the minor was injured, no employment certificate was on file.

The question here involved must necessarily be whether the actual duties of the minor at the time of the accident, i. e., selling the products of his employer, are to be classified as agricultural or mercantile.

The New Jersey Supreme Court in 1941 in the case of *Henry A. Dreer, Inc.* vs. *Unemployment Compensation Commission of New Jersey, et al,* 127 N. J. L. 149, pointed out that the test "is the nature and object of the business." Further the Court said at page 153 ". . . that emphasis is laid on the character, relationship and business of the employer, rather than on the kind of work done by the employee."

Here, as in the case supra, the work of the minor was germane and incidental to the business of the employer, and a fortiori, agricultural in character.

Very truly yours,
THEODORE D. PARSONS,
Attorney General.

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

May 5, 1949.

HON. J. LINDSAY DE VALLIERE, *Director,*
Division of Budget & Accounting,
State House, Trenton, N. J.

FORMAL OPINION—1949. No.43.

DEAR MR. DE VALLIERE:

Receipt of your memorandum of April 25, 1949, is hereby acknowledged.

As we understand the problem, you and Doctor Carpenter of the Civil Service Commission have been petitioned to change the salaries of the Director of the Division of Planning and Development, and the Director of the Division of Veterans' Services from $7,500.00 to $10,000.00. The Commissioner urges that the Legislature has failed to set these salaries pursuant to Article II, Section 8 and Article III, Section 21 of Chapter 448, P. L. 1948. We understand, further, that the $7,500.00 salaries of the directors are line items set forth in the appropriation law (P. L. 1949, Chap. 43).

You ask the question whether the Treasurer has authority to use other funds to transfer to these line items so that each item will be increased from $7,500.00 to $10,000.00 as requested by Commissioner Erdman.

The answer is no.

Article II, Section 8, Chapter 448, P. L. 1948, among other things, provides:

> "The director of such division shall be appointed by the governor with the advice and consent of the senate and shall serve during the term of office of the governor appointing him and until the director's successor be appointed and has qualified. *He shall receive such salary as shall be provided by law.*"

Article III, Section 21 of the same law provides, among other things, referring to the division of veterans' services:

> "The director of such division shall be appointed by the governor with the advice and consent of the senate and shall serve during the term of office of the governor appointing him and until the director's successor be appointed and has qualified. *He shall receive such salary as shall be provided by law.*"

Contrary to the Commissioner of Conservation and Economic Development's statement that the Legislature has failed to act in respect to these salaries as above provided, the fact remains that the Legislature has, by P. L. 1949, Chapter 43, set the salaries of the directors of the aforesaid divisions at $7,500.00 and the $7,500.00 in each instance has been made a line item.

This office has repeatedly ruled that the Legislature, having by line item fixed a salary, it is beyond the power of any officer, board or commission of the government, to increase or decrease that amount without express warrant of law for that purpose.

Yours very truly,
THEODORE D. PARSONS,
Attorney General,

By: JOHN W. GRIGGS,
Deputy Attorney General.

May 5, 1949.

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

FORMAL OPINION—1949, No. 44.

MY DEAR COMMISSIONER:

You advise that you desire an interpretation of the provisions of Chapter 20, P. L. 1949, which became effective April 11, 1949, and which provides a new procedure for imposition of sentence on persons convicted of those certain sex crimes enumerated in the law.

Specifically, you wish to be advised whether the provisions of this law are retroactive in their application to persons who committed these crimes prior to April 11, 1949, and, if the law is retroactive, whether it might be deemed ex post facto and unconstitutional by reason of the nature thereof.

It is my opinion and I so advise you that this law is not retroactive and has no application to persons who committed the enumerated sex offenses prior to the effective date of the act for in such case it would be ex post facto and, for that reason, unconstitutional.

This conclusion is predicated upon certain legal principles which I will discuss below.

My first consideration is directed to the elemental principle of statutory construction that:

> "Retroactive operation is not favored by the courts, and a law will not be construed as retroactive unless the act clearly, by express language or necessary implication, indicates that the Legislature intended a retroactive application." (Sutherland—Statutory Construction, Vol. 2, p. 115.)

Mere retroactivity does not make a statute unconstitutional. However, an examination of the law discloses an impairment or change in the substantial rights of the person convicted.

This brings me to the second consideration which relates to the language in Section 8 of the law that:

> "The statutes of this State relating to remission of sentence by way of commutation time for good behavior and for work performed shall not apply to any such person."

Such a provision

> "which attempts to deprive a convicted person of the right to reduce the term of his confinement by good behavior, is ex post facto as to prior offenses." (12 C. J. 1103 and footnote cases.)

Standing alone, the language of Section 8 would be sufficient to render the law inapplicable to offenses committed prior to the effective date thereof.

Other substantial rights of persons within the purview of the law are affected in that the court is prohibited from suspending the sentence, cannot place a person on probation and is precluded from imposing a minimum and maximum sentence as heretofore. The sentence must be for an indeterminate period with no specified minimum.

Further, the law denies to this class of persons, the right to be considered for release on parole under Chapter 84, P. L. 1948, until the Commissioner makes certification to the paroling authority that the person has recovered sufficiently from his mental illness to make him eligible for parole consideration.

These changes in procedure in imposing sentence on the class of persons affected by the law is a sufficient impairment of the substantial rights of these persons to bring the law within the line of cases which hold that any such law must be considered ex post facto. (12 C. J. 1103.)

For the reasons stated above, it is our opinion that the law should confine its application to persons convicted of the enumerated crimes committed after April 11, 1949.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: EUGENE T. URBANIAK,
Deputy Attorney General.

ETU:HH

May 11, 1949.

DR. WILLIAM S. CARPENTER, *President,*
Department of Civil Service,
State House.

FORMAL OPINION—1949. No. 45.

DEAR SIR:

I have your memorandum of the 2d inst., disclosing that in the City of Trenton a vacancy occurred in the position of Roentgenologist, and that a doctor who is a non-veteran is rendering the services required as such Roentgenologist without charge to the city.

Your letter also discloses that there are two veterans who have expressed interest in appointment to the vacant position.

The question is, must the position be filled.

I know of no authority under the Civil Service Law under which your Commission can compel a public officer to make an appointment to a position in the classified service.

I believe that you have determined that your Commission is without jurisdiction in the matter and with this conclusion I concur.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: THEODORE BACKES,
Deputy Attorney General.

TB:S

May 9, 1949.

DANIEL BERGSMA, M.D., M.P.H.,
State Commissioner of Health,
State House,
Trenton, N. J.

FORMAL OPINION—1949. No. 46.

DEAR DOCTOR BERGSMA:

This is to acknowledge receipt of your letter of recent date wherein you request opinion relative to the practice of beauty culture in the State of New Jersey.

STATEMENT OF FACTS.

It would appear from your inquiry that a licensed beauty shop operator of the State of New York desires to install a portable unit for the practice of beauty culture in a hospital situated in the State of New Jersey.

QUESTION.

The question to be answered is whether the practice of beauty culture in such place and under such condition is permissible under our law.

ANSWER.

The answer is no.

REASONS.

The answer must be in the negative because of our statutory law pertaining thereto and more particularly, R. S. 45:4A-11.2:

> "It shall be unlawful for any person to practice beauty culture in any place other than a licensed beauty shop; provided, however, that a licensed operator, sponsored by a licensed beauty shop, may furnish beauty culture treatments to persons in their private residences by appointment; * * *"

Under this statute it becomes immediately apparent that beauty culture shall be practiced only in a licensed beauty shop with the proviso that beauty culture treatments may be furnished to persons in their private residences.

It follows therefore that unless some portion of the hospital is licensed as a beauty shop, no beauty culture can be practiced therein; nor could an itinerant with a portable unit practice therein, for a hospital is not deemed to be a private residence.

Very truly yours,
THEODORE D. PARSONS,
Attorney General,

By: JOHN WARHOL, JR.,
Deputy Attorney General.

JW-B

May 13, 1949.

DR. WILLIAM S. CARPENTER,
President, Department of Civil Service,
State House,
Trenton, New Jersey.

FORMAL OPINION—1949. No. 47.

DEAR SIR:

I have your communication stating that you are advised that the governing body of the Borough of Edgewater, Bergen County, without first having had presented to it a petition for the adoption of the civil service law, by resolution, directed that the question of the adoption of that law be submitted to the people, which was done and the provisions of the civil service law adopted. You inquire into the sufficiency and legality of the adoption.

I have before me the original certificate of the governing body, signed by its mayor and attested by its clerk under the corporate seal of the municipality certifying to the Civil Service Commission the fact that the civil service law was adopted, giving the vote as 1,155 for and 243 against the proposition, the election having been held on November 2, 1948. R. S. 11:20-7 provides with respect to the election that if the result of the same is favorable to the adoption of civil service law, such result shall be certified to the commission by the governing body of the municipality. The certificate which I have before me and which I have referred to complies with the requirements of the statute and, in my opinion, your commission is bound thereby.

I am returning herewith the papers which you left with me including the certification above referred to.

Very truly yours,
THEODORE D. PARSONS,
Attorney General,

By: THEODORE BACKES,
Deputy Attorney General.

Encs. TB:B

May 11, 1949.

HON. HARRY C. HARPER,
Commissioner of Labor and Industry,
State House,
Trenton 7, N. J.

FORMAL OPINION—1949. No. 48.

DEAR COMMISSIONER:

Re: Employment of Minors in Connection With Power Driven Hoisting Apparatus.

Your letter of recent date requesting an opinion as to whether R. S. 34:2-21.17 prohibits the employment of minors under 18 years of age in work which involves riding on a freight elevator, has been received.

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.

Very truly yours,
THEODORE D. PARSONS,
Attorney General,

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

May 13, 1949.

HONORABLE HARRY C. HARPER, *Commissioner,*
Department of Labor and Industry,
State House,
Trenton, New Jersey.

FORMAL OPINION—1949. No. 49.

DEAR COMMISSIONER HARPER:

This is to acknowledge the receipt of the copy of letter transmitted to you by the Director of the Division of Employment Security requesting an opinion as to the authority and method to be pursued by the agency in securing reimbursement of disability benefits erroneously paid. The erroneous payment of benefits was occasioned by the employer improperly advising the agency that the claimant was covered under the State Fund when in fact he was entitled to benefits under the Insured Private Plan of the employer. The agency asks whether it should proceed to collect from the claimant or the insurer or against both, and, if so, in what order.

In the absence of any proof of a false statement or representation having been made to obtain his benefits, the Temporary Disability Benefits Law does not specifically provide for repayment of benefits by a claimant whether erroneously paid or collected. Section 18 thereof, authorizes the payment of disability benefits out of the Disability Benefits Fund to be made in accordance with and subject to the laws and regulations pertaining to the payment of unemployment benefits. Subsection 16 (d) of the Unemployment Compensation Law, in part, provides: "When it is determined by the deputy that any person, by reason of the nondisclosure or misrepresentation by him or by another, of the material fact (irrespective of whether such nondisclosure or misrepresentation was known or fraudulent) has received any sum as benefits * * *."

The New Jersey Supreme Court in the case of *Tube Reducing Corporation* vs. *U. C. C., et als.,* 62 A. (2d) 473, in its opinion, in part, held as follows:

> "The obligation of repayment of benefits erroneously paid to one disqualified under the statute does not depend upon moral or conscious fraud in the nondisclosure or misrepresentation. The principle of the cases dealing with life insurance policies, e. g. *Kozlowski* vs. *Pavonia Life Insurance Co.,* 116 N. J. L. 295 (Sup. Ct., 1936), has no application here. It does not matter whether there be concealment or mere silence. That such was the legislative intention is demonstrated by the use of the parenthetical clause 'irrespective of whether such nondisclosure or misrepresentation was known or fraudulent.' This qualification can have no other meaning. It clarifies and makes certain language that might otherwise be open to the interpretation that only fraud was comprehended. Even though the nondisclosure 'by him or another' be unwitting and without fraud, the benefits paid to the claimant by reason thereof while he was disqualified are recoverable, if the fact was material. The omission of the correlative adverbial phrase 'or not' has no significance. As the lexicographers say, the negative contrasting alternative is implied. *The clause is definitive; its plain sense is that benefits received under the statute while the recipient is disqualified are retrievable regardless of whether or not he knew of the vital fact undisclosed or misrepresented or was actuated by fraud in concealing or ignoring it.* It is conceded that the words 'known' and 'fraudulent' are used in the same general sense. And it goes without saying that the employer's formal notice to the Commission of the existence of the strike at its plant, before the making of the payments in question, is not a differentiating circumstance. The contrary view would ignore administrative realities and complexities and open the door to evasion of the statutory policy." (Italics supplied.)

The benefits were paid out of the State Disability Fund when they should have been paid by the insurance carrier in behalf of the employer. The fact that the claimant in this case acted in good faith or without fraud is immaterial. He must make reimbursement to the State of its property. The agency did not commit any error which resulted in the payment of the claim and even if it had, it would not have made any difference because the claimant was not entitled to the receipt of any moneys. The claimant must, therefore, return the moneys although he was innocent of any wrongdoing.

In the absence of any statutory authority therefor, the State agency has no right to collect directly from the insurer nor has it any right of subrogation to any funds or moneys in the hands of the insurer which belong to the claimant.

It is suggested that the Division of Employment Security, as one method of reimbursement, secure from the claimant an assignment of his claim to the benefits under the Private Plan, which would permit the insurance carrier to reimburse the agency of the amount of benefits erroneously paid.

Respectfully submitted,

THEODORE D. PARSONS,
Attorney General,

By: WILLIAM C. NOWELS,
Deputy Attorney General.

TDP:WNR

May 3, 1949.

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

FORMAL OPINION—1949. No. 50.

DEAR MR. DURAND:

I have had referred to me your request for an opinion in connection with the Veterans Loan Act (Chapter 126, P. L. 1944, as amended and supplemented).

The question is the amount of reserve necessary for approved guaranteed veterans' loans made pursuant to the above act.

We are of the opinion that twenty percent (20%) of the total face amount of all approved veterans' loans from time to time outstanding, plus such additional amounts as the Veterans Loan Authority shall set aside in its estimate as necessary for payment of approved guaranteed veterans' notes which may be submitted to it for purchase during a particular budget period, should be kept in a reserve fund for this purpose. The twenty percent (20%) reserve shall be computed pursuant to Section 14, Chapter 123, P. L. 1946, as hereinafter cited.

The parts of the statute applicable to these questions have in the most part been stated in your request for an opinion, and are as follows:

Section 5, Chapter 126, P. L. 1944, as Amended by Section 1, Chapter 185, P. L. 1945 and Section 5, Chapter 121, P. L. 1946:

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

Section 7, Chapter 185, P L. 1945:

> "The authority is hereby authorized and empowered to insure or guaranty, whichever any bank may elect in accordance with the provisions of section eight hereof, all veterans' loans heretofore or hereafter made by such bank, to the extent provided in section nine or section ten hereof respectively."

Section 14, Chapter 121, P. L. 1946:

> "The *sum total of all reserve funds* set aside by the authority in accordance with the provisions of section nine of chapter one hundred eighty-five of the laws of one thousand nine hundred and forty-five, *together with such amount as the commissioner may set aside, out of the veterans guaranty and insurance fund, to meet the payment by the authority of approved veterans' notes submitted to it for purchase in accordance with the provisions of section ten* of chapter one hundred eighty-five of the laws of one thousand nine hundred and forty-five, *shall in no event be less than twenty per centum (20%) of the total face amount of all approved veterans' loans from time to time outstanding."*

Section 9, Chapter 185, P. L. 1945, provides for the setting up of a reserve fund for insured loans. This section states that there shall be set aside in a reserve fund to the credit of the banks making insured loans under the act, an amount equal to twenty percent (20%) of the total face value of all the bank's approved veterans' loans, and that the Veterans Loan Authority shall add to such reserve funds twenty percent (20%) of the amount of each veteran's loan thereafter made by such bank. It further provides that the fund shall at no time exceed the total face amount of all such bank's approved veterans' loans outstanding; and that in no event shall any payment be made by the authority to any bank beyond the total balance set aside as a reserve fund for such bank at the time of payment.

Section 10, Chapter 185, P. L. 1945, sets forth the procedure for the purchase of guaranteed loans by the Veterans Loan Authority. It states:

> "In the event that a bank shall elect, pursuant to the provisions of section eight hereof, to have its veterans' loans guaranteed by the authority, then the authority shall purchase upon demand of such bank, *to the extent of the resources of the veterans guaranty and insurance fund in excess of the total of all balances then held in reserve funds in accordance with the provisions of section nine hereof,* any approved veteran's note which remains unpaid for thirty days after the date of maturity thereof, or on which any installment is more than three months in arrears, at a price equal to ninety per centum (90%) of the unpaid principal of such note." (Italics ours.)

Section 11 of Chapter 121, P. L. 1946, provides that the total amount of guaranty and insurance liability which may be outstanding at any time shall in no event exceed the sum of eleven million dollars ($11,000,000).

It appears clear that the minimum required as a reserve for loans guaranteed under this act is twenty percent (20%) of the total face amount of all such approved veterans' loans outstanding.

As to insured loans, the act sets forth both a maximum and minimum reserve. Section 9 of the act provides that in no event shall the reserve fund for each bank for payment of insured loans be more than the total face amount of all such bank's approved veterans' loans outstanding; and section 14 of the act as referred to herein states that in no event shall the amount of the reserve, both as to guaranteed or insured loans, be less than twenty percent (20%) of the total face amount of all approved loans from time to time outstanding.

There is no maximum reserve provided for as to guaranteed loans; however, a reserve in excess of twenty percent (20%) should be maintained in cases where the Veterans Loan Authority estimates that additional amounts will be necessary for the purchase of defaulted guaranteed loans during a particular budget period.

The necessity for this additional reserve is indicated by the language of section 5, which contains a provision in referring to monies to be invested and reinvested by the State Treasurer, that these monies are not to include such amounts as the authority shall estimate are needed for current operations The words "current operations" in our opinion include the estimated amounts necessary for the purchase of guaranteed veterans loans.

That this interpretation is correct is indicated by section 14, which provides for a minimum reserve of twenty percent (20%). This section states that the total of all reserve funds set aside for insured loans, together with the reserve set aside for guaranteed loans, including such amounts as the Veterans Loan Authority may set aside out of the entire fund as necessary to meet payments by it for the purchase of approved guaranteed loans, shall in no event be less than twenty percent (20%) of the total face amount of all loans from time to time outstanding.

It is our opinion that a reading of the sections above referred to clearly indicates that it was the intent of the Legislature that the Veterans Loan Authority should decide the amount of reserve necessary for the purchase of guaranteed loans, but that in no event should the overall reserve for all loans be less than twenty percent (20%), as above computed.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: CHESTER K. LIGHAM,
Deputy Attorney General.

CKL/f

May 17, 1949.

MR. GEORGE M. BORDEN, *Secretary,*
State Employees' Retirement System,
1 West State Street,
Trenton 7, New Jersey.

FORMAL OPINION—1949. No. 51.

MY DEAR MR. BORDEN:

I duly received your letter calling my attention to the fact that since April 24, 1937, all persons accepting employment in the classified service of this State after said date shall be required to join your retirement system. The classified service therein referred to means, of course, the classified service under the civil service law. In addition to these persons, you admit to membership in your fund other employees of the State who are not in the classified service.

I gather from your letter that with respect to withdrawal of accumulated deductions, you have been making a distinction between those in the classified service of the civil service and those who are in the unclassified service, the latter being permitted to withdraw at pleasure.

How long this practice has prevailed, I do not know, but in my view of the law this is immaterial because your statute on withdrawals (R. S. 43:14–29) is not of doubtful meaning and therefore is not subject to practical construction, (see *State* vs. *Kelsey,* 44 N. J. L. 1), for the section mentioned provides that "A member who withdraws from service or ceases to be an employee for any cause other than death or retirement" shall receive all or part of his accumulated deductions, with certain exceptions which need not here be noted.

I am, therefore, of opinion that all employees of the State who become members of your retirement system must continue as such members unless they withdraw from the service or cease to be employees of the State. Of course, we know of the exceptions in the statute (R. S. 43:14–43 and 43:14–44) with respect to withdrawal by (1) veterans, and (2) employees of the State who were drafted and discharged before induction into the army during any war, and (3) members of the National Guard to whom Federal recognition was extended prior to November 11, 1918.

The holding above likewise applies to members of your fund in counties and municipalities which have adopted by referendum the provisions of your act, some of which so adopting, not having adopted civil service, and also applies to certain governmental agencies which, under warrant of law, have been permitted to enroll their employees in your fund.

In view of the practice which has heretofore prevailed of allowing those members of your system who are not in the classified service of the civil service law to withdraw their accumulated deductions, I think your board should notify each such member of the ruling herein made and give each member an opportunity to withdraw within a limited period of time to be prescribed by the board.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: THEODORE BACKES,
Deputy Attorney General.

TB:B

May 18, 1949.

HONORABLE HARRY C. HARPER, *Commissioner,*
Department of Labor and Industry,
State House,
Trenton, New Jersey.

FORMAL OPINION—1949. No. 52.

DEAR COMMISSIONER:

You recently submitted a copy of a letter from the Director of the Division of Employment Security wherein it was requested that an opinion be secured interpreting the Temporary Disability Benefits Law. The particular problem presented was the interpretation of Sections 14 and 15 thereof as to what days the division should consider as the waiting period for the purpose of paying benefits.

You are advised that the first calendar day an individual is unable to perform the duties of his employment, by reason of a compensable disability, is the beginning of the period of disability.

The Temporary Disability Benefits Law, Chapter 110 of P. L. 1948, Section 14 thereof, provides as follows:

> "Disability benefits shall be payable with respect to disability which commences while a person is a covered individual under this act, and shall be payable with respect to the eighth consecutive day of such disability and each day thereafter that such disability continues but not in excess of the individual's maximum benefits."

Section 15 thereof, provides as follows:

> "Limitation of benefits. Notwithstanding any other provision of this act, no benefits shall be payable under the State plan to any person: (a) for the first seven consecutive days of each period of disability, or for more than twenty-six weeks with respect to any one period of disability, or for any period of disability which did not commence while the claimant was a covered individual;"

An examination of the statute shows that the word "day" is not defined therein. A day is the period of time which elapses between midnights or the twenty-four hours. Section 14, hereinabove quoted, provides that benefits shall be payable with respect to the eighth consecutive day of disability and each day thereafter that it continues. Section 15 mentions that no benefits shall be payable for the first seven consecutive days of each period of disability. In using the word "day," evidently the Legislature intended that an individual was required to complete seven full calendar days as his waiting period. The use of the word "consecutive" in Sections 14 and 15 in the statute means that the first day is to be a calendar day or a full day during which the individual is unable to perform the duties of his employment.

In the letter submitted by you requesting an opinion, it states that an individual entered the hospital on January 2, 1949, for an appendectomy which was performed on January 3, 1949. He had been ill on New Year's Day, called the doctor the same day and was under his care. It is assumed that he became ill sometime during the day of January 1st. The first full calendar day that he was unable to perform the duties of his employment was January 2, 1949, and such day is to be considered as the day beginning a period of disability.

In the other example contained in the letter is the case of a claimant who recovered from a previous illness on Sunday, January 2, 1949, and expected to return to work on January 3, 1949. On January 3, 1949, he arose at 5:30 A. M., intending to go to work when he suffered an attack of stomach pains and was unable to leave his home. His doctor visited him the same day and he entered the hospital on Janury 4 and was operated for an appendectomy. The first full calendar day that he was unable to perform the duties of his employment was January 4, and this establishes the commencement of the period of disability.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: WILLIAM C. NOWELS,
Deputy Attorney General.

WCN:R

May 17, 1949.

MR. FRANK B. BAER, *Secretary,*
Prison Officers' Pension Fund,
New Jersey State Prison,
Trenton 6, New Jersey.

FORMAL OPINION—1949. No. 53.

DEAR SIR:

I have your letter of the 2nd instant. The question to be determined is whether all fines, etc., imposed upon prison officers, whether such officers be members of your fund or no', shall be paid into your fund. The matter is controlled by Section 7 of Chapter 220 of the Laws of 1941, establishing the Prison Officers' Pension Fund.

As you know, under Section 11 of your pension act, any prison officer in office when the act became effective on July 4, 1941, had thirty days from that date in which to decline membership, and by Chapter 80 of the Laws of 1946, veterans are permitted to withdraw membership.

It is thus seen that there are prison officers as defined in Sectoin 2 of your act, as said section was amended by Chapter 193 of the Laws of 1943, who may or may not be members of your fund.

A mere glance at Section 7 of the Act of 1941 furnishes the answer, for the first subdivision (a) speaks of deductions from pay "to prison officers benefited by this act;" the second subdivision (b) directs payment by the State into the fund of a definite amount measured by the total salaries paid to the prison officers "who shall benefit by this act;" and subdivision 3 provides that "There shall be added to such fund all fines imposed upon any such prison officer" * * * as well as all money deducted from salary of "such prison officers." The word "such" as thus used twice in subdivision 3 clearly refers to the prison officers benefited by the act, and can have no application to a prison officer who is not a member of your fund.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: THEODORE BACKES,
Deputy Attorney General.

TB:B

May 20, 1949.

HON. SPENCER MILLER, JR.,
State Highway Commissioner,
State Highway Department,
Trenton, New Jersey.

Attention: COMMANDER CHARLES M. NOBLE,
State Highway Engineer.

FORMAL OPINION—1949. No. 54.

DEAR SIR:

On May 17th you advised me that the Division of Planning and Development (formerly Board of Commerce and Navigation) has no funds to pay for dredging the channels under the new Manasquan and Island Heights bridges. The question for determination is whether or not the State Highway Department may make a loan of funds to said Division for this work.

There is no statute authorizing one State department to lend funds to another State department and it will therefore be necessary to seek legislation by which highway moneys may be transferred to said division for the above purposes.

Very truly yours,
THEODORE D. PARSONS,
Attorney General,

By: SACKETT M. DICKINSON,
Assistant Deputy Attorney General.

May 23, 1949.

DANIEL BERGSMA, M.D., M.P.H.,
State Commissioner of Health,
State House,
Trenton, N. J.

DEAR DOCTOR BERGSMA:

Your letter of transmittal under date of March 22, 1949, requesting an opinion relative to the issuance of licenses by the Board of Beauty Culture Control is hereby acknowledged and memorandum opinion rendered as follows:

STATEMENT OF FACTS.

It appears from your inquiry that while the active conflict of World War II was going on, a person entitled to be licensed under your law actually entered the active military service of the United States.

QUESTION PRESENTED.

The question to be answered is whether such person is entitled to be licensed upon her discharge from service.

ANSWER.

The answer is yes.

REASONS.

An affirmative answer is made by virtue of the provisions of R. S. 45:4A–23.1, which provides as follows:

> "Any person to whom a license shall have been duly issued, may at any time within two years of the expiration date of such license make application for and obtain a license of like kind without re-examination; any such person making such application after two years from the expiration date of previous license, shall be required to make application therefor and submit to examination, as if such applicant had never been the holder of any license issued by this board; provided, however, that where any person had or shall have the privilege of making application for and obtaining a license without examination under this section at the time of his entrance into the military or naval forces of the United States during the present war, he may make such application for a license without examination at any time within a period of two years after his honorable discharge from such military or naval forces."

As to your second question, same seems to be in the nature of an academic inquiry needing no legal disposition at the present time for no actual case is presented thereby.

This opinion shall have no continuing effect as a precedent but is rendered in respect to a specific inquiry.

Respectfully,
THEODORE D. PARSONS,
Attorney General,

By: JOHN WARHOL, JR.,
Deputy Attorney General.

JW:B

May 23, 1949.

MR. R. J. ABBOTT,
Executive Assistant to the Governor,
State House,
Trenton, New Jersey.

FORMAL OPINION—1949. No. 55.

DEAR MR. ABBOTT:

With your memorandum of May 3rd you sent me a letter which you received from Mr. Frank A. Tracey, of the Division of Navigation, in reference to the possibility of the State Highway Department paying for the dredging of the proposed channel in the Manasquan River in the vicinity of the new Brielle-Point Pleasant Highway Bridge and paying for such work from the funds allocated for the construction of the bridge.

The question is presented in this form: "Is there anything in the general State Highway law which might prohibit such an expenditure from the Highway funds?"

To avoid considerable detailed analysis of the various statutes from which this opinion has been derived, I give the following list of some of those examined to reach this conclusion, they being the most important ones: P. L. 1894, p. 409; P. L. 1908, p. 604; P. L. 1909, p. 51; P. L. 1912, ch. 396; P. L. 1917, ch. 15; P. L. 1921, ch. 306; P. L. 1930, ch. 253; P. L. 1934, ch. 139; P. L. 1935, ch. 178; P. L. 1940, ch. 52. Others are mentioned hereafter.

By P. L. 1917, Chapter 15, Section 12 (e) the then State Highway Commission and Department was authorized to construct, build and improve, widen, straighten and regrade State highways and for such purpose and for any use incident thereto or connected therewith, to acquire any lands, bridges or approaches thereto and rights therein by gift, devise, purchase or by condemnation. By P. L. 1935, Chapter 178, it is provided that the State Highway Commissioner shall succeed to and exercise all the powers and perform all the duties exercised or performed by the State Highway Department and the State Highway Commission, or either of them, as constituted prior to April 29, 1935, by virtue of any then existing law or laws. (R. S. 27:1-5.)

Unless by inference and stretching the interpretation of P. L. 1917, Chapter 15, Section 12 (e) cited before, I can find no indication of any legislative intent to give the State Highway Commissioner and Department jurisdiction over waterways other than the building of bridges over them or tunnels under them (in limited conditions) as part of the State Highway System. Even if we go this far it would seem that to carry out what is suggested in the memorandum of Mr. Tracey referred to, it should be absolutely necessary to the construction and advancement of the State Highway System which, otherwise, does not include waterways so far as I can see.

Yet to do this certain other statutes and the policy apparent therein would have to be completely ignored.

It is assumed that the Manasquan River at the point involved is both a tide water and navigable stream. By P. L. 1945, Chapter 22, the powers, etc. of the Department of Commerce and Navigation and of the Board of Commerce and Navigation are transferred to the Division of Navigation of the Department of Conservation. By P. L. 1948, Chapter 448, such powers were again transferred to the Department of Conservation and Economic Development.

By various acts including P. L. 1940, Chapter 52, P. L. 1946, Chapter 258, P. L. 1946, Chapter 313 (particularly as to Shrewsbury and *Manasquan* Rivers, when appropriations made); R. S. 12:2-14, R. S. 12:2-17, R. S. 12:3-7, R. S. 12:6-1, R. S. 12:6-13, R. S. 12:6-18 (involving U. S. government), there appears a clear intent to place under the Department of Conservation and Economic Development such projects as are contemplated in the question presented to me for opinion.

I have given the statutes conferring powers and authority upon the State Highway Commissioner and the State Highway Department the broadest possible interpretation, particularly in view of acts limiting the scope for the use of highway funds, but, in view of the other statutes referred to, I am of the opinion that the Legislature has shown a clear intent to place such projects as the present within the province of the present Department of Conservation and Economic Development. That opinion is supported further by the fact that by doing so there is a clearer division of authority and power between the two departments of the State government and less likelihood of overlapping jurisdictional questions, conflict and confusion.

It is therefore my opinion that the intent of the legislation referred to is to withhold from the jurisdiction of the State Highway Commissioner and Department the project mentioned and that therefore such Commissioner and Department could not properly expend the funds and enter into the contracts referred to under the facts and circumstances presented.

Very truly yours,
THEODORE D. PARSONS,
Attorney General,

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

m:m

MAY 23, 1949.

MRS. RUTH SCISCO, *Commissioner,*
Monmouth County Board of Elections,
Court House, Freehold, N. J.

FORMAL OPINION—1949. No. 56.

DEAR MRS. SCISCO:

Receipt is acknowledged of your letter of May 21st in which you submit the following query:

> "Under Title 19, New Jersey Election Law, Revised Statutes, paragraph 19:31-5, whereby it states that any person who will be twenty-one years of age by next ensuing general election may register and referring to paragraph 19:4-1 whereby a person having the qualification to vote in the general election may register and vote on the primary has been brought to my attention regarding the following question. May a person who will be twenty-one years of age on or before general election and who may vote in the primary have the privilege of voting in a Commission or City Manager election which takes place between the primary and general election?"

The Constitution by Article II, paragraph 3 provides:

> "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."

Revised Statutes, Sections 19:4–1 and 19:31–5 must be read in the light of the constitutional provisions quoted.

The sections of the Election Law referred to deal primarily with the question of registration. This matter was considered by our courts in the case of *In Re Freeholders of Hudson County*, 105 N. J. Law 57, and in the case of *In Re Ray*, 56 Atlantic Reporter 2d, p. 761. Therein the court draws a distinction between a qualified voter under the Constitution and one who becomes entitled to exercise the right to vote pursuant to the Registration Law wherein the courts held:

> "Registration does not confer the right; but is a condition precedent to the exercising of the right."

A person registered pursuant to the Election Law must have the constitutional age qualification, to wit, being of the age of twenty-one years at the time he attempts to vote in any Commission or City Manager election which takes place between the primary and the general election.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: JOSEPH LANIGAN,
Deputy Attorney General.

JL:MB

JUNE 2, 1949.

HON. JAMES B. SAUTTER,
Deputy State Treasurer,
State House.

FORMAL OPINION—1949. No. 57.

MY DEAR MR. SAUTTER:

I have your letter of May 26th calling my attention to Chapter 79 of the Laws of 1944, and requesting advice as to whether that act includes savings banks. The act in question makes lawful, under certain circumstances, deposits of State moneys "in such of the national banks located in this State and institutions authorized by this State to carry on a banking business."

The language just quoted first appeared in Chapter 235 of the Laws of 1902 and has been continued in the amendment of 1944.

So far as I am aware it has never been suggested before that a savings bank fell within the descriptive words above quoted. My view is that a savings bank does not carry on a banking business such as was in contemplation of the Legislature when the act of 1902 was enacted, for a savings bank carries on a business of limited character, and not such as is usually transacted by a national bank or a State bank or trust company, and I find nothing in Chapter 67 of the Laws of 1948, concerning banks and banking business which covers savings banks, which in any wise changes the opinion which I have expressed. We must remember that in construing the statute of 1902 we must, if possible, ascertain the legislative will, and I am sure that the legislative body which enacted that law never had in contemplation savings banks when it spoke of institutions carrying on a banking business.

Furthermore, the long continued practical construction of that statute apparently placed thereon by the officers of the State must be considered and given weight, for I am advised that no deposit of State moneys, under the act of 1902, as amended, has ever been made by the State in a savings bank by the many State Treasurers who have occupied that office since the year 1902.

I am therefore of opinion that savings banks do not fall within the meaning of the words "institutions authorized by this State to carry on a banking business" as used in the act of 1944 above referred to.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: THEODORE BACKES,
Deputy Attorney General.

TB:S

JUNE 2, 1949.

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

FORMAL OPINION—1949. No. 58.

DEAR COLONEL SCHOEFFEL:

Your letter of May 31, 1949, requesting an opinion as to whether or not your department should continue to pay compensation to Sergeant Norman while he is under the care of the Veterans Administration on 100% disability and is receiving aid from the United States Government, received.

The facts show that Norman was in the United States Army during the period from January 31, 1942, to March 1, 1945, on leave of absence from the Division of State Police, and during that time he contracted a severe case of arthritis and a skin disease known as scleroderma. Since he returned to the division he has lost time and has not performed his duties as a State trooper since January 17, 1949, because of the disability received in the United States Army.

Norman receives 100% disability from the government of $149.00 a month, which he has accepted, and he has performed no services for the State but he has received his full pay during that period.

My suggestion is that Sergeant Norman should be retired under the provisions of R. S. 53:5–3 for ordinary disability; that statute being applicable, as I read it, to a situation such as you described.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: ROBERT PEACOCK,
Deputy Attorney General.

JUNE 6, 1949.

HON. CHARLES R. ERDMAN, JR., *Commissioner,*
Dept. of Conservation and Economic Development,
Trenton 7, New Jersey.

FORMAL OPINION—1949. No. 59.

DEAR MR. ERDMAN:

Your letter of June 1, 1949, concerning approval of a permit to extend a pier approximately 300 feet into the ocean on behalf of the Seaside Land and Amusement Company is at hand.

You inquire as to whether or not the Planning and Development Council, when it grants riparian rights and a permit to erect a structure oceanward over those rights, assumes any responsibility for that which may occur on the structure thus permitted.

When your Council grants a permit to erect a structure oceanward over riparian rights to the owner thereof, your Council assumes no responsibility for that which may occur on the structure thus permitted.

Under R. S. 12:5–3 plans for the development of any waterfront upon any navigable water or stream which is contemplated by any person or municipality shall be submitted to your board and no such development or improvement shall be commenced without a permit from your board.

The board would not be responsible because it is the duty of your board primarily in granting permits to ascertain whether or not the structure permitted interferes with navigation.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: ROBERT PEACOCK,
Deputy Attorney General.

JUNE 9, 1949.

HARRY C. HARPER, *Commissioner,*
Department of Labor and Industry,
State House,
Trenton, New Jersey.

FORMAL OPINION—1949. No. 60.

DEAR MR. HARPER:

Your letter of May 24, 1949, requesting an opinion as to the authority of the Commissioner of Labor and Industry to issue or deny employment agency licenses under certain circumstances acknowledged, and opinion rendered as follows:

STATEMENT OF FACTS.

None.

QUESTIONS PRESENTED

The questions respectively embodied in your letter are: No 1. Does the Commissioner of Labor and Industry have the authority and the power to require an applicant for a private employment agency license to submit with his application a statement of the type and class of occupations in which he intends to furnish help or employment or information concerning help or employment?

ANSWER.

The answer is yes.

REASONS.

Under N. J. R. S. 34:8–3 and 34:8–4 a license to conduct an employment agency must be obtained by application to the Commissioner of Labor and Industry in writing. In making such application the applicant should state the type of business he is to engage in, the type and class of occupations in which he intends to furnish help or employment and, all information concerning help or employment sufficiently to give the commissioner enough facts to investigate and determine whether or not a license is necessary or should be denied; and, for other informational and regulatory purposes.

No. 2. Does the Commissioner of Labor and Industry have the authority and the power to refuse to issue a license to an applicant when it is shown to his satisfaction that such applicant does not have the fitness and qualifications to perform the functions for which he seeks a license?

ANSWER.

The answer is yes.

REASONS.

Under the N. J. R. S. 34:8–1 to 34:8–23, inclusively, the New Jersey Legislature enacted a statute providing for the licensing of private employment agencies and included therein statutory requirements to be performed by the applicant.

N. J. R. S. 34:8–4. Application for License.

Application for license to conduct an employment agency shall be made in writing to the commissioner of labor and shall state the name and number of the building and place where the agency is to be conducted.

The commissioner shall act on the application within thirty days after it has been filed but shall grant no license until the application shall have been on file for at least one week.

N. J. R. S. 34:8–5. Qualifications of Licensee; Proof.

Every applicant for an employment agency license shall furnish satisfactory proof of good moral character by the affidavits of at least two reputable citizens of the state and furnish proof of citizenship of the United States. Any person may object to the issuance or transfer of any license.

The commissioner or his representative shall investigate the character and responsibility of the applicant and shall examine the premises designated in the application as the place in which it is proposed to conduct the agency.

N. J. R. S. 34:8–15, Enforcement; Revocation of License.

The enforcement of this chapter shall be intrusted to the commissioner, who shall cause to be made at least bimonthly visits to every agency by such inspectors as he shall designate for that purpose. Each inspector shall have a suitable badge, which he shall exhibit on demand of any person with whom he may have official business. The commissioner 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 this State's highest courts and the United States Supreme Court.

Ribnik vs. *McBride,* 48 Sup. Ct. Rep. 543, 137 At. 437, 133 At. 870.
Brazee vs. *Michigan,* 36 Sup. Ct. Rep. 561.
McBride vs. *Clark,* 101 N. J. L. 213.

In the *Ribnik* vs. *McBride* New Jersey Supreme Court opinion citing *Brazee* vs. *Michigan,* United States Supreme Court opinion, the court 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."

Also citing *Clark* vs. *McBride, supra.* In the *McBride* vs. *Clark, supra,* the court said:

"Under Section 10 of our own statute the commissioner of labor may refuse to issue any license for good cause shown within the meaning of the act."

The same provision of section 10 of the old act appears in our New Jersey Revised Statutes in 34:18–15.

Consequently, the Commissioner of Labor and Industry may deny the applicant a license where he (the applicant) has not proved to the satisfaction of the commissioner that he possesses the fitness and qualifications to conduct an agency as is provided by law.

No. 3. Does the Commissioner of Labor and Industry have the authority and the power to restrict a license to classes or types of help or employment concerning which the applicant has established his qualifications and fitness?

ANSWER.

The answer is no.

REASONS.

The right to regulate employment agencies is delegated to the Commissioner of Labor and Industry by the Legislature. The courts and statutes have sustained this legislative right in *Ribnik* vs. *McBride, supra; Brazee* vs. *Michigan, supra,* and *Clark* vs. *McBride, supra.*

Under N. J. R. S. 34:8–15 and in the reported cases, particularly *Ribnik* vs. *McBride,* the commissioner may refuse a 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.*

6 R. C. L., p. 273:

There is nothing within the meaning of this act, N. J. R. S. 34:8–1 to 34:8–23, inclusive, which invests the Commissioner of Labor and Industry with the right to restrict a license to classes or groups based upon his ability to specialize in a certain trade employment. May it be noted that it is the Legislature which prescribes the regulations and qualifications and not the Commissioner of Labor and Industry. The Legislature in the enactment of N. J. R. S. 34:8–4 and 34:8–5 has limited the commissioner in the exercise of his discretion as to the qualifications required. The commissioner himself cannot read into the statute something which does not exist. In doing so, he would be usurping legislative functions. The statute is purely regulatory under our police powers and must be applied as it appears.

To permit the commissioner to restrict as for example require an engineer to employ an engineer, a window cleaner to hire a window cleaner, or a domestic a domestic, etc., would not be within the meaning of the act and, in the writer's opinion an unreasonable basis upon which the State should regulate the general business of employment agencies.

It would in effect preclude the public from engaging in general employment agency business and confine it to experts in a special field. This would be creating a situation not intended under the police powers of a State Legislature to regulate a business for the safety of the public morals and public health.

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

THEODORE D. PARSONS,
Attorney General,

By: LOUIS S. COHEN,
Deputy Attorney General.

LSC:TR

JUNE 9, 1949.

DR. WILLIAM S. CARPENTER, *President,*
Civil Service Commission,
State House.

FORMAL OPINION—1949. No. 61.

DEAR SIR:

Your department has inquired whether, under Chapter 27 of the Laws of 1949, an additional increment may be provided for employees in the $120 and $180 increment groups who, as of July 1, 1948, were at the maxima of their respective ranges and are now receiving $360 bonus and who, on July 1, 1949, will be allocated to new ranges whose maxima will be higher by an amount in excess of $360 than the maxima of their present ranges. It has been estimated that such adjustment would affect 1,321 employees and that the amount required therefor would be $159,928.

If such additional increment could not be granted, the result would be that the employees in question, who are senior to others by virtue of having reached their maxima on or before June 30, 1948, and so were not eligible for further increments on July 1, 1948, except for the bonus provided by Chapter 116, P. L. 1948, would not receive any increment in overall compensation on July 1, 1949, even though their new ranges would make them eligible to receive such increment, while employees junior to them would be receiving increases in overall compensation under the provisions of Chapter 27, P. L. 1949. The closing of the gap between such classes of employees would be due to the fact that the former pay differential between them was in the form of a bonus rather than a basic rate.

It is true that Chapter 27, P. L. 1949 does not authorize the proposed additional increment in express terms. However, Section 13 thereof provides:

> "The State Treasurer, the President of the Civil Service Commission and the Director of the Division of Budget and Accounting in the Department of the Treasury shall have power to make such rules and regulations as, in their discretion, appear to be necessary in order to achieve an equitable application of the provisions of this act."

In my opinion, the proposed additional increment is a matter involving the equitable application of the act, and thus within the power of adjustment given by Section 13 to the officers therein named, constituting the Salary Adjustment Board. The matter should therefore be presented to the board for its consideration and determination.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: THEODORE BACKES,
Deputy Attorney General.

JUNE 15, 1949.

HON. LLOYD B. MARSH,
Secretary of State,
Trenton, N. J.

FORMAL OPINION—1949. No. 62.

DEAR SIR:

Your letter of June 10th relative to the effect of P. L. 1949, Chapter 22, received.

The question, restated as we understand it after conferring with you, is as follows:

> By virtue of P. L. 1949, Chapter 22, must the oath of allegiance and office (prescribed in R. S. 41:1–3, as amended by said act, and required of persons elected or appointed to certain public offices, positions or employments) be taken and subscribed by every person who, before the effective date of said act, had already assumed the office, position or employment to which he was elected or appointed?

The answer is no.

Section 41:1–3 of the Revised Statutes, as amended by P. L. 1949, Chapter 22, reads as follows:

> In addition to any official oath that may be specifically prescribed, the Governor for the time being and *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, or of, or in, any county, municipality or special district other than a municipality therein, or of, or in, any department, board, commission, agency or instrumentality thereof, and every counsellor and attorney-at-law, *shall, before he enters upon the execution of his said office, position, employment or duty* take and subscribe the oath of allegiance and office . . . (Italics ours.)

A careful reading of this section will reveal that it applies prospectively on and after April 12, 1949 (the effective date of Chapter 22), by prescribing that "every person . . . shall, before he enters upon the execution of his said office, position, employment or duty take and subscribe the oath of allegiance and office . . ." Moreover, the title of the act supports this construction. The title reads:

> An act concerning the oath of allegiance and office and providing for the taking of the same as a *prerequisite to the assumption of public office, position or employment* . . . (Italics ours.)

Obviously, persons in public office, position or employment who had entered upon their duties before April 12, 1949, are not within the purview of the section as amended.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: DOMINIC A. CAVICCHIA,
Deputy Attorney General

JUNE 15, 1949.

HONORABLE HARRY C. HARPER, *Commissioner,*
Department of Labor and Industry,
State House,
Trenton, New Jersey.

FORMAL OPINION—1949. No. 63.

DEAR COMMISSIONER:

You ask whether in your capacity as Commissioner of Labor and Industry you have the authority and the duty of deciding or disposing of some three hundred and fifty cases involving applications for refund under the Unemployment Compensation Law, which the former Unemployment Compensation Commission had under consideration. In some of the cases, the Unemployment Compensation Commission received the testimony, transcripts of which are available. You inquire whether it is within your power to delegate the determination of such cases to another person or tribunal. Further, whether you have the duty and the power to make a decision from a reading of this testimony.

Chapter 446 of P. L. 1948, Section 1, provides:

"There is hereby established in the Executive Branch of the State Government a principal department which shall be known as the Department of Labor and Industry. * * *"

Section 2 (in part), provides:

"The administrator and head of the department shall be a commissioner, who shall be known as the Commissioner of Labor and Industry, * * *"

Section 5 provides:

"There is hereby established in the Department of Labor and Industry a Division of Labor, a Division of Workmen's Compensation, and a Division of Employment Security."

Section 6 (in part), provides:

"All of the functions, powers and duties of the existing * * * Unemployment Compensation Commission, and of the respective bureaus and divisions therein, and of the executive director of such commission are continued, but such functions, powers and duties are hereby transferred to the Department of Labor and Industry established hereunder."

Section 4 provides:

"The commissioner may delegate to subordinate officers or employees in the department such of his powers as he may deem desirable, to be exercised under his supervision and direction, and shall, by order, rule or regulation filed with the Secretary of State, designate one or more officers or employees in the department who may act for him and on his behalf in the event of his absence or disability."

It is my opinion that in the cases where the former Unemployment Compensation Commission received the testimony and transcripts thereof are available, the Commissioner of Labor and Industry is the sole authority who may now decide the issues. The exercise of the power of final decision in quasi-judicial proceedings is nondelegable. The pre-existing Unemployment Compensation Commission, having assumed jurisdiction and, by statute, its duties and powers having been transferred to the Commissioner of Labor and Industry, he is the only person who may now act. Cases which were not heard by the Unemployment Compensation Commission may be completed by designated assistants acting in behalf of the Commissioner of Labor and Industry, but again his power of determination may not be delegated. As an administrative function, the Director of the Division of Employment Security may hold any necessary hearings, and grant or deny applications for refund and if there is any disagreement, the Commissioner of Labor and Industry is required to afford the persons affected a hearing and decide the issues. Any person intending to seek a review in our courts of an administrative determination must secure a final decision of the agency involved by exhausting all available administrative remedies. (Superior Court Rules 3:81–14.) Thus, the Commissioner of Labor and Industry, as the administrator and head of the department, is vested with the final authority to grant or deny any application for refund.

The Court of Errors and Appeals in the case of *Horsman Dolls, Inc.* vs. *Unemployment Compensation Commission,* in its opinion, in part, stated as follows:

"Any power of decision invested in or exercised by such hearer, examiner or 'referee' is ultra vires."

The delegation by regulation to a referee of the power of determination granted by the statute to the Unemployment Compensation Commission and its Executive Director was declared invalid by the court. Likewise, the power of final determination conferred upon the Commissioner of Labor and Industry is an investiture which may not be delegated to any other person or tribunal and any such attempted delegation is void.

Where the property rights of individuals are being weighed and a person is denied some of his rights by an administrative determination, which he is required to forfeit to the benefit of another or the general public, the administrative process takes on a judicial aspect and this is referred to as the "quasi-judicial" function of such administrative bodies. This official function is to be distinguished from the purely executive or administrative functions. An application for refund involves a property right. Where the denial of such application is involved, the opportunity for a "hearing" must be afforded before final decision. The Commissioner of Labor and Industry, however, may obtain the aid of assistants. They may hold hearings and the evidence so obtained may be sifted and analyzed for him.

The Unemployment Compensation Law (R. S. 43:21–14 (f) specifically provides that any determination of an employer's right to refunds of contributions is solely and exclusively vested in the Commission or Executive Director. This duty and authority has not been limited or impaired by any statute, and in the absence thereof, the Director of the Division of Employment Security, who is in fact a counterpart of the Executive Director of the Unemployment Compensation Commission, may grant or deny applications for refund. His action, however, is at all times subject to the direction and supervision of the Commissioner of Labor and Industry. The director may grant or deny applications for refund as an administrative function solely

and, if there is any disagreement, the Commissioner of Labor and Industry is required to afford the person affected a hearing as indicated and thereafter decide the issues.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

TDP:NR

JUNE 10, 1949.

HON. HARRY C. HARPER,
Commissioner of Labor and Industry,
State House,
Trenton 7, N. J.

FORMAL OPINION—1949. No. 64, supplementing
FORMAL OPINION—1949. No. 42.

Re: Employment of Minors in Agricultural Pursuits.

DEAR COMMISSIONER:

Your request for a further opinion relating to Formal Opinion, No. 42 and raising additional matters has been received.

While the precise question propounded is whether or not the duties of a minor in selling the products of his employer are to be classified as agricultural or mercantile and are, therefore, an incident to ordinary farming operations as distinguished from manufacturing or commercial operations, the more fundamental issue is the distinction between the two classifications.

The so-called Child Labor Law (R. S. 34:2-21.1 (e)) defines "Agriculture" as follows:

> "'Agriculture' includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section fifteen (g) of the Agricultural Marketing Act, as amended) the planting, transplanting and care of trees and shrubs and plants, the raising of livestock, bees, fur-bearing animals or poultry, *and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations,* including preparation for market, delivery to storage or to market or to carriers for transportation to market, provided that such practices shall be performed in connection with the handling of agricultural or horticultural commodities the major portion of which have been produced upon the premises of an owning or leasing employer." (Italics ours.)

It must be noted that the statutory definition by the use of the words ". . . and any practices (including any forestry or lumbering operations) performed by a farmer

or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market . . ." does not exclude or limit anything beyond preparation for market but rather extends the general broad provision annunciated by the words "and any practices . . . performed by a farmer or on a farm as an incident to or in conjunction with farming operations."

It appears from the definition that it was the purpose of the Legislature to include within its definition of agriculture, employees engaged in rendering *any* service incidental to or connected with agricultural pursuits.

There is as yet in New Jersey, a scarcity of judicial decisions dealing with the question herein being considered, but recourse to reported cases of other jurisdictions uncovers an abundance of judicial decisions in analogous cases.

The Federal Social Security Acts (42 U. S. C. A., Section 901, et seq. in Section 1107 (c)) defines "employment" as meaning "any service, of whatever nature, performed . . . by an employee for his employer, except (1) Agricultural labor." The latter is defined as

> *Agricultural labor.* The term "agricultural labor" includes all services performed
>
> (a) By an employee, on a farm, in connection with the cultivation of the soil, the harvesting of crops, or the raising, feeding or management of live stock, bees, and poultry; or
>
> (b) By an employee in connection with the processing of articles from materials which were produced on a farm; also the packing, packaging, transportation, or marketing of those materials or articles. Such services do not constitute "agricultural labor," however, unless they are performed by an employee of the owner or tenant of the farm on which the materials in their raw or natural state were produced, and unless such processing, packing, packaging, transportation, or marketing is carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations.

In the case of *Davis & Co.* vs. *Major and Council of Macon,* 64 Ga. 128, the court clearly distinguished between agricultural and commercial by employing the following language:

> "The business of a farmer is production, not trade, and the sale directly by himself of what he rears or produces is merely occasional or incidental. . . . The producer whose trade is incidental to production, and the middleman whose trade is intermediary between the producer and the consumer belong not to the same class. . . ."

The Legislature having by its enactments declared policies and fixed primary standards, may validily confer on administrative officers power to "fill up the details" by prescribing rules and regulations to promote the spirit and purpose of the legislation and its complete operation. (*United States* vs. *Shreveport Grain and Electric Company,* 287 U. S. 77.) However, when as here, the Legislature has made use of unmistakable language in setting forth that the Child Labor Act shall not apply to agriculture under certain specified conditions, and when as here, the great weight of logic and reason compels one to the conclusion that the sale of horticultural products by an employee of the grower or nurseryman is incidental to and in connection with the

agricultural business of the employer, administrative officers should not by devious or arbitrary construction attempt to override its intent.

Whether the activities of an employee in any particular case are to be considered agricultural or commercial or industrial, must depend on the facts of the particular case and no definite rule of general application can be evolved.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

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

JUNE 10, 1949.

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

Attention: L. M. LOUNSBERY, *Veterinarian in Charge, Food & Drug Section.*

FORMAL OPINION—1949. No. 65.

DEAR SIR:

This is in response to your communication dated May 24, 1949, concerning a milk product labeled "Frozen Milk Drink."

It appears from your communication that sugar and flavoring are mixed with a high test milk, the mixture agitated, then partially frozen in an ice cream freezer and subsequently placed in a "hardening" room to complete the freezing process. The finished product is transported in refrigerated trucks to the company's retail outlets, placed in a storage box and scooped from the container as needed. The product is labeled "Frozen Milk Drink—For Milk Shakes Only" and is supposedly used only in making milk shakes.

Analysis discloses that it contains less than ten per cent butterfat and more than five per cent total milk solids. On examination, the product has the texture and characteristics of ice cream. Three questions arise and their answers follow:

Question 1: Is the product an imitation ice cream where it is not sold in the frozen state as ice cream (R. S. 24:10-63)?

Answer: No.

Question 2: Does R. S. 24:10-65 apply?

Answer: No.

Question 3: Can R. S. 24:10-66 be applied independently of the above sections?

Answer: No.

For the sake of clarification, an explanation of the answers is needed. The provisions of R. S. 24:10-58 to 73 were taken from Chapter 271, P. L. 1907 (An act to secure the purity of foods, beverages, confectionery, condiments, drugs and medicines, and to prevent deception in the distribution and sales thereof). Chapter 271, P. L. 1933, was amended by Chapter 437, P. L. 1933. These statutes regulate the manufacture, production, distribution and sale of ice cream and similar frozen food products.

R. S. 24:10-58 (in the first paragraph) defines ice cream as any frozen, sweetened, milk product, which is agitated during the process of freezing and includes every frozen milk product which contains more than five per cent by weight of total milk solids and which, in any manner, simulates the texture and characteristics of ice cream. The product in question comes within the terms of this definition. However, the second paragraph of this section then sets up the standards of ice cream and requires the finished product to contain not less than ten per cent butterfat by weight, with some exceptions, not applicable here. The product in question does not conform to the standards required as it is deficient in the amount of butterfat. The product also is not a sherbet within the definition contained in R. S. 24:10-60 as it contains more than five per cent by weight of total milk solids.

R. S. 24:10-63 defines imitation ice cream and ice cream substitute as any frozen, sweetened product containing milk solids, manufactured in a manner similar to the process of manufacturing ice cream, and which contains less than the percentage of butterfat required for ice cream and more than five per cent of total milk solids. When this definition is applicable, the product in question comes within it and would be classed as imitation ice cream or ice cream substitute, or both.

R. S. 24:10-65 prohibits the sale of ice cream which is adulterated. Ice cream is adulterated (R. S. 24:10-66) if it is an imitation ice cream or ice cream substitute, or if it falls below the standards fixed under this provision. The product in question, if sold as ice cream, would be considered adulterated under this section, and its sale, therefore, prohibited. However, the product in question is not sold as ice cream and should not be considered adulterated if not sold as the article of which it is purported to be an adulteration.

The latter part of R. S. 24:10-65 prohibits the sale of any imitation ice cream or ice cream substitute as defined in R. S. 24:10-63. This product comes within the terms of that definition and if R. S. 24:10-65 is strictly and literally applied, it would prohibit the sale of this product entirely. Such an absolute prohibition of sale which has no relation to health aspects, where the product is wholesome and in no way deleterious to health, in my opinion is too strict, too literal, and not a reasonable construction. It is my opinion that the prohibition of sale of imitation ice cream or ice cream substitute applies when it is sold as the article of which it is an imitation or a substitute, but it is not prohibited if not sold as the article of which it is an imitation, a substitute, or an adulteration.

I am forced to conclude that the sale of "Frozen Milk Drink" does not violate the act unless sold as, or for, ice cream or substituted for it. The method of sale would be the determinative factor. If it is sold in milk shakes as ice cream, or substituted in its place therein, this would constitute a violation, but if not so sold or substituted, I do not think that the sale of this product is absolutely prohibited.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: JOSEPH A. MURPHY,
Assistant Deputy Attorney General.

JAM:MB

JUNE 20, 1949.

MR. GEOGRE M. BORDEN, *Secretary,*
State Employees' Retirement System,
1 West State Street,
Trenton, New Jersey.

FORMAL OPINION—1949. No. 66.

MY DEAR MR. BORDEN:

I have your letter of the 15th instant, from which it appears that Hon. John L. Hughes, Judge of the Third Judicial District Court of Union County, was admitted to membership in your Retirement System.

Judge Hughes having received his appointment from the Governor, with the advice and consent of the Senate, is a State officer, but his compensation is paid by the County of Union. No question is raised as to the right of Judge Hughes to membership in your Fund. The sole question, I understand, is whether Judge Hughes is entitled to credit for service which he rendered as Attorney for the Borough of New Providence. It appears that Judge Hughes was appointed as such attorney on April 6, 1926, but was not the Borough Attorney at the time New Providence adopted the provisions of your act. I do not see how the Borough of New Providence can certify him as a member.

Judge Hughes in his correspondence refers to R. S. 40:11-5, but that section has not the slightest application to a State officer. As I have already indicated, he received his appointment from the State and is, therefore, a State officer. See *Pierson* vs. *O'Connor,* 54 N. J. Law 36.

In my opinion, Judge Hughes is not entitled to any credit for service which he may have rendered to the Borough of New Providence.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: THEODORE BACKES,
Deputy Attorney General.

TB:S

JUNE 22, 1949.

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

FORMAL OPINION—1949. No. 67.

MY DEAR MR. BORDEN:

I have your letter of the 16th instant, stating that your Retirement System became effective as to the employees of the Housing Authority of the City of Newark on July 1, 1947, and that one of the employees of the Housing Authority, who then held a temporary civil service position, finally received permanent appointment under Civil Service Law. The question is, whether he is entitled to a prior service credit. The answer is yes. The Housing Authority employees of the City of Newark were admitted to membership in your Retirement System pursuant to the provisions of Chapter 289 of the Laws of 1946, and membership in your Fund was made compulsory for all employees of such Housing Authority who entered service after such act became effective as to the employees of such Housing Authority, and being admitted to membership they are entitled to all the benefits of your Retirement System as if they were State employees. See Section 5 of Chapter 280 of the Laws of 1946. This being so, by Section 1 of Chapter 211 of the Laws of 1947 a person temporarily employed by the State, where such employment resulted in permanent employment, is permitted to make contributions covering that period of time when temporarily employed.

Accordingly, the employee of the Housing Authority of the City of Newark who was admitted to membership after the Housing Authority act became effective, is entitled to credit for all services rendered by him to the Housing Authority from the date of his first temporary employment.

Of course, in order to get the full credit, as you know, he must pay on account of the annuity feature from the time the Housing Authority act became effective.

In view of your statement in your letter that other questions similar to the one above mentioned may occur from time to time, I have concluded to render you a formal opinion covering the matter. An opinion similar to this was rendered to you on June 15, 1949, but by its very terms it is not to be considered as a precedent.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: THEODORE BACKES,
Deputy Attorney General.

TB:S

JUNE 23, 1949.

HONORABLE DONALD G. COLLESTER,
County Prosecutor,
Court House,
Paterson, New Jersey.

FORMAL OPINION—1949. No. 68.

DEAR SIR:

Receipt is acknowledged of your request of May 27, 1949, for a formal opinion with respect to the effect of Chapter 80 of the Laws of 1948 upon jurisdiction of the county prosecutors when read in conjunction with Rule of Court 8:4–1.

The county prosecutor is a constitutional officer, nominated and appointed only by the Governor with the advice and consent of the Senate. (Art. VII, Sec. 2, par. 1, N. J. Constitution of 1947.) The Constitution makes no provision for the duties of the office, and they are therefore by necessary implication left to definition by the Legislature. *Public Utility Commission* vs. *Lehigh Valley Railroad Company* (E. & A., 1929), 106 N. J. L. 411; *State ex rel O'Reardon* vs. *Wilson* (D. C., 1926), 4 N. J. Misc. 1008. See *State* vs. *Longo* (E. & A., 1947), 136 N. J. L. 589.

The Legislature has vested in the prosecutors of the pleas (now county prosecutors) the exclusive jurisdiction over the criminal business of the State except in counties where for the time being there be no prosecutor, or where the prosecutor desires the aid of the Attorney General, or as otherwise provided by law. R. S. 2:182–4.

The Supreme Court has promulgated a rule governing local criminal courts. Rule 8:4–1 provides as follows:

> "Whenever in his judgment the interests of justice so require, or upon request of the magistrate, the attorney general, county prosecutor, or municipal attorney, as the case may be, may appear in any court on behalf of the state, or of the municipality, and conduct the prosecution."

Nowhere in the Constitution, the decisions or the statutes, is the Supreme Court of New Jersey given any jurisdiction to alter the powers of the county prosecutors by removing or supplanting the jurisdiction which the Legislature has vested in that office. As a result the answers to your questions are as follows:

First: Under Rule 8:4–1, the municipal attorney does not supersede the county prosecutor in a prosecution of criminal cases heard by the municipal court under Chapter 80 of the Laws of 1948, but his authority is concurrent with that of the county prosecutor, who may step in at any time to take over said prosecution.

Second: The county prosecutor has exclusive and complete control over criminal prosecutions within the county, and the provisions of Chapter 80 of the Laws of 1948 are an additional means of disposing of the criminal business of the State which the prosecutor may or may not recognize as he sees fit. Rule 8:4–1 does not supersede Sections 2:182–4 and 2:182–5 of the Revised Statutes.

Third: The municipal attorney does not have the right to conduct preliminary hearings before the magistrate and does not supersede the prosecutor therein. These

are indictable offenses and are not listed specifically in the statute (Chapter 80 of the Laws of 1948). The jurisdiction of the municipal magistrate and of the municipal attorney is strictly limited by statute.

Fourth: The municipal attorney cannot "appear in any court on behalf of the State upon the request of the municipal attorney and conduct the prosecution." Rule 8:4–1 of necessity applies only to "Local Criminal Courts." Rules of other courts apply in said other courts and a municipal attorney can act only under the authority of this rule, read in the light of appropriate statutes. The municipal attorney may only appear in those cases where he is permitted by statute to appear and those cases wherein his particular municipality has an interest, and then only when the county prosecutor chooses to permit him to exercise his exclusive jurisdiction over the criminal business of the State as provided for in R. S. 2:182–4.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: HENRY F. SCHENK,
Deputy Attorney General.

hfs:d

JUNE 29, 1949.

AUGUSTUS C. STUDER, JR., ESQ.,
11 Commerce Street,
Newark 2, New Jersey.

FORMAL OPINION—1949. No. 69.

DEAR MR. STUDER:

Receipt is acknowledged of your letter of June 27th, in which you call attention to your recent appointment as counsel of the New Jersey Turnpike Authority (created under P. L. 1948, Chapter 454) and request an opinion as to whether, in that capacity, you come under the supervision of the Attorney General.

Our opinion is that your employment as counsel to the New Jersey Turnpike Authority was within the powers granted to that body under Section 5(m) of P. L. 1948, Chapter 454, and that you, as such counsel, do not come under the supervision of the Attorney General.

In reaching this conclusion we have examined the provisions of P. L. 1944, Chapter 20, whose purpose, as stated in section one thereof, was "to accomplish economy and efficiency by centralizing, in one department, the facilities afforded by the State for the rendering of legal services to the Governor and to all officers, departments, boards, bodies, commissions and instrumentalities of the State Government . . ." The purpose so declared in this section, together with other provisions of the said act, clearly established a policy for the State with respect to the centralization of legal services in a Department of Law (now Division of Law) under the Attorney General. Therefore, any pertinent statute passed subsequent to said 1944 Law must be read in the light of such policy.

Under P. L. 1948, Chapter 454, section 5(m), the New Jersey Turnpike Authority is empowered:

> "To employ consulting engineers, attorneys, accountants, construction and financial experts, superintendents, managers, and such other employees and agents as may be necessary in its judgment; to fix their compensation; and to promote and discharge such employees and agents; all without regard to the provisions of Title 11 [Civil Service] of the Revised Statutes;"

This provision would not of itself necessarily lead to the conclusion that said Authority was empowered to employ attorneys (counsel) regardless of the policy laid down by P. L. 1944, Chapter 20. However, such conclusion is inescapable by force of section 21 of P. L. 1948, Chapter 454, which reads:

> "All other general or special laws, or parts thereof, inconsistent herewith are hereby declared to be inapplicable to the provisions of this act."

Thus, with respect to the rendering of legal services to the New Jersey Turnpike Authority, the Legislature, by empowering said Authority to employ its own attorneys, has deviated from the policy established by P. L. 1944, Chapter 20, and, to that extent, has undone the purpose of said act.

Moreover, inasmuch as your appointment as counsel was under and by virtue of P. L. 1948, Chapter 454, we know of no provision of law which places you in the Division of Law or otherwise under the supervision of the Attorney General.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: DOMINIC A. CAVICCHIA,
Deputy Attorney General.

JUNE 29, 1949.

DR. E. S. HALLINGER, *Secretary,*
State Board of Medical Examiners,
28 West State Street,
Trenton, New Jersey.

FORMAL OPINION—1949. No. 70.

DEAR SIR:

This is in response to your letter dated June 15, 1949, requesting the opinion of this office concerning the applicability of the Civil Service Law to an inspector appointed under the provisions of Section 45:9–3 and also the employees of your Board. Three questions are set forth in your request for opinion, and they will be answered in the order in which you have asked them.

QUESTION 1: Did the revision of the Constitution or the passage of Senate No. 27 (now Chapter 439, P. L. 1948) make it mandatory that all employees be placed under Civil Service?

Answer: Neither the Constitution of 1947 nor Chapter 439, P. L. 1948, in and of themselves, made it mandatory that all employees of your Board be placed under Civil Service.

QUESTION 2: Did the passage of these laws (Chapter 439, P. L. 1948) repeal or invalidate any section of the Medical Practice Act, such as Section 45:9–3 which definitely states that the inspector of the Board shall not be subject to the provisions of the Civil Service Law?

Answer: Chapter 439, P. L. 1948, did not repeal or invalidate Section 45:9–3 of the Revised Statutes which provides for the appointment of an agent known as the inspector of the Board. It did, however, place an additional limitation upon the power of appointment given the Board in said Section 45:9–3 by requiring such appointment to be approved by the Attorney General. (See Sec. 33, Ch. 439, P. L. 1948.)

QUESTION 3: This question relates to salary and is of a general nature. I understand, however, that you wish to be advised whether the salary of the inspector must be approved by the Civil Service Commission as well as the Attorney General. The answer will, therefore, be limited to that particular question.

Answer: Section 45:9–3 of the Revised Statutes provides for the appointment of an inspector and states *inter alia* that such agent shall receive such compensation as the Board shall fix and further, that the appointment shall not be subject to the provisions of the Civil Service Law. Section 33, Chapter 439, P. L. 1948, also provides that such persons shall receive such compensation as shall be fixed by such Board within the limits of available appropriations. In view of the wording of said sections, it is our opinion that the salary fixed by the Board for such officer does not need the approval of the Civil Service Commission.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: JOSEPH A. MURPHY,
Assistant Deputy Attorney General.

JAM:MB

JULY 1, 1949.

MR. GEORGE M. BORDEN, *Secretary,*
State Employees' Retirement System,
1 West State Street,
Trenton 7, New Jersey.

FORMAL OPINION—1949. No. 71.

MY DEAR MR. BORDEN:

I have your letter of the 27th ult. with enclosure of letter from your actuary, Mr. Buck, from which it appears that some of our counties and municipalities adopted the provisions of your Retirement System Act at the general election in November, 1948, and that the action of the legal voters became effective in the counties or municipalities so adopting on June 30th of the following year, that is yesterday. It also appears that at the last session of the Legislature, Chapter 28 was enacted to take effect this date, that is July 1, 1949. Chapter 28 amended section 43:14–1 of your Retirement System act and provided that regular interest should mean 3% per annum compounded annually in the case of members enrolled in the Retirement System on and after July 1, 1949, and in the case of all others, interest at 4% per annum compounded annually.

It also appears that some of the counties and municipalities adopting your act sent in applications of some of their employees for membership in your fund, such applications being received on or before June 30, 1949. With respect to these employees, as Chapter 28 of the Laws of 1949 did not become effective until this date, to wit, July 1, 1949, the interest rate of 4%, in my opinion, prevails. With respect to all employees enrolled on or after this date, to wit, July 1, 1949, the interest rate of 3% must prevail.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: THEODORE BACKES,
Deputy Attorney General.

TB:B

JULY 5, 1949.

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

FORMAL OPINION—1949. No. 72.

DEAR SIR:

The Honorable Frank J. Pfaff, a member of the Union County Board of Taxation, has applied for membership in the State Employees Retirement System. You have inquired (a) who is the proper person to certify as to his employment and service record, and (b) whether the applicant is eligible for membership in the State Retirement System.

A county board of taxation, although an integral part of the State tax system, is created by law as a body independent of and separate from any other department of the State government. Its members are appointed by the Governor with the advice and consent of the Senate, and the term of office of each member, as well as his salary, is fixed by statute. (N. J. S. A. 54:3–2, 3, 6.) The board elects its own president from among its members (54:3–5), and appoints its own secretary and clerical assistants (54:3–7). Its function is to secure the taxation of all property in the county at its true value (54:3–13), and to accomplish this end, it is vested with supervision and control over all officers charged with the duty of making assessments in the county (54:3–16), and is given jurisdiction to hear and determine appeals from assessments (54:3–21, 22).

In my opinion, if the applicant for membership in the State Employees Retirement System is a member of the County Board of Taxation other than the president, the president of the board is the proper person to certify the application. If the applicant is the president of the board, the other members thereof should certify to that fact in writing, and their signatures should be attested by the clerk of the board.

As to whether Mr. Pfaff is eligible for membership in the State Retirement System, the statute (43:14–2) provides that the Board of Trustees "may deny the right to become members of the retirement system . . . to any class of persons not within the classified civil service." Since the applicant here, being a member of a State board appointed by the Governor, is not within the classified service (11:4–4), it is optional with the Retirement Board as to whether or not the application for membership will be granted.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: THEODORE BACKES,
Deputy Attorney General.

July 7, 1949.

HON. WILLARD G. WOELPER,
Administrative Director of the Courts,
State House Annex,
Trenton, New Jersey.

FORMAL OPINION—1949. No. 73.

DEAR SIR:

Your letter of June 24, 1949, requesting an opinion concerning payment to official stenographic reporters is herewith acknowledged.

The facts in question are as follows:

One of the stenographic reporters, who was a proxy prior to September 15, 1948, has been ill for some time and therefore unable to pursue his duties as such reporter.

The questions presented are:

1. Does the administrative director have control over payments by the county?

2. Is the reporter in question entitled only to the usual sick leave pursuant to civil service regulations and should the director of the courts notify the County Treasurers that the State will not refund any sum paid in compensation to such reporter in excess of the usual sick leave, pursuant to Chapter 376, Laws of 1948?

The answer to the first question is that the director does not have control over payments made by the county. The counties have their own fiscal set-up and are authorized to disburse their funds exclusive of authority from the State Treasurer's office.

The answer to the second query is that you should notify the County Treasurers that the State will not refund any sums paid by counties through their generosity, when compensation has been made to such reporter in excess of the reasonable sick leave term set down by the administrative director.

The civil service regulations do not obtain as far as official stenographic reporters are concerned. These reporters come under the act to create a State Board of Shorthand Reporting. Therefore, the civil service regulation with reference to the right of compensation during sickness is inapplicable.

However, the Laws of 1948, Chapter 376, gives the administrative director wide latitude concerning the control and operations of official stenographic court reporters. It would seem that he could and should determine the policy of compensation of reporters during sickness and set down what he considers a reasonable period of time commensurate with the length of employment of the reporter. He should notify the County Treasurers that any payment made by them beyond the reasonable period already determined will be strictly for their own account and that the State Treasurer will not reimburse any county (paragraph 9 g, Chapter 376, Laws of 1948) for any voluntary payment made by said county in excess of the reasonable period decided upon.

Respectfully submitted,

THEODORE D. PARSONS,
Attorney General,

By: OSIE M. SILBER,
Deputy Attorney General.

oms;d

July 11, 1949.

MR. C. P. WILBER,
State Forester,
Division of Forestry,
Dept. of Conservation and Economic Development,
State House Annex.

FORMAL OPINION—1949. No. 74.

DEAR SIR:

Your letter of June 30, 1949, requesting an opinion as to whether your department has violated any agreement with Mr. Stephens, by authorizing use of a portion of the area by the National Guard, is herewith acknowledged.

The facts in question are as follows:

On November 12, 1936, the Stephens family made an offer to the State of New Jersey of 236 acres of land to be used for park recreation and conservation purposes. This acreage consisted of five tracts of land in the Township of Mt. Olive, Morris County, and partly in the Town of Hackettstown, Warren County. The State, through the proper authorities, advised the Stephens family that it could only accept a deed which had no conditions or restrictions or reservations, which was in pursuance of the State's policy. Accordingly, on May 20, 1937, a deed was executed by the Stephens family to the State of New Jersey completely free from any conditions or restrictions.

On January 9, 1940, an agreement was entered into between the Board of Conservation and Development and the Stephens family whereby the Board aforesaid recited the conveyance of 236 acres for a park known as Stephens State Park. In this instrument it was agreed that the Stephens family could use the dwelling house located on said premises during their lives and during the lifetime of the daughter of one of the donors. No restrictions or limitations were imposed by this agreement which was made gratuitously and without consideration. No restrictions were imposed upon the grant heretofore made.

Some time ago, at the request of the State Department of Defense, Commissioner Erdman, for the Department of Conservation and Economic Development, executed an agreement with the Department of Defense, authorizing the use of a portion of the area of Stephens State Park for National Guard use for the erection of an armory, equipment building and a tank training course. The construction of equipment building was begun before any protest was made by Mr. Stephens, and is now well under way. This building is being erected with Federal funds. To the foregoing, the Stephens family has objected, contending the use for the National Guard was in violation of park, recreation and conservation purposes.

The question presented is, has there been a violation of any agreement between the Stephens family and the State?

My reply is that the State has not violated any agreement with the Stephens family. Any preliminary discussion prior to the making of the deed became merged into the deed itself and as the deed contains no use restrictions or other covenant, no limitation exists. Prior to the acceptance of the gift, the grantors were advised that the deed would not be accepted if it contained any use restrictions or limitations, and accordingly an unconditional grant was made as appears by the deed itself. Even

if it be inferred that preliminary letters amounted to a contract, all of the conditions imposed were superseded by the deed.

In *McKelway* vs. *Seymour,* 29 N. J. L. 321, the Court held:

> "Land conveyed to be used for a certain purpose, and to be forfeited on the cessation of such use, if used for other purposes, is not ground for forfeiture of title, provided it also continues to be used for the purpose specified."

In *Crane* vs. *McMurtrie,* 77 N. J. E. 545, the Court stated:

> "A grantor cannot, by creating practical difficulties after he has made a grant that is free from them, defeat the grant or influence its legal construction."

In *Brownback* vs. *Spangler,* 101 N. J. E. 388, the Court stated:

> "Rights of parties to conveyance are to be determined by deed accepted and not by agreement to convey. The recognized rule is that the acceptance of a deed for land is to be deemed *prima facie* full execution of an executory agreement to convey and thenceforth the agreement becomes void, and the rights of the parties are to be determined by the deed and not by the agreement. The only exceptions to the rule appear to be in cases of covenants which are collateral to the deed and also cases in which the deed would be considered only a part execution of the executing contract."

In *Long* vs. *Hartwell,* 34 N. J. L. 116, the Court stated:

> "Where in a deed there is an absence of covenants against encumbrances, the vendee cannot resort to the contract. . . . In all cases, the deed, when accepted, is presumed to express the ultimate intent of the parties with regard to so much of the contract as it purports to execute."

It is interesting to note that the land conveyed by the Stephens family is and has been used as a park. The portion presently used by the National Guard in no way whatsoever diminishes the grant for park purposes. A study of the land encompassed by the gift shows that the lowest portion bordering on the D. L. & W. Railroad is that which is being used for National Guard purposes. This portion is so located and of such a character that it did not lend itself for development for use of public recreation. The placing of the National Guard in that area did in no way whatsoever eliminate any land from the Stephens Park for recreation as same could not and would not be used for that purpose. On the contrary, the use presently existing is of a tremendous value and protection to the remainder of the park as an added fire protection is being realized. Even at the outset the land in question was considered completely undesirable for recreation purposes and therefor the area was planted up for reforestation; a year or two later fire completely destroyed this area.

The land granted is and has been used as a park and will continue so to be. The presence of the National Guard in the lower undesirable area is without question a desirable asset to the park. The original grant provided for no forfeiture with respect to use of land, and even if it had so provided, the continued use of the land as a park, as well as use by the National Guard, would in no way result in forfeiture to the grantor. See *McKelnay* vs. *Seymour, supra.*

An analysis of R. S. 13:1-1 et seq. shows the powers and duties imposed upon members of the Board of the Department of Conservation and Development. It is incumbent on the Board to make a careful inspection and make surveys of land with respect to development, protection and management, R. S. 13:1-19. It is within the province of the Board when, in its judgment, it deems that the best interests of the State would be served, even to sell or exchange any portion of the land acquired by gift or purchase, R. S. 13:1-23. The Board in its administration of lands or property acquired, has the power to install permanent improvements for the protection, development, use, maintenance thereof . . . R. S. 13:1-24.

It can readily be seen from all of the foregoing that the Department of Conservation and Economic Development has exercised sound discretion in giving the added protection to the park as aforesaid and has faithfully and diligently fulfilled the duties imposed upon it pursuant to the statute made and provided.

From all of the foregoing it is my opinion that your Department has not violated any agreement with the Stephens family by permitting the National Guard to occupy the portion of the premises herein discussed.

Respectfully submitted,

THEODORE D. PARSONS,
Attorney General,

By: OSIE M. SILBER,
Deputy Attorney General.

oms;d

June 23, 1949.

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

FORMAL OPINION—1949. No. 75.

DEAR SIR:

You advise that a former patient at the New Jersey State Hospital at Trenton died in that institution on or about November 2, 1931, leaving the sum of approximately $200 on deposit in the institution.

After a year had elapsed following the death of the patient, this sum of money was turned over to the State Treasurer, pursuant to R. S. 30:4-132, which provides substantially that unclaimed personal property of deceased patients shall be held at the institution for a period of a year awaiting claim therefor and failing such claim shall be paid to the State Treasurer.

An administrator had been appointed to handle the estate of the decedent, but this fact seemed to be unknown to the institution officials; otherwise, we presume they would have paid the moneys to him. The original administrator died and a substituted administrator has recently qualified and has made claim upon you for payment to him of this sum of money. The decedent was supported partially at

the expense of the State, and the hospital now has a claim for this unpaid maintenance which is in excess of the fund on deposit.

You desire to be advised whether you should honor the claim of the administrator and make payment to him of this asset in the estate of the decedent in view of the counterclaim of the State for unpaid maintenance.

It is our opinion, and we so advise you, that you cannot make payment to the administrator of the sum of money which was turned over to your office under R. S. 30:4-132 unless and until such an item is included in an appropriation act approved by the Legislature.

This for the reason that these moneys have long since been merged with other State funds in the Treasury and "no money shall be drawn from the State Treasury but for appropriations made by law." (N. J. Constitution, Art. VIII, Sec. II, par. 2.)

In view of the foregoing, it becomes unnecessary to advise you at this time regarding the effect of the counterclaim of the State against these funds for maintenance of the decedent at a State institution.

This is a proper matter for consideration by the Legislature at the time of passage of such legislation.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: EUGENE T. URBANIAK,
Deputy Attorney General.

ETU:HH

July 19, 1949.

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

FORMAL OPINION—1949. No. 76.

DEAR DIRECTOR DEVALLIERE:

This will acknowledge your communication dated July 14, 1949, asking for an opinion as to the language of the 1948-1949 Appropriations Act concerning the request made by the Highway Department for the carrying over of $27,000 of the 1948-1949 salary appropriations to the fiscal year 1949-1950 for the purpose of paying salaries of employees to be hired in the future.

Section 1, Chapter 117, P. L. 1948, reads as follows:

> "1. The appropriations herein made or so much thereof as may be necessary are hereby appropriated for the respective public officers and for the several purposes herein specified for the fiscal year ending on the thirtieth day of June, one thousand nine hundred and forty-nine. The appropriations herein made for debt service, for State aid to counties and municipalities under R 3, and for State Highway purposes under R 8, herein shall not lapse by reason of the expiration of said period. *The appropriations herein made, other than those for debt service, State aid to counties and municipalities under R 3, and for State Highway purposes under R 8, shall be available for expenditure during said fiscal year and for a period of two months thereafter to pay obligations incurred during said period only. At the expiration of said two months period all unexpended balances except in appropriations herein made for debt services, State aid to counties and municipalities under R 3 and for State Highway purposes under R 8 and in appropriations to the extent specifically held by contracts on file with the Commissioner of Taxation and Finance shall lapse into the State treasury,* or in cases of appropriations from special funds, shall lapse to the credit of such special funds. Nothing in this section or in this act contained shall be construed to prohibit the payment due upon any contract made under any appropriation contained in any highway appropriation bill of the previous year or years." (Italics our own.)

Under this provision, appropriations are available for expenditure during the fiscal year and for a period of two months thereafter in order to pay obligations incurred during the said period only.

It is the opinion of this office that all moneys appropriated and not expended by the Highway Department for State Highway purposes under R 8 for the fiscal year remain in the State Highway as highway funds. However, it may not be expended until appropriated by the Legislature as provided by Article I, Section II, paragraph 2 of the Constitution. It reads as follows:

> "No money shall be drawn from the State Treasury but for appropriations made by law * * *."

Inasmuch as the Legislature only appropriated money for the paying of salaries for the fiscal year 1948-1949, it is clear that the Highway Department is not authorized to expend any moneys from its unexpended balance for said fiscal year for the payment of salaries for the fiscal year 1949-1950 unless appropriated.

It is, therefore, the opinion of this office that you are not permitted by law to allow the Highway Department to use the 1948-1949 funds, not appropriated, for the payment to employees hired for the fiscal year 1949-1950.

Respectfully yours,

THEODORE D. PARSONS,
Attorney General,

By: BENJAMIN M. TAUB,
Deputy Attorney General.

July 12, 1949.

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

FORMAL OPINION—1949. No. 77.

DEAR MR. DEVALLIERE:

Inquiries from your office and from the State Boards of Nursing and Pharmacy, respectively, have raised the question whether either of these Boards has the right to determine the salary increases to be granted to its employees as of July 1, 1949, and to have funds to cover these increases released, if the Board has not submitted a schedule of its titles and salary ranges to the Civil Service Commission and has not received from the Commission a determination placing the Board's employees in the classified or unclassified service. In my opinion, the answer is "No."

The key proposition here is that the Civil Service Law applies generally to employees of the State Professional Boards as it does to those of any other arm of the State government.

The Constitution of 1947 embodies the fundamental civil service principle in Article VIII, Section 1, paragraph 2, as follows:

> "Appointments and promotions in the civil service of the State, and of such political subdivisions as may be provided by law, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination, which, as far as practicable, shall be competitive."

The Constitution thus adopted the policy of the State as previously established by the Civil Service Law (N. J. S. A. 11:4–2). The purpose of that law, in its own language (11:4–1) is to provide "a modern personnel system for positions in the classified service," and the classified service is defined as follows (11:4–3):

> "Classified Service" means, unless otherwise provided in this subtitle, *all positions in the State service,* whether paid or unpaid, full time or part time, whether existing or hereafter created, except positions held by persons enumerated in section 11:4–4 of this title." (Emphasis supplied.)

In determining the applicability of this section and of the Civil Service Law generally, the courts have declared that the essential inquiry is whether the incumbent is "in the paid service of the State." *Newark Library Trustees* vs. *Civil Service Commission,* 86 N. J. L. 307; 90 Atl. 261; *Martini* vs. *Civil Service Commission,* 129 N. J. L. 599, 30 Atl. (2d) 569. In the last cited case the former Supreme Court applied the statutory definition of "unclassified service" to the position of clerk to the First Criminal Judicial District Court of Hudson County, and held that even though the statute creating that office contained no provision one way or the other as to the applicability of the Civil Service Law, the position was one in the classified service. Citing several similar cases, the Court said (129 N. J. L. 601): "To hold otherwise would be to render nugatory the policy and purpose sought to be effectuated by our Civil Service Law."

Likewise, in *Sullivan* vs. *McOsker,* 84 N. J. L. 380, 86 Atl. 497, where the warden of the Hudson County Jail was held to be within the protection of the Civil Service Law, the Court of Errors and Appeals declared (84 N. J. L. 385):

> "In order to carry out the legislative policy which had in view the welfare of the people, in that, it may receive good and efficient service from its public servants the widest range should be given to the applicability of the law."

So here, inasmuch as the employees of the Boards in question are plainly in the State service and are paid from State funds, it follows that the Civil Service Law applies and that except as the positions involved have been placed in the unclassified category—either by statute or by the Civil Service Commission—they are to be deemed classified.

The positions held by employees of the Boards do not fall within the categories declared by the Civil Service Law to be unclassified (11:4–4), except as one or more of such positions may come within the provision pertaining to the employment by each Board of "one clerk or secretary and one confidential employee or agent" whom the Board has certified to the Civil Service Commission as "essential to the work of" the Board (11:4–4, par. m). Nor is there any other law which, in my opinion, places the employees of the Boards generally in the unclassified service.

With respect to the Board of Nursing, the statute prior to 1948 authorized it to "determine and pay reasonable compensation" to its employees (45:11–24, par. 5), and this as well as other expenses of the Board were to be paid from fees and penalties received and recovered by it (45:11–31).

Chapter 439, P. L. 1948, placed the Professional Boards in the Department of Law and Public Safety, but provided that each Board "shall continue to have all of the powers and shall exercise all of the functions and duties vested in, or imposed upon, it by law" (Section 30). The statute further provided (Section 33):

> "The authority, vested pursuant to existing law in any of the respective boards enumerated in section twenty-nine hereof, or in any member or officer thereof, to appoint, employ or remove any officer or employee shall continue to be exercised by such board; *provided, however,* that the appointment, employment or removal of any such officer or employee shall be subject to the approval of the Attorney General. Persons thus appointed or employed shall be assigned to such duties as such board shall prescribe, and shall receive such compensation as shall be fixed by such board within the limits of available appropriations therefor."

These statutes must be construed in connection with other laws existing at the time or subsequently enacted, in order to discern if possible a consistent legislative scheme. Hence, it is my opinion that for those employees within the classified service, the Board's power to fix compensation may be exercised only within the ranges allocated by the Civil Service Commission to the positions held. Salaries for unclassified positions may be fixed by each Board as heretofore, within the limits of the appropriation for its use, and subject to the approval of the Attorney General.

For positions in the classified service, the Civil Service Law directs the Chief Examiner and Secretary of the Commission to prepare a schedule of compensation for each class (11:6–2, par. c); and when such schedules are adopted by the Commission (11:5–1, par. b), the Chief Examiner and Secretary must regulate the compensation of employees in the classified service in accordance with such schedules

(11:6–2, par. d; 11:8–3). It is specifically provided that no rate of compensation in excess of the maximum rate so established shall be paid to an individual employee in the classified service unless the specific sum is set out in an individual line item in an appropriation law (11:8–3).

In the years subsequent to 1944, due to price inflation and other causes, inequalities had developed in salaries paid by different departments of the State government for virtually the same duties. To correct this evil, the Legislature enacted Chapter 116, P. L. 1948, directing the Civil Service Commission to "make a study of the adequacy of the salary ranges and the annual salary increase increments fixed for State offices, positions and employments," and as a result of such study and report thereon, the Legislature further enacted Chapter 27, P. L. 1949, which fixed salary ranges and increments for all persons in the State service "whose compensation is paid from State funds" and holding positions "for which salary ranges have been fixed by the Civil Service Commission," whether such positions are classified or unclassified (Sec. 1). The law also provides:

> "3. All class titles having or requiring salary ranges within the classified Civil Service of the State, shall be allocated only to the ranges included in the Compensation Schedule, referred to in section two above, and to no other salary ranges not included in the Compensation Schedule. * * *"
>
> "4. All class titles having or requiring salary ranges within the unclassified Civil Service of the State shall, as far as practicable, and consistent with and not contrary to existing provisions of any law, be allocated to ranges included within the Compensation Schedule referred to in section two of this act."

The new law thus makes it plainer than ever that the compensation paid to classified civil servants must be in accordance with the ranges allocated to the various positions by the Civil Service Commission. In respect to unclassified positions, the new range schedule is applicable only if ranges have been allocated to such positions by the Commission at the request of the employing department.

The fact that the expenses of the Boards in question are paid from dedicated funds does not deprive their employees of Civil Service benefits and the right to statutory increases in pay. Their compensation, however, like that of all other government employees, is subject to the sufficiency of an appropriation to cover that item.

Where a position has not been assigned to the unclassified service by law, it is the function of the Civil Service Commission to determine whether it shall be in the classified or the unclassified category (11:7–11). Therefore, in so far as the Board has not already done so, it is under a duty to submit all pertinent information concerning the positions and personnel under its jurisdiction to the Civil Service Commission as the body to determine in the first instance whether the positions are to be classified or unclassified. Until this is accomplished, the Department of the Treasury may properly withhold increases in salaries which the Board has attempted to grant (52:19–10; 52:18A–7).

It may be noted in conclusion that the failure of any Board to comply with the law until now need not result in penalizing its employees, since they will be entitled to the benefits of Chapter 27, P. L. 1949 as of July 1, if they are found by the Civil Service Commission to belong in the classified service. As to those positions which the Commission determines should be unclassified, each Board may fix the salaries and increments therein within the limits of appropriations available therefor, and subject, as above stated, to the approval of the Attorney General.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,
By: THEODORE BACKES,
Deputy Attorney General.

JULY 20, 1949.

HON. I. GRANT SCOTT,
Clerk of the Superior Court,
State House Annex.

FORMAL OPINION—1949. No. 78.

DEAR SIR:

Your letter of July 7, 1949, requesting an opinion as to the costs allowable on the entry of a judgment on Bond and Warrant and the amount thereof pursuant to Chapter 193, P. L. 1949, is hereby acknowledged.

An examination and analysis of Section 8, Chapter 193, P. L. 1949, reveals the following language:

> "Costs awarded to a party in any action, motion or proceeding in the Law Division of the Superior Court shall be as follows:
>
> "For all proceedings down to and including final judgment when there has been a trial of an issue of fact, fifty dollars ($50.00).
>
> "Upon the entry of judgment final by default or upon consent or stipulation or admission or summary or by summary judgment or on dismissal, and on actions and proceedings to the moving party, forty dollars ($40.00)."

The statute uses the word "awarded," rather than the word "taxed." The Standard Dictionary defines the word "award" as follows: "To decide to be properly or rightly due as between or among contestants."

The costs, though awarded, would not be automatically taxed by the Clerk of the Court, but would be so if the party to whom they were awarded would make a request to have same taxed. The amount to be taxed by the Clerk clearly comes within the section of the statute which states "upon the entry of judgment final by default or upon consent . . . forty dollars ($40.00); a judgment on Bond and Warrant is a final judgment entered by consent of the defendant.

It is my opinion that upon request of the moving party who has entered judgment on Bond and Warrant, you are authorized to tax the sum of forty dollars ($40.00) which has been awarded to said party pursuant to the statute above referred to.

Respectfully submitted,

THEODORE D. PARSONS,
Attorney General,
By: OSIE M. SILBER,
Deputy Attorney General.

oms;d

TRENTON, N. J., JULY, 25, 1949.

DR. WILLIAM S. CARPENTER,
President, Civil Service Commission,
State House,
Trenton, New Jersey.

FORMAL OPINION—1949—No. 79.

DEAR SIR:

I have your memorandum of even date requesting to be advised whether a State employee is entitled to vacation pay in the event of his death on a non-working day immediately preceding the first working day of his vacation. The facts in the case are these: One of the employees of the State Purchase Department was given a twelve-day vacation leave from June 20, 1949, to July 6, 1949. He was killed in an automobile accident on June 19, 1949. The last working day prior to the death of this employee was Friday, June 17th. On the 18th he was not required to work, and June 19th was Sunday.

On October 2, 1946, in response to an inquiry from Dr. Messick, Secretary of the Civil Service Commission, I rendered an opinion with respect to an employee who died while actually on vacation leave and who had not been paid for the vacation period. I called attention to the fact that vacation leave for Civil Service employees was controlled by P. L. 1939, Chapter 233, and that where vacation pay had been earned as specified by the statute, and the employee dies during the vacation leave, the sum due such employee should be paid to his estate.

In the case we are considering, it must be remembered that all work to be done by the employee previous to his vacation had been performed, and he had actually earned his vacation leave. In fact, he had actually started on his vacation, because Saturday and Sunday were not working days.

I cannot differentiate the case now under consideration from the one which was presented to me by Dr. Messick. The vacation leave of an employee is earned by his previous service and to my view, in the instant case, payment should be made to the estate of the decedent for the twelve days' pay which he earned. It would indeed be strange to hold in one case that one who is on vacation leave and dies should be paid, and deny such right to one who has gone on vacation, after having rendered previous service to the State up to and including his last working day preceding such vacation leave, and died.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: THEODORE BACKES,
Deputy Attorney General.

TB:B

JULY 11, 1949.

HON. WALTER R. DARBY, *Director,*
Department of the Treasury,
Division of Local Government,
Commonwealth Building,
Trenton 8, New Jersey.

FORMAL OPINION—1949. No. 80.

DEAR SIR:

I have before me your letter of June 30, 1949, wherein you request an opinion relative to the right of a municipality to place its funds in a Savings and Loan Association.

It appears that several municipalities have made inquiry of you as to the availability of such institutions for their funds.

You inquire as to "whether a municipality has the power to deposit *any moneys* which may be in hand 'in one or more accounts in any insured association' as referred to in Section 151, of Article 20 of Chapter 56, P. L. 1946." You further inquire, in the sense of refining the primary question, "as to whether current funds which are not ordinarily eligible to investment may be deposited in the accounts of any insured Savings and Loan Association."

We are of the opinion that a municipality may invest its funds in an account or accounts of an insured Federal or State Savings and Loan Association in amounts not exceeding the amounts for which such accounts are insured, pursuant to the authority contained in the aforementioned statute.

It is fundamental under the formula of government established in this State that a municipality is a creature of the Legislature and that all authority for its actions must be found in the acts of that paramount body.

In 1937, the Legislature enacted the Revised Statutes and in Section 40:3-3 of that body of law we find the following direction to municipalities concerning the custody of its funds:

> "Any county or municipality may select as a depository for its moneys any bank organized under the laws of the United States, having its place of business in this state, or any bank or trust company organized under the laws of this state."

Prior to its expenditure for legal purposes, all moneys of a municipality are required to be kept in a National Bank or a State Bank or Trust Company.

However, in 1941, we find that the Legislature, in the proper exercise of its authority on such matters, enacted Chapter 297, P. L. 1941, which was amended three times, by Chapter 304, P. L. 1942; Chapter 208, P. L. 1943, and Chapter 250, P. L. 1944, whereby municipalities were authorized "to use moneys, which may be in hand, for the purchase of War Savings Bonds or other obligations of the United States of America."

Again in 1946, the Legislature enacted Section 151 of Chapter 56, P. L. 1946, the statute under discussion, which reads as follows:

> "All public funds, including those of the State of New Jersey, or any county or municipality or other political subdivision of New Jersey, and those in the control or possession of any public board or official, and all trust funds of every character in the control or possession of any fiduciary or other person or corporation, may, without any order of any court, be invested in one or more accounts in any insured association or any federal association whose principal office is located in New Jersey in any amounts up to, but not exceeding, the amounts for which such accounts are insured.
>
> "Any such account, in any amount up to, but not exceeding, the amount for which it is insured, shall be eligible for acceptance as security, whenever security is required by any law of this State."

The foregoing recital of the Legislature's activity on the subject reveals the pattern of that body's intent relative to the custody of the moneys of a municipality. We find the general rule to be that a municipality must keep its money in a depository as defined in R. S. 40:5–3. Without disturbing that rule, the Legislature in later enactments has permitted the "purchase" of War Savings Bonds and other obligations of the Federal Government and an "investment" in an insured Federal or State Savings and Loan Association within certain limitations.

We cannot see any conflict in these statutes. Moneys not used for the purchase of Federal bonds or invested in a Savings and Loan Association, must be kept in a statutory depository. In fact, both uses permitted are in the nature of investments, because a Savings and Loan Association cannot accept deposits, as we generally understand the term, and the purchase of a Federal obligation is certainly not a deposit. Thus, the matter is crystallized to the point that the Legislature has authorized additional uses to be made of moneys of a municipality than theretofore provided by law.

Our reading of the law fails to reveal any intent on the part of the Legislature to define the moneys, or the nature of its status, which a municipality may invest in a Savings and Loan Association. It merely states that "all public funds" of a municipality may be so invested. In view of this statement of the law, we have no alternative but to conclude that *any moneys* belonging to a municipality, regardless of its status, may be used for that purpose within the limitations of the statute.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: OLIVER T. SOMERVILLE,
Deputy Attorney General.

OTS/mb

JULY 19, 1949.

HONORABLE WILLIAM T. VANDERLIPP, *Director,*
Division of Planning and Development,
Department of Conservation and Economic Development,
520 East State Street,
Trenton, New Jersey.

FORMAL OPINION—1949. No. 81.

DEAR DIRECTOR:

This is to acknowledge your recent letter wherein you request an opinion as to the powers and duties of the Planning and Development Council. The question raised is general and, therefore, any answer will, of necessity, have to deal with the broad aspects of the problem. If answers to specific questions are desired, such questions, if any, should be submitted as they arise.

Under date of May 5, 1949, this office, pursuant to a request by Commissioner Charles R. Erdman, Jr., rendered an opinion designated as Formal Opinion 1949—No. 41, wherein the history of the Department of Commerce and Navigation and certain powers of the Council were discussed quite fully. For this reason, there is no need for a further review of the history and background of the Council.

The Council was established pursuant to Section 10, Chapter 448, of the Laws of 1948. This act provided for such a Council, consisting of twelve (12) members to be appointed by the Governor, with the advice and consent of the Senate. The answer to the question propounded is contained in the statute itself, particularly Sections 11 to 13, inclusive.

Section 11 (R. S. 13:1B–11) provides that the Council:

> "a. Shall formulate comprehensive economic policies in connection with the development of the natural and economic resources of the State, and other allied subjects;
>
> "b. Shall formulate comprehensive policies for the preservation, conservation and use of State forests and parks, and historic sites, and other allied subjects; and,
>
> "c. Shall formulate comprehensive policies for the prevention and control of beach erosion."

The policies formulated pursuant to this section shall not take effect unless approved by the Commissioner.

Section 12 of the act (R. S. 13:1B–12) states that the Council shall, in addition to the powers set forth in Section 11:

> "a. Consult with and advise the Commissioner and Director of the Division on the work of such Division;
>
> "b. Study the activities of the Division and hold hearings with respect thereto, as it may deem necessary or advisable; and,
>
> "c. Report to the Governor and Legislature annually, and at such other times as it may deem in public interest, with respect to its findings and conclusions."

The exercise by the Council of its powers under this section is not subject to the control of the Commissioner or the Governor. In order for the Council to exercise its powers as set forth therein, its members, of necessity, must know and be informed as to all the workings of the Division of Planning and Development. They must be kept fully informed, and they have the right to call upon the Commissioner or Director to furnish such information as they may need for these purposes.

Section 13 of the act (R. S. 13:1B–13) provides that no riparian leases or grants shall be allowed, except when approved by at least a majority of the council, and approved and signed by the Governor and Commissioner.

The above generally sets forth the powers and duties of the Council. To summarize: the policies formulated by it pursuant to Section 11 shall not become effective until approved by the Commissioner; the exercise of its powers under Section 12 is not subject to the approval of any outside officer or agency; and, the exercise of its powers under Section 13 is subject to the approval of the Governor and the Commissioner.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: CHESTER K. LIGHAM,
Deputy Attorney General.

CKL/f

JULY 22, 1949.

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

FORMAL OPINION—1949. No. 82.

DEAR SIR:

This is in response to your inquiry whether Article 8, Section 4, paragraph 1, of the Constitution of 1947, prevents appropriation of State funds for education other than in the age range of 5 to 18 years set forth therein.

In my opinion the answer to such inquiry is in the negative and there may be appropriation of State funds for education beyond such age group.

Article 8, Section 4, paragraph 1, provides:

> "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years."

This provision was contained verbatim in Article 4, Section 7, paragraph 6, of the Constitution of 1844 as amended, and the same question now raised was considered by the Courts of this State in *Rutgers College* vs. *Morgan Compt'r,* 70 L.

460, affirmed by the Court of Errors and Appeals in 71 L. 663. In that case the Court held this constitutional provision fixed the minimum of what must be done and did not define the maximum of the legislative power. It enjoined the Legislature to do that much but did not forbid it to do more. In speaking of this provision, the Court said (P. 70 L., at p. 412):

> "The injunction in the organic law that free public schools shall be established and maintained for all children between the ages of five and eighteen years does not exclude the legislative power to provide for the education of persons not within that class. The former must be provided for; the latter may be an object of legislative concern."

In my opinion, Article 8, Section 4, paragraph 1, fixes the minimum requirement. It was not intended to narrow or circumscribe the legislative power with respect to education and does not prevent the Legislature from providing for education outside the age range specified.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: JOSEPH A. MURPHY,
Assistant Deputy Attorney General.

JAM:MB

JULY 28, 1949.

HON. J. LINDSAY DEVALLIERE,
Director, Division of Budget and Accounting,
Department of the Treasury,
State House.

FORMAL OPINION—1949. No. 83.

DEAR MR. DEVALLIERE:

You have requested my opinion as to whether or not Mr. William Abbotts, the law reporter for the former Supreme Court, was entitled to receive any salary from the State as law reporter after September 15, 1948.

In my opinion, the answer is "no"; and if, as you have indicated, Mr. Abbotts was paid any money on that account after said date, the State should file a claim against him for refund of the same.

The Constitution of 1844, Article VII, Section II, par. 4, provided for the constitutional office of law reporter as follows:

> "The law reporter shall be appointed by the justices of the supreme court, or a majority of them; and the chancery reporter shall be appointed by the chancellor.
>
> "They shall hold their offices for five years."

The new Constitution of 1947 contains no provision for continuing the office of law reporter. Since the new Constitution supersedes the old (Art. XI, Sec. 1, par. 1), it necessarily follows that the office of law reporter, as a constitutional office created by the old but not continued on by the new Constitution or by statute, was abolished.

This conclusion is reinforced by Art. XI, Sec. IV, par. 3, which provided that the former Supreme Court and Court of Chancery, along with the Court of Errors and Appeals, should be "abolished when the Judicial Article of this Constitution takes effect." The law reporter under the old Constitution was appointed to report cases at law in the former Supreme Court and in the former Court of Errors and Appeals, while the chancery reporter was appointed to report equity cases in the former Chancery Court and in the Court of Errors and Appeals. With the abolition of separate courts of law and equity as of September 15, 1948, there was no reason for prolonging the existence of the offices of the respective reporters for the two systems.

Art. XI, Sec. III, par. 2 of the new Constitution provides in part:

> "Unless otherwise specifically provided in this Constitution, all constitutional officers in office at the time of its adoption shall continue to exercise the authority of their respective offices during the term for which they shall have been elected or appointed and until the qualification of their successors respectively."

The above quoted provision does not apply to the instant case because the office of law reporter ceased to exist as of September 15, 1948. The provision in question can apply by its terms only to an office in which there will be successors who shall qualify, and there will be no successor to the last incumbent of the office of law reporter.

Since Mr. Abbotts no longer held this office after September 15, 1948, he was not entitled thereafter to receive the salary formerly provided by law for that position (N. J. S. A. 2:18–5).

I am informed that Mr. Abbotts has already been paid for the 450 copies of the last volume of the law reports, published after September 15, 1948, containing cases decided in the former Supreme Court and Court of Errors and Appeals before their abolition. This payment was made pursuant to an order of the Chief Justice of the former Supreme Court entered before September 15, 1948, in accordance with the statute then in force (2:18–4). In my opinion, the fact that Mr. Abbotts did not complete the publication and delivery of the last volume, as contemplated by said order of the Court, until after his office had become extinct, did not operate to continue that office in existence so as to warrant the payment of the salary formerly provided for the incumbent thereof.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: THEODORE BACKES,
Deputy Attorney General.

AUGUST 5, 1949.

HON. J. LINDSAY DEVALLIERE,
Director, Division of Budget and Accounting,
Department of the Treasury,
State House,

FORMAL OPINION—1949. No. 84.

DEAR MR. DEVALLIERE:

You have requested advice as to whether Mr. James D. Moore, District Supervisor of Inheritance Taxes in Bergen County, is entitled to reimbursement by the State for damages caused to his automobile while it was being used in the discharge of his duties as District Supervisor. In my opinion, the answer must be "No."

The Division of Taxation has informed me that Mr. Moore holds his office under Section 54:33–9 of the Revised Statutes, which provides as follows:

> "The State Tax Commissioner shall appoint all appraisers and employees necessary to carry out the provisions of chapters 33 to 36 of this title (section 54:33–1 et seq), subject always to the provisions of Title 11, Civil Service."

There seems to be no provision of law whereby a District Supervisor holding office under this statute can receive compensation of the type here sought.

Furthermore, this office has been informed by the Division of Taxation and by the Civil Service Commission that, with an exception not here material, District Supervisors are employed on the basis that the incumbent will maintain at his own expense telephone, stenographic and office accommodations, equipment and supplies, and will provide necessary transportation facilities for himself and his employees in the performance of his official duties. Thus, not only is the reimbursement in question unauthorized by statute, but the circumstances of the employment negative the existence of any agreement or understanding which could support Mr. Moore's claim.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: THEODORE BACKES,
Deputy Attorney General.

JULY 27, 1949.

HON. CARL ERDMAN,
Administrator of Public Housing and Development Authority in the Department of Economic Development, State of New Jersey,
Trenton, New Jersey.

FORMAL OPINION—1949. No. 85.

DEAR SIR:

In re QUESTION CONCERNING PAYMENT FOR PAINTING OF FENCE UNDER LEASE DATED MARCH 27, 1947, between ESSEX COUNTY PARK COMMISSION, Lessor, and ADMINISTRATOR OF PUBLIC HOUSING AND DEVELOPMENT AUTHORITY IN THE DEPARTMENT OF ECONOMIC DEVELOPMENT OF THE STATE OF NEW JERSEY, acting for, etc., STATE OF NEW JERSEY, Lessee.

The question presented for opinion is, as I understand it:

Is the lessee liable, under the lease mentioned, for the cost of painting a certain fence situate along the boundary line between the premises leased and remaining premises of lessor or others?

The lease, with map attached forming part of it, shows the situation to be as stated in the above question.

Paragraph 7 of the lease reads:

"7. The lessee agrees with the Lessor that the Lessee will assume the sole responsibility for the condition, operation, maintenance, management, servicing, and both police and fire protection of the *leased premises,* and that the lessee will take good care of and keep the same, including all improvements, at any time existing thereon, and the appurtenances thereto, in good order and condition, suffering no waste or injury, and shall, without expense to the Lessor, promptly make all needed installation of and repairs and replacements, structural or otherwise, in and to any dwellings, improvements, and facilities upon the *leased premises or connected therewith,* whether above or beneath the surface of the ground, and that the Lessee will not permit the accumulation of waste or refuse within the leased area." (Italics mine.)

Is, then, the fence in question part of the "leased premises" or connected therewith?

There is no specific mention of the fence in the body of the lease. The body of the lease and the map attached show that the fence, being on the boundary line, could as well be without as within the leased area and as well connected with the remaining premises of lessor, or of others, as with the leased premises. But the answer to that question would not be the sole determining factor, in any event.

Paragraph 13 of the lease provides that a certain joint physical survey and inventory of the "leased area" shall be made, etc., and become part of the lease. There has been presented to me what purports to be a copy of this joint physical survey and inventory. On the cover page appear the words "Physical survey of Weequahic Park, Newark, N. J." On the second page, with the signed approvals,

it is stated that the report represents the true physical condition of the "premises leased." On the third page appear the following words:

"The following data comprises a complete report to a survey of physical condition of utilities and other improvements as listed below under the heading of 'Contents' of that portion of Weequahic Park acquired under lease by" etc.

Under Item #5 h. is "Fences." On a subsequent page are described fences which, taken together, would appear to refer to what is called the fence in this opinion.

That the "leased premises" are by no means identical with property within the "leased area" is quite plain. The description of the "premises leased" on page 3 of the lease specifically excludes

"all buildings structures, and other installations within the *leased area* * * * which are not the property of lessor; and reserving unto the lessor all its buildings now upon *leased premises,* and the right of uninterrupted use of all the sub-surface installations to which said buildings are presently connected, together with unrestricted ingress and egress" etc. (Italics mine.)

In the physical survey and inventory referred to are contained a hospital heating plant and references to structural details of all existing buildings and structures, which obviously include buildings belonging to the United States Government and those reserved by the lease to lessor.

The inclusion of the fence in this last named document can no more make it part of the "leased premises" than the inclusion of the other buildings mentioned. The lease itself, as pointed out, called for a survey and inventory of the "leased area," not one of the leased premises and property only. Any reference in the survey and inventory to property "leased" which was not so leased under the wording of the body of the lease agreement itself would not, particularly under the circumstances hereafter pointed out, convert such property into part of the "leased premises." In emphasis of this point, the survey and inventory under Item #1 includes a map showing "former Army building" etc.

Additionally, by the terms of the lease the lessee obtained the use of and undertook described responsibility for the repair and upkeep of certain facilities and utilities *outside* the "leased area" necessary for the purposes of the lease.

Regardless of the above, had the lease been between two private individuals for general purposes and had the lessee actually utilizd the fence in question, it might be said that by such action the fence became part of the "leased premises." But, in answer to question propounded by me to lessee, I have a statement from which I quote, in part, as follows:

"It (lessee) was not concerned with the fence or the need for a fence, and gave no consideration to the existence of the fence. So the answer to your question is that the fence was no part of the consideration for leasing the land * * *. We have made no use of this fence and have no use for it."

Again, this lease is not between two private individuals, nor is it for general purposes.

The lease recites, *inter alia* (on page 2), that it is made pursuant to and under the authority of Chapter 279, P. L. 1946, as amended, and Chapter 323, P. L. 1946. In fact, the lease would probably be a legal impossibility without these statutes.

Lessor is a public corporation created by the State of New Jersey for certain purposes which do not embrace emergency public housing, and lessee is a creature of statute for the purposes and with the authority given by statute, and is described in the lease as "acting for, in behalf of, and in the name of" said State. The authority of lessee is limited by the policy and purposes of the statutes. Without reciting the statutory provisions in detail, it is plain that they relate to a program of *emergency public housing* and nothing else. Furthermore, by Paragraph 4, page 5, the lease itself, by its very terms, restricts the use of the "leased premises" to such project.

By Section 2 of the statute first mentioned in the lease it will be seen that lessor is (and was) *not compelled* to lease its property but that it "may" do so

> "upon such terms, subject to such conditions and in such manner as such park commission may deem proper or necessary for the preservation for park purposes of the lands of such county park commission, and as may be agreed upon between the contracting parties."

This left lessor free to lease upon its own terms, if it could, or not to lease at all. Likewise lessee had no authority to accept terms which incurred expenses totally unrelated to the said emergency public housing program.

The funds for lessee's purposes were originally authorized to be raised by a bond issue (P. L. 1946, Chapter 324, Second Special Session) which statute was put to a vote of the people of the State and adopted at the general election of November 5, 1946, by which statute they were "specifically dedicated to providing housing for Veterans of World War II and other people of the State and shall be disposed of in accordance with this act" etc. It has been suggested that lessee might have the right to pay the cost of painting this fence, even though unnecessary and unused for and unrelated to the emergency public housing program, from rentals received by lessee from occupants of houses provided by the program. In view of this statute, put to public vote, particularly Section 15 (c), general principles of law and the reasoning applied in the case of *City Publishing Co.* vs. *Jersey City,* 54 N. J. L. 437, such suggestion appears to me unsound.

Had the lease specifically and in clear language contained a provision for the liability of the lessee for the painting of this fence, a serious question would arise as to whether he had authority, under the circumstances, to execute the lease with such provision in it. It should be noted that, while the power of the lessee under the statutes is quite broad, it is manifestly so only for whatever may be reasonably necessary for or necessarily incidental to an emergency public housing program. There is no such specific inclusion in the lease, but on the contrary, while going into great detail as to almost every other condition and contingency which might affect lessor deleteriously, the lease itself is without any direct reference to the fence.

Under these circumstances, only lessor, for its own purposes (county park facilities, not state-wide public housing, can benefit from the repair, maintenance or even actual existence of the fence.

With respect to the provisions in Paragraph 12, page 10, of the lease, it need only be said that since the fence is not part of the "leased premises," those provisions have no application. As to Paragraph 5, page 5, of the lease, by refusing to pay for the painting of this fence lessee, in my opinion, is actually complying with the law of the State of New Jersey and to pay for it would be a violation of such law. Concerning the provisions with regard to lessee's obligations or liabilities, if any, to the Federal Government and others mentioned, those are matters (certainly insofar as this fence is concerned) solely between lessee and these other parties unless and until some actual violation of the lease by lessee makes lessor directly liable to such parties. In this connection, an examination of the Fence Act (R. S. 40:20–1 et seq., particularly 40:20–7) shows that it has no application to the present point.

It, therefore, appears:

1. That the said fence was neither by the lease itself nor any incorporated document, a part of the leased premises.

2. That lessee, whose only authority to lease was for emergency public housing projects, did not need and never used the said fence under the lease or for such projects.

3. That benefit from the existence, maintenance, repair and painting of said fence is solely to the lessor in its conduct of local county park facilities and in no way for emergency public housing.

4. That to divert any proceeds of said bond issue or rentals received by lessor in the conduct of emergency public housing to the payment of the cost of painting the fence, in any event might well be an illegal and improper diversion of such funds.

5. That is not to be presumed that lessor itself intended any such result as set forth in (4) above by the execution of this lease.

It is, therefofe, my opinion that there is no liability upon the part of the lessee to pay for the painting of this fence and that any such payment, under the circumstances, would be illegal and improper.

Respectfully submitted,

THEODORE D. PARSONS,
Attorney General of New Jersey.

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

m:m

AUGUST 19, 1949.

DR. CHARLES R. ERDMAN, JR.,
Dept. of Conservation & Economic Development,
Trenton, New Jersey.

FORMAL OPINION—1949. No. 86.

DEAR MR. ERDMAN:

An opinion is requested from this office clarifying for the warden force of the Division of Fish and Game, the law relating to the acts legally permissible in hunting for or destroying woodchuck. The following sections of Title 23, commonly known as the Fish and Game Act, pertain to the subject matter: R. S. 23:4–1, R. S. 23:4–12, R. S. 23:4–13 and R. S. 23:4–25. In order to discuss the sections aforementioned we quote herein for your benefit said sections and will discuss them separately.

23:4–1. No person shall capture, kill, injure, destroy or have in possession any reed-bird, wild swans, wood duck, wild geese, brant, wild ducks, rails or marsh hens, gallinules, coot (commonly known as crow duck), upland plover, black bellied plover, golden plover, greater or lesser yellowlegs; willets, sandpipers, dowitchers or robin snipe, brown backs, curlews, turnstones or calico backs, godwits or marlin, tattlers, Wilson snipe or jacksnipe, woodcock or any other birds commonly known as shore birds, surf snipe or bay snipe, unless an open season is prescribed therefor by the regulations of the United States Bureau of Biological Survey, made under the provisions of an Act of Congress relating to migratory birds and then only during the respective open seasons fixed for such birds by such regulations.

No person shall capture, kill, injure, destroy or have in possession any quail, rabbit, hare, gray, black or fox squirrel, raccoon, woodchuck, English or ringnecked pheasant, ruffed grouse, wild turkey, partridge, or any other game bird or game animal, other than those mentioned in the first paragraph of this section, unless an open season is prescribed therefor by the State Fish and Game Code, and then only during the respective open seasons fixed by such code; or, in the absence of such provision in said code, unless an open season is prescribed therefor by law, and then only during the respective open seasons fixed by this section.

Unless otherwise prescribed by the State Fish and Game Code, the open season for quail, rabbit, hare, gray, black or fox squirrel, male English or ringnecked pheasant, ruffed grouse, or partridge, except as hereinafter in this article is restricted, shall be from November tenth to December tenth; provided, however, no person shall capture, kill, injure, destroy or have in his possession any of the birds or animals mentioned in this paragraph on the first day of any open season for such birds and animals before nine ante meridian.

Unless otherwise prescribed by the State Fish and Game Code, the open season for woodchuck, shall be from July first to September thirtieth; provided, however, that notwithstanding any provision of the State Fish and Game Code, or of this section to the contrary, woodchuck may be taken at any time from cultivated farms, by landowners or occupants of farms, members of their family, guests or hired help.

Unless otherwise prescribed by the State Fish and Game Code, the open season for raccoon shall be from November first to January fifteenth between sunset and sunrise only, except during the open season for deer.

Unless otherwise provided by the State Fish and Game Code, the birds and animals for which an open season is prescribed by this section may be possessed during the respective open seasons therefor and for the additional period of ten days immediately succeeding the open seasons.

Except as otherwise specifically provided by this act or any other law, for capturing, killing, injuring, destroying or having in possession any of the game birds or game animals mentioned in this section, or any other game bird or game animal other than during the respective open seasons, if any, and at the times, if any, fixed therefor by the respective provisions of the State Fish and Game Code, or, in the absence of any such provisions in said code, fixed therefor by this section, or for violating any other provision of this section, a person shall be liable to a penalty of twenty dollars ($20.00) for each bird or animal or part thereof unlawfully captured, killed, injured, destroyed or had in possession.

23:4–12. No person shall kill, destroy or injure, pursue with intent to kill or injure or in any manner attempt to take or injure any anatidæ commonly known as swans, geese, brant and river and sea ducks; rallidæ, commonly known as rails, gallinules, coots and mud hens; limicolæ, commonly known as shore birds, surf snipe or bay snipe, among them being yellowlegs, plovers, willets, sandpipers, dowitchers or robin snipe, brown backs, burlews, turnstones or calico backs, godwits or marlin, tattlers and woodcocks, gallinæ, commonly known as wild turkey, grouse, prairie chickens, pheasants, partridge and quails; or any hare, commonly known as rabbit; gray, black or fox squirrels; or any other game bird or game animal, except in the manner prescribed by the provisions of the State Fish and Game Code, or, in the absence of such provision in said code, except in the manner usually known as hunting with a gun, the gun being not larger than ten gauge and held at arm's length and fired from the shoulder without rest, or by the use of bow and arrow, under a penalty of twenty dollars ($20.00) for each offence; provided, however, that woodchucks, commonly called groundhogs, may be dug out of their dens or killed in any manner, at any time, by landowners or occupants of farms, or by members of their family, guests, or hired help, when such dens are located on farms, and woodchucks may also be taken in any manner during the regular open woodchuck season by any other person.

23:4–13. No person shall use in hunting any fowl or animals of any kind any firearm except as permitted by the provisions of the State Fish and Game Code, or, in the absence of such provision in said code, except a shotgun being not larger than ten gauge, and capable of holding not more than two cartridges at one time, or that may be fired more than twice without reloading, or use a silencer on any firearm when hunting for game or fowl, under a penalty of twenty dollars ($20.00) for each offense; provided, however, that the division in its discretion may issue permits for the use of a rifle for shooting woodchucks only. No person shall have any missile larger than as permitted by the provisions of the State Fish and Game Code, or, in the absence of such provision in said code, larger than number four shot in possession in the woods or fields at any time other than during the open season for killing deer, under a penalty of one hundred dollars ($100.00) for each offense.

23:4–25. The owner, lessee or custodian of a dog found running at large in the woods or fields, or a person going into the woods or fields with a hound or firearm, except during the open season for quail, rabbit, squirrel, English or ringnecked pheasant, raccoon, woodchuck, ruffed grouse, or partridge, shall be liable to a penalty of twenty dollars ($20.00) for each offense.

The occupant of a farm may permit his dog to run at large on the land he occupies, except during the open season for deer. The owner, lessee or custodian of a dog may go into the woods or fields with the dog without firearms for the purpose of exercising or training it in daylight at any time, except during the open season for deer. Nothing in this section contained shall be construed to prohibit the training of raccoon dogs between the hours of sunset and sunrise for a period of four weeks prior to the last week preceding the opening of the raccoon season.

This section shall not apply to hunting deer, raccoon, woodchuck, woodcock, snipe, rail, mud hen and waterfowl at the time and in the manner provided by the respective provisions of the State Fish and Game Code, or, in the absence of such provisions in said code, at the time and in the manner provided by law, or

to the killing of crows, hawks, woodchuck and vermin at any time of the year when in the act of destroying poultry, crops or property.

Discussing the aforementioned pertinent sections of Title 23 relating to the subject, we shall comment briefly on each section.

Section 23:4–1 has a proviso that notwithstanding any provision of the State Fish and Game Code, or of this section to the contrary, woodchuck may be taken at any time from cultivated farms, by landowners or occupants of farms, members of their family, guests or hired help.

Section 23:4–12 prohibits the taking of all game birds or game animals except in the manner prescribed, but also contains a proviso that woodchuck, commonly called groundhogs, may be taken out of their dens or killed in *any manner, at any time,* by landowners or occupants of farms, or by members of their family, guests or hired help, when such dens are located on farms. (Italics supplied).

Section 23:4–13 designates the type of firearm that is legal for hunting in New Jersey. It outlaws the use of a rifle for hunting but the section further provides that the Division of Fish and Game may in its discretion issue permits for the use of a rifle to persons shooting woodchuck only.

Section 23:4–25 prohibits a person from going into the woods or fields with a firearm except during certain open season, but you will note that the last paragraph in this section has a proviso to the effect that it shall not apply to the killing of crows, hawks, woodchuck and vermin at any time of the year when in the act of destroying poultry, crops or property.

It appears from a reading of the sections referred to herein, that the Legislature intended to except from the provisions of said sections, the destroying of woodchuck by farmers on their own property in any manner and at any time. The act gives the landowner, the occupants of the land or farm members of the family, guests and hired help the right to protect the property from woodchuck.

We understand that arrests have been made and fines imposed for killing woodchuck out of season where the killing took place on the land owned by the person charged with the violation. We have been informed that much damage has been caused by woodchucks.

We are therefore of the opinion and so advise you that a landowner or occupant on a farm, the members of his family, guests or hired help, can hunt woodchuck at any time (including Sunday) and in any manner without a permit.

We do not deem it necessary to comment on R. S. 23:4–11 or R. S. 23:4–24 because a reading of R. S. 23:4–12 clearly reflects the right of a landowner to take or kill woodchucks in any manner, at any time.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: BENJAMIN M. TAUB,
Deputy Attorney General.

AUGUST 12, 1949.

WILBUR E. POWERS, *Secretary,*
State Board of Pharmacy,
28 West State Street,
Trenton 8, New Jersey.

FORMAL OPINION—1949. No. 87.

DEAR MR. POWERS:

Your letter of August 5, 1949, raises two questions, the first of which is whether the election of the secretary of your Board, which takes place annually, is subject to the approval of the Attorney General. The answer is in the affirmative, whether the person elected is a member of the Board or not. Even though membership on the Board is effected through appointment by the Governor, a person's status as secretary of the Board is not derived from that source. In so far as a Board member serves as secretary, his employment by the Board in that capacity is subject to the approval of the Attorney General under N. J. S. A. 52:17B–33.

The other question you raise is whether the position of secretary to the Board is in the classified or unclassified Civil Service. Our opinion of July 12, 1949, did not make any determination as to the status of particular employees of the Board. It merely observed that there is no law which places "the employees of the Board generally" in the unclassified service, and it advised that the matter of classification should be submitted in the first instance to the Civil Service Commission.

In your particular case, it is my opinion that your position as secretary of the Board must be unclassified. The Board is so constituted (N. J. S. A. 45:14–1) that it must be reorganized each year as a new member thereof takes office. It is necessary, therefore, that officers of the Board be elected or re-elected annually, from which it follows that the secretary can hold that office for only one year at a time. Consequently, he cannot be accorded the tenure which is the mark of positions in the classified service.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: THEODORE BACKES,
Deputy Attorney General.

TB:rk

AUGUST 23, 1949.

HON. HARRY C. HARPER,
Commissioner of Labor and Industry,
State House,
Trenton, N. J.

FORMAL OPINION—1949. No. 88.

MY DEAR COMMISSIONER:

In answer to your request for a legal opinion concerning the applicability of R. S. 34:6–120 et seq., popularly known as the Industrial Home Work Law, to the occupation of addressing envelopes and letterheads by a typist in her own home, please be advised that it is our opinion that said law has no such applicability.

Industrial home work and industrial pursuits are very broad expressions. Recourse must be had to the specific statute under consideration in order to glean from its history, scope and terminology the purpose of the Legislature in enacting it and the mischief sought to be overcome.

Historically, we find a long, unsavory period in our social development prior to the enactment of such laws as the Wage and Hour Law, Child Labor Law, and others all designed to alleviate the unscrupulous practices to which a large segment of industrial workers were subjected and to safeguard the health and life of the general public.

The purpose of the Industrial Home Work Law as stated in R. S. 34:6–136.1 is:

> "(a) The Legislature has long recognized, through laws regulating the employment of men, women and children, that working conditions detrimental to health and welfare result in injury not only to the workers immediately affected but to the public interest as a whole. Now the Legislature finds that industrial home work runs counter to, and tends to defeat, the purpose of these laws because it is performed at excessively low wages for long and irregular hours, under insanitary and otherwise unhealthful working conditions, in constant competition with factory production and free from effective regulation; that these factors result in (1) serious danger to the health, efficiency and general well-being of homeworkers, (2) the breakdown of standards of employment for factory workers in this State, (3) rendering more difficult the enforcement of laws governing the standards of employment for such factory workers, (4) unfair competition between employers in factory production and employers utilizing industrial homework, and (5) detriment to the consumer and the public welfare."

Succinctly stated the Industrial Home Work Law sought to abolish what had come to be known as "Sweatshops" or plants whose employees were overworked and underpaid, and who were required to work to an extent hardly endurable. Work was "farmed out" to be done in homes where sanitary conditions left much to be desired, and where the aged, infirm and in many instances incurably ill persons worked long hours on materials which eventually found their way to the ultimate consumer in the form of wearing apparel or worse still, toys for children.

Likewise the purpose of the Minimum Wage Act is "to enable a minimum wage scale or code to be adopted and to be put into effect as regards any "sweatshop occupation" defined as an industry, trade, business or occupation in which persons are gainfully employed, which pays to its employees an unfair and oppressive scale of wages (*Swiss Cleaners Ins.* vs. *Danaher,* C. of L. of comm. 165 S. W. 2 701).

It is worthy of note that the Minimum Wage Law of New Jersey does not cover clerical or office workers.

We come now to the terminology used by the Legislature and we find that throughout, it is directed to manufacturing of goods. An article cannot be designated "Manufactured" unless and until it is made into new or different articles, having a distinctive name, character and use.

In the ordinarily understood meaning of the term, a "clerical worker" is one whose occupation is the opposite of manual or factory work.

It must be recognized that the enactment of the Industrial Home Work Law was to protect the health and welfare, both physical and economic, of factory operatives as a means better to secure public safety. Obviously, the Legislature had in mind, labor engaged in the manufacture of some material product as distinguished from the employment of those engaged in clerical or professional pursuits.

It would be contrary to the manifest purpose of the Legislature to extend the meaning of the phrase "Industrial Home Work" to include the peculiarly clerical operation of addressing envelopes.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: GRACE J. FORD,
Ass't Deputy Attorney General.

AUGUST 29, 1949.

DR. DANIEL BERGSMA,
Commissioner of Health,
State House,
Trenton, N. J.

FORMAL OPINION—1949. No. 89.

DEAR SIR:

This will acknowledge receipt of your letter of August 22nd relating to water supplies at trailer camps, tourist cabin colonies and other developments consisting of small shacks or cottages. You request an opinion as to whether the water supplies above mentioned constitute public supplies within the purview of the public health statutes.

The memorandum furnished me shows that in this State there are several trailer camps in which there are more than twenty trailers and some camps consisting of forty to fifty trailers. There are also developments consisting of small shacks or cottages of one or two rooms each where water is supplied by the owner of the ground upon which they are located.

The statute concerning the question is found in Title 58 of the Revised Statutes and Sec. 58:11–1 provides that no person engaged in the distribution or sale of water for potable purposes shall deliver to any consumer any water which, in the opinion of your department, is polluted, contaminated or impure, or which is obtained from any source which, in the opinion of your department, is or may become polluted, contaminated or impure, unless purification by filtration or other means acceptable to the department shall be accomplished before the water is distributed.

R. S. 58:11–2 provides that every person intending to furnish water for potable purposes shall submit to your department a detailed report containing all information regarding the source from which such supply is to be derived, and until such source has been approved said person shall not distribute water to any consumer for potable purposes.

R. S. 58:11–18.10 defines "public water supply" as a system comprising structures which operating alone or with other structures result in the derivation, conveyance (or transmission) or distribution of water for potable or domestic purposes to consumers in twenty or more dwellings or properties.

Under the facts and the law, I am of the opinion that the water supply, such as is described in the memorandum submitted, is a public water supply within the meaning of the statute and, therefore, is subject to the requirements of the law relating to public supplies.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: ROBERT PEACOCK,
Deputy Attorney General.

SEPTEMBER 1, 1949.

HON. WALTER T. MARGETTS, JR.,
State Treasurer,
State House,
Trenton, N. J.

FORMAL OPINION—1949. No. 90.

DEAR MR. MARGETTS:

Receipt is acknowledged of your letter, dated August 12, 1949, in which you ask for an opinion as to whether veterans, and volunteer and exempt firemen, and others specified in R. S. 54:4–3.12 are entitled to exemption from locally-assessed poll taxes in view of Article VIII of the 1947 Constitution.

It is the opinion of this office that all persons enrolled as active members of a fire department, or of any organized volunteer fire department of any taxing district, or fire district under the control of any authorized public body; all exempt firemen of any taxing district; honorably discharged soldiers, sailors and nurses who have served in the army or navy of the United States during any war or rebellion; and their widows during widowhood; honorably discharged persons who have served in

the armed forces of the United States during the present war with Germany, Japan and Italy; members of the national guard during their term of service; and persons who were or are bona fide residents of this State on the day they were or will be mustered into federal military service for the present war (World War II), shall be exempt from locally-assessed poll taxes on proper claim made therefor.

A study of the subject discloses that the Legislature has empowered governing bodies of municipalities to levy poll taxes by R. S. 40:48–8, which provides as follows:

> "The governing body may by ordinance provide for the levying of an individual tax of one dollar to be known as a poll tax on every male inhabitant of the municipality domiciled therein of the age of twenty-one years or more, except paupers, idiots and insane persons, but no such tax shall be levied against any exempt fireman of such municipality or against any honorably discharged soldiers or sailors who have served in the army or navy of the United States during any war or rebellion, or against any member of the national guard during his term of service, if the persons so exempt shall present proper certificates from duly constituted authorities showing them entitled to such exemption. Such tax when established shall be collected for each year in the municipality in which he resides on December first of the preceding year and shall be collected as other taxes."

Let us consider the tax clause of the Constitution of 1947 as it applies to the question at hand.

Article VIII, Section 1, Paragraph 1 of the new Constitution provides as follows:

> Property shall be assessed for taxation under general laws and by uniform rules. All real property assessed and taxed locally or by the State for allotment and payment to taxing districts shall be assessed according to the same standard of value; and such real property shall be taxed at the general tax rate of the taxing district in which the property is situated, for the use of such taxing district.

Article VIII, Section 1, Paragraph 2 of the new Constitution provides:

> Exemption from taxation may be granted only by general laws. Until otherwise provided by law all exemptions from taxation validly granted and now in existence shall be continued. Exemptions from taxation may be altered or repealed, except those exempting real and personal property used exclusively for religious, educational, charitable or cemetery purposes as defined by law, and owned by any corporation or association organized and conducted exclusively for one or more of such purposes and not operating for profit.

Article VIII, Section 1, Paragraph 3 of the new Constitution provides:

> 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.

Paragraphs 1 and 3 of Section 1 of Article VIII, as recited hereinabove, are limited in their application to property taxes. The Legislature is therefore free to levy taxes, such as excise or franchise, on the exercise of a privilege. *Jersey City* vs. *Martin,* 126 N. J. L. 358, 359.

A poll tax is not a tax upon property, but a tax against a person upon the right to exercise a personal privilege. See *Cooley on Taxation,* 4th Ed., Sec. 1771, pages 3497, 3498. *Words and Phrases* (Perm. Ed.), Vol. 33, page 6. Therefore, we conclude that Paragraph 1 of Section 1 of Article VIII of the Constitution of 1947 is not applicable. Paragraph 3 of Section 1 of Article VIII, limiting personal exemptions to veterans, and others, is without force in respect to the matter we are considering since said section is restricted to taxation on real and personal property.

With respect to Paragraph 2 of Section 1 of Article VIII, it is to be noted that in the provision thereof relating to exemption from taxation, no reference is made to property. Hence, it is reasonable to infer that the framers, when writing this provision, had in mind not only exemption from taxation on property but exemption from taxation generally. This view is supported by their evident carefulness in mentioning property (real and personal) in all three paragraphs of said Section 1 of Article VIII, and is consonant with the limitation in Paragraph 9 (6) of Section 7 of Article IV that the Legislature shall not pass any private, special or local law relating to taxation or exemption therefrom. After due consideration we have resolved all doubts in favor of this view and have concluded that the provision of Paragraph 2 of Section 1 of Article VIII, relating to exemption from taxation applies to the exemption under consideration.

The statute providing exemption from poll taxes is a general law. See *Hines* vs. *Board of Chosen Freeholders,* 45 N. J. L. 504.

There being no constitutional limitations upon the power of the Legislature to impose a tax upon the exercise of a privilege and to grant exemptions therefrom based upon reasonable classification, it seems clear to us that R. S. 54:4–3.12, amended by Chapter 39, P. L. 1940, Chapter 70, P. L. 1942, Chapter 71, P. L. 1944, and Chapter 212, P. L. 1946 (New Jersey Statutes Annotated 54:4–3.12, 3.12a, 3.12b, 3.12c), and R. S. 40:48–8, insofar as it relates to exemption from poll taxes, are valid enactments and that the persons enumerated in both R. S. 54:4–3.12 &c. and R. S. 40:48–8 are entitled to exemption from poll taxes.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: BENJAMIN M. TAUB,
Deputy Attorney General.

SEPTEMBER 12, 1949.

SYLVESTER B. MATHIS, *County Clerk,*
Office of the County Clerk,
Toms River, New Jersey.

FORMAL OPINION—1949. No. 91.

DEAR SIR:

Receipt is acknowledged of your letter, in which you request an opinion "as to whether it is compulsory to furnish registry lists of voters for each election district as referred to in 1949 Election Laws, 19:31–18.1, page 120" (Section 2 of Chapter 347, P. L. 1947; C. 19:31–18.1).

In reality, the exact point presented by your inquiry is whether it is mandatory for the county clerk in all counties to cause to be printed in handbill form the registry lists of voters certified and transmitted to him under R. S. 19:31–18. For if the section under consideration (C. 19:31–18.1) imposes such a mandatory duty upon the county clerk, there can be no doubt that copies of the printed lists must be furnished or delivered not only to voters applying and paying therefor but also to the several public and party officers specified.

After a thorough consideration of the matter we have concluded that under section 2 of Chapter 347, P. L. 1947 (C. 19:31–18.1) it is within the discretion of each county clerk to determine whether or not to cause the registry lists to be printed in handbill form; but that if the county clerk causes such lists to be so printed, it is his mandatory duty to furnish or deliver copies as prescribed in said section.

Section 2 of Chapter 347, P. L. 1947 (C. 19:31–18.1) reads as follows:

> The county clerk in all counties *may* cause copies of the registry lists, certified and transmitted under section 19:31–18 of the Revised Statutes, to be printed in handbill form, and *shall* furnish to any voter applying for the same such copies, charging therefor twenty-five cents ($0.25) per copy. He *shall* also furnish five printed copies thereof to each district board, which *shall* within two days post to such registry lists, one in the polling place and one in another conspicuous place within the election district. The county clerk *shall* also forthwith deliver to the chief of police, superintendent of elections if any there be and the municipal clerk of each of the municipalities in the county for which the lists have been printed five copies of the lists of voters of each election district in such municipality, and to the county board ten copies of the lists of voters of each election district in each of such municipalities. The county clerk *shall* also forthwith deliver to the chairmen of the State committees and to the chairmen of the county committees of the several political parties, five copies of the lists of voters of each election district in each of the municipalities in his county. (Italics supplied.)

In the above quoted section, does the word "may" connote discretion or mandate in the exercise of permitted authority? Ordinarily, the word "may" is not a mandatory term. But where statutes provide for the doing of acts or the exercise of power or authority by public officers, and private rights or the public interest require the doing of such acts or the exercise of such power or authority, they are mandatory, regardless of whether they are phrased in imperative or permissive terms. (See

Sutherland's Statutory Construction, Volume 3, Section 5808.) Resting upon this rule alone, and without deliberating the problem further, it might be concluded that, since the furnishing or delivery of the registry lists by the county clerk is obviously in the public interest, the word "may" is here to be construed in a mandatory sense.

However, the history of the legislation relating to the printing of registry lists by county clerks does not justify such a conclusion. Before enactment of Section C. 19:31–18.1 (which as aforesaid is section 2 of Chapter 347, P. L. 1947), the same (1947) Legislature had earlier amended R. S. 19:30–2 to provide that county clerks in counties having a superintendent of elections *shall* forthwith, and in all other counties *may*, cause the registry lists to be printed. (The distinction as to mandatory and discretionary printing had theretofore pertained to county clerks in counties of the first class and those in all other counties.)

It is important to note that Chapter 347, P. L. 1947, deals only with registry lists. This chapter amended R. S. 19:31–18 relating to the transmittal of the lists to the county clerk by the commissioner of registration; it supplemented Title 19 (Elections) by adding thereto the section under consideration (C. 19:31–18.1), another requiring investigation of names by the chief of police after his receipt of copies of the lists (C. 19:31–18.2), and a third requiring the county clerk to keep the registry lists on file for a year (C. 19:31–18.3); and it repealed R. S. 19:30–1 and R. S. 19:30–2. A comparison of the pertinent sections of the election law before and after the enactment of said Chapter 347 will reveal that, aside from the existing provision relating to the printing of the registry lists by the county clerk in all counties, virtually all the provisions of Chapter 347, P. L. 1947, had been previously embodied in the sections amended and repealed thereby. In other words, the act constituted a re-treatment of the subject matter. It is a logical presumption, therefore, that the 1947 Legislature, in enacting the same, concentrated its attention upon this particular phase of the election law to the point of being cognizant of the words which had been used therein to distinguish between discretionary and mandatory printing of the registry lists by the county clerks. In fact, by Chapter 168, passed earlier in the session, the same Legislature, as hereinabove indicated, had amended R. S. 19:30–2 to prescribe that county clerks in counties having a superintendent of elections *shall* forthwith, and in all other counties *may* cause the registry lists to be printed. Here was a clear distinction between discretion and mandate in the exercise of permitted authority. Accordingly, it must be assumed that, in phrasing section 2 of Chapter 347, P. L. 1947 (C. 19:31–18.1) the Legislature retained the word "may" with deliberate intent. Especially is this assumption logical when in the same section the word "shall" was used (several times) with respect to the furnishing and delivery of copies by the county clerks to the persons or officers specified.

Under the circumstances we have been forced to apply the rule of construction stated in *Federal Land Bank of Springfield, et al.* vs. *Hansen,* 113 F. 2d 82, 84, as follows:

> "May" will ordinarily be interpreted as discretionary when the word "shall" appears in close juxtaposition in other parts of the same statute.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: DOMINIC A. CAVICCHIA,
Deputy Attorney General.

DAC/rk

SEPTEMBER 22, 1949.

HONORABLE SANFORD BATES,
Commissioner, Department of Institutions and Agencies.

FORMAL OPINION—1949. No. 92.

DEAR COMMISSIONER:

This opinion answers the following two questions which have been raised concerning the rights of a civil service employee who is suffering from a physical infirmity:

1. Is sick leave cumulative from year to year, so that, for example, an employee who has taken no sick leave for ten years and then develops a heart ailment can take with pay an accumulated sick leave of approximately 150 days?

2. How may the services of an employee, for example, a painter who has lost his eyesight, be terminated when he is ready and willing, though unable, to perform the regular duties of his position?

On the first question, the law is clear that sick leave accumulates continuously from year to year throughout the employee's period of service. The pertinent statute (N. J. S. A. 11:14–2) expressly so provides in the following language:

> "* * * If any such employee requires none or only a portion of the allowable sick leave for any calendar year, the amount of such leave not taken shall accumulate to his credit from year to year and such employee shall be entitled to such accumulated sick leave of absence with pay if and when needed. 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." * * *

The foregoing statute was construed in *Ballarene* vs. *Rosenblum,* 133 N. J. L. 108, as providing for cumulative sick leave. It was there held that an employee who had served the Hudson County Board of Taxation for a period of sixteen years was within his rights in taking one hundred and six days of sick leave during his sixteenth year, and that at the end of that time he still had a credit of one hundred and fourteen sick leave days. The employee was held entitled to receive his salary during the entire period that such sick leave was taken.

In answer to the second question, it is my opinion that an employee who is ready and willing to work but is unable to perform his regular duties because of a physical ailment may first take his accumulated sick leave, and when that has been consumed, his services may be terminated in accordance with the procedure established by the rules of the Civil Service Commission.

Those rules, adopted pursuant to Chapter 14 of Title 11 and Section 11:6–2 of the N. J. S. A., provide in brief that after the employee has used up his accumulated sick leave, he may, with the approval of the employing department and of the Commission, receive the benefits of any one of the following three alternatives: (1) a leave of absence without pay for a period of one year; (2) placement upon a re-employment list for a period of two years; or (3) such leave of absence followed by such status on the re-employment list. If, at the end of any one of the three aforesaid periods of grace, he is still unable to resume his duties, the employee will be requested to resign. In any event, if, without the permission of the employing depart-

ment, he fails to report for work for more than five successive working days, he will be deemed to have resigned. I have been advised by the Department of Civil Service that the foregoing rules would apply to any employee who is unable to perform his regular duties, even though he may be ready and willing to do so.

If an employee has been in the classified service for the ten years preceding his disability, he shall, upon the application of the head of the employment department or upon his own application, be retired for ordinary disability, on a regular disability allowance if he is under sixty years of age and on a service allowance if he has reached or passed that age. (N. J. S. A. 43:14–30). Furthermore, if the disability resulted from an accident suffered in the course of his employment, and the employee has not attained the age of seventy years, he shall, upon the application of the employing department or upon his own application, be retired on an accident disability allowance. (N. J. S. A. 43:14–31).

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: THEODORE BACKES,
Deputy Attorney General.

OCTOBER 7, 1949.

MR. ROGER H. MCDONOUGH,
Director, Division of the State Library,
Department of Education,
State House Annex,
Trenton, New Jersey.

FORMAL OPINION—1949. No. 93.

DEAR SIR:

I have your letter of the 29th ult. presenting the following question: "Is it possible to include in the official title of a municipally tax supported library words indicating that it is a memorial, for example, 'Free Memorial Public Library of .....'."

By R. S. 40:54–11, the board of trustees of a municipal free public library is created a body corporate under the name of "the trustees of the free public library of ....."

It is clear from the foregoing that the trustees of a free public municipal library has a statutory name of "the trustees of the free public library of ....."

If your inquiry is whether the building may bear a sign "Free Memorial Public Library," the answer is in the affirmative.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: THEODORE BACKES,
Deputy Attorney General.

TB:B

OCTOBER 7, 1949.

HONORABLE ERWIN B. HOCK,
Director, Division of Alcoholic Beverage Control,
Department of Law and Public Safety,
1060 Broad Street,
Newark 2, New Jersey.

FORMAL OPINION—1949. No. 94.

MY DEAR MR. HOCK:

I have your letter of the 5th instant calling my attention to Chapter 296 of the Laws of 1949 amendatory of each of the five local option sections of the Alcoholic Beverage Law (R. S. 33:1–44; 33:1–45; 33:1–46; 33:1–47; and 33:1–47.1), in that the time which must elapse between a referendum election was changed from three years to five years.

It appears from your communication that the County Clerk of Burlington County received from the governing body of one of the municipalities in that county a copy of a resolution directing him to print upon the official ballot to be used in the municipality at the next general election the "Sunday sales" question prescribed by R. S. 33:1–47. It also appears that the same question was voted upon in the municipality at the general election held therein in the year 1946.

The question which you have presented for my consideration is whether a referendum may be had in the Burlington County municipality at the coming general election. In other words, as you state the question "does the five year interval commence only on the date of a referendum held after the effective date of the 1949 act or does it apply, also, with respect to the interval between a referendum held prior to the 1949 act and a referendum held after the 1949 act?"

Your letter gives me to understand that in response to other inquiries which you have received on the same question, you have expressed your administrative construction that the 1949 act's "five-year interval commences to run as of the latest referendum on the same question in the municipality, whether such referendum's date is before or after the 1949 act."

Your construction, in my opinion, is absolutely correct. The amendments of 1949 supersede and take the place of the prior law. It is clear, therefore, that from one referendum to another referendum on any of the questions mentioned in the five sections above referred to, the second referendum cannot be held until the fifth year after the first referendum.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: THEODORE BACKES,
Deputy Attorney General.

TB:B

OCTOBER 14, 1949.

HON. ARTHUR L. WILCOX,
Clerk of the County of Sussex,
Court House,
Newton, New Jersey.

FORMAL OPINION—1949. No. 95.

DEAR SIR:

The question presented is whether, in the absence of a time limit for filing the question with the County Clerk under R. S. 40:62–3 et seq., the County Clerk is bound by the limit fixed in R. S. 19:37–1 or whether R. S. 40:62–3 et seq. may be construed to authorize such filing within a reasonable time.

Section 19:37–1 applies where there is no other statute by which the sentiment of the legal voters can be ascertained. Section 40:62–5 specifically provides a procedure for submission of the question, as well as the form and content of the question.

It is our opinion, therefore, that Section 19:37–1 et seq. does not apply and that, inasmuch as no time limit is specified in Section 40:62–5, the service upon the county clerk of the certified copy of the ordinance with a request that the question be placed upon the ballot is sufficient if made within a reasonable time. A reasonable time would be any time up to the time fixed by R. S. 19:14–1 for the County Clerk to have ready for the printer a copy of the contents of the official ballot, which time is seventeen days prior to the general election.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: DOMINIC A. CAVICCHIA,
Deputy Attorney General.

OCTOBER 3, 1949.

HON. C. A. GOUGH, *Deputy and Acting Commissioner,*
Department of Banking and Insurance,
State House Annex,
Trenton 7, New Jersey.

FORMAL OPINION—1949. No. 96.

DEAR COMMISSIONER GOUGH:

I am in receipt of your letter of September 20, 1949, wherein you request an opinion relative to the application of the insurance premium tax, contained in Chapter 132, P. L. 1945, to certain premiums and considerations collected under life insurance policies and annuity contracts written within this State on persons who are not residents of New Jersey.

It appears that a Canadian Life Insurance Company, authorized to transact business in New Jersey, has been writing insurance policies and annuity contracts through its New Jersey office on residents of other States, principally the State of New York, and that it is not licensed to transact business in those States. As far as you are able to determine, the Company pays no taxes to any State on the premiums and considerations collected at the time of writing this business, which are the first or initial premiums or considerations. The Company has never included them in its annual tax return to your Department, contending, that they are not collected under insurance policies and annuity contracts on residents of this State, and therefore, they are not taxable under the aforesaid statute.

Since said statute requires you to furnish the Director of the Division of Taxation with all the facts necessary for him to assess and collect the tax, you inquire as to whether said premiums and considerations are subject to taxation under said statute and should be included in the Company's return to your Department.

We are of the opinion that said premiums and considerations are not subject to taxation under said statute and that the Company is not required to include them in its return to your Department.

The question arises under Section 8 of the said statute and the pertinent part thereof reads as follows:

> "The tax specified in section one of this act as to life insurance companies, shall be two per centum (2%) upon the taxable premiums collected by the company during the year ending December thirty-first next preceding under all policies or contracts of insurance on residents of this State and one per centum (1%) upon the taxable considerations collected by the company during the said year under annuity contracts on residents of this State . . ."

The answer to the question lies in the meaning of the phrase "residents of this State."

Our examination of the authorities reveals that the word "resident," as used in a statute, may have several meanings. They all arise from interpretations of our Divorce, Elections, Attachment and Adoption Acts and little help can be obtained from them. The statute under consideration has not been before the Courts and, consequently, there are no decisions concerning it.

We, therefore, must fall back to the general rule pertaining to statutory construction. It has long been the law of this State that the construction of statutes, words and phrases shall be read and construed with their context, and shall, unless inconsistent with the manifest intent of the Legislature, or, unless another or different meaning is expressly indicated, be given their generally accepted meaning, according to the approved usage of the language. Upon revising the statutes in 1937, this rule was incorporated therein at *R. S. 1:1–1.*

The rule as thus expressed in the Revised Statutes has been given effect and followed in many cases since the revision, the most recent being *Madden* vs. *Madden,* 136 N. J. E. 132 (E. & A. 1944).

With the foregoing rule in mind, a reading of the statute under consideration does not reveal any reason why the phrase "resident of this State" should not be given the generally accepted meaning according to the approved usage of the language. We find nothing therein inconsistent with that intent, nor is there another or different meaning expressly indicated.

In *Bouvier's Law Dictionary* (Rawle's Third Revision) at page 2920, we find "resident" to be defined as, "One is a resident of a place from which his departure is indefinite as to time."

There being no indication in the statute to the contrary, either by way of inconsistency or by express language, we are of the opinion that the generally accepted meaning of the phrase "resident of this State," as used therein, according to approved usage of language, is a person residing in this State from which his departure is uncertain.

We, therefore, conclude that the Company need only report to your Department the premiums and considerations collected from persons coming within that category.

Very truly yours,

THEODORE D. PARSONS,
Attorney General of New Jersey.

By: OLIVER T. SOMERVILLE,
Deputy Attorney General.

OTS/meb

OCTOBER 26, 1949.

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

FORMAL OPINION—1949. No. 97.

DEAR COLONEL SCHOEFFEL:

Your letter of October 17, 1949, is at hand requesting an opinion as to action to be taken when a violation of the motor vehicle act is committed on State property (not a public way) and also whether a State Trooper has authority to issue a summons for such violation.

The facts given to me in this case indicate that two motor vehicles owned by employees of the State Hospital had an accident on State Hospital property at Trenton.

The roadways of the State Hospital and other institutions of similar character are not open to the public as a public way. There is no law on the statute books which gives the right to a State Trooper to issue summons for violation of the motor vehicle law on State property not used by the public as a public way and the law being silent concerning such State property, you cannot prosecute for violation of the motor vehicle act which was committed as aforesaid.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: ROBERT PEACOCK,
Deputy Attorney General.

NOVEMBER 1, 1949.

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

FORMAL OPINION—1949. No. 98.

DEAR MR. DEVALLIERE:

You have requested the opinion of this office as to whether the State Treasurer has the right to transfer unused funds, appropriated for the use of the Department of Conservation and Economic Development, from the account described as "Reconstruction and maintenance of beach protection projects already constructed along the Atlantic coast * * *," to the account described as "For beach protection along the Atlantic coast, for the construction of beach protection measures * * *" (Appropriation Act, P. L. 1949, Ch. 43, p. 310).

In my opinion the answer is "yes."

Section 4 of the Appropriation Act provides that "in order that there be flexibility in the handling of appropriations," the State Treasurer may, on the written application of any spending agency receiving an appropriation, transfer money from one item in such appropriation to another item therein, subject to the following provisos:

> "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 foregoing statute, in my opinion, plainly authorizes the State Treasurer to make the contemplated transfer.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: THEODORE BACKES,
Deputy Attorney General.

tb;d

NOVEMBER 7, 1949.

DR. WILLIAM S. CARPENTER, *President,*
State Civil Service Commission,
State House,
Trenton, New Jersey.

FORMAL OPINION—1949. No. 99.

MY DEAR SIR:

I have your communication of the 4th instant requesting an opinion on the effect of Chapter 121 of the Laws of 1948 on the placement in the unclassified division of positions which were formerly in the exempt division in counties, municipalities and school districts.

Prior to the enactment of Chapter 121 of the Laws of 1948, which took effect June 12th of that year, the classified service in counties, municipalities and school districts was arranged in four classes, known as the exempt class, the competitive class, the non-competitive class, and the labor class.

By the act of 1948, above referred to, Section 11:22–4 of the Revised Statutes was amended by deleting from that section as it appears in the Revised Statutes, the exempt class, so that under the present arrangement there are three classes only, to wit, the competitive class, the non-competitive class, and the labor class.

There was added, however, in the amendment of Section 11:22–4 of Chapter 121 of the Laws of 1948 a provision that those employees of counties, municipalities and school districts who had theretofore been classified in the exempt class should continue to hold their offices or positions and have the same rights of tenure and appeal as they theretofore had but when a vacancy should happen in any such office or position in the exempt class, appointments to fill the vacancies should be made as provided for appointments in the unclassified service, if such office or position is then included in the unclassified service under the provisions of said section or of any other statute, but if such office or position was not then included in the unclassified service, it should be filled in the manner prescribed for filling vacancies in the classified service.

Answering specifically your inquiry, I am of opinion that when a vacancy happens in an office or position which was in the exempt class on June 12, 1948, when Chapter 121 of the laws of that year became a law, the Civil Service Commission must determine whether such office or position should in the future be in the unclassified service or in the classified service.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: THEODORE BACKES,
Deputy Attorney General.

TB:B

NOVEMBER 10, 1949.

DR. WILLIAM S. CARPENTER
President, Civil Service Commission
State House
Trenton, New Jersey

FORMAL OPINION—1949. No. 100.

DEAR DR. CARPENTER:

You have requested my opinion as to whether the position of sergeant-at-arms of the Superior Court, Law Division, Essex County, is in the unclassified division of the Civil Service.

The answer is "Yes".

R. S. 2:16—27 provides:

> In each county of the first class the circuit court judges of the several circuit courts may appoint a sergeant-at-arms, who shall attend daily upon such courts in the county wherein appointed during the several terms thereof. Any such appointment may be revoked at any time by the appointing judge.

Chapter 375, Section 1, of the Laws of 1948 provides that where any statute, which became effective prior to September 15, 1948 and still remains in effect after said date, contains any provision with reference to the circuit court existing in accordance with the Constitution of 1844, said statute shall be given effect on and after September 15, 1948 as though it referred to the Law Division of the Superior Court, or a judge thereof.

From a reading of these two statutes together, it follows that power to appoint a sergeant-at-arms for the Law Division of the Superior Court, Essex County, now resides in the judge or judges assigned to that division, and that such appointment may also be revoked at any time by the appointing judge. Since such power of revocation is inconsistent with the tenure which characterizes positions in the classified service, the position must be deemed in the unclassified category.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: THEODORE BACKES,
Deputy Attorney General.

NOVEMBER 10, 1949.

MR. GEORGE M. BORDEN, *Secretary,*
State Employees' Retirement System,
1 West State Street,
Trenton 7, New Jersey.

FORMAL OPINION—1949. No. 101.

MY DEAR MR. BORDEN:

I have your letter of the 27th ult. with enclosure of copy of opinion rendered by this department on May 1, 1947 to the effect that under R. S. 43:16A—3 (Police and Firemen's Retirement System), payments by the municipality and the members should commence from the date of permanent appointment and that if such action is delayed by the municipality, the accrued payments are due from the municipality and the members.

This opinion undoubtedly correctly states the law with respect to the matter then under consideration because that statute provided that "any person becoming a policeman or a fireman . . . shall became a member of this retirement system as a condition of his employment".

You present two inquiries for my consideration — (1) whether your retirement law requires enrollment of an employee within the six months or one year period provided in Paragraphs "a" and "b" of Section 43:14-2 of your Retirement System; and (2) whether your law requires an employee to pay back to within the six months or one year period mentioned above if the employer has not required the employee to comply with the statute.

The answer to your first inquiry is that employees who are in the classified civil service should be enrolled within the time prescribed in "a" and "b" of Section 43:14-2 of your retirement system law for these periods of time are beyond the working test period or probationary period prescribed by law for those who enter the classified service of the civil service law.

R. S. 43:14-2 states who may be members of your fund and by 43:14-5 the head of a department employing a member is required to submit to your board a statement showing the name, title, compensation, duties, date of birth and length of service of the member and any other information the board may require as to such member, and by 43:14-6 your board is required to classify such person in one of the four classes mentioned in that section and to certify to the member the group in which he has been placed and the date of his admission to membership.

By R. S. 43:14-16 your board is required to certify to the head of each department the amount which is to be deducted from the compensation of such member on every pay roll. It will be observed from the two sections last above referred to, the head of a department employing a member and your commission have a duty to perform. The first shows that your board must not only know the name but the compensation to be paid to the person employed in order that your board may ascertain and certify the amount to be deducted from the compensation of such employee. No duty is imposed upon your board of trustees under your retirement system act to see to it that persons employed in the classified civil service shall enroll in your retirement system within the time prescribed by your law, and that the duty of furnishing the required information in order that enrollment may be had is cast upon the head of the department in which the employee is employed. Of course, as

you know, where an employee of the State does enroll in your retirement system and has served the State previously to such enrollment, he may be given credit for such prior service upon making back payments; and by Section 43:14-2.9, one who has been temporarily employed by the State and whose temporary employment resulted in permanent employment is permitted to make contributions covering his temporary service so that he will get the benefit of the period of time covered by such temporary employment.

It is true that under R. S. 43:14-19 employees entering the classified service of the State on and after January 1, 1922, are subject to the provisions of your Retirement Act and that there is cast upon the employer the duty of informing the employee of his duties and obligations under your act as a condition of his employment. This section, however, imposes no duty upon your trustees and in nowise modifies the view which I entertain and which I have expressed herein.

One can imagine that where enrollment was deferred for a year or two by reason of the fact that information was not furnished to your commission of the employment of a person in the classified service, that deductions, if made from one payment alone, or possibly two or three payments, might exhaust the entire income of the person for a given month and thus leave such person without any visible means of support.

I suggest that you promptly contact the Civil Service Commission and request from that Commission that when future appointments are made from a civil service list that your commission may be notified so that you may immediately communicate with the head of the department and obtain the necessary information to enroll such member after the expiration of the working test or the period of time mentioned in R. S. 43:14-2.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: THEODORE BACKES,
Deputy Attorney General.

TB:B

NOVEMBER 14, 1949.

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

FORMAL OPINION—1949. No. 102.

DEAR DR. BOSSHART:

You have requested our opinion as to whether, under the Fair Labor Standards Act of 1938 as amended by the Fair Labor Standards Amendments of 1949, the State of New Jersey is legally bound, in awarding "work scholarships" to students at State Teachers Colleges, to allow credit for work performed at a rate of not less than 75c per hour. It is understood that a work scholarship consists of giving credit

toward the payment of tuition in consideration of services performed by the student under the direction and control of, and for the sole benefit of, the State Teachers College where he is enrolled.

It is my opinion that the law in question does not apply to such work scholarships, since the Act excludes from its operation individuals employed by "any State or political subdivision thereof" (U.S.C.A. Section 203 (d)). The State Teachers Colleges are established, owned and operated by the State government through the Department of Education (N.J.S.A. 18:16-20), and in rendering services to such an institution, the student is performing work for the State within the meaning of the above-cited section of the Fair Labor Standards Act.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: THEODORE BACKES,
Deputy Attorney General.

OCTOBER 24, 1949.

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

FORMAL OPINION—1949. No. 103.

MY DEAR COMMISSIONER:

You desire formal advices from this offiice respecting certain questions relating to the administration of the work of the State Board of Child Welfare, an agency coming within the jurisdiction of your department.

The questions will be answered in the order raised and in the interest of brevity the question will be restated in shorter form.

1. You desire to be advised whether county welfare boards are authorized to issue orders requiring legally responsible relatives to support children who are applicants for or recipients of assistance under your Home Life division.

This question must be answered in the negative for there is nothing contained in Chapter 5, Title 30, Article 4, relating to Home Life of Dependent Children, which authorizes the county welfare board to proceed to the issuance of an order of support contemplated by your question. It is true that the county welfare board has such authority under Chapter 7, Title 44, Revised Statutes, but this authority confines itself solely to the administration of the affairs of the granting of Old Age Assistance, under a separate and distinct division of your department which has no relationship to the category of assistance here under discussion. In the absence of specific language in the statute, it cannot be presumed that the Legislature intended the functions of the welfare board, under Chapter 7, Title 44, to be carried over into Chapter 5, Title 30, Revised Statutes. This for the reason that the county welfare board is a creature of the Legislature and can only carry out the specific duties and responsibilities vested in it by the law creating it or those which may be reasonably presumed from the intent of the law. If the Legislature had intended the welfare board to issue orders of support in Home Life cases, it would have stated so specifically as it did in Chapter 7, Title 44, Revised Statutes.

2. In your second question you ask whether the State Board of Child Welfare is authorized to initiate on its own complaint actions to enforce support from any legally responsible relatives, in view of the fact that there is a specific section in the law (R. S. 30:5-14) which gives the agency authority to take action solely with respect to deserting fathers.

This question must also be answered in the negative for the language of R. S. 30:5-14 confines the power of the State Board of Child Welfare in the matter of enforcing support to a situation relating to the desertion of a father. It cannot be said that the Legislature intended this authority to extend to other legally responsible relatives other than the father. If it had so intended it would have so stated.

3. Your third question is paraphrased as follows: Is the State Board of Child Welfare authorized to require that an applicant for Home Life assistance initiate action against a legally responsible relative, and is the agency further authorized to deny assistance whenever there is a refusal by the applicant to take such action?

Both parts of this question must be answered in the negative for there is no requirement in R. S. 30:5-33, defining eligibility of an applicant mother, which requires her to exhaust other legal means to secure support from her husband in order to qualify for Home Life assistance. Therefore, if the applicant mother meets the requirements of R. S. 30:5–33 she would be deemed eligible for assistance. Accordingly, the agency is not authorized to deny assistance where the applicant refuses to take the legal procedure to compel her husband to support their children.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: EUGENE T. URBANIAK,
Deputy Attorney General.

ETU:HH

NOVEMBER 15, 1949.

MAJOR GENERAL EDWARD C. ROSE,
Chief of Staff,
Department of Defense,
Trenton 10, New Jersey.

FORMAL OPINION—1949. No. 104.

DEAR GENERAL ROSE:

Receipt is acknowledged of your request for my opinion as to your right to lease or rent the National Guard Armory at Jersey City, for the purpose of conducting weekly benefit parties on Sunday evenings during the balance of the present fiscal year.

Prior to the enactment of the act creating the State Department of Defense (P.L. 1948, page 473) the leasing of armories was the duty of the State Military Board. These powers and duties, by the consolidation act, were transferred to and are now vested in the Department of Defense.

An examination of the several sections of the old Militia Act relative to the use of armories for other than military purposes, notably Revised Statutes 38:8-13 thru 38:8-22, lists the specific uses for which any armory may be leased. These include the use of armories by recognized organizations composed of honorably discharged soldiers, sailors or marines; use of armories by pupils, boys scouts and girl scouts; State Board of Agriculture; State Board of Horticulture; State Grange or by any duly authorized or incorporated association approved by the State Board of Agriculture.

I can find no statutory authorization for the making of a lease for other than these purposes and in the absence of specific statutory authorization I am of the opinion that the Department of Defense is without power to make the contemplated lease or arrangement.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: JOSEPH LANIGAN,
Deputy Attorney General.

JL:rk

NOVEMBER 28, 1949.

DR. WILLIAM S. CARPENTER, *President,*
Civil Service Commission.
State House,
Trenton, New Jersey.

FORMAL OPINION—1949. No. 105.

DEAR DR. CARPENTER:

You have requested our opinion as to what, if any, length of service in grade is required of a police sergeant in the City of Newark in order that he may be eligible to take a promotion examination for the position of police lieutenant.

In my opinion, the situation is governed by Rule 24 of the Civil Service Rules, which was adopted pursuant to R. S. 11:10-7 and provides in part:

> "In all cases unless the President for good and sufficient reasons deems otherwise, the person seeking promotion shall have served at least one year after permanent appointment in the next lower class or classes as the case may be".

In accordance with this Rule, the Civil Service Department has fixed twelve months as the required time in grade in order to achieve eligibility for the promotion examination in question.

You have inquired as to the effect of R. S. 11:27-12 (Ch. 164, P.L. 1920). That section, so far as here pertinent, provides:

> "A member of the police department in a city of the first class who served in the war between the United States and the German Empire shall be entitled to be admitted to examination for promotion to a superior rank and upon successfully passing such examination shall be entitled to appointment in such superior rank, notwithstanding that fact that such person may not have held the position or rank held or occupied by him at the time of taking the examination for more than two years".

When the foregoing statute was in bill form, it was accompanied by the following statement of purpose, in compliance with the rules of the General Assembly:

> "This act is to benefit members of the police in Jersey City who served in the recent war with Germany and who have taken promotion examinations but, by reason of being unable to comply with the regulations of the Civil Service, are not entitled to such promotion."

While such statement was not part of the bill, it serves to confirm the conclusion herein reached, i.e., that the above quoted section does not affect the issue now pending.

As early as the Civil Service Law of 1908 (Ch. 156), the Commission was given the general power to make rules and regulations to carry the law into effect. Nevertheless, in respect to requiring service of a minimum time in a lower class of position in order to achieve eligibility for promotion, a later (1930) Legislature thought it proper to specifically empower the Commission to determine the requirement by regulation. Such power was accordingly granted expressly to the Commission by Chapter 176 of the Laws of 1930, from which R. S. 11:10-7 was derived. This power applies to positions in local government service as well as in the state service. R. S. 11:19-2.

Under the authority of the 1930 statute, the Commission has fixed twelve months as the required minimum time for the position in question. Since that is less than the two years mentioned in R. S. 11:27-12, and since there is nothing else in the latter statute which, in my opinion, could possibly invalidate or override the determination of the Commission, that determination controls this case.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: THEODORE BACKES,
Deputy Attorney General.

tb;d

NOVEMBER 30, 1949.

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

FORMAL OPINION—1949. No. 106.

DEAR MR. ERDMAN:

This will acknowledge receipt of your letter of November 4, 1949 asking for an opinion on the question of having members of the planning and development council sign grants. Your specific inquiry as to whether or not the board members should sign grants and leases, or whether, under the 1948 act, they should be signed only by the governor and commissioner of conservation and economic development has been considered.

My opinion is that the board members should sign grants and leases granted and leased by said board.

Under the original riparian act, on down through 1915, and under R. S. 12:3-16, it is set forth that the board shall fix and determine the purchase money and rental for riparian lands, and the board shall grant or lease said lands accordingly, and all such conveyances or leases shall be prepared by the board or its agents and subscribed by the governor and the board and attested by the secretary of state. "Subscribed" means the signing of one's name beneath and at the end of such instruments.

Under Chapter 22, P.L. 1945 it is set forth that no grants shall be allowed by less than a majority of the council and they are to be approved and signed by the commissioner and the governor:

The legislature passed Chapter 448, P.L. 1948 relating to the reorganization of the executive and administrative offices and departments, etc. Under Sec. 7 of that act it provides that all functions, powers and duties of the existing department of economic development be transferred to the department of conservation and economic development. Also, in Sec. 111 it provides that all files, books, papers, records, equipment and other property of any department, commission, board, office, authority or other agency, the functions, powers and duties of which have been transferred and assigned to the department of conservation and economic development, shall, upon the effective date of this act, be transferred to the department, office, authority or agent to which such assignment or transfer has been made hereunder.

Under Sec. 112 this act shall not affect orders, rules and regulations heretofore made and promulgated by any department or commission and the functions. powers and duties which have been herein assigned to the department of conservation and economic development continued or constituted hereunder shall continue in full force and effect until amended or repealed pursuant to law. These functions, powers and duties have never been repealed by legislative enactment.

Chap. 448, P.L. 1948 provides that no section of the acts prior to this act are repealed except 12:9-1 to 12:9-10 and 12:10-1. R. S. 12:9-1 refers to harbor masters, Hudson County, and 12:10-1 refers to the appointment of port wardens. So that the original acts concerning the duties of the former boards of commerce and navigation and conservation are still in effect and must be read with and in connection with Chapter 448.

You refer to Sec. 13 which states that no riparian lease shall hereafter be allowed except when approved by at least a majority of the planning and development council and no lease or grant in any case shall be allowed except when approved and signed by the governor and commissioner of conservation and economic development. That does not take the place of the original act, but only grants additional powers. R. S. 12:3-16 which provides that the board shall make grants and that they shall be subscribed by the governor and the board means that grants and leases shall be signed by members of the planning and development council.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: ROBERT PEACOCK,
Deputy Attorney General.

DECEMBER 1, 1949.

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

FORMAL OPINION—1949. No. 107.

MY DEAR MR. DE VALLIERE:

I have your communication of the 22d ult. requesting to be advised whether the Director of the Division of Motor Vehicles has the authority, under existing law, to require a reexamination of every holder of a driver's license who is above the age of 40 years, the proposed examination varying according to the age of the driver.

In my opinion no such authority exists. Under our law (R. S. 39:3-10), a person desiring to drive a motor vehicle on any of the public highways of this State must first undergo and pass a satisfactory examination as to his ability as an operator, which examination includes a test as to the applicant's knowledge of certain mechanisms of a motor vehicle so as to insure the safe operation thereof and also his knowledge of the laws and ordinary usages of the roads and a demonstration of his ability to operate a motor vehicle.

The section in question further provides that upon payment of the prescribed fee and after the Director of Motor Vehicles or an inspector of his has examined the applicant and is satisfied of the applicant's ability as an operator, the Director may grant a license to the applicant to drive a motor vehicle.

If a licensee is guilty of a violation of the motor vehicle or traffic law, his license may be suspended or revoked, but only after due notice in writing upon grounds assigned and an opportunity to be heard.

The conclusion, therefore, is inevitable that if it is contemplated to require a reexamination of every holder of a driver's license who is above the age of 40, legislation will have to be enacted for that purpose.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: THEODORE BACKES,
Deputy Attorney General.

DECEMBER 5, 1949.

DR. WILLIAM S. CARPENTER,
President, Civil Service Commission,
State House,
Trenton, New Jersey.

FORMAL OPINION—1949. No. 108.

DEAR SIR:

I have your communication submitting for my consideration the question as to who has jurisdiction to hear and determine complaints by State employees of allocation of ranges to class titles under Chapter 27 of the Laws of 1949.

An examination of that act discloses that the Legislature, by Section 2, established for the fiscal year 1949-1950 four compensation schedules consisting of thirty-four salary ranges for employees in the classified civil service of the State, and Section 5 directed that the ranges allocated to all classes as of July 1, 1949, should be the established ranges for the fiscal year commencing on that date.

By Section 13 of said act of 1949, the State Treasurer, the President of the Civil Service Commission and the Director of the Division of Budget and Accounting in the Department of the Treasury are granted power to make rules and regulations as in their discretion appears to be necessary in order to achieve an equitable application of the provisions of the act.

From your communication it appears that in the month of July, 1949, the then Acting Governor directed the Civil Service Commission to hear all complaints of State employees regarding their compensation under the act of 1949. I am sure that the Acting Governor, by the directive mentioned, did not intend or contemplate any more than that the complaints mentioned should be heard by the Civil Service Department, and that the question of jurisdiction had not entered his mind. The situation then was that certain employees of the State felt aggrieved by their allocations to certain ranges under the act of 1949 and desired to be heard, and the Acting Governor did nothing more than direct that that be done.

Prior to 1944, all the affairs of the Civil Service Department were under the jurisdiction of the Civil Service Commission. In that year, however, a very great change was effected in the law by Chapter 65 of the laws of that year, and by Section 3, amendatory of R. S. 11:1–6, all the executive functions, powers and duties vested in the commission by any section of the civil service law (Title 11), were thereafter required to be performed, exercised or discharged, as the case might be, solely by the President of the Civil Service Commission. You were given the authority as President to exercise general supervision over all activities under any section of Title 11 (Civil Service), and by Section 9 of said act, amendatory of R. S. 11:2–6 of the Revised Statutes, the Chief Examiner and Secretary was empowered, among other things, to administer the work of the commission and perform such other duties as may be prescribed under the civil service law or by rule or regulation, under the direction and supervision of the President of the commission.

I now quote two pertinent provisions of Section 10 of the act of 1944, amendatory of R. S. 11:5–1 of the Revised Statutes, empowering the commission to

"d. Hear appeals, either as a body or through one or more members designated by a majority thereof to hear such appeals, of persons in the classified service sought to be removed, demoted in pay or position, suspended, fined or otherwise discriminated against contrary to the provisions of this subtitle, and render decisions thereon and require observance of the decisions as herein provided;

"e. Hear and determine such appeals respecting the administrative work of the department, including appeals from the allocation of positions, the rejection of applicants for admission to examination, and the refusal to certify the name of an eligible, as may be referred to the commission by the chief examiner and secretary."

This brings us to the question of who has jurisdiction to hear appeals by State employees who were dissatisfied by their allocations under the act of 1949. Certainly that power was not vested in the Civil Service Commission for under "d" the commission, in addition to its other duties imposed under the civil service law, shall, as a body, or through one or more of its members designated by a majority thereof, hear appeals of persons in the classified service sought to be removed, demoted in pay or position, suspended, fined or otherwise discriminated against contrary to the provisions of the law, and to render decisions thereon and require observance of such decisions.

Certainly the activities required in determining allocations of positions within the ranges described in the schedules set forth in the act of 1949 cannot and do not fall within any of the descriptive words used in clause "d" of Section 10 of the act of 1944 just referred to, but do fall within clause "e" above referred to, for they are administrative matters and may be only heard by the commission when referred to that body by the Chief Examiner and Secretary.

It is clear from the foregoing, that the Civil Service Commission, as a body, has no jurisdiction to hear complaints of employees who feel aggrieved by allocations made under the act of 1949, for, as I have pointed out, they are administrative matters and belong to the President of the commission, and not to the commission itself, and that the directive of the Governor hereinabove referred to, which I have said, was not designed to and did not contemplate a question of jurisdiction, should not be understood to confer a jurisdiction where none was granted by law.

Finally, Section 13 of the act of 1949, amply empowers the officers of the State therein named "to make such rules and regulations as in their discretion appear necessary in order to achieve an equitable application of the provisions of the act." The final determination therefore of what adjustments should be made in the compensation of an employee of the State where those officers find that an employee should have compensation greater than that prescribed in the schedule to which he has been assigned, resides in those officers, who may, in order to achieve an equitable application of the provisions of the act, make a rule or regulation covering such situation and direct that a greater allowance be made.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: THEODORE BACKES,
Deputy Attorney General.

TB:B

DECEMBER 6, 1949.

HONORABLE WILLARD G. WOELPER,
Administrative Director,
Administrative Office of the Courts,
Trenton, New Jersey.

FORMAL OPINION—1949. No. 109.

DEAR DIRECTOR:

Receipt is acknowledged of your letter of November 23rd, in which you call our attention to the formal verified petition of Mr. Louis F. Beachner, an official stenographic reporter, "requesting retirement upon a pension pursuant to Chapter 402 of the Laws of 1948"; state that "since September 15, 1948, Mr. Beachner has been paid a proportionate share of his salary from each of the counties in the chancery vicinage where he was serving"; and ask to be advised "whether under the existing statutes any pension awarded to Mr. Beachner would be payable by these counties and, if so, in what proportion."

It is our opinion, and we advise you, that any pension awarded to Mr. Beachner will be payable by the four counties last paying his salary and in the same proportion paid by each thereof, but that one-third of the amount so directly payable by each county will be reimbursable by the State Treasurer upon the warrant of the State Comptroller.

The reasoning by which we have arrived at this conclusion is hereinafter set forth.

The petition is filed under R. S. 43:6-9 to 43:6-13, sections 43:6-10 and 43:6-11 whereof were amended by P. L. 1948, c. 402. The judicial officers and courts named in these sections were those in being under the Constitution of 1844, and the stenographic reporters referred to in said sections were those authorized by law before enactment of P. L. 1948, c. 376, which, by way of implementing the Constitution of 1947, provided a new scheme for the appointment, and availability for service, of official stenographic reporters. However, by section 3 of said act, it was provided that the reporters to be first appointed thereunder "shall be the reporters serving as official reporters of the old Supreme Court . . . and as the official reporters of the Court of Chancery, and as the official reporters of the courts of common pleas."

You indicate in your letter that Mr. Beachner was employed "from May 1, 1928, up until September 14, 1948 . . . as an Official Stenographic Reporter, serving in the Court of Chancery . . . On September 15, 1948 . . . he was appointed an Official Stenographic Reporter . . . and was assigned to the Chancery Division." If Mr. Beachner is still in service, he has served (if the dates set forth in his petition are correct) continuously for twenty years. But under section 43:6-10, in order to qualify for retirement on pension a stenographic reporter must have served *continuously in the Court of Chancery or any one circuit* (on the law side) *for at least twenty years.* In view of the reorganization of our court structure under the Constitution of 1947, and the provisions of P. L. 1948, c. 376, by which there was created an integrated system for the service of stenographic reporters, the first question to be determined is whether the continuous service in the one court or in any one circuit of the other court, required by section 43:6-10, is possible of attainment at all or is possible of attainment only by continued service in that division of our Superior Court

which can be said to be the counterpart of the Court of Chancery or the particular circuit on the old law side.

The whole tenor of the Schedule of the Constitution of 1947 evidences an intent that the new instrument itself was not to operate unfavorably upon persons holding public office, position or employment. And by Article XI, Section I, Paragraph 3, of the same instrument, it was decreed that

> All law, statutory and otherwise, all rules and regulations of administrative bodies and all rules of courts in force at the time this Constitution or any Article thereof takes effect shall remain in full force until they expire or are superseded, altered or repealed by this Constitution or otherwise.

We have been unable to find any constitutional provision which could be construed as superseding or repealing R. S. 43:6-9 et seq. And if our new organic law can be said to have altered these sections of the Revised Statutes at all, it is only to the extent that Article XI, Section IV, Paragraph 10, transferred to the Chief Justice of the new Supreme Court, until otherwise provided by law, such statutory powers *not related to the administration of justice* as were vested in certain judicial officers at the time the new Judicial Article took effect. (This paragraph of the Schedule of the Constitution, however, we reserve for discussion later herein.) Nor have we been able to find any provision of law since enacted which could be construed as superseding or repealing these sections of the Revised Statutes. On the contrary, the very enactment of chapter 402 by the 1948 Legislature evidences an intent to retain (and with reduced age requirement effected by said chapter by way of amendment) R. S. 43:6-9 et seq. (Later herein we shall discuss the relation of P. L. 1948, c. 375 to these sections of the Revised Statutes.)

The enactment by the same Legislature (1948) of chapter 376, providing for an integrated system for the service of official stenographic reporters in the new court structure (under which assignment and re-assignment may be made without regard to law or chancery), conduces to the conclusion that there is no more justification for saying that continuous service in the Court of Chancery and in the Chancery Division of the Superior Court, or that continuous service in any one of the old circuits at law and in the Law Division of the Superior Court, meets the literal requirement of continuous service in the Court of Chancery or in any one circuit, as the case may be, than there is for saying that the requirement is not met in the case where the service began in the Court of Chancery, or in any circuit at law, and continued there until interrupted by the taking effect of the new Judicial Article and the consequent assignment, under chapter 376, to a place in no way analogous to the place of former service.

Of statutes granting pensions to persons in public service, it is stated in *Sutherland Statutory Construction,* 3rd Ed., Vol. 3, section 7209, as follows:

> . . . Although this type of legislation constitutes a form of public grant, nevertheless it has as its purpose the promotion of the public welfare, and for that reason pension statutes are liberally construed to accomplish their objectives. Thus in determining the beneficiaries entitled to pensions, the qualification of the pensioner, and the time of service required for obtaining a pension, the courts should not resort to technicalities. . . .

We think that by force of the organic revision of our court structure and P. L. 1948, c. 376 (an implementing statute) as of September 15, 1948, and thereafter the criterion in R. S. 43:6-9 et seq. (so far as concerns continuous service) has been the

fact of continuous service for at least twenty years, regardless of *place* of service. Statutes are to be considered *in pari materia* when they relate to the same person or thing, or to the same class of persons or things, or to have the same object. *Sutherland, supra,* section 5202. Thus, to the extent that P. L. 1948, c. 376, relates to those persons now serving as official stenographic reporters and who served as stenographic reporters in the old court structure and before September 15, 1948, were covered by R. S. 43:6–9 et seq., the said act and the said sections of the Revised Statutes are to be read together; and, from the standpoint of continuous service for at least twenty years, if the dates alleged are accurate, Mr. Beachner qualifies for retirement on pension.

Now as to the funds out of which, and the manner in which, the pension is payable. Section 43:6–12 provides:

> . . . The pension shall be paid out of the same funds and in the same manner as the salary or compensation of the stenographic reporter was paid to him while acting as stenographic reporter.

The obvious intent of this provision, according to context, is that the unit or units of government paying the salary or compensation of the applicant at the time of retirement shall bear the cost of his pension to the same extent that it or they bore the cost of his services.

In your letter you indicate that Mr. Beachner has been paid his salary, since September 15, 1948, by four counties: "Hudson County 44%; Bergen County 27%; Passaic County 21%; Morris County 8%." We take it that this apportionment was made under section 9 (c) of P. L. 1948, c. 376, which provides:

> Where a reporter is employed in more than one county, or in a part or parts of the Chancery Division of the Superior Court having a vicinage embracing more than one county, the Director shall apportion to each of said counties the payment of such part of the reporter's annual salary as the population of such county bears to the population of all of said counties according to the latest Federal census. The Director shall file a certificate with the treasurer of each of said counties designating the reporter and the amount of his annual salary apportioned to the particular county, and shall also file a duplicate thereof with the State Comptroller. The county treasurer shall pay the part of such annual salary so apportioned to his particular county as hereinabove provided.

However, section 9 (g) of the same act (so far as pertinent) provides as follows:

> One-third of the amount paid directly to reporters by each county as herein provided, whether as salary, fees in lieu of salary or traveling and other necessary expenses incident to his attendance upon court, shall be refunded to said county by the State Treasurer upon the warrant of the State Comptroller . . .

In other words, direct payment of Mr. Beachner's salary was, by apportionment under section 9 (c), made by four counties in the respective proportions certified by the Administrative Director, but by virtue of section 9 (g) each county was reimbursable by the State to the extent of one-third of the amount so paid him.

In order, therefore, to give full force and effect to the intent of R. S. 43:6–12 that the pension "shall be paid out of the same funds and in the same manner as the salary or compensation" was paid to Mr. Beachner while acting as stenographic reporter, the full amount of the pension is to be apportioned among the counties last paying his salary, in the same manner as his salary was apportioned, and the respective counties are in turn to be reimbursed one-third by the State Treasurer in the manner provided by section 9 (g) of P. L. 1948, c. 376

In considering this matter, the present posture of the law has raised in our minds the question whether the Chief Justice has authority to determine Mr. Beachner's application. Our conclusion is that the Chief Justice has, and until law is enacted to provide otherwise, will continue to have, the powers of Chancellor, Vice-Chancellor and Justice of the former Supreme Court in connection with R. S. 43:6–9 et seq.

By section 43:6–11, as amended by P. L. 1948, c. 402, the "Chancellor, Vice-Chancellor or Justice of the Supreme Court, under whom or in whose circuit the stenographic reporter is serving at the time of his application to be retired upon a pension, shall satisfy himself of the age and physical incapacity . . . and fix the amount of the pension" and if satisfied that the applicant "is sixty-one years of age, or more, and is physically incapacitated from further service as a stenographic reporter, he may, if under all the circumstances he determines that the retirement upon . . . a pension is just and proper," make the requisite certificates to that effect. As already indicated, the scheme of service of stenographic reporters evident in R. S. 43:6–9 et seq was consonant with the court system superseded by that ordained by the Constitution of 1947, to implement which, so far as official stenographic reporters are concerned, P. L. 1948, c. 376, was enacted.

Under this enactment (aside from stenographic reporters thereunder appointable by county judges and not of consequence in this opinion) the appointment of stenographic reporters is made by the Supreme Court, their salary is fixed by the Supreme Court, and their removal for cause may be by the Supreme Court alone. As we read this statute, these reporters essentially serve under the Supreme Court, and administratively (assignment for service, change of assignment, etc.) they are controlled by the Chief Justice through the Administrative Director.

Hereinabove we have mentioned, but not discussed, Article XI, Section IV, Paragraph 10, of the Constitution of 1947. It reads:

> Upon the taking effect of the Judicial Article of this Constitution, all the functions, powers and duties conferred by statute, rules or otherwise upon the Chancellor, the Ordinary, and the Justices and Judges of the courts abolished by this Constitution, to the extent that such functions, powers and duties are not inconsistent with this Constitution, shall be transferred to and may be exercised by Judges of the Superior Court until otherwise provided by law or rules of the new supreme Court; *excepting that such statutory powers not related to the administration of justice as are then vested in any such judicial officers shall, after the Judicial Article of this Constitution takes effect and until otherwise provided by law, be tranferred to and exercised by the Chief Justice of the new Supreme Court.* (Italic supplied.)

The rule of construction regarding the ordinary meaning of words is well established. As was said in the case of *In re An Act Concerning Alcoholic Beverages,* 130 N. J. L. 123, at page 128:

> In the classic words of Chief Justice Marshall, the framers of the constitution and the people adopting it "must be understood to have employed words in their natural sense, and to have intended what they said."

Webster's Twentieth Century Dictionary assigns to the word "administration" the meaning (among others) of

> Dispensation; distribution; exhibition; as the *administration* of justice . . . (Italics in the text.)

Thus the phrase "powers not related to the administration of justice," as used in the paragraph of the Constitution above recited, obviously was intended to comprehend those powers which by their very nature are not essentially judicial. And since the powers vested in the judicial officers named in R. S. 43:6–9 et seq. are patently not essentially judicial, they were among those transferred, until otherwise provided by law, to the Chief Justice of the new Supreme Court in the said paragraph of the Constitution. The framers manifestly intended, and it cannot be reasonably disputed that the people so understood it, to constitute the Chief Justice as the temporary repository of those extra-judicial powers which by statute had been conferred on certain judicial officers and which by their very nature are at the Legislature's disposal and, consequently, subject to its enactment. But in this manner of treatment, there was nonetheless a constitutional investiture of these powers in the Chief Justice, even if provisionally. And there they remain until otherwise provided by law.

Our search for law in which it might be otherwise provided has turned up P. L. 1948, c. 375, "An Act to provide for the effect to be given, on and after September fifteenth, one thousand nine hundred and forty-eight, to certain statutes which became effective prior to, and remain in effect upon, said date." By this omnibus law, effective on the date the new Judicial Article was to take effect, the Legislature sought to integrate into the revised judicial system, so far as possible, the then existing statutes dealing with the power, jurisdiction, duty, limitation, or provision, governing or relating to any former court or officer specifically named, etc. But our examination of this act convinces us that there is no provision thereof which could be rationally construed to divest the Chief Justice of his provisional constitutional powers in relation to R. S. 43:6–9 et seq.

Bearing in mind that under P. L. 1948, c. 376, enacted by the same Legislature that enacted chapter 375, the scheme for service of stenographic reporters is different from that in vogue for stenographic reporters appointed by the Chancellor, a Vice Chancellor or a Justice of the former Supreme Court in circuit, and the construction which (in the light of the present posture of applicable law resulting from the constitutional reorganization of our court structure) we have placed upon the phrase "continuously in the Court of Chancery or any one circuit for at least twenty years," we find it impossible to correlate the respective provisions of chapter 375 with the respective references in R. S. 43:6–10 and 43:6–11 to "Chancellor, Vice-Chancellor or Justice of the Supreme Court under whom or in whose circuit" the stenographic reporter "is serving at the time of his application" to be retired on pension. We therefore conclude that the Chief Justice has authority to determine Mr. Beachner's application.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: DOMINIC A. CAVICCHIA,
Deputy Attorney General.

DECEMBER 7, 1949.

HONORABLE BENJAMIN S. DANSKIN,
President, Monmouth County Board of Taxation,
Spring Lake, N. J.

FORMAL OPINION—1949. No. 110.

DEAR MR. DANSKIN:

Receipt is acknowledged of your letter, dated December 6, 1949, wherein you request information regarding the appointment of a secretary to the Monmouth County Board of Taxation, You further advise me that the secretary, now holding office, is resigning, effective January 1, 1950.

> "Each county board may appoint a secretary, who shall hold office for a term of three years, and, with the approval of the Board of Chosen Freeholders, appoint such other clerical assistants as may be necessary" (R. S. 54:3–7 N. J. S. A., Laws of 1944, chapter 189, page 697, paragraph 1).
>
> "All secretaries, hereafter appointed, who shall have received two consecutive appointments as such secretary, and all secretaries now in office shall hold office during good behavior, efficiency and residence in the county where employed, and shall not be removed for political reasons, or for any cause other than incapacity, misconduct, non-residence, or disobedience of just rules and regulations established by the county board of taxation" (R. S. 54:3–9, N. J. S. A., Laws of 1944, chapter 189, page 697, paragraph 2).
>
> "No secretary hereafter appointed who shall have received two consecutive appointments as such secretary, and no secretary now in office, shall be removed from office, except for just cause, as provided in Section 54:3–9 of this Title, and after a written charge or charges of the cause of complaint shall have been preferred against him, signed by the person making the charge, and filed with the president of the county board of taxation, and after the charge has been publicly examined by the board upon such reasonable notice to the person charged, and in such manner and examination as the rules and regulations of the board may prescribe. Every such secretary, against whom a charge for any cause may be preferred hereunder, shall receive a fair trial upon the charge, and have every reasonable opportunity to make a defense thereto" (R. S. 54:3–10, N. J. S. A., Laws of 1944, chapter 189, page 697, paragraph 3).

The aforementioned provisions of the statutes, relating to the secretary of county boards of taxation, clearly defines the method of appointment, tenure of office and method of removal.

Answering your specific inquiry, therefore, I am of the opinion that your county board may appoint a secretary for a term of three years, and that if the said secretary receives two consecutive appointments as such secretary, he shall thereafter hold his office during good behavior, efficiency, and residence in the county where employed, and shall not be removed therefrom for any political reason, or for any cause other than incapacity, misconduct, non-residence and disobedience of your rules and regulations.

THEODORE D. PARSONS,
Attorney General.

By: BENJAMIN M. TAUB,
Deputy Attorney General.

DECEMBER 5, 1949.

HON. HARRY C. HARPER,
Commissioner of Labor and Industry,
State House,
Trenton, N. J.

FORMAL OPINION—1949. No. 111.

MY DEAR COMMISSIONER:

This is in response to your request for an opinion relative to the jurisdiction of the Department of Labor and Industry over certain operations involving the use of radioactive substances and radio isotopes. The facts are as follows:

The United States Government has contracted with a New Jersey Laboratory to assay and analyze certain material for the Atomic Energy Commission. The work is performed on property located in New Jersey but owned and operated by the Federal Government. In furtherance of this project the Federal Government has also contracted with a New York Warehousing Company to supply the necessary labor. The material which is analyzed and tested must be crushed and ground to a fine state in order to carry on this work. This is "primarily a way station and no processing of any kind is carried out." The material is then shipped to other locations "probably outside of the State, for further use."

It is our considered opinion that nowhere in Title 34 of the Revised Statutes (Labor Laws) is there any authority vested in the Department of Labor and Industry to exercise supervisory jurisdiction over the operations in question.

Chapter 6 of Title 34 deals with the Inspection and Regulation of Factories, Mines, Workshops and other Industries. While the term "workshop" is not defined anywhere in the chapter it is significant that every reference to it is in connection with "a place where the manufacture of goods of any kind is carried on." Thus the Legislative intent to use the word, "workshop," in its generic sense is obvious. It cannot be said that the highly technological processes involved in the operations under consideration were within the contemplation of the Legislature.

Consideration has likewise been given to Article 4 of Title 34 of the Revised Statutes which deals with occupational diseases. This article sets forth and defines especially dangerous processes and specifically limits their scope to work or processes exposing employees to lead dusts, lead fumes or lead solutions. It does not and cannot, by inference or projection, be deemed to apply to radioactive substances and/or radio isotopes.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: GRACE J. FORD,
Ass't Deputy Attorney General.

DECEMBER 7, 1949.

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

FORMAL OPINION—1949. No. 112.

MY DEAR TREASURER:

I have your letter of the 28th ult., with enclosures, from which it appears that one Albert B. Ari was an employee of your department during all the year 1948 and up and until the time of his death on June 26, 1949; that 5½ days of the vacation leave to which he was entitled for the year 1948 were carried over; and that had he lived until vacation time had arrived, and been granted vacation leave, in the year 1949, he would have been given a vacation leave for that year and would have had added thereto the 5½ days which he did not take in the year 1948.

It also appears that counsel for the estate of the decedent has raised the question of the right of the administratrix of his estate to collect vacation pay.

Vacation leave is provided for by R. S. 11:14–1 for all those in the classified service of civil service; and that section, among other things, directs that "Where in any calendar year the vacation or any part thereof is not granted by reason of pressure of State business, such vacation periods or parts thereof not granted shall accumulate and shall be granted during the next succeeding calendar year only."

Mr. Ari having died prior to his application for or the granting of a vacation leave for the year 1949, to which the 5½ days from the year 1948 were carried over, in my opinion no payment can be made under existing law for the vacation leave not used in the year 1948 or for any vacation leave which would have been granted in the year 1949 had he lived.

It is to be observed from the statute just referred to that a vacation leave or portion thereof not used can accumulate and be used in the next succeeding calendar year only. This necessarily leads to the conclusion that the full vacation period which Mr. Ari could have had in the year 1949 was lost by his death before vacation leave period arrived in that year.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: THEODORE BACKES,
Deputy Attorney General.

TB:B

DECEMBER 12, 1949.

N. J. STATE BOARD OF ARCHITECTS,
1060 Broad Street,
Newark, New Jersey.

FORMAL OPINION—1949. No. 113.

GENTLEMEN:

I acknowledge receipt of your request for an opinion respecting the effect of Chapters 293 and 294 of the Laws of 1948.

Chapter 293 of the Laws of 1948 amends R. S. 52:32-3 to read as follows:

"52:32-3. No department in the State created for the purpose of filing plans and specifications for buildings under the several laws shall receive or file any plans or specifications unless the same bear the seal of a licensed professional engineer or a licensed architect of the State, or in lieu thereof an affidavit sworn to by the person who drew or prepared the same."

Chapter 294 of the Laws of 1948 amends R. S. 40:55-2 to read as follows:

"40:55-2. No department in a municipality, created for the purpose of filing plans and specifications for buildings, shall receive or file any plans or specifications unless they bear the seal of a licensed professional engineer or a licensed architect of the State of New Jersey, or in lieu thereof an affidavit sworn to by the person who drew or prepared them."

The amendments in both cases consist in the addition of the words, "a licensed professional engineer or."

R. S. 45:3-10 reads in part as follows:

"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."

There is nothing in Chapters 293 and 294 of the Laws of 1948 to indicate a repeal in whole or in part of R. S. 45:3-10. Consequently, the statutes must be read together. The provisions of R. S. 45:3-10 continue to prohibit licensed professional engineers from engaging in the business of preparing plans, specifications and preliminary data for the erection or alteration of any building except buildings designed by such engineer incidental or supplemental to engineering projects, unless such engineers hold certificates issued by the State Board of Architects authorizing them to engage in the practice of architecture.

Chapters 293 and 294 of the Laws of 1948 deal solely with the receipt or filing by State departments or by municipal departments respectively, created for the purpose of filing plans and specifications for buildings. These laws do not broaden the scope of professional activities which may be performed by licensed professional engineers and the sole purpose of the two laws is to substitute a seal of a licensed professional engineer on plans and specifications for buildings designed by such engineer incidental or supplemental to engineering projects for the affidavit now required of a professional engineer.

The amendments merely provide a means by which licensed professional engineers may authenticate plans, specifications and preliminary data prepared in accordance with R. S. 45:3-10 in addition to the affidavit provided for therein.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: HENRY F. SCHENK,
Deputy Attorney General.

DECEMBER 14, 1949.

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

FORMAL OPINION—1949. No. 114.

MY DEAR COMMISSIONER BATES:

You have indicated that on occasion prisoners serving sentences in the several penal and correctional institutions are taken out to the several county courts and a new and additional sentence imposed upon them for a crime other than that for which they are presently confined.

You desire to be advised, in the absence of a specific direction in the order of commitment, when such recently imposed sentence commences to run, whether concurrently with the sentence then being served or consecutively at the expiration of the present sentence.

It is our opinion and we so advise you that, in the absence of a specific direction in the order of commitment, the sentence shall commence to run at the time of imposition thereof upon the prisoner, as further explained hereinbelow.

While we are unable to find a specific case which has been adjudicated in this State, nevertheless the general rule in other jurisdictions supports the foregoing view.

The proposition is aptly stated in 16 C. J. 1374, as follows:

"In the absence of a statute to the contrary, if it is not stated in either of two or more sentences imposed at the same time that the imprisonment under any one of them shall take effect at the expiration of the others, the periods of time

named will run concurrently and the punishments will be executed simultaneously. The fact that the terms of imprisonment are to be successive must be clearly and expressly stated."

The foregoing rule confines itself to sentences imposed at the same time, which is a slightly different situation than that which confronts us. Your specific question is disposed of in the following excerpt from the above cited authority as follows:

"Where, however, different sentences are imposed by different courts, the rule as to sentences operating concurrently unless otherwise directed in the sentence does not apply. Under a statute which provides that the term of imprisonment shall commence from the day of sentence, where defendant is sentenced to imprisonment while serving a term under a previous sentence, his term under the two sentences will run concurrently from the day the second is pronounced."

The statutes of New Jersey are silent as to when the sentence of the court shall commence and we must, therefore, again apply the general rule as stated in 16 C. J. 1372, Sec. 3228:

"When not otherwise directed by statute, or by the sentence of the court, as a general rule the term of imprisonment for which defendant is sentenced begins with the first day of actual incarceration in the prison, unless actual imprisonment is prevented by some cause other than the fault or wrong of the defendant. In some jurisdictions, however, it is held that the term of imprisonment shall date from the time sentence is pronounced, unless the convict by his own wrong has prevented it, while in others it begins to operate from the date of entry in the judgment."

The better rule would seem to be that the sentence commences to run on the day of the imposition thereof.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: EUGENE T. URBANIAK,
Deputy Attorney General.

ETU:HH

DECEMBER 21, 1949.

HONORABLE J. LINDSEY DE VALLIERE,
Director, Division of Budget and Accounting,
State House,
Trenton, New Jersey.

FORMAL OPINION—1949. No. 115.

DEAR SIR:

Receipt is acknowledged of your letter dated December 8, 1949 in which you ask for our opinion as to whether or not the Commissioner of the Department of Economic Development now has the sole power to make leases for lands of the State

of New Jersey under the tidal waters thereof or is the function still in the hands of the Shell Fisheries Council.

I am of the opinion that all leases, including the provision for the fixing of rentals, must have the approval of a majority number of the Shell Fisheries Council and the Commissioner, and thereafter the lease is to be signed by the Commissioner of Economic Development. I would suggest that hereafter all leases be executed in the following manner:

"In Witness Whereof, I have hereunto set my hand and seal the..... day of.....in the year of our Lord one thousand nine hundred and.... after first approving of the foregoing lease and the same having been likewise approved by a majority of the members of the Shell Fisheries Council."

Originally, the Shell Fisheries Council had the power to lease lands of the State under the tidal waters thereof (see R. S. 50:1-23) and it continued to have such power after the reorganization (see R. S. 13:1a-19; Laws 1945, Chapter 22, page 70). In 1947 R. S. 50:1-23 was amended (Laws 1947, Chapter 359, page 368, paragraph 1), and by this law the Shell Fisheries Board still had power to lease any of the lands of the State under the tidal waters thereof, to be exclusively used for the planting and cultivating of oysters and clams. However, in 1948 the Legislature enacted an act reorganizing the Department of Conservation and Development (see Chapter 448, Laws 1948). The pertinent part of this law relating to Shell Fisheries, R. S. 13:1b-42 to 13:1b-46, further amended the laws relating to Shell Fisheries. R. S. 13:1b-46 now provides that no lease of any of the lands of the State under the tidal waters thereof to be exclusively used and enjoyed by the lessee for the planting and cultivating of oysters and clams, shall hereafter be allowed, except when approved by the majority of the Shell Fisheries Council, and no such lease shall hereafter, in any case, be allowed except when approved and signed by the Commissioner of Economic Development. Laws 1948, Chapter 448, page 1834, paragraph 97).

This opinion is predicated on the fact that the latest declaration of the Legislature clearly intended that the Commissioner of Economic Development approve and sign the lease after an approval thereof by a majority of the members of the Shell Fisheries Council.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: BENJAMIN M. TAUB,
Deputy Attorney General.

DECEMBER 21, 1949.

DR. JOSEPH A. S. MILLAR, *Secretary,*
State Board of Veterinary Medical Examiners,
Deal, New Jersey.

FORMAL OPINION—1949. No. 116.

DEAR SIR:

This is in response to your letter requesting the opinion of this office with respect to educational qualifications of applicants under R. S. 45:16-7. You inquire whether an applicant for examination holding a license conferring the full right to practice all the branches of veterinary science in some foreign country must prove to the Board that he pursued the study of veterinary medicine for at least three years including three regular courses of lectures of at least six months each in different years, in a veterinary college or university approved by the Board, prior to obtaining such license.

In my opinion such an applicant must show he has pursued such study before he may be admitted to the examination.

R. S. 45:16-7 provides as follows:

> "45:16-7. Applications for licenses; fee; qualifications of applicants.
>
> "A person desiring to commence the practice of veterinary medicine, surgery and dentistry in this State shall deliver to the secretary of the board, upon payment of a fee of twenty-five dollars ($25.00) a written application for a license, together with satisfactory proof that the applicant is a citizen of the United States, is more than twenty-one years of age, is of good moral character, has obtained a competent school education and has received a diploma conferring the degree of veterinary medicine from a veterinary college or university of the United States, approved by the board, or in lieu thereof a diploma or license conferring the full right to practice all the branches of veterinary science in some foreign country. Applicants must have pursued the study of veterinary medicine for at least three years including three regular courses of lectures of at least six months each in different years, in a veterinary college or university, approved by the board, prior to the granting of the diploma or foreign license, and such proof shall be made, if required, upon affidavits."

Under the provisions of this section applicants who do not have a diploma conferring the degree of veterinary medicine from a veterinary college or university of the United States, must, in lieu thereof, have a diploma or license conferring the full right to practice all the branches of veterinary science in some foreign country. Such an applicant must also show that prior to his obtaining such a diploma or license, he had completed the required courses in a veterinary college or university *approved by the the Board.* The complete course must be received and pursued in approved schools.

It appears from your letter that the gentlemen in question, although graduating from approved schools have not pursued their study of veterinary medicine for the entire three years in a school approved by your Board. Part of their education was received in a school not approved by your Board. They have not, therefore, complied with the requirements of the statute that the complete course of study be in a school

approved by your Board. Specifically answering your question, therefore, I would state that these men, based upon the facts stated in your letter, are not qualified under the statute to be admitted to the examination for a license to practice veterinary medicine.

It further appears from your letter that these men were admitted to and took an examination, that you accepted fees for examination from them but none of them passed the examination. You now ask whether the fee of $25.00 for examination should be returned. In my opinion it should because they were erroneously admitted to the examination in the first instance and you may only accept the examination fee from qualified applicants. I would, therefore, advise that the fee of $25.00 previously collected be returned.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,
By: JOSEPH A. MURPHY,
Assistant Deputy Attorney General.

JAM:rk

JANUARY 5, 1950.

COL. S. L. SOUTH,
QMC, N.J.N.G.
Acting Adjutant General,
State Armory,
Trenton, New Jersey.

FORMAL OPINION—1950. No. 1

DEAR COLONEL SOUTH:

Receipt is acknowledged of your letter of December 29, 1949 relative to the installation of a motor vehicle storage building on the armory site at Elizabeth, New Jersey. I note you desire to be advised whether or not it is necessary to obtain a permit from the City of Elizabeth for such construction as required by the ordinances of said City.

This Department has ruled constantly, for many years, that the operations of the State, in the construction of armories and other buildings, are not subject to municipal regulations, for the reason that the State is never bound by any grant of power to a municipality, or the regulations established by the municipality under such power, or by any statute, unless the intention is clearly expressed in the grant of power to the municipality, or in the statute, that the State shall be bound thereby.

This is on the authority of *Trustees for the Support of Public Schools* vs. *Trenton,* 30 N. J. Eq., page 667, and *New Jersey Interstate Bridge and Tunnel Commission* vs. *The City of Jersey City,* 93 N. J. Eq., page 550, which opinions have been uniformly followed by our courts.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,
By: JOSEPH LANIGAN,
Deputy Attorney General.

JL:rk

JANUARY 3, 1950.

HOUSING AUTHORITY OF THE CITY OF PERTH AMBOY,
Perth Amboy, New Jersey.

FORMAL OPINION—1950. No. 2.

GENTLEMEN:

This letter is being written pursuant to a recent request made by you for an opinion concerning the status of one of your Housing Commissioners, namely, Frank Van Syckle.

Mr. Van Syckle is a duly appointed and acting Commissioner of the Perth Amboy Housing Authority and is also the President of the Perth Amboy National Bank of Perth Amboy, New Jersey. This bank is the depository of Housing Authority Funds.

This matter involves two questions:

(1) Whether Commissioner Van Syckle should be removed as a member of the Housing Authority because he is President of the bank which is used as depository by the Authority; and

(2) Whether it is necessary to discontinue the use of this bank of which the Commissioner is an officer as a depository for Authority Funds.

The answers to these questions are contained in the Local Housing Authorities Law, R. S. 55:14A et seq. Section 6 of that act refers to the problem at hand. The applicable part of this section reads as follows:

R. S. 55:14A-6:-

"... No commissioner or employee of an authority shall acquire any interest direct or indirect in any housing project or in any property included or planned to be included in the project nor shall he have any interest direct or indirect in any contract or proposed contract for materials or services to be furnished or used in connection with any housing project. If any commissioner or employee of an authority owns or controls an interest direct or indirect in any project included or planned to be included in a housing project he immediately shall disclose the same in writing to the authority and such disclosure shall be entered upon the minutes of the authority. Failure so to disclose such interest shall constitute misconduct in office. Upon such disclosure such commissioner or employee shall not participate in any action by the authority affecting such property. For inefficiency or neglect of duty or misconduct in office, a commissioner of an authority may be removed by the appointing authority which made the original appointment, but a commissioner shall be removed only after he shall have been given a copy of the charges at least ten days prior to the hearing thereon and had an opportunity to be heard in person or by counsel. In the event of the removal of any commissioner, a record of the proceedings, together with the charges and findings thereon, shall be filed in the office of the clerk."

The section of the statute above cited clearly states that if any commissioner of an authority owns or controls an interest direct or indirect in any project included or planned to be included in a housing project he shall immediately disclose same in writing to the authority and such disclosure shall be entered upon the minutes of the authority. Failure to make such disclosure constitutes misconduct in office. Upon such disclosure such commissioner shall not participate in any act of the authority affecting such property.

It can be assumed that Mr. Van Syckle's position as President of the Perth Amboy National Bank was known by the commissioners who designated the bank as depository for authority funds and that his interest as such has therefore been disclosed. The record, therefore, indicates that there is no misconduct on the part of Mr. Van Syckle which would warrant his removal from office or which would require that proceedings for this purpose be instituted against him.

The answer to the first question above set forth, therefore, is that he should not be removed from office as commissioner.

The second question is whether the Authority should discontinue the bank as depository because of the fact that one of its commissioners is president.

In view of the fact that there has been a disclosure as to any interest Mr. Van Syckle may have in this matter either direct or indirect, there is no need of any such discontinuance. However, Mr. Van Syckle should not participate in any action by the Authority affecting the use of this bank as depository or in which both the bank and the Authority have an interest. As to any future matters concerning situations where both the bank and the Authority may have an interest, he should make a full disclosure of same to the Authority, which disclosure should be included in the minutes of the authority.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: CHESTER K. LIGHAM,
Deputy Attorney General.

JANUARY 5, 1950.

HON. ROBERT B. MEYNER,
Senator, Warren County,
Phillipsburg, New Jersey.

FORMAL OPINION—1950. No. 3.

DEAR SENATOR:

Reference is made to your letter of December fourteenth, written on behalf of the Democratic members of the 1950 Senate.

The real issue presented by your letter, as we understand it, is whether it is the intendment of Article IV, Section IV, paragraph 4, of the Constitution of 1947, that the demand of one-fifth of the members present that the yeas and nays be

entered on the journal is of itself effective to force a roll call on any question not otherwise properly before the house for a vote. That paragraph reads:

> Each house shall keep a journal of its proceedings, and from time to time publish the same. *The yeas and nays of the members of either house on any question shall, on demand of one-fifth of those present, be entered on the journal.* (Italics ours).

Our opinion is, and we advise you, that the obvious intendment of Article IV, Section IV, paragraph 4, of the Constitution of 1947, is that the proceedings must be at that stage where, in due course, a question is properly before the house for a vote, before the demand of one-fifth of the members present will be effective to cause the yeas and nays to be taken and entered on the journal.

Article IV, Section IV, paragraph 3, of the Constitution of 1947 (one of the very paragraphs incorporated by reference in Rule 66, as you indicate in your letter) provides:

> Each house shall choose its own officers, *determine the rules of its proceedings,* and punish its members for disorderly behavior. It may expel a member with the concurrence of two-thirds of all its members. (Italics ours).

Of the rule-making power of the respective houses, it is said in Cushing's *Law and Practice of Legislative Assemblies,* 9th Ed., section 614:

> The principle, that each branch of a legislative assembly has a right to determine its own rules, is deemed so important that where it is inserted in the constitution of a State, it has been doubted, whether it was competent for the legislature of such State, by law, to provide rules for the government of its respective branches, which should bind them and supersede their authority to make rules for themselves.

Senate Rule 18, to which you refer in your letter and which you contend "is modified by Rule 66 and paragraph 4 of Section IV of Article IV of the Constitution" (said paragraph 4 being incorporated by reference in said Rule 66), provides:

> Committee reports upon bills, joint resolutions and concurrent resolutions of either House shall be in writing and shall show whether the same are reported upon favorably or otherwise, and how each member signing the report voted upon the question of the report, and *upon the written request of eleven Senators to the Chairman of a Committee to which such bill or resolution shall have been referred, the Committee shall forthwith report the same.* (Italics ours).

Senate Rule 18 is not conceivably at variance with the said paragraph of the Constitution (IV:IV-4). In the absence of constitutional specifications for, or restraints upon, legislative committees as regards the treatment of measures committed to them, we perceive in Rule 18 as written no constitutional infirmity. As already stated, Article IV, Section IV, paragraph 4, of the Constitution is applicable only after a question is properly before the house for a vote.

The clause in our Constitution of 1947 (as in our Constitution of 1844) anent the rule-making power of each house is in essence the same as that contained in the Constitution of the United States (I:5-2). Of the federal clause the United States Supreme Court said, in *United States* vs. *Ballin,* 144 U. S. 1, 5:

> Neither do the advantages or disadvantages, the wisdom or folly, of . . . a rule present any matters for judicial consideration. With the courts the question is only one of power. The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the House, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just. It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time. The power to make rules is not one which when once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal.

We conclude by emphasizing that the Senate, as one of the independent houses of the Legislature, has exclusive authority to "determine the rules of its proceeding"; and that this opinion is not to be interpreted as an expression on our part concerning the policy of the Senate as to procedures which lie within the sole discretion of that body.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: DOMINIC A. CAVICCHIA,
Deputy Attorney General.

JANUARY 10, 1950.

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

FORMAL OPINION—1950. No. 4.

DEAR DR. BERGSMA:

Your letter of transmittal under date of November 30th, 1949 requesting an opinion relative to requirement of a license in a given case by the Board of Beauty Culture Control is hereby acknowledged and memorandum opinion rendered as follows:

STATEMENT OF FACTS.

It would appear from your inquiry, that a person who is presently licensed as a teacher and demonstrator under the rules and regulations of the Board of Beauty Culture Control and laws applicable thereto, is holding himself out as a "consultant" by rendering advice to duly licensed beauticians on problems of hair styling, illustrating the technique involved and supervising first attempts to apply newer techniques, in places other than licensed beauty schools.

QUESTION PRESENTED.

The question to be answered is whether such a person is precluded from acting as a "consultant" under present laws.

ANSWER.

The answer is no.

REASONS.

A negative answer is in order for the reason that there are no laws presently upon the books of this State which require licensing as a beauty culture "consultant".

R. S. 45:4A–5.1 provides as follows:

> "Subject to compliance with the requirements of chapter four-A of Title 45 of the Revised Statutes, the Board of Beauty Culture Control shall issue the following licenses: (a) license to practice beauty culture as an operator; (b) license to practice beauty culture as manager-operator; (c) license to demonstrate appliances, methods or cosmetics used in the practice of beauty culture; (d) shop license to use or maintain premises for the practice of beauty culture; (e) license to teach beauty in licensed beauty schools only; (f) limited license as a manicurist to manicure the fingernails only; (g) school of beauty culture license to use or maintain premises for the teaching of beauty culture; (h) temporary license to use or maintain premises for the demonstration of appliances, methods or cosmetics to be used in the practice of beauty culture; (i) student's temporary permit to practice beauty culture; (j) temporary permit to practice beauty culture while an applicant is scheduled for an examination; (k) duplicate license, issued in case of loss or destruction of the original license."

It should be noted that no mention is made in the statute hereinbefore referred to as to consultants. It should also be noted for the purposes of this opinion that inquiry is made of a person who has already complied with the provisions of subdivisions (c) and (e) of the statute referred to.

Websters New International Dictionary, Second Edition, (unabridged) defines a consultant as (1) "one who consults another;" (2) "one who gives professional advice or services regarding matters in the field of his special knowledge or training, as a consulting physician or engineer, or, sometimes, a detective".

From such a definition, it would appear entirely proper to hold that those pursuing an interest in particular fields of beauty culture can hold themselves out as consultants, there being no less reason to so hold than in case of doctors who, as specialists, instruct other doctors as to operations or treatments, or in the case of lawyers who, as specialists, advise other lawyers.

To hold, therefore, that consultants in beauty culture are nothing more than teachers who should limit their teaching of beauty culture in licensed beauty schools only as provided in R. S. 45:4A-5.1 subdivision (e) would, to my mind, do violence to the statute in question and represent an attempt to read into the law something that is not there now.

It follows then, that a person may properly hold himself out as a consultant and not necessarily limit his right to impart knowledge in a particular or special field of beauty culture to a place or building called a beauty school and more particularly in the case of a person who already holds a demonstrator's and teacher's license as in the case at bar.

Respectfully submitted,

THEODORE D. PARSONS,
Attorney General,

By: JOHN WARHOL, JR.,
Deputy Attorney General.

JANUARY 11, 1950.

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

FORMAL OPINION—1950. No. 5.

DEAR COMMISSIONER ERDMAN:

You have requested our opinion as to whether the State, which operates and maintains the Manasquan Canal at its own expense, may attempt to recover such cost by charging tolls for the use of the Canal. The answer is "No".

Although constructed by the State on land owned by it, the Canal connects two navigable waters of the United States, and thus is itself a navigable water of the United States. *Ex parte Boyer,* 109 U.S. 629; *The Robert W. Parsons,* 191 U.S. 17; *State* vs. *Columbia Waterpower Co.,* 82 S. C. 181, 63 S. E. 884. The Canal is therefore subject to the control of Congress for regulatory purposes, to insure the free navigation of those waters. *County of Mobile* vs. *Kimball,* 102 U. S. 691, 699; 11 C. J. 1140. Until the Federal government has dictated otherwise, the State has the right to charge tolls as compensation for the use of canals owned and operated by it. *Sands* vs. *Manistee River Improvement Co.,* 123 U. S. 288, 295; *Huse* vs. *Clover,* 119 U.S. 543,548. See also *S. C. Highway Dept. v. Barnwell Bros.,* 503 U.S. 177, 187; *Clyde-Mallory Lines* vs. *Alabama,* 296 U. S. 261, 267; *State* vs. *Columbia River Waterpower Co. supra,* 63 S. E. 885. In respect to the Manasquan Canal, however, it appears that the United States has exercised its power to prevent the State from exacting tolls.

In 1906 Congress passed a statute (33 U. S. C. A., Section 566) authorizing the State of New Jersey or its agents "to improve the channels on the New Jersey seacoast, or any portion of said coast, or the waters adjacent thereto, lying between thirty-eight degrees, fifty-six minutes and forty degrees, twenty minutes, north latitude, (the Canal lies within these parallels) by dredging, or by the construction of piers, jetties, or breakwaters, or other river and harbor work of any description or nature adapted to attain the ends now pursued by the United States government for the advantage of said coast or for the relief of commerce; *Provided* * * * That no tolls or other charges upon commerce shall be imposed by those making such improvements. * * *" This proviso exemplifies a policy against tolls which has been

widely adopted by the Federal government in recent years. See, for example, 33 U. S. C. A., Section 5 prohibiting tolls on federally owned canals; and 33 U. S. C. A., Sections 6, 8 and 9, prohibiting tolls on several other waters.

Although it could be urged that the construction of a canal through dry land belonging to the State does not fall within the classification of "river and harbor work" within the meaning of the above-quoted statute, a contrary interpretation was placed thereon by both the Secretary of War and the State of New Jersey, through the old Board of Commerce and Navigation, when the latter applied to the Secretary of War for a permit to construct the Canal. The permit, dated December 16, 1915, recited that the State had applied for authority to construct the Canal in accordance with the provisions of the Act of March 3, 1899, "and also the provisions of an Act of Congress approved June 30, 1906, entitled 'An Act to improve the channels along the New Jersey seacoast'" (33 U. S. C. A., Section 566). The permit then proceeded with a grant of authority to the State for the canal construction "in accordance with the provisions of the Acts of Congress aforesaid". One of the conditions of the grant was as follows:

> "13. That said canal shall be constructed, operated and maintained in accordance with the laws of the United States applicable thereto".

The foregoing excerpts from the permit plainly indicate that the State agreed to build and operate the Canal in accordance with the Act of 1906 (33 U.S.C.A., Section 566), which was viewed by both parties as applicable to the project. Therefore the Act of 1906, with its prohibition against tolls, should be regarded as concluding the issue presented.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: THOMAS P. COOK,
Deputy Attorney General.

tpc;d

JANUARY 10, 1950.

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

FORMAL OPINION—1950. No. 6.

DEAR COMMISSIONER:

Your letter at hand stating that your department has under consideration the allocation from coast protection funds of $5,000 to Middle Township, Cape May County, for the building of coast protection structures at Reeds Beach, a locality in the township fronting on Delaware Bay and inquiring whether or not your department is authorized to allocate funds to said township from the coast protection appropriation in Chapter 43, P. L. 1949.

Chapter 258, Laws of 1946 provides that in addition to the powers conferred by the provisions of the act to which this is a supplement, the state department of conservation, through the division of navigation, is authorized and empowered to repair, reconstruct, or construct bulkheads, breakwaters, groins or jetties on any and every beach front along the Atlantic Ocean, or any beach front along Delaware bay and Delaware river, or at any inlet or any inland waters adjacent to any inlet along the coast of the State of New Jersey to repair damage caused by erosion and storm, or to prevent erosion of the beaches and to stabilize the inlets.

Chapter 43 of the Laws of 1949 provides for beach protection along the Atlantic coast, for the construction of beach protection measures, including bulkheads, backfill, groins, and jetties, and the pumping of sand, advertising and inspection costs; providing fifty percent of the cost of each project shall be borne by each municipality participating in the project. Following the above paragraph, the act states that any municipality participating in a beach protection project shall deposit its fifty percent share of participation with the department of conservation, division of navigation, and all projects are to be constructed under contract with and under the supervision of the former division of navigation. All allocations heretofore made to any municipality and any balances unused in the "Beach Erosion Account" as of July 1, 1949, are hereby reappropriated and subject to the provisions as heretofore stated. No allocation of beach erosion moneys shall be made to any municipality without the written consent of the Governor.

The appropriation act above cited (Chap. 43, P.L. 1949) follows the instruction to the division of navigation by Chap. 256, Laws of 1946 and you would have authority to allocate the sum of $5,000 to the contract for beach erosion in Middle Township in case Middle Township allocated the same amount, said project to be constructed under contract with and under the supervision of the former division of navigation.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: ROBERT PEACOCK,
Deputy Attorney General.

JANUARY 19, 1950.

THE HONORABLE LLOYD B. MARSH,
Secretary of State,
State House,
Trenton, New Jersey.

FORMAL OPINION—1950. No. 7.

DEAR SIR:

You have informed us that you are preparing for the printer your annual compilation of Title 19 (Elections) of Revised Statutes and Other Acts Concerning Elections, and you desire to be advised whether, in view of the opinion in the case of *James Imbrie, et als.,* vs. *Lloyd B. Marsh, et als.,* Supreme Court of New Jersey

(No. A 68, September Term, 1949), you should include therein amendments effected by P.L. 1949, c. 24 ("An Act concerning elections, and amending sections 19:3-7, 19:13-8, 19:13-15, 19:13-20, 19:13-21, 19:14-2, 19:23-7, 19:23-12; 19:23-13, 19:23–15 and 19:23–16 of the Revised Statutes.").

Our categorical answer to your question is "yes."

Whatever the effect of the opinion in the Imbrie case upon P.L. 1949, c. 24, you are not warranted in ignoring the existence of said act; and you are bound, therefore, to include it in your compilation. As was said by Mr. Justice Collins, who delivered the opinion of our Court of Errors and Appeals (1902) in the case of *Allison* vs. *Corker,* 67 N. J. L. 596:

> . . . But I am prepared to go further and hold that an unconstitutional statute is nevertheless a statute — that is, a legislative act. Such a statute is commonly spoken of as void. I should prefer to call it unenforceable because in conflict with a paramount law. If properly to be called void, it is so only with reference to claims based upon it. Neither of the three great departments to which the constitution has committed government by the people can encroach upon the domain of the other. . . . An unconstitutional statute is not merely blank paper. The solemn act of the legislature is a fact to be reckoned with. Nowhere has power been vested to expunge it or remove it from its proper place among statutes.

Having disposed of your direct query by the direct answer hereinabove set forth, we remark that you seem to have the impression that the intendment of the court's opinion in the Imbrie case is that Chapters 21, 22, 24 and 25 of the Laws of 1949 are "unconstitutional and void" *in toto* and, therefore, wholly unenforceable. Such, however, is not our impression; and, in view of the fact that certain official oaths are ordinarily filed with you as Secretary of State and, for that reason, you may be queried with respect to the taking thereof, we proceed to explain the effect of the said opinion.

It is true that Chief Justice Vanderbilt, who delivered the opinion of the Supreme Court, said: "In the view that we take of the exclusive nature of an oath prescribed in the Constitution, Chapters 21, 22, 24 and 25 must be declared unconstitutional and void." However, this statement must be read in light of the opinion as a whole and particularly in light of the fact that the opinion concludes by saying that the judgement below is affirmed. And the judgment below (Appellate Division, Superior Court) was that ". . . we hold that Chapters 21 to 25 inclusive of the Laws of 1949 are invalid insofar as they relate to the governor, senators and members of the general assembly, and candidates for those offices". And, as was said in the Supreme Court opinion in the case: "From that determination the defendants have appealed to this court". Thus, the issue actually before the Supreme Court was whether to affirm or reverse the judgment of the Appellate Division of the Superior Court. Upon that basis, the effect of the opinion of the Supreme Court is that Chapters 21, 22, 24 and 25 of the Laws of 1949 (the court having properly ignored Chapter 23 for the reason that it had no relevance to the issue in the case) are unenforceable only as to the governor, senators and members of the general assembly, and candidates for those offices.

However, we are constrained to say that, in view of the reasoning by which the Supreme Court reached its conclusion, it would be absurd for us to advise that as to all State officers other than the governor, senators and members of the general assembly Chapters 21, 22 and 24 (1949) are still to be given full force and effect

(Chapter 25 having spent its force because of its applicancy only to candidates at the 1949 general election). Such advice on our part would only hold open the door for further attack upon these laws by other State officers, and we see no point in prolonging a legal controversy which, in view of the Supreme Court's opinion in the Imbrie case, can only come to the same end.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: DOMINIC A. CAVICCHIA,
Deputy Attorney General.

JANUARY 23, 1950.

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

FORMAL OPINION—1950. No. 8.

DEAR MR. ERDMAN:

Your letter of January 18, 1950, is at hand.

The opinion you seek is whether or not harbormasters appointed by your department (navigation section) have jurisdiction (1) on the Shrewsbury River, and (2) on Sandy Hook Bay.

The answer is that harbormasters appointed by the navigation section, under the above department, have jurisdiction on the Shrewsbury River and Sandy Hook Bay.

The original board of commerce and navigation, which has been transferred by statute to the department of conservation and economic development, had power to appoint harbormasters in any locality where an inland waterway shall have been constructed or improved by the State. (12:6–4 R. S.)

Such harbormasters shall have power to regulate all water traffic in inland waterways and upon other waters under the jurisdiction of the State, and shall have explicit power to enforce all laws and regulations relating to or regulating traffic or inspecting the equipment of vessel on such inland waterways and other waterways within the control of the State. (12:6–7 R. S.)

Your board had power to improve by deepening and widening such streams, creeks, etc., as connect with or are tributaries to the inland waterway system, that flow through any of the tidal waters bordering or adjacent to the Atlantic Ocean. (12:6–8 R. S.)

Any stream, creek, river or inland waterway improved pursuant to R. S. 12:6–8 of this title shall constitute and form part of the inland water system of this State, and thereafter shall be maintained as such by the State. (12:6-9 R. S.)

The Legislature passed an act conferring powers on the board of commerce and navigation to provide for a harbor of refuge in Sandy Hook Bay near the borough of Atlantic Highlands and to do all things necessary therewith for effectuating the purposes of this act, and an appropriation was made under said act. (12:5–9 R. S.)

The board having power to appoint said harbormasters, and the Legislature having constituted streams, creeks, rivers and inland waterways improved pursuant to this act a part of the inland waterway system of the State, and having created a harbor of refuge in Sandy Hook Bay, and under Sec. 12:8-1 et seq. having created regulations for the appointment of pilots in Sandy Hook Bay, places such harbor of refuge under the jurisdiction of the State of New Jersey. And the Shrewsbury River being an inland waterway under the terms of this act, the harbormasters so appointed by your department have jurisdiction on the Shrewsbury River and Sandy Hook Bay.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: ROBERT PEACOCK,
Deputy Attorney General.

JANUARY 24, 1950.

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

FORMAL OPINION—1950. No. 9.

DEAR COLONEL SCHOEFFEL:

I have your request of January 20, 1950, for opinion on the following questions:

1. Is the State Police responsible or liable for feeding prisoners while in custody, or while in juvenile shelters?

2. Is the State Police liable in general for meals served to prisoners?

The county jails are under the jurisdiction of the sheriffs of the respective counties and the statute provides that the board of freeholders may fix a price for victualing prisoners in the county jail at a sum not exceeding 50c per day for each prisoner, and shall annually appropriate a sum of money sufficient for that purpose. (30:8-14 R. S.)

Prisoners who have been sent to county workhouses shall be kept therein at the charge and expense of the county. (30:8-34 R. S.)

Concerning the question of juvenile shelters, under the juvenile and domestic relations court established by R. S. 9:18-4 it is provided that where a child is arrested, the court may place said child in a house of detention or shelter home and whenever the court has assumed custody of said child, if not released in custody of the parent, it shall be detained in such place of detention as may be designated by the court subject to further order. (9:18-24 R. S.)

Under 9:18-26 the board of freeholders may establish and maintain a home for the temporary detention of children and all expenses incurred in complying with the provisions of the act shall be a county charge.

On the question as to who is responsible for feeding prisoners while in custody of the State Police, I would say that the State Police should not keep persons in custody in their barracks, but when arrested should be transported to a jail or juvenile shelter.

On the question as to who is responsible for feeding prisoners while in county jails, county workhouses or juvenile shelters, the county board of freeholders, under the act cited above, is responsible for feeding such prisoners.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: ROBERT PEACOCK,
Deputy Attorney General.

JANUARY 27, 1950.

COL. CHARLES H. SCHOEFFEL, *Supt.,*
Division of State Police.

FORMAL OPINION—1950. No. 10.

DEAR COL. SCHOEFFEL:

Your letter of January 9, 1950, requesting an opinion from this office concerning the rights and duties of the State Police when confronted with problems as presented to you by Chief Donahue of the Bergen County Police Department, is herewith acknowledged.

The facts in question are as follows:

Recently there was a disagreement as to the renewal of a contract at the Wright Aeronautical Corporation Plant No. 7 at Wood Ridge, New Jersey, and it appeared that the workers at the plant would go on strike. Conferences between labor and management deferred strike action but no settlement had been reached. Pursuant to the original threat, a conference was held by representatives of the Wright Corporation, Wood Ridge Police, Bergen County Police, Bergen County Sheriff's Office and the United States Air Corps to formulate plans for security measures. The United States Army representative advised that there was some very valuable equipment at the Wood Ridge plant belonging to the Air Corps, and therefore military regulations, not in violation of any existing State statute, would be set up. These regulations would be enforced by military police. The military authorities asked for the assistance and cooperation of the civilian authorities and said assistance was agreed upon by all present.

The important questions presented are:

1. Would civil police have any authority to enforce an army regulation or ruling which ruling does not violate any existing statute?

2. Would civil or military courts-martial have jurisdiction over offenders?

The powers and duties of the State Police are set forth in Chapter 2, Title 53 of the New Jersey Statutes Annotated under the general head of "State Police." The members of the State Police are police officers primarily employed to furnish adequate police protection to inhabitants of rural sections, etc. . . . They may co-

operate with any other state department or any state or local authority in detecting crime, apprehending criminals and preserving law and order; but the State Police shall not be used as a posse in any municipality except upon order of the Governor when requested by the governing body of such municipality.

The Military Police have authority on a post, camp, station or reservation over all persons; in other areas only over military personnel. They would not have any jurisdiction over civilians at the Wright Aeronautical Plant (a private corporation) and would have no right to request State Police for assistance in the enforcement of rules to protect its property.

The Military Police are vested with such powers of arrest or confinement over persons subject to military law as are provided by army regulations. See Army Regulations 600-355; see Articles of War 2.

Ordinarily a request from the Military Police for assistance cannot be honored. However, a request from a municipal authority (Wood Ridge, N. J.) where the military police are protecting property, to the State Police for assistance if same is necessary, will meet with approval under the law authorizing State Police to cooperate with local authority in preserving law and order. The preservation of law and order in such a municipality is clearly distinguishable from the use of State Police as a posse. Therefore it is not necessary to obtain an order from the Governor.

In the event of an arrest by a state trooper, the offender would be tried by civilian and not military courts. Only persons subject to military law are subject to trial by military tribunals. See Articles of War 2.

I trust the above answers the questions raised in your letter.

Respectfully submitted,

THEODORE D. PARSONS,
Attorney General.

By: OSIE M. SILBER,
Deputy Attorney General.

oms;d

JANUARY 31, 1950.

THE HONORABLE LLOYD B. MARSH,
Secretary of State,
Trenton, New Jersey.

FORMAL OPINION—1950. No. 11.

DEAR SIR:

This opinion is rendered in response to your letter of January twenty-sixth, in which you state that the "county clerks are making preparations for the 1950 primary and general elections, and several of them have raised the question whether the office of coroner was abolished by the Constitution of 1947 or still exists."

We advise you that the office of coroner was not abolished by the Constitution of 1947; that such office still exists, although the continued existence thereof is now

wholly dependent upon the will of the Legislature; and that until the provisions of Section 40:40–1 of the Revised Statutes (formerly adjunctive and implemental to our fundamental law but still in force even though under our revised fundamental law the office of coroner is no longer a constitutional office) are superseded, altered or repealed, coroners are to be elected in the respective counties in the same manner, in the same number, and for the same term (but not subject to the former constitutional restriction that three years must elapse before they can be again capable of serving) as before the taking effect of the Constitution of 1947.

The conclusions hereinabove expressed have been reasoned as follows:

The Constitution of 1844 (Article VII, Section II, Paragraph 6) made fundamental provision for the election and term of office of coroners, and imposed a restriction that three years must elapse before "they can be again capable of serving." Adjunctive and implemental to this fundamental provision, there were enacted provisions of law which, at the time of the taking effect of the Constitution of 1947, were embraced within section 40:40–1 of the Revised Statutes, as follows:

> There shall be elected in each county three coroners, who shall be elected at a general election for three years, and who shall be inhabitants of the county. If a vacancy shall occur in any such office it may be filled by appointment by the governor, and the commission of the appointee shall expire at the next general election thereafter, at which time such vacancy shall be filled by election.
>
> The commissions of all coroners elected at a general election shall bear date and take effect on the Wednesday after the first Tuesday succeeding the general election, and their terms of office shall expire on the first Tuesday after the third succeeding general election.

The Constitution of 1947 makes no mention whatsoever of coroners. Thus the office of coroner is no longer a constitutional office.

Article XI, Section I, Paragraph 3, of the Constitution of 1947 provides that:

> All law, statutory and otherwise, all rules and regulations of administrative bodies and all rules of courts in force at the time this Constitution or any Article thereof takes effect shall remain in full force until they expire or are superseded, altered or repealed by this Constitution or otherwise.

The Constitution of 1947 did not specifically abolish the office of coroner; and, in our view, there is no provision of that instrument which can be construed as superseding, altering or repealing section 40:40–1 of the Revised Statutes (above recited) so far as the same relates to the election and term of coroners in each county and the number thereof to be elected. Moreover, a search has revealed no statutory provision enacted since the taking effect of the Constitution of 1947 (or any Article thereof) by force of which any of the pertinent provisions of section 40:40–1 are made to expire or are superseded, altered or repealed. Thus, said section (R. S. 40:40–1) is still in full force; and the office of coroner still exists, although the continued existence thereof is now wholly dependent upon the will of the Legislature.

Therefore, by virtue of the continued force of our pertinent statute law coroners are to be elected in the respective counties in the same manner, in the same number, and for the same term as before the taking effect of the Constitution of 1947. However, we direct your attention to the fact that the restriction contained in the Constitution of 1844 (that three years must elapse before coroners can be again capable of serving) is not contained in our statute law.

Not without giving full consideration to that provision of the Constitution of 1947 (Art. VI, Sec. VI, Par. 1) which enjoins the appointment by the Governor, with the advice and consent of the Senate, of "judges of the inferior courts with jusisdiction extending to more than one municipality," have we expressed ourselves respecting the continued validity of the statutory provision calling for the election of coroners. We are fully aware of the functional significance of the office of coroner, of the fact that the coroner's jurisdiction is countywide, and of the historical reference to the coroner's inquest as the "coroner's court."

But the "coroner's court" (if such his inquest be) is certainly not a court of judicature where a controversy between parties is heard and determined. The proceedings there are merely investigatory and preliminary. And however true it may be that in some respects the coroner is a judicial officer, yet his "court" and his power are not of the nature contemplated by Article VI, Section I, Paragraph 1, of the Constitution of 1947, which provides:

> The judicial power shall be vested in a Supreme Court, a Superior Court, County Courts and inferior courts of limited jurisdiction. The inferior courts and their jurisdiction may from time to time be established, altered or abolished by law.

In *Bradley* vs. *Town of Bloomfield*, 85 N. J. L. 506 (Supreme Court, 1944), Mr. Justice Bergen, who delivered the opinion of the court, said:

> . . . The word "court" has generally a well recognized meaning in this State, which is that part of the government of the State vested with the judicial power necessary to the administration of justice, and whose duty it is to apply the law to controversies brought before it. . . .

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: DOMINIC A. CAVICCHIA,
Deputy Attorney General.

FEBRUARY 1, 1950.

HON. CHARLES R. ERDMAN, JR., *Commssioner,*
Dept. Conservation & Economic Development,
520 East State Street,
Trenton, New Jersey.

FORMAL OPINION—1950. No. 12.

DEAR SIR:

I have your communication of the 26th ult. stating that you desire to promote a veteran employee of your department from his position as Veterans' Loan Representative to Assistant to the Chief, Bureau of Veterans' Loans; that the veteran now has the protective features conferred by Chapter 435 of the Laws of 1948.

Your letter indicates that you sent a notice of the proposed promotion to the Department of Civil Service and have received word to the effect that the promotion has not been approved and placing the veteran in the position of Assistant to the Chief pending open competitive examination.

The question which you have asked is whether you would have the power to make the promotion without Civil Service approval. The answer is no. Chapter 435 of the Laws of 1948, when it became effective on October 6, 1948, did nothing more than give tenure to the veterans in the positions then held by them. It is apparent that the promotion proposed is to a position in the classified service and that position must be filled in accordance with the requirements of the Civil Service law.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: THEODORE BACKES,
Deputy Attorney General.

TB:B

FEBRUARY 6, 1950.

HON. WILLARD G. WOELPER,
Administrative Director of the Courts,
State House Annex,
Trenton, New Jersey.

FORMAL OPINION—1950. No. 13.

DEAR MR. WOELPER:

In reply to your recent request with respect to the status of Paul S. Gallena, the following is the situation:

The budget request of the Clerk of the Court of Chancery for the fiscal year beginning July 1, 1948, included a line item for the position of Chief Clerk at an annual salary of $6,750. The Governor's budget, however, excluded the entire line item. The Appropriations Act passed by the Legislature followed the recommendation of the Governor and again omitted the line item in its entirety (P. L. 48, Chapter 117). The budget for the fiscal year beginning July 1, 1949, made no provisions for a Chief Clerk in the office of the Clerk of the Superior Court other than for Mr. Rue Brearley.

Mr. Gallena may be paid only from moneys appropriated by the Legislature, and in view of the fact that the Appropriations Act for the fiscal year 1948-1949 failed to make such appropriation, there is obviously no claim on the part of Mr. Gallena for that period. The same is true for the fiscal year 1949-1950.

It is the view of this office that the only way that Mr. Gallena's claim can be recognized is by an act of the Legislature.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: HENRY F. SCHENK,
Deputy Attorney General.

HFS:aw

FEBRUARY 6, 1950.

MR. GEORGE M. BORDEN, *Secretary,*
State Employees' Retirement System,
1 West State Street,
Trenton 7, New Jersey.

FORMAL OPINION—1950. No. 14.

MY DEAR MR. BORDEN:

I duly received your letter of the 25th ult. with enclosure of order of Chief Justice Arthur T. Vanderbilt retiring Louis F. Beachner, a court stenographer, on an annual pension of $2,500 per annum.

It appears that Mr. Beachner is also a member of your retirement system. The question which you have asked is whether Mr. Beachner is entitled to either the pension or annuity portion of the retirement allowance in your fund.

In my opinion he is not entitled to any portion of the pension element which would go to make up his retirement allowance had he retired under your retirement system. He has elected, however, to take the benefit of the law for the retirement of stenographic reporters, and is entitled only to have returned to him his accumulated deductions with interest as provided by your law.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: THEODORE BACKES,
Deputy Attorney General.

TB:B

FEBRUARY 6, 1950.

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

FORMAL OPINION—1950. No. 15.

DEAR MAJOR NICOL:

Your letter is at hand requesting an opinion as to procedure in authorizing the removal of disabled vehicles from highways.

Under R. S. 39:4–136, no person shall park or leave standing a vehicle, whether attended or unattended, upon the paved, improved or main traveled portion of a highway, outside of a business or residence district, when it is practicable to park or leave it standing off the paved, improved or main traveled portion thereof. In no event shall a person park or leave standing a vehicle whether attended or unattended, upon a highway, unless a clear and unobstructed width of not less than fifteen feet upon the main traveled portion of the highway opposite the standing vehicle is left

for free passage of other vehicles thereon, nor unless a clear view of the vehicle may be obtained from a distance of two hundred feet in each direction upon the highway.

The act further states that when a peace officer finds a vehicle standing on a highway in violation of this statute he may move the vehicle or require the driver or person in charge of the vehicle to move it to a position permitted under the statute.

So, on your inquiry above, the State Police would have the right to move the vehicle or require the person in charge to move it.

Your second inquiry is, when a highway is blocked by a vehicle as the result of some accident, and the driver has been taken for medical treatment, what liability rests upon the trooper; that is, has the trooper authority to move the vehicle without the consent of the driver.

A vehicle placed upon the highway under such circumstances does not come within the provisions of the statute above quoted, so there would be no violation under the statute. But it is the duty of the State Police to keep the highway clear and if a vehicle has been disabled by accident and no one is in charge of it, it is the duty of the State Police to have the same removed from the highway. If the trooper has the vehicle removed by a responsible person, the trooper is not liable for damage sustained in removing the same.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: ROBERT PEACOCK,
Deputy Attorney General.

FEBRUARY 10, 1950.

HON. FRANK THOMPSON, JR.,
Assemblyman from Mercer County,
Assembly Chamber,
State House,
Trenton, New Jersey.

FORMAL OPINION—1950. No. 16.

MY DEAR ASSEMBLYMAN:

Receipt is acknowledged of your inquiry of February 3rd in which you submit for my consideration and opinion several questions concerning the Trenton War Memorial Building, the right of the City of Trenton and the County of Mercer jointly to erect a memorial stadium, and the status of the citizen members of the present War Memorial Commission. Your queries and the answers thereto follow:

1. Under the existing statute may a memorial be built jointly by the City of Trenton and the County of Mercer?

Yes. The Revised Statutes by Section 40:10–2 provides:

> "Any municipality having a population in excess of one hundred thousand inhabitants and which is the county seat, may, jointly with the county, erect and maintain a suitable building or buildings for public use, as a permanent memorial

commemorative of the services of the soldiers and sailors of the United States in any war in which the United States has been engaged or participated."

2. Do the statutes permit this building to consist of a stadium?

Yes. The statute (40:10–2) authorizes the erection and maintenance of a suitable building or buildings for public use, as a permanent memorial commemorative of the services of the soldiers and sailors of the United States in any war in which the United States has been engaged or participated.

3. Can the city contribute the land for the site as its share of the costs?

Yes, provided the value of the land is included in the city's share of the joint and equal expense. The Revised Statutes by Section 40:10–4, among other things, provides: "The commission may acquire by gift, purchase or condemnation, any lands suitable for the purpose, and erect thereon at the joint and equal expense of the municipality and of the county a memorial building or buildings * * *."

4. For what terms do the citizen members hold office?

The first legislation on this subject is Chapter 186 of the Laws of 1924. Therein it was provided that there be a commission consisting of the Mayor of the municipality, the Director of the Board of Freeholders of the County and one citizen to be then appointed who should hold office for the term of one year. In 1928, the Legislature by Chapter 21 of the laws of that year, revised the structure and created a commission consisting of two members of the governing body of the municipality to be selected annually by the governing body, two members of the board of chosen freeholders of the county to be selected annually by the board of chosen freeholders, and five citizens. The act then provided that the citizens so chosen, together with the members of the respective governing bodies, should constitute the commission, and all vacancies in the citizen members thereof shall be filled by the commission as constituted at the time of the happening of the vacancy. That law is embodied in the Revision of 1937, and is now R. S. 40:10–3.

It is to be noted that in the earlier act of 1924 the term of the citizen member was expressly limited to one year, while the term of the members of the governing bodies was limited to their respective terms of office; that by the amendment of 1928 the Legislature expressly limited, by the use of the word "annually," next to the public members' designation, their term to one year. It is also to be noted that the word "annually" was not inserted next to citizen members' designation, which omission seems rather significant, for had the Legislature intended to limit their term to one year it could have readily done so by inserting the word "annually" as it did in the designation of the members of the governing bodies. It might also be noted that in nearly every case where a commission has been created by the Legislature, providing for citizen membership, such as the Police and Firemen's Pension Commission, it has expressly provided that the term of the citizen member shall be one year, or some other fixed period.

Applying the settled rules of statutory construction, I am of the opinion that the citizen members of the Trenton and Mercer County Memorial Building Commission once having been named, as provided by statute, continue as permanent members thereof.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: JOSEPH LANIGAN,
Deputy Attorney General.

JL:rk

FEBRUARY 14, 1950.

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

FORMAL OPINION—1950. No. 17.

DEAR COMMISSIONER:

This is being written pursuant to your request for an opinion concerning the constitutionality of the Limited-Dividend Housing Corporations Law (c. 184, P. L. 1949). We understand that such an opinion has become necessary because the Federal Housing Administration has delayed the processing of applications for mortgage commitments by persons intending to proceed under the above law until a determination by this office that the act is constitutional. We participated in the drafting of this law and at the time considered the constitutional questions involved. Among other things the act was intended to encourage the undertaking by private enterprise of the clearance, replanning, development or redevelopment of blighted areas in exchange for tax exemption as authorized by Article VIII, Section III, paragraph 1 of the Constitution. An act of the Legislature is presumed to be constitutional until declared unconstitutional by a court of competent jurisdiction; and it is the duty of administrative bodies to accept a legislative act as constitutional until such time as it has been declared to be unconstitutional by a qualified judicial body. *Schwartz* vs. *Bd. of Taxation,* 129 N. J. L. 129; Affd. 130 N. J. L. 177 (E. & A. 1943).

The main constitutional question involved is whether Section 18 of the Act. (sec. 18, c. 184, P. L. 1949 as amended by sec. 5, c. 305 P. L. 1949) providing that projects of Limited-Dividend Housing Corporations, hereinafter referred to as corporations, will be exempted from taxation under certain circumstances violates Article VIII, Section I of the Constitution which provides that property shall be assessed for taxation under general laws and by uniform rules according to the same standard of value. This same question applies to section 19 of the act (c. 184, P. L. 1949) which exempts Housing Corporations from payment of franchise or other State tax.

The act seeks to accomplish the public purpose of providing adequate housing by enlisting the participation of private capital and enterprise. The need for rental housing in the State of the type contemplated by this law is very acute. The intention of the act is to provide rental accommodations for persons in need of housing who cannot obtain accommodations in the open market commensurate with their income. This is clearly set forth in section 2 wherein it is stated:

Section 2, Chapter 184, P. L. 1949—

"It is hereby declared that there is a severe housing shortage in the State; . . . that the improvement of these conditions requires the production of new dwellings at rents which the families who need housing can afford; that the creation of the agencies and corporations hereinafter described, is necessary and desirable for this purpose; that the provision of housing to make possible and to assist the clearance, planning, development or redevelopment of blighted areas, as proposed in this act, is a public purpose and a public use for which public money may be spent and private property acquired; and that the necessity in the public interest for the provisions hereinafter enacted is hereby declared as a matter of legislative determination."

Section 4 of the act provides that these corporations may be organized to provide accommodations for families in need of housing and to develop or redevelop blighted areas, when authorized by the Authority (Public Housing and Development Authority, a body politic and corporate of the State).

Section 5 provides that stockholders of the corporations shall at no time receive in repayment of their investment any sums in excess of the amount thereof plus cumulative dividends at a rate not to exceed six per centum (6%) per annum, and that on dissolution of the corporation (which shall be within fifty years; since its duration is so limited by section 6) any surplus in excess of these amounts shall be paid to the State except that where tax exemption is provided by a municipality under section 18 the surplus may be divided between the State and said municipality. Sections 6, 7 and 8 provide for the incorporation and powers of these corporations, all being subject to the approval of the Authority.

Section 9 of the act provides that no securities or obligations shall be issued by corporations except for money or property actually received by it and of property on a valuation approved by the Authority.

The Authority has the power to make rules and regulations to supervise the operations of these corporations and no corporation can proceed with a project under the act without its approval (sections 11-16, inclusive).

The Authority under section 16 of the act is given the right to supervise the operations of these corporations, examine their books, financial activities and fix and alter from time to time the rents for projects operated by them.

Section 18 of the act provides for tax exemption and reads as follows:

Section 18, Chapter 184, P. L. 1949—

"When the governing body of any municipality in which a project of a housing corporation is or will be located, by resolution finds *that the project is or will be an improvement made for the purposes of the clearance, replanning, development, or redevelopment of any blighted area* (as defined in any law of this State) within such municipality, or for any of such purposes, then *such project and improvement shall be exempt from all property taxation; provided that in lieu of taxes the housing corporation owning said project shall make to the municipality payment of an annual service charge for municipal services supplied to said project,* in such amount, not exceeding the tax on the property on which the project is located for the year in which the undertaking of said project is commenced or ten per centum (10%) of the annual gross shelter rents obtained from the project, whichever is the greater, as may be agreed to by the municipality and the housing corporation and approved by the Authority. *Any exemption from taxation made pursuant to the provisions of this section shall not extend for a period of more than fifty years and shall only be effective during the period of usefulness of the project as determined by the Authority and shall continue in force only while the project is owned by a housing corporation formed under this act and regulated by the Authority or owned or operated by the Authority.*" (Italics ours).

The exemption from taxation as provided in the act is proper pursuant to Article VIII, Section III, paragraph one of the Constitution which states:

Article VIII, Section III, Paragraph 1 of the Constitution—

"The clearance, replanning, development or redevelopment of blighted areas shall be a public purpose and public use, for which private property may be taken or acquired. Municipal, public or *private corporations may be authorized by law to undertake such clearance, replanning, development or redevelopment; and improvements made for these purposes and uses, or for any of them, may be exempted from taxation, in whole or in part,* for a limited period of time during which the profits of and dividends payable by any private corporation enjoying such tax exemption shall be limited by law. The conditions of use, ownership, management and control of such improvements shall be regulated by law." (Italics ours).

The act provides that this tax exemption shall only apply in cases where a municipality shall by resolution find the project to be an improvement for the purposes of the clearance, replanning, development or redevelopment of a blighted area. The tax exemption is for a limited period of time and during this time the profits and dividends of the corporation are limited by law. The dividends are limited to not in excess of six per centum (6%) per annum; and the profits by reason of (1) regulation of rents and (2) that any surplus of the corporation shall be payable to State or State and municipality. The act also explicitly provides for regulation of the condition of use, ownership, management and control of the projects.

A similar question was before the Court in the case of *Redfern* vs. *Jersey City,* 137 N. J. L. (E. & A. 1948) pg. 356, which involved the constitutionality of the Urban Redevelopment Law (c. 52, P. L. 1946). That law provides for tax exemption and the Court was concerned with the question as to whether it violated Article 4, Section 7, paragraph 12 of the Constitution of 1844, which stated that property shall be assessed for taxes under general laws and by uniform rules according to its true value. The Court found that the law was constitutional and stated on page 360, per BODINE, *J.*:

"Public housing is a public purpose for which public funds may be expended. *Romano* vs. *Housing Authority, Newark,* 123 N. J. L. 428, 10 A. 2d 181, affirmed 124 N. J. L. 452, 12 A. 2d 384; *Ryan* vs. *Housing Authority of Newark,* 125 N. J. L. 336, 15 A. 2d 647. See *Tide-Water* vs. *Coster,* 18 N. J. Eq. 518, 90 Am. Dec. 634; *Simon* vs. *O'Toole,* 108 N. J. L. 32, 155 A. 449, affirmed 108 N. J. L. 549, 158 A. 543, and the reasoning implicit in each of those cases.

The Urban Redevelopment Law and the ordinances under review do not constitute a donation by a municipality to a private corporation of any property. The whole purpose is to remedy, in part, a situation now a public danger to health and welfare. . . .

As Chief Justice Beasley said in *Tide-Water* vs. *Coster,* 18 N. J. Eq. 518, 90 Am. Dec. 634: 'It is the resulting general utility which gives such enterprises a kind of public aspect, and invests them with privileges which do not belong to mere private interests.'

The Legislature may exclude from taxation and thus exempt property constituting a proper class. *State Board of Assessors* vs. *Central Railroad,* 48 N. J. L. 146, 4 A. 578. Undoubtedly, the whole legislation would be unconstitutional were it not for the public use. To provide housing, when housing is a pressing public need, is the justification for the legislation.

The property to be used, as soon as the plan becomes effective, is an appropriate class for the exemption provisions, if in fact there were in any sense an exemption.

We see no delegation of governmental powers to a private business corporation any more than in the case of delegating the power of eminent domain to

railroad companies and traction companies, and others, to carry on a business made necessary to properly serve the public."

There are many cases in other states upholding the constitutionality of similar legislation, namely: *Zurn vs. City of Chicago,* 389 Ill. 114, 59 N. E. (2d 18); *Spahn* vs.*Stewart,* 268 Ky. 97, 103 S. W. (2d) 651; *Wells* vs. *Housing Authority,* 213 N. C. 744, 197 S. E. 693; *Dornan* vs. *Philadelphia Housing Authority,* 331 Pa. 209, 200 At. 834; *Housing Authority* vs. *Dockweiler,* 14 Cal. (2d) 437, 94 Pac. (2d) 794; *Stockus* vs. *Boston Housing Authority,* 24 N. E. (2d) 333; Re *Brewster Street Housing Site.* 291 Mich. 313. 289 N. W. 493; and *Humphrey* vs. *Phoenix.* 55 Ariz. 374, 102 Pac. (2d) 82.

It is our opinion that under Article VIII, section III, paragraph 1 of the Constitution the tax exemption provided by the act is proper. It does not violate Section 1 of that article since that section permits the granting of exemption from taxation by general laws. Under the authority of the *Redfern case* it can be stated that the property to be included in the exemption is an appropriate class and that this is a general law.

The recent case of *Janouneau* vs. *Div. of Tax Appeal,* 2 N. J., pg. 325 (Sup. 1949) does not apply in that it involved a strictly private use.

It is our opinion that the Limited-Dividend Housing Corporation Act and the tax exemption provided therein is constitutional. Our opinion is based on the statements set forth above and the cardinal rule that in judging the constitutionality of legislation every intendment must be found in its favor and its constitutionality shall be sustained where the issue is in doubt unless it clearly and inescapably offends a plainly written provision of the Constitution; which is not the case at hand. *City of Jersey City* vs. *Kelly,* 134 N. J. L. 239, 243 (E. & A. 1946); *State* vs. *Klapprott,* 127 N. J. L. 395, 399 (Sup. Ct. 1941); *Mansfield & Swett, Inc.* vs. *West Orange,* 120 N. J. L. 145, 156, 157 (Sup. Ct. 1938); *State* vs. *Murada,* 116 N. J. L. 219, 223 (E. & A. 1935); *State Board of Milk Control* vs. *Newark Milk Co.,* 118 N. J. Eq. 504, 518, 519 (E. & A. 1935).

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: CHESTER K. LIGHAM,
Deputy Attorney General.

FEBRUARY 24, 1950.

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

FORMAL OPINION—1950. No. 18.

DEAR COMMISSIONER BATES:

This relates to your request of February 21, 1950, for an opinion regarding sentencing practices now in effect at the State Prison.

You illustrate your first question by a hypothetical example as follows: A prisoner was received at the State Prison accompanied by five separate sentences, each with

a minimum of one year and a maximum of two years, and you indicate that the court that imposed the sentences provided therein that the sentences should be consecutive rather than concurrent.

You advise that the prison authorities now follow the practice of combining the minima and maxima of the five sentences so that in total aggregate they determine the sentence in the case presented to have a minimum of five years and a maximum of ten years.

First, you desire to be advised whether it is legally proper for the State Prison authorities to consider consecutive sentences in total aggregate by combining the minima and maxima thereon, resulting in a sentence having a total aggregate minimum and maximum which is the sum total of the five sentences.

It is our opinion, and we so advise you, that the above described procedure is unlawful and must be discontinued, for the reasons set forth below. The proper method of handling these cases will also become apparent.

At the outset let it be noted that our former Court of Errors and Appeals determined that the imposition of consecutive sentences was legal and proper, and that one should follow the other. (*State* vs. *Mahaney,* 73 N. J. L. 53; aff. 74 N. J. L. 849).

The order in which respective terms shall be served, unless otherwise provided by the court, will be determined by the order in which the court pronounces sentence or renders judgment. (16 C. J. par., 3237).

We fail to find any statute in this State which specifically permits the handling of consecutive sentences by aggregating the sum total of the minima and maxima. In the absence of such a law there is no legal authority so to do. This for the reason that, traditionally, penal statutes have been strictly construed and the rights and freedom of the individual are regarded with tenderness by the law. (Sutherland - Statutory Construction Vol. III, 49, 53).

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,* 1902, 68 N. J. L. 89, 52 A. 294).

Nor does it appear that these specific facts have ever been the subject of judicial determination in this State. Our courts have not been called upon to approve or reject the system. Not so in other jurisdictions.

An almost identical situation was considered by the Supreme Court of Pennsylvania in Commonwealth ex rel *Lynch* vs. *Ashe,* 320 Pa. 341; 182 A. 229, and the court declared that, in the absence of statutory authority, the practice of combining minima and maxima on consecutive sentences was unlawful and should be discontinued.

Thereafter, in 1937, Pennsylvania enacted 19 P. S. 897, which specifically provided for the aggregating of minima and maxima on consecutive sentences and the statute was judicially construed in Commonwealth ex rel *Lycett* vs. *Ashe,* 20 A. 2d. 881. The Superior Court said:

> "It is clear that the purpose of the Act of 1937 was to furnish the legislative authority for the computing together, for purposes of parole, of consecutive sentences of imprisonment, which it was pointed out in Com. ex rel. *Lynch* vs. *Ashe,* 320 Pa. 341, 344, 182 A. 229, was necessary before such a course could be applied by the prison authorities in relation to the parole of prisoners."

The court thereupon went on to declare that such an act is in no sense violative of the constitutional rights of the prisoner.

However, it cannot be retroactive in its application to sentences imposed prior to passage of the law. (Commonwealth ex rel *Stengel* vs. *Burke,* 43 A. 2d. 921, 158 Pa. Super. 87).

In view of the striking similarity between the procedure in this State and that rejected in Pennsylvania, we rely on the decisions of our sister State and must conclude that the practice now followed at the State Prison with respect to this matter is unlawful and must be discontinued.

We can also look to the Pennsylvania decisions for guidance as to the correct method to be used. In Com. ex rel *Lynch* vs. *Ashe, supra,* the court took great pains to illustrate its decision. It said that a prisoner serving two consecutive sentences was eligible for consideration for release on parole at the expiration of the minimum on the first sentence, and if parole was allowed, "he would then enter upon the minimum term of his second sentence, and while serving it would also be serving the maximum term of his first sentence, thus reducing to that extent the combined maximum terms of his consecutive sentences."

The court then cautioned that the period of time that the prisoners should serve on parole would be that represented by the time remaining unserved on the longest maximum, having due regard for the formula described in the court's decision above.

In addition to the Pennsylvania decisions there is other authority for treatment of consecutive sentences on an individual basis where one term is shortened by pardon or parole:

> "Where accused is sentenced to imprisonment for successive terms, and the first sentence is reversed or is shortened by a pardon, the second term begins to run from the time of the reversal of the first, or from the pardon of the convict." (16 C. J., par. 3238).

It would further appear from the provisions of Chapter 84, P. L. 1948, establishing the State Parole Board that there is a requirement in Section 17 thereof that sentences shall be subject to individual treatment, for this language is found:

> "It shall be the duty of the board to maintain a record of the dates upon which each prisoner shall first be eligible for parole consideration as provided in section 9 hereof. On or before such date, in the case of each prisoner, it shall further be the duty of the board to consider the case of each such prisoner for parole * * *."

If the Legislature had intended that there be a combining of consecutive sentences, for purposes of parole, it should have so stated, and it may very well now do so, prospectively, as did the State of Pennsylvania.

We now direct our attention to your second inquiry:

When a prisoner on parole is convicted of subsequent commission of crime, and in the absence of a specific direction in the most recent sentence of imprisonment, does the latest sentence commence to run on the date imposed and concurrently with the sentence upon which the prisoner was paroled or can the prisoner be required to serve the most recent sentence, and then be reverted to and be required to serve the balance of time remaining upon the sentence upon which he was paroled?

It is our opinion and we so advise you that in the situation you describe, the prisoner shall first serve the most recent sentence, which begins to run when imposed, and upon completion thereof, he shall be reverted to and be required to serve the balance of time remaining on his prior sentence, computed from the date of his release thereon.

This for the reason that Chapter 84, P. L. 1948, Section 24, so provides as follows:

> "A prisoner, whose parole has been revoked because of conviction of crime committed while on parole, shall be required, unless sooner reparoled 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."

Our courts have not yet decided a case exactly in point but the Superior Court of Pennsylvania, in an identical situation respecting a similar statutory provision, in the case of Commonwealth ex rel *Barnes* vs. *Smith,* 156 Pa. Super. 231; 40 A. 2d 104, determined that a prisoner sentenced for a crime committed while on parole, shall serve that sentence and thereafter shall serve the remainder of the sentence upon which he was paroled. (See also *Wolkiewicz* vs. *Pa. Parole Board,* 45 A. 2d. 868; 158 Pa. Super. 607).

There are also numerous footnote cases in other jurisdictions in support of this legal proposition in 46 Corpus Juris 1209.

And as recently as a few days ago, in a case not yet reported (Com. ex rel *Tate vs. Pa. Parole Board*), the Supreme Court of Pennsylvania reaffirmed the principle that commission of crime by a prisoner on parole operates to stop the running of time on his prior sentence, requiring service thereof after completion of the most recent sentence. (See also *In re Wright,* 139 N. J. Eq. 515).

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: EUGENE T. URBANIAK,
Deputy Attorney General.

ETU:HH

FEBRUARY 28, 1950.

HARRY S. WALSH, *Superintendent,*
Custodian, Capitol,
State House,
Trenton, New Jersey.

FORMAL OPINION—1950. No. 19.

DEAR SIR:

Receipt is acknowledged of your inquiry of February 20th in which you ask who has the authority to grant requests for the use of the Assembly Chamber, Highway Board Room, and other State buildings for meetings of outside private organizations that have no official connection with the State government. By the provisions of the Revised Statutes 52:27B–64 this power is now vested in the Division of Purchase and Property and in the Director thereof. (See also Chapter 92, P. L. 1948.)

Originally, by the provisions of the Revised Statutes 52:20–7 this power was exercised by the State House Commission. The statute in part provided:

"The commission shall have custody of the State House, the property contained therein and the adjacent public grounds and all buildings owned by the State, including the State Barracks, which are used by the departments, agencies and officials of the State in connection with the conduct of the State's business * * *."

In 1944 by the statute first cited, the powers of the State House Commission as set forth in Revised Statutes 52:20–7 were transferred to the Division of Purchase and Property and the Director thereof. The Division of Purchase and Property and its Director are the agencies to whom application must be made and permission obtained for the use of the Assembly Chamber, the Highway Board Room and other State office buildings.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: JOSEPH LANIGAN,
Deputy Attorney General.

JL:rk

FEBRUARY 28, 1950.

DR. PAUL T. STAFFORD,
Chief Examiner and Secretary,
Department of Civil Service,
State House, Trenton, N. J.

FORMAL OPINION—1950. No. 20.

DEAR SIR:

I have your letter of the 15th instant stating that originally there were two criminal judicial district courts in Passaic County and that by Chapter 201 of the Laws of 1941 the act establishing the Second Criminal Judicial Court of the county was repealed. I find that this is so; that all of the County of Passaic was established to be the First Criminal Judicial Court of the County of Passaic.

It also appears from your communication that under date of March 15, 1945, you received an opinion from this department to the effect that a county employee could not be transferred to the State service. You now have a situation where the Clerk of the Second Judicial District Court, the establishment of which was repealed as hereinbefore stated, was transferred to county service in the office of the sheriff of the county.

I also understand that the county to whose service the Clerk of the court was transferred has adopted the provisions of the civil service law. The question is whether such transfer legally can be made. In my opinion, it cannot. The Civil Service Act of 1908 as to State employees took effect in that year; not so as to counties and municipalities which were permitted to adopt the act by referendum.

The judge of a criminal district court is appointed by the Governor by and with the consent of the Senate. The sheriff of a county, while a constitutional officer, is a county officer.

The civil service law is divided into the State service and into service of counties, municipalities and school districts, the latter class (school districts) having been permitted by act of the Legislature enacted subsequent to the original act of 1908 to adopt the provisions of the civil service law.

The conclusion that I have reached is that there cannot be a lawful transfer from a State position to a county position even where the county has adopted the provisions of the civil service law, for I find no warrant at all for such a transfer. That both the judge and clerk of a criminal judicial district court are State officers cannot be doubted. See *Pierson* vs. *O'Connor*, 54 N. J. L. 36.

The enclosures which Mrs. Murphy loaned me are herewith returned.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: THEODORE BACKES,
Deputy Attorney General.

Encs.
TB:B

MARCH 3, 1950.

MR. GEORGE M. BORDEN, *Secretary,*
State Employees' Retirement System,
1 West State Street,
Trenton 7, New Jersey.

FORMAL OPINION—1950. No. 21.

DEAR MR. BORDEN:

I have your letter of the 1st instant stating that a member of your system who was a State employee in the Social Security Employment Service and whose services were loaned to the Federal Government pursuant to law, desires to have established credit for the period of time spent in Federal service as authorized by Chapter 320 of the Laws of 1947.

You desire to be advised whether the purchase of the proposed credit is in order. In my opinion, it is. I understand that the former employee in the Social Security Service desires to transfer her credits from your system to the Teachers' Pension and Annuity Fund. This is, as you know, authorized by law, and I am of opinion that under Chapter 320 of the Laws of 1947, the service credits therein provided for must be established in your system in order that when the transfer is made from your system to the Teachers' Pension and Annuity Fund the member may transfer all credits to which she is entitled in your fund including, of course, the credit which is accorded to her under the act of 1947.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: THEODORE BACKES,
Deputy Attorney General.

TB:B

FEBRUARY 28, 1950.

COL. CHARLES H. SCHOEFFEL, *Supt.,*
Division of State Police,
Department of Law and Public Safety,
State House,
Trenton, New Jersey.

FORMAL OPINION—1950. No. 22.

DEAR SIR:

You desire to be advised concerning the propriety and legality of fingerprinting certain juvenile offenders of the age of 17 but under the age of 18. Specifically, you desire answers to the following three inquiries:

1. May police officers fingerprint persons of or over the age of 17 and under the age of 18 who are arrested for what would be classed as an indictable offense?

2. May persons of or over the age of 17 and under the age of 18, who are received in county jails, workhouses and penitentiaries be fingerprinted when received in those institutions?

3. May persons of or over the age of 17 and under the age of 18, who have been convicted and sentenced to State penal institutions be fingerprinted when received in those institutions?

It is our opinion and we so advise you that the answer to each query is in the affirmative, subject, however, to the conditions and limitations imposed by the Legislature and discussed below. Chapter 284, P. L. 1948, Section 2 thereof, amending R. S. 9:18–12 controls and for purposes of clarity we set out the section hereinafter in its entirety:

> "Any person of or over the age of seventeen years and under the age of eighteen years, who shall have been arrested and charged with the commission of any offense which, except for the provisions of the act to which this act is a supplement, would be an indictable offense, may be fingerprinted, but 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 a judge of the court having jurisdiction of such proceedings, upon demand, and they thereupon shall be destroyed."

The immunity from fingerprinting which formerly obtained with respect to an offender of this age, derived from R. S. 9:18–32, which provided in substance that no adjudication upon the status of a child under the act pertaining to the juvenile courts should operate to impose upon him any of the civil disabilities ordinarily connected with conviction and further that no child should be deemed a criminal because of the disposition made of his case in juvenile court. Nor could such adjudication be admissible as evidence against him in any other court. This office, accordingly, ruled that no fingerprints of such a child could be taken under the law as it existed prior to July 27, 1948, the effective date of Chapter 284, P. L. 1948.

However, the Legislature, by the 1948 amendment to R. S. 9:18–12 evidenced an intention to remove this legislative immunity against fingerprinting from those prisoners of or over the age of 17 and under the age of 18 coming within the purview of Title 9, Chapter 18.

It is noted in connection with the first query that the Legislature, while it removed the immunity against fingerprinting, made the further stipulation that if the offender is found to be not guilty of the offense for which he was apprehended then it is the responsibility of the State Bureau of Identification, or any police department having possession of such fingerprints, to deliver them to the judge of the court having jurisdiction of the proceedings, upon demand, and they thereupon shall be destroyed. Even if not demanded by the court, it would seem to be the better plan for the agency having possession of said fingerprints, in case of a dismissal of the charges, to voluntarily surrender them to the court.

In respect to the second and third questions, you inquire as to whether persons over the age of 17 and under the age of 18, who are received in county jails, workhouses and penitentiaries and State penal and correctional institutions, may be fingerprinted when received therein. The answer is in the affirmative if the offenses for which these individuals were convicted and sentenced would have been indictable offenses were it not for the provisions of Title 9, Chapter 18, Revised Statutes. If, however, the individuals were received in these respective institutions for offenses not indictable then they may not be fingerprinted.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: EUGENE T. URBANIAK,
Deputy Attorney General.

ETU:HH

MARCH 10, 1950.

HON. J. L. BROWN, *Acting Commissioner,*
Department of Labor and Industry,
State House,
Trenton 7, N. J.

FORMAL OPINION—1950. No. 23.

DEAR MR. BROWN:

This will acknowledge receipt of your letter of February 24, 1950, wherein you request an opinion interpreting Sec. 3, Chap. 38, P. L. 1946, which law pertains to labor disputes in public utilities. The law also provides for collective bargaining, enlarging the duties of the State Board of Mediation and providing for seizure and operating of public utilities by the State.

Section 3 is as follows:

> "There is hereby included in the functions of the State Board of Mediation the following responsibility:
>
> (A) The determination of who are the representatives of any given craft or class of employees of a utility; which employees of a utility constitute or are members of a given craft or class and entitled to vote in an election for choice of representatives of such craft or class for purposes of collective bargaining. It

shall be the duty of the State Board of Mediation to recognize as an appropriate bargaining unit, any craft, group, or class of employees of a utility, the majority of whom desire to be represented as such class, craft or group."

The facts in question are as follows:

There is presently pending the conduct of an election involving the Passaic Valley Water Commission and its employees in an appropriate class. Conflict in opinion has arisen as to the construction of the words "majority of whom" as the same appear in Sec. 3, Chap. 38, P. L. 1946, and as the same pertain to the election in question.

The questions presented are:

1. In elections conducted among employees of a utility for a choice of representation of a craft or class for the purpose of collective bargaining, shall the *majority voting in such election* be sufficient to determine the collective bargaining agency?

2. Shall the *majority of those eligible to vote* in such election be required, before the collective bargaining agency can be determined?

The interpretation of the phrase "majority of whom" has arisen in a great many cases. In 1905, the Supreme Court of this State in the case of *Murphy* vs. *City of Long Branch,* 61 A. 593, cited with approval the General Election Law (P. L. 1898, p. 319, Sec. 185.) This law is as follows:

> "When by the provisions of any statute the decision of any question has been or shall be submitted to the decision of a majority of the legal voters of this State or of any subdivision thereof; or when the approval of a majority of the legal voters of this State or of any subdivision thereof is required in any statute before such statute takes effect or before any prescribed action or proceeding under such statute shall be valid and lawful, it is hereby declared that the intent and meaning in any such statute of the words, legal voters, are persons entitled to vote, and who do vote, at the time and in the manner prescribed in and by such statute upon the question or proposition submitted; and that for the purpose of ascertaining what is a majority of the legal voters of any district defined in such statute, upon the proposition herein directed to be submitted, the persons who do not vote at such election shall not be estimated, counted or considered for the purpose of ascertaining what is a majority of the legal voters in such district, with respect to the proposition submitted; * * *."

The New Jersey Supreme Court held that "a majority of the voters voting at such election" required for approval of a resolution for a bond issue means only a majority of the persons voting on such proposition and not a majority of the persons voting at such election on that and other questions. Only the voters who actually vote upon the proposition submitted are to be counted in determining the result on the proposition.

The same interpretation was followed in *Louisville & N. R. Co.* vs. *Davidson County Court,* 33 Tenn. 637. The court there held:

> "A 'majority of the voters' does not mean a majority of the voters of the county, since what is a majority of the voters in the county at any given time could be determined only by the ballots cast, but the phrase must be construed to mean a majority of the voters in the county who see fit to exercise their privilege of voting."

In *Holcomb vs. Davis,* 56 Ill. 413, the court held a majority of the legal voters of the county to be construed as meaning a majority of the legal voters voting on the proposition.

The same principle was followed in *Harrison* vs. *Barksdale,* 127 Va. 180; *Bradshaw* vs. *Marmion,* 188 S. W. 973; *Williams* vs. *City of Norman,* 85 Okla. 230; *Taylor* vs. *McFadden,* 84 Iowa 262; *People* vs. *Warfield,* 20 Ill. 159, and cases in many other jurisdictions.

A reading of the act hereinbefore referred to, reveals that the Legislature followed the phrase, "the majority of whom," with the words "desire to be represented," and it would seem that the only way one could officially express his desire to be represented would be at an election held for that purpose.

It is my opinion that based on all of the foregoing the answer must be that the "majority of whom desire to be represented can only mean the majority of those members of a given class or craft who exercise their vote at the election and not a majority of all the members of such group who are eligible to vote.

Nothing in this opinion contained shall be construed as indicating a right in the Passaic Valley Water Commission to enter into any bargaining agreement with a representative of the employees of said Commission.

I trust that the above answers the questions contained in your letter.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: OSIE M. SILBER,
Deputy Attorney General.

MARCH 13, 1950.

HONORABLE C. A. GOUGH, *Commissioner,*
Department of Banking and Insurance,
State House Annex,
Trenton 7, New Jersey.

FORMAL OPINION—1950. No. 24.

DEAR COMMISSIONER GOUGH:

We are in receipt of your letter of March 2, 1950, wherein you request an opinion relative to the scope of insurance permitted by Section 17:17–1(e) of the Revised Statutes of New Jersey and that a previous opinion on the subject, rendered by the Department of Law under date of August 30, 1946, be re-examined in light of developments since that date.

The statute in question reads as follows:

> "Against loss or damage resulting from accident to or injury suffered by any person for which loss or damage the insured is liable, including, if the insured is a State or a political subdivision of a State or a municipal corporate instrumentality of one or more States, loss or damage resulting from accident to or injury suffered by any person for which loss or damage the insured would be liable if it were a private corporation."

At this point it is pertinent to observe that the aforesaid paragraph was amended in 1948 to read in its present form. On August 30, 1946, the date of the previous opinion, it read as follows:

"Against loss or damage resulting from accident to or injury suffered by any person for which loss or damage the insured is liable."

It appears that the previous opinion was in answer to a request dealing specifically with liability insurance, as then written, to cover the operation and use of automobiles and you were advised that the authority contained in said paragraph, as it existed at that time, permitted insurance against liability for damages occasioned to personal property, but not to real property. It further appears that said opinion was requested shortly after the enactment of the "Multiple Line Law", Chapter 224, P. L. 1945, and that the full significance of that law was not reflected in the request.

It also appears that since the enactment of the said "Multiple Line Law" the base of insurable liability for damages occasioned to the person or property has been considerably broadened so as to include liability originating from any source and not confined alone to automobile liability or to the other specific risks provided for in paragraphs (a), (b), and (f) of said section of the Revised Statutes, as outlined by you. We also note that companies desiring to insure against liability for damages occasioned to real property must now have such authority specifically set forth in their charters.

You inquire as to whether the present trend to insure against liability arising from any source for damages occasioned to the person or property, as developed by the operation of the "Multiple Line Law" has not sufficiently changed the earlier situation so that the said paragraph (e) can now be said to include damages to real property as well as damages to personal property.

We are of the opinion that your question must be answered in the affirmative.

It is quite apparent that an entirely different situation prevails than that which existed at the time of issuing the previous opinion. At that time the full impact of the "Multiple Line Law" had not been felt and it was considered that only those specific items of risk contained in the statute could be the subject matter of liability insurance. With the advent of the "Multiple Line Law" an entirely different concept of liability insurance was developed which has resulted in a broader coverage of liability arising from any source. This trend of multiple coverage was, undoubtedly, considered by the Legislature when the paragraph under discussion was amended in 1948, for there we see that the addition of certain public bodies, as the insured party to such insurance, included loss or damage for which such public bodies "would be liable if it were a private corporation". Certainly, private corporations are liable for damages caused to real property.

When we examine the case of *Gillard* vs. *Manufacturers Casualty Insurance Company,* 92 N. J. L. 146, in light of the present situation, we find that the former Supreme Court, in interpreting the said paragraph (e) found that the words "injuries", "damages" and "loss" were broad enough to include injury or damage to property and thereupon held that the contract of insurance under consideration included damages to personal property. It is to be noted that there is no discussion in this case concerning damages to real property as distinguished from personal property. We know of no reason why the same construction cannot be placed on these words when applied to real property as well as to personal property.

Respectfully yours,

THEODORE D. PARSONS,
Attorney General,

By: OLIVER T. SOMMERVILLE,
Deputy Attorney General.

OTS:meb

MARCH 7, 1950.

MR. FRANK B. BAER, *Secretary,*
Prison Officers' Pension Fund,
1604 Greenwood Avenue,
Trenton 9, New Jersey.

FORMAL OPINION—1950. No. 25.

MY DEAR MR. BAER:

I have your letter of the 23rd ult. with enclosures relative to the application of one Perkins for retirement on pension from your Prison Officers' Pension Fund. Your letter states that Mr. Perkins is 52 years of age and has only had fifteen years of service. The question upon which you seek my opinion is whether Mr. Perkins is eligible for pension.

The application has been signed for Mr. Perkins by his wife, as his guardian, and from the enclosures I gather that he is under confinement in a mental institution.

Your Prison Officers' Pension Act (Chapter 220 of the Laws of 1941) provides for a pension to a prison officer who has served continuously or in the aggregate as such for a period of twenty years, and who shall have attained the age of 55 years, but there are other circumstances under which a prison officer may be retired. Under Section 6 of your act, a prison officer who has received permanent disability in the performance of his duty, may be retired on pension. The section then reads as follows: "Where, however, any such prison officer shall desire to retire by reason of injury or disease, such prison officer shall make application in writing to the pension commission for such retirement;" whereupon the pension commission shall proceed in accordance with the requirements of that section, that is, by calling to their assistance the aid of a regularly licensed and practicing surgeon or physician, and the applicant doing likewise, and your commission is authorized to call in other persons in respect to the matter of granting the pension. The determination of the commission as to whether a pension is to be allowed or not must be by resolution. The statute further provides that in the event that the two surgeons or physicians called in as hereinbefore mentioned shall fail to agree upon the physical condition of the applicant, then your pension commission is authorized to call a third and disinterested licensed and practicing surgeon or physician and the determination of the majority of the three surgeons or physicians, who shall be first duly sworn, shall be reduced to writing and signed by them, and your pension commission shall consider the same in reaching their decision.

In the case of *Cummings* vs. *Police Officers' Pension Fund,* 121 N. J. Law Reports, page 129, our Court of Appeals by unanimous vote of fifteen of its members had before it an application for a pension under Chapter 160 of the Laws of 1920 providing for the retirement of policemen and firemen in municipalities, where the language used is practically identical with the language used in Section 6 of your act where an application is received from a member who desires to retire by reason of injury or disease. The Court of Appeals said "We think it clear that the petitioner could only succeed by showing that his disability, which is admitted, arose out of his performance of duty as a policeman. The words injury and disease are used in the same connection and both relate back to the disability received in such performance above recited".

As you know, your act, in Section 6, speaks of permanent disability in the performance of duty and is followed by the clause which we are construing where a person

desires to be retired by reason of injury or disease. It is clear, therefore, that the injury or disease upon which an application for retirement is based must be an injury or disease resulting from his performance of duty.

With respect to the application, I observe a number of certificates from which I gather that Mr. Perkins is ill and may never be able to return to duty. In my opinion, if his present physical condition resulted from the performance of his duties as a prison officer, then and in that event, his application for retirement having been received by your Prison Officers' Pension Commission, that commission should proceed in accordance with the requirement of Section 6 of your act and call to their aid a physician or surgeon and the applying member should do likewise and thereupon your commission can make a determination in accordance with the further requirements of that section.

The papers which you enclosed are returned herewith.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: THEODORE BACKES,
Deputy Attorney General.

Encs.
TB:B

APRIL 17, 1950.

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

FORMAL OPINION—1950. No. 26

DEAR DOCTOR ERDMAN:

As we understand it, in connection with the reorganization of the State Department (Forestry Division) you state that an officer of that department originally was discharged from his initial period of service in the armed forces of the United States in 1946; that he subsequently returned to the department for a short period of duty and thereafter accepted an offer of further service with the armed forces, and continues in the military service at the present time.

You ask if the department is required to hold open for an employee on leave of absence with the armed forces, who has re-enlisted after returning from his initial service, the identical position which he held before entering military service.

Chapter 327 of the Laws of 1942 specifies that a person entering the service of the armed forces of the United States in time of war must be given leave of absence for the period of military service and for a period of three months after receiving his discharge from such service.

In this case, we are considering an individual who voluntarily re-enlisted and thus made it impossible for him to return to his original employment from which he received a leave of absence. It is hard to believe that the legislature ever intended that Chapter 327 should apply to a situation such as we are considering. The voluntary

re-enlistment was undoubtedly to the benefit of the employee and such voluntary enlistment cannot thwart the clear mandate of the statute that when the individual in question was discharged from the military service, he must thereafter return to his original place of employment.

In so ruling, this office is mindful that Chapter 72, Laws of 1942, defines the meaning of the words "present war" when used or named within this state should mean so long as the United States of America continues in the present war with the governments of Japan, Germany and Italy. Nevertheless, we feel that this situation is not applicable in light of the fact that the legislature has provided otherwise by the terms of Chapter 327 of the Laws of 1942.

This office has, by formal opinion dated February 11, 1949, addressed to John A. Wood 3d, Secretary of the Teachers' Pension and Annuity Fund, interpreted the statute involved in the manner herein set forth.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: JOHN W. *Griggs,*
Deputy Attorney General.

MARCH 13, 1950.

STATE PAROLE BOARD,
State Office Building,
Trenton, New Jersey.

FORMAL OPINION—1950. No. 27.

GENTLEMEN:

It appears that you desire to be advised as to whether the State Parole Board is empowered by law to consider, for release on parole, a prisoner serving a life sentence, who originally had been sentenced to death and whose death sentence had been commuted by action of the Governor to a sentence of imprisonment for life.

It is our opinion and we so advise you that the State Parole Board cannot release upon parole such a prisoner serving a life sentence after commutation of a death sentence, for we construe the pertinent statutes to reflect a legislative intent that the power to release such a prisoner from confinement shall at all times reside in the Governor.

"The pardoning power is generally regarded as not being inherent in any officer of the state, or any department of the state, but the power is one of the government, in the people, who may confer it on any officer or department as they see fit." (46 C. J. 1184 and foot-note cases).

In New Jersey, the people have determined that the pardoning power shall be vested in the Governor and this by virtue of Art. V, Sec. II, par. 1, of the State Constitution, wherein it is provided that "The governor may grant pardons and reprieves in all cases other than impeachment and treason and may suspend and remit fines and forfeitures."

"Although there is authority to the contrary, it is generally held that the general power to pardon necessarily contains in it the lesser power of remission and commutation. If the whole offense may be pardoned, a fortiori a part of the punishment

may be remitted or the sentence commuted." (46 C. J. 1197). In this jurisdiction, the late Chancellor Walker in his exhaustive opinion in *In re Court of Pardons* 97 N. J. Eq. 555, expressed the view that the power to pardon did in fact carry with it the power to remit a part of the penalty without a complete pardons of the entire offense.

Despite the foregoing, the Legislature, by the provisions of Chapter 83, P. L. 1948, apparently deemed it necessary to implement the constitutional authority of the Governor in matters of executive clemency and in Section 1 of that act restated the exact language of the Constitution, above cited. An interesting provision is found in Section 4, which, in our judgment, is expressive of a legislative intent that the eventual release from confinement of a prisoner whose death sentence has been commuted to one of life shall be at the discretion of the Governor, and we quote the section as follows:

> "The principal keeper of the State Prison, upon receiving such order, (of commutation of sentence of death) shall refrain from executing the sentence of death and shall detain said prisoner for the term for which the sentence was commuted *but such term of imprisonment shall not be remitted or commuted except by the governor.*"

Any authority that the State Parole Board might have to parole such a prisoner serving a commuted sentence of life would derive from Section 11, Chapter 84, P. L. 1948, as follows:

> "Any prisoner serving a sentence of life shall be eligible for consideration for release on parole after having served 25 years of his sentence, less commutation time for good behavior and time credits earned and allowed by reason of diligent application to work assignments."

The above cited sections of the respective statutes, both of which were enacted simultaneously, having been approved by the Governor on May 28, 1948, must be deemed in pari materia. The principle of law governing a situation of this kind is aptly stated by Justice Heher in the case of *In re Huyler* 133 N. J. L. 171, as follows:

> "It is a primary canon of construction that the provisions of statutes in pari materia shall be reconciled and harmonized, if possible, into a consistent, homogeneous whole. *Crater* vs. *County of Somerset,* 123 N. J. L. 407; *Broderick* vs. *Abrams,* 116 Id. 40. This rule is in aid of the discovery of the legislative intent, and its application is circumscribed accordingly. The effectuation of the legislative will is the end to be served in the exposition of statutes; and this of necessity calls for an accommodation of apparent conflicts to advance the essential statutory policy, giving to each clause a meaning not in opposition to the related provisions, if that is reasonably consonant with the terms employed to voice the legislative design. The literal import of the terms ofttimes gives way to the outstanding legislative purpose, considering the particular statute in relation to statutes in pari materia."

It now becomes necessary to apprehend the legislative will that impelled the enactment of Chapter 83, P. L. 1948, which, save for the prohibition in Section 4, is merely a restatement of the constitutional power of the Governor in matters of executive clemency and is declaratory of the decision of Chancellor Walker that the power to pardon includes the right to commute a death sentence to one of life imprisonment.

It is true that provision is made in the same law for reference by the Governor, of applications for commutation and restoration of suffrage, to the State Parole Board for review and recommendation but this is merely procedural, for the Governor in the exercise of his constitutional authority to grant pardons and reprieves and remit fines and forfeitures is not bound by law to refer such matters to another agency for such would be an unwarranted legislative abridgment of a constitutional grant to the Governor.

Therefore, the prohibition contained in Section 4, in our opinion, is an expression of the people through the Legislature that the disposition to be made of a prisoner whose sentence of death has been commuted to one of life by the Governor shall be determined at all times by the Governor. In short, we perceive no legislative intent that such a prisoner is within the purview of Section 11, Chapter 84, P. L. 1948, above cited and accordingly is not eligible for parole consideration thereunder for the reasons above stated, and further because he is not serving a sentence of life imposed by the court but rather a commuted sentence of life achieved by grace of the Governor's intervention in the exercise of his sovereign power of clemency.

This opinion violates no constitutional rights or privileges of such a prisoner for he may, in the discretion of the Governor, be released on a further conditional pardon to partake of a release in the nature of a parole, with conditions attached, in exactly the same manner as he might be released by the State Parole Board. One who has partaken of executive clemency may again be the recipient of further beneficence for "the commutation of a death sentence to life imprisonment does not exhaust the power of commutation vested in the Governor and preclude a subsequent commutation to a limited term of years." (46 C. J. 1199).

We are not unmindful of the fact that in some jurisdictions it has been determined by judicial decision that the commutation of a death sentence to one of life by the Governor has the same legal effect as though the life sentence had been imposed originally for the life term. We have examined these cases and in no situation has there been a legislative prohibition similar to that in Section 4, Chapter 83, P. L. 1948.

Were it not for the existence of Section 4 aforesaid, we would adopt the view that your Board could treat with a commuted life term prisoner under Section 11 of the law establishing your Board.

However to do so, in view of the enactment of Section 4, would be to find that the section is without meaning but such an interpretation is repugnant to the primary canons of statutory construction.

> "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, par. 4510).

As demonstrated above, we feel that the primary purpose of Section 4 supra was to prevent any State officer or agency, save the Governor, from releasing a commuted life sentence prisoner on parole or otherwise to prevent the shortening of such sentence, except by direct act of the Governor. If Section 4 does not have the purpose and meaning that we have ascribed to it, then it can have no meaning whatsoever for no other intent can be attributed thereto. This for the reason that the Constitution of New Jersey limits the power to remit or commute a sentence to the Governor, which right cannot be abridged or enlarged by the Legislature, and cannot conceivably be vested concurrently, by statute, in some other State officer or agency.

While it is true that the word "parole" was not specifically alluded to in said Section 4, nevertheless, we feel that the Legislature intended by the use of the phrase "remitted or commuted" to include, in the broader sense, the term "parole" and any other method that might be used to shorten the period of confinement of a commuted life term prisoner.

For the above reasons, and to give meaning and purpose to Chapter 83, P. L. 1948, we are of the opinion that it is part of the constitutional and legislative policy of this State that the Governor shall at all times control the destiny of a prisoner whose sentence of death has been commuted to one of life, and this particularly in view of the fact that such prisoner will be denied none of the rights or privileges which would be available to him if your Board were permitted to consider his case for purposes of parole.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: EUGENE T. URBANIAK,
Deputy Attorney General.

ETU:HH

MARCH 13, 1950.

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

FORMAL OPINION—1950. No. 28.

MY DEAR DR. BERGSMA:

I have your letter of the 7th instant stating that at the present time your department has eight nurses with permanent status who receive less than 50% of their total salary from State funds and that the balance of their salary may be made up from funds of one or more local communities in whose area they carry out nursing functions of your department.

The question which you have presented for consideration is whether these nurses should be compelled to join the State Employees' Retirement System. The answer is in the affirmative. These nurses undoubtedly are civil service employees, and by the State Employees' Retirement System act such employees are required to be members of the Retirement System. I therefore advise you to certify the names of these employees to the State Employees' Retirement System.

I note your observation that your department was advised by the Retirement System on March 6, 1946 that these nurses could be members of the Retirement System but that such membership was not compulsory. This determination may have been reached on the assumption that these employees were not full time employees of the State, but I think this reasoning is unsound. Undoubtedly, the first duty of these

nurses is to the State, and I also assume that they render to the State all the service that the State requires of them. This being so, I consider them as full time employees.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: THEODORE BACKES,
Deputy Attorney General.

TB:B

MARCH 13, 1950.

MR. FRANK B. BAER, *Secretary,*
Prison Officers' Pension Fund,
1604 Greenwood Avenue,
Trenton 9, New Jersey.

FORMAL OPINION—1950. No. 29.

DEAR SIR:

I have your letter of the 9th instant with enclosure of application for service retirement of one Fusco, a prison officer.

Your letter states that Mr. Fusco is 47 years of age and has had only seventeen years of State service.

It is clear from the accompanying papers that Mr. Fusco is not seeking retirement because of age and service under Section 1 of your act (P. L. 1941, Chapter 220), which requires twenty years of service and attained age of 55 years. Apparently he is seeking retirement because of illness. Two physicians certify as to his illness and both agree that he is unable to perform his former work.

I do not understand that Mr. Fusco claims that his present illness and disability arose out of his employment and he has not reached the age of 55 years and has not had twenty years of service with the State and I do not see how he can be granted a pension under your act. Of course, if he should resign, his accumulated deductions could be returned to him under Section 9 of the act and, of course, if his death should ensue while he is still a prison officer, a pension can be paid to the surviving widow, minor children or dependent parents, as pointed out in Section 4 of your act. This section, as you know, provides that in the event of the death of one of your prison officers from causes other than injuries or illness received or incurred in the performance of his duties, and where such officer has paid into your fund the full amount of his assessments or contributions and has served in the employ of the State for five years, twenty-five per centum of the pension which would have been paid him had he served twenty years shall be paid to the widow, etc., and for each additional year of service thereafter, the proportion of the amount of the pension to be paid to the widow, etc., as the case may be, shall be increased to the extent of five per centum over and above the twenty-five per centum just mentioned for each additional year of service up to and including twenty years.

If I am in error in concluding that Mr. Fusco desires to retire because of disease not incurred in performance of duty but in fact claims that such disabling disease was in fact incurred in performance of duty, then the procedure outlined in Section 6 of your act should be followed.

I am returning herewith the papers which you sent me.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: THEODORE BACKES,
Deputy Attorney General.

Encs.
TB:B

APRIL 12, 1950.

HON. HARRY C. HARPER,
Commissioner of Labor and Industry.
State House,
Trenton 7, New Jersey.

FORMAL OPINION—1950. No. 30.

DEAR COMMISSIONER:

In compliance with your request for an interpretation of the term "and other foodstuffs" as used in R. S. 34:6-105, otherwise known as the Bakeries and Confectioneries Law, please be advised that it is our opinion that the cardinal purpose or intent of the whole act shall control and that all the parts be interpreted as subsidiary and harmonious (Sutherland Statutory Construction, 3rd edition, Section 4704).

In attempting to arrive at the meaning of a word or phrase as used by the Legislature in any specific law one must necessarily construe such word or phrase with reference to the leading idea or purpose of the instrument.

In the case of *International Trust Co.* vs. *American Loan and Trust Co.*, 65 N. W. 78, it was held

> "It is always an unsafe way of construing a statute or contract to divide it by a process of etymological dissection, and to separate words and then apply to each, thus separated from its context, some particular definition given by lexicographers and then reconstruct the instrument upon the basis of these definitions. An instrument must always be construed as a whole, and the particular meaning to be attached to any word or phrase is usually to be ascribed from the context, the nature of the subject matter treated of, and the purpose or intention of the parties who executed the contract or of the body which enacted or framed the statute or constitution."

Likewise Chancellor Kent in his Commentaries observed:

> "In the exposition of a statute the intention of the lawmaker will prevail over the literal sense of the terms; and its reason and intention will prevail over the strict letter. When the words are not explicit, the intention is to be collected from the context; from the occasion and necessity of the law; from the mischief felt and the remedy in view; and the intention should be taken or presumed according to what is consistent with reason and good discretion."

Therefore, by the great weight of authority we must conclude that the term "or other foodstuffs" cannot be lifted out of its context but must be read in the light of the entire instrument, "No person shall engage in the business of making or manufacturing biscuits, pies, bread, crackers, cake, macaroni, candy, . . . or other foodstuffs or confections for the purpose of sale unless licensed so to do by the commissioners," and must be interpreted to apply only to confections and allied products. The act cannot be construed to include the use of mono-sodium glutamate to be used to impart a meat flavor to foods.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: GRACE J. FORD,
Ass't. Deputy Attorney General in Charge.

APRIL 17, 1950.

MR. GEORGE M. BORDEN, *Secretary,*
State Employees' Retirement System,
1 West State Street,
Trenton 7, New Jersey.

FORMAL OPINION—1950. No. 31.

DEAR MR. BORDEN:

Reference is made to your letter of March 21 regarding the computation of retirement allowance of Mrs. Mary E. Westcott. You state that Mrs. Westcott retired on January 1, 1950, and that prior to that date she was an employee of Cumberland County, in which the State Employees' Retirement System became effective on July 1, 1949.

You have inquired specifically whether, in figuring the final compensation of Mrs. Westcott for purposes of her retirement allowance, your Board of Trustees should consider salaries received by her prior to January 1, 1945, which was exactly five years prior to the effective date of her retirement.

In my opinion the answer is no.

Final compensation is defined in the State Employees' Retirement Act as follows (N. J. S. A. 43:14-1, subparagraph e):

> "'Final compensation' means the average annual compensation earnable by a member for the five years immediately preceding his retirement, or, at the option of such member, it shall mean the average annual compensation earned by a member during any five consecutive years of his or her membership, within which period of five consecutive years he was entitled to retirement for service, said five years to be selected by the applicant prior to the date of retirement."

It will be noted that the option given to the member by the last portion of the above quoted definition applies only if the member is selecting a period of five consecutive years "within which * * * he was entitled to retirement for service." Inasmuch as the State system did not become effective in Cumberland County until July 1, 1949, Mrs. Westcott was not entitled to retirement for service under this act prior to that date. The option in question is, therefore, not open to her, and her final compensation must be figured as that which was earnable by her for the five years immediately preceding her retirement.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: THOMAS P. COOK,
Deputy Attorney General.

tpc;d

APRIL 24, 1950.

MR. GEORGE M. BORDEN, *Secretary,*
State Employees' Retirement System,
1 West State Street,
Trenton 7, New Jersey.

FORMAL OPINION—1950. No. 32.

MY DEAR MR. BORDEN:

I have your letter of the 19th instant stating that Senate Bill No. 107 has passed both houses and awaits the Governor's signature.

You also state that, in view of the fact that the bill is to take effect immediately upon the Governor's approval, you are endeavoring to determine the method of procedure to be followed in having the two new municipal representatives elected. The bill in question provides for two new representatives to be elected from municipal membership, one to hold for a term of three years and one to hold for a term of two years.

You also call my attention to the fact that, under a rule of your Board adopted in the year 1923 providing that when nominations are made for membership in the Board of Trustees, if the nominee receives fifty per cent or more of the votes cast he shall be declared elected. In examining the bill for the election of the two new municipal members, which bill amends Section 43:14-7 of the Revised Statutes, under e, I find that the two new trustees shall be elected by the member employees of the municipalities and that the "same method of holding an election now used for the State employees' representatives shall be followed" in elections held for municipal representatives. I understand that, since the year 1923 when the rule above mentioned was adopted, where a nominee received fifty per cent or more of the ballots cast, he was declared elected. In view of the fact that Senate Bill No. 107, if it becomes a law, requires you to adopt the same method of holding the election for the new representatives as is now used for State representatives, I advise you that the ballot should provide spaces for the writing in of two names for the new trustees and in one space should be the words "or the term of three years" and in the other space should be the words "for the term of two years," and that if either or both of the two nominees receive fifty per cent or more of the ballots cast they shall be declared elected.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: THEODORE BACKES,
Deputy Attorney General.

TB:B

MAY 25, 1950.

DR. WILLIAM S. CARPENTER,
President, Civil Service Commission,
State House,
Trenton, New Jersey.

FORMAL OPINION—1950. No. 33.

DEAR SIR:

Receipt is acknowledged of your request for my opinion as to existing demotional rights of Frederick E. Sieper, Transportation Inspector, and John Rogers, Traffic Maintenance Foreman, recently employees of the City of Passaic. You advise that the City of Passaic adopted civil service on November 2, 1948; that your records show at said time Mr. Sieper held the title of Bus Inspector, which was subsequently changed to Transportation Inspector. Mr. Rogers at the same time held the title of Foreman, Parking Meter and Traffic Maintenance Division, which was changed to Traffic Maintenance Foreman.

Revised Statutes 11:21-6 provides:

> "Hereafter, all officers, clerks and employees in the employ of any county, municipality or school district at the time of the adoption of this subtitle by such county, municipality or school district, coming within the competitive or non-competitive class of the civil service, except such as may be appointed between the time of the filing of the petition for the adoption of this subtitle and holding of the referendum for the adoption thereof in such county, municipality or school district, shall continue to hold their offices or employments, * * * (P. L. 1940, c. 150, p. 317, § 1)."

An examination of the file discloses that both men held the listed positions at the time of the adoption of civil service in the City of Passaic and that these positions were embodied in the classification plan. Thus their positional status was fixed as of November 2, 1948. Subsequently both positions were abolished.

In the case of *Kraibuehler* vs. *Civil Service Commission,* 124 N. J. L. p. 99, the Supreme Court held:

"It is settled that positions within the civil service may be abolished and that employees under civil service may be separated from their positions for reasons of economy. *Santucci* vs. *Paterson,* 113 N. J. L. 192; *Byrnes* vs. *Boulevard Commissioners of Hudson County,* 121 Id. 497; *Gianettino* vs. *Civil Service Commission,* 120 Id. 531.

"Statutory provisions pertinent to civil service employees separated from the service without delinquency or misconduct on their part are R. S. 11:22-9 and R. S. 11:22-10.

"R. S. 11:22-9 provides:

"'When any person holding an office or position under the classified service has been separated from the service because of reasons of economy or otherwise, * * * his name shall be placed upon a special eligible list, which list shall take precedence over all other civil service lists, and shall be entitled to reinstatement at any time thereafter in the same or any similar office or position of the same kind as that from which he was previously separated as soon as such an opportunity arise. * * *'

"R. S. 11:22-10 provides:

"'A person in the classified service whose position has been abolished for reasons of economy or otherwise * * * shall, with the approval of the commission, be demoted to some lesser office or position in the same department in the regular order of demotion and placed therein with the salary of pay attached. * * *'.

"Under the first provision a person separated from the service has the right to have his name placed upon an eligible list for reinstatement when an opportunity arises; but there is no provision for displacing another employee. Under the second provision a person whose position has been abolished has, with the approval of the commission, the right to be demoted to some lesser office or position in the same department. The two statutory enactments were not passed at one time. The first was enacted as section 23 of chapter 156, Pamph. L. 1908, Comp. Stat., p. 3803, § 79, amended by chapter 128, Pamph. L. 1933 and chapter 11, Pamph. L. 1935. The second was enacted as section 1 of chapter 122, Pamph. L. 1916, 1924 Supp., § 144-98. The two overlap in their application and may, we think, be read together to the extent of deducing a legislative intent that where the right of demotion exists it is restricted to a demotion within the department within which the person has been employed. Aside from that the right of one who has been separated from the service or whose position has been abolished, for reasons of economy or other reason not grounded in his delinquency or misconduct, is to have his name placed upon a special eligible list with reinstatement at an appropriate time thereafter. Prosecutors have not been deprived of any right thus accorded them."

From an examination of the Civil Service Law, particularly Sections 11:22-9 and 11:22-10 and a consideration of the facts, I am of the opinion petitioners' claim to a demotion must be denied there being no position or employment of a similar class or character to which a demotion could be made, but that they are entitled to the

placement of their names on the civil service list for appointment should the positions be again created.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: JOSEPH LANIGAN,
Deputy Attorney General.

JL:rk
Att: File ret'd.

MAY 25, 1950.

DR. WILLIAM S. CARPENTER,
President, Civil Service Commission,
State House,
Trenton, New Jersey.

FORMAL OPINION—1950. No. 34.

DEAR SIR:

Receipt is acknowledged of your request for my opinion as to whether the Board of Chosen Freeholders of the County of Hudson can create the position of Commissioner of Public Works in the Department of Public Works and place the incumbent thereof as the superior of the County Engineer.

Revised Statutes by 40:21-3, among other things, provides:

"In addition to the officers and employees whose appointment is specifically provided for by law, the board of chosen freeholders may appoint or provide for the appointment of such other officers, agents and employees as may be required for the execution of the powers conferred upon said board or any board or officer within the county."

This statute vests in the Board of Chosen Freeholders the right to create the position of Commissioner of Public Works and prescribe his powers and duties. However, such position, when validly created must be placed in the competitive division of the classified civil service and be filled on a permanent basis as a result of an open competitive examination.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: JOSEPH LANIGAN,
Deputy Attorney General.

JL:rk
Att: File ret'd.

MAY 25, 1950.

MR. JOHN A. WOOD, 3D., *Secretary,*
Teachers' Pension and Annuity Fund,
Trenton Trust Building,
Trenton 4, New Jersey.

FORMAL OPINION—1950. No. 35.

DEAR SIR:

I have your letter of the 18th instant. The question propounded for my consideration is whether the employees of your system are in fact State employees.

The answer is yes, although this is contrary to the views expressed by a former Attorney General in an opinion to Hon. John Enright, Secretary of your Pension Fund, under date of July 1, 1919. That opinion was written by a member of the then staff of the Attorney General's office, now deceased, and was predicated upon the assumption that under law (Chapter 80, Laws of 1919, sec. 248) granting to the Teachers' Pension and Annuity Fund the powers and privileges of a corporation, that in fact a body corporate was created. I cannot read subsection 2 of that law, which is now R. S. 18:13–27, as creating a body corporate; it merely confers on the Teachers' Pension and Annuity Fund the powers and privileges of a body corporate. A similar power is conferred in the State Employees' Retirement Act (R. S. 43:14–10).

That your fund is an agency or instrumentality of the government I have not the slightest doubt. Under the Constitution of 1844, Article IV, Section VIII, paragraph 6, it was provided that "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." The identical provision of the Constitution of 1844 just noted, was retained in Paragraph 1 of Section IV of Article VIII of the new Constitution of 1947.

When your fund was created, it was accomplished by an act of the Legislature enacted in the year 1919 by the addition of an article known as XXVIII to the school law of 1903.

It is true that the employees of your fund have never been classified into the civil service and that, undoubtedly, was occasioned by the determination of the former Attorney General.

The true facts are that all of the employees ever since the creation of the fund have been paid out of State appropriations and they are so paid today. Of course, I realize that by Section 14 of Chapter 92 of the Laws of 1948, the Board of Trustees of your system and all their respective functions, duties, etc., were transferred to the Division of Budget and Accounting established under said act in the Department of the Treasury, and except as otherwise provided in that act, each of the pension funds mentioned in that act as agencies were continued with all the powers, functions and duties imposed by law upon them.

In order that there may be no misunderstanding of the purport of this opinion, I advise you that, in my opinion, not only are the employees of your fund State employees but many of them undoubtedly are subject to classification under the civil service law.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

MAY 31, 1950.

THE HONORABLE LLOYD B. MARSH,
Secretary of State,
Trenton, New Jersey.

FORMAL OPINION—1950. No. 36.

DEAR SIR:

Receipt is acknowledged of your letter of May twenty-third, in which you request an opinion as to the date on which the term of office of Howard F. Barrett, Judge of the County Court of Morris County, will expire.

It is our opinion that Judge Barrett's term of office will expire on April 1, 1953.

The provisions of the Constitution of 1947 which we deem to be pertinent to the question before us are:

> There shall be a County Court in each county, which shall have all the jurisdiction heretofore exercised by the Court of Common Pleas, Orphans' Court, Court of Oyer and Terminer, Court of Quarter Sessions, Court of Special Sessions . . . (Art. VI, Sec. IV, par. 1).
>
> There shall be a Judge of each County Court and such additional Judges as shall be provided by law, and they shall be appointed in the same manner as heretofore provided for Judges of the Court of Common Pleas. (Art. VI, Sec. IV., par. 2).
>
> The Governor shall nominate and appoint, with the advise and consent of of the Senate, . . . the Judges of the County Courts . . . (Art. VI, Sec. VI, par. 1.).
>
> The Judges of the Courts of Common Pleas shall constitute the Judges of the County Courts, each for the period of his term which remains unexpired at the time the Judicial Article of this Constitution takes effect. (Art. XI, Sec. IV, par. 2.)

From the several paragraphs of the Constitution of 1947 above recited it is readily apparent that the framers intended — and there can be no doubt that the people who ratified the instrument so understood it — that a single court of permanent constitutional status in each county, formally denominated the County Court, was to replace the five separate courts (including the Court of Common Pleas) held by the Judges of the Court of Common Pleas, and that the Judges of the Court of Common Pleas were to become, without interruption in term of office, the Judges of the new County Courts.

The framers of the Constitution of 1947 did not expressly designate a number of years as the term of office of Judges of the County Courts appointed after the effective date of the Judicial Article thereof. This we ascribe neither to oversight nor to an intent to leave to the Legislature — which for want of fundamental treatment would have the power to legislate upon the subject—the fixing of such term. As we see it, the term was taken care of in the clause (hereinabove recited) which requires that the Judges of the County Courts "shall be appointed in the same manner as heretofore provided for Judges of the Court of Common Pleas." (Art. VI, Sec. IV, par. 2.)

In the construction of constitutions, it is necessary, as in the construction of statutes, to collect the sense and meaning of the clause by comparing one part with another, and by considering all the parts as a whole, and not one part as a seperate and independent provision bearing no relation to the remainder. The purpose of interpretation is the discovery of the true sense of the form of words which are used, taking all parts into consideration, and, if fairly possible, giving them all effect. The object of interpretive inquiry is the thought which the instrument expresses. (See *State* vs. *Murzda,* 116 N. J. L. 219; see also *In re an Act Concerning Alcoholic Beverages,* 130 N. J. L. 123.)

In *Marvel* vs. *Camden County,* 137 N. J. L. 47, the phrase "in the same manner" was construed to be broad enough to comprehend term of office. In that case our Court of Errors and Appeals (1947), reversing our then Supreme Court, said (page 51):

> . . . The court construed the word "manner" as meaning "mode of procedure" and as not comprehending term of office. In adopting this construction, we think the court erred and failed to follow the guide to statutory construction . . . When the phrase "in the same manner" is considered in reference to the thrice repeated phrase "for the term of three years" [in the pertinent statutes] it becomes apparent that its meaning is broader than that attached to it by the court below. Unless the phrase is construed broadly enough to comprehend term of office, it is tantamount to a deletion from the statutes of the phrase "for a term of three years."

So, too, with the Constitution of 1947 as regards the term of office of County Court Judges. Taking into consideration all parts of that instrument relating to the organization and plan of the courts, and especially in view of the provision (Art. VI, Sec. VI, par.1) specifying that the mode of procedure for appointing the Justices and Judges of all the constitutional courts (including the County Courts) shall be by the Governor's nomination and appointment with the advice and consent of the Senate, it becomes clear that term of office is comprehended within the phrase "in the same manner" as used in the clause providing that the Judges of the County Courts "shall be appointed in the same manner as heretofore provided for Judges of the Court of Common Pleas."

Accordingly, we proceed to ascertain what provisions controlled "the manner" (other than the mode of procedure) of appointment of Judges of the Court of Common Pleas.

The Constitution of 1844 (as amended) provided, so far as applicable to the question before us, as follows:

> They [the Judges of the Court of Common Pleas] shall hold their offices for five years; but when appointed to fill vacancies, they shall hold for the unexpired term only. (Art. VII, Sec. II, original par. 2.)
>
> The commissions for the first appointments of judges of said court shall bear date and take effect on the first day of April next; and all subsequent commissions for judges of said court shall bear date and take effect on the first day of April . . . except commissions to fill vacancies, which shall bear date and take effect when issued. (Art. VI, Sec. VI, par. 2.)

In *Delmar* vs. *Bergen County,* 117 N. J. L. 377, Mr. Justice Case, speaking for the Court of Errors and Appeals (1936), said (page 384):

> . . . The 1844 constitution originally provided in article VII, section II, paragraph 2, that "judges of the Courts of Common Pleas shall be appointed by the Senate and General Assembly, in joint meeting. They shall hold their offices for five years; but when appointed to fill vacancies they shall hold for the unexpired term only." That paragraph still so reads, but (*Schalk* vs. *Wrightson,* 58 Id. [N. J. L.] 50), was impliedly repealed *pro tanto* by the 1875 amendment whereby paragraph 1 of the section is made to read: "* * * Judges of the inferior court of common pleas shall be nominated by the governor and appointed by him with the advice and consent of the senate." . . .

Accordingly, the provision that the Judges of the County Court "shall be appointed in the same manner as heretofore provided for Judges of the Court of Common Pleas" is to be read, we think, in the following sense:

> The Judges of the County Courts shall hold their offices for five years; but when appointed to fill vacancies they shall hold for the unexpired term only. The commissions for the Judges of said Courts shall bear date and take effect on the first day of April, except commissions to fill vacancies, which shall bear date and take effect when issued. The unexpired term for each office of Judge of the Court of Common Pleas existing on September 15, 1948 shall be deemed to be an unexpired term for the office of Judge of the County Court.

In your letter you indicate that Judge Barrett's nomination was confirmed by the Senate on May 15, 1950. Applying the construction we have hereinabove enunciated, the term involved in this appointment began (according to your letter) on April 1, 1948 for the office of Judge of the Court of Common Pleas but became on September 15, 1948 (when the Judicial Article of the Constitution of 1947 took effect) the unexpired term for the office of Judge of the County Court, such term to expire five years from April 1, 1948. Accordingly, since Judge Barrett's nomination to the office was confirmed as of a date between the beginnig of the term and the expiration thereof, he holds the office for the unexpired term only, or until April 1, 1953.

You have called to our attention the ad interim appointment of Judge Albert H. Holland, made on September 15, 1948. This has no bearing whatever on the question, since Judge Holland's period of service as an ad interim appointee merely consumed *pro tanto* a portion of the aforesaid term.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: DOMINIC A. CAVICCHIA,
Deputy Attorney General.

MAY 31, 1950.

N. J. STATE BOARD OF PROFESSIONAL
ENGINEERS AND LAND SURVEYORS,
921 Bergen Avenue,
Jersey City, New Jersey.

FORMAL OPINION—1950. No. 37.

GENTLEMEN:

I acknowledge receipt of your inquiry of May 17th with respect to the effect of Chapters 293 and 294. P. L. 1948 upon R. S. 45:8-28.

Chapters 293 and 294 of the Laws of 1948 provide a means by which licensed professional engineers may authenticate plans, specifications and preliminary data prepared in accordance with R. S. 45:3-10 in addition to the affidavit provided for therein. (Formal Opinion 1949, No. 113).

Chapters 293 and 294 of the Laws of 1948 do not affect R. S. 45:8-28 which reads in part as follows:

> "(b). The practice of professional engineering within the meaning of this chapter includes any professional service such as consultation, investigation, evaluation, planning, design, or responsible supervision of construction or operation in connection with any public or private engineering or industrial project. * * *"

Specifically, R. S. 45:8-28 permits a licensed professional engineer of the State of New Jersey to prepare and file plans for industrial projects with state and municipal departments in this State.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: HENRY F. SCHENK,
Deputy Attorney General.

HFS:rk

JUNE 7, 1950.

THE HONORABLE LLOYD B. MARSH,
Secretary of State,
Trenton, New Jersey.

FORMAL OPINION—1950. No. 38.

DEAR SIR:

Receipt is acknowledged of your letter of May twenty-sixth, in which, as we understand it, you request an opinion as to whether, under the present state of the law, May first, the date designated in P. L. 1906, c. 120, is still the beginning date for the term of office of members of county boards of taxation appointed for a full term. (Vacancies other than those caused by expiration of term are filled for the unexpired term only).

Our opinion is, and we advise you, that you should continue to regard May first as the beginning date of the term of office of members of county boards of taxation (other than those appointed to fill an unexpired term) in all counties.

In your letter you state that members of the county boards of taxation "are appointed in counties other than counties of the first class for a term of three years and in counties of the first class [for a term of] five years." This we find to be so by virtue of the provisions of R. S. 54:3-3 as amended (P. L. 1940, c. 113; P. L. 1941, c. 142). The boards in counties of the first class were increased to five members (from three) by P. L. 1940, c. 113, amending R. S. 54:3-2 as well as R. S. 54:3-3.

An examination of the pertinent sections of the Revised Statutes reveals no provision expressive of a beginning date for the term of office of members appointed to said boards. However, R. S. 54:3-3, which in 1940 was amended to increase to five years the term of members of said boards in counties of the first class, provides (as further amended in 1941) as follows:

> The members shall be appointed for a term of three years and until their successors shall have been duly appointed and qualified. If there happens to be any vacancy in said office, during the recess of the Legislature, caused by reason of death, resignation or in any manner other than by the expiration of the term for which any person shall have been appointed, the Governor shall fill such a vacancy and the commission shall expire at the end of the next session of the Legislature unless a successor shall be sooner appointed. In filling vacancies other than those that have been created during the recess of the Legislature as herein provided for the Governor shall appoint with the advice and consent of the Senate for the unexpired term only. The members of the county boards of taxation in counties of the first class who are in office at the time this act (Sec. 54:3-2, Sec. 54:3-3 and Sec. 54:3-22.1 [P. L. 1940, c. 113]) becomes effective shall, without further appointment or confirmation, continue in office for the balance of the term for which they and each of them were respectively appointed. The term of office of the members hereafter appointed by the Governor by and with the advice and consent of the Senate shall be five years and until their successors shall have been duly appointed and qualified; *provided, however, that of the two additional members to be added, the term of one shall expire April thirtieth, one thousand nine hundred and forty-four, and the other April thirtieth, one thousand nine hundred and forty-five;* and provided, further, that they shall continue in office until their respective successors shall have been duly appointed and qualified. (Italics ours).

Bearing in mind the May first date fixed in P.L. 1906, c. 120, we mark as significant the proviso that of the two additional members (of boards in counties of the first class) the term of one shall expire April 30, 1944, and the other April 30, 1945. This, we are persuaded, evidences a legislative recognition that under the then state of the law the beginning date of the term of members of such boards appointed for a full term was May first, and, further, a legislative intent not to disturb that scheme of term succession.

R. S. 54:3-1 (which section is still in the form in which it was enacted as part of the Revised Statutes), reads as follows:

> The several county boards of taxation created and established in the several counties for the equalization, revision, review and enforcement of

taxes by the act entitled "A supplement to an act entitled 'An act for the assessment and collection of taxes,' approved April eighth, one thousand nine hundred and three," approved April fourteenth, one thousand nine hundred and six (L. 1906, c. 120, p. 210), as amended and supplemented, are hereby continued.

Under the provisions of section one of said act (P. L. 1906, c. 120), it was provided that

> The term of office of the members first appointed shall commence on the first day of May, nineteen hundred and six, and the members so appointed by the Governor shall be appointed for the terms of one, two and three years respectively; and, thereafter, as the terms of said members expire, appointments shall be made for a term of three years . . . .

The same section of said 1906 act further provided that if the first appointments of members of the county boards of taxation should be made when the Senate would not be in session they would be "valid until the first day of May, nineteen hundred and seven, and the appointments of successors shall be made as provided in this act, their terms to commence on the first day of May, nineteen hundred and seven." Both of these provisions were still part of section one of said 1906 act as last amended by the Legislature (P. L. 1933, c. 281) before enactment of the Revised Statutes (1937).

We have ascertained from your office that your official records show that there has been an observance of the May first beginning date with respect to the term of office of members of county boards of taxation heretofore appointed for a full term. In view of this long continued construction, and especially in view of the Legislature's apparent recognition thereof (particularly as evidenced by the proviso, in R. S. 54:3-3, above marked and which first made its appearance in said section by virtue of P.L. 1940, c. 113), we are constrained to adhere to the same construction. Contemporaneous and long-standing exposition exhibited in usage and practice under a statute requires a similar construction in case of doubt. *In re Hudson County,* 106 N. J. L. 62.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: DOMINIC A. CAVICCHIA,
Deputy Attorney General.

JUNE 8, 1950.

MR. GEORGE M. BORDEN, *Secretary,*
State Employees' Retirement System,
1 West State Street
Trenton 7, New Jersey.

FORMAL OPINION—1950. No. 39.

DEAR SIR:

I have your letter of the 2d instant with copy of letter to you from R. William Lagay, Superintendent of the New Jersey State Prison Farm at Rahway. It appears from the papers submitted that one Joseph Evans has been receiving a retirement

allowance from your fund amounting to $30.79 monthly. It also appears from Mr. Lagay's letter that Evans was received at the State Prison on January 31, 1950, on a conviction of lewdness, his term of imprisonment being fixed as two to three years, and that he was thereafter transferred to the Prison Farm at Rahway.

By Chapter 221 of the Laws of 1938 no pension or subsidy is to be paid by the State * * * to any person for the period during which he is confined in a penal institution as a result of conviction of crime involving moral turpitude, with certain exceptions therein named which need not be noted. The crime of which Joseph Evans was convicted is one involving moral turpitude.

The question is whether you shall continue to pay him the retirement allowance of $30.79, which, of course, includes not only the pension element, but the annuity element as well. By your statute, R. S. 43:14-1 (g), "Pension" means payments for life derived from appropriations made by the state * * *. In my judgment, the pension element should be withheld so long as Evans remains under the jurisdiction of the prison authorities and until his final discharge.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: THEODORE BACKES,
Deputy Attorney General.

TB:B

JUNE 14, 1950.

MR. GEORGE M. BORDEN, *Secretary,*
State Employees' Retirement System,
1 West State Street,
Trenton 7, New Jersey.

FORMAL OPINION—1950. No. 40.

DEAR MR. BORDEN:

I have your letter of the 12th instant with enclosure of letter from Peter P. Walsh, Esq., a member of the Bar, concerning a member of your system, who is now confined to an institution. You enclosed me a copy of a designation signed by such member in which she named a beneficiary to receive her accumulated deductions in the event of her death prior to retirement on pension.

You state that a brother of the member is considering the possibility of applying for guardianship papers so that he may apply for an ordinary disability retirement allowance. Such an application can be made by anyone acting on her behalf. (R. S. 43:14-30.) Your real question is, would the guardian have the right to designate a beneficiary and select one of the optional modes of retirement. In my opinion, he could not. You will notice in the section which I have just mentioned that anyone acting on behalf of the member may make application for ordinary disability retirement, and the same language is used in R. S. 43:14-31 with respect to accident disability retirement.

With respect to the exercise of an option as provided in R. S. 43:14-38, the member, in my opinion, must make the election, and I am likewise of opinion that he would have no right to designate a beneficiary. Upon the members' retirement for ordinary disability, monthly payments of the amount allowed may be made to her guardian duly appointed, and should there be a balance due upon her death, such balance can be paid to her estate.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,
By: THEODORE BACKES,
Deputy Attorney General.

TB:B

JUNE 14, 1950.

MR. GEORGE M. BORDEN, *Secretary,*
State Employees' Retirement System,
1 West State Street,
Trenton 7, New Jersey.

FORMAL OPINION—1950. No. 41.

DEAR MR. BORDEN:

I have your letter of the 9th instant with enclosures. I gather from the papers that a veteran retired from your retirement system by withdrawing his accumulated deductions on February 15, 1949, and ceased to be eligible for any of the benefits of your act until he re-enrolled on November 1, 1949; that on April 28, 1949, while mowing his lawn, he had a heart attack.

The right to withdraw his accumulated deductions was accorded the veteran by R. S. 43:14-43 "without prejudice to his right as a veteran to any benefit to which he may be entitled under any other law."

Undoubtedly, the veteran withdrew his accumulated deductions and thus ceased to be a member of your fund because of the privilege accorded him by the Veterans' Act to retire after twenty years of service and reaching the age of sixty-two. (R. S. 43:4-1 et seq.). It now appears that the veteran, after suffering the heart attack, decided to rejoin the system and he did so. I believe he now claims the right to an accident disability allowance.

When he suffered the heart attack, he was not a member of your fund and his re-enrollment after the accident did not restore to him the right to an accident disability retirement when such accident if it, in fact, be established as such, occurred, as I have indicated, during the period of time when he was not a member of the fund.

I am returning herewith all the papers which you enclosed me.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,
By: THEODORE BACKES,
Deputy Attorney General.

Encs.

JUNE 22, 1950.

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

FORMAL OPINION—1950. No. 42.

DEAR DIRECTOR:

Receipt is acknowledged of your inter-departmental communication of June twenty-first, in which you state that the Highway Department has requested permission to transfer $785,000.00 from its operating account to its capital construction account, and request an opinion as to whether there is in the "flexibility section" of the current appropriation act (P. L. 1949, c. 43) any provision prohibiting such a transfer.

Our opinion is that there is in the flexibility section of the current appropriation act (P. L. 1949, c. 43, sec. 4) no provision which prohibits the transfer of money from an operating account to a capital construction account, and that the tranfer of $785,000.00 from the Highway Department's operating account to its capital construction account may be made if the State Treasurer consents thereto.

In your communication you call attention to the first proviso of the "flexibility section" of the current appropriation act (P. L. 1949, c. 43, sec. 4) which reads as follows:

> . . . *provided, however,* that no sum appropriated for any permanent improvement shall be used for maintenance or for any temporary purpose; . . .

You state that the language of this proviso "seems to indicate that the Legislature has definitely fixed the amount of capital appropriation for permanent improvements." Our view, however, is to the contrary. To us it is obvious that the Legislature after providing generally in the section that "any department or other State agency receiving an appropriation . . . may apply . . . for permission to transfer a part of any item granted to such department or agency to any other item in such appropriation," qualified the general effect of the provision by writing into the section a restriction against a transfer from an item "for permanent improvements" to an item "for maintenance or for any temporary purpose." The office of a proviso in a statute is to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation. *Rutgers Chapter of Delta Upsilon Fraternity* vs. *City of New Brunswick* (Sup. Ct. 1942), 129 N. J. L. 238; affirmed (E. & A. 1943) 130 *Id.* 216.

It is clear, then, that by the proviso in question the Legislature intended to provide against the increase of an item for purposes other than permanent improvements with funds appropriated for permanent improvements. We are unable to read into the proviso a restriction against increasing an item for permanent improvements. And we are confirmed in this view, we think, by the second proviso, which prescribes "that any item for capital improvement may be transferred to any other item of capital improvement on the approval of the State Treasurer."

In this connection we point out that until 1949 the annual appropriation act had for years included the "flexibility section" with only one (the first) proviso, i. e.

"that no sum appropriated for any permanent improvement shall be used for maintenance or for any temporary purpose." In 1949, however, the second proviso ("that any item for capital improvement may be transferred to any other item of capital improvement on the approval of the State Treasurer") made its appearance in the section for the first time. In our view the term "capital improvement" was used in this proviso as a synonym for the term "permanent improvement" in the first proviso, and that the proviso itself was added as a precaution against the misinterpretation that funds appropriated for permanent improvements could not be transferred to augment an appropriation for a like purpose.

The construction we have herein placed upon the "flexibility section" is not to be understood to permit the increase of an item in the instance where the Legislature has expressed itself to the effect that the appropriation is not to exceed the sum named. Such an expression is, we think, clearly indicative of a legislative intent to keep expenditures for such item within the amount specified; and we cannot conceive that the Legislature, having made an appropriation in such rigid terms, intended by the "flexibility section" to undo the rigidity so imposed.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,
By: DOMINIC A. CAVICCHIA,
Deputy Attorney General.

JULY 7, 1950.

HONORABLE SAMUEL L. BODINE,
President of the Senate,
Flemington, New Jersey.

FORMAL OPINION—1950. No. 43.

DEAR MR. PRESIDENT:

Receipt is acknowledged of your letter of July sixth, in which you state that "there is a possibility that when the Constitutional Session of the Legislature convenes on Saturday, July 8, that there will not be a quorum present either in the Senate or in the House of Assembly" and request an opinion as to "whether it is proper procedure to provide for a recess from day to day until July 17th when a quorum will probably be available."

It is our opinion, and we advise you, that the members of the Legislature have a constitutional duty to assemble on July eighth, which is the forty-fifth day (Sundays excepted) after sine die adjournment of the regular session, in special session "for the sole purpose of acting . . . upon bills returned by the Governor;" but that, in the event a quorum of each house (which is a majority of all the members thereof) is not present, those present may adjourn from day to day until such time as a quorum is present.

Article V, Section I, paragraph 14 (b), of the Constitution of 1947 provides, in part:

> (b) If on the tenth day the Legislature is in adjournment sine die, the bill shall become a law if the Governor shall sign it within forty-five days, Sundays excepted, after such adjournment. On the said forty-fifth day the bill shall become a law, notwithstanding the failure of the Governor to sign it within the period last stated, unless at or before noon of that day he shall return it with his objections to the house of origin at a special session of the Legislature which shall convene on that day, without petition or call, for the sole purpose of acting pursuant to this paragraph upon bills returned by the Governor.

And Article IV, Section IV, paragraph 2, prescribes in part that a majority of all the members of each house

> shall constitute a quorum to do business, but a smaller number may adjourn from day to day . . .

In your letter you ask specifically: "Can each house properly recess from July 8 each day until July 17 without placing in jeopardy the legality of any action that may be taken on July 17?" In view of the constitutional provision, above recited, that a smaller number than a quorum may adjourn from day to day, the members assembled (less than a quorum) must adjourn daily until a quorum is present. In other words, adjournment cannot be taken to a day other than the succeeding day. However, Sunday is not to be deemed a day for this purpose, and adjournment on Saturday will be until the Monday next succeeding.

It is further our opinion that the Legislature will be duly convened for the session only when a majority of the members of both houses have assembled for the first meeting thereof. In other words, one house, a quorum being present, cannot proceed to the business of the session unless a quorum is also present in the other house.

Concluding, we point out that the absence of a quorum on July 8th will in no way affect the return of any bill vetoed by the Governor, provided he returns the same "at or before noon" of that day; and we advise that, if a quorum be not present, due record of the return of all vetoed bills be made in the journal of the proper house for that day, but we caution that the veto messages of the Governor are not to be opened and spread upon the journal until such time as, a quorum being present, the house may proceed to do business.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

JUNE 26, 1950.

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

FORMAL OPINION—1950. No. 44.

MY DEAR MR. FERBER:

I have your letter on the 20th instant requesting my opinion whether the operation of the cafeteria in the new State Highway building is a function of your department or a function of the State Highway Department. This necessitated an examination

of the various laws applicable to this subject and such examination has led me to the conclusion that the operation of the new Highway building is under your jurisdiction as Director of the Division of Purchase and Property. My reasons therefore are as follows:

By Chapter 10 of the Laws of 1949 an appropriation of $1,700,000 was made for a new highway building at Fernwood, Ewing Township. Section 1 of that act reads as follows:

> The Director of the Division of Purchase and Property in the Department of the Treasury, in co-operation with the State Highway Commissioner, is hereby authorized and directed to construct and equip such building as may be necessary for the housing and accommodation of the various divisions of the State Highway Department operating in the city of Trenton on land in the Township of Ewing, in the County of Mercer, now owned by the State of New Jersey, commonly known as Fernwood Service Station, a portion of which is now occupied by the State highway service buildings. For said purpose the sum of one million seven hundred thousand dollars ($1,700,000.00) is hereby appropriated from State highway revenues.

R. S. 52:20-7 (State House Commission act) reads as follows:

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

The powers and duties conferred by the section last quoted were transferred to the Division of Purchase and Property and to the Director thereof by section 12 of chapter 112 of the laws of 1949. By section 52:20-20 the powers and duties conferred on the State House Commission by that section were likewise transferred by said section to the Division of Purchase and Property and its Director. That section (R. S. 52:20-20) authorizes the appointment of a custodian of the State House, a superintendent of the state office building and state house annex, and authorizes the assignment of said officials to "such other buildings as may be acquired for state use, and the public grounds surrounding the state house and state buildings."

The question has been asked — what about other State buildings, such as those under the control of the Department of Institutions and Agencies, the State Board of Education, and the State Police.

By R. S. 30:1-7 the general jurisdiction of the institutions under the control of the Department of Institutions and Agencies is conferred by R. S. 30:1-7 upon the State Board and as the statute states "to the end that they shall be humanely, scientifically, efficiently and economically operated."

As to the State Board of Education, the normal schools and state teachers' colleges are under the jurisdiction of the Commissioner of Education (R. S. 18:16-20) as amended in 1947, Chapter 148, p. 644, sec. 31.

As to the State Police, they maintain no cafeteria. What they do maintain is what the statute calls a "mess" for which the superintendent is authorized to employ cooks and civilian help, (R. S. 53:1-24). As stated, no cafeteria is maintained by the State Police and the food that is served is, in fact, served as it has been for many years, in one of the old buildings at Wilburtha, and all buildings are serviced by a janitor and helpers.

Now, as to the State armories which, of course, are State buildings, by R. S. 38:2-17 the Quartermaster General (c) was charged with and had the direction of "The construction, alteration, maintenance and repair of armories, buildings and utilities used or intended to be used by the militia." These powers were transferred to and now vested in the new Department of Defense by section 2 of chapter 82 of the Laws of 1948.

The conclusion which I have reached is that the new highway building at Fernwood is under the jurisdiction of the Director of Purchase and Property. My reasons are as follows: The act of 1949 first above set forth provides that the new building shall be "for the housing and accommodation of the various divisions of the State Highway departments operating in the City of Trenton." As is well known the operation of that department for years has been carried on in the State House Annex and if the Legislature had directed that the new building be erected on land owned by the State directly west of the State House Annex, could any doubt arise as to who had jurisdiction of the new structure? I think not. Furthermore, an examination of the provisions of the State House Commission act likewise referred to hereinabove indicates clearly that with respect to other buildings for housing the working force of a department or division of the government, the jurisdiction likewise is in the Director of Purchase and Property. This is clearly demonstrated when we look at the provisions of R. S. 52:20-20 which authorize the State House Commission to appoint a custodian of the State House and a Superintendent of the State office building and State House Annex and authorizes the assignment to these officials of such other buildings as may be acquired for State use.

As I view the situation, the Legislature never contemplated that all buildings owned by the State should be under the sole jurisdiction of the Director of Purchase and Property but that with respect to buildings owned by the State and used for office purposes, the clear intention was that such buildings should be under the jurisdiction of that official.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

JULY 10, 1950.

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

FORMAL OPINION—1950. No. 45.

MY DEAR COMMISSIONER BATES:

You desire to be advised concerning the effect of the provisions of Chapter 315, P. L. 1950, approved July 6, 1950.

This statute removes the present requirement in New Jersey that a prisoner committed to the State Prison shall serve commutation time previously granted him

for good behavior on a prior sentence or sentences. It also removes the present prohibition in our law against granting commutation time for good behavior to prisoners serving third and subsequent sentences, irrespective of whether the prior sentences were imposed in the State of New Jersey or in some other jurisdiction.

It is suggested that you advise the Principal Keeper of the State Prison to examine the records of the prisoners who come within the purview of this statute and to make such adjustments as may appear necessary in each individual case, both as to removal from their present sentences of commutation time earned and allowed on prior sentences and, secondly, as to granting commutation time for good behavior to prisoners serving third and subsequent sentences.

The granting of commutation time for good behavior is still controlled, as heretofore, by the provisions of R. S. 30:4-140 within the discretion of the Board of Managers of the Prison. Likewise, the Board of Managers may still declare a forfeiture of time previously remitted either in whole or in part, as to them shall seem just, in case of flagrant misconduct by a prisoner.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: EUGENE T. URBANIAK,
Deputy Attorney General.

ETU:HH

JULY 13, 1950.

DR. WILLIAM S. CARPENTER, *President,*
Department of Civil Service,
State House,
Trenton, New Jersey.

FORMAL OPINION—1950. No. 46.

DEAR SIR:

I have your memorandum of the 6th instant calling my attention to Chapter 289 of the Laws of 1949 which provides that any water commission, established pursuant to R. S. 40:62-108 to 40:62-150, by two or more municipalities in counties of the second class now having a population between three hundred thousand and three hundred and twenty-five thousand shall, upon written application regulating the same, signed by a majority of the employees of said water commission employed by it on the effective date of Chapter 289 (May 28, 1949), certify to the Civil Service Commission the names of all employees, including the Secretary-Treasurer. The act further provides that when the names of the employees, including the Secretary-Treasurer have been certified, the Civil Service Commission shall classify, without examination, the employees so certified into the classified service and the employees shall thereafter be subject to all the provisions of Title 11, Civil Service Law, with respect to tenure, classification and compensation.

The act applies only to the County of Passaic, as it is the only county falling within the population prescribed by the act of 1949. (See Legislative Manual of 1950, p. 261).

The sole question to be decided, as I understand, is whether the Secretary-Treasurer shall be certified. The act of 1949 so directs.

You have forwarded to me a copy of the agreement between the City of Paterson, City of Passaic and City of Clifton, which three municipalities form the Passaic Valley Water Commission. In the agreement between these municipalities, the Secretary-Treasurer is to be appointed by the Commission for the term of four years at a salary of $3,500 per annum. Nowhere in the sections of the Revised Statutes referred to in the Laws of 1949 do I find any provision concerning a definite fixed term of years for the Secretary-Treasurer. The Water Commission derives its sole power from the Legislature and the act of 1949 directs that among the other employees of the Water Commission, the Secretary-Treasurer shall be included and shall be classified by the Civil Service Commission into the classified service.

The counsel of the City of Paterson takes the position that the act of 1949 is unconstitutional in that it impairs the obligation of a contract, that is, it impairs the agreement between the Cities of Paterson, Passaic and Clifton which provided for a term of office and the compensation to be received by the Secretary-Treasurer. With this conclusion, I cannot agree. The Passaic Valley Water Commision is a creature of our law and its officers as well as the Civil Service Commission are to obey the act in advance of the determination by a court of competent jurisdiction that the act is unconstitutional for any reason. See *Schwartz* vs. *Essex County Board of Taxation,* 129 N. J. L., 129.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: THEODORE BACKES,
Deputy Attorney General.

TB.B

JULY 17, 1950.

MR. J. LINDSEY DEVALLIERE, *Director,*
Department of Budget and Accounting,
State House,
Trenton, New Jersey.

FORMAL OPINION—1950. No. 47.

DEAR MR. DEVALLIERE:

Under memorandum dated July 11th you have requested an opinion as to whether Regulation 4 of the official state travel regulations promulgated by proclamation of the Governor on July 1, 1950, in effect rescinds a departmental regulation of the highway department reading as follows:

> "Moving expenses will be allowed when employees are transferred permanently from one location to another; or when temporarily transferred, moving expenses will be allowed when the cost to the state will not exceed transportation and/or living expenses allowed for the total period of the assignment."

You ask whether, in light of possible transfer of employees resulting from reorganization, the state must pay the moving expenses in the event of a permanent transfer.

We believe the answer to this question to be in the negative.

While R. S. 27:1-8 regarding the organization of the state highway department provides that the commissioner may formulate and adopt rules and regulations and prescribe duties for the efficient conduct of that department, its officers and employees, it does not give you authority to pay obligations incurred for which there was no appropriation under the annual appropriation act. In order words, there would first have to be a line item set up covering such expenditures.

Very truly yours,

THEODORE D. PARSONS,
Attorney General,

By: JOHN W. GRIGGS,
Deputy Attorney General.

JULY 20, 1950.

COLONEL JOHN H. AHRENS,
Adjutant General,
Department of Defense,
Trenton 10, New Jersey.

FORMAL OPINION—1950. No. 48.

DEAR SIR:

I have your letter of the 18th instant propounding for my consideration two questions as follows:

a. Are employees in the unclassified service, such as armory personnel who are hired under the provisions of Section 38:2-21, Revised Statutes, required by law or regulations to join the State Employees' Retirement System?
b. If the reply to *a* is negative, may the Chief of Staff, State Department of Defense, establish such a requirement and insist that new employees join the State Employees' Retirement System as a condition for employment?

The answer to both inquiries is in the negative.

As to your first inquiry, R. S. 38:2-21 authorizes the Quartermaster General to appoint all custodians, armorers and other persons employed in the care of armories, arsenals and camp grounds.

The functions, powers and duties of the Quartermaster General were by Section 6 of Chapter 82 of the Laws of 1948 transferred to the State Department of Defense to be exercised by the Chief of Staff of said department.

Under the Civil Service law (R. S. 11:4-4) officers, noncommissioned officers, enlisted men, and other persons employed in the military or naval service of the State and under military or naval discipline and control are in the unclassified service of the civil service.

All employees in the classified civil service are required to join the State Employees' Retirement System (see R. S. 43:14-2.3, last clause).

I have examined the militia law in the Revised Statutes (R. S. 38:1-1 et seq.) as well as Chapter 82 of the Laws of 1948 establishing the State Department of Defense, and find nothing in those laws to indicate that any employee of the State who is in the unclassified service shall be required to join the State Employees' Retirement System, and, in the absence of legislation upon the subject, I advise you that, in my opinion, the Chief of Staff of the State Department of Defense is without authority to make a rule or regulation that employees of the State Department of Defense who are, as I have indicated, in the unclassified service, join the State Pension System as a condition for employment. However, I believe that the Trustees of the State Employees' Retirement System will admit to membership any employee of the State who is in the unclassified service upon application being made for that purpose.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: THEODORE BACKES,
Deputy Attorney General.

TB:B

JULY 10, 1950.

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

FORMAL OPINION—1950. No. 49.

DEAR MAJOR NICOL:

Your request for opinion regarding the status of members of the State Police appointed under Chapter 394, P. L. 1941, is at hand. Your request sets forth that you have several inquiries from members of your department who resigned under the provisions of the above act, and who have been in military service, as to whether or not upon returning to the State Police they should be credited with continuous service pursuant to the provisions of R. S. 38:23-1 and subsequent clauses.

Chapter 394, of the Laws of 1941, provides for the appointment of 100 additional members of the State Police to be assigned to such duty as the superintendent, in his discretion, shall determine. The superintendent, with the consent of the Governor, under said act could increase the present commissioned and non-commissioned personnel as he deemed necessary. Par. 3 of the above act sets forth that these appointments and promotions shall be temporary and for the duration of the present defense emergency only, and any and all such appointments and promotions may be terminated upon the order, in writing, of the Governor.

In order to carry out the provisions of Chapter 394, P. L. 1941, the Legislature appropriated $206,266.00 or so much thereof as may be necessary.

Under the State Police retirement and benevolent fund act provision is made for retirement for service and age and for disability and for injury or disease and allows pensions to widows and children of dependent parents.

None of the men appointed under the above act qualify under the retirement and benevolent fund, because they do not have the number of years of service provided by said act.

Answering your inquiry as to whether these men should be granted continuous service credit as provided in R. S. 38:23 and retain their pension rights, would say that this act has no application to these men, because when they went into military service under the terms of Chapter 394 they resigned their temporary positions. They accepted appointment in accordance with Memo 176 which stated that the appointments were only temporary and the men so appointed would submit their resignations if for any reason they left the department, and any who did resign could be considered for reinstatement or re-enlistment. So that during the time they were in military service they had no standing with the State Police, being temporary appointees and having resigned to enter the military service.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: ROBERT PEACOCK,
Deputy Attorney General.

JULY 24, 1950.

HONORABLE CHARLES R. ERDMAN, JR., *Chairman,*
Board of Directors, Morris Canal & Banking Company,
Department of Conservation and Economic Development,
State House,
Trenton, New Jersey.

FORMAL OPINION—1950. No. 50.

DEAR SIR:

I have your letter of the 20th instant with enclosure of agreement between the Morris Canal and Banking Company and the John Swenson Dry Docks, Jersey City, made June 10, 1948, for a term of five years from June 15, 1948, at an annual rental of $10,000, payable in advance, in equal monthly installments. The lease covers a part of the Little Basin in Jersey City.

You ask, first, whether the lease is valid and binding upon the lessee despite the fact that the lessor has a thirty day cancellation privilege and this same privilege is not available to the lessee. The thirty day clause in the lease is inserted pursuant to the requirement of R. S. 13:12–18 which, after authorizing a letting of part or parts of the canal property, provides as follows:

> "* * * but any and all leasehold estates so created shall be terminable upon thirty days' notice to the lessee of the desire of the canal and banking company or the State of New Jersey to terminate the same."

I see no infirmity in the lease by reason of the cancellation privilege inserted therein pursuant to the requirement of the statute just referred to.

Your second question is whether the Board of Directors of the Morris Canal and Banking Company have the legal authority to cancel the lease if in their judgment such action is justified at the present time, or whether the lease must be continued for the full five year period. The lease in question is now in force and has a period of nearly three years yet to run. It can be terminated upon giving the required thirty days' notice as provided in R. S. 13:12–18, but the reason for such cancellation I think should be inserted in your minutes, if such action should be taken.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: THEODORE BACKES,
Deputy Attorney General.

TB:B

JULY 28, 1950.

DANIEL BERGSMA, M. D., M. P. H.,
State Commissioner of Health,
Department of Health,
State House, Trenton, N. J.

FORMAL OPINION—1950. No. 51.

DEAR DOCTOR:

This is in response to your letter concerning the term of Dr. Richard E. Shope, who was appointed as a member of the Public Health Council.

It appears from your letter that Dr. Shope was confirmed by the Senate on March 13, 1950. Previously, a Dr. Harvey N. Davis had been appointed as a member of the Public Health Council for a term of one year beginning July 1, 1947. His term would expire on July 1, 1948. However, no appointment was made to fill the office held by Dr. Davis at that time. In March of 1950, Dr. Shope was nominated by the Governor to membership on the council and confirmed by the Senate on March 13, 1950, as indicated above.

The question for determination is when does the term of office of Dr. Shope expire. Does he hold for a term of seven years from the time of the confirmation of his appointment, or does he hold for a term of seven years from July 1, 1948, the date when the term of Dr. Davis expired?

In my opinion, Dr. Shope holds for a term of seven years from the date of the confirmation by the Senate, to wit, March 13, 1950.

The statute relating to the appointment of members of the Public Health Council, to wit, Chapter 177, P. L. 1947, Article II, Section IV, provides as follows:

> "Each member shall be appointed by the Governor, by and with the advice and consent of the Senate, for a term of seven years and until his successor is

appointed and qualified; provided, that the first appointments hereof shall be for terms which shall commence on the first day of July, 1947, and shall continue one for one year, one for two years, one for three years, one for four years, one for five years, one for six years and one for seven years . . ."

"Any vacancy occurring in the membership of the Council for any cause shall be filled in the same manner as the original appointment but for the unexpired term only."

It will be seen from the above quote that the term specifically set forth is seven years. The statute, however, does provide when the term shall commence for first appointments. It is silent, however, upon the question of whether subsequent appointments shall have a specific beginning date. The statute does, however, provide that vacancies occurring in membership shall be filled for the unexpired term. This then raises the question whether the expiration of the term of Dr. Davis constituted a vacancy in the membership. If it did, then, of course, the term of Dr. Shope would begin on July 1, 1948, to wit, the date that the term of Dr. Davis expired. In my opinion, there was no vacancy in the membership by reason of the expiration of the term of Dr. Davis. The statute provides that each member shall be appointed for a term of seven years and until his successor is appointed and qualified. As a result, on the expiration of the term the incumbent continues to hold membership until his successor is appointed and qualified. By reason of this fact, no vacancy occurred in the membership of the Council. No vacancy is created if there is a holdover provision in the statute and there is no appointment at the end of the term. *Mount* vs. *Howell,* 85 N. J. L. 487; *Stilsing* vs. *Davis,* 45 N. J. L. 390; *Kimberling* vs. *State,* 29 N. E. 773. An office is vacant only when it is without an incumbent who has a right to exercise its functions. In other words, where there is an office but no legally qualified incumbent, there is a vacancy in the office. *Board of Education of Newark* vs. *Civil Service,* 98 N. J. L. 417.

On July 1, 1948, the term of Dr. Davis expired. Had Dr. Shope been appointed to the Council at that time, he would have held for a term of seven years. However, because no appointment was made at the end of such term, Dr. Davis continued to hold membership in the council by reason of the holdover provision in the statute. As a result, no vacancy in the membership occurred. Since the statute provides that the appointment shall be for a term of seven years but only provides that an appointment shall be for an unexpired term in the case of a vacancy, and no vacancy occurred by reason of the holdover provision, therefore, I must conclude that Dr. Shope holds office for the full term of seven years from the time he was confirmed by the Senate (*Height vs. Love,* 39 N. J. L. 476). His term of office, therefore, will expire on March 13, 1957.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: JOSEPH A. MURPHY,
Assistant Deputy Attorney General.

JAM:MB

JULY 28, 1950.

MR. ELMER G. BAGGALEY, *Secretary,*
Police and Firemen's Retirement System,
1 West State Street,
Trenton 7, New Jersey.

FORMAL OPINION—1950. No. 52.

DEAR MR. BAGGALEY:

Receipt is acknowledged of your letter of July 25th in which you inform me that you are receiving numerous inquiries from various municipal officials, as well as from members of the Police and Firemen's Retirement System, who have or who may be called to duty either as active reservists or through selective service.

They desire to know what are their respective rights as to leaves of absence, tenure and pension contributions while on active service.

I have examined our Revised Statutes and particularly Sections 38:23–4; 38:23–5 and 38:23–6 thereof and upon a consideration of the problem, I am of the opinion that such rights are fully protected.

For their information, I would summarize these rights as follows:

"Every person holding office, position or employment * * * under the government of this State, or of any county, municipality or school district * * * who * * * has entered, or hereafter shall enter, the active military or naval service of the United States or of this State, in time of war or an emergency, or for or during any period of training, or pursuant to or in connection with the operation of any system of selective service * * * shall be granted leave of absence for the period of such service and for a further period of three months after receiving his discharge from such service

"No person holding any office, position or employment under the government of the State of New Jersey or of any county, municipality or school district who has or shall hereafter enter the active military or naval service of the United States * * * and who, at the time of such entry was or is a member in good standing of any pension, retirement or annuity fund, shall suffer the loss or impairment of any rights, benefits or privileges accorded by the laws governing such fund; and the time spent in such service * * * shall be considered as time spent in the office, position or employment held by him at the time of his entry into such service, in all calculations of the amount of the pension to which he is entitled and of the years of service required to entitle him to retire.

"During the period beginning with the time of the entry of such person into such service and ending at the earliest of (a) three months after the time of such person's discharge from such service or (b) the time such person resumes such office, position or employment or (c) the time of such person's death or disability while in such service, the proper officer of the State, county, municipality, school district, political subdivision, board, body, agency or commission shall contribute or cause to be contributed to such fund the amount required by the terms of the statute governing such fund based upon the amount of compensation received by such person prior to his entry into such service and during the period first mentioned in this section any such person receiving compensation from the State, county, municipality, school district, political subdivision, board, body, agency or

commission, shall continue to contribute the amount required by statute to be paid by members of such fund and during the period first mentioned in this section any such person not receiving compensation from the State, county, municipality, school district, political subdivision, board, body, agency or commission shall not be required to contribute the amount required by statute to be paid by members of such fund, but said amount shall be contributed for such person by the State, county, municipality, school district, political subdivision, board, body, agency or commission.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

AUGUST 3, 1950.

MR. ELMER J. HERRMANN, *Clerk,*
Essex County Board of Elections,
Hall of Records,
Newark 2, New Jersey.

FORMAL OPINION—1950. No. 53.

DEAR SIR:

Reference is made to your letter of August first, in which you request, on behalf of the Essex County Board of Elections, an opinion "relative to Sections 19:27–11 and 19:27–6, R. S. Laws of New Jersey, as to procedure pertaining to the proclamation issued by Governor Driscoll, under date of July 25th, 1950, declaring an election to be held in Essex County on November 7th, 1950, to fill the vacancy caused by the resignation of Percy A. Miller, Jr."

The said Percy A. Miller, Jr., was a member of the General Assembly from Essex County. He resigned as such member on May 17, 1950, thereby causing a vacancy to exist in the representation of Essex County in the General Assembly.

The writ of election issued by the Governor (in the nature of a proclamation, as required by R. S. 19:27–5) designates the next general election day (November 7, 1950) for the election to fill said vacancy. Such designation accords with R. S. 19:27–6, which provides that the writ "may designate the next general election day for the election . . ."

By virtue of R. S. 19:27–11, in the event of a vacancy occurring in the representation of any county in the Senate or General Assembly "after the last day for filing petitions for nominations for the primary election and prior to twenty-five days preceding the general election," if a writ of election shall have issued prior to twenty-five days preceding the general election and the writ shall designate the next general election day for the election to fill such vacancy, "the members of the county committee of each political party representing the territory affected by such vacancy are hereby authorized to select a candidate for the office in question and within twenty-two days prior to the general election to file a statement of such selection duly certified to with the county clerk, and the person so selected shall be the candidate of the party at the ensuing general election." R. S. 19:27–11 also makes provision for the nomination of candidates by petition.

The obvious intent of R. S. 19:27–11 is to make unnecessary a special primary election in connection with certain vacancies and yet to make available the machinery of the general election for the filling of such vacancies. Thus, insofar as the section relates to the filling of a vacancy in the representation of any county in the Senate or General Assembly, in the case where such vacancy occurred after the last day for filing petitions of nominations for the primary election and prior to twenty-five days preceding the general election (as in the instant case), when the writ of election designates the next general election day for the election to fill such vacancy and has been issued prior to twenty-five days preceding the general election (as in the instant case) county election officials should disregard the provisions of R. S. 19:27–6 and proceed under R. S. 19:27–11 (as well as under all other applicable provisions of law).

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: DOMINIC A. CAVICCHIA,
Deputy Attorney General.

AUGUST 15, 1950.

MR. GEORGE M. BORDEN, *Secretary,*
State Employees' Retirement System,
1 West State Street,
Trenton 7, New Jersey.

FORMAL OPINION—1950. No. 54.

DEAR SIR:

I have your letter of the 9th instant in which you call my attention to Chapter 326 of the Laws of 1942 and inquire "Should the employing department, of any employee who enlists or is inducted into military service at the present time, make contributions to his annuity savings fund while he is in military service? In a recent formal opinion, number 52, it is indicated that contributions should be made in behalf of such employee."

Formal Opinion No. 52, dated July 28, 1950, I am sure fully answers your inquiry. However, answering your question specifically as to a person who enters the military service *at the present time* and who is a member of a pension fund, it is my opinion that the contributions which the member would have made had he not entered military service must be made by the State, county, municipality, school district, political subdivision, board, body, agency or commission by whom such person is employed.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: THEODORE BACKES,
Acting Attorney General.

TB:B

AUGUST 28, 1950.

HON. WALTER T. MARGETTS, JR.,
State Treasurer,
State House,
Trenton 7, N. J.

FORMAL OPINION—1950. No. 55.

DEAR SIR:

This will acknowledge receipt of your letter, dated August 10, 1950, wherein you advise that Frank M. Deiner, Secretary of the Middlesex County Board of Taxation, has raised the following question:

> "Must the veteran hold title to property as of October 1 of the pretax year in order to be entitled to claim a $500 veteran's exemption where improvements added to the property subsequent to said date are assessed under the added assessment act (See N. J. S. A. 54:4–63.1)?"

It is our opinion that in order for a veteran to be entitled to his exemption, as provided for in the Constitution (Article VIII, section 1, paragraph 3), he must (1) assert his right to claim the exemption (54:4–3.12), and (2) be the owner of the property, upon which he claims exemption, on October 1 of the pretax year. (See R. S. 54:4–1).

As we view the law, the controlling date therefor is October 1 of the pretax year, and if the veteran would not be entitled to his exemption by reason of the fact that he did not own the property on October 1 of the pretax year, we see no reason nor do we find any provision in the law (R. S. 54:4–63.1 et seq.) which would grant to the veteran an exemption on property acquired subsequent to the taxing date, that is, October 1 of the pretax year. In *Jersey City* vs. *Montville,* reported in 84 N. J. L. 43, it was held that taxation of property is based upon the status as of the assessing date, not as of the tax year or any portion thereof. The court also followed this view in the case of *Corrado* vs. *Hoboken,* 20 Misc. 134.

We therefore conclude that the answer to your query, as stated in the first paragraph of this letter, must be that the assessor may not grant to the veteran an exemption on property acquired by him after the tax date (October 1), and this is applied also in the case of added assessments where the controlling date must be October 1 of the pretax year.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: BENJAMIN M. TAUB,
Deputy Attorney General.

AUGUST 28, 1950.

HON. J. LINDSAY DEVALLIERE,
Director, Budget & Accounting,
Department of the Treasury,
State House,
Trenton, N. J.

FORMAL OPINION—1950. No. 56.

MY DEAR MR. DEVALLIERE:

I have your letter of the 22nd instant stating that the Commissioner of the Department of Economic Development, Division of Veterans' Services, in 1947 certified under the provisions of Chapter 18, Title 38 of the Revised Statutes, which has now culminated in an amendment of all three sections of that statute by Chapter 85 of the Laws of 1946, that one Edward J. Buczek was entitled to receive from this State in monthly payments the sum of $500 annually, as a blind veteran, and that in August of this year you received from the Director of Conservation and Economic Development, Division of Veterans' Services, another certificate that in accordance with the provisions of Chapter 263, Laws of 1947, as amended by Chapter 196, Laws of 1950, Mr. Buczek was entitled to receive from this State, in monthly payments, the sum of $500., as an amputee.

The question which you have presented for my consideration is whether you are justified in paying two pensions to Mr. Buczek. The answer is in the affirmative. There is nothing in either statute to indicate that a veteran, who is blind and also an amputee should not be paid the two pensions if he is suffering from the causes specified in each of the acts above referred to. Accordingly, I advise you that you are warranted in making two payments of $500. each annually to the individual named.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: THEODORE BACKES,
Deputy Attorney General.

TB:B

OCTOBER 2, 1950.

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

FORMAL OPINION—1950. No. 57.

DEAR DR. BERGSMA:

Receipt is acknowledge of your letter of September 11th in which you submit for my consideration and opinion the following question:

> "Is it legal for a local registrar to accept a death certificate fully and accurately filled out and signed by a physician, except for the fact that said certificate does not contain a signature, license number and address of an undertaker who holds a New Jersey license as an undertaker?"

The Revised Statutes—26:6-7, as amended by Chapter 253 of the Laws of 1945 (P. L. 1945, pages 777-79) provides that the certificate of death shall contain some 26 items, being the contents of the death certificate, and by item 25 requires the signature, New Jersey license number and address of the undertaker.

The language of the statute is:

"26:6-7. The certificate of death shall contain the following items:

"* * * (25) Signature, New Jersey license number and address of undertaker."

Further, by the Revised Statutes 26:6-13 it is provided:

"26:6-13. Incomplete certificate of death.

"No certificate of death shall be held to be complete and correct that does not supply all of the items of information called for therein, or satisfactorily account for their omission."

I am of the opinion that the signature, New Jersey license number and address of the undertaker as required by item 25 of the 1945 statute are essential requisites to the issuance of the burial permit.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: JOSEPH LANIGAN,
Deputy Attorney General.

JL:rk

SEPTEMBER 11, 1950.

HON. WALTER T. MARGETTS, JR.,
State Treasurer,
State House.

FORMAL OPINION—1950. No. 58.

DEAR MR. MARGETTS:

You have inquired whether the State of New Jersey has a claim against the Federal Government for damages caused by the alleged negligence of the Coast Guard in connection with the South Amboy explosion of May 19, 1950. The answer is "No."

According to the best information I have been able to obtain, the only appreciable damage to State property as a result of the explosion was suffered by a veterans housing project owned by the State. This damage has been fully compensated for by insurance, and in connection with such compensation the State has assigned to the insurer any claim it might have against those responsible for the damage.

Since the State has no cause of action for injury to its own property, the only basis that the State would have for a claim against anyone would be that as sovereign or guardian of its people, it was suing to redress a public wrong. As is stated in 59 C. J. 316, "When suing, as sovereign, a State must assert a public interest and it can not sue to vindicate only the right of a private citizen."

I have examined the precedents as to what constitutes such a public interest, and there appears to be no support for the view that extensive damage to persons and property as a result of a disaster gives rise to such a public interest that the State can bring an action to redress the wrong.

Even if the State could be a party plaintiff in this matter, it seems well settled that it could not maintain a suit against the Federal Government. The law was so stated in *State of Florida* vs. *Mellon,* 273 U. S. 12, 18, as follows:

"Nor can the suit be maintained by the State because of any injury to its citizens. They are also citizens of the United States and subject to its laws. In respect of their relations with the Federal Government—
'it is the United States, and not the State, which represents them as parens patriæ, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status.' *Massachusetts* vs. *Mellon, supra,* pages 485, 486 (43 S. Ct. 600)."

The foregoing opinion makes it unnecessary to determine whether the United States Coast Guard was negligent in the promulgation and enforcement of rules for the safe handling of explosives on waters under its jurisdiction.

Yours very truly,

THEODORE D. PARSONS,
Attorney General,

By: THOMAS P. COOK,
Deputy Attorney General.

tpc;d

SEPTEMBER 12, 1950.

HON. R. J. ABBOTT,
State Highway Commissioner.

FORMAL OPINION—1950. No. 59.

DEAR MR. ABBOTT:

Your letter of September 6 raises several questions, which I shall endeavor to to answer below in the order presented.

1. Your first inquiry is whether, where a State aid project is involved, the opening of a bid by a municipality constitutes a determination by the municipality that the bidder is qualified. The answer is "No." It is well settled that until a contract is actually awarded, both municipalities and counties have the right and duty to examine the qualifications of the low bidder to whatever extent is necessary for a determination that he is the lowest responsible bidder. *Faist* vs. *Hoboken,* 72 N. J. L. 361; *Kelly* vs. *Freeholders of Essex,* 90 N. J. L. 411; *Selitto* vs. *Cedar Grove Township,* 133 N. J. L. 41; See also R. S. 40:25-21. However, the lowest bid can not be rejected because of the irresponsibility of the bidder unless he is given reasonable notice and opportunity to be heard. *Araneo-White Construction Co.* vs. *Joint Municipal Sewer Commission,* 9 N. J. Misc. 243; *Ianniello vs. Harrison,* 4 N. J. Misc. 111.

2. Your second, third and fourth inquires all raise, in substance, the question whether the State Highway Commissioner, in projects for State aid to counties or municipalities, has the right to throw out any or all bids received by the county or municipality, respectively, on the ground that the low bidder is not qualified. In my opinion, the Commissioner has no such right. Where contracts for highway work are to be awarded by the county, the procedure and the qualifications of bidders are governed by the specific provisions of the county law (R. S. 40:25–1 et seq.; see also 27:16–41 and 27:14–12). Likewise, provisions governing contract work for municipalities are set forth in R. S. 40:50–1 et seq. The general municipal law also gives to the governing body of every municipality the right to "prescribe the form and manner of execution and approval of all contracts to be executed by the municipality." R. S. 40:48-1.

It is true that the State Highway Commissioner, in administering State aid, has the power to reject contracts for which State aid is to be given. R. S. 27:14-13; 27:15-1 et seq. The grant of such power must nevertheless be construed in conjunction with the above cited provisions of the county and municipal laws. When all these pertinent statutes are read together, it seems clear that the Commissioner's power does not include the right to fix the qualifications of bidders as a condition of approval of State aid. The authority of the Commissioner would appear to be limited to protecting State funds by requiring the price to be reasonable and the plans, specifications and work to conform to recognized standards. See R. S. 27:14-3; 27:16–22; 27:14–47; 27:15–1.3; 27:15–1.14E. If a municipality or county objects to the low bidder on the ground of lack of qualifications, it is that body, and not the State Highway Commissioner, that should conduct the hearing and reject the bid on that ground.

3. Your last question asks what authority you have to establish a procedure for taking bids. As has already been implied above, your authority in this regard does not extend to county or municipal contracts, even though State aid may be involved. In regard to contracts to be awarded by the State, the pertinent statutes (particularly R. S. Title 52, Chapters 34 and 35) prescribe in detail the procedure for advertising for bids, receiving and opening the proposals, awarding the contract, and determining the qualifications of bidders. However, if there are minor details concerning which you desire to establish a procedure in conformity with the law, your authority for so doing could be based, in my opinion, on R. S. 27:1-8, which provides that the Commissioner "may formulate and adopt rules and regulations and prescribe duties for the efficient conduct of the business, work and general administration of the department."

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: THOMAS P. COOK,
Deputy Attorney General.

JULY 24, 1950.

BOARD OF PUBLIC UTILITY COMMISSIONERS,
1060 Broad Street,
Newark, New Jersey.

FORMAL OPINION—1950. No. 60.

GENTLEMEN:

You have requested the opinion of this Office with reference to the following situation involving Trenton Transit, the owners and operators of an auto bus transportation system in Trenton, New Jersey.

On September 22, 1933, the Court of Chancery of New Jersey appointed Rankin Johnson and Edward W. Lee, as Receivers of Trenton Transit Company, and directed them to continue the operation of the transit business. On December 9, 1941, the same persons were appointed as Receivers of Trenton Street Railway Company, Consolidated. Both companies, while in receivership were merged. Accordingly, the receiverships were consolidated by order of the Court of Chancery, and the Receivers were ordered to continue the business of the two corporations as Receivers of "Trenton Transit," the name of the continuing company under the merger. Mr. Lee having died in 1942, the Court of Chancery, by an order dated February 10, 1942, ordered Rankin Johnson to continue, until further order of the Court, the business under the designation "Receiver of Trenton Transit." Application recently having been made to terminate the receivership, the Superior Court, Chancery Division, on May 25, 1950, ordered the Receiver to "convey, assign, transfer and set over" to Trenton Transit, as of the close of business on May 31, 1950, all real and personal property, including franchises and monies, held by him as Receiver, and to file his final accounting as Receiver.

On the date of said order of the Chancery Division, the auto bus equipment owned and operated by the Company, was licensed for 1950, by the Commissioner of Motor Vehicles of New Jersey, in the name of Rankin Johnson, Receiver, Trenton Transit.

Under date of May 31, 1950, counsel for the Receiver, in a communication addresed to Mr. R. Earle Leonard, Motor Vehicle Department, Trenton, N. J., requested a ruling as to whether, in view of the terms of the aforementioned Court order of May 25, 1950, it was necessary for the Receiver to transfer to the Company title to the buses, and also whether the Company now should obtain new motor registration plates and licenses in the name of Trenton Transit.

I am informed by Hon. William Dearden, Deputy Commissioner of Motor Vehicles, that after consulting with the Deputy Attorney General assigned to the Motor Vehicle Department, he verbally advised the Company that a transfer of title to the motor equipment and new licenses were not necessary under the circumstances indicated. Mr. Dearden further advised me that he had reasoned that the 1950 plates had been issued in reality to a corporation, viz., Trenton Transit, and inasmuch as that Company would now continue its corporate existence, the only significant change being the removal of the Receiver, that no change in ownership had taken place, and accordingly new licenses were not required. I also was informed by Mr. Dearden that his Department, in accordance with his opinion as stated, merely issued new certificates of ownership dated June 1, 1950, covering the auto bus equipment of the Company, listing Trenton Transit, as the owner of said equipment.

Your Board now inquires whether "certificates of compliance" heretofore issued by your Board to Rankin Johnson, Receiver, Trenton Transit, certifying that specified motor equipment of the Company, complies with the Board's requirements, may be amended without re-inspection and fee, or whether, re-inspection of the equipment should now be made and new certificates of compliance issued on payment by the Company of the statutory fee. These certificates of compliance were issued by your Board pursuant to the requirements of R. S. 39:3–4.1 and were a condition precedent to the issuance of motor vehicle licenses.

The answer to your question, as well as that presented to the Commissioner of Motor Vehicles, depends upon whether, a real change in ownership of the motor equipment took place under the terms of the order of the Chancery Division, dated May 25, 1950, referred to above.

It is my opinion, and I so advise, that under the specific circumstances herein presented and discussed, such change of ownership of the motor equipment did not take place as to require the Commissioner of Motor Vehicles to issue new registration plates for the operation of its auto buses, nor is your Board required to issue new certificates of compliance, and to collect the fee therefor, assuming, of course, that the motor equipment does comply with your rules, regulations and specifications.

The reasons for the foregoing conclusion may be found first in the provisions of the pertinent statutes. R. S. 14:14-9 provides that "all the real and personal property of a corporation for which a receiver shall be appointed . . . and all its franchises, rights, privileges, credits and effects shall, upon the appointment of a receiver or trustee . . . forthwith vest in him or them, and the corporation shall be divested of the title thereto." R. S. 14:14–10 provides that the Court subsequently may "direct the receiver to reconvey to the corporation all of its property, franchises, rights and effects, and thereafter the corporation may resume control of and enjoy the same as fully as if the receiver had never been appointed." This section further provides that "in every case in which the Court of Chancery shall not direct such re-conveyance, it may, in its discretion make a decree dissolving the corporation and declaring its charter forfeited and void."

It will be recalled in the matter before us, that the Court of Chancery by its order of February 10, 1942 had directed Mr. Rankin Johnson to continue the business of Trenton Transit, as Receiver under the designation "Receiver of Trenton Transit," and that the Chancery Division of our Superior Court, by its order of May 25, 1950 had directed the Receiver to "convey, assign, transfer and set over" to Trenton Transit all real and personal property, thus permitting the *same corporation,* viz., Trenton Transit to continue in its business under the direction of its stockholders, rather than under the direction and supervision of a receiver. The effect of the order of May 25, 1950, was not, in my opinion, an order directing a transfer of property to a *new* owner but merely constituted an order complying with the specific terms of R. S. 14:14-10. In no event, however, had liquidation of Trenton Transit ever taken place. Liquidation does not necessarily follow a receivership. See *Garr* vs. *Kelly-Springfield Tire Co.,* 117 N. J. Eq. at 365 (1934). The Court could have ordered this result. A decree of dissolution "actually killing the corporation may be entered at any time after the appointment of a receiver." See *Michel* vs. *Necher,* 90 N. J. Eq. at 175 (1918). No such action was taken by the court with reference to Trenton Transit, but instead it will be noted that the Court took the Company out of receivership, permitting the company to continue in its business as heretofore, under the direction and control of its owners.

In other words the intent of the provisions of R. S. 14:4-9 was to place title to assets of the then insolvent corporation in the receiver, an independent entity created by the statute, in order that he might preserve these assets in the best interests of all concerned. See *Shachat* vs. *Standard Auto Supply Co.* 106 N. J. Eq. at 110 (1930). As has been said heretofore, the order of the Chancery Division terminating the receivership, and directing the reconveyance of the assets of the corporation to it, merely restored control of those assets to the original owner, namely the stockholders of the original company. A change of ownership did not take place, as the corporation had never been dissolved.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: DANIEL DE BRIER,
Deputy Attorney General

deB:k

SEPTEMBER 15, 1950.

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

FORMAL OPINION—1950. No. 61.

DEAR COMMISSIONER BATES:

This acknowledges your inquiry of September 15th, relating to the improvement and beautification of the burial plot for deceased indigent prisoners from the State Prison. You indicate that the Prison authorities are desirous of utilizing monies from the Inmates' Welfare Fund for the improvement of this plot and you wish to be informed whether this would be a proper expenditure from the fund as contempleted by the statute.

It is our opinion and we advise you that such an expenditure from the Prison Inmates' Welfare Fund is not within the legislative intent as expressed in the statute and, therefore, cannot be permitted.

The Welfare Fund derives from interest which accumulates on monies of the inmate population maintained in a general trust fund. The manner in which these monies shall be deposited and maintained is provided for in R. S. 30:4–67.1.

The most significant language in the cited section of the law and which, of necessity, controls this situation is as follows:

> "Any interest paid by a bank or trust company wherein said fund is maintained may be utilized by the board of managers of such institution for the use, benefit and general welfare of the inmate population as a whole."

Admittedly, this burial plot is utilized for the interment of indigent prisoners who die while in confinement. Of necessity, the number of prisoners buried therein

represents but a small portion of the inmate population as a whole for it is inconceivable that a great number of prisoners would die under conditions of pauperism while in confinement. The benefit of the burial plot flows to this small percentage and it cannot be said that it is maintained for the "use, benefit and general welfare of the inmate population as a whole."

Since these monies constitute a fund in the nature of a trust, the expenditure therefrom must be in strict compliance with the spirit and letter of the law for the purposes intended by the statute. The use which is proposed is not properly within the provisions of the act.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: EUGENE T. URBANIAK,
Deputy Attorney General.

ETU:HH

SEPTEMBER 22, 1950.

HON. FRANK W. SHERSHIN,
80 First Street.
Clifton, New Jersey.

FORMAL OPINION—1950. No. 62.

DEAR ASSEMBLYMAN SHERSHIN:

You have inquired whether the warden of your County jail who has been the warden for only five years but who has been in the service of the County for a total period of 19 years, not continuously, and not in the same position, would be eligible for a pension under Chapter 228, Laws of 1949 (Revised Statutes 43:9-5.1).

The facts as submitted by you did not state that the warden is physically incapacitated but because the determination of his eligibility for pension is requested under the provisions of this statute, it must be assumed that he is. Your real concern then is whether the warden qualifies as to years of service. The answer is yes. Chapter 228 of the Laws of 1949 provides that:

> "The Board of Chosen Freeholders of any county may, in its discretion, adopt a resolution providing for the payment of a pension to a warden or keeper of the county jail, who has been in the employ of such county for a period of not less than sixteen years and who has become physically incapacitated for further service to the county where such physical condition was caused or aggravated by injuries received while on duty in the service of the county."

The purpose of this statute is to authorize the pensioning of wardens or keepers of county jails in certain limited cases. The pensioning under this statute is permissive and is not mandatory. By the terms of the statute three conditions are imposed which must be met. First, that the warden or keeper must have been in the employment of the County for not less than 16 years. Second, that the warden or keeper

be now physically incapacitated for further service to the county. Third, that such physical condition was caused or aggravated by injuries received while on duty in the service of the county.

As to the first condition, it is not a requirement that the 16 years were passed in the office of warden or keeper nor is it a requirement that the employment be continuous for the 16 years. The statute says: ". . . who has been in the employ of of such county for a period of not less than sixteen years . . ." Had the legislative intent been that the 16 years be continuous and in the same office they would have so provided. In providing for pensioning of county clerks the Legislature said: ". . . who shall have held such public office for thirty years continuously . . ." (R. S. 43:9-19). In providing for the pensioning of superintendents of county lunatic asylums or county hospitals for mental diseases the Legislature said ". . . who has served continuously for twenty-five years as such superintendent . . ." (R. S. 43:9-22), and in providing for the pensioning of secretaries of county boards of taxation the Legislature said: ". . . who was employed as such secretary for twenty years or more . . ." (R. S. 43:9-17).

In all of the other pension statutes examined the Legislature specifically required that the employment be continuous for a certain number of years in the same office or employment. The same would have been required by this statute if that had been the intent of the Legislature. As we interpret this statute any employment by the county prior to the taking of the position of warden or keeper can be counted in computing the necessary 16 years to qualify thereunder.

As to conditions two and three, the burden of proof is on the warden to establish that he is physically incapacitated for further service to the county and that the physical condition was caused or aggravated by injuries received while in the employ of the county.

In advising you that it is our opinion that the warden of your county jail is eligible for pension under the provisions of Revised Statutes 43:9-5.1 (Chapter 228 of the Laws of 1949) you must bear in mind that we have assumed that the warden is physically incapacitated and can sustain the burden of proof as to the cause as required by the statute.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

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

HMB:rk

SEPTEMBER 20, 1950.

CHESTER A. CHARLES,
Brigadier General, AF, NJNG,
Deputy Chief of Staff,
Department of Defense,
State Armory, Trenton, N. J.

FORMAL OPINION—1950. No. 63

DEAR GENERAL CHARLES:

Receipt is acknowledged of your request for my opinion as to the operation and effect of Section 12 of Chapter 239 of the Laws of 1950 (P. L. 1950, p. 814-15). Section 12 of the Act provides:

"12. Section 38:3-18 of the Revised Statutes is amended to read as follows:

38:3-18. The commission or warrant of an officer shall be vacated only:

a. Upon the acceptance by the Governor of the resignation of such officer; or

b. By an order of the Chief of Staff of the State Department of Defense,

(1) Discharging such officer because of his failure to maintain his qualifications for Federal recognition, or

(2) Discharging such officer because of his absence from duty without leave for more than three months, or

(3) Discharging such officer pursuant to the recommendation of a board of examination, approved by the Governor, or

(4) Dismissing such officer pursuant to the sentence of a court-martial, approved by the Governor."

You submit for my consideration the following state of facts:

"After the termination of hostilities in 1945 following World War II, most of the New Jersey National Guard officers who were ordered to active Federal service in 1940 and 1941 were relieved from active Federal service and reverted to State control. At the time of or subsquent to the date of relief, however, the majority of these officers accepted a commission in the Officers' Reserve Corps. This action by NJNG officers was encouraged by this headquarters to enable the officers to protect the higher ranks attained in Federal service.

The result of the acceptance of an ORC commission was to cause termination of Federal recognition as a NJNG officer. Thereafter they had no commission in the National Guard of the United States and no Federal status as a National Guard officer.

It accordingly became necessary to have their active status in the NJNG terminated. This has been accomplished in good part by acceptance of resignations and retirements under the then existing statutes. In many cases action has not been possible by reason of inability to communicate with the officer, refusal to resign or lack of eligibility for retirement.

It is essential to administration and record keeping that some action be taken to separate these officers from active NJNG status or their commissions in the NJNG."

You seek my advice as to whether the Act of 1950 may be applied to the above cited cases, even though the actual termination of Federal recognition took place prior thereto and that these officers were discharged from their commissions in the NJNG by reason of failure to maintain their qualifications for Federal recognition.

Upon a consideration of the state of facts and a review of the statute, I am of the opinion that Section 12 of the Act of 1950, supra, may be applied to the cases referred to in your letter, where Federal recognition was terminated or withdrawn prior to June 26, 1950, the operative date of the act,, provided the effective date of the discharge from commission or warrant is subsequent to June 26, 1950.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: JOSEPH LANIGAN,
Deputy Attorney General.

JL:MB

OCTOBER 3, 1950.

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

FORMAL OPINION—1950. No. 64.

MY DEAR MR. MARGETTS:

Your letter of July 21st requesting opinion as to the effect of the affidavit which is required on forms presented by dealers selling securities to a State agency is acknowledged and the opinion rendered herewith.

STATEMENTS OF FACTS.

There are no actual facts in the presented problems but all are based on hypothetical questions.

QUESTION PRESENTED.

No. 1. Does the word "bonus" on the affidavit required on invoices transmitted by security dealers upon the sale of securities to an agency of the State include the payment of a commission to a second broker-dealer for the latter's assistance in negotiating the transaction with the State agency?

ANSWER.

The answer is no.

REASONS.

The word "bonus" as defined by Webster's Universal Unabridged Dictionary is:

"an extra compensation beyond the amount agreed upon; an extra payment or consideration given as a reward or an inducement, or as a means of avoiding loss, in many contracts and business transactions."

It is defined in Black's Law Dictionary, Second Edition as:

"an extra consideration given for what is received" and also "as a gratuity;"

In Bouvier's Law Dictionary, Rawles Third Revision as:

"a consideration given for what is received" and also "it is not a gift or gratuity, but is paid for some service or consideration and is in addition to what is ordinarily given,"

Kenicott vs. *Wayne County,* 16 Wall (US) 452.

In the case of *Taylor et al* vs. *Errion,* 137 N. J. Eq. 221, Vice-Chancellor Jayne speaking for the then Chancery Court said:

"A bonus is something given in addition to what is ordinarily earned by or strictly due to the recipient."

Similar conclusions and statements of law were expressed in the cases:

Jones vs. *Loughman,* 288 N. Y. S. 44, Ct. of Ap. N. Y., 174 Fed. 289.
Covington vs. *South Covington and C. St. Ry.,* 147 Ky. 329.
Payne vs. *U. S.,* 269 Fed. 871.
Wilkie vs. *Commission Internal Revenue,* 127 Fed. 2nd, page 953, C. C. A. 6.

In the case of *Smith* vs. *David Crockett Co.,* 85 Conn. 282, it was held that:

"though an agreement to pay a bonus does not necessarily mean a payment of a bribe, it generally means a sum given or paid beyond what is legally required but the word may also be used to designate bribery so that where in a contract for services as salesman there was no explanation of a provision for the reimbursement of sums to be paid by the salesman as 'bonuses' evidence was admissible under proper plea to explain that the payments were to be made as bribes to purchasing agents."

"An agreement to pay a bonus is not necessarily a corrupt and unlawful agreement. Generally a bonus is a sum given or paid to the recipient. The words "payment of a bonus" may also be used in the sense of payment of a bribe (Century Dictionary) of the payment of a sum to weaken or destroy the fidelity of a trusted agent."

The meaning of the word "bonus" varies with the context in which it is used.
Leonedas, D. C. Md., 32 Fed. Suppl. 738.

The uniform invoice as used by the Division of Budget and Accounting includes the following:

"All bills over $5.00 must be sworn to

.....

being duly sworn, on his oath saith that within bill is correct in all its particulars; that the articles have been furnished or services rendered as stated therein, and that no bonus has been given or received on account of said bill.

.....
(Sign Here)

....."
(Official Position)

N. J. R. S. 52:18A-9, Laws 1948 provides that the Director of the Division of Budget and Accounting shall have the authority to prescribe uniform forms to be used by all Departments or other agencies of the State Government in encumbering any funds appropriated, that the Director shall prepare the forms upon which shall be rendered all statements of indebtedness against any department, institution, commission, committee, official, board, or body of State Government, and that the forms, in this section provided, shall, when so prepared, be the only forms used for the evidence and record of such encumbrances and indebtedness.

N. J. R. S. 52:18A-10, Laws 1948 provides among other things that the Director may administer the oath to the persons presenting the encumbrance or statement of indebtedness and to any witness presented on behalf of such person and may examine such person or witness as to the truth, fairness and correctness of such encumbrance or statement of indebtedness.

From a reading of the above it is apparent that it is the intention of the Statute to repose in the Director of the Division of Budget and Accounting the authority to prepare a uniform form to be used by all Departments. The invoice to be used by the State Investment Council must be in uniformity to those used by other Departments or Divisions.

It is evident, further, that it is the purpose of the form to determine whether or not any bribe, extraordinary payment, rebate or kick-back was given on account of said claim set up in the invoice other than the payment for ordinary service rendered. The payment of a commission to the second broker-dealer for the latter's assistance in negotiating the transaction with the State agency is not such a bonus as is contemplated within the meaning on the affidavit.

Questions Presented.

No. 2. Where the selling dealer's confirmation accompanying the invoice discloses the transaction had been negotiated by the second broker-dealer but not the fact that a commission was to be paid to the latter, does that spell out a bonus as set forth in the affidavit?

No. 3. Where a formal written offer to sell securities is transmitted to the State agency prior to the transaction and same has been submitted to the second broker-dealer with an indication he was acting as agent for the selling dealer and receiving commission for his services, does that constitute a bonus as referred to in the affidavit?

No. 4. Where the selling dealer pays an undisclosed commission to a regular employee for negotiating the transaction and which commission is based on the total selling price of the securities, is this transaction affected by the word "bonus" as appears on the affidavit attached to the invoice?

Answer.

The answer is no. (Questions No. 2, No. 3 and No. 4 are grouped together as they may be answered by the same reasoning.)

Reasons.

For the reasoning expressed in the answer to Question No. 1, unless the bonus paid is for a bribe, rebate, kick-back or for something other than legitimate services rendered, no statement for such service must appear on the affidavit unless requested by the Director of the Division of Budget and Accounting on the prescribed form.

Since the creation of the State Investment Council, Laws 1950, Chapter 270, in the purchase of securities the Council may prepare a questionnaire if they are desirous of obtaining the responses to the above questions, but as presently set up it is the writer's opinion such information is not required to be answered.

QUESTION PRESENTED.

No. 5. Does the word "bonus" on the affidavit accompanying the invoice transmitted by the security dealers upon the sale of securities to agencies of the State affect the second broker-dealer who happens to be an office holder of the State or Municipality?

ANSWER.

The answer is no.

REASON.

Where the transaction is legitimate and the bonus is not a gratuity or bribe, no disclosure is required whether or not the broker-dealer is an office holder of the State or Municipality. I can find no law or statutory regulation prohibiting an office holder of the State or Municipality from legitimately performing services of the nature imposed in the query and receiving compensation therefor.

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

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: LOUIS S. COHEN,.
Deputy Attorney General.

OCTOBER 23, 1950.

HON. J. LINDSAY DEVALLIERE,
Director, Budget & Accounting,
Department of the Treasury,
State House,
Trenton, N. J.

FORMAL OPINION—1950. No. 65.

DEAR SIR:

This is in response to your letter of the 18th instant relative to the application of Mr. Fred C. Ginder for a pension under the Veterans Act. It appears from the record that Mr. Ginder's services with the State during 1928 and up to and including August 11, 1950, cover a period of seventeen years, ten months and eleven days, which leaves approximately twenty-six months of service to complete the twenty years required by the Veterans Pension Act (R. S. 43:4-1 and 43:4-2). These sections have been amended on several occasions but the amendments have no application to the

matter we are considering. The record discloses clearly that Mr. Ginder had performed services for the State prior to 1928 and proof has been submitted by way of affidavits to establish the fact of such employment. These earlier records apparently were kept by the then Adjutant General but were destroyed as ancient records.

The question upon which you seek my opinion is whether you would be justified in accepting these affidavits as proof of the required twenty years' service in granting this pension to Mr. Ginder. The answer is yes, for I cannot conceive of any other way of proving the fact of such prior service in view of the fact that the Adjutant General's records have been destroyed.

All the papers which you sent me are herewith returned.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: THEODORE BACKES,
Deputy Attorney General.

TB:B

OCTOBER 25, 1950.

COL. CHARLES H. SCHOEFFEL,
Superintendent, N. J. State Police,
West Trenton, New Jersey.

FORMAL OPINION—1950. No. 66.

DEAR COLONEL SCHOEFFEL:

Your memorandum of October 19, 1950, with copy of letter from Mrs. Edward E. Tucker, concerning her husband, Edward E. Tucker, holder of individual private detective license No. 562, is at hand.

Concerning your first request as to the private detective license of Mr. Tucker, I will say that you have been notified of his death and it is your duty to revoke this license and have Mrs. Tucker return to you the original license and all copies.

On your second request as to whether or not you should return the bond of Edward E. Tucker to his widow for cancellation, I will say that the statute, R. S. 45:19–12, provides that when a license is issued to any individual he shall furnish a bond for $3,000.00 running to the State of New Jersey, which bond shall be for the benefit of any person injured by willful, malicious or wrongful act of the applicant. It is your duty to retain that bond for the benefit of any person who may have an action against Edward E. Tucker, in accordance with the above-cited statute.

On your third request, as to whether or not Mrs. Tucker is entitled to any reimbursement of the license fee of $200.00 I will say that R. S. 45:19–12 provides for a license fee of $200.00 for an individual license, and further states "In case of revocation or surrender of any license, no refund shall be made of any license fee paid under the provisions hereof." Therefore, you have no authority to return to Mrs. Tucker any part of the $200.00 paid by her husband when he obtained his license from your department.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: ROBERT PEACOCK,
Deputy Attorney General.

OCTOBER 26, 1950.

HON. LESTER H. CLEE, *Chairman,*
New Jersey State Board of Mediation,
1060 Broad Street,
Newark, New Jersey.

FORMAL OPINION—1950. No. 67.

DEAR MR. CLEE:

Your letter of October 19 raises the question whether the Board of Arbitration in the matter of the New Jersey Bell Telephone Company and the Communications Workers of America, New Jersey Traffic Division 55, CIO, should be reconvened and should revise its findings, decision and order in accordance with and pursuant to the direction of the New Jersey Supreme Court in the aforesaid arbitration case. You have pointed out that subsequent to the Supreme Court's decision the parties met and negotiated a collective bargain which settled all points in dispute before the Board of Arbitration. It appears, however, that no stipulation or memorandum of settlement was filed with the Board and that there is nothing as yet in the Board's records to show that the dispute has been terminated.

In my opinion, the Board of Arbitration has no authority to proceed further in the matter, in view of the settlement of the dispute submitted to it. Under the governing statute, the Board of Arbitration is not constituted and does not function until the Governor has taken possession of the utility plant involved in the labor dispute (N. J. S. A. 34:13b–20), and when such dispute has been settled, the plant must be returned to its owners "as soon as practicable" (34:13b–13). The implication seems clear that with the cessation of the dispute the purpose of the arbitration procedure has been fulfilled, and accordingly the Board's authority and functions are at an end. This interpretation of the statute is in harmony with the general rule that if no controversy exists between the parties there can be no arbitration, 5 C. J. 27.

I conclude, therefore, that the Supreme Court's directive should be read in the light of the substantive law as above set forth and that the settlement in this case has rendered it unnecessary for the Board of Arbitration to take the steps which the Court ordered before the settlement had occurred. The fact of settlement should appear with the record of the Board's proceedings, however. The appropriate method of accomplishing this would be for the parties to file with the Chairman of the Board a stipulation or memorandum reciting the fact of settlement, together with a copy of the agreement reached. These documents should thereupon be filed by the Chairman with the Governor, the latter having previously received the findings, decision and order of the Board pursuant to the statute (34:13B–22).

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: THOMAS P. COOK,
Deputy Attorney General.

tpc;d

OCTOBER 27, 1950.

MR. ANDREW J. REID,
Civilian Intelligence Officer,
Security & Intelligence Division,
Fort Monmouth, New Jersey.

FORMAL OPINION—1950. No. 68.

DEAR MR. REID:

Receipt is acknowledged of your letter of October 17th in which you inform me that at Fort Monmouth civilian armed guards have been employed for the express purpose of guarding Federal property. I note you desire to be advised as to whether or not these guards may bear arms in the State of New Jersey on property other than military reservations and if so, is there any statute exempting them from the obtaining of permits to carry weapons. There is no such statute.

Permission to carry revolvers, pistols and other firearms in this State has been long the subject of legislative consideration and our present statute (R. S. 2:176–44, P. L. 1939, Chapter 321, p. 790) provides: that the applicant must in the first instance apply either to the chief police official of the municipality or to the sheriff of the county wherein he resides; that if such application be approved by the chief police official or the sheriff the same shall then be presented to the judge of the county in which the applicant resides, who, after investigation, which shall include the name and address of the manufacturer of such revolver, pistol or other firearm, and any and all of the manufacturer's identification numbers, letters and marks; a complete description of the kind and type of revolver, pistol or other firearm which the applicant intends to carry, together with the fingerprints of the applicant and the comparison of the same with any and all records of fingerprints in the municipality and county in which the applicant is resident and also the records of the supervisor of the State Bureau of Identification of this State and the national bureau in the Department of Justice in Washington, and the judge being satisfied of the sufficiency of the application and the need of such person to carry a revolver, pistol or other firearm shall issue a permit therefor.

The promiscuous carrying of weapons, both concealed and unconcealed, is a perplexing present-day problem confronting law enforcement officials. Nearly every major crime committed in this country is the result of using a gun.

Many states in the Union have enacted forward-looking legislation designed to make the possession and use of guns subject to the most rigid inspection and supervision. In New Jersey, one of the most densely populated states, the question has long been studied and has resulted in the enactment of the present licensing statute.

Unless specifically exempted by our statute, the fact that one is a Federal employee, whether he be a civilian armed guard or other enforcement officer, gives him no extra-territorial status nor does it exempt him from complying with the licensing statute above cited.

The protection of our citizens from the hazards and perils of unlicensed armed persons is the paramount concern of our State and if armed civilian guards are

required to bear arms on property in this State other than that of a military reservation full compliance with the above cited statute is an essential requisite.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: JOSEPH LANIGAN,
Deputy Attorney General.

JL:rk

OCTOBER 30, 1950.

COL. CHARLES H. SCHOEFFEL, *Supt.,*
Division of State Police,
Department of Law and Public Safety,
State House,
Trenton 7, New Jersey.

FORMAL OPINION—1950. No. 69.

DEAR COLONEL SCHOEFFEL:

You desire to be advised concerning the correct procedure to be followed in the matter of the apprehension, arrest and arraignment of an individual resident in New Jersey whose extradition is sought to another jurisdiction.

You advise that at least one municipal magistrate seems to have the impression that he cannot effect the arrest of such individual before issuance of the Governor's warrant following requisition by the demanding State.

It is our opinion and we advise you that this is an improper interpretation of the law and that, on the contrary, provision is made in our Uniform Extradition Act for the arrest of the accused before issuance of the Governor's warrant and even before requisition by the demanding jurisdiction.

It appears advisable to review the law on the subject matter to dispel any doubts that have arisen with respect thereto and further to the end that New Jersey may at all times fully co-operate with other states which seek to utilize the process of extradition.

R. S. 2:185–21 provides:

(a) that any credible person in this State may file complaint with any judge or magistrate that the accused has committed crime in another jurisdiction or has been convicted and has escaped or broken the terms of his bail, probation or parole.

(b) that complaint may be made before any judge or magistrate in this State on the affidavit of a credible person in another state that a crime has been committed in that jurisdiction and that the accused has fled from justice or, having been convicted, has escaped or broken the terms of his bail, probation and parole and is believed to be in New Jersey.

The judge or magistrate shall thereupon issue a warrant directing the apprehension of the person named and cause him to be brought before the court or any other court

which may be available or convenient to answer the charge or complaint and affidavit. It is provided that a certified copy of the sworn charge or complaint and affidavit upon which the warrant is issued shall be attached to the warrant.

This procedure, at first blush, appears to be rather formal and may lead to the belief that, during the time required to prepare these papers, the accused may again take flight.

In any situation of emergency, the accused, pursuant to R. S. 2:185–22, may be arrested without warrant by any peace officer or a private person, upon reasonable information that the accused stands charged in the courts of another state with a crime punishable either by death or imprisonment for a term exceeding one year.

However, when any such arrest is made without warrant, the statute is explicit as to what must be done thereafter with the accused. He "must be taken before a judge or magistrate with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in Section 2:185–21 * * * and thereafter his answer shall be heard as if he had been arrested on a warrant."

This may seem extremely harsh but an examination of the remaining provisions of the law, R. S. 2:185–23 et seq., discloses that the detention shall not exceed 30 days and bail may be secured unless the offense is punishable by death.

During the intervening period, the demanding state makes its requisition and the Governor of New Jersey, after examination of the circumstances, may elect to issue his warrant as provided by law.

In order to effect substantial compliance with our Uniform Extradition Act, it is suggested that whenever information reaches a judge or magistrate to the effect that the accused has committed crime and is required in another jurisdiction, the better practice would seem to be to have a complaint entered on information and belief by one of the police officers so that the warrant may issue for the arrest of the individual.

However, in situations of emergency, where insufficient time renders it impossible to secure the warrant and execute the complaint, the individual should be apprehended and brought forthwith before the magistrate and the complaint drawn at that time. Our courts, in *LaSasso* vs. *MacLeod,* 136 N. J. L. 345, considered a situation where the accused, having been arrested without warrant, was detained for three days before the complaint was issued. The court did not condone or approve the procedure but, without expressing opinion as to the validity of the arrest of the accused, nevertheless, determined that he was amenable to the requisition of the Governor of the demanding state and upon proof of full compliance with the statutory requirements concerning rendition, ordered his return to the other state.

It is to be hoped that the judges and magistrates will apply either of the alternate procedures suggested herein as the circumstances may require so that New Jersey may at all times co-operate in extradition matters with demanding states.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: EUGENE T. URBANIAK,
Deputy Attorney General.

ETU:HH

NOVEMBER 1, 1950.

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

FORMAL OPINION—1950. No. 70.

DEAR SIR:

I have your letter of the 27th ult. relative to the Division of Investment within the Department of the Treasury created by Chapter 270 of the Laws of 1950. You first inquire as to the effective date of the act.

The act was approved July 1, 1950, and took effect immediately.

You further ask as to the term of office of the members of the Council and whether their terms started July 1, 1950, the date when the act became effective, or the date they were sworn in (September 15), or from the date of the appointment of the Director. By Section 5 of the act of 1950 the Council consists of nine members, one member being designated by each of the four State retirement systems mentioned in said section, each such member to serve for one year from the date of his selection and until his successor is selected, and the remaining five members are to be appointed by the Governor for a term of five years and to serve until their successors are appointed and qualified, but of the first appointees, one is to serve for one year, one for two years, one for three years, one for four years, and one for five years, and until their respective successors are appointed and qualified; the term of each such member being designated by the Governor.

The Secretary of State's records show that each of the five members to be appointed by the Governor were appointed on August 24, 1950, and they hold their respective terms of one, two, three, four and five years from that date.

Our Court of Errors and Appeals in the case of *Haight* vs. *Love,* 39 N. J. L., 476, held that "When no time is fixed by law for the commencement of an official term, it begins to run from the date of the appointment." As Chapter 270 of the Laws of 1950 prescribes no time when the term of the five appointed members of the Council should begin, all their terms commenced on the date of their appointment, August 24, 1950. This, necessarily, excludes any notion that the terms of the five members of the Council could by any possibility commence from the date of the appointment of the Director of the division established under said act.

Your last inquiry relates to the term of the chairman of the Council. The act of 1950, in Section 5, provides that the members of the Council shall elect annually from their number a chairman, and that the chairman so selected shall serve as such for a term of one year and until his successor is in like manner elected.

The foregoing I am sure fully answers your inquiries.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: THEODORE BACKES,
Deputy Attorney General.

TB:B

NOVEMBER 1, 1950.

KATHERINE CLARKE, *Chairman,*
Camden County Board of Elections,
Court House,
Camden, New Jersey.

FORMAL OPINION—1950. No. 71.

DEAR MADAM:

Receipt is acknowledged of your letter of October thirtieth, in which (a) you state that the County Clerk, in preparing the official ballots for the voting machines and the sample ballots "made an error in the placing of the Republican candidates' names for the Board of Chosen Freeholders by transposing the names of the two candidates;" that the "error was discovered and ballots printed for the voting machines and also sample ballots were prepared before mailing to the voters" but that "on the Official Absentee Service Ballot [military service ballot] the error was not discovered and ballots have been mailed to the Service Men [military service voters];" and (b) you request an opinion "as to procedure in canvassing and tabulating" for the official return "these improperly printed and mailed" military service ballots.

We understand your inquiry to be really directed to the question whether these military service ballots, by reason of the transposition of names thereon, will be void either in whole or in part for the purpose of counting and canvassing the votes for the respective candidates for the various offices.

It is our opinion that the military service ballots in question are not invalidated either in whole or in part because of the transposition thereon of the names of candidates; and we advise you that the Board of Elections should count and canvass all the votes represented by these ballots.

Section 2 of the military service voting law (P. L. 1948, c. 1; N. J. S. A. 19:56–2) declares that it is the purpose of the act "to afford every military service voter the opportunity to vote," and enjoins that the act "shall be liberally construed to effectuate such purpose." Section 8 (N. J. S. A. 19:56–8) prescribes: "Each military service ballot to be used at any general election . . . *shall conform generally* to the ballot to be used at said election in the military service voter's election district" (italics ours); and section 26 (N. J. S. A. 19:56–26) specifies that

> No election shall be held to be invalid by *reason of any irregularity or failure in the preparation* or forwarding of any military service ballots pursuant to the provisions of this act. (Italics ours).

These provisions will suffice to show the tenor of the military service voting law. It was obviously the intent of the Legislature that so long as the military service voter qualifies as such and complies with all requirements of law in voting and returning the ballot forwarded to him, the candidates for whom he has cast his vote are entitled to have such votes counted and canvassed in their favor. But, more important still, to hold the ballots void either in whole or in part would be contrary to the clear mandate of the Legislature that the act should be liberally construed to effectuate its declared purpose.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: DOMINIC A. CAVICCHIA,
Deputy Attorney General.

NOVEMBER 16, 1950.

HON. ANDERSON FOWLER:
Peapack, New Jersey.

FORMAL OPINION—1950. No. 72.

DEAR ASSEMBLYMAN:

Receipt is acknowledged of your letter of November third in which you direct our attention to the passage, at the 1949 session of the Legislature, of Assembly Concurrent Resolution No. 17 (which in reality is an application to Congress "to call a convention for the sole purpose of proposing amendments to the Constitution which are appropriate to authorize the United States to negotiate with other nations, subject to later ratification, a constitution of a World Federal Government, open to all nations, with limited powers adequate to assure peace, or amendments to the Constitution which are appropriate to ratify any world constitution which is presented to the United States by the United Nations, by a world constitutional convention or otherwise").

The application represented by this concurrent resolution was made in accordance with Article V of the Constitution of the United States, which provides that

> The Congress, whenever two-thirds of both Houses shall deem it necesary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; . . . (U. S. C. A. Const.).

It is to be noted that there are two distinct stages in the process of amendment thus specified. One is the proposal and the other is the ratification; and just as there are two methods of proposal, so are there two methods of ratification.

In your letter you state that the concurrent resolution has, since its passage, "become a controversial issue and misunderstanding exists in many people's minds regarding the implications of the measure;" and "in order to assure a fair appraisal" thereof, you request a clarification of what you denominate as three points.

Two of the points are specific queries which permit of categorical answers. The third point is really a discussion in which you evince concern (in relation to which you desire to be advised) as to whether the people of New Jersey will have ample opportunity to express approval or disapproval of the participation of the United States in a limited world government as set forth in the said concurrent resolution (A. C. R. No. 17).

To the two specific queries we shall give categorical answers and such further clarification as, under the circumstances, it is possible to set forth. We shall then proceed to a clarification of your third point.

Your first specific query is: "Has the passage of A. C. R. No. 17 committed the people of the State of New Jersey to participation in a world government?"

Our answer to this query is "no."

Inasmuch as the convention toward which the passage of the concurrent resolution was directed has not as yet been called, there has been before the people no proposed amendment. Therefore, there has been no action by the Legislature which has committed the people of New Jersey to participation in a world government. When such a convention is called (which will be only in the event of a similar petition on the part of the Legislatures of two-thirds of the several States), it will be expressly for the purpose of *proposing* amendments to that end. And only the action *ratifying* any such proposed amendment can be binding upon the people. (We shall treat of this further when we come to your third point).

In this connection, we call to your attention the case of *Dillon* vs. *Gloss*, 256 U. S. 368, 41 S. Ct. 510, 65 L. Ed. 994, in which the United States Supreme Court (1921), speaking through Mr. Justice Van Derventer, said:

> "We do not find anything in the Article [U. S. Const., Art. V] which suggests that an amendment once proposed is to be open to ratification for all time, or that ratification in some of the States may be separated from that in others by many years and yet be effective. We do find that which strongly suggests to the contrary. First, the proposal and ratification are not treated as unrelated acts but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the states, there is a fair implication that it must be sufficiently contemporaneous in that number of States to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do. These considerations and the general purport and spirit of the Article lead to the conclusion expressed by Judge Jameson [Constitutional Conventions, 4th ed., sec. 585] 'that an alteration of the Constitution proposed today has relation to the sentiment and the felt needs of today, and that, if not ratified early while that sentiment may be fairly supposed to exist, it ought to be regarded as waived . . .'"

The court concluded that the ratification must be within some "reasonable time after the proposal." While the deliverance in that case related to an amendment proposed by Congress itself, it has bearing here, we think, because the court expressed its opinion to be that the fixing of a period of time is "a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification." But see the later case of *Coleman* vs. *Miller*, 307 U. S. 972, 59 S. Ct. 972, 83 L. Ed. 1385, where the United States Supreme Court (1939), speaking through Mr. Chief Justice Hughes and referring to its opinion in *Dillon* vs. *Gloss*, said:

> ". . . But it does not follow that, whenever Congress has not exercised that power, the Court should take upon itself the responsibility of deciding what constitutes a reasonable time and determine accordingly the validity of ratifications. . . .
>
> "Where are to be found the criteria for such a judicial determination? . . . In short, the question of a reasonable time in many cases would involve . . . an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to which it would be an extravagant extension of judicial authority to assert judicial notice as the basis of deciding a controversy with respect to the validity of an amendment actually ratified. On the other hand, these conditions are appropriate for the consideration of the political

departments of the Government. The questions they involve are essentially political and not justiciable. . . ."

Your second query is: "Has the passage of A. C. R. No. 17 committed the members of the State Legislature, who voted for it, to acceptance of any constitutional amendment that may result from their petition to the Congress of the United States as embodied in A. C. R. No. 17?"

Our answer to this query is also "no."

Acceptance will involve a new question. We deem it unnecessary to elaborate upon this one, except to say that the question of acceptance would not come before the Legislature unless action by the Legislatures of the several States (rather than by conventions therein) were the mode of ratification prescribed by Congress.

We proceed now to the third point set forth in your letter, i.e., your discussion in which you evince concern as to whether the people of New Jersey will have ample opportunity to express approval or disapproval of the participation of the United States in a limited world government as set forth in the concurrent resolution.

The convention mode of proposing amendments has never been successfully invoked. Should the current application advance to that stage where Congress is to call a convention for proposing amendments accordingly, it is to be expected that the people of the several States will have a voice, either directly or through their representatives, in the choice of delegates thereto.

The procedure for ratification of any amendment proposed by the convention (if one should eventuate) would be no different from the procedure for ratification of a proposed amendment originating in Congress. One or the other constitutional mode of ratification would have to be prescribed by Congress. When proposed in either mode amendments to be effective must be ratified by the Legislatures, or by conventions, in three-fourths of the States, "as the one or the other mode of ratification may be proposed by Congress." See *Dillon* vs. *Gloss, supra,* where the court further declared: "Thus the people of the United States, by whom the Constitution was ordained and established, have made it a condition to amending that instrument that the amendment be submitted to representative assemblies in the several States and be ratified in three-fourths of them. The plain meaning of this is (a) that all amendments must have the sanction of the people of the United States, the original fountain of power, acting through representative assemblies, and (b) that ratification by these assemblies in three-fourths of the States shall be taken as a decisive expression of the people's will and be binding on all."

If a proposed amendment should materialize (and this is applicable whether the amendment originates either in convention or in Congress) and the prescription for ratification be by conventions in the states, rather than by the Legislatures thereof, it would doubtless devolve upon each State, as in the case of the twenty-first amendment, to legislate for the calling of its own convention. (See P. L. 1933, c. 73, which was passed in New Jersey to bring about a convention for the ratification of the twenty-first amendment and in which provision was made for delegates-at-large as well as for delegates on a county basis). As one court put it, the views of the candidates, for election to the convention, would be known in advance, so that the final action of the convention would be truly representative of the will of the people. See *State ex rel. Donnelly* vs. *Meyers, Secretary of State* (Ohio), 186 N. E. 918.

There remains only to say that should the prescription of Congress be ratification by the Legislatures of the several States, it is to be expected that the members of the Legislature would vote upon the question in a manner that would reflect the then prevailing sentiment of their constituents thereon.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: DOMINIC A. CAVICCHIA,
Deputy Attorney General.

OCTOBER 31, 1950.

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

FORMAL OPINION—1950: No. 73.

DEAR COLONEL SCHOEFFEL:

Your letter received, with request for opinion as to whether police officers or prosecutors have the right to close fatal automobile accident investigations without first making complaint before a local magistrate or having the matter presented to the grand jury.

Your inquiry is directed particularly to a fatal automobile accident case in Middlesex County, where your department has conducted the investigation and the prosecutor has advised that no action whatever would be taken against the operator, if his investigation disclosed that the operator was not at fault.

The statute concerning killing by automobile is set forth as follows in R. S. 2:138-9:

> "Any person who shall cause the death of another by driving any vehicle carelessly and heedlessly in willful or wanton disregard of the rights or safety of others shall be guilty of a misdemeanor. * * *."

Under R. S. 2:182-4 the criminal business of the State shall be prosecuted exclusively by the prosecutor of the pleas except in counties where, for the time being, there is no prosecutor or where the prosecutor desires the aid of the attorney general or otherwise as provided by law.

Under R. S. 2:182-5 each prosecutor of the pleas will be vested with the same powers and subject to the same penalties within his county as the attorney general shall by law be vested with or subject to, and he shall use all reasonable and lawful diligence for the detection, arrest, indictment and conviction of offenders against the law.

Under the new rules adopted by the court, where it appears from the complaint that there has been probable cause to believe that an offense has been committed a warrant for the arrest of the offender shall issue to any officer authorized by law to

execute it. It is set forth that the warrant shall be signed by the magistrate and the defendant taken before the magistrate named in the warrant for hearing. In case of violation of 2:138-9 it is the duty of an officer having knowledge of an offense to sign the complaint and have the warrant issued and take the offender before the magistrate in the community in which the offense was committed. It is the duty of the magistrate to hear the evidence and, if a prima facie case has been made out against the defendant, he shall be committed to the county jail where the judge of the court may set bail for such offender.

In all criminal cases, the prosecutor must use all reasonable and lawful diligence for the arrest and indictment of all persons and where the arresting officer has made a prima facie case, it is the duty of the prosecutor to submit the case to the grand jury, who shall pass upon the question of whether or not there is sufficient evidence to find an indictment and bring the defendant to trial.

I trust this answers your inquiry.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: ROBERT PEACOCK,
Deputy Attorney General.

RP:N

NOVEMBER 14, 1950.

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

FORMAL OPINION—1950. No. 74.

DEAR SIR:

I am replying to your communication of October 20, 1950, in which you advise me that for a number of years the State has been making regular yearly appropriations for municipal aid and in addition has been making supplemental appropriations for payment of deficiencies, and that when the Legislature passed the annual appropriation act for the fiscal year beginning July 1, 1950, the sum of $3,600,000 was appropriated for subsidies to municipalities for relief costs, and that a supplemental appropriation act contained an appropriation for the fiscal year 1949-50 of $2,202,000. These appropriations will be found in the session laws of 1950, the first on page 791, and the second on page 109.

It now appears from your communication that subsequent to the supplemental appropriation of $2,202,000 it was ascertained that the appropriation would be insufficient by approximately $550,000. The question which you have propounded for my consideration is whether you may permit the use of funds appropriated for the fiscal year 1950-51 to pay deficiencies incurred in the fiscal year 1949-50.

The answer is positively "no."

The annual appropriation act of 1950 (Chapter 236), to be found in the session laws of that year beginning at page 598, both by its title and section 1 thereof, makes it clear that the appropriations therein are only for the fiscal year ending June 30, 1951, and by the provisions of section 3 of that act no money is to be drawn from the treasury except for objects as in the act specified and for other purposes specially excepted in said section.

As I have indicated, the appropriation in chapter 236 covered a fixed definite period, that is the fiscal year of the State ending on the thirtieth day of June, 1951. The deficiencies existing for relief subsidies in the previous fiscal year must await further action of the Legislature by way of an additional appropriation as was done in Chapter 62 of the Laws of 1950 making good the deficiencies above referred to of $2,202,000.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: THEODORE BACKES,
Deputy Attorney General.

TB:B

OCTOBER 31, 1950.

HON. CHARLES R. ERDMAN, JR., *Commissioner,*
Dept. of Conservation and Economic Development,
State House, Trenton, N. J.

FORMAL OPINION—1950. No. 75.

DEAR COMMISSIONER ERDMAN:

Your letter of October 20th is at hand in which you request an opinion as to whether or not persons permitted to dredge lands under the waters of this State require additional permits to maintain that dredging.

The law on this subject is as follows:

> "Submission to board of plans for waterfront development. All plans for the development of any waterfront 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, plan, bulkhead, bridge, pipe line, cable, or any other similar or dissimilar waterfront 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." (R. S. 12:5-3.)

Under 12:5-4 upon the presentation of plans for waterfront development, the board shall consider the same and hold meetings and give directions for such changes or alterations in the plans as it deems necessary.

Under 12:5–6 any development or improvement as outlined in 12:5–3 or included in a proper interpretation thereof, which is commenced or executed without first obtaining approval as provided in 12:5–4 and 12:5–5 shall be deemed to be a purpresture and a 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 the right to dredge in any of the waters of this State for the development of any waterfront upon any navigable water or stream of this State or bounding thereon without first obtaining a permit from your board.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: ROBERT PEACOCK,
Deputy Attorney General.

RP:N

NOVEMBER 14, 1950.

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

FORMAL OPINION—1950. No. 76.

DEAR MR. DEARDEN:

Your memorandum of November 8th requested an opinion as to whether you would be violating the spirit or intent of R. S. 39:4-131 if your furnish the following information:

1. That an accident has been reported.
2. The name and address of the person or persons alleged to have been in the accident.
3. The license number of the person or persons alleged to have been in the accident.
4. The date and location of the accident.

R. S. 39:4-131 generally provides for the reporting of accidents by police departments and individuals upon forms to be furnished by the division of motor vehicles. This section of the revised statutes provides that the report shall be made without prejudice, shall be for the information of the division, and shall not be open to public inspection. I feel that this statement is perfectly clear and provides that these reports and the information contained thereon are for the use of the division only and neither the reports nor the information thereon are to be given to any other person or agency.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

By: JOHN J. KITCHEN,
Deputy Attorney General.

JJK:N

NOVEMBER 17, 1950.

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

FORMAL OPINION—1950. No. 77.

DEAR SIR:

We have before us your letter of October 16, 1950, and enclosure, requesting an opinion relative to the status of the Columbus Trust Company, in liquidation.

It appears that the Columbus Trust Company was a duly authorized banking corporation of this state and that it conducted business as such until July-1948, when a defalcation occurred which required liquidation. The former directors, in their capacity as trustees in liquidation, turned certain of the assets over to another bank, and the remainder of them to the Federal Deposit Insurance Corporation to liquidate and to reimburse itself for moneys advanced because of the defalcation. It further appears that the Federal Deposit Insurance Corporation has now recovered its advances and it is returning certain remaining assets of the trustees which they will continue to liquidate, and upon completion they will distribute the proceeds thereof among the stockholders.

Additional inquiry made by us to the Department of Banking and Insurance reveals that at the time of the defalcation voluntary proceedings in dissolution were taken pursuant to the statute then in force.

You inquire of us as to "whether the Columbus Trust Company in liquidation still comes under the Banking and Insurance Department, or whether because they are no longer doing banking and merely liquidating, they are considered an independent corporation and will have to file state franchise taxes."

In answer to your first question, we are of the opinion that the Department of Banking and Insurance relinquished its jurisdiction over the affairs of the bank at the time of its voluntary dissolution, and consequently, that department is not concerned with the liquidation proceedings. With reference to your second question, we are of the opinion that the trustees, in winding up the affairs of the former bank, do not constitute themselves an independent corporation subject to the state franchise tax.

The dissolution took place under R. S. 17:4-118 (susperseded by Chapter 67, P. L. 1948, known as The Banking Act of 1948.) Under that act the directors are constituted the trustees for the purpose of the liquidation, subject to the order of the court. Consquently, the remaining liquidation proceedings will follow a pattern similar to that of any other corporation in liquidation, and we know of no authority which constitutes the trustees as an "independent corporation."

A reading of the Corporation Business Tax Act, Chapter 162, P. L. 1945, as amended, which provides for a corporation franchise tax, clearly indicates that it applies to corporations in the usual sense of the term, and not to corporations which have ceased to exist and are having their affairs wound up in the manner provided by statute.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: OLIVER T. SOMERVILLE,
Deputy Attorney General.

NOVEMBER 14, 1950.

HON. AARON K. NEELD, *Deputy Director*
Division of Taxation,
State House,
Trenton, New Jersey.

FORMAL OPINION—1950. No. 78.

DEAR SIR:

You have requested my opinion on the following question:

Will interstate carriers of persons using the New Jersey turnpike be subject to the ½c a mile tax provided by R. S. 48:4-20.

The answer is "No."

R. S. 48.4-20 provides for an excise tax for the use of highways which are maintained by the public and is intended to compensate the public in part of the cost of construction and maintenance of such public roads. The New Jersey Turnpike Authority Act of 1948 provides that all expenses incurred in carrying out the provisions of the Turnpike Act shall be payable solely from funds provided under the authority of that Act, and the Turnpike Authority is not authorized to incur indebtedness or liability on behalf of or payable by the State or any political subdivision thereof. The Turnpike Act contemplated the imposition of tolls for the use of a turnpike project, and any such turnpike project constructed pursuant to such Act is not a highway within the intendent of R. S. 48:4-20.

Yours very truly,

THEODORE D. PARSONS,
Attorney General.

tdp;vtd

NOVEMBER 17, 1950.

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

FORMAL OPINION—1950. No. 79.

DEAR COLONEL SCHOEFFEL:

Your letter requesting an opinion on the validity of a court order expunging the burglary charge against Earl Russell, and also asking whether or not the sheriff of Bergen County must return the fingerprints in connection with this arrest is at hand.

On the question of expunging the burglary charge from the record, will say that under R. S. 2:192-15 it is provided that in all cases where a criminal conviciton has been entered against any person and sentence suspended thereon, or where a fine of not more than $500.00 has been imposed, and no subsequent conviction entered, it

shall be lawful after the lapse of ten years from the date of such conviction for the person so convicted to present a duly verified petition to the court wherein the conviction was entered, setting forth the facts and praying relief under this section.

Upon reading and filing such petition the court may by order fix a time, not less than 10 nor more than 30 days thereafter, for the hearing of the matter, a copy of which order shall be served in the usual manner upon the prosecutor of the pleas and upon the chief of police or other executive head of the police department of the municipality wherein the offense was committed.

There are exceptions to the above act which state that the evidence of such conviction shall be expunged from the record excepting convictions involving treason, anarchy, hostility to government, all capital cases, perjury, carrying concealed weapons or weapons of any deadly nature or type, rape, seduction, aiding, assisting or concealing persons accused of high misdemeanors, aiding the escape of immates of prisons, embracery, arson or burglary.

It is my opinion that under the exceptions above set forth the court has no authority to expunge from the record a conviction of burglary.

As to your second question, as to whether or not fingerprints should be returned, will say that the bureau of identification was created under R. S. 53:1-2.

R. S. 53-1-13 provides that the supervisor of the bureau of indentification shall procure and file for record fingerprints, plates, photographs, pictures, descriptions, and measurements as may be pertinent, of any person convicted of an indictable offense, as well as known and habitual criminals.

The supervisor of the bureau of identification may procure for record fingerprints and other identification data of all persons confined in any workhouse, jail, reformatory, penitentiary or other penal institution and shall file for record such other information as he may receive from law enforcement officers of the state. The wardens, jailers or keepers of workhouses, jails, reformatories, penitentiaries or other penal institutions shall furnish the state bureau of indentification with fingerprints and photographs of all prisoners who are or may be confined in the respective institutions.

Under R. S. 53:1-15 the sheriff, chief of police, members of the state police and any law enforcement agent shall immediately upon the arrest of any person for an indictable offense or of any person believed to be wanted for an indictable offense or believed to be an habitual criminal take the fingerprints of such person according to the fingerprint system of identification established by the superintendent of state police and forward without delay two copies, together with photographs and other descriptions to the state bureau of identification.

For the purpose of submitting to the governor and the legislature a report of statistics on crime conditions the clerk of every court before which a prisoner is arranged on an indictable offense shall promptly report to the bureau of identification the sentence of the court or other disposition of the case.

This act providing for the fingerprinting and photographing of persons arrested for indictable offenses and the dissemination of copies thereof in advance of conviction is not unconstitutional as being an invasion of rights and privileges. *McGovern* vs. *Van Riper,* 140 Eq. 341. And the court in that same case held that this section was constitutional.

The taking of fingerprints in the first place and the whole process of arrest of a possibly innocent person are a humiliation to which he must submit for the benefit of society. To the same end, the police are justified in retaining such records, in certain cases, after an acquittal or a failure of the grand jury to indict. Sometimes a grand

jury dismisses a charge because it seems trivial; sometimes the trial jury must acquit a guilty person because the evidence does not establish guilt beyond a reasonable doubt. If a person be lawfully arrested and fingerprinted, the police are justified in keeping the fingerprints for possible use in the future even though no indictment is found. But in the absence of statute, discretion in the matter belongs to the police. This is cited in *Fernicola* vs. *Keenan,* 136 Eq. 10.

Under the above law and decisions of our courts, it is my opinion that the police are not bound to return fingerprints or records of any person taken in accordance therewith. It is their duty to retain them in their files.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: ROBERT PEACOCK,
Deputy Attorney General.

NOVEMBER 28, 1950.

MR. WALTER R. DARBY,
Director of Local Government,
Trenton, New Jersey.

FORMAL OPINION—1950. No. 80.

DEAR DIRECTOR:

Receipt is acknowledged of your memorandum of November twenty-second in which you request an opinion on the following question: "If the commission form of government is adopted in a township and the township has more than one fire district within its territory, upon the adoption of commission form of government, are the fire districts automatically extinguished or do they continue to operate as theretofore?"

It is our opinion that when a township in which there are fire districts adopts the commission form of government, such districts are not ipso facto abolished (automatically extinguished).

The creation and abolition of fire districts in townships are specifically provided for in R. S. 40:151-1 *et seq.* The commission form of government law provides (R. S. 40:71-9) in part as follows:

> Upon the adoption of chapters 70 to 76 of this title (section 40:70-1 et seq.), and the organization of the commissioners first elected, the governing body or bodies and all other boards and bodies whether state or local municipal agencies then existing in the municipality, except the board of education and the district court or courts, shall be ipso facto abolished and the terms of all councilmen, aldermen and all other officers, whether elective or appointive, shall immediately cease and determine, and all the powers and duties devolved by law upon such boards and bodies shall pass to, vest in and be performed by the board of commissioners elected under the provisions of said chapters 70 to 76, but nothing in this section contained shall prohibit the creation of subordinate boards authorized by section 40:72-7 of this title.

> The board of commissioners shall have and exercise all the powers granted or to be granted to the boards and bodies supplanted by it, by laws enacted subsequent to the organization of said board, unless such power is expressly withheld.

To us it is clear that the adoption of commission form of government does not ipso facto abolish fire districts but does ipso facto abolish boards of fire commissioners, and that all the powers and duties devolved by law upon such boards pass to, vest in and are to be performed by the board of commissioners elected under the commission form of government law or by such subordinate boards as may be appointed pursuant to the warrant of R. S. 40:72-7. In short, the fire districts continue until such time as they are abolished, by purposeful action in accordance with applicable provisions of law, or by operation of law (see R. S. 40:151-1 *et seq.*).

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: DOMINIC A. CAVICCHIA,
Deputy Attorney General.

NOVEMBER 29, 1950.

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

FORMAL OPINION—1950. No. 81.

MY DEAR MR. FERBER:

I have your letter of the 15th inst. requesting my opinion whether under the $25,000,000 for new institutional buildings you must take into consideration the fixture and loose equipment of the projects.

The answer is yes.

The matter is controlled by Chapter 3 of the Laws of 1949 authorizing the creation of a debt of the State in the sum of $25,000,000 for said purposes. This act, as you know, being for the creation of a debt of the State, was required under the Constitution (Article VIII, Section II, paragraph 3) to be submitted to the people for their assent, which was done at the last general election and assented to. As you also know, the $25,000,000 of bonds were recently issued and sold. This being so and the debt being outstanding the act creating the debt (Chapter 3 of the Laws of 1949) is irrepealable until the debt is paid and the moneys raised by authority of the 1949 Act must be applied only to the specific objects stated therein. We only have

to look at the language printed on the ballot submitted to the people to determine what they assented to. It reads as follows:

> "Shall the act entitled 'An act authorizing the creation of a debt of the State of New Jersey by the issuance of bonds of the State in the sum of twenty-five million dollars ($25,000,000.00) for State mental, charitable, hospital, relief, training, correctional, reformatory and penal institutional buildings, their construction, reconstruction, development, extension, improvement, equipment and facilities, for the health and welfare uses; providing the ways and means to pay the interest of said debt and also pay and discharge the principal thereof; and providing for the submission of this act to the people at a general election.' be approved?"

By Section 13 of the Act of 1949 the moneys raised from the sale of the bonds were to be expended in accordance with appropriations from the State Institutional Construction Fund in which the proceeds of the sale of bonds were placed, in accordance with appropriations made by the Legislature.

The Legislature in 1950 by Chapter 57 of the laws of that year allocated the money from said fund. The items vary. For instance, the first two items are for fireproofing; other items are for new buildings and additions to old buildings and for various other purposes. But by the title of the last named act where buildings were to be erected equipment and facilities were to be provided "for health and welfare purposes." The language just quoted "for health and welfare purposes" is practically the language used in the bond act submitted to the people.

From the foregoing, the conclusion is inevitable that where new buildings are constructed or additions made to existing buildings, equipment and facilities must be supplied out of the bond money, for it is inconceivable how the new buildings or additions to old buildings could be used for health and welfare of the patients and inmates without equipment and facilities.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: THEODORE BACKES,
Deputy Attorney General.

TB:rk

NOVEMBER 30, 1950.

DR. WALTER A. WILSON, *Secretary,*
State Board of Registration and Examination in Dentistry,
150 East State Street,
Trenton 8, New Jersey.

FORMAL OPINION—1950. No. 82.

DEAR DR. WILSON:

In reply to your inquiry relative to reinbursment of members of the Board of Registration and Examination in Dentistry for expenses incurred in performance of their duties, please be advised that the position of this office is as set forth herein.

R. S. 45:1-3 reads in part as follows:

> "Each member of the boards mentioned in Section 45:1-2 of this title shall be entitled to his actual traveling and other expenses incurred in the performance of his duties, which sum shall be paid from the license fees and other sources of income of such boards."

Executive Order No. 24, approved by the Governor July 1, 1950, superseded all previous travel regulations, and particularly those of May 1, 1939. The said Order applies to State officials and employees not governed by statute and it was obviously not the intention of the Governor to attempt to repeal the statue by the Executive Order.

Accordingly, it is felt that the Board of Registration and Examination in Dentistry should be guided by the provisions of R. S. 45:1-3 and that each board member should be entitled to actual expenses incurred in the performance of his duties.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: HENRY F. SCHENK,
Deputy Attorney General.

DECEMBER 6, 1950.

MR. GEORGE M. BORDEN, *Secretary,*
State Employees' Retirement System,
1 West State Street.
Trenton 7, New Jersey.

FORMAL OPINION—1950. No. 83.

DEAR SIR:

I have your letter of the 28th ult. stating that a member of your Retirement System desires to reduce her rate of contribution for annuity purposes to a lower rate which she previously paid. As stated in a copy of a letter from the member to you, which you sent me, her present take home pay, by reason of the larger contribution, is not sufficient to meet her requirements.

As the payment for annuity purposes only in no way affects the contributions required to be made by the State, I see no reason why her request should not be granted, although I realize that she elected to make the larger contribution.

The member further desires at the present time to make a voluntary contribution for annuity purposes of $1500. The question is can this request be granted. This of course depends upon a fact which must be determined by your Board of Trustees in accordance with R. S. 43:14-17, as it appears in your compilation, the pertinent part of which reads:

> ". . . or he may deposit therein by a single payment, or by extra salary deductions, as determined by the board of trustees, an amount computed to be sufficient, together with his prospective retirement allowance otherwise provided, to provide

for him a total retirement allowance of one-half of his final compensation at any retirement age, not below sixty, as elected by the member . . ."

If a deposit of $1500 meets the requirement of the statute as above set forth and the Board of Trustees so find, in my opinion the request may be granted, otherwise not.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: THEODORE BACKES,
Deputy Attorney General.

TB:B

DECEMBER 6, 1950.

MR. GEORGE M. BORDEN, *Secretary,*
State Employees' Retirement System,
1 West State Street,
Trenton 7, New Jersey.

FORMAL OPINION—1950. No. 84.

DEAR SIR:

I have your letter of the 4th instant stating that there appears to be some conflict on the policy of enrolling temporary employees who, if regularly employed, would be in the classified service of the civil service. I understand you have a situation where such a temporary employee was admitted to membership in your fund and who has now been called into Federal military service. The question is whether the amount which such employee would have paid into your fund had he not entered military service must be paid by the State.

The answer is "no."

You refer to Chapter 326 of the Laws of 1942, which provides for such payment, but I am quite sure we must also take into consideration the provisions of Chapter 327 of the laws of that year as being pertinent to the question we are considering; for I am of opinion that the two statutes mentioned are in pari materia and must be considered together. The temporary employee was filling a position coming within the classified service and his services could have been dispensed with at any time and he could not have been classified under any circumstances into civil service without examination and certification. Chapter 327 of the Laws of 1942 provides for a leave of absence to those entering the armed forces of the United States and the right to return to position upon his discharge therefrom. The member of your fund of whom you write, as the correspondence indicates, was never given a leave of absence and properly so because he never was a regular employee and never served a working test period, as required by the civil service law. Under Chapter 221 of the Laws of 1947, where a person is employed temporarily by the State and the temporary employment results in permanent employment, he is permitted to make contributions covering his temporary service in accordance with

rules and regulations of your board and is then to receive the same annuity and pension credits as if he had been a member during his temporary service.

In writing this I am not unmindful that there are employees of the State who are not covered by the civil service and, in my opinion, these employees may be admitted at any time. Civil service employees, in my judgment, should not be admitted until they have served their working test or probationary period and have become permanent employees.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

By: THEODORE BACKES,
Deputy Attorney General.

TB:b

DECEMBER 5, 1950.

HON. ROBERT J. WEGNER,
The House of Assembly of N. J.,
Paterson, N. J.

FORMAL OPINION—1950. No. 85.

DEAR ASSEMBLYMAN WEGNER:

The Legislature of New Jersey during the 1950 session amended Section 1 of the Revised Statutes 34:15-12. Under the terms of the amendment (Chapter 175 P. L. 1950) the law will become effective on January 1, 1951.

The controversy revolves around paragraphs "a," "b" and "y" which are as follows:

a. For injury producing temporary disability, sixty-six and two-thirds per centum ((66-⅔%) of the wages received at the time of the injury, subject to a maximum compensation of thirty dollars ($30.00) per week and a minimum of ten dollars ($10.00) per week. This compensation shall be paid during the period of such disability, not, however, beyond three hundred weeks.

b. For disability total in character and permanent in quality, sixty-six and two-thirds per centum (66-⅔%) of the wages received at the time of injury, subject to a maximum compensation of twenty-five dollars ($25.00) per week and a minimum of ten dollars ($10.00) per week. This compensation shall be paid for a period of four hundred and fifty weeks, at which time compensation payments shall cease unless the employee shall have submitted to such physical or educational rehabilitation as may have been ordered by the rehabilitation commission, and can show that because of such disability it is impossible for him to obtain wages or earnings equal to those earned at the time of the accident, in which case further weekly payments shall be made during the period of such disability, the amount thereof to be the previous weekly compensation payment diminished by the portion thereof that the wage,

or earnings, he is then able to earn, bears to the wages received at the time of the accident. If his wages or earnings equal or exceed wages received at the time of the accident, then his compensation rate shall be reduced to five-dollars ($5.00). In calculating compensation for this extension beyond four hundred and fifty weeks the minimum provision of ten dollars ($10.00) shall not apply. This extension of compensation payments beyond four hundred and fifty weeks shall be subject to such periodic reconsiderations and extensions as the case may require, and shall apply only to disability total in character and permanent in quality, and shall not apply to any accident occurring prior to July fourth, one thousand nine hundred and twenty-three.

y. The weekly compensation payments specified in this section are all subject to the same limitation as to maximum and minimum as are stated in paragraph "a" hereof.

It will be noted that the language used in the amendment (Chapter 175 P. L. 1950) remains unaltered in paragraphs "b" and "y" and that the only change is to be found in *paragraph "a"* which increases the compensation rate to a maximum of $30.00 per week where temporary disability is involved. Therefore, the question reduced to its simplest terms is "Does paragraph "y," by its terms, comprehend paragraph "b" as well as paragraph "a?"

We are of the opinion that it does not.

In the consideration of conflicting provisions in a statute, the great object to be kept in view is to ascertain the legislative intent.

General and special provisions in a statute should stand together, if possible, but where general terms or expressions in one part of a statute are inconsistent with more specific or particular provisions in another part, the particular provision must govern unless the statute as a whole clearly shows the contrary intention and they must be given effect notwithstanding the general provision is broad enough to include the subject to which the particular provisions relate. The particular provision should be regarded as an exception to the general provision so that both may be given effect . . .

59 Corpus Juris, Sec. 596, page 1000

Thus, in the case of *The State, Edmund Bartlett, Prosecutor* vs. *The Inhabitants of the City of Trenton* (38 N. J. L. 64) it was held,

"when the intention of the lawgiver, which is to be sought after in the interpretation of a statute, is specifically declared in a prior section as to a particular matter, it must prevail over a subsequent clause in general terms, which might, by contruction conflict with it. The legislature must be presumed to have intended what it expressly stated, rather than that which might be inferred from the use of general terms."

So also in the case of *State* vs. *Masnik* (125 N. J. L. 34) Justice Heher speaking for the Court of Errors and Appeals said,

"It is an elementary canon of construction that the general regulation yields to the particular, and is modified pro tanto. The special provision is deemed an exception engrafted on the general rule. Of course, this formula is in aid of the primary purpose of construction, that is, the ascertainment of the intention of the law-givers . . ."

In the case sub judice paragraphs "a" and "b" are specific, particular provisions, while paragraph "y" is a general provision. Therefore, the question is resolved by the application of the principle ennunciated supra.

Very truly yours,

THEODORE D. PARSONS,
Attorney General.

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

NOVEMBER 30, 1950.

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

FORMAL OPINION—1950. No. 86.

DEAR COMMISSIONER BATES:

This acknowledges your request for an opinion from this office respecting certain aspects of the proper division of cost to be shared by the State and several counties for assistance furnished pursuant to the provisions of Chapter 5, Title 30.

Specifically, you desire to be advised whether the procedure now being followed by the State Board of Child Welfare, within the jurisdiction of your department, constitutes a proper interpretation to be placed upon the statutes referred to in your request and which will be dealt with hereinafter.

It is our opinion and we so advise you that the present procedure now being followed by the Board of Child Welfare with respect to division of cost between the State and several counties for assistance rendered under the pertinent sections of our statutes is a correct and proper interpretation of those laws.

An examination of the pertinent statutes reveals that in 1936 the Federal Government first made available to New Jersey a proportionate share of the cost of rendering assistance to dependent children under Chapter 5, Title 30, Revised Statutes. It became necessary, in connection therewith, to amend the New Jersey laws and this was accomplished by the provisions of Chapter 33, P. L. 1936. At that time, the Federal Government agreed to pay one-third of the cost of rendering assistance to children living with those relatives enumerated in R. S. 30:5-7, which was enacted in 1936 to conform with Federal requirements. With respect to assistance necessary for children not in this limited category, the Federal Government contracted to pay nothing.

It is significant, therefore, in reading R. S. 30:5-7, that each county was made chargeable with one-third of the cost of assistance rendered in Federal participation cases, the Federal Government paying one-third and the State paying the other one-third.

The law of 1936 further provided that in all other cases, i. e., those wherein the Federal Government would not participate, the county and State would each pay one-half of the cost of rendering such assistance. We are informed, further, that in any situation where the amount of the grant exceeded the maximum established by the Federal Government, beyond which the Federal Government would not participate, that such excess was paid in equal one-half shares by the State and county.

To further support this interpretation, it was also provided in R. S. 30:5-7 that, if Federal aid should be withdrawn, the county share of rendering such assistance to dependent children should be one-half in all cases.

Therefore, since the establishment of the program wherein the Federal Government began to contribute to the cost of rendering aid to dependent children in New Jersey, we see a legislative policy, clearly estalished, that the State and county shall each pay an equal share of that portion of the cost of rendering such assistance wherein the Federal Government did not participate.

It is also desirable to examine R. S. 30:5-8, relating to sharing the cost of assistance to dependent children, which related to the establishment of county legal settlement for such child. If such child did not have the one-year county settlement prescribed by statute, the State assumed the full burden of the cost until county residence was created and then the county would pay a sum equal to that paid by the State.

From the outset, the Federal Security Act imposed a maximum upon the amount of assistance rendered a child as to which the Federal Government would pay a proportionate share. We are informed that since 1936, it has been the accepted custom and procedure in New Jersey for the State to receive the Federal Government's share of the cost of such assistance based upon the maximum established by the Federal Act and thereafter the State and county pay the remainder in equal portions.

Subsequently, in 1944, the Federal Government increased its proportionate share, within established maximum ranges, to 50%. Thereupon, the New Jersey legislature, by Chapter 194, P. L. 1944, amended R. S. 30:5-7 to conform our law to the circumstances created by the Federal increase. In the 1944 amendment, since the Federal Government paid one-half of such cost, the county was made chargeable with one-fourth of the cost, when the child was living with certain specified relatives, and the State paid a like amount.

It is important to remember that in 1936, when Federal aid first began, and in 1944, when it was increased, the Legislature, by appropriate enactment, established the proportionate percentages to be paid by the counties. Since 1944, on two occasions, the Federal Government has further altered its program of participation to provide a still greater portion of Federal aid, within the maximum limits prescribed in the Federal Act. It is significant, however, that on these two occasions the Legislature did not alter the 1944 formula, which required the county to pay 25% of the cost of rendering assistance to dependent children within the maxima established by the Federal Government and in those cases wherein Federal participation was had.

Inasmuch as the Legislature, since 1944, permitted the formula to remain unchanged, the State had no alternative but to submit to the counties a bill for 25% of cost of this type of assistance within the limits of the maxima imposed by the Federal law. We are informed that this was the procedure, that it was accepted by the counties and the bills have been paid.

With respect to the cost of assistance rendered above the maxima prescribed by the Federal law where there is no Federal participation and in those cases where, for other reasons, no Federal aid is forthcoming, we are informed that the State submitted to the several counties a bill for one-half of the cost of such assistance.

We are of the opinion that this is in conformity with the legislative intent as expressed in the earliest 1936 statute, and which was carried forward into the amendments thereto, to the effect that in situations where Federal aid was not available or was withdrawn that the cost of assistance in non-Federal cases would be borne equally by the State and the several counties affected thereby.

It appears to have been suggested that the county should only be required to pay 25% of the cost of assistance above the Federal maxima and that the State should pay 75% thereof. We must reject this view for we find it to be without support in the language of the law which has made specific provision for the distribution of cost in cases where the Federal Government does not participate or withdraws its financial support above the maximum arbitrarily established by it.

If it is to be the intention of the Legislature to provide for this type of unequal division of costs between the State and county in situations where the Federal maximum is exceeded, then such should appear in the language of the law in clear and unambiguous words. We find no such intent.

For the reasons stated hereinabove, we are of the opinion that the procedure followed by the State Board of Child Welfare in submitting bills to the several counties for the county share of the cost of rendering assistance to dependent children reflects a proper interpretation of the legislative intent set forth in the pertinent portions of our statutes.

Very truly yours,

THEODORE D. PARSONS,
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By: EUGENE T. URBANIAK,
Deputy Attorney General.

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